In the conduct of troops and command of naval vessels the President has exclusive discretion; but Congress may use the money power, as Parliament uses it in Great Britain, to control the conduct of war in a manner it condemns. But all the operations of war in an enemy's country, by levy of contributions and the like, would seem to revert to the President by virtue of his power as commander-in-chief. To illustrate, suppose war has been declared. The status of war is thus constituted. How can it be stopped when once begun? The President and Senate can make a treaty of peace, but must war continue until the President and Senate agree to the terms of peace? Is there no end to the war except at the will of the President and Senate? No authority can be cited on the question, but the writer thinks a repeal of a law requiring war would be effectual to bring about the status of peace in place of war. Besides this direct method, Congress, by the denial of supplies, as Parliament in England may do, would bring the war easily to an end, though the President might desire to continue it. As commander-in-chief he must personally approve or disapprove of the judgment of courts-martial under the articles of war which require the proceedings to be submitted to him.[1]

§ 352. "He may require the opinion, in writing, of the principal officer in each of the Executive Departments, upon any subject relating to the duties of their respective offices," etc. This is, as Mr. Hamilton says,[2] "mere redundancy, as it would have been inferred necessary without being expressed." It indicates clearly, however, that while the Constitution made the executive a unit, and excluded all idea of an advisory council, it still contemplated that the executive function should be divided between the executive departments with a principal officer at the head of each, who should

[1] United States v. Page, 137 U. S. 673, distinguished from Runkle v. United States, 122 id. 543.

[2] Federalist, No. LXXIV.

be subordinate to the President in all things concerning his duties; and this is clearly inferable from the language used.

"He shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."[1] Under this clause the President may suspend, commute or abrogate penalties. He may commute the death penalty to imprisonment for life, which the convict may accept, and the latter cannot then claim that the pardon is absolute and the condition void.[2] The language is, "to grant pardons," which includes conditional as well as absolute pardons. The term is analogous to that recognized in the English law, and the Supreme Court has agreed that in the use of those terms our Constitution must be construed to have referred to that law. But the convict must accept the commutation. If he does not, the President could not inflict, without judgment of the court, the substituted penalty. His acceptance, therefore, is necessary to the operation of the commuted penalty.[3] The President may grant a pardon before criminal procedure is instituted, and it will operate as well as if granted after a conviction.[4]

The amnesty proclamations of the Presidents since the war embraced large numbers of persons against whom there were no criminal prosecutions instituted, and these amnesty proclamations have been construed as pardons granted before and without trial or conviction. When granted before, it prevents all penalties and disabilities from attaching to the offender and restores him to all of his civil rights. If granted after conviction, it removes all of these penalties and disabilities and restores him to his civil rights. Pardon releases all penalties, including fines and confiscations,[5] and this applies to property confiscated under judicial proceed-

[1] Art. II, sec. 2, clause 1.

[2] Ex parte Wells, 18 How. 307.

[3] United States v. Wilson, 7 Pet. 162.

[4] Ex parte Garland, 4 Wall. 326. *Accord*, Cummings v. Missouri, id. 277.

[5] Osborn v. United States, 91 U. S. 474.

ings; and if the money has not been distributed, all will be restored to the offender, upon pardon, unless by judicial process the title has been vested in another person.[1] Pardon wipes out guilt and all of its consequences as if it had never been. In the eye of the law the offender is as innocent as if he had never committed the offense.[2] In *United States v. Klein*,[3] disloyalty, which forbids the owner to claim captured property, is removed by pardon, and the owner is treated as if he had never been otherwise than loyal. The effect of pardon upon the offender's right to property, saving the reversion to his heirs at law, was fully considered in a number of cases besides the one last cited.[4] These cases have been before explained In the leading case of *United States v. Klein* the Supreme Court decided another important question; namely, that it is not in the power of Congress to qualify the pardoning power of the President, either in respect to the cases in which it may be exercised, or in respect to its consequences. Thus, it is not competent for Congress to say that the effect of the pardon shall not be to restore the property rights of the offender. Thus, rights are restored as the legal consequences of the exercise of the pardoning power by the executive, without any right to qualify the power on the part of the legislative department.

§ **353.** "He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."[5] The negative of this clause is in article I, clause 10, "No State shall enter into any treaty," etc. The object of the Constitution, as it had been of the Articles of Confederation, was to give to the general government of the States of the Union the regulation of their relations

[1] Id.

