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AUTOCRACY BY PLEBISCITE

BY DAVID JAYNE HILL

THE founders of our Republic well expressed their purpose in declaring that they wished it to be a "government of laws and not of men."

We have, however, abundant historical illustration of the method by which a government of laws may be transformed into a government of men. It consists in appealing to the confidence of the electors in the superior wisdom and authority of the Executive, and the displacement of representative legislative action by confiding the decision of public questions to one person and a few personally appointed agents who are the creatures of his will.

It seldom happens that this transformation occurs by a single sudden *coup d'état*. It is usually progressive rather than immediate, proceeding by easy stages. Thus, previous to the French revolution of 1848, Louis Bonaparte was the most advanced advocate of democratic ideas in France. He wrote and spoke most ardently of the neglected rights of the working classes and the extinction of pauperism by political reforms. The State, according to his programme, was to be completely reorganized in the interest of the oppressed. On December 10th of that year, Louis Bonaparte was chosen by a large popular vote President of the new French Republic. In a short time he asked to be entrusted with remodelling the constitution of France, in order to embody in it the conception of the people's rule. The Assembly opposed. He then demanded that the people of France be the arbiter between the Assembly and himself, "by invoking the solemn judgment of the only sovereign I recognize in France, the people." So great was the confidence in him that a plébiscite was taken which registered 7,439,216 yeas and only 640,737 noes. Four years later, after the constitution had been changed at the pleasure of the popular President, the people were invited to reestablish

the imperial office with Louis Bonaparte as sole candidate. The answer was,—or at least was officially announced to be,—that 7,824,189 Frenchmen recorded an affirmative vote, and only 253,145 ventured to oppose. Personality had completely triumphed over principles, and the work of the revolution was thus undone by the establishment of the Second Empire, with Napoleon III in the place of Napoleon I.

Under cover of an appeal to the “will of the people” an irresponsible power was evoked, stimulated by private interests, and guided by personal control. The people knew nothing of the effect of the constitution that would be framed for them. Wholly without knowledge, they were called upon to build upon faith. No doubt the faith was genuine, but it proved to be ill founded. They surrendered blindly to a leader only to discover that they had created a master. It cannot be held that a vote in such a case is an expression of public opinion. An opinion requires elements of judgment, and a sound opinion implies complete enlightenment. Without deliberate and free discussion, public opinion, in a proper sense, cannot exist. Mere social unrest and vague aspirations do not constitute opinion, they only furnish motive power for promoting the schemes of a demagogue who promises to secure what the most vocal of the people say they desire. To leave the decision of any great public question to the volition or control of a single individual is the abdication of public opinion.

The disposition to resort to such abdication is strongest when the subject under consideration is too intricate for the ordinary mind; but the complexity of the question to be determined presents the best possible reason for referring it to many experts rather than to any single person, for it is thus more certain to be considered from all points of view both of public interest and of private judgment. The American people, possessing from the beginning a larger experience in self-government than the French possessed in 1851, would never have thought for a moment of confiding to one person, however trusted, so grave a task as framing a constitution; and it is improbable that any American statesman at any past period of our history as a nation would ever have been willing to take the responsibility of such an attempt, even if he were empowered to undertake it. Guided by a sound instinct, the founders of the nation were unwilling to entrust so important an undertaking even to their

ordinary legislative bodies; and, to crown their system of representative government, they called into being for the first time the constitutional convention, a body composed of carefully selected men fitted to perform this specific task.

In like manner, in framing the Constitution of the United States, the founders had the wisdom to provide that in the responsible work of making treaties with foreign nations,—which they dignified by including treaties in “the supreme law of the land,”—power should not be entrusted to a single person, even though he might have been chosen as head of the nation. On the contrary, express provision was made for the “advice and consent” of a body of men possessing knowledge and experience in such matters. Not only this, but even in this body a great preponderance of opinion was made necessary before such consent could be given.

For this caution there was a double reason. It was necessary to guard against misadventure, not only in the interest of the country as a whole, but to secure by an equal representation of the States the rights and the interests of each one of them. When it is considered how possible it would be for a single person, if the power were exclusively in his own hands, to impose upon the nation contractual relations with foreign Powers which, though advantageous to one or several portions of the nation, might be extremely detrimental to others, it is evident that this division of power was not not only wise and just, regarded as a principle, but certain to be insisted upon by statesmen far-seeing enough to realize the immense consequences involved in the exercise of the treaty-making power.

