INDEPENDENCE OF CUBA.

REMARKS

OF

HON. JOSEPH L. RAWLINS,

OF UTAH,

IN THE

SENATE OF THE UNITED STATES,

MONDAY, APRIL 18, 1898.

WASHINGTON.
1898.

REMARKS

OF

HON. JOSEPH L. RAWLINS.

INDEPENDENCE OF CUBA.

Mr. RAWLINS. Mr. President, the pivotal question in the existing situation in our relations with Spain and Cuba seems to be involved in the claim made that the power and right to decide the question of national independence rest exclusively with the President of the United States, and that no such power exists in the conjoint action of the President, the Senate, and the House of Representatives, or that, if by such joint action national independence may be recognized, it is a power which ought not now to be exercised.

As I may at this time without taxing the patience of the country or delaying action which may be regarded as urgent, I desire to discuss that question in the light of the provisions of the Constitution of the United States.

Mr. President, the power to recognize national independence is not conferred in express terms either upon the President or upon any other department of the Government. It necessarily, therefore, exists as an incidental or implied authority. It is claimed to exist in the President as an incident to his power to make treaties.

The power to make treaties is expressly vested by the Constitution in the Executive, "to be exercised by and with the advice and consent of the Senate," two-thirds of the Senate concurring. The Supreme Court of the United States has defined a treaty in the case of Edye *vs.* Robertson, reported in 112 United States Reports, where this subject was under consideration and the opinion was rendered by that eminent jurist, Mr. Justice Miller. On page 598 he says:

> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it.

As a treaty is a compact between independent nations, whenever it is proposed to enter into a treaty the question necessarily arises as to whether the party proposing to become bound by it is an independent nation. The President, therefore, before he enters into the consideration of the subject-matter of a treaty necessarily must make inquiries as to whether the other party is a national sovereignty and has an independent existence.

So, whenever such question is presented to the President as incidental to the exercise of the treaty-making power, the President must determine that question of national independence, which involves the competency of the party proposing to enter into the contract; but when he has decided that question and enters into the treaty, it must be submitted to the Senate for its concurrence, as provided in the Constitution. The Senate of the United States must necessarily pass in review all the elements which are primarily to be considered by the Executive whenever the making of a treaty is involved, and among those elements is the question as to the competency of one of the parties to the contract.

The Senate must, therefore, make inquiry, in the exercise of its undoubted authority as an incident to its power to advise the President in respect to the making of a treaty, whether the opposite party is an independent nation competent to enter into the contract.

Mr. President, the Senate may differ with the President in his determination that the party proposing the treaty is an independent nation. It may decide that it is not possessed of national sovereignty, and upon that ground may refuse to concur in the treaty which has been sent to it by the President. Therefore, the Senate, in the exercise of that incidental authority, may decide for or may decide against national independence, notwithstanding the President himself has previously passed upon that question, because if the Senate decides that the party proposing the treaty is not an independent nation and not competent to make a contract, or to comply with its provisions if made, it is the end of controversy, and the decision first made by the President is overruled in effect by the power in whom the Constitution has vested the authority to concur or refuse to concur in a treaty.

Mr. President, suppose the President has decided in favor of

national independence and the Senate has concurred in that decision by ratifying or confirming the treaty. Is that final? Is that a conclusive determination of the question of national independence which is thus exercised as an implied or incidental authority? I will endeavor to show that it is not conclusive; that there is another authority provided by the Constitution competent to review this action and this determination both of the Executive and of the Senate, and which may overrule that determination decisively and finally. That such is the case is no longer the subject of controversy or dispute if we are to follow the decisions of the highest tribunal in this nation.

The Supreme Court, in the case to which I have just referred, after setting forth that a treaty is primarily a compact between independent nations, decided that whenever this Government enters into such a compact, it necessarily recognizes the independent existence of the other party to the contract; but the Congress of the United States, by the conjoint action of the President, of the Senate, and of the House of Representatives, may modify or repeal that treaty; may wipe it out of existence by revocation; and when it is so repealed or revoked, it falls to the ground with all its implications, including that of the recognition of the competence of one of the parties to the contract, namely, its national independence.

