The honorable R. EASTON's SPEECH,
delivered in the house of representatives of the U. States.

FIRST SESSION OF THE FOURTEENTH CONGRESS,
TENTH OF JANUARY, 1816.
SPEECH
OF THE
HONORABLE RUFUS EASTON,
DELIVERED IN THE
HOUSE OF REPRESENTATIVES
OF THE
CONGRESS OF THE UNITED STATES,
ON THE TENTH OF JANUARY, 1816,

Upon the engrossed bill to regulate the commerce of the United States, according to the convention of commerce concluded with Great Britain, on the third day of July, one thousand eight hundred and fifteen, upon the question, "Shall the bill pass."

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1816.
Mr. EASTON said, he had intended yesterday to deliver his sentiments in relation to the subject matter of the bill upon which the vote of the house was about to pass; not having then been so fortunate as to gain the floor, he now had risen to advocate its passage, and for that purpose, begged the indulgence of the house; he asked not only the indulgence, but the attention of the house to the arguments he was about to urge upon the occasion. He considered the passage of the bill, very important, as it regarded the powers under the constitution, delegated to congress; the powers delegated to the president and senate; the powers delegated to the courts of justice, and highly important as it regarded the rights and liberties of the people of this nation.

He apprehended very injurious consequences, might, at some future period, result to the nation by a contrary course. The convention being reciprocal and beneficial, it was the avowed intention and desire of all parties, to carry it into effect. It had been said, by gentlemen on both sides of the house, that the convention was of itself the supreme law of the land, whilst a majority had inclined to the opinion that legislative provisions are ne-
cessary to give it force and efficiency, tho' some doubted as to the expediency of legislating at all upon the subject. I am of opinion, Mr. Speaker, (said Mr. E.) that it is not a treaty until it shall have been sanctioned by the congress of the United States, by a legislative act, to carry it into effect.

The precedent about to be established, on the present occasion, was of all others the most favorable to the security, or pernicious in the extreme, to the future liberties of the American people.

What are the powers by the constitution delegated to congress? and what are those delegated to the treaty-making power? In adverting to the constitution it will be found, that "all legislative powers are vested in a congress of the United States, which shall consist of a senate and house of representatives." "The congress shall have power to regulate commerce with foreign nations." Surely, then, this power is not granted to any other authority. It cannot be given to two separate, distinct and independent authorities. If it is given to congress it is not given to the treaty-making power, to the exclusion of congress: it may be given to both to act in concert: it is not given to the one, to act to the exclusion of the other. This is a government of laws; it is not a government by compacts, by conventions, or by treaties concluded independent of the powers of congress, in violation of the constitution, and beyond the control of the supreme authority of the land, the sovereignty of this nation. What is the present convention? It is "a convention to regulate commerce between the territories of the United States and of his Britannic majesty;" it is then an agreement upon the face of it "to regulate commerce with a foreign nation." The president "has power by and with the advice and consent of the senate to make treaties, provided two-thirds of the senators present concur." It is not ordained in this clause of the constitution, that such treaties are made "under the authority" of the United States, nor that a treaty thus made, shall "be the supreme law of the land." It would be indeed extraordinary if the destines and the liberties of this nation, were to rest upon the will of the treaty form-
ing power: I say treaty forming power, because, it is but another expression to convey a correct idea.

A power composed (as the case might happen) of the executive and thirteen senators, a less number by far than a majority of that honorably body; a power specially given to one authority, under the constitution, can not be construed to be given to another; such a construction would introduce into the government an irregularity, and an inconsistency fatal to its harmony, and destructive in its consequences. The president has a qualified negative upon the laws of congress; the senate are a part of congress. Is not the regulation of commerce trusted to the proper authority? Is it not in safe hands? Will you—can you treat the authority given to congress, by the constitution "to regulate commerce," as a dead letter?

If this construction prevails, is the treaty made without the concurrence of the president and senate? Shall it be binding without the assent of congress? If that assent is given, it is a treaty made under the authority of the United States. If it is withheld, it is a treaty made under the authority of the president and senate, and not a treaty made under the authority of the United States. I should regret, and who are they that would not regret, to see the authority and destinies of this nation placed in the hands of an executive and a senate?

