AMERICAN PARTICIPATION IN INTERNATIONAL CONFERENCES

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The participation of the United States in the Opium Conference, and in the London and Paris conferences with reference to the operation of the Dawes plan, has brought forward the question of the right of the executive to participate in such conferences. Sharp criticism has been levelled at the executive on the ground that the President is without right to send representatives, either official or unofficial, to such gatherings without the prior authorization of Congress. This question has now been in the foreground of discussion intermittently for twelve years and is worthy of some analysis.

The grant of power for the control of foreign affairs in the Constitution is both brief and bare. The instrument as it stands furnishes no description of the respective powers and duties of the President, the Senate and the House. Constitutional practice has developed in the course of a long conflict between the executive and the legislative branches for the dominant position with reference to foreign affairs. The development has not been wholly consistent or in one direction. Though it is usually assumed that the President has gained most in the struggle, in some important respects Congress has gained power at the expense of the executive.

The field in which the legislative branch of the government has made greatest headway is in the matter of appointments. At the outset of the government the initiative of the President was complete. It was for him to determine where diplomatic representatives should be sent and what their grades should be. Jefferson advised Washington that the Senate could not "negative the grade" of a diplomatic appointee. A lump sum was even put at the disposal of the President from which he could determine the salaries of American diplomatic officers. It was held that diplomatic offices were derived from international law and were simply recognized by the Constitution. Consequently, there was no statute defining the duties of a consul, for example, for some years after the government was established. Nor was there a statute defining the duties of a minister. The powers and functions of American foreign representatives were defined by the law of nations as interpreted by the executive department.

The President steadily lost power in this matter. Congress soon abandoned the practice of lump sum appropriations, and the use of specific app-
propriations gave to Congress a certain authority in the matter of appointments. In 1792 an act was passed defining the duties and functions of consuls. In 1855 and 1856 Congress passed comprehensive legislation dealing with the diplomatic and consular service, defining the functions of the officers, stating where representatives were to be sent, and the grade which was to be employed. These acts were not perfectly effective because an opinion of the Attorney General, Caleb Cushing, declared that the President was not bound to send persons to all the places named, nor was he prohibited from sending representatives to places not named. He even went to the extent of saying that the President might send persons of different grades to places which were named in the law. Thus this legislation did not immediately result in crippling presidential initiative. Congress persisted in that type of legislation, however, and ultimately gained complete control. The law of 1893, which provided for the creation of the rank of ambassador and defined the circumstances under which an ambassador might be sent, originated in Congress and was not desired by the President or the Secretary of State. When a legation is to be raised to the rank of an embassy, it now requires specific statutory approval to make the alteration, and the President does not send regular diplomatic officers to places not provided for in legislation, nor does he send officers of a grade other than that authorized by Congress.

The laws by which the President's power of appointment was limited did not deal with temporary appointments or the appointment of delegates to international conferences. One reason was that for many years after the organization of the government the United States did not participate in international conferences. Most of the temporary appointments were not of a formal or important character. Where they were, as for example in the case of Jay's famous mission to Great Britain, nominations were sent to the Senate. When Madison appointed commissioners during a recess to negotiate for peace at the close of the War of 1812, a tempest broke out in the Senate because he had "initiated" a mission without the consent of the Senate.

The first important invitation to an international conference was that for

2. Foster, Practice of Diplomacy, 20-26; Moore, Digest of International Law, IV, 737-739.
3. See, for statement of the principal acts in this connection, Q. Wright, The Control of American Foreign Relations, 325. There has been important legislation subsequent to its publication, including provision for an embassy at Havana (Public, No. 385, 67th Congress), and an Act for the Reorganization and Improvement of the Foreign Service of the United States (the Rogers Bill—Public, No. 135, 68th Congress).
the Panama Congress of 1825. When the invitation arrived, the President, John Quincy Adams, though he wished to accept it, did not feel that he had power to appoint plenipotentiaries without the approval of the Senate. An unfortunate phrase in a message to Congress was interpreted as an assertion that he could accept an invitation to participate in such a conference upon his own responsibility. A bitter debate ensued. It brought a denial from Adams that he had ever asserted such authority; and a hostile Senate Committee grudgingly admitted that he had made "an express reference . . . to the concurrence of the Senate as the indispensable preliminary to the acceptance of this invitation." Having amply demonstrated that they must be consulted, the Senators ultimately approved the nominations and Congress made an appropriation. Matters had been delayed so long by the dispute that the Panama Congress had adjourned before the American delegates arrived.8

After the Panama fiasco there ensued another period of many years when the United States did not participate in international conferences. The notion of a true Pan American conference was in eclipse, and the United States would not consider attending European political conferences even if European nations would have considered issuing invitations to the United States.

