Jay's Treaty

[6 April 1796]

On 31 March, the day after Washington had rejected the call for Jay's instructions and papers, Blount (North Carolina) moved that the president's message be referred to a Committee of the Whole on the State of the Union. He wished to allow the House to record on its journals its reasons for seeking Jay's papers. JM then voted with a majority of 55 to 37 in favor of the motion and did so again on 6 April in a majority of 57 to 26, after opponents had tried to delay the debate. In the Committee of the Whole, Blount **[291]**proposed two further resolutions to the effect that while the House claimed no treaty-making powers, it did have a right to deliberate and act if the execution of a treaty required legislation; and that the House did not have to state reasons to the president in seeking information from him (*Annals of Congress*, 4th Cong., 1st sess., 760, 762, 768–69, 770–72). JM then spoke.

When the message was first proposed to be committed, the proposition had been treated by some gentlemen not only with levity, but with ridicule. He persuaded himself that the subject would appear in a very different light to the committee; and he hoped that it would be discussed on both sides, without either levity, intemperance or illiberality.

If there were any question which could make a serious appeal to the dispassionate judgement, it must be one which respected the meaning of the constitution; and if any constitutional question could, make the appeal with peculiar solemnity, it must be in a case like the present, where two of the constituted authorities interpreted differently the extent of their respective powers.

It was a consolation however, of which every member would be sensible, to reflect on the happy difference of our situation, on such occurrences, from that of governments, in which the constituent members possessed independent and hereditary prerogatives. In such governments, the parties having a personal interest in their public stations, and being not amenable to the national will, disputes concerning the limits of their respective authorities, might be productive of the most fatal consequences. With us, on the contrary, although disputes of that kind are always to be regretted, there were three most precious resources, against the evil tendency of them. In the first place, the responsibility which every department feels to the public will, under the forms of the constitution, may be expected to prevent the excesses incident to conflicts between rival and unresponsible authorities. In the next place, if the difference cannot be adjusted by friendly conference and mutual concession, the sense of the constituent body, brought into the government through the ordinary elective channels, may supply a

remedy. And if this resource should fail, there remains in the third and last place, that provident article in the constitution itself, by which an avenue is always open to the sovereignty of the People for explanations or amendments as they might be found indispensable.

If, in the present instance, it was to be particularly regretted, that the existing difference of opinion had arisen; every motive to the regret, was a motive to calmness, to candor, and the most respectful delicacy towards the other constituted authority. On the other hand, the duty which the House of Representatives must feel to themselves and to their constituents, required that they should examine the subject with **[292**  **]**accuracy, as well as with candor, and decide on it with firmness, as well as with moderation.

In this temper he should proceed to make some observations on the message before the committee, and on the reasons contained in it.

The message related to two points: first, the application made for the papers; secondly the constitutional rights of Congress and of the House of Representatives, on the subject of treaties.

On the first point, he observed that the right of the house to apply for any information they might want, had been admitted by a number in the minority, who had opposed the

exercise of the right in this particular case. He thought it clear that the house must have a right, in all cases, to ask for information, which might assist their deliberations on subjects submitted to them by the constitution; being responsible nevertheless for the propriety of the measure. He was as ready to admit, that the executive had a right under a due responsibility also, to withhold information, when of a nature that did not permit a disclosure of it at the time. And if the refusal of the President had been founded simply on a representation, that the state of the business within his department, and the contents of the Papers asked for, required it, although he might have regretted the refusal, he should have been little disposed to criticize it. But the message had contested what appeared to him a clear and important right of the house; and stated reasons for refusing the papers, which, with all the respect he could feel for the executive, he could not regard as satisfactory or proper.

One of the reasons, was, that it did not occur to the executive that the papers could be relative to any purpose under the cognizance, and in the contemplation of the house: The other was, that the purpose for which they were wanted, was not expressed in the resolution of the house.

With respect to the first, it implied that the executive was not only to judge of the proper objects and functions of the executive department; but also of the objects and functions

of the house. He was not only to decide how far the executive trust would permit a disclosure of information; but how far the legislative trust could derive advantage from it. It belonged, he said, to each department to judge for itself.

If the executive conceived that in relation to his own department, papers could not be safely communicated, he might on that ground refuse them, because he was the competent though a responsible judge within his own department. If the papers could be communicated, without injury to the objects of his department, he ought not to refuse them as irrelative to the objects of the House of Representatives, because the House was in such cases the only proper judge of its own objects.