It is, therefore, not a little disconcerting that a Chief Executive of the United States, sworn to obey the Constitution in which such foresight is expressed, should for a moment be tempted to disregard so important a provision, and it is much more surprising that he should attempt in any manner or degree to thwart its operation. Having conscientiously performed the part assigned to him by the only authority on the subject, he might reasonably be expected to leave his co-partners in the process of treaty-making to the free and untrammelled performance of their part.

Although the participants in the treaty-making process have often in the course of our history as a nation differed widely in their views of the expediency of proposed treaty

engagements, the constitutionally authorized procedure has never until recently been departed from. The Senate has modified treaties to a point at which it was necessary to abandon them or negotiate the acceptance of changes, and the President has not only yielded to such changes but undertaken fresh negotiations; but never has a treaty been submitted to the direct action of the electorate as a means of forcing either the Senate or the President to yield to the other. For such direct action the Constitution, which is clear and specific in delegating final authority in the treaty-making process, has made no provision, nor does it appear even to have been contemplated as a possibility.

When, therefore, President Wilson, having personally negotiated a treaty involving a reversal of the traditional policies of the United States, extending far beyond the usual conditions of making peace, and even setting up a mechanism of super-government capable of acting with and upon sovereign States in a manner which subordinates the constitutional powers of Congress, and having failed to obtain the consent of the Senate to its ratification, appeals to the electorate as a means of enforcing acceptance of the treaty, he is proposing a course of action which is extra-constitutional, anti-constitutional, and legally futile. It is extra-constitutional, because the "great and solemn referendum" to which he makes appeal is nowhere provided for in the Constitution of the United States; it is anti-constitutional, because it is a resort to a procedure which sets aside the explicit and final constitutional authority for making treaties; and it is futile, because a popular vote on the subject, if favorable to the ratification of the Covenant of the League of Nations would have no binding legal force without a formal amendment to the Constitution. Until that is accomplished the Senate cannot be legally compelled to ratify the treaty; and a majority of the members, believing as they do that the unmodified Covenant of the League of Nations is in conflict with the Constitution, could not conscientiously yield to a constitutionally unauthorized procedure and give their advice and consent to ratify the treaty so long as the Constitution they have sworn to support remains unchanged.

The proposal of a *plébiscite*, therefore, raises two interesting questions: (1) What would be the legal or moral value of a majority popular vote on the subject? and (2) What would be the effect upon the system of constitutional

and representative government of resorting to such a method?

The President proposes to force the ratification of the Treaty of Versailles, including the Covenant of the League of Nations, without a change, by a plébiscite in connection with a presidential election. Having publicly declined to accept the action of the Senate, he demands a popular vote supporting his defiance of the Senate's constitutional prerogative.

His position on this point is unmistakable. He is willing to have the treaty ratified only in the form in which, "in his own name and by his own proper authority," he signed it at Paris. In his letter of November 19th, 1919, addressed to Senator Hitchcock, the leader of his party, he said: "I sincerely hope that the friends and supporters of the treaty will vote against the Lodge,—that is the Senate majority,—resolution of ratification." On January 8th, 1920, in a letter addressed to the Chairman of his party's National Committee, he made his attitude still more explicit in the following words:

"Personally, I do not accept the action of the Senate of the United States as the decision of the Nation.

"I have asserted from the first that the overwhelming majority of the people of this country desire the ratification of the treaty, and my impression to that effect has recently been confirmed by the unmistakable evidences of public opinion given during my visit to seventeen of the States.

"I have endeavored to make it plain that if the Senate wishes to say what the undoubted meaning of the league is, I shall have no objection. There can be no reasonable objection to interpretations accompanying the act of ratification itself. But when the treaty is acted upon, I must know whether it means that we have ratified or rejected it.

"We can not rewrite this treaty. We must take it without changes which alter its meaning, or leave it, and then, after the rest of the world has signed it, we must face the unthinkable task of making another and separate treaty with Germany.