When the United States began to accept invitations, it was to conferences of a technical and scientific character, without political or diplomatic significance. In 1863, for example, the Government of Prussia invited the United States to participate in the International Statistical Congress. The invitation was received after the Senate had adjourned, and the meeting was to be held and its work completed before the Senate reconvened. Under those circumstances the President appointed a commission to represent the United States, acting without any appropriation, special authority from Congress to make the appointment, or nomination to the Senate at the close of the recess. It may well have seemed that no precedent was being set, for the Statistical Congress was not wholly official in character, delegates from learned societies, as well as from cities and states, being admitted along with national delegates.9 Nevertheless, in 1869, an official delegate was sent to another session of the Statistical Congress without being nominated to the Senate.10 Even when, in 1872, Congress made a special appropriation to pay the costs of participation in still another session, the Senate was not asked for its approval of the three delegates.11

The precedents thus established went unchallenged. It is true that practice was not perfectly uniform. Sometimes, as in the case of the first Pan American Conference, in 1889, the President sent the names of proposed

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8 Ibid., III, 457-459, 473, 554, 567.
9 H. Ex. Doc. 289, Serial 1615, 43 Cong. 1 sess.
10 Ibid.
11 Ibid., Statutes at Large, XVII, 368.
delegates to the Senate for approval. Occasionally, as in the law of August 5, 1892, the President was specifically "authorized to appoint five commissioners," in that instance to a monetary conference. But in no case did the President ask permission of Congress to send or to accept an invitation, and in most instances he appointed official delegates without reference to the Senate. That procedure was followed, not only in the cases of technical and scientific conferences, but also when plenipotentiaries were sent to the second, third, and fourth Pan American Conferences, and to the two conferences at The Hague. In none of these cases was the President "authorized" to make the appointments; he made them under his broad powers as the negotiator of treaties. As time went on, the practice of occasionally sending the names of delegates to the Senate for approval was dropped altogether. President Roosevelt was quite free from the trammels which hampered John Quincy Adams. The initiative of the President with reference to international conferences was complete, and the appointing power was entirely in his hands.

The President was dependent upon the legislative branch only for the funds required to pay the costs of participation in conferences. Two presidents sought in some measure to free the executive from even so much legislative control as arose from the necessity of seeking specific appropriations. President Arthur, in his second annual message of December 4, 1882, said, "In view of the frequent occurrence of conferences for the consideration of important matters of common interest to civilized nations, I respectfully suggest that the Executive be invested by Congress with discretionary powers to send delegates to such conventions, and that provision be made to defray the expenses incident thereto." The hoped-for lump sum appropriation was not forthcoming, and the request was renewed the next year. Again no attention was paid to the President's recommendation, and the matter rested until President Harrison, in his second annual message of December 1, 1890, referred to Arthur's message and asked that "standing provision be made for accepting, whenever deemed advisable, the frequent invitations of foreign governments to share in conferences looking to the advancement of international reforms in regard to science, sanitation, commercial laws and procedure, and other matters affecting the intercourse and progress of modern communities." This, in like fashion, brought no response, and Congress continued to make individual appropriations in all cases where money was needed to allow the President to participate in such gatherings. Thus, while Congress showed no disposition to give the Pres-

12 Senate Executive Journal, XXVII, 52.
13 Stat. at Large, XXVII, 349.
14 Stat. at Large, XXXI, 637, 1179; XXXIV, 118; Sen. Ex. Doc. 744, 61 Cong. 3 sess., p. 3.
15 Richardson, Messages and Papers, VIII, 127.
16 Ibid., 176.
17 Ibid., IX, 111.
ident greater freedom than he already enjoyed, it showed as little disposition to restrict his judgment within its legitimate scope.