The other reason of refusal was, that the use which the house meant to make of the papers, was not expressed in the resolution.

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As far as he could recollect, no precedent could be found in the records of the house, or elsewhere, in which the particular object in calling for information was expressed in the call. It was not only contrary to right to require this; but it would often be improper in the house, to express the object. In the particular case of an impeachment referred to in the message it might be evidently improper to state that to be

the object of information which might possibly lead to it, because it would involve the preposterous idea of first determining to impeach, and then enquiring whether an impeachment ought to take place. Even the holding out an impeachment as a contemplated or contingent result of the information called for, might be extremely disagreeable in practice, as it might inflict a temporary pain on an individual, whom an investigation of facts might prove to be innocent, and perhaps meritorious.

From this view of the subject he could not forbear wishing that, if the papers were to be refused, other reasons had been assigned for it. He thought the resolutions offered by the gentleman from North Carolina, one of which related to this subject, ought to stand on the Journal along with the message which had been entered there. Both the resolutions were penned with moderation and propriety. They went no farther than to assert the rights of the house; they courted no reply; and it ought not to be supposed they could give any offence.

The second object to which the message related, was the constitutional power of the house on the subject of treaties.

Here again he hoped it might be allowable to wish, that it had not been deemed necessary to take up, in so solemn a manner, a great constitutional question, which was not contained in the resolution presented by the house, which

had been incidental only to the discussion of that resolution and which could only have been brought into view through the inauthentic medium of the newspapers. This however, would well account for the misconception which had taken place as to the doctrine maintained by the majority in the late question. It had been understood by the executive, that the house asserted its assent to be necessary to the validity of treaties. This was not the doctrine maintained by them. It was, he believed, fairly laid down in the resolution proposed, which limited the power of the house over treaties, to cases where treaties embraced legislative subjects, submitted by the constitution, to the power of the house.

Mr. M. did not mean to go into the general merits of this question as discussed when the former resolution was before the committee. The message did not require it; having drawn none of its reasoning from the text of the constitution. It had merely affirmed that the power of making treaties is exclusively vested by the constitution in the President, by and with the consent of the Senate. Nothing more was necessary on this **[294]**point, than to observe that the constitution had, as expressly and exclusively vested in Congress, the power of making laws, as it had vested in the President and Senate the power of making treaties.

He proceeded to review the several topics on which the message relied: First, the intentions of the body which

framed the constitution; Secondly, the opinions of the state conventions who adopted it; Thirdly, the peculiar rights and interests of the smaller states; Fourthly, the manner in which the constitution had been understood by the executive and the foreign nations, with which treaties had been formed; Fifthly, the acquiescence and acts of the house on former occasions.

1. When the members on the floor, who were members of the general convention, particularly a member from Georgia1 and himself, were called on in a former debate, for the sense of that body on the constitutional question, it was a matter of some surprize; which was much increased by the peculiar stress laid on the information expected.2 He acknowledged his surprise also at seeing the message of the executive appealing to the same proceedings in the general convention, as a clue to the meaning of the constitution.

It had been his purpose during the late debate to make some observations on what had fallen from the gentlemen from Connecticut and Maryland,3 if the sudden termination of the debate had not cut him off, from the opportunity. He should have reminded them, that this was the ninth year, since the convention executed their trust, and that he had not a single note in this place, to assist his memory. He should have remarked that neither himself nor the other members who had belonged to the federal convention, could be under any

particular obligation to rise in answer to a few gentlemen, with information not merely of their own ideas at that period, but of the intention of the whole body: many members of which too had probably never entered into the discussions of the subject. He might have further remarked that there would be the more delicacy in the undertaking, as it appeared that a sense had been put on the constitution by some who were members of the convention, different from that which must have been entertained by others, who had concurred in ratifying the treaty. After taking notice of the doctrine (of Judge Wilson, who was a member of the federal convention, as quoted by Mr. Gallatin) from the Pennsylvania debates;4 he proceeded to mention that three gentlemen who had been members of the convention were parties to the proceedings in Charleston, S.C. which among other objections to the treaty, represented it as violating the constitution.5 That the very respectable citizen, who presided at the meeting in Wilmington, whose resolutions made a similar complaint, had also been a distinguished member of the body that formed the constitution.6 It would have been proper for him also to have recollected what had, on a **[295]**former occasion, happened to himself during a debate in the house of representatives. When the bill for establishing a national bank was under consideration, he had opposed it as not warranted by the constitution, and incidentally remarked that his impression might be stronger, as he remembered that in the convention, a motion was