[2] Ex parte Garland, 4 Wall. 380. *Accord*, United States v. Padford, 9 Wall. 542.

[3] 13 Wall. 128.

[4] Wallach v. Van Riswick, 92 U. S. 202; Avegno v. Schmidt, 113 id. 293; Hart v. United States, 118 id. 62; Shields v. Schiff, 124 id. 351; Railroad v. Bosworth, 133 id. 92; Jenkins v. Collard, 145 id. 546; United States v. Dunnington, 146 id. 338.

[5] Art. III, sec. 2, clause 2

with foreign nations. And these two clauses vesting the power of making treaties in the President and Senate, and denying the power to every State, give the exclusive power of making treaties to the President and Senate. It is a striking fact that the body which represents the co-equality of the States should be the advisory and consenting body to any treaty between the States and foreign nations. The President has no power, unless the treaty be made by and with the advice and consent of the Senate.

The nature of the treaty-making power it is now proper to consider. Mr. Hamilton, speaking of this power, says: "Though several writers on the subject of government place that power in the class of executive authorities, yet this is evidently an arbitrary disposition; for if we attend carefully to its operation, it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either. The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society, while the execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all of the functions of the executive magistrate. The power of making treaties is, plainly, neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the enaction of new ones; and still less to an exertion of the common strength. Its objects are contracts with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive."[1]

The treaty-making power in England is vested in the Crown; but this does not show that it is in its true nature an executive function. A treaty may be defined to be a

[1] Federalist, No. LXXV.

compact between nation and nation. The treaty, as a contract, is the *nexus* between the two distinct national wills, creating a pact between them. The subject-matter of the treaty and the objects of the contract may require legislation to complete it and to carry into execution what, by treaty, is merely executory. A treaty may be designed to establish peace instead of war. It may relate to the regulation of commerce between the inhabitants of two nations, and as to this, by operating upon individual rights, may partake largely of the legislative function. It may apply to extradition of criminals, which, operating upon the liberty of the individual, is characteristic of legislative power. This object, as all these mentioned, must be the result not of the will of one nation alone, but of the concurrent will of two nations. The power to make the contract is given neither to the legislative nor to the executive department alone, but to a combination of the two, by entrusting it to the President and the Senate. It will be seen that the President has power to make treaties, which seems to give to him the power of negotiation and formulation of the treaty, which shall have no force as such unless it is sanctioned by the advice and consent of the Senate. The word "advice," used in the clause, indicates action by the Senate preliminary to making the treaty. The word "consent" indicates action by the Senate subsequent to the making of the treaty by the President. It is therefore clear that the Senate may advise the President before he has fully acted, or consent to his action after he has formulated the treaty.

The proviso is very important. We have already referred to the fact that the equality of representation of the States in the Congress of the Confederation gave undue power to the small States as to any action which depended upon a majority of their votes. In the Articles of Confederation it is provided that Congress (which has the treaty-making power) should enter into no treaties unless nine States assented to the same — nine States out of the thirteen. Two-thirds of the States, therefore, were required to make the

treaty binding. The same idea was in the minds of the members of the convention, when they required that two-thirds of the senators should advise and consent to a treaty in order to its validity. But it does not require that two-thirds of all of the senators should advise and consent to the treaty, but two-thirds of the senators present.

Why is this? Mr. Hamilton, in the *Federalist*, has given the reason for it in the following words: "If two-thirds of the whole number of members had been required, it would, in many cases, from the non-attendance of a part, amount in practice to a necessity of unanimity. And the history of every political establishment in which this principle has prevailed is a history of impotence, perplexity and disorder."[1]

§ 354. A grave question has arisen whether the exclusive power of treaty-making, vested in the President and Senate, is unlimited in its operation upon all the objects for which a treaty may provide. Can a treaty by compact with a foreign nation bind all of the departments of our own government as to matters fully confided to them; can it surrender or by agreement nullify the securities for personal liberty engrafted upon the Constitution itself; can it cede to a foreign power a State of the Union or any part of its territory without its consent; can it regulate commerce with foreign nations in spite of the power of Congress to regulate commerce with them; can it provide for the rates of duty to be imposed upon certain articles imported from foreign nations, or admit them free of duty, in the face of the power given to Congress to lay and collect taxes and duties; can a treaty appropriate money from the public treasury and withdraw it without the action of Congress; can a treaty dispose of any part of the territory of the United States, or any of their property, without the consent of Congress, which alone has power to dispose of and make rules and regulations concerning the territory and other property of the United States? These important questions have several

[1] Federalist, No. LXXV.

times arisen for discussion in our history, and upon them authoritative decisions have been made by other departments of the government, which are based upon solid reason and sound principles of constitutional construction.