Suddenly, with no warning, an assault was made upon the President's power by Congress. After the General Deficiency Appropriation Bill of 1913 had been passed by the House of Representatives, the Senate Committee on Appropriations offered an amendment to the effect that, "hereafter the Executive shall not extend or accept any invitation to participate in any international congress, conference, or like event, without first having specific authority of law to do so." The amendment appeared on the floor on March 1st, in the midst of the legislative jam at the close of an expiring Congress, and during a parliamentary wrangle over the order of business before the Senate. It had not an instant of consideration, and was agreed to without a word of comment either by way of explanation or criticism.18

When the bill was sent back to the House, the amendment was not mentioned, and in accepting the conference report, no reference was made to it even by way of inquiry.19 The bill was one of the last signed by President Taft, at the Capitol, just before the inauguration of his successor.20

Such was the extraordinary manner in which an important precedent was overthrown. After refraining from legislative efforts to control the appointing power in matters of this character for many years, a new policy was adopted without a word of discussion upon the floor of either house. No satisfactory explanation has ever been offered. Discussion has occasionally turned to this statute in both Senate and House; but no one has been able to state authoritatively what was its real purpose or the fundamental motive.21

It is altogether likely that the law did not seem so revolutionary a move as it actually was. Congress had, as we have seen, long since gained the power to determine the grade of American diplomatic officers and where they should be sent, matters which had originally been left entirely to the discretion of the President. However similar such laws may have seemed to the new legislation respecting international conferences, there was an important difference. Acts of Congress fixing the grade or rank of permanent diplomatic officers were defensible as growing out of the power of Congress to originate and control appropriations. It could be argued that grade affects salary,22 and a regular appropriation becomes necessary thereby. Congress, it was held, has a right to a voice in whatever requires a regular appropria-

18 Congressional Record, 62 Cong. 3 sess., XLIX, 4411.
19 March 4, 1913, ibid., 4835-4836, 4847.
20 Ibid., 4855.
21 Congressional Record, 63 Cong. 1 sess., I, 1611–1612; 67 Cong. 4 sess., LXIV, 929, 990, 1058.
22 This was not true of the Act of March 1, 1893, which provided for the grade of ambassador, for the law specifically said, "This provision shall in no wise affect the duties, powers, or salary of such representative." Stat. at Large, XXVII, 497. It is interesting and pertinent that this departure from a tradition as old as the government, like the one under discussion, was made without a word of comment, explanation, or criticism.
tion. But in the matter of international conferences, the argument does not have the same force. Appointments to such gatherings are temporary in character. They may involve no cost; or the cost may properly be met from funds already at the disposal of the President or the Department of State. If Congress desired to legislate merely to preserve the independence of its appropriating power, the act should have been phrased in different terms. Congress could properly prohibit sending or accepting any invitation which would involve expenditure of funds not previously appropriated. A law requiring the President to secure an appropriation from Congress before entering upon a course of action that would entail expenditure beyond the amount of his "secret fund" would have involved no invasion of executive power.

The law of 1913 was not so limited. It made no reference to the appropriating power, but only to the legislative power. It should be borne in mind that the process of "authorization" is legislative in character, and is to be distinguished from the process of "appropriation." The rules of Congress recognize this distinction, so that the objection of a single member rules out legislative provisions from an appropriation bill. An appropriation does not constitute an "authorization"; it merely facilitates the exercise of a power derived from the Constitution or from prior legislative authorization. In default of any verbal explanation of the purpose of the act, the intent was made clear by subsequent authorizations under the act; many of these contained the proviso "that no appropriation shall be granted at any time for expenses by delegates or any other expenses incurred in connection with said conference." The intent, in such instances, is manifestly to secure legislative control of the executive management of foreign relations. In attempting thus to curtail the President's power, a new departure was made, for which the statutes with reference to the foreign service offer no true analogy.