made and negatived for giving Congress a power to grant charters of incorporation. This slight reference to the convention, he said was animadverted on by several in the course of the debate, and particularly by a gentleman from Massachusetts, who had himself been a member of the convention, and whose remarks were not unworthy the attention of the committee. Here Mr. M. read a paragraph in Mr. Gerry's speech, from the Gazette of the United States, p. 814, protesting in strong terms, against arguments drawn from that source.7

Mr. M. said he did not believe a single instance could be cited in which the sense of the convention had been required or admitted as material, in any constitutional question. In the case of the bank, the committee had seen how a glance at that authority had been treated in this house. When the question on the suability of the states was depending on the supreme court, he asked whether it had ever been understood that the members of the bench who had been members of the convention, were called on for the meaning of the convention on that very important point; although no constitutional question would be presumed more susceptible of elucidation from that source.8

He then adverted to that part of the message which contained an extract from the journal of the convention, shewing that a proposition "that no treaty should be binding

on the United States, which was not ratified by law," was explicitly rejected. He allowed this to be much more precise than any evidence drawn from the debates in the convention, or resting on the memory of individuals. But admitting the case to be as stated, of which he had no doubt, altho' he had no recollection of it; and admitting the record of the convention to be the oracle that ought to decide the true meaning of the constitution, what did this abstract vote amount to? Did it condemn the doctrine of the majority? So far from it, that as he understood their doctrine, they must have voted as the convention did: For they do not contend that *no* treaty shall be operative without a law to sanction it; on the contrary they admit that *some* treaties will operate without this sanction; and that it is no further applicable in any case, than where legislative objects are embraced by treaties. The term *ratify* also deserved some attention, for altho' of loose signification in general, it had a technical meaning different from the agency claimed by the house on the subject of treaties.

But, after all, whatever veneration might be entertained for the body of men who formed our constitution, the sense of that body could never **[296]**be regarded as the oracular guide in the expounding the constitution. As the instrument came from them, it was nothing more than the draught of a plan, nothing but a dead letter, until life and validity were breathed into it, by the voice of the people, speaking through

the several state conventions. If we were to look therefore, for the meaning of the instrument, beyond the face of the instrument, we must look for it not in the general convention, which proposed, but in the state conventions, which accepted and ratified the constitution. To these also the message had referred, and it would be proper to follow it.

2. The debates of the conventions in three states, Pennsylvania, Virginia, and N. Carolina, had been before introduced into the discussion of this subject, and were he believed the only publications of the sort which contained any lights with respect to it. He would not fatigue the committee with a repetition of the passages then read to them. He would only appeal to the committee to decide whether it did not appear from a candid and collected view of the debates in those conventions, and particularly in that of Virginia that the treaty making power was a limited power; and that the powers in our constitution, on this subject, bore an analogy to the powers on the same subject, in the government of G. Britain. He wished as little as any member could, to extend the analogies between the two governments. But it was clear that the constituent parts of two governments might be perfectly heterogenous, and yet the powers be similar. At once to illustrate his meaning, and give a brief reply to some arguments on the other side, which had heretofore been urged with ingenuity and learning, he would mention as an example, the power of

pardoning offences. This power was vested in the President. It was a prerogative also of the British king. And in order to ascertain the extent of the compound and technical term "pardon" in our constitution; it would not be irregular to search into the meaning and exercise of the power in Great Britain; yet where is the general analogy between an hereditary sovereign, not accountable for his conduct, and a magistrate, like the President of the United States, elected for four years, with limited powers, and liable to impeachment for the abuse of them.

In referring to the debates of the state conventions as published, he wished not to be understood as putting entire confidence in the accuracy of them. Even those of Virginia which had been probably taken down by the most skilful hand,9 (whose merit he wished by no means to disparage) contained internal evidences in abundance of chasms, and misconceptions of what was said.