If the treaty-making power possess the authority to make commercial and other regulations, they may go on regulating till they will have regulated this branch of the government, (the house of representatives,) out of its whole weight of influence upon the councils of the nation, their authority will become a mere carte blanche; to be filled up as the treaty-making power may think proper to dictate or direct. Congress may regulate commerce in one manner; the president and senate at their pleasure change that regulation.

It is a correct principle, that subsequent laws, inconsistent with former laws, repeal such former laws, and is a rule which cannot be controverted. It is a principle as sound and potent as the eternal principles of justice. But the question to be decided is, when does a
treaty become a law, when has it efficacy as such, and when shall it be binding as the supreme authority of the nation? Two separate and distinct legislative authorities independent of each other, possessing equal power, cannot in one and the same government exist together. That is, if the executive and senate alone can legislate, it is perfectly idle to vest the legislative authority in congress. "A house divided against itself cannot stand." Congress divided against itself must fall. Congress have power, or they have not power, to legislate. If they do possess the whole powers of legislation granted under the constitution of which there cannot be a question—it follows as a certain and incontrovertible conclusion, that the president and senate alone, forming only two branches of the legislative authority of this government acting in their executive capacities, as necessarily they must do in negotiating treaties, do not possess authority to legislate independent of the house of representatives, the immediate representatives of the people: the people have not granted such power.

It will be admitted, I presume, that ours is the best constitution and government 'here below,' that it is the best to be found among the nations of the earth. It may emphatically be stiled a constitution of checks and balances; the senate in its legislative capacity is a check upon the house of representatives; the president upon the congress. There must be a concurrence according to the provisions of the constitution to form a law, and laws must be made before they can be executed: in the executive and treaty-making capacity of the president and senate, the house of representatives, with the constitution in their hand, hold a check; a treaty cannot become the supreme law of the land which is inconsistent with the constitution, or the powers delegated to congress by the constitution.

"The president shall nominate, and by and with the advice of the senate, shall appoint ambassadors, other public ministers and consuls;" suppose they should appoint "swarms of officers" needless and unnecessary. The appointments are complete, the officers are made; they hold the seals of office under the authority of the constitution; they are officers to all intents and
purposes, they are commissioned under the authority of the United States, their appointments do not infringe any right or trespass upon any authority delegated to congress, and yet in my humble opinion, congress would not be bound in honor, or otherwise, to sanction such a procedure by originating an appropriation bill for the outfits and expenditures of such officers. Congress are not bound nor is the nation bound, nor are the courts of justice bound, to consider a treaty as the law of the land, till that law has been made under the authority only competent to make laws for the people of this nation, to wit: the congress of the United States.

It has been contended that the treaty repeals the discriminating duties, and it being concerning affairs wholly international, that the legislative acts of this government operate wholly internally, and cannot reach or affect the domestic or internal regulations of the foreign nation; that the convention therefore is a compact, and its subject matter a contract to which the legislative authority of this country cannot extend. I admit, said Mr. E. that all treaties when completed and carried into effect by the supreme authority of a state or kingdom, are compacts, and form a part of the law of nations, but this nation is not bound by a contract to which it has not given its assent; the senate do not go abroad, nor do they negotiate the terms of a treaty at home; to an honorable and beneficial treaty, the assent of congress and of this honorable house is as easily obtained as that of the senate: in ordinary legislation committees report bills, they go to different readings according to the rules prescribed by the different branches of the legislature, are rejected or finally, with the approbation of the president, pass into laws, and become binding on the nation. The president has no legislative authority strictly so speaking, and yet no bill can become a law without his assent, but by the consent of two-thirds of both houses of congress.