From another point of view it may have appeared to the framers of the law that no great or significant variation from established custom was involved. Upon a number of occasions Congress had requested the President to issue invitations to international congresses or conferences to be held in this country. Occasionally the language was made to read, "that the President be authorized and requested" or simply "authorized" to extend invitations. The meaning of such resolutions is clear when viewed in the light of legislative practice; they meant that if invitations to an "authorized" conference were accepted, and an appropriation became necessary to provide for its sessions, the money would be forthcoming. Such resolutions were intended as advice or encouragement for the President. They did not compel him to call the conference. Neither did the absence of such a reso-

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24 See, for example, Stat. at Large, XXXVIII, 237, 768, 773, etc.
25 See, for example, Stat. at Large, XXXVII, 642.
25 Ibid., 636, 637, etc.
26 For "authorization," see ibid., XXXIV, 1422, and for the appropriation, XXXV, 680.
tion prevent him from making plans for a conference. The President did not need to wait for such authorizations in issuing invitations. In no case did the executive request "authority" to invite other nations. So far as the acceptance of invitations from other nations to conferences to be held abroad was concerned, the President never requested authority to accept; and Congress did not volunteer to give it. The procedure was simply to ask, where necessary, an appropriation to pay the costs of American participation, which Congress, in its discretion, could grant or withhold. Congress did not always have a perfectly free hand, for sometimes the prior acceptance of the invitation had, in a sense, committed the whole government; and sometimes, but less frequently, the request did not come until participation was a fact. Approaching the matter from the point of view of executive practice or from that of Congressional procedure, it is perfectly clear that these earlier legislative "authorizations" involved no element of control over the executive beyond that arising from the normal exercise of the appropriating power. In that respect, as in others, the law of 1913 made a radical departure from earlier practice.

The conclusion must be that the law of 1913 represented an attempt to control the judgment of the President on a matter committed to his especial care. In so far it appears to be unconstitutional. It has never been construed by the Attorney General and it has not come before any court. President Wilson did not know of its existence until he had been in office more than three years. As soon as his attention was drawn to it, he declared it to be an "utterly futile" statute, because it did not come within the recognized powers of Congress. It was not an act limiting the power of the Secretary of State, whose powers, being the creature of legislation, may be altered by act of Congress. It was levelled at the President himself, and sought to limit his discretion in the conduct of one type of negotiation, an increasingly common type. If Congress may deny the President the right to negotiate in a conference, it may limit his power to negotiate through other channels. This has not been contemplated in our constitutional law. Congress may partially cripple a power which it is not competent to destroy by refusing appropriations. But Congress has no power whatever to limit the President in his choice of negotiators. In contemplation of law, the President is the negotiator of all treaties. The actual discussion is usually committed by the President to an agent, but there are no limitations upon

It is to be contrasted with laws giving directions or powers, or limiting the authority of federal bureaus. A joint resolution approved Aug. 17, 1912, provided "That the several Federal bureaus doing hygienic and demographic work are hereby authorized to prepare and install exhibits at the exhibition to be held in connection with the Fifteenth International Congress on Hygiene and Demography. . . . Provided, That such exhibits . . . can be prepared and installed without requiring any special appropriation for this purpose." Stat. at Large, XXXVII, 642. Such an authorization is proper when directed to a bureau, but to require the President to get such authorization to engage in a discussion, for such is the work of a conference, is an entirely different matter.
his choice of a representative. He may select a diplomatic or other official, a private citizen, or even a foreigner. That has long been the admitted theory and practice. It is only the question whether his agents, be they called commissioners or delegates or by some other title, shall receive compensation, which must be decided by Congress, and then only in the absence of money available from contingent or other funds. Yet this statute seeks, in explicit terms, to prevent the President from appointing delegates to conferences, and makes no reference to the matter of appropriations at all.

In view of these considerations, it is not surprising that the law has not been uniformly interpreted or consistently observed. In many cases, it is true, attention has been paid to its terms. Shortly after the passage of the act, for example, authorization was secured before the President accepted an invitation from the Government of the Netherlands to be represented at an international conference on education held at The Hague, in 1913. On that occasion the Acting Secretary of State called the attention of the Secretary of the Interior to the law. The joint resolution authorizing participation was drafted in the office of the Commissioner of Education. This was considered by committees of the House of Representatives and the Senate, and finally reported favorably and passed.

