

Debate on Mr. Livingston's resolution continued.

Thursday, March 17.

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[Mr. Tracy's Speech Concluded.]

In that country, the immediate representatives of the people, had been for a long time obtaining privileges from an hereditary executive and nobles, which by them had been usurped. In this country, the Executive and Senate were the Representatives of the people, possessing powers exactly marked out and defined, by a written Constitution :—and the attempt to give an alarm, against the despotism of the President and Senate, by comparing them with King and Lords, could not, on any principle, be proper, delicate, or justifiable.

He had often heard before he came into the government and since, that we had a Constitution, giving portions of power, exactly defined, and that if we thought, it might even become beneficial to the people, to take a constructive latitude, in the exercise of power, yet to step off of the written, and defined limits given us, would be improper in the extreme : this doctrine, although used on occasions, which in his opinion, were inapplicable, was weighty and important. He asked gentlemen to reflect, in what way this power, now contended for, was to be obtained ? Was it found in the Constitution, or by a construction, which, if not directly in violation of terms, was nearly so ?

He said it had been asserted, that a writer under the signature of Publius, in a series of papers called the *Federalist*, had been quoted as favoring this doctrine of associating the House of Representatives in the formation of treaties. He said it was an unfounded assertion: what that author had said upon the subject was contained in two chapters; the first begins with page 201, and the other in page 272, both of the 2d vol.—He requested gentlemen to read those two chapters, and he was much mistaken if all would not acknowledge that the opinions of the *Federalist* were not to associate the House of Representatives with the President in the making of treaties. What was said in page 133 of the same vol. he would notice in the other branch of the argument.

But gentlemen had said, if this extensive right must be abandoned, yet a constitutional check remains with the House of Representatives, to defeat all treaties, which may require appropriations of money to carry them into effect. If this was called a right of co-operation in making treaties, he did not understand it; to say, a payment of debt was part of a contract, and a refusal to pay, made void the contract, was to him perfectly unintelligible. He considered a treaty, bargain or contract, complete, when made by the President and Senate—and if money was necessary to carry it into effect, it did not invalidate the contract to refuse an appropriation; it was only saying, the nation had made a contract, and then refused to fulfil it. He requested a few minutes indulgence on the subject of appropriations, which was the second and last view he had proposed to take of the subject.

Gentlemen had exclaimed with some warmth, "are we to be machines perfectly at command of President and Senate?—and are appropriations to be made, without exercising any discretion."

He considered this House in all legislative acts to possess a full and unlimited discretion, with some few exceptions, which he would point out. "A bill comes under the consideration of this House, to establish trading houses with the Indian tribes.— Full and perfect discretion to accept or refuse is certainly vested in this House. Suppose they, in concurrence with the other branches, pass the bill, and employ an agent, with a promise contained in the same bill to pay him one thousand dollars for certain services, and this agent renders the services and produces his account, it is well known he cannot be paid without an appropriation by law. Can any man say, that in considering the bill of appropriation, a complete discretion is left to pass or not?"

Mr. Tracy said he would not detain the committee any longer than to hint at what was said of a sentence in page 133, of the *Federalist*. He conceived that laws might become necessary, in the various exigencies of a government, in consequence of treaties being made, that might be called sanctioning them, and yet not so immediately connected with them, as to preclude a full or nearly a full and complete discretion, whether to pass them or not—but he could not agree, that in the act of appropriation, which might be the only desideratum in a treaty, that a full and complete discretion to appropriate or not was left to any one or all branches of the government. He acknowledged if a treaty was unconstitutional, it was then not a contract of binding force, and of course contained no obligation of any kind whatever—if a treaty was so terrible in itself and manifest in its consequences, would ruin the nation, no argument could be drawn from such a statement; to establish general rules. The moral law had said, we shall not kill, and yet a man may be placed in such a situation, as that he not only may but it becomes his duty to kill—Could it be said, a general right to kill is proved by this concession? But could gentlemen seriously say, we now wanted these papers, mentioned in the resolution, to assist us in determining upon the question of appropriation? He thought not. He supposed the first extensive and unlimited right of interfering in the making a commercial treaty could alone justify the call, and he believed that ground must be given up. He said his colleagues (Messrs. Smith and Griswold) had asserted no other doctrines than such as he now advocated, and yet they had been accused of saying, that this House had no will of their own, but must in all cases implicitly obey the President and Senate. The construction he had given to the constitution he believed to be just, and trusted he could be under no necessity of declaring the purity of his intentions, as he did not doubt that every member of the House was guided in the investigation by the purest motives.