It cannot be denied that very many of these questions must be answered in the negative, or the consequence would be that, under the treaty-making power, the President and Senate might absorb all the powers of the government. In favor of the extreme claim of power for the President and Senate, it has been urged that a contract between the United States and a foreign nation must be conclusive against all departments of the government, because it is a contract; but the answer to this contention is obvious and conclusive. It involves the *petitio principii*, by assuming that the contract is complete though it trenches upon the power of the other departments of the government, without their consent. And if it be further urged that foreign nations know no party in the contract on the part of the United States except the President and Senate, the answer is equally conclusive that if our Constitution requires the consent of the departments to a treaty of the nature referred to, the foreign nation is bound to take notice of that fact, and cannot claim a completed obligation, in the absence of the consent of the other departments. The maxim upon this subject is familiar: *qui cum alio contrahit vel est, vel debet esse, non ignarus conditionis ejus.* And if it be further urged that this is too refined a doctrine to regulate our delicate relations with foreign powers, the answer is that the treaty-making power of the Crown of Great Britain, where it involves a concession of the clear and absolute power of Parliament, has never been recognized as valid by the English government, and has never been enforced. The Queen may make a treaty to pay ten millions of dollars to the French government, but unless Parliament appropriates the money the treaty will be ineffectual.[1] "It is from the fundamental laws of each State that we must learn where resides

[1] Wharton's International Law, 457; 1 Mahon's History of England, p. 20.

the authority that is capable of contracting with validity in the name of a State."[1]

A treaty, therefore, cannot take away essential liberties secured by the Constitution to the people. A treaty cannot bind the United States to do what their Constitution forbids them to do. We may suggest a further limitation: a treaty cannot compel any department of the government to do what the Constitution submits to its exclusive and absolute will. On these questions the true canon of construction, that the treaty-making power, in its seeming absoluteness and unconditional extent, is confronted with equally absolute and unconditioned authority vested in the judiciary. Therefore, neither must be construed as absolute and unconditioned, but each must be construed and conditioned upon the equally clear power vested in the others. For example, Congress has power to lay and collect duties; the President and Senate have power to make and contract with a foreign nation in respect to such duties. Can any other construction be given to these two apparently contradictory powers than that the general power to make treaties must yield to the specific power of Congress to lay and collect all duties; and while the treaty may propose a contract as to duties on articles coming from a foreign nation, such an executory contract cannot be valid and binding unless Congress, which has supreme authority to lay and collect duties, consents to it. If it is then asked, how are you to reconcile these two powers which appear to be antagonistic, the answer is clear. Congress has no capacity to negotiate a treaty with a foreign power. The extent of its membership makes this impracticable. The Constitution, therefore, left the House of Representatives out of all consideration in negotiating treaties. The executory contract between the United States and a foreign nation is therefore confided to the one man who can conduct the negotiations, and to a select body who can advise and consent to the treaty he has negotiated. But this executory contract must depend for its execution

[1] Vattel, Bk. 2, sec. 154.

upon the supreme power vested in Congress "to lay and collect duties." It is therefore a contract not completed, but inchoate, and can only be completed and binding when Congress shall by legislation consent thereto, and lay duties in accordance with the executory contract or treaty. The same reasoning may apply to all of the great powers vested in Congress, such as to "borrow money, regulate commerce, coin money, raise armies and provide a navy, make laws as to naturalization, bankruptcies, and exercise exclusive legislation" in the District of Columbia and Territories of the country. If these are sought by treaty to be regulated by the President and Senate, it can only be done when the Congress vested with these great powers shall give its unconditional consent.

Mr. Madison, in the reports of the convention which he has left to us, used an expression which is significant upon this point. He intimated that in making treaties eventual, that is, complete and final *per se*, the treaty-making power might be independent; but where they referred to matters that were incomplete without legislation, they would be incomplete until that consent was given.[1]

The absurdity of any other construction as to the power to lay taxes, duties and so on is very palpable. We have seen from the Constitution that all bills for raising revenue shall originate in the House of Representatives, to which the Senate may or may not assent, and the President may veto; but if the President and Senate have the power to regulate the system of taxation and revenue by treaty without the consent of Congress, then the House of Representatives, which by the terms of the Constitution is made the originating body for such bills, without whose primal action the President and Senate can have no voice whatever in the matter, is to be excluded from any consent to the terms of the treaty of the President and Senate, who, by the constitutional method, are not entitled to act at all until the House of Representatives has inaugurated a bill.

