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Charles C. Tansill

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THE FUR-SEAL FISHERIES AND THE DOCTRINE OF THE FREEDOM OF THE SEAS

By CHARLES C. TANSILL
Fordham University

THE controversy between the United States and Great Britain concerning the fur-seal fisheries was one that involved several important principles of international law. In this brief paper there is no opportunity to develop all the questions at issue between the two nations, but attention can be directed to the ironic fact that with reference to the fur-seal fisheries dispute the United States abandoned its historic stand for the freedom of the seas, and Great Britain defended a doctrine that in practice she had at times openly flouted.

The roots of this fur-seal controversy can be traced back to 1727 when Vitus Bering, a Dane in Russian employ, discovered the strait that bears his name. Fourteen years later he explored the Aleutian Islands and sailed along the coast of Alaska.¹ His course was eagerly followed by Russian traders who were anxious to supply furs for the Chinese market at Kiakta. As a base from which to extend their operations, they made a settlement upon the Aleutian Islands.² But this spirited search for furs led to sharp friction between rival traders, and in order to stop this growing competition the Czar issued on July 8, 1799, a ukase which organized the Russian American Company. For a period of twenty years this company was given a monopoly of the trade along that part of the North American coast which lay above the 55th degree of north latitude. It was empowered to "make new discoveries not only north of the fifty-fifth degree of north latitude, but farther to the south, and to occupy the new lands discovered . . . if they have not been previously occupied by . . . any other nations."³

Although this grant of monopoly rights to the Russian American Company served to quiet the friction between Russian traders along the North-west Coast, it did not put an end to the visits of American vessels to points above the 55th parallel of north latitude.

In 1784 Yankee merchants opened a lucrative trade with the Chinese port of Canton, and they soon discovered that Chinese mandarins would pay high prices for good furs. In order to secure these valuable pelts, American traders sailed along the North-west Coast with scant regard for Russian restrictions. Diplomatic protests presented by the Russian Minister at Washington were politely accepted but quietly ignored.⁴ Perhaps another ukase would remedy the situation, so on September 16, 1821, the Czar granted to certain of his subjects a monopoly over the "pursuits of commerce, whaling and fishery, and of all other industry on all the islands, posts, and gulfs including the whole of the northwest

¹F. A. Golder, *Bering's Voyages* (2 vols., New York, 1922).

²James Cook, *A Voyage to the Pacific Ocean* (London, 1784), III, 359-83. For a scholarly account of the expansion of Russia, see R. J. Kerner, *The Urge to the Sea* (Berkeley, 1942). Certain aspects of the quest for furs are admirably described in Adele Ogden, *The California Sea Otter Trade, 1784-1848* (Berkeley, 1942).

³*Proceedings of the Alaskan Boundary Tribunal* (Washington, 1904), II, 23-5.

⁴Tyler Dennett, *Americans in Eastern Asia* (New York, 1922), 34-43; J. C. Hildt, *Early Diplomatic Negotiations of the United States with Russia* (Baltimore, 1906), 158-9.

coast of America, beginning from Behring Straits to the 51° of northern latitude." All foreign vessels were forbidden to approach within less than one hundred Italian miles of these coasts. Several days later (September 25, 1821) a second ukase renewed the monopoly granted to the Russian American Company, and invested it with the sole right to control the fisheries "from the northern point of the Island of Vancouver, under 51° north latitude, to Behring Straits and beyond them."⁵

The Russian government next sent a note to Lord Castlereagh in which it was pointed out that the purpose of the imperial ukases was to stop the trading by "vagabonds" along the North-west Coast.⁶ Although the British government knew that this Russian edict was primarily aimed at the repression of the activities of American traders, it was nevertheless thought to be expedient to register a complaint against the Russian pretension to sovereignty over the waters extending from the North-west Coast to Bering Straits.⁷

