Slavery and the race problem in the South

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Treaty-Making Power

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By

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ADDRESS OF WILLIAM H. FLEMING

BEFORE THE GEORGIA BAR ASSOCIATION AT WARM SPRINGS, GA., ON JUNE 3, 1909.

THE TREATY-MAKING POWER OF THE PRESIDENT AND SENATE: HOW AFFECTED BY THE POWERS DELEGATED TO CONGRESS, AND BY THE POWERS RESERVED TO THE STATES.

(From The Augusta Chronicle, Sunday, June 6, 1909.)

Following is the address of Hon. William H. Fleming, at Warm Springs, before the annual meeting of the Georgia Bar Association:

Mr. President and Gentlemen:

By the highest authority in the land we have been cordially assured that the South is now a fully restored member of the Union and is to be recognized and treated as such. That being true, there can be no impropriety in a Southern man before a Southern Bar Association discussing a national question.

The subject of our discussion is:

The Treaty-Making Power of the President and Senate; How Affected by the Powers Delegated to Congress, and by the Powers Reserved to the States.

The recent crisis which almost precipitated international estrangement between the United States and Japan, by reason of threatened legislation by the State

of California discriminating against Japanese children in the public schools, in contravention of their alleged rights under an existing treaty, imparts a living, practical interest to our discussion, which might otherwise stand exposed to the criticism of being merely academic.

A law connotes a sovereign and subjects; a treaty connotes two sovereigns. One is intra-national; the other is inter-national. Violation of a law involves disobedience, with the consequent penalties prescribed. Violation of a treaty involves breach of faith, with such consequent protest, retaliation, or war, as the aggrieved nation may be willing and able to make.

As between the nations themselves, the stipulations of a treaty rest in contract. But as between each nation and its own subjects, those stipulations have the status of positive law throughout its whole territory — unless that status be modified by the political structure of the government. Hence the pertinency of inquiring into our fundamental law on this subject.

Historical Development of Treaty-Provisions in Constitution.

When our Revolutionary fathers met in the Federal Convention of 1787 to frame our Constitution, there was, in the midst of great diversity of opinion on many other matters, entire unanimity on lodging the treaty-making power in some department of the na-

tional government to the complete exclusion of the states.

That proposition was unanimously agreed to as early as May 31st, the second business day after the Committee of the Whole began its work. It was affirmed in the regular convention without dissent on August 25th and reaffirmed without dissent on September 6th.

And when, after weeks and months of arguments, amendments, and re-amendments, the heterogeneous mass of political material had been combined into system and wrought into shape by the Committee of Detail, and the almost finished instrument came at last from the hands of the "Committee of Stile & Arrangement" (as Mr. Madison writes it) and received the final approval of the convention, it contained the following provisions on the subject of treaties:

No state shall "enter into any treaty, alliance or confederation." Art. 1, Sec. 10, Par. 1.

"He (the President) shall have power by and with the advice and consent of the Senate to make treaties, provided two-thirds of the senators present concur." Art. 2, Sec. 2, Par. 2.

"This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land." Art. 6, Sec. 2.

Indeed the looser Articles of Confederation which became operative March 1, 1781, contain substan-

tially similar provisions against state action in the making of treaties.

But although there was such oneness of opinion in regard to vesting the treaty-making power in the Federal government as against the states—resulting from manifest political propriety and necessity — yet there was serious difference of opinion as to just what department of the Federal government should be intrusted with this high prerogative of sovereignty.

The draft of the Constitution as it came to the regular convention from the Committee of the Whole on August 6th lodged the treaty-making power exclusively in the Senate acting by majority vote, and there it remained until September 7th, ten days before adjournment, when the following substitute provision was adopted:

"The President by and with the advice and consent of the Senate shall have power to make treaties — but no treaty shall be made without the consent of two-thirds of the members present."

This verbiage was condensed and improved by the Committee on Style and Arrangement to read as it now stands:

"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."

The requirement of a two-thirds vote was doubtless based upon the same considerations of public policy and local jealousy which necessitated the provision in

the Articles of Confederation that the votes of nine states should be required to ratify a treaty.

Judging from the debates in the convention, the exclusion of the House from participation in treaty-making was not based on any principle of division of powers, but arose solely from the advantage of having a comparatively small body to deal with the class of subjects that often required secrecy for successful negotiation.

Had the fathers understood the mysteries of telepathy, and foreseen how easy it would be for the modern newspaper reporter to possess himself, by some subtle method of thought-transference, of all the secrets of executive sessions of the Senate, no doubt they would have attached less importance to the plea of necessity for excluding the more numerous branch of the legislature from these supposedly secret sessions.

In these secret executive sessions, the Vice-President retains the chair, thus establishing, as was supposed by some, a closer nexus between the President and the Senate.

In the convention on September 7th Elbridge Gerry opposed the provision making the Vice-President ex-officio president of the Senate. He contended that the close intimacy that must subsist between the President and the Vice-President makes it "absolutely improper." But on that issue, he was easily out-voted — the logic of his contention being more than met by the wit of Gouverneur Morris, who ob-