[1] 3 Madison Papers, 1415.

The reason in the nature of our system which makes the conclusion absolute is that in the balance of power which was ordained by the convention, the House of Representatives was to originate all taxation upon the people. The people at large dreaded the placing of the tax power in the hands of a majority of the States without regard to their size, and insisted that the power should be in the hands of the States according to the numerical proportion of their population. To give the President, with the advice and consent of two-thirds of the senators present, the power to regulate taxation, is to reverse this scheme and destroy the equilibrium of the Constitution. For in 1790 two-thirds of the States containing 1,685,360 people could ratify a treaty against the other third of the States containing a population of 2,166,419; that is to say, that a minority could tax at will the majority. By the census of 1880 two-thirds of the Senate, representing 19,755,532, could regulate taxation against the other third containing a population of 29,615,818; and by the late census of 1890 this disproportion would be greatly increased.

It has been shown in previous parts of this work that the regulation of commerce by a majority vote of the two Houses, instead of requiring two-thirds, was the result of a concession made upon a compromise. But if this regulation of commerce can be made by two-thirds of the States in the Senate, then under the census of 1880 above shown, two-fifths of the population of the country could regulate commerce against the other three-fifths, instead of the original purpose to require a vote of two-thirds to do so.

§ 355. These results demonstrate the fatal disturbance of the equilibrium of the Constitution which would arise from any such construction as would give the President and Senate the right by treaty with a foreign power to regulate the internal concerns of the country. We have had several historic precedents on this subject, to which brief reference may be made. President Washington negotiated Jay's treaty in 1795, in which were general stipulations as to commerce and

duties upon British vessels, etc. It was insisted that this treaty was complete without any consent of the House of Representatives. The House of Representatives resolved by a vote of 63 to 36 that while the House did not claim any agency in making treaties, yet when a treaty stipulated for regulations upon any of the subjects submitted by the Constitution to the power of Congress, it must depend for its execution, as to such stipulations, on a law or laws to be passed by Congress, and it was the constitutional right and duty of the House of Representatives in all such cases to deliberate on the expediency or inexpediency of carrying such a treaty into effect, and to determine and act thereon as in their judgment might be most conducive to the public good.[1]

When the treaty of Ghent was negotiated in 1814, containing stipulations as to duties on articles imported from Great Britain, and as to commerce from that country, Mr. Madison transmitted the treaty and recommended to Congress legislation such as the treaty required, and a bill was passed in conformity therewith. The two Houses were in fierce contention upon the question we have been discussing. Calhoun of South Carolina, William Pinckney of Maryland, supported the views in favor of the treaty-making power, while Lowndes of South Carolina and Randolph of Virginia and others insisted that Congress must consent to it. In 1844 the question was again considered upon what was known as the Zollverein treaty, when the foreign affairs committee of the Senate, through Senator Rufus Choate, their chairman, maintained the principles we have stated above.[2] Without going further into this question we may refer to the various views of learned writers on this subject.[3]

The courts in the cases cited, though holding the fact that a treaty as well as a law is held by the Constitution to be

[1] 1 U. S. Stat. at Large, 459.

[2] Senate Journal, 1st Sess. 28th Cong., Sess. 1843–44, p. 445.

[3] 1 Kent's Com., p. 235; Story's Com., sec. 1502; Foster v. Neilson, 3 Pet. 314; Turner v. American Baptist Union, 5 McLean, C. C. R. 344; Taylor v. Morton, 2 Curtis, C. C. R. 454; Cherokee Tobacco, 11 Wall. 616; Head-Money Cases, 112 U. S. 580.

the supreme law of the land, also hold that a subsequent law of Congress may supersede a prior treaty. That had been decided in *The Cherokee Tobacco*, *supra*, while there is an *obiter dictum* by the court that a treaty may supersede a prior act of Congress. Chief Justice Marshall seems, in *Foster v. Neilson*, *supra*, to accord with the remark of Mr. Madison, above referred to, as to the distinction between an eventual treaty and treaties requiring regulation. In the treaty with the Hawaiian government in 1876, the terms of the treaty required that it should be sanctioned by Congress, though it should go into effect as had like treaties which provided for a similar ratification. On this subject the writer refers to a report of the judiciary committee of the House of Representatives made in March, 1887.[1]