It is exceedingly significant, however, that there is not a single case where the President secured from Congress authorization to accept an invitation to a conference of a political or diplomatic character, such, for example, as the Fifth Pan American Conference. The illustration, moreover, is one of peculiar interest, because an appropriation was necessary. The policy in this respect was of the greatest importance, because it released the President from leading strings in the matter of war diplomacy. There was no legislative authorization for him to attend the Paris Peace Conference, nor for American participation in the Supreme Economic Council, the London Conference or any of the other numerous bodies charged with the liquidation of the political and other problems of the World War.

Not only has the executive acted in accepting invitations to participate in political conferences without congressional authorization, but it appears that since 1917 the whole practice of requesting Congress for authority to accept invitations to any sort of international conference has virtually fallen into disuse. The last specific statutory authorization of that character occurred with the approval, March 3, 1917, of a joint resolution for participation in the Tenth International Congress of the World's Purity Federation. There appears to have been only one request for authority to accept an invitation since that time. Yet it is well known that the United

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24 Congressional Record, 63 Cong. 1 sess., 1466.
25 Ibid., 1611–1612; Stat. at Large, XXXVIII, 236–237.
26 Stat. at Large, XXXVIII, 450, 1126; ibid., XXXIX, 250, 1055.
27 Stat. at Large, XXXIX, 1134.
28 Congressional Record, 67 Cong. 4 sess., LXIV, 1520; Sen. Ex. Doc. 287, 67 Cong. 4 sess.
States has participated in many conferences in the years between 1917 and 1925. Moreover, Congress has in several instances appropriated money for participation, despite the fact that the provisions of the law had been neglected.32

In the matter of issuing invitations to conferences in this country, the provisions of the statute have been somewhat more carefully observed. There is one exception of the first magnitude. The so-called Borah resolution, approved July 12, 1921, "authorized and requested" the President "to invite the Governments of Great Britain and Japan to send representatives to a conference" for the purpose of reaching an agreement for the reduction of naval expenditures and building programs "during the next five years." 34 The executive took no notice of this in preparing for the Washington Conference, either in sending invitations to foreign nations or in asking appropriations from Congress. The President acted as though the two had no connection whatever. Senator Borah himself said in the Senate a year after the conference, that "it has been stated time and time again authoritatively that he [the President] did not call the disarmament conference as a result of that resolution. It originated in another way, we are told, and it was not the disarmament conference for which the resolution provided. It included subject matters which the resolution did not cover. It included countries which the resolution did not cover, and it included subject matters which even disarmament did not cover."35

The Washington Conference stands as an exception. It is very significant that the exception occurred in the case of a conference diplomatic and political in character. It indicates that the executive is more willing to make a stand for the independent exercise of power in matters of that character. The general custom of the executive is to ask authorization from Congress before issuing invitations for conferences to meet in this country. That practice has been followed even when no appropriation was required.38

Congress, on its part, has not hesitated to attach restrictions when it gave legislative approval to executive proposals for participation in international conferences. An important instance occurred in connection with the International Communications Conference. It was agreed during the negotiation of the Treaty of Peace at Paris that "the Principal Allied and Associated Powers shall as soon as possible arrange for the convoking of an international congress to consider all international aspects of communication by land telegraphs, cables, and wireless telegraphy, and to make recommendations to the Powers concerned with a view to providing the entire world with adequate facilities of this nature on a fair and equitable basis." The

