

AGAIN THE SENATE

BY SAMUEL W. McCALL

I

In governments which are really popular the final arbiter upon questions of policy is the people, and it is for them to break up deadlocks and settle differences between their agencies of government. Last winter the President proposed 'a great and solemn referendum' on the treaty of Versailles. A genuine referendum on such an occasion would indeed be most solemn. It would be very impressive for a great and free people to meet at their polling booths and by their ballots speak the simple words of our great soldier, 'Let us have peace.' But if, in addition to a declaration ending a war, they should pronounce in favor of a properly framed union of nations for the banishment of the war-god from the earth, it would be the most impressive spectacle ever witnessed in the history of government.

But under our system there could be no such referendum, even at a general election. A President and a House of Representatives might be chosen strongly in favor of or against the Treaty. The moral effect of the mandate would be both great and solemn, as the President said. But nothing would be settled, because the voters would be without power to elect a new Senate which should be charged with jurisdiction over the Treaty. Only a third of that body could be chosen. It is true that two years afterwards another third would be chosen, and two years after that the remainder; but that slow process would tax the patience

of a waiting and almost Bolshevist world. However necessary, in the slow-moving time when the Constitution was framed, such deliberation might have been to the formation of public opinion, in the rapidly moving currents of to-day it would be like referring a pressing public question for decision to another age.

Mr. Taft, who can speak upon the subject with as much authority as any man, says that, if the Democratic candidate for President is elected, it is a certainty that 'the Republican Senators who will have the power will reject Article X, and defeat the Treaty.' Such a statement could not be made in England in advance of a general election; and it implies the sort of government of which Bismarck would have rejoiced to be the head. Whether or not that would happen which Mr. Taft predicted, he correctly appreciated the impotence of the people to settle the question and he treats the two thirds of the Senators who do not appear for reëlection as fixed quantities, 'above the arrows, views, and shouts of men.' However the populace may rave, against the citadel of the Senate the waves will beat in vain. That is, in the greatest possible referendum to the people that can be had under our system, a legal mandate cannot be obtained upon a momentous public question; but the proceeding partakes of the character of what in the modern political lingo is called a 'soap-box primary.'

Mr. Bryan recently made a contribution to the subject in which he did not pay full deference to the popular idea. He proposed an amendment to the Constitution so that treaties might be made with the advice and consent of a majority of the Senate. Since Mr. Bryan was proposing to amend the Constitution, he was not bound by any of the limitations which rested upon the President when he asked for the referendum, and he might have been expected not to stop short of what he regarded as the ideal. It is not easy to reconcile his proposition that treaties should be ratified by a majority of the Senate with his popular reputation, which is expressed in the title of 'Commoner.' Why should Mr. Bryan's state of Nebraska, which contributes to a war ten times, or New York, which contributes a hundred times, as many men and as much money as Nevada, have no more weighty voice than the latter state in deciding whether a war should end? In other words, if we are to begin amending the Constitution, why should we not reform it altogether in this particular, and provide that treaties shall be ratified by the representatives of the people elected by them according to the democratic principle? Why should not the people calling themselves the great democratic republic of the world put in practice the popular principle which holds sway in some of the European monarchies in the settlement of such a vital public question; do away with bickerings between two branches of the government, and interpose their peremptory mandate, so that a final decision may be reached in accordance with their will?

I have more than once set forth, in the pages of the *Atlantic*¹ and elsewhere, the objections to the undemocratic structure of the Senate and to the

¹ See 'The Power of the Senate,' *Atlantic* for October, 1903.

abuses growing out of that structure and of the functioning of the Senate as an organ of government. The intervening years have served to make more clear, if possible, the validity of those objections. And however trite the subject may be, it so vitally concerns correct government that no aspect of it can be brought forward too often.

The Senate was the connecting link between an imperfectly formed union and the old order where thirteen independent states were animated with pride in their separate sovereignty. It was in a sense the price that was paid for union; and for a long period it was by no means certain that the price had not been paid in vain, or that a real union had been secured. The Virginia Resolutions, the Hartford Convention, and the boldly asserted doctrine of Nullification bore witness to the doubtful character of the central government, whose supremacy awaited vindication by the matchless eloquence of Webster, and finally by force of arms.