"But no mere assertions with regard to the wish and opinion of the country are credited. If there is any doubt as to what the people of the country think on this vital matter, the clear and single way out is to submit it for determination at the next election to the voters of the Nation, to give the

next election the form of a great and solemn referendum as to the part the United States is to play in completing the settlements of the war and in the prevention in the future of such outrages as Germany attempted to perpetrate."

The President refuses to accept the advice, and he demands that the treaty be ratified without the consent, of the Senate of the United States. Unable to dominate its action or to obtain its assent by argument, he declares that the Senate must take the treaty as it was written, or leave it. The Senate's advice and consent are then to be ignored. It may, if it pleases, offer its "interpretations," but these are to have no authority. In no case are they to be inserted in the act of ratification. They may "accompany" it as casual comments, but there must be no alteration in its meaning. He understands perfectly that if such comments coincide with the plain meaning of the text, they are superfluous; and if they do not coincide, they would be ridiculous.

Even after the plain intimations already given that the accession of the United States to the League of Nations with the Senate's reservations would be gladly accepted by the Allied Powers, the President attempts to warn against even the slightest reservation regarding the Covenant by declaring that "we must face the unthinkable task of making another and separate peace with Germany"; when he knows that, as Germany is not a member of the League, and has had nothing to do with the formation of it, she would have nothing to say regarding it. There is not in the entire Treaty of Versailles a single line that prevents the League, which possesses the explicit right of self-amendment, from making any changes its members may think it expedient to make in its powers or its conditions of membership.

Seeing clearly that, without a means of escape, responsibility for preventing the ratification of any treaty must fall upon himself, unless he recognizes the constitutional rights of the Senate, President Wilson is now looking for an avenue of retreat. He finds it as Louis Bonaparte found it in the form of a *plébiscite*; and, to serve a double purpose, he affirms that "the clear and single way out is to submit it [the treaty] for determination at the next election to the voters of the Nation, to give the next election the form of a great and solemn referendum."

On his part, this is an ingenious proposal. On the one hand, it is a desperate attempt to test the continuation of

the personal leadership of his party; on the other, whatever the outcome, the result could be utilized as a means of escape from the responsibility which the Allies and the history of his administration will place upon him, if now that he has created the present international situation, he cannot make good the promises made in Paris, but by his own act prevents the ratification of the Treaty of Versailles.

Secluded from contact with the present condition of the public mind, as Mr. Wilson is, having so long disregarded his electoral slogan of "common counsel," as he indisputably has, and recalling the triumphal journeys in which he was once the object of so much popular adulation, it was not unnatural that he should cherish the belief that he could greatly embarrass his opponents by confronting them in an electoral campaign. In 1918 he stood almost alone in believing that the majority of his countrymen would gladly make him their "unembarrassed spokesman in affairs at home and abroad." They had made him a dictator during the war; would they not follow him also in peace, and even renounce, as they had so long held in abeyance, their party affiliations in order to do so?

After the support the President has had from prominent Republican leaders in his international adventures, why should he not entertain the hope, being of an inspirational type of intelligence, that the multitudes who have sent telegrams and resolutions to the Senate urging the prompt acceptance of the League of Nations, and especially those who have paid for them and for the apostleship that inspired them, although hitherto attached to the Republican party, would gladly continue the same high and holy mission in an electoral campaign?

I do not doubt that Mr. Wilson understands, however,—and this is greatly disturbing to the knowing among his followers,—that there would be a large defection from his own party columns, in the event of his candidacy in order to obtain a victory for an unmodified League of Nations by his triumphant reelection to the presidency. By adding promises of another sort, he not improbably thinks that he could still carry an election; and he knows that no other candidate would be anxious to stand on a platform peremptorily committed to the unmodified League.

But more is involved than a final test of leadership. The projected reorganization of the world is languishing. To

stand once more before the world as an "unembarrassed spokesman" would be an unprecedented victory, but at present Mr. Wilson finds himself in an extremely embarrassing position. He has demanded a "great and solemn referendum" to force upon the Senate a treaty which it will not accept; and yet he has himself threatened to withdraw the treaty, and to cancel all his efforts for peace, if the action of the Supreme Council does not please him.