The Supreme Court of the United States has in a number of cases decided that the treaty may be modified or may be revoked by the action of Congress. This question directly arose in the case to which I have referred, where Mr. Justice Miller used this language:

> We are of the opinion that, so far as the provisions in that act may be found to be in conflict with any treaty with a foreign nation, they must prevail in all the judicial courts of this country. We had supposed that the question here raised was set at rest in this court by the decision in the case of The Cherokee Tobacco, 11 Wall., 616.

Further on the court say:

> The precise question involved here, namely, a supposed conflict between an act of Congress imposing a customs duty and a treaty with Russia on that subject, in force when the act was passed, came before the circuit court for the district of Massachusetts in 1885.

After referring to that decision, which held that the act of Congress necessarily repealed pro tanto the treaty made by the Execu-

tive with the concurrence of the Senate, the court proceeds to decide in this case that this power of Congress is unquestioned. But I read further as bearing upon this same question, and the reasoning herein employed, it seems to me, is decisive of this entire question:

> A treaty is made by the President and the Senate. Statutes are made by the President, the Senate, and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an act in which all three of the bodies participate. And such is, in fact, the case in a declaration of war, which must be made by Congress, and which, when made, usually suspends or destroys existing treaties between the nations thus at war.
>
> In short, we are of the opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal.

It must follow, therefore, that in so far as the President and Senate have incidental authority to recognize national independence in the exercise of the treaty-making power, which is expressly conferred by the Constitution, such recognition may be wiped out and obliterated by the conjoint action of the President and the Senate and the House of Representatives in the exercise of legislative authority. It must follow, then, clearly, that in so far as the President is claimed to have authority to recognize the independence of a nation in the exercise of this treaty-making power his decision of that question is subject to review, first, by the Senate, which may nonconcur, which renders ineffectual his recognition; but if the Senate concur, there is still another ultimate tribunal by whom the question may be decided, namely, the Congress of the United States; and the language of the Supreme Court is not inapt when it says:

> If there be any difference in this regard, it would seem to be in favor of an act in which all three of the bodies participate.

Next, it is claimed, as I understand the argument of those opposed to the view of the question which has been entertained by the majority of the Senate, that the President has the authority to recognize national independence as an incident to his authority to receive foreign ambassadors or diplomatic representatives.

Mr. President, the power to receive ambassadors, as already pointed out, is not conferred upon the President in express terms

anywhere in the Constitution. The Constitution in defining the jurisdiction of the courts makes reference to ambassadors. In the controversies relating to ambassadors, the Supreme Court or the United States is vested with original jurisdiction; and when a case comes up, and any question of ambassadorship arises in the court, the question as to whether the party claiming any privilege or right in virtue of that character which must be decided' Is the individual a foreign ambassador? The determination or that question is necessary in order to decide, first, whether the Supreme Court of the United States has original jurisdiction of the controversy. It may be necessary to decide it in order to determine whether the person is entitled to the privilege which pertains only to a foreign ambassador.

How is the court to decide that question? The Constitution has made no provision as to how it shall be determined. We can, therefore, not look to any express provision in order to determine that question. Who is to decide that fact? Mutuality and reciprocity are essential to the exercise of the power both to send and receive ambassadors. If some foreign government should send a diplomatic representative to the United States, and he should address himself to the President, undoubtedly the power of the President informally to receive him would be unquestioned, as he may receive any individual, irrespective of the official character of that individual.

Naturally, as has been frequently suggested, the President will, in the first instance, pass upon the question as to whether any particular individual presenting credentials from an alleged independent nation is entitled to be received; and in passing upon the question as to whether he shall be extended that official courtesy the President would undoubtedly be called upon to pass upon the question as to whether the authority undertaking to accredit him was possessed of national independence or sovereignty.

I readily concede, Mr. President, that here incidentally the President is called upon to determine whether or not national independence exists in respect of the power undertaking to accredit an ambassador to the United States, but the important question is whether his determination in such a case as that is final and conclusive and binding upon all the other departments of the Gov-

ernment, or binding upon him in his future action in respect to that Government.

