FORERUNNERS OF COLONEL HOUSE AND JOHN LIND

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American Presidents Since Washington's Time Have Used Irregular Diplomatic Agents in the Conduct of Foreign Affairs.

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President Monroe had made these appointments without the authority of the Constitution and without the authority of any law creating their position. "There was an act of Congress fixing the grade of the only Ministers we send abroad, and it provided for two cases only, that of Minister Plenipotentiary and that of Chargé d'Affaires." These men were neither. Their appointment was doubly illegal, as not resting upon any law, and because they had not been confirmed by the Senate. Clay, however, went on to say that there was a contingent fund allowed the President by law which he was authorized to spend without rendering Congress any account of it. It was confined to his
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Mr. James M. Beck, whose career and writings give him a right to be heard with attention, raises the question in The New York Times Magazine of February 27, 1916, whether President Wilson's failure to consult the Senate in important foreign policies and in certain diplomatic appointments has not reduced the Constitution to a "scrap of paper." It is rather surprising to find so able a lawyer devoting so large a share of attention, in discussing the problem, to the personal qualifications of Colonel E. M. House, which can have obviously, no relation to the constitutionality of President Wilson's action, and consequently is not to be considered as part of "the evidence in the case."

In Mr. Beck's clear analysis of the treaty-making power it is admitted that while the President "cannot negotiate a binding treaty with any foreign power...he can arrange, pending the action of the Senate, for a modus vivendi." This probably covers the field of the "executive agreement" with Santo Domingo, although that agreement remained in force after a treaty--suspiciously like it in its provisions--had been rejected by the Senate.

The main thesis, however, of Mr. Beck is that President Wilson has appointed a diplomatic officer, or rather a series of them, without
the advice and consent of the Senate, which is specifically required by the Constitution. In his view the sending of Mr. John Lind and Mr. William Bayard Hale to Mexico, and Colonel E. M. House to Europe is unwarranted in law or reputable precedent.

He is careful to point out that "the President is not forbidden by any express provision in the Constitution from securing information through any messenger that he may select for the purpose, and as long as the messenger thus selected does not assume a diplomatic character there can be no constitutional objection."

Mr. Beck's criticism, then, is of the appointment of a diplomatic officer without proper constitutional sanction. We may admit at the outset that the Constitution does not provide for such appointment other than those which fall vacant in a recess, and that there is no law which specifically provides for such an appointment. The point at which Mr. Beck departs from the true path is in loading it all on Mr. Wilson. One would expect a lawyer to examine the precedents and weigh their importance.

Mr. Wilson may have taken a "liberty" "with the Constitution of his country" in sending Mr. Lind to Mexico and Colonel House to Europe. But if he did, he had a most remarkable series of precedents upon which to base his action.

The first President to take such a "liberty with the Constitution" was George Washington, who, though not a lawyer, may yet "be credited with a passing knowledge of the Constitution," and who, though not an accepted historian, may be presumed to have had a "knowledge of the philosophy of our political institutions." Washington in the early days of the Government found the relations between England and America unsatisfactory. England had no Minister here, and the United States had no diplomatic
representative at the Court of St. James's--"It being important to both countries, that the treaty of peace between Great Britain and the United States should be observed and performed with perfect and mutual good faith, and that a treaty of commerce should be concluded by them, I wish to be ascertained of the sentiments and intentions of the Court of London on these interesting subjects. It appears to me most expedient to have these inquiries made informally, by a private agent, and...I desire you in that capacity, and on the authority and credit of this letter, to converse with his Britannic Majesty's Ministers on these points, namely, whether there be any and what objections to performing those articles in the treaty, which remain to be performed on his part; and whether they incline to a treaty of commerce with the United States on any and what terms."

On the strength of this letter Gouverneur Morris held conferences with Mr. Pitt and the Duke of Leeds in order to sound their attitude on important questions in the relations of the two powers, much as Colonel House, perhaps, has been doing recently. It would be difficult to call Morris "a Secret Service agent." It would be difficult to call him anything but a diplomatic agent. It would be very difficult indeed to draw any line of distinction between his status and that of Colonel House, at least so far as we know the status of this modern "private agent," who acts on the authority and credit of a letter from the President. Finally there is no record that the Senate was any the less acquiescent in the impairment of its constitutional prerogative then than now, for no record exists of any discussion of Morris's appointment, status, or compensation, either in the Annals of Congress or in the Executive Journal of the Senate.

There were other cases of minor importance early in our history, which do not require full treatment here. The first important Senatorial
debate on the subject appears to have been in March and April of 1814. At that time Christopher Gore, Senator from Massachusetts, objected to the recess appointments of Gallatin, J. Q. Adams, and Bayard as Envoys Extraordinary and Ministers Plenipotentiary to negotiate peace with England. He insisted, as does Mr. Beck in the case of Colonel House, that no such office existed and that no vacancy can happen in any office not at some previous time filled. Mr. Beck assumes Gore's position precisely when he says: "The law never created any such position, and without the action of Congress this new position has no legal justification whatever." But at that time Senator Bibb of Kentucky pointed out clearly that many original appointments were made to offices not created by law and without the advice and consent of the Senate during the recesses of that body.