32 See, for example, Stat. at Large, XLII, 1548.
34 Ibid., 141.
35 Congressional Record, 67 Cong. 4 sess., LXIV, 929.
36 See, for examples, Stat. at Large, XXXVIII, 1222; XXXIX, 475, 618, 894, 1168; XLI, 271, 279, 367.
conference was to meet in Washington. Secretary of State Lansing wrote President Wilson, September 4, 1919, calling his attention to the law of March 4, 1913, and suggesting that the matter "be laid before Congress for its decision as to whether it will authorize the extension of the formal invitation and will provide the appropriation of $75,000 which it is thought will be required for United States participation in this international conference."\textsuperscript{37} The President, thereupon, without referring to the opinion of this act which he had expressed with such vigor and promptness on first hearing of it, sent a message to Congress asking the authorization, mentioning the Act of 1913 as the reason for his action. The chairman of the Committee on Foreign Relations, Senator Lodge, requested the Secretary of State to draft a bill.\textsuperscript{38} As drafted in the Department of State, it provided that the President be "requested and authorized" to call the conference "and to appoint representatives to participate therein."\textsuperscript{39} The inclusion of the last clause proved to be an error in judgment. The President had full power to make the appointments without any special authorization upon that point. The appearance of the phrase served only to draw attention to the fact that the appointments were to be made by the President alone. The Committee on Foreign Affairs of the House of Representatives considered the clause, and the majority determined upon an amendment providing that the delegates should be appointed only "by and with the advice and consent of the Senate."\textsuperscript{40} The acting chairman communicated their purpose to the Secretary of State, who replied, "I would suggest that it is not customary to stipulate that delegates to the conference shall be appointed with the advice and consent of the Senate, and I think it would be wise to omit that stipulation."\textsuperscript{41} A struggle over precedents ensued in the committee; but the majority persisted, and two reports, one for the majority and one for the minority, were laid before the House. In the partisan debate which followed, the majority admitted that precedents were against them,\textsuperscript{42} that no such limitation had ever been put upon the President in any previous act of the character of the one under discussion.\textsuperscript{43} Majority spokesmen stated boldly and frankly that the amendment was designed to establish a new precedent.\textsuperscript{44} It was contended that by sending a message requesting authorization, the President had "recognized the authority of Congress to place this restriction on the calling of these conventions," and that having "the right to vote to grant or deny the President's request," Congress has "the right to put conditions on the granting of that request, whether it has ever been done otherwise.

\textsuperscript{37} Congressional Record, 66 Cong. 2 sess., LIX, 270.
\textsuperscript{38} Ibid., 267.
\textsuperscript{39} Ibid., 66 Cong. 1 sess., LVIII, 7329.
\textsuperscript{40} Congressional Record, 66 Cong. 1 sess., LVIII, 7329.
\textsuperscript{41} Ibid., LIX, 271.
\textsuperscript{42} Ibid., LVIII, 7331, 7333, 7339, etc.
\textsuperscript{43} Ibid., 7332, 7335, etc.
\textsuperscript{44} Ibid., 7331, 7335.
before or not." The provision was inserted in the bill, and while it has not been uniformly made a part of subsequent enactments of the same character, it has appeared upon one or two occasions.

Another instance of attaching restrictions to legislative authorization of conferences occurred in connection with the International Labor Conference. The Treaty of Versailles provided that such a meeting should be held, and Washington was named as the place of meeting. When the time came for issuing the invitations, the Senate was in the midst of its bitter debate over the proposal to approve the ratification of that treaty. There were, naturally enough, fears that the proposal for the International Labor Conference would get tangled up in the general treaty discussion. Apparently in an effort to avoid that result, the Secretary of Labor prepared a joint resolution authorizing the President to convene and make arrangements for the conference, "provided, however, that nothing herein shall be held to authorize the President to appoint any delegates to represent the United States of America at the said meeting of such conference, or to authorize the United States of America to participate therein unless and until the Senate shall have ratified the provisions of the said proposed treaty of peace with reference to such general International Labor Conference." The proviso had the desired effect, and the authorization was voted without serious opposition. But there was loss as well as gain. For the sake of expediency, a very damaging principle, so far as the executive conduct of foreign relations is concerned, was admitted. In this case it was virtually conceded that Congress has a right to attach conditions to a proposed line of action by the President within the sphere of his control of foreign relations.

In seeking to exercise control beyond its historic province Congress tends to dictate the instructions which the American delegate is to bear, or to drive the President to unofficial diplomacy. Former Secretary of State Hughes in an address referred to the danger that if Congress undertook to authorize representation in the League of Nations, "the Congress itself most probably would reserve the authority to give instructions." In appropriating money for representation in the Opium Conference, Congress stipulated that "the representatives of the United States shall sign no agreement which does not fulfill the conditions necessary for the suppression of the habit forming drug traffic." Certainly there is no logical stopping place between giving the