A few considerations, it seems to me, will make it perfectly clear and conclusive that where the President thus incidentally passes upon the question as to whether a given power is an independent nation is not conclusive, because, before we can have complete relations with any foreign government, we must not only receive, but we must undertake to send diplomatic representatives from this Government to represent it in the matters pertaining to the power which it is proposed to recognize. It is a reciprocal duty. To receive the representative of a foreign government and to refuse to send one is an anomaly in the affairs of nations. The President undoubtedly, in the first instance, may receive, but he has no power to send a representative. He can not create the office of ambassador, he can not provide his salary, he can not determine his grade, unless some express authority be conferred upon him to that effect by the Congress of the United States.

Unquestionably the power is vested in Congress to determine whether or not we will send any representatives and what the grade and pay of its representatives shall be, and when Congress has so acted, the President, under his oath, in the execution of the power vested in him by the Constitution, must recognize that action of Congress as his exclusive guide in such matters. Then, although the President may incidentally determine that the nation is in existence to the extent necessary to enable him to extend the official courtesy of receiving its representatives, he has no power to determine as to whether the foreign relations with that government shall be made complete by the sending of a representative from this country.

Hence we find in this case that, while the President may be called upon to act, and may properly act, his action is subject to review by the Congress of the United States, by the conjoint action of the President, the representatives of the States, and the representatives of the people in the two branches of Congress, and the united action, the conjoint consent and direction, of these three departments of our Government, so to speak, are of far more efficacy and power than the determination of the President inci-

dentally in undertaking to receive a diplomatic representative from abroad.

The Congress may overrule the action of the President and wipe it out, and not only that, but I next call attention to a power vested in Congress whose exercise may be destructive absolutely of diplomatic relations with foreign governments, and which can not by any possibility be questioned. The power to declare war is vested exclusively in the Congress of the United States, and the moment such a declaration is made by Congress the President has no authority to receive any diplomatic representative from the power or nation against whom the declaration of war is made. The language which is employed by the Supreme Court of the United States in direct application to the power of Congress in respect to treaties is equally applicable to the question of the exercise of the power of the President to receive ambassadors from foreign governments. This language is used:

> Such is, in fact, the case in a declaration of war, which must be made by Congress and which, when made, usually suspends or destroys existing treaties between the nations thus at war.

Usually, I believe universally, the diplomatic relations existing between the nations thus at war are destroyed by a declaration of war, and though the President may have decided to receive an ambassador from some foreign country, that power is wiped away. Although the President in the first instance has that power, Congress can take away that power by a simple declaration of war. It can wipe it out absolutely and eternally, and what it can do thus completely it can do in part if it see proper to do it.

Therefore the two grounds upon which it is claimed that the President of the United States alone can recognize the national independence of another power, government, or people and that such determination is finally conclusive, as it is claimed to relate to the power to make treaties, are destroyed, because the Supreme Court of the nation has decided that Congress may revoke, repeal, or wipe out treaties as it sees proper; and as to the power claimed to exist in the President by virtue of his right to receive foreign ambassadors, Congress can take away effectually that power. There is no ground, no foundation anywhere to be found in the Constitution, either in express authority or implied authority, by

which it can be successfuly maintained that the President has the exclusive authority finally to determine the question of national existence.

Mr. President, it would seem to follow that, while the President has incidental authority in certain cases to recognize the independence of foreign governments, in the case of treaties his determination of it may be reviewed and overruled by the Senate of the United States. Where it is determined both by the President and the Senate, it may be overruled by the action of the Congress of the United States, composed of the President, Senate, and House. It also follows that, while the President incidentally may decide that a given government is a national sovereignty, in order that he may receive its accredited representatives, that may be reviewed and overthrown by the action of the Congress of the United States, and no provision of the Constitution and no other authority has been pointed out to which the authority of the President to recognize national independence can be claimed as an incident. It must follow that no such exclusive power exists in the President, and that in every case it is subject to be reviewed and overthrown by the conjoint action of the President, the Senate, and the House of Representatives.

Having come to the conclusion, therefore, that this is a power which rests finally for the determination of the Congress of the United States whose action must receive the concurrence of the President in the method provided in the Constitution, so that in that case we have the conjoint action of the three departments passing upon the question, the next question which arises is whether under the existing circumstances in the present situation the Congress of the United States ought to recognize the independence of the Republic of Cuba.

