

CHAPTER XI

THE SENATE AS AN EXECUTIVE AND JUDICIAL BODY

THE Senate is not only a legislative but also an executive Chamber; in fact in its early days the executive functions seem to have been thought the more important; and Hamilton went so far as to speak of the national executive authority as divided between two branches, the President and the Senate. These executive functions are two, the power of approving treaties, and that of confirming nominations to office submitted by the President.

To what has already been said regarding the functions of the President and Senate as regards treaties (see above, Chapter VI.) I need only add that the Senate through its right of confirming or rejecting engagements with foreign powers, secures a general control over foreign policy; though it must be remembered that many of the most important acts done in this sphere (as for instance the movement of troops or ships) are purely executive acts, not falling under this control. It is in the discretion of the President whether he will communicate current negotiations to it and take its advice upon them, or will say nothing till he lays a completed treaty before it. One or other course is from time to time followed, according to the nature of the case, or the degree of friendliness existing between the President and the majority of the Senate. But in general, the President's best policy is to keep the leaders of the senatorial majority, and in particular the committee on Foreign Relations, informed of the progress of any pending negotiation. He thus feels the pulse of the Senate, which, like other assemblies, has a collective self-esteem leading it to strive for all the information and power it can secure, and while keeping it in good humour, can foresee what kind of arrangement it may be induced to sanction. The

right of going into secret session enables the whole Senate to consider despatches communicated by the President; and the more important ones, having first been submitted to the Foreign Relations committee, are thus occasionally discussed without the disadvantage of publicity. Of course no momentous secret can be long kept, even by the committee,¹ according to the proverb in the Elder Edda — "Tell one man thy secret, but not two; if three know, the world knows."

This control of foreign policy by the Senate goes far to meet the difficulties which every free government finds in dealing with foreign Powers. If each step to be taken must be previously submitted to the governing assembly, the nation is forced to show its whole hand, and precious opportunities of winning an ally or striking a bargain may be lost. If on the other hand the executive is permitted to conduct negotiations in secret, there is always the risk, either that the assembly may disavow what has been done, a risk which makes foreign states legitimately suspicious and unwilling to negotiate, or that the nation may have to ratify, because it feels bound in honour by the act of its executive agents, arrangements which its judgment condemns. The frequent participation of the Senate in negotiations diminishes these difficulties, because it apprises the executive of what the judgment of the ratifying body is likely to be, and it commits that body by advance. The necessity of ratification by the Senate in order to give effect to a treaty, enables the country to retire from a doubtful bargain, though in a way which other Powers find disagreeable, as England did when the Senate rejected the Reverdy Johnson treaty of 1869. European statesmen may ask what becomes under such a system of the boldness and promptitude so often needed to effect a successful *coup* in foreign policy, or how a consistent attitude can be maintained if there is in the chairman of the Foreign Relations committee a sort of second foreign secretary. The answer is that America is not Europe. The problems which the Foreign Office of the United States has to deal with are far fewer and usually far simpler than those of the Old World. The republic keeps consistently to her own side of the Atlantic; nor is it the least of the merits of the system of senatorial control that it has tended, by discouraging the executive from schemes which

¹ Cæsar Borgia complained that the Florentine Republic could not keep a secret.

may prove resultless, to diminish the taste for foreign enterprises, and to save the country from being entangled with alliances, protectorates, responsibilities of all sorts beyond its own frontiers. It is the easier for the Americans to practise this reserve because they need no alliances, standing unassailable in their own hemisphere. The circumstances of England, with her powerful European neighbours her Indian Empire, and her colonies scattered over the world, are widely different. Yet different as the circumstances of England are, the day may come when in England the question of limiting the at present wide discretion of the executive in foreign affairs will have to be dealt with;¹ and the example of the American Senate will then deserve and receive careful study.

The Senate may and occasionally does amend a treaty, and return it amended to the President. There is nothing to prevent it from proposing a draft treaty to him, or asking him to prepare one, but this is not the practice. For ratification a vote of two-thirds of the senators present is required. This gives great power to a vexatious minority, and increases the danger, evidenced by several incidents in the history of the Union, that the Senate or a faction in it may deal with foreign policy in a narrow, sectional, electioneering spirit. When the interest of any group of States is, or is supposed to be, against the making of a given treaty, that treaty may be defeated by the senators from those States. They tell the other senators of their own party that the prospects of the party in the district of the country whence they come will be improved if the treaty is rejected and a bold aggressive line is taken in further negotiations. Some of these senators, who care more for the party than for justice or the common interests of the country, rally to the cry, and all the more gladly if their party is opposed to the President in power, because in defeating the treaty they humiliate his administration. Thus the treaty may be rejected, and the settlement of the question at issue indefinitely postponed. It may be thought that a party acting in this vexatious way will suffer in public esteem. This hap-

¹ Parliament of course may and sometimes does interfere; but the majority which supports the ministry of the day usually forbears to press the Foreign Office for information which it is declared to be undesirable to furnish.