Mr. S. Smith said, that at the present stage of the discussion, little was left but gleanings, and to bear testimony against a doctrine that appeared to him big with consequences fatal to the true interests of this country.—He would not pursue the sophistry of the gentleman laid up (Mr. Tracy) through all its windings and turnings, he would only observe that the gentleman had read some and quoted much to prove that treaties were the supreme law, a doctrine that was admitted by all, that is when under the authority of the United States.—He also had taken much pains to convince us, that a contract being made by authority of congress for 1000 dollars,—money ought and would be appropriated to pay the contractor.—Does any one deny this to be sound doctrine? Yet he thought he had seen conduct which might be construed against it.

He said the resolution requested certain papers to be laid before the house. What had been the custom of the house heretofore? Invariably to ask for all and every paper that might lead to information. He well recollected that in 1793, a great ferment had arisen in the public mind, in consequence of the proclamation of neutrality (which had always appeared to him to be a wise measure) that on the meeting of Congress a great number of useful papers relative to our situation with respect to foreign nations were submitted; some of them of a most confidential nature, relating to treaties then depending—particularly that with Spain.—The President was not afraid to place his confidence in that house; and he was right, the public mind was relieved to quiet, and the people of Kentucky (then restless) were satisfied that the executive were doing every thing in their power to obtain the free navigation of the Mississippi. The President went farther, he sent a special agent to Kentucky to communicate to that government the true line of conduct then pursuing for their welfare.—Had the public mind been less disturbed on the late treaty, than in 1793? he thought not, and that every paper which would tend to satisfy that the treaty was expedient, or to give information on a subject that must be discussed before that house, might with propriety be asked for.

A gentleman from Vermont (Mr. Buck) repeated by another from South Carolina (Mr. Smith) said that to vote for this resolution would be treason

against the laws and constitution. Why this harsh language? Did it lead to a discovery of truth? Where did these gentlemen find that definition of treason? Not in the constitution; for there it was properly defined.

A gentleman from South Carolina (Mr. Smith, had said that none of the various town meetings relative to the treaty, had asked for papers; the various legislatures who had judged of the treaty had they requested papers? did the gentleman mean this as good reason why that house should not ask for them; if he did—it was certainly argument not worthy of refutation. Another gentleman from South Carolina (Mr. Harper) had said, the house might institute an enquiry into the conduct of the envoy, and he challenged the opposers of the treaty on that ground; it may investigate the treaty itself. Mr. Smith would ask whether the papers were not necessary to such enquiry and to such investigation. The same gentleman said, that if these papers were necessary, he would demand them as a right not ask for them in the milk and water style proposed. Here the gentleman felt bold. But, this has not been the custom. It had been usual and he hoped always would be, to approach the Chief Magistrate of the Union, with proper respect and decorum. To ask for the papers, he added, was unconstitutional, because unnecessary; he might as well have endeavored to convince by saying—*It is so—because it is so*. A gentleman from Connecticut (Mr. Griswold) had opposed the passing of the resolution in a masterly manner. He had never, at any time, listened to any man in that house with greater pleasure. But, upon re-examining what he heard, he found the merits of the orator lay in the ingenuity, not in strength of his reasoning.

From the papers Mr. Smith said, gentlemen had taken a ground that appeared alarming, viz.