In this connection, before proceeding to the discussion of the question of expediency, I desire to allude for a moment to a claim made by the distinguished and learned Senator from Alabama [Mr. MORGAN]. It had been asserted that France recognized the independence of the colonies when the situation in regard to actual independence, national sovereignty, and ability to carry into effect provisions of treaties and perform international duties and obligations was less tenable than that which pertains to the Re-

public of Cuba. I understood the Senator from Alabama to deny that any such recognition had taken place, and he read from a treaty entered into between France and the colonies, whereby it was provided that neither should enter into any agreement for a cessation of hostilities with Great Britain without the consent of the other. When the Senator, as it seems to me, read from that treaty, he overthrew the very proposition which I understood him to seek to maintain; because when that treaty was made with France, France necessarily determined and decided that the other party to the treaty or contract was an independent nation. I read from the definitions as given by Mr. Justice Miller as to what a treaty is. He says:

A treaty is a contract between independent nations.

And that is necessarily true. Hence, when France entered into a treaty with the colonies she entered into a compact or contract with an independent nation. When she entered into a contract with that independent nation, she recognized the existence of the colonies as an independent nation, a people occupying an equal station, possessed of sovereignty among the nations of the world. It is a shining example and an apt illustration of the duty of the people of the United States in relation to the Republic of Cuba.

Is it wise or is it expedient for Congress to recognize the independence of the Republic of Cuba? In the course of the very able discussion of the different phases of this question during the last week some Senator deprecated with great earnestness that anyone in this body, that any member of either branch of Congress, should lack confidence in the President of the United States. If we had good reason to believe at this time that the President of the United States was in fact favorable to the independence of the Republic of Cuba, I for one would be disposed to leave the question of recognition of that independence to his determination, having full confidence that such recognition would take place within such time as would prevent any evil consequences arising which have been depicted as likely to result from a failure to recognize the independence of the island or its emancipation from the authority of Spain.

The President of the United States in all his representations to the Kingdom of Spain has never caused any suggestion to be made

to that Government in favor of the absolute and complete independence of the Island of Cuba. In the two communications which he has made to the Congress of the United States relating to that subject we do not find any suggestion, any recommendation, to the Congress of the United States that the ultimate end in this case is the establishment of the independence of the Island of Cuba and its emancipation from Spanish authority. It is not a question of lack of confidence in the Executive.

There are Senators upon this floor with whom I differ in respect to questions of public policy in whom I have the utmost confidence, but for the reason that I am compelled to differ with those Senators in respect to some matter of public policy I must, so far as I am able, bring their purposes to naught. Every man who believes that the people of Cuba, who have during the past three years struggled to establish their independence and emancipate themselves from the tyranny of Spain, have established it, will do and must do, if he is true to his convictions, do legitimately, whatever he thinks is necessary in order to bring about that result.

If we find ourselves upon that question in opposition to the expressed desires of the President of the United States, and if we seek to bring to naught the purpose which he seems to have in view, which does not mean the complete independence of that island, it is not because we lack confidence in the personal integrity and honesty of the President, but it is because we believe in a policy and a purpose which essentially, and maybe radically, differs from that which he maintains; and if we would be true to our convictions, we must seek to defeat the purposes and policy of the President.

It is not necessary that we distrust the President. If I have read the purpose of the President as expressed in his message, if I may judge of it by his previous conduct in relation to this question, if we are to judge as to what may take place in the future by what has taken place in the past, we necessarily come to the conclusion that the end which the President seeks is peace in the Island of Cuba and some kind of stable government there, perhaps an autonomous government in which the sovereignty of Spain over the island remains, but in which there is tranquillity,

in which we may proceed in peace to carry on our international commerce and perform our international relations and duties without the incidental disturbance and outrages which the conduct in respect to that island has entailed in the times which have passed. But that does not reach the end which, in my judgment, is desired by the American people. It is not the purpose entertained by a vast majority of the members of the Senate, and I do not believe it is entertained elsewhere. Our duty, then, in this emergency is, if we can, to carry into effect the purposes which a majority of the Senate entertains upon this question.

Mr. President, suppose we content ourselves with the direction to the President to intervene in the affairs of Cuba. Suppose we declare in connection with that that the people of Cuba ought to be a free and independent nation. Suppose we authorize and direct the President of the United States to employ the Army and Navy for the purpose of bringing about some result which we do not plainly and unequivocally declare in the resolution which we enact. We turn over to the Executive the Army and the Navy of the United States to be employed at his discretion.