The American government filed a similar protest against these extravagant Russian assertions of authority, and negotiations were initiated that led to the conclusion of the treaty of April 17, 1824. Under the terms of this convention the Czar's government abandoned any claim to exclude American citizens from approaching within a hundred Italian miles of the North-west Coast, and the southern boundary of Alaska was fixed at the fateful parallel of fifty-four degrees and forty minutes of north latitude.⁸ The following year the Russian and British governments signed a treaty (February 28, 1825) along similar lines.⁹ The maritime pretensions so boldly announced by Russia in 1821 were now placed in the discard, and no further use was made of them until President Cleveland attempted to play a bold hand in the summer of 1886. To his dismay he soon discovered that in order to win the game of diplomacy one must have more than bad cards and empty bluff.¹⁰

On March 30, 1867, the representatives of Russia and the United States signed a treaty which ceded to the United States "all the territory and dominion" which the Czar of Russia possessed on the "continent of America and in the adjacent islands."¹¹ Three years later the Acting Secretary of the Treasury leased to the Alaska Commercial Company the right to take seals on the islands of St. Paul and St. George.¹² Under American auspices the fur-seal industry seemed to have a rosy future, and American officials were anxious to give it every possible protection. In March, 1872, Mr. T. G. Phelps wrote to the Secretary of the Treasury and called his attention to reports of various expeditions being fitted out in Australia and in other Pacific lands for the purpose of conducting

⁵*Proceedings of the Alaskan Boundary Tribunal*, II, 25-8.

⁶*Ibid.*, 95-7, Baron de Nicolay to the Marquis of Londonderry, Nov. 12, 1821.

⁷*Ibid.*, 104-5, Marquis of Londonderry to Count Lieven, Jan. 18, 1822.

⁸Hunter Miller, *Treaties and Other International Acts of the United States of America*, III (Washington, 1922), 151-62.

⁹*Proceedings of the Alaskan Boundary Tribunal*, II, 12-16.

¹⁰With reference to the general topic of the fur-seal fisheries, see J. B. Moore, *History and Digest of International Arbitrations* (Washington, 1898), I, 755-961; J. B. Lockey, "James Gillespie Blaine" (*American Secretaries of State and Their Diplomacy*, VIII, 128-45); A. F. Tyler, *The Foreign Policy of James G. Blaine* (Minneapolis, 1927), 302-45; J. B. Henderson, *American Diplomatic Questions* (New York, 1901), 3-62.

¹¹W. M. Malloy, *Treaties, Conventions, etc.*, II, 1521-4.

¹²*Fur Seal Arbitration, Senate Ex. Doc.*, no. 177, 53 Cong., 2 sess. (Washington, 1895, 16 vols.), IV, 80.

sealing operations in the North Pacific. In view of the damage these sealers might inflict upon a valuable American industry, was it not possible, through the employment of revenue cutters, to take some action against them?¹³ In his reply Mr. Boutwell frankly stated that he did not see how the United States "would have the jurisdiction or power to drive off parties up there for that purpose unless they made such attempts within a marine league of the shore."¹⁴

Nine years later the Treasury Department took a much stronger stand. In March, 1881, Mr. H. F. French, Acting Secretary of the Treasury, informed Mr. D. A. d'Ancona, of San Francisco, that the treaty with Russia contained definite maritime boundaries which included a large part of Bering Sea and the North Pacific.¹⁵ The penalties prescribed by American law against the killing of fur-bearing animals would attach, therefore, against any violation within these limits.

But despite this bold assertion of jurisdiction over the waters of the North Pacific, the Treasury Department did not attempt to protect the sealing industry by seizing the ships of other nations found cruising in this area. It was not until the first Cleveland Administration that any action was taken in this regard, and in this case the Treasury Department did not bother to consult with the Department of State before sending instructions to the officers in charge of the revenue cutters. Daniel Manning, the Secretary of the Treasury, had left the post of President of the National Commercial Bank of Albany, New York, to assume the burden of chief fiscal officer of the United States, and his mind seemed to be more fixed upon questions of revenue than upon diplomatic difficulties that might arise from seizures of foreign shipping. The sealing industry brought certain revenues into the Treasury Department, and Mr. Manning would conserve this income even at the cost of serious friction with Great Britain. Pelagic sealing by British schooners must cease at once, and in August, 1886, American revenue cutters began to seize ships conducting sealing operations in the North Pacific.