There is no expression in the constitution that authorizes the senate to ratify a treaty, the phrase used by the constitution is to make treaties. The question is, when shall a treaty be said to be made? Ministers and envoys extraordinary are appointed and commissioned to agree
upon the terms of a treaty; they meet the foreign embassy in convention, they conclude a treaty: the convention with Great Britain, was concluded on the third day of July one thousand eight hundred and fifteen, it was then moulded, it was not then made, although in common parlance it is said to have been made. It was like dough unbaked. It will not be bread till it is baked. The treaty is forwarded to the president; if he disapproves of it, he returns it to those who framed it; if he likes it, he submits it to the senate; if they approve of it, it is ratified; it is then said to be made. But it is not yet completed under the authority of the United States; it is only a treaty sub modo; it is not a treaty in effect. It does not become the property of the nation till it shall have received the sanction of the national consent, through the organs of the national will. The constitution does not declare that a treaty made, by and with the advice and consent of the senate, shall be the supreme law of the land. It does not say that a treaty so concluded, so ratified, so made or whatsoever you may please to term it, is made under the authority of the United States. It cannot be a treaty till it shall have received the sanction of the national authority under the constitution; when it shall have received that sanction, it is then, and not till then, a treaty, made under the constitution and under the laws of the United States; and such a treaty made under their authority, to which the judicial power shall extend. They are treaties only made under the authority of the United States, which are declared to be the supreme law of the land by the constitution, and which the judges in every state are bound to obey; for example: It might be said, that a piece of parchment in printed form of a commission, filled out with the name of the incumbent, and sign manuel of the executive subscribed to it, is a commission; and yet it is not a commission under the authority of the United States, until the proper seal shall be thereto set, and affixed in due form of law.

Sir, the present convention is a commercial regulation, which interferes with the powers expressly delegated to the legislative authority, and therefore must receive the legislative sanction, the confirmation of con-
gress, before it can be binding on the people of this nation; and without which, it is not competent to the president and senate, or to the judicial authority, to enforce.

The constitution expressly ordains, that "congress shall have power to make all laws which shall be necessary and proper for carrying into execution all powers vested by the constitution in the government of the United States, or in any department or office thereof." No department or officer coming in contact with the powers delegated to congress by the constitution have authority under the government, and it would be a solecism to say we have a government under the constitution; independent of congress; this construction can do no injury to our republican institution, it may be productive of much good; it is placing it beyond the reach of the treaty-making power: to repeal this treaty by making another no inconvenience will result, as two-thirds of the senate have concurred in approving of it; and I should presume there can be no obstacle to the passage of the bill in that honorable body.

I perceive, Mr. Speaker, by a bill now on my table, that the senate propose to declare, by act of congress, "that so much of any act or acts as is contrary to the provisions of the convention, shall be deemed and taken to be of no force or effect:" if the treaty is a law, and, as such, binding upon the nation, the passage of such a bill is wholly unnecessary, upon the principle that subsequent laws repeal former laws, in all cases where they are inconsistent with each other: and why are two-thirds of the senate required to make a treaty? It would appear to me that as this house have not the power to negotiate a treaty, it would be scarcely proper that it should be called upon to discuss one, that two-thirds of the senate present would not deem beneficial and honorable to the country. If a contrary construction shall prevail, and it shall be determined that a treaty made and approved by the president and senate, is of itself the supreme law of the land, then indeed can they legislate, then indeed can they regulate commerce; and the supreme authority will be placed in the hands of the executive, the senate, and the courts of justice, who may also legislate without the
aid, and beyond the control of congress, make contracts and carry into effect treaties, however odious they may be to the people, or to their immediate representatives; this may be, I do not say it will be, the effect of this monstrous treaty-making power.

Congress may declare war, no authority is expressly given by the constitution to make peace; if any treaty would be binding, made independent of the legislative authority, I am inclined to believe it would be a treaty of peace, and yet this would only form one exception; it would be a treaty not against the provisions of any article of the constitution, as the power is not delegated to any other branch of the government; it becomes the exclusive province of the treaty-making power, and does not require a law to give it validity, or to carry it into effect: it is a treaty made under the authority of the United States. The great objects in going to war, are the protection of the national rights, and to secure an honorable peace; such a peace would be acquiesced in by common consent; and the power to make peace is not a dangerous power, it is suited to the trust of the executive alone, who would have authority, being the commander in chief of the whole military, to carry it into effect. But it is perfectly idle to talk of authority to do this, that, or the other thing, under our constitution and form of government, without power to carry that authority into effect. The power to act under the constitution, is evidence of a right to act, and to act with effect. The constitution should be construed to harmonise all its parts, and the construction which I have given will produce such harmony. If it is unnecessary, and would be improper in congress to legislate upon the treaty to give it a construction, that belongs to another authority, to the courts of judicature, any construction congress might give it would not be binding upon the courts; yet every member who legislates upon a treaty must, in making up his opinion, whether to carry it into effect or not, give it his own construction, in order to form such opinion correctly.