§ **356.** One other view may be presented. Treaty is international compact. The root of the word (*tractare*) indicates negotiation between two or more. In itself treaty is a bargain, not law. "It has the force of law, but derives it from the obligations of good faith."[2] No power is given to the President and Senate to effectuate the terms of the treaty by legislation. On the other hand, power is given to Congress by law to carry into execution all the powers vested in other departments, of which the treaty-making power is one. Can the conclusion be reached that the law-making department must then concur in action with the treaty-making power to make the treaty effectual as law to the people, or to execute its terms by needful and proper laws, especially as to those matters which are peculiarly confided to Congress? Can an inference in favor of executive authority be admissible in the face of this expressed delegation of power to Congress to carry the treaty into execution; and can it be held that it is obligatory upon Congress to do all of this, not discretionary, and that Congress must register the will of the President and Senate without power to dissent?

[1] Report No. 4177, H. R. 49th Cong., 2d Sess.

[2] Mr. Hamilton, The Federalist, No. LXXV.

The precedents in our history are quite numerous, and some of them have been already mentioned. Attention may be called to cases where treaties have bargained for the acquisition of territory. We have already seen that Congress has power "to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States." But how is the United States to acquire such territory or property? It may be by purchase or cession from a foreign power. The contractual *nexus* between the United States and a foreign nation making cessions or selling territories can be established only by treaty. But when the grant is executed by the treaty, Congress will hold for the United States under the above grant of power, and if the grant be for a money consideration, Congress alone can appropriate the money.

In all of the precedents where money was to be paid, Congress has passed a law to appropriate it, but as to the *transitus* of the title the precedents are peculiar and instructive. The treaty with France for the cession of Louisiana was concluded April 30, 1803, during the recess of Congress. Mr. Jefferson was then President; Congress met October 17, 1803. The Senate ratified the treaty negotiations of the previous April on the 20th of October; it was proclaimed by the President October 21. The President sent a special message to Congress communicating the requisite papers for the purpose of the consideration of Congress in its legislative capacity and for the exercise of its functions which are within the power vested by the Constitution in Congress. "You will observe that some important conditions cannot be carried into execution but with the aid of the Legislature." Congress on the 31st of October passed a law authorizing the President to take charge of the Territory of Louisiana so acquired; thus, as the holder of territory belonging to the United States, giving its sanction to the acquisition of the territory by the treaty aforesaid.[1] In the same way, when the treaty between

[1] 2 U. S. Stat. at Large.

the United States and Spain was made, by which Florida was acquired, Congress passed an act on March 3, 1819, authorizing the President to take possession of Florida according to the terms of the treaty.[1] The celebrated Ashburton treaty for the settlement of the northeastern boundary between Maine and the British possessions in 1842 established the boundary, by which part of the territory claimed by Maine passed to Great Britain, and part of the British territory passed to Maine. In the fifth article of that treaty it was provided that the United States should secure the consent of Maine and of Massachusetts, the mother State of Maine, to the adjustment of the boundary, and would pay over to those States the sum of money agreed to be paid by Great Britain.[2] This shows that Secretary Webster recognized the incapacity of the United States to cede by treaty any part of the territory of a State without its consent, and that the treaty-making power was qualified by the constitutional duty of the United States "to protect each State against invasion."[3] So in the settlement of the boundary of Oregon by the treaty of 1846, and of the boundary between Mexico and the United States after the war by the treaty of Guadalupe-Hidalgo, Congress recognized and sanctioned the treaty by assuming possession and establishing governments over the territory acquired under that treaty.

The acquisition of Alaska in 1867 brought up the question as to the appropriation of the money agreed to be paid for its purchase. Congress passed a bill making an appropriation of money to carry the treaty with Russia into effect. The House of Representatives, however, had taken a stronger position, and on the 14th of July, 1867, by a vote of 113 to 43, it asserted the necessity of the consent of Congress to the said treaty, before the same should have full force and effect. From this proposition the Senate dissented, and the difference of opinion between the two bodies resulted in the act simply appropriating the money to carry the treaty into effect. It

[1] 3 U. S. Stat. at Large, 523–24.
[2] 8 U. S. Stat. at Large, 554.
[3] Const. U. S., Art. IV, sec. 4.