As soon as Lord Lansdowne heard of these seizures, he wrote to Sir John Macdonald and expressed the opinion that this action by American officials was "far more open to criticism than anything we have done."¹⁶ The British Foreign Office was deeply concerned over this situation. Canadian vessels had been seized when they were more than sixty miles from the nearest land, and such action was in open defiance of the principles of international law. Lengthy instructions were sent to the British Minister at Washington, directing him to protest against these infractions of the law of nations.¹⁷ Attention was called to the fact that the American government had always made it a point to proclaim in loud tones its adherence to the doctrine of the freedom of the seas. Was it about to reject one of the most important articles in the faith of the American founding fathers?

At Washington Sir Lionel West made careful preparations for his diplomatic duel with Secretary Bayard. He was a man who had walked

¹³*Ibid.*, 82, T. G. Phelps to Secretary Boutwell, March 25, 1872.

¹⁴*Ibid.*, 83, Secretary Boutwell to T. G. Phelps, April 19, 1872.

¹⁵*Ibid.*, 85-6, H. F. French to Mr. D. A. d'Ancona, March 12, 1881.

¹⁶Public Archives of Canada, Macdonald Papers, XIII, 535-41, Lansdowne to Sir John Macdonald, Sept. 20, 1886.

¹⁷*Fur Seal Arbitration*, II, 153-5, Earl of Iddesleigh to Sir Lionel West, Oct. 30, 1886.

through life on the easy levels of instinct, and his amazing amours had so sapped his strength that Bayard called him a "mere postage stamp." In the summer of 1886 he made daily calls at the Department of State. He was the ideal ambulatory ambassador, and he gives real point to Hugh Gibson's famous remark that "diplomacy is not hard on the brain, but it is hell on the feet." Clad in the armour of a righteous cause, Sir Lionel strongly pressed the claims of Great Britain. Bayard was disturbed by the situation in Bering Sea, and he informed Sir Lionel that he was studying the precedents in the case. Previous to the treaty of March 30, 1867, Russia had always contended that Bering Sea was a *mare clausum* or closed sea. At this point Sir Lionel adverted to the fact that the American government had protested against such a contention. "Yes," replied Bayard, "at that time."¹⁸

But despite this Delphic utterance on the part of the Secretary of State, Sir Lionel had high hopes for an early adjustment of difficulties. During a conference with Bayard on November 19 he canvassed the whole situation, and drew from the Secretary the assurance that the American government would look into the matter in a "spirit of fairness."¹⁹ This was certainly true as far as Bayard was concerned, but President Cleveland knew little about international law and often had his eye fixed upon political considerations. With him it is true that public office was a public trust, but he never lost sight of the fact that the votes of the public were vitally necessary to secure the office.

Before taking up this matter of the Bering Sea seizures with President Cleveland, Bayard first turned to the American Minister at St. Petersburg and inquired if the Russian government had ever assumed control over Bering Sea.²⁰ After making extended inquiries, Mr. Lothrop informed Bayard that he could not discover any "case of seizure and adjudication under the Ukase of 1821."²¹

Bayard next requested the advice of the Solicitor of the Department of State. Francis Wharton was thoroughly familiar with the theory and practice of international law, and he did not hesitate to express the opinion that the American government had no right to "seize and search British vessels on the high seas of the Northwest Pacific." The Attorney-General should be promptly advised to direct a discontinuance of legal proceedings against the Canadian vessels that had been seized.²²

After receiving these memoranda, and after making a careful study of every aspect of the Bering Sea situation, Bayard wrote a long letter to President Cleveland. After discussing the historic American attitude towards the doctrine of the freedom of the seas, Bayard warmly urged the President to discontinue all proceedings against the Canadian sealing vessels. The American government is "one of law," and it yields the "same voluntary and self-imposed submission to the rules of public international regulation in the use and navigation of the high seas which it requires from other members of the family of nations." In conclusion he expressed the firm conviction that the "honor" of the American

¹⁸Canada, *Sessional Papers*, 1887, no. 48, 32-4, Sir Lionel West to the Earl of Iddesleigh, Nov. 12, 14, 1886.

¹⁹*Ibid.*, 40, Sir Lionel West to the Earl of Iddesleigh, Dec. 10, 1886.

²⁰Bayard MS., Bayard Letter Book, III, Secretary Bayard to George V. N. Lothrop, Oct. 29, 1886.