Regard for state sovereignty and the sentiment of home rule were very strong in the Constitutional Convention, and they were shrewdly, and even greedily, taken advantage of by the small states, for the very practical purpose of securing political power. On the principle of the equality of nations the states, big and little, were to send each the same number of ambassadors to the Senate, and they were to share equally in the swollen powers of that body. The men of largest mind in the Convention were reluctant to yield to this violation of the democratic principle. Franklin, perhaps the wisest of all, proposed to have no Senate at all. To the threat that the small states would not enter the union unless they were granted an equal vote in the Senate, James Wilson, one of the greatest men of that time, declared that, if a separation should take place, it could never

happen on better grounds. 'Shall less than one third of the United States,' he asked, 'withdraw themselves from the Union; or shall more than three fourths renounce the inherent, indisputable, and inalienable rights of men in favor of the artificial system of the states?' Was it, he asked, for men, or for the imaginary beings called states, that the government was being formed?

The Revolution had just been won upon the principle that taxation without representation was tyranny, and here it was proposed to belie that principle by recognizing the equality of states and mere incorporations instead of the equality of men, and by giving to a man who paid in one state very much greater power over taxation than a man who paid in another. Over that contention the Convention was nearly brought to disaster. It was finally saved by the great compromise which was supposed to give an important control over taxation bills to the representatives of the people chosen substantially according to population. For proof that such control was supposed to be given, one need not look beyond the proceedings of the Convention itself, the character of the difficulty which the compromise was designed to overcome, and the emphatic assertions of the *Federalist*. Hamilton and those associated with him in the authorship of the *Federalist* papers displayed nothing less than a gross ignorance of the purpose of the Constitution if it did not confer a genuine control over the purse.

The great men, however, who harbored the supposition that an important power over revenue had been granted to the House signally failed to appreciate how a body like the Senate, placed at the centre of the Constitution, sharing on the one side the legislative power with the House and on the other side the executive power with the President, might encroach in both directions and

illustrate the worst evils of usurpation of power. Strong as was the sentiment for state sovereignty at the time of the Constitution, it is safe to say that it would have been far from strong enough to secure a Senate with equality of state representation for a government as powerful as is the central government to-day. Equality was yielded because the powers over which it was to operate were supposed to be few and limited in character. The framers of the Constitution believed that they were granting authority over only a few common concerns, and that the great mass of governmental power remained to be exercised by the people of the states.

But the Federal powers have been enormously expanded, first by the construction of the courts and then by the direct grants contained in the amendments, which, among other things, invade the police powers of the states, and, by the removal of almost every restraint upon taxation, sap their resources and hold out to the Federal government a temptation to prodigality of expense to which it has readily yielded. A purpose to retain as much as possible of state sovereignty by equality of representation in the Senate would have baffled itself by stripping the states themselves of power, and laying them prostrate at the feet of the national government.

But, whatever might have been done by the architects of the Constitution if the machinery of the government they were constructing was designed to have control over the present greatly expanded powers, it is impossible to imagine that the people to-day would exactly reproduce the Senate if they were building another Constitution. We need bear in mind only two tests. This would be anything but a democratic age if states having less than one fifth the population of the country should be accorded a majority of the

membership of its most powerful governing body. There would be nothing popular about a government in which the people could not seasonably change their agents if they wished to do so, and effectively express themselves upon a crisis of world-wide moment until after it had passed by and been forgotten.

The practical part in government played by the Senate has gone on expanding. In great men the possession of power is apt to foster sobriety and a sense of responsibility; in men of small natures, self-importance and a tendency to appraise themselves according to the magnitude of their powers; and even men who are neither great nor small are complacently willing to wield such power as comes within their reach. Great Senators like Choate, Webster, and Benton enjoined a scrupulous regard for the prerogative of the House in respect to revenue legislation. They appreciated that they were only a part of a great system of government, and the philosophy of the whole system animated them rather than the spirit of the club, which too often leads men to follow the narrow view and to aggrandize the institution of which they are at the time a part, as a means of adding to their own stature.

But, from whatever cause, the Senate has come to be willing patriotically to exercise all the powers of government upon which it can lay its hands. It is placed at the centre of our system. The nature of its powers and the length of the term of office have given it the advantage in contending with the other departments of the government; and the part it was to play, sufficiently great as originally contemplated, has been augmented by practical usurpation. The President has but a four-years' term. He is at the mercy of the Senators in his selection of agents for carrying on the government. He must get on with them, and an easy way

of getting on is to yield. A study of the course of events will show that like little foxes they have fed upon the substance of his power.

The members of the House have only a two-years' term. They are no sooner in their seats than they are in a campaign for reëlection. Their constituents want office, and too often the members become suppliants at the Senatorial bar. Such a condition is hardly ideal for independence and for sturdy resistance in case of a difference between the two Houses. The Senators are there for six years, and they can wait. The term of the Representative is always expiring, and he must show results. A better system could not have been devised for putting one body of men at a disadvantage in a contest with another.