That debate, however, did not have the clear bearing upon the problem that the next discussion has. On November 24, 1817, Caesar Rodney, John Graham, and Theodorick Bland were sent with "no distinct diplomatic rank" on a mission to South America. Their commission makes clear the fact that they were not Secret Service agents but diplomatic agents of undefined status. When the appropriation bill carrying provision for the compensation of these men came before the House the Speaker, Henry Clay, raised many of the objections that Mr. Beck advances in the present case. He first pointed out the folly of the mission and then turned to the constitutional point. He insisted that President Monroe had made these appointments without the authority of the Constitution and without the authority of any law creating their position. "There was an act of Congress fixing the grade of the only Ministers we send abroad, and it provided for two cases only, that of Minister Plenipotentiary and that of Charge d'Affaires." These men were neither. Their appointment was doubly illegal, as not resting
upon any law, and because they had not been confirmed by the Senate. Clay, however, went on to say that there was a contingent fund allowed the President by law which he was authorized to spend without rendering Congress any account of it. It was confided to his discretion, and if the compensation of the Commissioners had been made from that fund Clay admitted that it would not have been a proper subject for inquiry. After this protest by Clay the $30,000 appropriation was shifted on to the Contingent Fund, from which the Commissioners were ultimately compensated. Clay offered no further objection. It is pertinent to point out in this connection that Mr. Lind received his compensation from that same fund, and that Colonel House's expenses (Secretary Lansing told the House Foreign Affairs Committee that he draws no pay) are paid from the same fund.

In 1818 that Senate was as callous as in 1916 with regard to the reduction of the Constitution to "a scrap of paper," for there is no record of any discussion of the matter in that body whatever.

The next notable discussion of the subject came in the Administration of John Quincy Adams. He nominated to the Senate two men to represent the United States at the "assembly of American nations at Panama." Senator John Branch, by a forced interpretation of a few words in the Presidential message to Congress, asserted that Adams had claimed the right to appoint these men without Senatorial consent, and in defense of the constitutional prerogative of that august body he introduced a resolution to the effect that "the President of the United States does not, constitutionally, possess either the right or the power to appoint Ambassadors or other public Ministers but with the advice and consent of the Senate, except when vacancies may happen in a recess." Upon this a furious debate broke out in the Senate and raged hotly for a while. But the resolution was
not bona fide; it was drawn for political, not constitutional, purposes and, after having been modified, was finally laid upon the table, where it remained.

One of the most interesting and famous of these Commissioners was Nicholas P. Trist, who was sent along with the army toward Mexico City to hold out the olive branch after every notable gain of American arms. President Polk took the liberty of sending Trist without the ratification of his appointment by the Senate. Indeed, he does not seem to have wished the Senate to know anything about it. He wished the utmost secrecy. It must be conceded that Mr. Trist's mission was as thoroughly diplomatic in character as was that of Mr. Lind or that of Mr. Hale. He was allowed the salary and outfit of a Charge d'Affaires, and, being charged with the negotiation of a treaty, was clearly a diplomatic officer.

Passing over a whole group of these anomalous diplomatic agents appointed by Presidents Polk, Taylor, Fillmore, Pierce, Grant, and Arthur, we come to the Administration of Grover Cleveland. Some of the cases thus passed over would be worth some investigation, but they are not essential to the proof of the matter under discussion. Grover Cleveland made as full use of this power as has President Wilson. He sent George H. Bates to Samoa to conclude a treaty. He commissioned Thomas F. Bayard, William L. Putnam, and James B. Angell to adjust questions with regard to the northeastern fisheries dispute between the United States and England. The appointment of these men raised the question of validity of commissions issued without Senatorial approval, but nothing came of it. On March 11, 1893, James H. Blount was sent as Paramount Commissioner to Hawaii, and his authority was declared to be "paramount" to that of the regular diplomatic agents—as Mr. Beck presumes that of Mr. House to be. Blout's status was
minutely inquired into and the majority report of the Senate Foreign Relations Committee said:

A question has been made as to the right of the President of the United States to dispatch Mr. Blount to Hawaii as his personal representative for the purpose of seeking the further information which the President believed was necessary in order to arrive at a just conclusion regarding the state of affairs in Hawaii. Many precedents could be quoted to show that such a power has been exercised by the President on various occasions without dissent on the part of Congress or the people of the United States. The employment of such agencies is a necessary part of the proper exercise of the diplomatic power which is intrusted by the Constitution with the President. Without such authority our foreign relations would be so embarrassed with difficulties that it would be impossible to conduct them with safety or success. These precedents also show that the Senate of the United States, though in session, need not be consulted as to the appointment of such agents, or as to the instructions which the President may give them.

On the other hand, the minority's report said that the appointment of Blount as special Commissioner to the Hawaiian Government "under letters of credence and those of instruction which declared that 'in all matters affecting the relations with the Government of the Hawaiian Islands his authority is paramount' was an unconstitutional act, in that such appointee, Mr. Blount, was never nominated to the Senate, but was appointed without its advice and consent, although that body was in session when the appointment was made."

This furnishes another illustration that Senatorial opinion with regard to these appointments is determined by partisanship.

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It is not necessary to examine the appointment by President McKinley of W. W. Rockhill as "Commissioner of the United States to China, with diplomatic privileges and immunities." Enough has been said already to make it clear that there is a wealth of precedent for the appointment of Mr. Lind and Mr. Hale to Mexico, and of Colonel House as "Paramount Ambassador," as Mr. Beck, perhaps in reminiscence of Mr. Blount's title, calls him.

These facts make clear that we cannot assert without very important exceptions that "hitherto those provisions of the Constitution, which require the concurrence of the Senate with the President in the conduct of our foreign relations, have been observed and cherished with a general and jealous acceptance of their wisdom."