The amendments proposed by the several conventions, were better authority and would be found on a general view to favour the sense of the constitution which had prevailed in this house. But even here it **[297]**would not be reasonable to expect a perfect precision and system in all their votes and proceedings. The agitations of the public mind on that occasion, with the hurry and compromise which generally prevailed in settling the amendments to be proposed, would

at once explain and apologize for the several apparent inconsistencies which might be discovered. He would not undertake to say that the particular amendment referred to in the message by which two states required that “no commercial treaty should be ratified without the consent of two thirds of *the whole number* of Senators; and that no territorial rights &c. should be ceded without the consent of *three fourths* of the members of both houses” was digested with an accurate attention to the whole subject.10 On the other hand it was no proof that those particular conventions in annexing these guards to the treaty power understood it as different from that espoused by the majority of the house. They might consider Congress as having the power contended for over treaties stipulating on Legislative subjects, and still very consistently wish for the amendment they proposed. They might not consider the territorial rights and other objects for which they required the concurrence of three fourths of the members of both houses, as coming within any of the enumerated powers of Congress, and therefore as not protected by that control over treaties. And although they might be sensible that commercial treaties were under that controul, yet as they would always come before Congress with great weight after they passed through the regular forms and sanctions of the treaty department, it might be deemed of real importance that the authority should be better guarded which was to give that weight to them. He asked whether it might not happen, even in the

progress of a treaty through the treaty department, that each succeeding sanction might be given, more on account of preceding sanctions than of any positive approbation? And no one could doubt therefore that a treaty which had received all these sanctions would be controuled with great reluctance by the Legislature; and consequently that it might be desirable to strengthen the barriers against making improper treaties, rather than trust too much to the Legislative controul over carrying them into effect.

But said Mr. M. it will be proper to attend to other amendments proposed by the ratifying conventions, which may throw light on their opinions and intentions on the subject in question. He then read from the Declaration of Rights proposed by Virginia to be prefixed to the constitution, the 7th article as follows.

"That *all* power of suspending laws, or the execution of laws by *any* authority without the consent of the *Representatives* of the people in the *Legislature*, is injurious to their rights, and ought not to be exercised."

The convention of North Carolina, as he shewed, had laid down the **[298]** same principle in the same words. And it was to be observed that in both conventions, the article was under the head of a Declaration of Rights, "asserting and securing from encroachment the essential and inalienable rights of the people" according to the language of the

Virginia convention; and "asserting and securing from encroachment the great principles of civil and religious liberty, and the inalienable rights of the people" as expressed by the convention of North Carolina. It must follow, that these two conventions considered it as a fundamental and inviolable and universal principle in free governments, that no power could supercede a law without the consent of the Representatives of the people in the Legislature.

In the Maryland convention also, it was among the amendments proposed, tho' he believed not decided on, "that no power of suspending laws, or the execution of laws, unless derived from the Legislature, ought to be exercised or allowed."

The convention of North Carolina had further explained themselves on this point, by their 23d amendment proposed to the constitution, in the following words, "That no treaties which shall be directly opposed to the existing laws of the United States in Congress assembled, shall be valid until such laws shall be repealed, or made conformable to such treaty; nor shall any treaty be valid which is contradictory to the constitution of the United States."

The latter part of the amendment, was an evidence that the amendment was intended to ascertain, rather than to alter the meaning of the constitution; as it could not be supposed to have been the real intention of the constitution that a

treaty contrary to it should be valid.

He proceeded to read the following amendments accompanying the ratifications of state conventions.

The N. York convention had proposed,

"That no standing army or regular troops shall be raised or kept up in time of peace without the consent of *two thirds* of the Senators and Representatives in each house."

"That no money be borrowed on the credit of the United States without the assent of *two thirds* of the Senators and Representatives in each house."

"That the Congress shall not declare war without the concurrence of *two thirds* of the Senators and Representatives present in each house."

The N. Hampshire convention had proposed,

"That no standing army shall be kept up in time of peace unless with the consent of *three quarters* of the members of each branch of Congress." In the Maryland convention a proposition was made in the same words.

The Virginia convention had proposed,

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"That no navigation law, or law regulating commerce shall be passed without the consent of *two thirds* of the members present in both houses."

"That no standing army or regular troops shall be raised or kept up in time of peace, without the consent of *two thirds* of the members present in both houses."

"That no soldier shall be enlisted for any longer term than four years, except in time of war, and then for no longer term than the continuance of the war."