History will ask, Who is responsible for the refusal to make peace? Mr. Wilson would put the responsibility, if he could, on the Senate; but the Senate is anxious to make peace, and is ready to ratify a treaty of peace that will leave the institutions and the liberties of America unimpaired. It is, in truth, very anxious about it. If the President refuses to accept the advice and consent of the Senate as to the terms of peace, will he not be responsible for a failure? He thinks, however, that he sees a way to place the responsibility elsewhere.

The situation reminds one of the advice Kaiser William II gave to the late Czar of Russia after he had lost the war with Japan. Let others, he advised, bear the odium of the disappointment caused by the failure of the war through letting them take the responsibility of making peace! Hide behind your people by letting them have their way! A plébiscite is a double resource for an autocrat. If it sustains him, he becomes a hero. If it decides against him, he receives applause for yielding to the will of the people. It is a great game, in which every loss is a gain, because even defeat affords a new opportunity of escaping the odium of having broken pledges too adventurously made.

Apart from the President, the only persons who want "a great and solemn referendum" are the so-called "Irreconcilables," who wish nothing so much as to defeat the treaty. Do they not see that they are playing into the President's hands? Without a plébiscite either he himself must defeat his own treaty or accept a modification of it that would make it safe for the country and its institutions. The "Battalion of Death" honestly believes, and its judgment is no doubt correct, that a referendum would result in disapproval of the unmodified treaty. But would that disapproval include a disapproval of the reservations also? Would that be a victory of American nationalism, for which the "Irreconcilables" profess to stand? Do they really wish that there

shall be no treaty, or that there shall be henceforth no international association? They might by raising this issue divide the country, but they would lose on that platform. There must be some kind of a treaty. There must be some kind of better international organization. The people may not know precisely what either should be, but it is certain that they will demand both a peace with Germany which other nations will help to sustain, and a world ruled by law.

If there is to be a plébiscite, it must be upon alternative propositions. What are they to be? If the President could force a vote on the simple questions, this treaty, or no treaty; this League, or no international organization; and could make it a party issue, that would be in itself a victory for him. Even if he were defeated, he could say, "I did the best I could. I am now relieved of further responsibility. I bow to the will of the people."

But the issue cannot fairly be thus stated. The real issue is, This League, or a better international organization in which the United States can heartily cooperate.

If the subject is to be forced into party politics, this is the only form it can justly take. The political parties in the United States cannot be aligned on any other ground. They may by violent procedure be divided, but the opponents of President Wilson's attitude can never be united on the alternative of this treaty or no treaty. An attempt to force this would be an alliance with the President's unwavering supporters.

Events have made it evident that the President's devotion to the Treaty of Versailles and the Covenant of the League of Nations is by no means steadfast. He has clearly intimated to his former colleagues in the Supreme Council at Paris that, unless his authority is recognized and his decisions are complied with, he will withdraw the treaty from the Senate. He has not hesitated to say this, even though he would have to "face the unthinkable task of making another and separate peace with Germany"! A treaty with reservations, the President professes, he will not have; but the policy of those acting under his orders is not clear. While Mr. Wilson is making his protest against reservations, his principal spokesman in the Senate,—not altogether "unembarrassed", it is true,—while contending that an amendment would kill the treaty, has not hesitated to offer one under the cover of a reservation. Whatever the motive, the

fact is indisputable. On February 26th, Senator Hitchcock introduced the following as a substitute for a proposed revision of the reservation on domestic questions:

"That no member nation is required to submit to the league, its council, or its assembly for decision, report, or recommendation any matter which it considers to be a domestic question, such as immigration, labor, tariff, or other matters relating to its internal or coastwise affairs."

Senator Brandegee inquired if the Senator did not consider this really an amendment to the treaty, "in that it changes the treaty provision as to all the other signatory Powers as well as ourselves." "All we are trying to do in the reservation," he continued, "is to fix our duty under the treaty; but the Senator's reservation—if that is the proper designation of it—changes the treaty provision as to the duty of all the signatory Powers as well as ourselves." Senator Hitchcock admitted that his reservation "changes the treaty," but he thought the change would be "pleasing to the other nations"! Senator Lenroot then observed: "There is no Senator upon this floor who has declaimed louder against amending the treaty and sending it back to the different nations than has the Senator from Nebraska, and yet the Senator from Nebraska now offers to the Senate a clear amendment of the treaty that affects the rights not only of the United States, but attempts to change the rights and privileges of every member of the League as fixed by the treaty, and after they have ratified the treaty." He then asked, "Does not the treaty provide that the League itself shall determine what are domestic questions?"