"That the President and two thirds of the Senate may by the aid of a treaty, do any thing and every thing not morally impossible (provided they do not infringe on the constitution) and that the immediate representatives forming this house, have only to be informed thereof, and to obey."

Let us pause, said he, for a moment and ask was this possible? Could this be the fair construction of our so much boasted constitution? If it should be he would not regret the services rendered his country during the late glorious revolution, nor the part he had taken to promote the adoption of the Constitution; nor would he, by inflammatory speeches within, nor his actions without doors, do any thing that should tend to destroy the harmony then subsisting, or to disunite a people whom nature and relative wants seemed to have connected together. But, he would endeavor, in a constitutional manner to obtain amendments to the constitution which would prevent the evil in future. But, said he, is there occasion for amendments to the treaty making power? He thought not. There were checks and balances sufficient in the constitution, to prevent the evils that might arise out of it. He added, that he could offer nothing new, but would pursue the train of reasoning begun by a gentleman from Virginia (Mr. Madison.)

In the 8th section of the 1st article of the constitution, Congress have power to lay duties, &c. &c. but all duties shall be uniform throughout the United States ;

- Can regulate trade with foreign nations ;
- Can establish an uniform rule of naturalization.

lay taxes and duties, and to make laws of naturalization, are bound to make them uniform; and in another article are prevented from giving a preference by any regulation of commerce or revenue to the ports of one state over those of another. But the treaty making power is not so confined—it may relieve one of our ports from this uniformity of duties, or one of the states from the uniformity of naturalization. For explanation it may relieve goods imported in British bottoms into New-York from the one tenth extra duty, and let it remain on all the other ports of the Union. But, say gentlemen, it is unfair to reason against the use of power by its probable abuses—he thought it advisable to guard against abuses—he asked, has this abuse not already taken place? he thought it had. Not with respect to a port of the consequence of New-York that would have been too palpable. On the lakes by the 3d. article of the treaty, goods imported to the territory in that quarter in British bottoms, were subjected to no higher duty than goods imported in American vessels to the Atlantic ports. Here, said he, appeared a departure from that uniformity required by the constitution? here appeared a preference given to the ports of one state over those of another, and yet gentlemen contended, that this house have no right to enquire into the business.—Indeed so delicate was one gentleman (Mr. Buckle) on the subject, that he opposed committing the Algerine treaty, lest it should establish a claim to investigation! It was true, the trade on the lakes was small; but it would increase, and thus (if the explanation given to the third article be just) although Congress were very wisely restricted, when laying duties, to make them uniform, yet the President and Senate would be capable, by the assistance of a foreign power, to destroy that uniformity.

Again, he said, the treaty-making power, as contended for, may prevent the exportation of rice, tobacco, fish, or any other article, and that House must not interfere, must not enquire. But this would be said to be the abuse of power. True; but it will be found by the 12th article, that the envoy agreed that we should pass laws to prevent the export of all West-India goods. Nay, even of cotton, one of the objects of our growth. It was true, the Senate did not consent to this. But if they had, and the President had ratified it, that house, it was contended, must have passed the laws. It would have had no option.

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Again, Mr. Smith said, Congress passed a law (in his opinion a wife law) granting a bounty on the fishery, as a nursery for seamen, and another for promoting navigation, by restrictions on foreign bottoms. Suppose a power jealous of our rapid increase of navigation, should by a treaty repeal those laws—would this house have no right to enquire the reason why? Gentlemen say no; but that the senate would be too wise to consent to such a treaty. And yet it will be found, the law giving advantages to American vessels over foreign, and laying an extra duty on tonnage, will be virtually repealed by the treaty, which gives a right to the British to countervail and preclude the United States from legislating further on that subject. But the treaty has not touched the fishery bill; if it had, submission ought; it is contended, to have followed from that house. The subject may thus be followed, said he, under the treaty making power, until every power granted by the people to Congress, would be swallowed up, and that house reduced to a registering office.