The convention of N. Carolina had proposed the same three amendments in the same words.11

On a review of these proceedings may not, said he, the question be fairly asked, whether it ought to be supposed that the several conventions, who shewed so much jealousy with respect to the powers of commerce, of the sword, and of the purse, as to require for the exercise of them, in some cases *two thirds*, in others *three fourths*, of both branches of the Legislature, could have understood that by the treaty clauses in the constitution they had given to the President and Senate, without any controul whatever from the House of Representatives, an absolute and unlimited power over all those great objects?

3. It was with great reluctance, he said, that he should touch

on the third topic, the alledged interest of the smaller states in the present question. He was the more unwilling to enter into this delicate part of the discussion, as he happened to be from a state which was in one of the extremes in point of size. He should limit himself therefore to two observations. The first was, that if the spirit of amity and mutual concession from which the constitution resulted, was to be consulted on expounding it, that construction ought to be favoured, which would preserve the mutual controul between the Senate and the House of Representatives, rather than that which gave powers to the Senate not controulable by, and paramount over those of the House of Representatives, whilst the House of Representatives could in no instance exercise their powers without the participation and controul of the Senate. The second observation was that whatever jealousy might have unhappily prevailed between the smaller and larger states, as they had most weight in one or other branch of the government, it was a fact, for which he appealed to the journals of the old congress from its birth to its dissolution, and to those of the Congress under the present government, that in no instance would it appear from the yeas and nays, that a question had been decided by a division of the votes according to the size of the States. He considered this truth as worthy of the most pleasing and consoling reflection, and as one that ought to have the most conciliating and happy influence on the temper of all the states.

4. A fourth argument in the message was drawn from the manner by which the treaty power had been understood in both parties in the negociations with foreign powers. “In all the treaties made *we* have declared and *they* have believed, &c.” By *we*, he remarked, was to be understood, the executive alone who had made the declaration, and in no respect, the House of Representatives. It was certainly to be regretted as had often been expressed that different branches of the government should disagree in the construction of their powers; but when this could not be avoided, each branch must judge for itself; and the judgment of the executive could in this case be no more an authority overruling the judgment of the house, than the judgment of the house, could be an authority overruling that of the executive. It was also to be regretted, that any foreign nation should at any time proceed under a misconception of the meaning of our constitution. But no principle was better established in the law of nations, as well as in common reason, than that one nation is not to be the interpreter of the constitution of another. Each nation must adjust the forms and operation of its own government: and all others are bound to understand them accordingly. It had before been remarked, and it would be proper to repeat here, that of all nations Great Britain would be least likely to object to this principle, because the construction given to our

government, was particularly exemplified in her own.

5. In the fifth and last place, he had to take notice of the suggestion that every House of Representatives had concurred in the construction of the treaty power, now maintained by the Executive; from which it followed, that the House could not now consistently act under a different construction. On this point it might be sufficient to remark, that this was the first instance in which a foreign treaty had been made, since the establishment of the constitution; and that this was the first time the treaty making power had come under formal and accurate discussion. Precedents therefore, would readily be seen to lose much of their weight. But whether the precedents found in the proceedings preparatory to the Algerine treaty, or in the provisions relative to the Indian treaties, were inconsistent with the right which had been contended for in behalf of the House, he should leave to be decided by the committee. A view of these precedents had been pretty fully presented to them by a gentleman from New York (Mr. Livingston) with all the observations which the subject seemed to require.12

On the whole, it appeared that the rights of the House on two great constitutional points, had been denied by a high authority in the message before the committee. This message was entered on the journals of the House. If nothing was entered in opposition thereto; it would be

inferred that the reasons in the message had changed the opinion of the **[301]**House, and that their claims on those great points were relinquished. It was proper therefore that the questions, brought fairly before the committee in the propositions of the gentleman (Mr. Blount) from North Carolina, should be examined and formally decided. If the reasoning of the message should be deemed satisfactory, it would be the duty of this branch of the government to reject the propositions, and thus accede to the doctrines asserted by the Executive: If on the other hand this reasoning should not be satisfactory, it would be equally the duty of the House, in some such firm, but very decent terms, as are proposed, to enter their opinions on record. In either way, the meaning of the constitution would be established, as far as depends on a vote of the House of Representatives.