Take the case of revenue legislation, to which I have referred, where the House holds in sacred trust, in the interest of the people, an important control over taxation. One would naturally look here for manly resistance, and manly resistance upon a subject so essentially related to liberty would be sure to be crowned with ultimate success. But one would look in vain. The House sends a bill to the Senate putting a tax on the single article of coffee, and the Senate, under the pretense of amendment, substitutes a bill of its own, revising the whole tariff. The great constitutional prerogative of the House to originate revenue bills would appear to be simply the prerogative to originate an enacting clause; and then the country would be called upon to witness the Senate prescribing the real subjects and amounts of taxation and originating the real revenue bill. This position has been denounced by leading men in the House, among them Garfield; and sometimes the House itself has refused to yield; but it has often been acquiesced in, and to that extent

has reduced to a nullity the constitutional control of the Representatives over the purse-strings of the people.

It has sometimes been asserted as a justification of this substantial usurpation that the Senate prepared better taxation bills than the House. That would be a slender justification, even if it were true. But it is not true. Upon important differences over the substance of bills the House has generally favored the greater number of people and the Senate the few. For instance, in reducing taxation the House passed a bill repealing the stamp tax on bank-checks, which was directly paid by great numbers of people; the Senate struck out that provision and put in its place one repealing the tax on beer, which was paid by a few brewers. If such a practice reflects a correct rule of constitutional action, one may wonder at the interest shown by the great men in the Convention over what scarcely arose to the dignity of a quibble.

II

This encroachment of the Senate upon the prerogative of its partner in legislation, the House of Representatives, may be paralleled by its encroachment upon the President, with whom it is in partnership in important executive functions. It is the province of the President to negotiate treaties. But they cannot have validity, any more than certain appointments to office, until they have been ratified by the Senate. The concurrence of both is necessary, and the constitutional power of the one is no less fixed than that of the other. But a practice has grown up of having Senators act as original negotiators. Obviously, a negotiation by an individual Senator is not a negotiation by the Senate. He would act in the first instance as nominally the agent and instrument of the Executive.

From the latter he would receive his instructions, and it would by no means follow that they would in all details coincide with his own views. Thus he would afterwards, in the exercise of his independent office as a Senator, be called to pass upon the work he had done when acting as an agent of the Executive. And since it is hardly thinkable that he would fail to approve what he had already solemnly executed, he would in effect exercise his function as Senator as an instrument of the President. This practice has been denounced as an abuse, and nowhere more strongly than in the Senate itself. Three of the five men who negotiated the treaty of peace with Spain were members of the Senate; and it may be credited to the moderation of Senators that there were not five instead of three. An amiable executive, or one who was more concerned to get his treaties ratified than to perform his own independent constitutional function, might view such a practice with complacency; but it is none the less an abuse, and it deprives the country of that safeguard, of vast importance, which comes from the independent action of two branches of the government.

It has been said that, when Senators negotiate treaties, they can better explain them to the Senate and reproduce the setting of facts surrounding the negotiations. What, for instance, could the negotiators of the Spanish treaty bring to the attention of the Senate that could not as well have been brought to its attention in some other way? But it may have been due to their committal in advance to the terms of the treaty that the Philippine Islands became American territory and were not accorded the same standing in the world as was given to Cuba. The annexation of the Philippines may or may not have been sound policy, but the question should have been passed

upon by an untrammelled Senate and not by one some of whose members were already committed by their action as agents of the Executive. Of course, the power of Senators is much magnified if they may both negotiate treaties and ratify them.

The appointment of so many negotiators and arbitrators from the Senate implies in the mass of our citizenship a poverty of talent which has no existence. Times almost without number, in both peace and war, men who were practically new to office, and chosen apparently at random, have brilliantly rendered most important public service and have quite thrown into eclipse the performances of the professional holders of office. In a republic which certainly is not poor in men, the offices should be 'passed around.' There is no need to use their plumes to bedeck the members of a privileged order, who hold most intimate, if not coercive, official relations with the appointing power.