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4 Congressional Record, 7346, 7348; and for Senate action, LIX, 267.
5 See, for example, Stat. at Large, XLII, 363.
6 Congressional Record, 66 Cong. 1 sess., LVIII, 3503.
7 Ibid., 3503, 3502.
8 Ibid., 3504, 3584, 3921.
9 House Joint Resolution, 195, 68th Cong. (Public Resolution 20, approved May 15, 1924). It is significant to observe that one of the reasons publicly stated for the retirement of the American delegation from the Opium Conference was that an agreement could not be reached which would accord with the limitation set by Congress in this act. (See letter of the Hon. Stephen G. Porter, announcing the withdrawal of the American Delegation, printed in the Journal for April, 1925, p. 380.)
President authority to act only upon conditions which affect the content or tenor of his instructions, and making the main points of the instructions part of the authorization.

The Act of March 4, 1913, has brought confusion into the practice of the government. It has never achieved its apparent aim, yet it has not been overthrown. Neither branch of the government has pursued a consistent course with reference to it. While the President regarded it, as has been said, "utterly futile," he proceeded to say he would not disregard it entirely, but would use his judgment as to what the circumstances of each occasion required. In the exercise of that judgment he authorized members of his administration to seek legislative authorization; on at least one occasion he signed a message to Congress which appeared to recognize the act as a bar to his independence of action; yet there are enough cases where the President has acted independently to make it clear that when sufficiently determined he can override the provisions of the law, if funds are available to meet the expenses. It is difficult, from a study of the cases, to make a categorical declaration as to factors which influenced his judgment in the several cases. Apparently the most important was whether it would make an unpleasant issue with Congress. Where the conference was to be manifestly diplomatic and political in character the executive has acted with considerable boldness. When Congress has discussed such cases the more able constitutional lawyers in the Senate have admitted that the Act of 1913 probably went beyond the power of Congress. With regard to conferences of less important character, there appears to have been a desire on the part of the executive to avoid making an issue of it. This would partly explain the difference in practice with reference to the issuance and the acceptance of invitations. Both are equally covered in the act. But invitations can more frequently be accepted without attracting undue attention and without the necessity of securing appropriations. Often, too, the United States can be represented abroad by an unofficial observer, who serves to express the point of view of the American Government and to report proceedings and views, thus avoiding, in the case of conferences where question might otherwise be raised, the necessity of Congressional authorization. Issuance of invitations, on the other hand, is a more public act, almost inevitably involves a larger appropriation, and would challenge Congress more openly.

If the executive has not been perfectly consistent, Congress has been no more so. While upon some occasions it has given only conditional consent, upon others it has failed to protest when the law was disregarded. It has made special appropriations for attendance upon conferences despite the fact that the President had not been authorized to accept the invitation. On some occasions, too, Congress appears to have recognized the initiative of the President by "requesting" him to act, instead of "authorizing" him to do so, reverting to the phraseology common before the Act of 1913.\[6\]

\[6\] See, for example, Stat. at Large, XLII, 822.
From any point of view the act is unfortunate. It is an interference with the historical balance of power between the executive and the legislative. Without it there was already ample provision for preventing the President from entering upon binding commitments at conferences. If money were required for participation, the executive was bound to seek it of Congress. That body could exercise its unquestioned right to grant or refuse an appropriation. If any formal instrument were signed it would have to go before the Senate for approval before the President could ratify it. If informal engagements were entered upon, there would be need, not infrequently, for legislation to carry into effect contemplated action, and Congress was free, in such cases, to exercise its discretion.

The act has also affected the method of our diplomacy. One of the motives for the informal methods which have become so common is to avoid legislative interference. As executive agreements avoided the necessity of going to the Senate for approval, so "unofficial observers" and "personal representatives of the President" may be sent to conferences and to some of the commissions without Congressional authorization. There are of course other reasons for the use of observers, arising out of the nature of the subject, the character of the conference, or the membership of the group; but when all is said and done, one of the principal motives for informal and unofficial representation is to keep for the executive a free hand as against the legislature.

The Senate and Congress as a whole have been restive in the face of executive agreements which seemed designed to rob the legislative branch of its opportunity to advise and consent to international commitments, and it is not surprising that the executive has been restive under the restrictions imposed by this law, which appears to be legislative trespass on historic executive functions.