²¹Bayard MS., Mr. Lothrop to Secretary Bayard, Dec. 3, 1886.

²²*Ibid.*, Mr. Wharton to Secretary Bayard, Jan. 11, 1887.

government required that the Attorney-General be directed to take immediate action for the discharge of the vessels held in Alaskan ports.²³

Under the impact of this strong letter the President authorized Bayard to convey to the British Minister assurances that the pending proceedings against Canadian vessels would be discontinued, but he would make no further concessions, and no assurances were given that further seizures would not be made.²⁴

In a new effort to convince the Chief Executive that seizures of Canadian sealing vessels on the high seas constituted a palpable infraction of international law and were in violation of the American theory and practice, Bayard prepared a memorandum which he sent to the White House. He was certain that Bering Sea was not a closed sea but was a "part of the high seas of the world, and equally open to the navigation of all nations." American jurisdiction in that area did not extend "to a greater distance from the land than is claimed and exercised by the United States over the waters adjacent to its territories on the Atlantic coast."²⁵

In his memorandum for the guidance of the President, Bayard emphasized the expediency of settling, by international arrangement, all the questions arising out of seal hunting in Bering Sea. In a personal letter to Phelps, in London, he expressed the view that it might be well to discuss with Lord Salisbury "the necessity for co-operative action of the two governments over their respective citizens, to prevent the annihilation of the fur seals. I do not see how we can maintain Behring's Sea to be a *mare clausum*, or claim an exclusive jurisdiction beyond the three mile limit."²⁶

While Bayard was endeavouring to convince President Cleveland that American seizures of Canadian sealing vessels in Bering Sea were a serious infraction of international law, the new Secretary of the Treasury, Mr. Fairchild, was permitting American revenue cutters to resume this practice. Bayard exerted fresh pressure upon the President, who once more directed the Attorney-General to issue an order "for the release of the officers and other persons employed in the vessels lately seized by the Revenue Cutter *Rush* in Behring Sea." It was significant, however, that this instruction to the Attorney-General was prefaced with a reservation to the effect that this order of release would have no effect upon the "other questions connected with the alleged violation of the laws of the United States relating to the fur-seal fisheries."²⁷ This meant that the Canadian *ships* were not released, and in a brief memorandum attached to the President's letter, Bayard remarked: "The reasons for this release arise from the regard for the personal liberty of the individuals. As to the detention of property, compensation can always be awarded."²⁸

President Cleveland still clung to the belief that the United States had some measure of control over the waters of Bering Sea with special reference to the preservation of the herds of seal that were threatened

²³*Ibid.*, Secretary Bayard to President Cleveland, Jan. 22, 1887.

²⁴*Ibid.*, Secretary Bayard to Sir Lionel West, Feb. 3, April 12, 1887.

²⁵*Ibid.*, Memorandum prepared by Secretary Bayard for President Cleveland, April 28, 1887.

²⁶*Bayard Letter Book*, V, Secretary Bayard to Phelps, May 6, 1887.

²⁷*Ibid.*, President Cleveland to the Acting Attorney-General, Aug. 23, 1887.

²⁸*Ibid.*, Memorandum written by Bayard, Aug. 1887.

with destruction by pelagic killing. After a conference with the Chief Executive and the Acting Attorney-General, Bayard noted in a memorandum that the "President seemed disposed to delay giving any order that would indicate the restriction of our jurisdiction to three miles."²⁹

The President's reluctance to take any decisive stand in this matter of jurisdiction in Bering Sea had many implications, and the *New York Times* remarked that the Cleveland Administration was still disposed to treat the North Pacific as a "closed sea."³⁰ This comment was correct with reference to the President's position, but it did not do justice to Bayard's position. In a personal letter to an old friend, Bayard frankly stated that he would not make any claim that was untenable. He believed that any assertion of jurisdiction over the waters of Bering Sea was in direct conflict with the traditional American support of the doctrine of the freedom of the seas. With special reference to the role played by the Alaska Commercial Company, he was determined "not to allow the interests of any association of Commercial or trading interests to lead us into a position not based upon law, justice and consequent National dignity and self-respect."³¹

