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REMARKS on the Amendments to the Federal Constitution, proposed by the Conventions of Massachusetts, New-Hampshire, New-York, Virginia, South and North-Carolina, with the minorities of Pennsylvania and Maryland, by a FOREIGN SPECTATOR.

### NUMBER XVII.

The following amendments relate to the power of making treaties, which, by the constitution, is lodged with the president and senate. *That no treaty shall be effectual to repeal or abrogate the constitutions or bills of rights of the states, or any part of them*, 6th am. by the minority of Maryland. *That no treaty 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opposed to the existing laws of the United States in Congress assembled, shall be valid until such laws shall be repealed or made conformable to such treaty; neither shall any treaties be valid which are contradictory to the constitution of the United States, or the constitutions of the individual states*, 13th am. by the minority of Pennsylvania. *That no commercial treaty shall be ratified without the concurrence of two-thirds of the whole number of the members of the senate; and no treaty, ceding, contracting, or restraining, or suspending the territorial rights or claims of the United States, or any of them—or their, or any of their rights or claims to fishing in the American seas, or navigating the American rivers, shall be made, but in cases of the most urgent and extreme necessity; nor shall any such treaty be ratified, without the concurrence of three-fourths of the whole number of members of both houses respectively*, 7th am. by Virginia and North-Carolina. It is self-evident that the executive can have no power to infringe the constitution of the United States by any treaty, however beneficial it might appear. The whole federal government had no such authority. It is also granted that the constitutions of the several states cannot be repealed or abrogated by any acts of the federal power: besides, treaties concern the general affairs of the union, and cannot affect the forms of the several state-governments.

The power of legislation is vested in both houses of Congress with the president so far as his negative extends. Treaties, which must necessarily have the full energy of laws, are to be made by the president and the senate. Consequently, as two co-equal separate powers are a solecism in politics, it would seem reasonable to require a concert between the two parties, and to enact that no treaty, which shall be directly opposed to the existing laws of the United States, shall be valid until such laws shall be repealed, or made conformable to it. But, on the other hand, very momentous reasons justify the delegation of this power to the executive and senators exclusively. First, these persons will, from their long continuance in office, derive a more ample, exact and

systematic knowledge of those great national affairs which are the objects of treaties, than can be generally expected from a popular assembly that is changed every second year. Secondly, negotiations often require secrecy and expedition. It may be imprudent to lay open our whole situation to the nation with whom we treat. It may also be proper to conceal many things from another which is a rival in such treaty. In the cabinet, as in the field, the moments are sometimes precious, and must be caught as they pass. Every person who is versed in history must know, that a battle, the death of a prince, the change of a ministry, and many other circumstances, have often caused great alterations; and that able politicians have made an excellent use of such events. Thirdly, if a treaty is advantageous, there is no doubt but Congress will repeal or alter such laws as are in opposition to it. Fourthly, the president and senate will certainly confer with some of the principal members in the house of representatives in all difficult cases, when the treaty in agitation demands a change of some important laws.

The concurrence of two thirds of the whole senate is, undoubtedly, very desirable, when a commercial treaty or any other is to be ratified. But what must be done, when so great a majority of those present cannot be obtained, and a delay would have bad consequences? I have before observed the pernicious tendency of indolence, and other private avocations, and repeat again, that such conduct is peculiarly disgraceful and criminal in offices of high trust. The constitution might have fixed a quorum of the senate for transacting the more important business; but it supposed a sense of duty and honor that wants no coercion. Indeed, what can be a substitute for this? May not the plea of sickness, alone, elude any compulsive measures?

That no detrimental treaties ought to be made, but from necessity, is clear. The magnitude of the sacrifice must not exceed the greatness of this necessity; but it is difficult to determine this proportion, previous to such deplorable events. The cases expressed by the conventions of Virginia and North-Carolina, are all very alarming, yet not in the same degree; the cession of territorial, or other, rights, is worse than a temporary suspension; positive rights are less alienable than mere claims. A part of the federal territory, or any other common advantages, may also, *ceteris paribus* [Latin: All other things being equal], be given up sooner than the appurtenance of any particular state. The federal constitution expressly declares, *that nothing in the same shall be so construed as to prejudice any claims of the United States, or of any particular state*, 4th art. 3d sect. 2d par. In strict compliance with this clause, neither the executive nor the congress have the power to abalienate [to transfer or make over (property) to another] any possessions or rights of the United States, or any of them. Such unhappy necessity may, however, exist, and the general government must then concert what remedy is practicable. The house of representatives may, in this case, have a salutary co-operation with the president and senate, especially as secrecy and dispatch are less requisite. Unanimity is devoutly to be wished for in such critical resolves; but it is extremely difficult to fix the degree of it. It is doubtful whether even two thirds of both houses would agree on a measure, that must affect some states very deeply. Necessity has no law; when a victorious army can enforce hard conditions, there is no choice.

It is a consolation, that this kind of amendments will, probably, never be wanted, while a solid confederation is an impregnable bulwark to every state in the union.

An explanation on this important subject, will be an improvement of the constitution, but, at the same time, a very arduous task. In the vicissitude of human affairs, the cession of a frontier state may become indispensable; yet what constitutional act can be framed for such a melancholy

event, which is, in fact, a partial dissolution of the union, and, consequently, of the constitution itself? Human prudence cannot pass certain limits; let us trust something to Divine Providence, and the means of security he has graciously given.

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