In the sixth article of the constitution it is declared, that the "constitution, and laws of the United States
which shall be made in pursuance thereof, and all treaties which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby.” What is the authority of the U. States? The constitution and will of the people expressed through their representatives in the congress of the U. States; the legislative authority of the nation is that authority, without which no law or treaty can become the supreme law of the land. An individual officer, a judge, a marshal, or a justice of the peace, may act under the authority of the U. States, so long as he keeps himself within the pale of the constitutional limits, and the laws of the U. States enjoining the duties to be by him performed. The constitution is the paramount law, but without the aid of congress it becomes inoperative. A person may possess the faculty to play upon an organ, but if he has not that instrument he does not possess either the power or the means to play upon it. The president, by the constitution, shall be commander in chief of the army and navy, when called into the service of the U. States; but he cannot command, if there shall not be any army or navy called into the service of the U. States.

“The judicial power shall extend to all cases in law and equity, arising under the constitution, the laws of the U. States and the treaties which shall be made under their authority.” If the words “under their authority” had been omitted, their powers would not have been construed to extend to foreign treaties. Hence the judicial power cannot carry into effect a treaty not made under the authority of the constitution and laws of the United States; a law is as necessary to the validity of a treaty as the constitution itself.

I do not wish to be understood, that a law is necessary in all cases to the validity of a treaty; I mean to extend it only to cases where a treaty would contravene the powers delegated to congress. If the constitution itself gives authority to make the treaty, the treaty thus made becomes the supreme law of the land; the judges in every state shall be bound thereby, and the judicial power of the U. States shall extend to it; but
treaty not thus made cannot be carried into execution by the judicial authority: they certainly would not adjudge a treaty to be made under the authority of the U. States, when the treaty is made in derogation of that authority: I speak of the authority expressly delegated to congress.

Suppose a treaty made on a subject not prohibited, nor permitted by the constitution, as in the case of the treaty for the purchase of the province of Louisiana; that power is not expressly delegated to any authority, under the constitution, nor is it forbidden: the constitution is silent; one of the conditions of the compact is for the payment of 15,000,000 of dollars to France; the convention is ratified: the money is not paid; is it then a treaty? It is not. It becomes a nullity if the money is withheld; but, according to the argument of some gentlemen, it is a treaty, and the supreme law of the land; and yet it is not a treaty; and so, it is a treaty, and it is not a treaty: suppose the money paid, it is then a treaty, and not till then has it received the sanction of the legislative authority, under the constitution, and becomes the supreme law: the treaty contains a stipulation that the inhabitants shall be admitted into the union. It is the supreme law of the land, and yet the courts are not enabled to carry that clause of the treaty into effect: it requires farther legislative provisions.

It has been said, sir, that the president has ratified the convention with Great Britain, that it has been approved of by the senate, and sent forth to the public by a proclamation as a treaty, and if it is not a treaty the president knows not what he is about. Sir, said Mr. E. the president does know what he is about: that wise, intelligent and upright chief magistrate, who has long enjoyed the confidence of this nation, was a member of the convention who framed the constitution, understands the subject correctly; in his communication of the treaty to the senate and house of representatives, on the 23d day of December last, he says, "I lay before congress copies of a proclamation notifying the convention concluded with Great Britain, on the 3d day of July last, and that the same has been duly ratified: and I
recommend to congress such legislative provisions as the convention may call for on the part of the United States."

He who helped to make the constitution recommends to congress legislative provisions in relation to this treaty, and such as it may call for, on the part of the United States.

The principles for which I contend, Mr. Speaker, are briefly these: A treaty though made has not force, and cannot be said to be made under the national authority, without a law of congress giving it that authority, or to carry it into effect: that is, in all cases where the treaty in its provisions interferes with, or contravenes any of the powers expressly delegated to the legislative authority, or where from the nature of the treaty itself it requires legislative provision; but if the treaty is not made contrary to the provisions of the constitution, and does not contravene any of the powers delegated to congress, and is of the description that it can be carried into effect by the president alone, or by the president and senate, or by the judicial authority, without the aid of congress, legislation in such cases becomes wholly useless: treaties thus made are the supreme law of the land, which every citizen is bound to respect and to obey.