He then asked, what could stop the treaty power thus confirmed? he trusted that house would; and as he was happy that the subject was brought forward under the presidency of the greatest man on earth, because a doctrine established whilst he was at the helm of the nation, would carry so much weight with it, that it would probably never be again disputed.

But, said he, are these papers secret? No: They are known to thirty senators, their secretary and his clerks, to all the officers of government, and to those of the members of this house who chose to read them. Then, say gentlemen, where is the necessity for calling for them? He answered, because it was more proper and more respectful to themselves; they would form a document which the members might quote in support of their arguments, when the treaty came under discussion; otherwise they might be called to order, or their quotations denied. For instance, suppose he should assert that the envoy had no power to effect a commercial treaty; that he was only to try what terms relative to commerce might be obtained, but positively prohibited from signing any thing until it should first be seen by the President. Suppose he went further, and should say, that the signature of the envoy committed this country to a situation so delicate, as in some measure compelled the senate to consent, and the President to ratify; what would be the consequence? Why some member might deny it, and the one assertion would stand against the other.

A gentleman from Massachusetts (Mr. Sedgwick) had applied his arguments to three points. 1st, That the doctrine of that house having any check or controul over treaties entered into by the President and Senate was new, never before heard of, and never mentioned in the different conventions which adopted the constitution. 2d, That the Senate was composed of men, the most virtuous and enlightened; men who had always been forward in the hour of the greatest danger; chosen by the elect of the people; by the legislators of the different states; not by an ignorant herd who might be cajoled, flattered and deceived—not even by the enlightened citizens of America. 3d, That the opposition arose not from the provisions in the treaty, but because it was made with the British.—From the first point he had been completely driven by a gentleman from Virginia, (Mr. Brent) who had proved that the doctrine was not novel, but as old as the constitution, and had been generally admitted in the convention.

On the second point, no person would deny the good qualities of the Senate, but without any disparagement to the Senators from Massachusetts, he should be at no loss to find two gentlemen from the same State of equal abilities, and of patriotism as well tried, as those gentlemen, and he presumed the gentleman would not disagree with him, when he was informed that he would probably fix his eye on him as one. The gentleman said, *who are we that we should attempt to judge over the heads of those wise men; we who are collected from the remote corners of the Union?* We, said Mr. S. are the immediate delegates of the people, collected from the different districts of the Union, to aid and assist the wise men above stairs in making wholesome laws, and to retain those privileges given to this house by the constitution, which he trusted they would hand to their successors inviolate. He then took a view of the members who came from the remote parts of the Union, and declared them to be men of sound judgment and real abilities.

The third point was a very serious charge indeed, no less than that the opposition made, was not to the instrument, but because it was made with Britain; and the gentleman asks why a similar opposition had never been made to the treaty with France? Why this language? Can such reflections assist in the discovery of the truth? Was the gentleman aware how this might be retorted? Did he reflect that some gentlemen of as little temper as himself might have said that such a treaty would not have been signed by the envoy with any other nation, nor consented to by the Senate? Nay, he might, if very irritable, have said, that if it had not been British it would not have been supported on the floor of that house, and might have quoted, as proof, the great delicacy of certain gentlemen on the resolution relative to American seamen impressed by the British.

But it was with pleasure he had seen that no reflection, no insinuation, no threats had been uttered by any gentleman on that side of the question which he had espoused. He hoped that nothing but fair arguments would be adduced. If he should be in the minority it would be his duty; and he would (as a republican ought to do) acquiesce in whatever might be the determination of the majority. As to the treaty with France, it was made before the formation of our constitution, which wisely provided that all engagements heretofore made, should be binding on the new government; of course neither the President and Senate, nor that house had any power over it.

Mr. Smith then stated that he did not mean, and he hoped he should not be understood to preclude himself from voting to carry the treaty into effect. He held himself open to conviction on that subject, if he should find that the same was expedient, (whatever might be his opinion at present on the instrument, and in truth he did not think it good,) yet he would keep himself at full liberty to act as he might think most to the interest of this country, when that subject should come before the house.