



INDIAN TREATIES

David P. Currie

THE UNITED STATES HAD MADE TREATIES with Native American tribes since before the Constitution was adopted. The Statutes at Large are full of them.¹ By an obscure rider to an Indian appropriation bill Congress in 1871 attempted to put an end to the practice:

Provided, that hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty

Existing treaties were not affected; but there were to be no new treaties with the Indians.²

On January 26, 1871, Ohio Representative William Lawrence offered the following amendment to a routine bill making appropriations to cover expenses incurred in connection with Indian affairs:

*Provided, that nothing in this act contained shall be construed to ratify any of the so-called treaties entered into with any tribe, band, or party of Indians, since the 20th July, 1867.*³

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¹ There is a whole volume (7 Stat) of Indian treaties concluded between 1778 and 1842.

² 16 Stat 544, 566 (Mar 3, 1871).

³ Cong Globe, 41st Cong, 3d Sess 763.

The reference to ratification seemed to claim for the House of Representatives a role in the making of Indian agreements, while the pejorative term “so-called” appeared to call into question the power to make treaties with the Indians at all.

Horace Maynard of Tennessee protested at once. “[T]his amendment ... means to assert by this House the prerogative, the power, to determine whether a treaty made by the treaty-making power of the Government is binding on this nation or not.” Yet the Constitution gave the President authority to make treaties with the advice and consent of the Senate; and once made, a treaty was the law of the land.⁴ Joseph Smith of Oregon agreed: “[I]t is a heresy, a dangerous heresy, for this House to insist that it can control or regulate the treaty-making power of the Government.”⁵

“I admit the treaty-making power with foreign nations,” Aaron Sargent of California replied, “[b]ut I deny that there can be such nations on our own soil. ... I think it is well that this House of Representatives should declare its position on this matter, and reject the idea that we can or ought to treat these individuals as independent nations.”⁶

But the Supreme Court, Eugene Wilson of Minnesota responded, had expressly affirmed the constitutionality of Indian treaties. Here are the words of Chief Justice Marshall in *Worcester v Georgia*, in 1832, which Wilson quoted:

The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties.

⁴ Id at 764. See US Const, Art II, § 2, cl 2.

⁵ Cong Globe, 41st Cong, 3d Sess 764. Both Maynard and Smith insisted that it followed that Congress had an obligation to appropriate money to carry out a treaty. Id. That question was debated extensively in the great battle over the Jay Treaty back in the eighteenth century (see David P. Currie, *The Constitution in Congress: The Federalist Period 209-17* (Chicago 1997)) and will not be reviewed here.

⁶ Cong Globe, 41st Cong, 3d Sess 765.

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The words “treaty” and “nation” are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.⁷

Smith agreed with Wilson too: “The Supreme Court has sustained the treaties made by our treaty-making power with the Indian tribes ever since our Government has had an existence. And it is too late to question their validity now.” The treaty power should be left where the Constitution had placed it: with the President and the Senate. And with that he moved to strike the offensive term “so-called” from Lawrence’s proposed amendment.⁸

Sargent had anticipated this argument:

Eighty or a hundred years ago, perhaps, when there were great confederated nations upon our borders, not entirely upon soil owned by ourselves, we might treat with them in order to keep peace; but now the whole thing is changed. We have absorbed the whole of the territory over which they then roamed; it now belongs to us, not to them.⁹

Kentucky Democrat James Beck echoed Sargent’s argument: “[W]hile it may be that in times gone by the Indian tribes were properly regarded as suitable parties to our treaties, I deny the power of the Senate to make such treaties as those referred to in the proviso, and bind the House to carry them out”¹⁰

Smith’s motion to omit the reference to “so-called” treaties was defeated, Lawrence’s amendment was adopted, and the House

⁷ 31 US 515, 559-60. See Cong Globe, 41st Cong, 3d Sess 765-66. Wilson mistakenly attributed this passage to Marshall’s earlier opinion in *Cherokee Nation v Georgia*, 30 US 1 (1831), where the Court held that an Indian tribe, while not a “foreign state” for purposes of the judicial power in Article III, was indeed a “state,” as shown by the long practice of making Indian treaties. *Id.* at 16.

⁸ Cong Globe, 41st Cong, 3d Sess 766.

⁹ *Id.* at 765.

¹⁰ *Id.*

passed the bill.¹¹ If the Senate concurred, the law would provide that nothing in its provisions should be taken to “ratify” any “so-called” Indian treaty entered into after 1867.