The relation of Senators to the national party machinery and that of the several states gives them much influence, or certainly consideration, in filling the important places at the national conventions. The selections for these places may serve to shed light upon what the attitude of Senators would be touching doubtful questions of jurisdiction in government, and whether they would be likely to shun such jurisdiction or to seize it. Self-effacement as party leaders, and a delicacy in accepting an undue proportion of party honors, would imply a reluctance to lay hands on doubtful governmental powers. The nominal electors appear unable to look far beyond the horizon of the Senate. One of the great parties, at its recent Convention, was very partial to Senators; but the other was unanimous in their favor. Indeed, its last two conventions were officered by Senators, almost down to the police.

Here again depression overtakes us at this paucity of the country's talent, which seems to be circumscribed within a circle of ninety-odd men. But there breaks upon the country a gleam of hope. In some manner it happened that a major part at one of the conventions was assigned to a man who had never been in the Senate, and indeed had never held office at all. And in the manner in which the parts in both conventions were performed, the friends of Senatorial monopoly may well avoid a comparison with that gentleman.

The expected has happened where there is such a concentration of diverse powers in a single body, and where it shares, now with one branch and now with another, the most important functions of the Constitution. There will be a steady absorption of power, and when there is added an indirect and delayed responsibility for its exercise, you will have an inner ruling ring which differs in nothing from an oligarchy.

In order to succeed at his trade, a member of an oligarchy must become a highly artificial being. He must cultivate the illusion that he is exactly the opposite of what he is; for a self-confessed oligarch would be compelled to abandon the profession at once. In poses and mummery he must rival a Roman augur. It is not difficult to produce illusions when on each new day we may look upon a newspaper hero in the making. But the times are not now propitious for a few men to run the government and parties of the United States, and to cherish the illusion that we are having popular government.

III

But I have been speaking of the functioning of the Senate as an institution, with little reference to the individuals who compose it. The same developments would very probably be

witnessed if another body of respectable gentlemen were operated upon by the same conditions. While even an enthusiast would be compelled to admire the present Senate of the United States with some moderation, it undoubtedly contains many able and patriotic men. There have been few better lawyers ever in that body, or few men of greater intellectual energy, than Mr. Knox. In breadth and fairness of mind, and in the statesmanlike quality, Mr. Underwood would have been a conspicuous figure in any Senate in our history. The names associated with genuine talent and public spirit are too many to be repeated here. And yet, during the past generation, an element antagonistic to the old traditions has found its way into the body, and has wielded an influence far out of proportion to its numbers. The ways of the jobber, and the piratical methods sometimes associated with what is called 'big business,' have been in evidence in its management. Some men have found their way into it who have amassed great fortunes in its service. As a result, the Senate has stood as the rampart, not indeed of property, but of great and special interests, the well-being of which was by no means always compatible with the general weal, and was often antagonistic to the institution of property itself. From these and other causes there has been a distinct lowering of tone, and it has been shorn of much of its ancient splendor.

This moral decadence has shown itself in the recent notable debate upon the Treaty. There are some who indulge in the dream that our time may inaugurate a new era and may realize the aspirations of the race for a golden age. They hope that the peoples of the world may have the wisdom, after a war destructive and wicked beyond all parallel, to take steps to safeguard the peace of the future, and to free mankind from

servitude to a monster that has been its most deadly and implacable foe. It has destroyed hundreds of millions of the choicest youth; it has devoured the substance of nations, and it bids fair, if not checked, to obliterate civilization itself. The hope of making permanent peace a foremost object of the war was held out to the men who were sent to the front and in that faith gave their lives.

If the dream should happily be made to come true, those who follow us by a few centuries, in looking back upon the history of the time, may well regard with wonder the contribution to this result made by the Senate of a great people. They would look there for the culmination of a symphony unsurpassed since Bethlehem, and at least for a moral enthusiasm commensurate with so noble a cause. They would indeed read speeches, some of real eloquence and of analytical power, and they would witness much learning upon details. But they would see a cause of colossal importance brought down to the level of the hustings, as if it were the prime purpose, not to confer a memorable boon upon mankind, but to carry the next election. They would see it too much disfigured by hate, and marred by the raven's croaking note; and they would be able to catch too little of the majestic tones of the spiritual voices of the age. Whatever may have been the merit of the verbal criticism of the Treaty, or of the clauses that were suggested to improve it, the moral tone of the debate as a whole fell far below the sublime level of the theme.