But Bayard soon realized that the Acting Attorney-General was firmly of the opinion that the United States had jurisdiction over vast stretches of Bering Sea. The three-mile limit was scornfully rejected by this lawyer who would not permit his far-ranging vision to be cramped by accepted legal limitations. In a long letter to Bayard, he discussed with legal loquacity the many points involved in the question of preserving the fur seals in Bering Sea. After a show of learning he came to the conclusion that the "United States, as sovereign, has the right to protect the fur seals whose habitat is upon the shores and islands of Alaska, whether within or without the marine belt."³²

After receiving this jolt from the Department of Justice, Bayard next felt the impact of a learned memorandum from Francis Wharton, the Solicitor of the Department of State. In his earlier memoranda Wharton had insisted that the American government could not claim any jurisdiction in Bering Sea outside the three-mile limit. Now, possibly taking his cue from the President or from Mr. Jenks, Wharton suddenly abandoned his former ground and moved to the position that the "three-mile zone" is not "an arbitrary cosmopolitan rule, but a rule adopted by compromise and custom for certain specific coasts." Applying this idea to the situation in Bering Sea, Wharton expressed the conviction that "wherever a sovereign has property, there he is to have sufficient police control over the waters adjacent to such property as to enable him to protect it. This is the rule of the law of nations. . . . The three-mile rule has never applied to the North Pacific."³³

While Bayard was trying to digest this legal advice that looked towards the adoption of a policy that was certain to lead to increasing difficulties with England, Phelps, in London, was sounding a note that was distinctly belligerent. Unlike other American representatives at the Court of St. James, Phelps was never converted into an Anglophile

²⁹*Ibid.*, Memorandum written by Bayard, Aug. 25, 1887.

³⁰*New York Times*, Aug. 22, 1887.

³¹Bayard MS., Bayard to Thomas Wright, Aug. 27, 1887.

³²*Ibid.*, Acting Attorney-General (George A. Jenks) to Secretary Bayard, Aug. 31, 1887.

³³*Ibid.*, Francis Wharton to Secretary Bayard, Sept. 4, 1887.

with deep sympathies for the English point of view. He retained his Yankee suspicions of things British, and was sharply critical of the failure of the British Foreign Office to court American favour by turning a cold shoulder to Canadian demands. In a personal letter to Bayard, Phelps complained of British weakness wherever Canada was concerned. Lord Salisbury had assured him that he had done "what he could to induce moderation in the conduct of the Canadians, but again intimated that the Imperial Government stands much in the situation of a *broker*." This being the case, Bayard should hold on to the Canadian vessels that had been seized in Bering Sea. Such action might induce the Foreign Office to be more conciliatory.³⁴

Ill feeling concerning the Bering Sea seizures was fast rising both in the United States and in Canada, and the American Consul at Halifax reported that one of the newspapers in that city had become "very abusive towards the United States," and had demanded that the "outrages be stopped."³⁵ In response to these complaints, Sir Lionel West called at the Department of State and presented a long instruction he had received from Lord Salisbury. There was nothing new in this communication. The familiar arguments concerning British rights in the North Pacific were rehearsed, and the principles of international law were again discussed. It was a routine instruction that failed to point to any mode of prompt settlement of the controversy.³⁶

Bayard had already realized that nothing could be accomplished by a continuous exchange of diplomatic notes. The Bering Sea question could be settled only through international co-operation. On August 19 Bayard sent a circular instruction to the American Ministers accredited to France, Germany, Great Britain, Japan, Norway, Russia, and Sweden, directing them to lay before the Foreign Offices of these different countries the matter of preserving fur-seal life in Bering Sea through regulations prescribed in a multi-lateral treaty.³⁷

The French, Japanese, and Russian governments were quick to respond to this invitation, but Lord Salisbury delayed taking any action. Finally, in February, 1888, Phelps reported that the British Foreign Office had expressed its willingness to "join the United States Government in any preventive measures it may be thought best to adopt" with reference to the preservation of the herds of seal in the North Pacific.³⁸ Bayard was delighted with this co-operative spirit, and he wrote to Phelps that he would suggest that instructions be given to the officers in charge of American revenue cutters not to "molest British vessels at a distance from the shore in Behring's Sea."³⁹ As an additional precaution against friction in the North Pacific, Bayard instructed Phelps to ask Lord Salisbury about the possibility of refusing clearances to Canadian vessels intending to conduct sealing operations during the approaching summer.

