

Sec. 2—Powers, Duties of the President Cl. 2—Treaties and Appointment of Officers

preme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Court of Law, or in the Heads of Departments.

THE TREATY-MAKING POWER

President and Senate

The plan that the Committee of Detail reported to the Federal Convention on August 6, 1787 provided that “the Senate of the United States shall have power to make treaties, and to appoint Ambassadors, and Judges of the Supreme Court.”²⁷⁷ Not until September 7, ten days before the Convention’s final adjournment, was the President made a participant in these powers.²⁷⁸ The constitutional clause evidently assumes that the President and Senate will be associated throughout the entire process of making a treaty, although Jay, writing in *The Federalist*, foresaw that the initiative must often be seized by the President without benefit of senatorial counsel.²⁷⁹ Yet, so late as 1818 Rufus King, Senator from New York, who had been a member of the Convention, declared on the floor of the Senate: “In these concerns the Senate are the Constitutional and the only responsible counselors of the President. And in this capacity the Senate may, and ought to, look into and watch over every branch of the foreign affairs of the nation; they may, therefore, at any time call for full and exact information respecting the foreign affairs, and express their opinion and advice to the President respecting the same, when, and under whatever other circumstances, they may think such advice expedient.”²⁸⁰

Negotiation, a Presidential Monopoly.—Actually, the negotiation of treaties had long since been taken over by the President; the Senate’s role in relation to treaties is today essentially legislative in character.²⁸¹ “He alone negotiates. Into the field of negotiation, the Senate cannot intrude; and Congress itself is powerless to

²⁷⁷ 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 183 (rev. ed. 1937).

²⁷⁸ Id. at 538–39.

²⁷⁹ No. 64 (J. Cooke ed., 1961), 435–436.

²⁸⁰ 31 ANNALS OF CONGRESS 106 (1818).

²⁸¹ Washington sought to use the Senate as a council, but the effort proved futile, principally because the Senate balked. For the details see E. Corwin, *supra*, at 207–217.