To this Senator Hitchcock answered, "That is a dubious question. I doubt whether it does." Whereupon Senator Reed inquired if the Senator from Nebraska would sign a treaty of whose meaning he was doubtful; and Senator Smith of Georgia affirmed, that the formula proposed by the Senator from Nebraska was "a clear amendment of the treaty." But he did not stop with that. Having so far deserted the President's representatives in the Senate as to wish the treaty ratified with reservations, Senator Smith said, speaking of Senator Hitchcock's amendment: "I do not think it wise now for us to undertake to amend the original document. We have all conceded that reservations are the only mode by which the Senate will vote for such an amendment now, and to present it as a substitute for a reservation

is to offer something that the Senator from Nebraska knows will be killed, and almost amounts to joining the irreconcilables in hindering action."

If the Senate should now, as the Senator from Georgia suggests, burden the treaty with amendments altering for other nations the engagements already agreed to and ratified by them, and they should decline to reopen formal negotiations for revision, the President would no doubt insist that the Senate had not only made reservations limiting the obligations of the United States,—which under the established procedure of diplomatic practice it may do without rejecting the treaty,—but had refused to accept the treaty with any modification that can be made, and had therefore rejected it altogether. If, as appears, the President already has ground for being distrustful of the result of the "great and solemn referendum," he might welcome such a reason for declaring that it was the Senate that had made ratification impossible. He would then feel relieved of the responsibility of himself withdrawing the treaty, as he threatened to do if his will did not prevail in the Serbo-Italian settlement.

The reaction of the President's political party to his idea of a plébiscite has not met his expectations. It is on this, as well as on other matters, undoubtedly divided. Perhaps he would, after all, prefer another way out of the situation he has created for himself. If the responsibility for a failure to make peace could be thrown upon the Senate, that would, in appearance at least, save him from the reproach of having made to the Allies pledges which he now so easily threatens to withdraw.

The President's attitude on the Adriatic question is almost a declaration that he believes his associates in forming the League of Nations cannot be depended upon to do what he considers should be done unless his authority is continually brought to bear upon them. Does even the President believe that any league could long endure on this condition? Can what the European Powers think expedient always be thwarted by the intervention of a non-European Power? Would not reciprocity require that American questions should be subject to the decisions of non-American Powers? Do the American people desire either to exercise and take the consequences of exercising controlling authority in European affairs, or to submit to have a foreign authority

exercised upon themselves, as reciprocity would require? Can Mr. Wilson really believe that the American people are going to give him by plébiscite a right to use this power over European nations with the implied right of European nations to exercise the same control over American affairs?

Seeing the futility of any such expectation, reliance upon a plébiscite to accord him such power is likely to be, if it is not already, a vanished hope even in the mind of the President himself.

One thing is, however, clear. The President cannot be permitted to urge the importance of a "great and solemn referendum" on the acceptance of the Treaty of Versailles, and especially the League of Nations, when he himself contemplates throwing overboard the whole work accomplished at Paris, simply because his colleagues in the Supreme Council will not accept his personal dictum as final. He may be right, or he may be wrong, in his Adriatic doctrine. That is not the question. The essential point is that what Mr. Wilson asks by this proposed plébiscite is that his personal will shall dominate, not only over the Senate of the United States, but over the Supreme Council and the Council of the League of Nations also. With what consistency can he urge that our sacred honor as a nation is pledged to ratify this unmodified treaty, or that it is our duty in any sense to do so, when he can so lightly threaten, and may at any future time decide, if he has the power, to throw to the winds everything that was done at Paris, because he does not personally approve of some particular European arrangement?

But there are other considerations regarding the consequences of a "great and solemn referendum." Supposing it to be carried into a general election, what would be its legal effect?

Whatever the result of the election might be, it would not affect either the personal convictions of the President or of the Senate. Either might legally refuse to act otherwise than they were ready to act before, and might properly hold that the decision affected only their successors. When the President was last elected, the chief slogan of his party was, "He kept us out of war"; but did that eventually control his action? In the election won with this watchword there was nothing that compelled him to act otherwise than he might deem it expedient to act. The constitutional powers

of the Government in all its branches remained unchanged by the result of the election.