When this matter was laid before Lord Lansdowne he expressed doubts about the power to refuse these clearances. He thought it was

³⁴*Ibid.*, Phelps to Secretary Bayard, Aug. 27, 1887.

³⁵*Ibid.*, Mr. Phelan to Secretary Bayard, Sept. 8, 1887.

³⁶*Fur Seal Arbitration*, II, 162-5, Marquis of Salisbury to Sir Lionel West, Sept. 10, 1887.

³⁷*Senate Ex. Doc.*, no. 106, 50 Cong., 2 sess., 84.

³⁸*Fur Seal Arbitration*, II, 175, Phelps to Secretary Bayard, Feb. 25, 1888.

³⁹Bayard MS., Bayard Letter Book, VII, Secretary Bayard to Phelps, March 16, 1888.

quite unlikely that the Canadian government would be able "to prevent" sealers from "fishing as usual during the present season." If the American government were wise it would see to it that Canadian sealing ships were unmolested, and it would "endeavor to come to some arrangement" with Great Britain for the "establishment of a close time for the future."⁴⁰

Lord Salisbury was more conciliatory than Lord Lansdowne, and instructions were sent to the Governor-General of Canada directing him to prevent the clearance, from British Columbian ports, of vessels intending to shoot seals in Bering Sea during the summer of 1888. Lord Salisbury then grew so generous as to suggest the "inclusion of everything north of north latitude 47 degrees" as the maritime area which should be under international control with reference to the preservation of seal life.⁴¹ Bayard responded to these goodwill gestures by indicating his willingness to accept a close season in the North Pacific that would run only from April 15 to October 15.⁴²

Concession was in the air and Anglo-American amity was much in evidence, but Canada soon supplied a big fly in this new ointment of friendship. After a conversation with Lord Salisbury, Henry White wrote a short letter to Secretary Bayard in which he expressed certain forebodings of trouble. He was certain that in Canada there was a real fear that the American government was "trying to 'do' them out of something. I have seen Lord Salisbury twice in society since writing to you on the 28th, and he implied that Canada is the source of delay. . . . Lord Salisbury inquired whether I had any instructions as to the *duration* of the proposed Seal Convention. Evidently the Canadians are anxious to cut it as short as possible. I said 'as long a time as possible,' but no special time had been mentioned in your instructions. He thought (I fancy, inspired by Canada) about three or five years."⁴³ There is little doubt that the necessity of consulting Canadian desires was the main reason for British delay in coming to an agreement with the United States with reference to the protection of seal life in the North Pacific. In seeking to conclude an arrangement concerning the close season, Lord Knutsford proposed that this season should operate with reference only to pelagic sealing. This proposal did not please Lord Lansdowne, who wished to have American sealers on the islands in Bering Sea placed under the same restrictions as the sealers on the high seas. But Lord Knutsford apprehended difficulties in securing this concession from the United States, and he expressed his fears that if the present situation continued there was grave danger of "serious friction."⁴⁴

In order to prevent this friction, Bayard prepared for President Cleveland a draft of amended regulations that would not bear so hard upon Canadian sealing vessels in Bering Sea.⁴⁵ But this conciliatory course encountered many obstacles, and one of them was the reluctant attitude of British Columbian officials to respond to pressure from the

⁴⁰Macdonald Papers, Governor-General's Correspondence, XV, 127, Lansdowne to Sir John Macdonald, April 7, 1888.

⁴¹Bayard MS., Henry White to Secretary Bayard, April 18, 1888.

⁴²*Fur Seal Arbitration*, II, 180, Secretary Bayard to Henry White, May 1, 1888.

⁴³Bayard MS., Henry White to Secretary Bayard, May 2, 1888.

⁴⁴Governor-General's Correspondence, XV, 177-8, Lord Knutsford to Lord Lansdowne, May 9, 1888.

⁴⁵Bayard MS., Secretary Bayard to President Cleveland, May 9, 1888.