But we have the Senate, with the mechanism of a bygone age, and with a structure so undemocratic as to make it the glaring solecism of the time. It retains all its original powers, swollen by those it has drawn to itself from other departments of the government. The

evil of the original inequality in its representation has been greatly intensified by the admission of so many small states. What is to be done with it? Its composition was designed to be perpetual, for the Constitution declared that no state should without its consent be deprived of its equal representation in the Senate. In other words it would require unanimous consent of the states to change the basis of representation. A convention to frame a new constitution is not to be thought of. Such a convention would be revolutionary, and it is no justification to say that the original convention was also revolutionary because at the time of its formation we were practically without a central government. But there is much besides the Senate: there are the muni-ments of liberty,—the courts, and the other cherished parts of our system,—and it would be madness to throw them into the crucible.

It is claimed that the Senate might be abolished constitutionally, and there are some, by no means classed among radicals, who believe in a government by an executive and a single chamber. But the system of two houses is greatly in the interest of safety. They should, however, be houses which are directly amenable to popular opinion, and if they are unequal in power the disparity should be in favor of that house the composition of which does no essential violence to the democratic principle. In this direction lies the one practical hope of reform. If the Senate cannot be reconstituted, and if it should not be abolished, it can be relieved of the congestion of power from which it and the country suffer, and in the matter of its tenure it should be made more responsive to public opinion.

To return to the particular aspect of the subject with which I began, the country might well enter upon the work

by taking away from the Senate the power to ratify treaties, and conferring it upon the House of Representatives. Why should that not be done? In Great Britain the Cabinet is responsible directly to the House of Commons, which is chosen by the British electorate. The Crown makes treaties, but the Crown is little more than a fiction and does in the long run just what the Cabinet wishes it to do. If the Cabinet cannot command the support of the Commons, it must either resign or appeal to the people, in which case they can directly express themselves and decide the issue. The result is that the government passes upon treaties with the promptitude which the nature of the case demands, and does not permit a time to elapse in which new wars may spring up and expose civilization to the frightful consequences of inaction. If Great Britain can be safe with her system of popular rule, why should it not be safe for America to have a treaty made in the first instance by a president who is no fiction but a very vital institution, and then have it ratified by a House of Representatives chosen by the people in the different districts? There would be a check here which does not exist in England. The argument was urged in the Convention, that secrecy was necessary to treaties and that secrecy could not be secured in the House of Representatives. Secrecy may have been necessary at that time, but to-day it is something to be avoided. Indeed, with a Senate much larger than the original House of Representatives, secrecy could not now be maintained for a single day.

If then we are to have open, free, and responsible democratic government in America, the Senate must be reformed; and no time is more auspicious than the present to begin with that branch of its jurisdiction as to which the people are having such a striking object-

lesson. Let us take a first step in the direction of popular and efficient government, and amend the Constitution so that treaties shall be ratified by the House of Representatives.

The time is here for a recasting of some of our institutions in response to the demands of modern conditions. When our Fathers framed the Constitution, they achieved a work that was little short of superhuman. On the one side, they were hemmed in by savages, on the other, by a chain of civilized nations which held the American ideas of government to be destructive of their own. Encompassed by foes on every hand, they indeed launched their little commonwealth upon a tempestuous sea.

And yet their work has prospered beyond all hope. Under the shelter of our Constitution the fairest forms of civilization have found refuge. The names that were a byword a century ago have become the most luminous in the science of government. The little commonwealth has mightily grown. True to the inspiration of her origin, she has just shown herself the zealous guardian of a world's freedom. Upon the supremely great work of the Fathers we should lay our hands only with the deepest reverence. But we should fail in our duty to them and to ourselves if we did not keep it true to their spirit, or if we permitted it to become a laggard on the resplendent and revealing tides of time.

POLISH ADVENTURES

BY NELSON COLLINS

I

WE went into Kiev with Bolshevist and Polish artillery still booming, and fighting aeroplanes over the city. At noon of our first day a Bolshevist aeroplane dropped four bombs on a Polish aviation camp in the outskirts of Kiev, and the victims were given a state funeral at noon of the day following: hearse after hearse, — eight or ten of them, — gun-carriages, soldiers, school-children, priests, the white eagle of Poland, the red and white flag of the Polish Republic. That same day there was a big withdrawal of the Bolshevist forces and the fighting-line shifted fifteen miles away from the city.

The Poles held Kiev, the great Russian city on the river Dnieper, the metropolis of the Ukraine, the stepping-off place for an expedition down to Odessa on the Black Sea, if Polish military strategy and other national considerations held wise such an extension of the supply-line, even farther beyond the boundaries of Poland than this Russian-Ukrainian city of Kiev. The train of President-Marshal Pilsudski — or, for this season of fighting, perhaps it should be Marshal-President Pilsudski — passed back and forth between Kiev and Warsaw — two days' fast journey, through stations thick with the young