As to the moral effect of a plébiscite upon this question, we know from experience what it would be. All the forces that have already been utilized either to secure the ratification of the treaty or to defeat it would continue to be employed in the political campaign, but upon a more extensive scale. What are some of those forces?

There could hardly be imagined a better illustration of the distracting character of direct popular action in the management of foreign affairs than that afforded by the controversy over the League of Nations in the United States. For several months Senators were besieged with letters, telegrams, and the resolutions of various associations,—from sewing circles to labor unions and church organizations,—inspired to this action, to a great extent, by an expensive public propaganda, demanding that the Senate should immediately ratify a treaty which few of the importunists had ever read and the real purport of which still fewer understood. A critical examination of these communications would show that, almost without exception, they represented no accurate knowledge, no deliberate consideration, and no responsible authority. They were, no doubt, in most instances prompted by good motives, among them a sincere desire for peace and the organization of means for the preservation of it in the future, but without any adequate appreciation of the liabilities to be assumed under the form of covenant proposed or the consequences involved to the lives and fortunes of the American people.

In the communications sent to the Senate intended to influence its action, serious argument based on the interests of the American people was conspicuously absent. Appeals to the emotions were abundant, but there were few attempts to convince the intelligence by an impartial analysis of a document which at first frankly called itself a "constitution," thus avowedly setting up a new political entity for the control of international relations. Most of the statements made were merely declaratory of the personal views and desires of those who made them, unsupported by reasoning connected with the world of facts. Whole societies were grouped as being in favor of a treaty which few of the members had studiously examined, often represented by the vote of a small number presuming to act for the whole member-

ship, and cases were not wanting where the resolution actually adopted was denatured and distorted in the published report in a manner that misrepresented the action actually taken.

Hundreds of thousands of dollars were expended in the manufacture and expression of opinions that were utterly valueless from a scientific point of view. It was admitted that the success of this effort to influence by the weight of numbers the decision of a responsible legislative body was exactly in proportion to the amount of money available for this purpose; and this was explicitly asserted in a frantic appeal for more funds to "save" the Treaty of Versailles from being modified, as the independent judgment of a constitutional partner in the process of treaty-making might, in the national interest, consider necessary.

The greatest danger now menacing this Republic is the control of the Government by well-organized, persistent, and vociferous private groups of men and women aiming to acquire the power to influence the action of public officers; yet the whole fabric of justice rests on the responsibility of those entrusted with authority. Having been freely chosen by the ordered procedure legally provided, a public officer in the United States is not properly subject to the orders or the intimidation of any group of citizens, however powerful; and he cannot better display his fitness for discharging a public trust than by ignoring, or if necessary resisting, any attempt by any group, for any purpose, to deflect him from the resolute and conscientious performance of his duty as a public officer in matters confided to his action, however numerous and respectable that group may be.

If a few thousand theorists could deflect the action of a public officer by a vigorous propaganda of their private views on a question of foreign policy, and cause him to abandon his convictions through fear of personal or party unpopularity, what might be expected when millions of men, determined to secure their private advantage, even by changing the form of Government, combine to accomplish their purpose?

However opinions may differ on this subject, it cannot be controverted that the control of foreign relations by plébiscite would be an abandonment of the constitutional system now in force in the United States. It is right and proper

that there should be full and free discussion of every subject of public importance on the platform and in the press, including the relations of our country to foreign nations; and this is necessary to the creation and expression of intelligent public opinion, which in legitimate ways should and will exercise an influence upon legislation. But direct action, an attempt to bind public officers against their will, to act in a particular manner not prescribed by law, is quite a different matter. That is the substitution of a new form of government for one already established. If it can be proved that direct action on foreign relations is preferable to existing constitutional arrangements, the next step would be to amend the Constitution, and that is what the demand for a plébiscite really signifies; but, if this step is to be taken, it should not be accomplished as an act of revolution, but in the manner which the fundamental law prescribes, a condition which a plébiscite in an electoral campaign does not fulfill.

Honestly formulated, the President's proposal of a "great and solemn referendum" submits the question, "Shall the President of the United States conclude treaties without the advice and consent of the Senate?" The next step might easily be, Shall the President make laws without the sanction of Congress?

DAVID JAYNE HILL.