Foreign Office in the matter of refusing clearances for vessels engaged in sealing. To Bayard this attitude seemed unpardonable, and he thought it was difficult to see "why Great Britain should permit one of her colonies to thwart a plan intended to preserve the race of seals from extermination."⁴⁶

He was soon to discover that Lord Salisbury was extremely anxious to cater to Canadian desires. From Henry White news came that the Foreign Office would take no further steps to conclude a convention concerning seals until the wishes of the Canadian government had been ascertained in detail. London was paying more and more heed to Ottawa.⁴⁷

In June Phelps reported that Lord Salisbury was still awaiting some action on the part of Canada, and it was understood that he was growing "impatient" at the delay caused by Canadian tactics.⁴⁸ But this impatience did not seem seriously to worry the Canadian government, and negotiations continued their leisurely course. On July 13 Phelps informed Bayard that no progress had been made in the matter of the "seal fishery convention owing solely to the opposition of Canada. England and Russia agree with us. I shall continue to press it, and unless soon disposed of, shall recommend a course in which Russia will join, and to which England will not, I am sure, take much exception—the seizure of all vessels found engaged in the exterminating cruelty which it is sought to put an end to. I do not doubt that such a course may be supported."⁴⁹ In London Phelps began to chafe more and more under British reluctance to exert pressure upon Canada, and he became convinced that the situation called for firm action on the part of the United States. America "must show Canada that she cannot outrage us with impunity. And the moment we take a firm stand all the trouble will cease. That is the surest way to avoid difficulty. And you may be sure it will be satisfactory to the present British Government which is embarrassed by Canadian conduct which she can not control and can not justify, and can not afford to fight for."⁵⁰

This belligerent advice was given to Bayard in a personal letter from Phelps in the second week of September, 1888. In an official despatch of the same date he writes in the same aggressive spirit. There were only two alternatives for the American government to take. One was meek submission to Canadian practices in the North Pacific, and the other was seizure of Canadian sealing vessels. Between these two alternatives there should not be the slightest hesitation on the part of the American government. The three-mile limit had been invoked by the British government as a prohibition against the seizure of Canadian vessels on the high seas, but this limit had no universal application in international law. It should also be remembered that international law is not a collection of dusty precedents that statesmen keep in national archives against the time when they may be used to advantage. International law is something that is constantly expanding and taking on new aspects: it had "arisen from precedents that have been established

⁴⁶*Ibid.*, Memorandum written by Bayard, May 17, 1888.

⁴⁷*Ibid.*, Henry White to Secretary Bayard, May 17, 1888.

⁴⁸*Ibid.*, Phelps to Secretary Bayard, June 23, 1888.

⁴⁹*Ibid.*, Phelps to Secretary Bayard, July 13, 1888.

⁵⁰*Ibid.*, Phelps to Secretary Bayard, Sept. 12, 1888.

when the just occasion for them arose, undeterred by the discussion of abstract and inadequate rules."⁵¹

Phelps was eager for a show of force, but Bayard would not adopt such a belligerent course of action. He was familiar with the fact that one nation cannot make international law no matter how pressing the exigency. He continued to adhere to the position that the best way to settle the seal-fisheries dispute was through an "international arrangement which would enable the nations to co-operate for the purpose of preventing the destruction of the seal."⁵² This international arrangement must have a background of friendly understanding rather than a prelude of sharp friction that might lead to war.

Although Bayard constantly clung to this policy of conciliation, there were some officials in the Cleveland Administration who thought that the best way to bring the British government to reason was through the adoption of a policy of defiance. In Congress this was a common viewpoint, and on February 18, 1889, Mr. Dunn, Chairman of the Committee on Merchant Marine and Fisheries, reported back from his committee a bill (H.R. 12432) to provide for the better protection of the fur-seal and salmon fisheries of Alaska. One paragraph in this bill amended section 1956 of the *Revised Statutes of the United States* so that its terms included "all the waters of Behring Sea" that were embraced within the boundaries as described in the treaty of March 30, 1867. The President was empowered to issue a proclamation warning all persons against entering these waters for the purpose of violating the provisions of this section.⁵³

In his speech in support of this bill, Mr. Dunn frankly stated that his purpose was more adequately to protect seal life in the North Pacific. Russia had exercised jurisdiction over Bering Sea, and the United States should do the same.⁵⁴ Other members of Congress were equally forthright in expressing their opinions about the necessity for extending American control over the waters of Bering Sea, and it was apparent that they had little concern about the consequences.⁵⁵