But the Senate did not concur. Its prerogative in passing upon Indian treaties had been called into question, and it dug in its heels. The first amendment proposed by the Senate Appropriations Committee was to drop the term “so-called” in connection with Indian treaties.¹²

Nevada Senator William Stewart opposed this amendment: “I regard all these Indian treaties as a sham”¹³ Samuel Pomeroy of Kansas thought otherwise: From the beginning Indian treaties had been regarded as the law of the land.¹⁴ Without further ado the amendment was adopted, the term “so-called” was dropped, and the Senate too passed the bill.¹⁵

The House refused to accept the Senate amendments, the Senate insisted on them, and a conference committee was appointed.¹⁶ The conference-committee report recommended that Lawrence’s non-ratification proviso be replaced by a brand-new provision: Henceforth no Indian tribe should be considered a proper party with which to make a treaty.¹⁷

The House adopted the conference report without recorded objection.¹⁸ The Senate adopted it too, but not without dissent. Garrett Davis of Kentucky stated it most plainly: The Constitution vested treaty-making authority in the President and the Senate; the Supreme Court had held that they could make treaties with the In-

¹¹ Id at 767, 790.

¹² Id at 1112.

¹³ Id.

¹⁴ Id.

¹⁵ Id at 1480, 1489, 1599-1600.

¹⁶ Id at 1701, 1756, 1771.

¹⁷ Id at 1810.

¹⁸ Id at 1812.

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dians; and Congress could not by legislation strip the President and Senate of their constitutional powers.¹⁹

This last proposition was so obvious that even supporters of the new provision professed to embrace it. Of course Congress could not deprive the President of his right to make treaties with foreign nations, said John Stockton of New Jersey; “but I do not think we do that when we simply declare that hereafter the Indians within our own borders . . . shall not be treated as foreigners.”²⁰ Pennsylvania Representative William Armstrong, who had introduced a proposed joint resolution that was the source of the conference committee’s provision,²¹ said much the same thing in the House:

The right to make treaties is vested by the Constitution in the “President, by and with the advice and consent of the Senate.” As a power vested by the direct provision of the Constitution, it is lifted beyond the control of Congress; for it is plain that it is not competent by force of a mere law to withdraw a power conferred by the Constitution. But the right to determine who are nations or Powers with whom the United States will contract by treaty belongs to the political power of the Government, or, in other words, the law-making power.

Congress might even refuse to recognize France or England, Armstrong concluded, and no one would have a right to complain.²²

I find this a lame distinction. The power to make treaties seems to me to include the right to decide with whom to make them, as the power to declare war includes the right to decide whom to fight. Whatever casuistic defenders of the new provision might say,

¹⁹ Id at 1822. See also id (Sen. Pomeroy); id at 1824 (Sen. Casserly).

²⁰ Id at 1823. The Supreme Court had rejected the premise of Stockton’s argument. In the *Cherokee Nation* case the Court had held Indian tribes were not foreign; in *Worcester v Georgia* it had held the United States could make treaties with them. See note 7 supra.

²¹ See Cong Globe, 41st Cong, 3d Sess 1154, 1811. Armstrong’s resolution was identical to the statutory provision ultimately adopted except that it added that agreements with Indian tribes required congressional approval. Id at 1154.

²² Id at 1812.

Congress was attempting to dictate to the President with whom he might make treaties, and that seems to me a blatant invasion of the executive prerogative. Indeed, as Eugene Casserly of California observed in the Senate, it was up to the President, not to Congress, to determine which states to recognize: “Of course I need not remind Senators ... that the various departments of this Government, the judiciary included, follow the Executive in regard to the recognition of the existence of other States and Powers.”²³

Of course if supporters of the original House amendment were right that the power to enter into treaties did not include agreements with the Indians, there was nothing wrong with the proviso; it merely restated in statutory form the requirements of the Constitution itself. The trouble with that argument was that it contradicted our entire history, contravened direct Supreme Court precedent, and invalidated every Indian treaty made since 1789 – although the statute professed to preserve them.

To escape from the box required acceptance of the shaky premise that although the treaty power had initially included Indian agreements, it no longer did; Indian tribes had somehow ceased to be nations with which treaties could constitutionally be made. Iowa Senator James Harlan, Chairman of the Committee on Indian Affairs, attempted to explain:

I agree with the Senator from Kentucky [Davis] that treaties made with the Indian tribes are the law of the land, and have been held to be such by the highest judicial tribunals of the country. But he will agree with me that the relation of the Indian tribes to the United States and their condition is continuously changing, and nations of Indians that might have been recognized years ago may now be well regarded as having deteriorated to such an extent as to justify the adoption of this declaration on the part of Congress.²⁴

²³ Id at 1824. For discussion of this issue see David P. Currie, *The Constitution in Congress: The Jeffersonians 200-05* (Chicago 2001).

²⁴ Cong Globe, 41st Cong, 3d Sess 1823-24.

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I don't buy it. If England sank into the sea we could no longer make treaties with it; if an Indian nation had disbanded, we could not make treaties with it either. But nothing of the sort had occurred. The "deteriorat[ion]" of Indian tribes did not deprive them of their status; we can still make treaties with Austria though it has lost the great bulk of its former territory. In short, the entire enterprise was flatly unconstitutional, and it seems extraordinary that President Grant unblinkingly signed it into law. If he didn't want to make Indian treaties, he didn't have to. But nobody had the right to tell him he couldn't if he did. If you don't believe me just wait till Congress tries to tell the President he may not make treaties with England or France. The Constitution says he can.