We have confidence in the President. Judging by the past, we have reason to believe what his action is likely to be in the future. What will he do? It is not a question of personal integrity. It is not a question of Americanism. It is not a question of the respect which every citizen of the United States owes to the Chief Magistrate of the nation. What will he do with the Army and the Navy? To what end will he employ it? is the question which concerns the American people and the American Congress.

We should all be delighted if we had an explicit and direct assurance of the President that he would employ the Army and Navy decisively for the purpose of giving complete independence to the people of Cuba, but the misfortune of the situation is that the President has in no way intimated, either in terms or by act or conduct, that he would drive the Spaniards away from Cuba and leave the people of that island in a complete state of emancipation.

The Senator from Delaware [Mr. GRAY] held up his hand and with great earnestness and eloquence declared that he was not a partisan in respect to this question, but was an American, and I

doubt not that the sentiment which he thus expressed is entertained perhaps by every member of the Senate. I agree with him fully when he declares that the question of national honor, the question of safety, the question of freedom, the question of public policy as it relates to that moral control which this Government has sought to maintain of affairs upon this continent rises far above partisan consideration. The sentiment which he thus expressed, while advocating the view that Congress ought to yield to the suggestions of the President on this occasion, is entertained, I believe, by everyone who entertains the opposite view and thinks that in order that the purpose which the majority of the Senate has in view may be carried into effect we are unable to conform to the suggestions of the President.

The difference between the Executive and the people and the Senate is not one of inexpediency. It is not a mere question of administration.

The President in his communication to the Senate has claimed not only that the Republic of Cuba ought not to be recognized, but the supporters of the President here have informed us that his contention is that he alone may exercise the power to determine whether any nation is independent or otherwise, and that his determination is final and exclusive—that there is no authority in this Government to pass in review and modify or repeal the determination which he thus makes.

In connection with that claim on his part it is also claimed that the conditions in Cuba are not such as to warrant any recognition of the organized government existing there and which has had control of the operations against Spain. If those conditions do not now exist there, I ask is there any reasonable probability that in the future any change in the condition is likely to take place which will convince the President, in the exercise of what he claims is his exclusive province and authority, that there should be a recognition of the independence of the people upon that island?

I will never consent by any vote which I shall cast to concede to the President of the United States that he can determine finally and without review by Congress whether any nation is free or

independent or otherwise. See what that involves. The President of the United States might decide that Japan is not an independent nation; he might refuse to receive diplomatic representatives from that Government; he might undertake to intercept supplies sought to be delivered to that Government on the ground that it was under subjection to some other foreign government, such as Russia or Great Britain or some other power, as a mere dependency and not as an independent sovereignty.

The rights and duties of neutrality necessarily depend upon national sovereignty and national existence. It is only necessary to proceed further in order to see that the question of national independence may mean peace or war.

To abdicate the power which thus belongs to Congress to recognize the independence of a nation, to declare war, to prescribe the conditions upon which war may be carried on, to do those things which may be necessary to wage that war to success—to abdicate all this power to the President is too much for the President to ask and too much for any friend of the President to seek upon the mere pretense that every Senator owes it as a duty as a patriot to support every recommendation which the President may make.

I think the Senate ought to adhere to the position which it has taken and only concur in any action whereby the Republic of Cuba may be recognized as a separate and independent nation, that its forces may be utilized in conjunction with those of the United States, in order that the war which seems now to be impending against Spain may be waged to a successful conclusion, in order that by the precedent which we now establish in this great and critical emergency the question may be finally and forever settled. While the President has incidental authority, primarily, to recognize national independence in connection with the power to make treaties and receive ambassadors, the exercise of that power is always subject to revision, modification, or review by the Congress of the United States.

I believe there never has arisen any duty more important than the one which now devolves upon both branches of Congress upon this great question. For myself, I am unwilling to surrender it.

I am unwilling to make any concession which implies its surrender. I am unwilling for a moment to concede to the present Executive or any other Executive that power which belongs, in my judgment, finally to the representatives of the States and of the people in the two branches of Congress. It is the power of peace or war, that power which is clearly and unequivocally vested here and not anywhere else.

3219

O