This belligerence on the part of members of the House of Representatives was somewhat tempered by a measure of restraint exercised by the more conservative members of the Senate. At a conference between House and Senate leaders the bill dealing with the fur-seal fisheries was amended so as to make its provisions sufficiently ambiguous. Section 1956 of the *Revised Statutes* was now to apply only to "the dominion of the United States in the waters of the Behring Sea," and the President was empowered to issue a proclamation warning all persons against entering these waters for the purpose of killing fur-bearing animals. He was also given authority to send one or more vessels to cruise in these designated waters and seize all vessels engaged in operations that were in violation of section 1956.⁵⁶

As one reads the provisions of this bill it is evident that the legislative decks had been cleared for action that might easily bring war. The person directly responsible for this legislation was Mr. Poindexter Dunn, Chairman of the Committee on Merchant Marine and Fisheries

⁵¹*Fur Seal Arbitration*, II, 181-3, Phelps to Secretary Bayard, Sept. 12, 1888.

⁵²Bayard MS., Memorandum written by Bayard after a conversation with Baron Rosen, March 1, 1889.

⁵³*Congressional Record*, 50 Cong., 2 sess., XX, pt. 3, Feb. 18, 1889, 2021-2.

⁵⁴*Ibid.*, 2022-7.

⁵⁵*Ibid.*, 2026.

⁵⁶*Ibid.*, 2614.

in the House of Representatives. Needless to say, Mr. Dunn must have worked in close co-operation with President Cleveland, who, it should be remembered, had held out against any surrender of the claim of American jurisdiction over Bering Sea. The President knew that Secretary Bayard had been strongly opposed to this claim, and therefore he had not hesitated to work behind Bayard's back in order to push through this legislative programme. He had not hesitated to employ similar tactics in connection with the Scott Act that had made a mere scrap of paper out of our treaty with China.⁵⁷ Devious dealing was a part of the Cleveland procedure when it came to the conduct of foreign relations in the latter part of his Administration.

For many months Bayard had held out against presidential pressure in this matter of jurisdiction over Bering Sea. He had also been at odds with the Solicitor of the Department of State and with the Minister to Great Britain on this same point. Party leaders in Congress apparently knew of this defection, and felt free to disregard Bayard's viewpoint. In the legislative rush that came in the last days of the 50th Congress, the Department of State was neatly by-passed, and Bayard was left holding a position that the President had always wished to surrender. By this surrender Mr. Cleveland abandoned the long-cherished principle of the freedom of the seas, and gave to the British government the opportunity to stand as a leader in the fight for a free sea. Bayard was keenly aware of all the implications in the legislation sponsored by the President; he could have no doubt that he had been pushed aside in the matter of formulating American foreign policy. He could, however, console himself with the thought that he had closely adhered to the principles that had long been regarded as important articles in the American creed. Freedom of the Seas was a slogan that dated back to the American Revolution, and it had been a battle cry in the War of 1812. Successive Secretaries of State had regarded it as one of the great political labels that Americans had lived by and had died by, and they had given it wide currency. But President Cleveland was so out of touch with American tradition that he closed his ears to this old call to arms and permitted Lord Salisbury to bring it out in a new edition with appropriate English accents. It is surprising to discover that the American Chief Executive was so ignorant of American precedents; it is equally surprising to discover that many American historians still speak in glowing terms of Cleveland's "sturdy Americanism."

DISCUSSION

In reply to questions, *Mr. Tansill* said that he thought Cleveland's attitude was to be explained almost entirely by the fact that he was looking toward the elections of 1888. Bayard, he said, thought Tupper was a liar, and disliked Chamberlain's "Birmingham tone," but he was on the whole friendly to Canada and wanted to avoid trouble. There was continual concern and perplexity in Washington during this period because the Foreign Office failed to put pressure on Canada. In regard to the Irish bloc in Congress, *Mr. Tansill* said that Bayard disliked it, but that Cleveland was responsive to it.

⁵⁷C. C. Tansill, *The Foreign Policy of Thomas F. Bayard* (New York, 1940), 175-7.