In 1886 a resolution was all but carried in the House of Commons, desiring all treaties to be laid before Parliament for its approval before being finally concluded.

pens in extreme cases; but the public are usually so indifferent to foreign affairs, and so little skilled in judging of them, that offences of the kind described may be committed with practical impunity. It is harder to fix responsibility on a body of senators than on the executive; and whereas the executive has usually an interest in settling diplomatic troubles, whose continuance it finds annoying, the Senate has no such interest, but is willing to keep them open so long as some political advantage can be sucked out of them. The habit of using foreign policy for electioneering purposes is not confined to America. We have seen it in England, we have seen it in France, we have seen it even in monarchical Germany. But in America the treaty-confirming power of the Senate opens a particularly easy and tempting door to such practices.

The other executive function of the Senate, that of confirming nominations submitted by the President, has been discussed in the chapter on the powers of that officer. It is there explained how senators have used their right of confirmation to secure for themselves a huge mass of Federal patronage, and how by means of this right, a majority hostile to the President can thwart and annoy him. Sometimes he ought to be thwarted: yet the protection which the Senate provides against abuses of his nominating power is far from complete.

Does the control of the Senate operate to prevent abuses of patronage by the President? To some extent it does, yet less completely than could be wished. When the majority belongs to the same party as the President, appointments are usually arranged, or to use a familiar expression, "squared," between them, with a view primarily to party interests. When the majority is opposed to the President, they are tempted to agree to his worst appointments, because such appointments discredit him and his party with the country, and become a theme of hostile comment in the next electioneering campaign. As the initiative is his, it is the nominating President, and not the confirming Senate, whom public opinion will condemn. These things being so, it may be doubted whether this executive function of the Senate is now a valuable part of the Constitution. It was designed to prevent the President from making himself a tyrant by filling the great offices with his accomplices or tools. That danger has passed away, if it ever existed; and Congress has other means of muzzling an ambitious chief magistrate.

The more fully responsibility for appointments can be concentrated upon him, and the fewer the secret influences to which he is exposed, the better will his appointments be. On the other hand, it must be admitted that the participation of the Senate causes in practice less friction and delay than might have been expected from a dual control. The appointments to the cabinet offices are confirmed as a matter of course. Those of diplomatic officers are seldom rejected. "Little tiffs" are frequent when the senatorial majority is in opposition to the executive, but the machinery, if it does not work smoothly, works well enough to carry on the ordinary business of the country, though a European observer, surprised that a democratic country allows such important business to be transacted with closed doors, is inclined to agree with the view lately advanced in the Senate that nominations ought to be discussed publicly rather than in secret executive session.

The judicial function of the Senate is to sit as a High Court for the trial of persons impeached by the House of Representatives. The senators "are on oath or affirmation," and a vote of two-thirds of those present is needed for a conviction. Of the process, as affecting the President, I have spoken in Chapter V. It is applicable to other officials. Besides President Johnson, six persons in all have been impeached, viz.:—

Four Federal judges, of whom two were acquitted, and two convicted, one for violence and drunkenness, the other for having joined the Secessionists of 1861. Impeachment is the only means by which a Federal judge can be got rid of.

One senator, who was acquitted for want of jurisdiction, the Senate deciding that a senatorship is not a "civil office" within the meaning of Art. iii. § 4 of the Constitution.

One minister, a secretary of war, who resigned before the impeachment was actually preferred, and escaped on the ground that being a private person he was not impeachable.

Rarely as this method of proceeding has been employed, it could not be dispensed with; and it is better that the Senate should try cases in which a political element is usually present, than that the impartiality of the Supreme court should be exposed to the criticism it would have to bear, did political questions come before it. Many senators are or have been lawyers of eminence, so that so far as legal knowledge goes they are competent members of a court.

CHAPTER XII

THE SENATE: ITS WORKING AND INFLUENCE

THE Americans consider the Senate one of the successes of their Constitution, a worthy monument of the wisdom and foresight of its founders. Foreign observers have repeated this praise, and have perhaps, in their less perfect knowledge, sounded it even more loudly.

The aims with which the Senate was created, the purposes it was to fulfil, are set forth, under the form of answers to objections, in five letters (lxi.—lxv.), all by Alexander Hamilton, in the *Federalist*.¹ These aims were the five following:—

To conciliate the spirit of independence in the several States, by giving each, however small, equal representation with every other, however large, in one branch of the national government.

To create a council qualified, by its moderate size and the experience of its members, to advise and check the President in the exercise of his powers of appointing to office and concluding treaties.

To restrain the impetuosity and fickleness of the popular House, and so guard against the effects of gusts of passion or sudden changes of opinion in the people.

To provide a body of men whose greater experience, longer term of membership, and comparative independence of popular election, would make them an element of stability in the government of the nation, enabling it to maintain its character in the eyes of foreign States, and to preserve a continuity of policy at home and abroad.

To establish a Court proper for the trial of impeachments, a remedy deemed necessary to prevent abuse of power by the executive.

¹ See also Hamilton's speeches in the New York Convention.—Elliot's *Debates*, ii. p. 301 *sqq.*