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The Framers' Intent and the Early Years of the Republic

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NOTES ON PRESIDENTIAL FOREIGN POLICY POWERS
(PART I)

THE FRAMERS' INTENT AND THE EARLY YEARS OF THE REPUBLIC

I. INTRODUCTION

"Most talk about the intent of the Framers—whether in the orations of politicians, the opinions of judges, or the monographs of professors—is as irrelevant as it is unpersuasive, as stale as it is strained, as rhetorically absurd as it is historically unsound." Clinton Rossiter, in reaching this conclusion, points out the snares that can trap scholars who attempt to analyze the Framers' objectives. He notes that on some major issues,

the Framers expressed no clear intent, or invited their descendants to generate an intent of their own; on others they divided into a dozen or a score or even fifty-five different camps... on still others they framed their intent in words whose meaning is now so different from what it was in 1787 that to quote a Framer at all is to quote him quite out of context.

2. Id. at 333-34. Justice Jackson, in his concurrence in Youngstown Sheet & Tube Co. v. Sawyer, offers some amusing and instructive comments about determining the Framers' intent:

Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharoah. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.

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Yet, Rossiter feels that throughout most of American history the Constitution has been interpreted well.\(^3\)

Provided that care is taken to avoid the pitfalls of which Rossiter warns, discussion of the Framers' intent can be quite fruitful.\(^4\) In and of itself, such discussion is interesting from an historical perspective because study of the Convention records and the historical context surrounding the Convention furnishes much insight into the values and perceptions of the Framers. Additionally, since the courts are frequently called upon to resolve constitutional issues, analysis of the Framers' intent can provide valuable clues as to how the Constitution should be interpreted and applied. Examination of the history of the Confederation period, in conjunction with the concerns of the Framers and the intellectual currents of the time, helps to elucidate the meaning that the Framers attached to particular phrases and sections of the Constitution and provides guidance as to how various sections should be construed.

Determining the Framers'\(^5\) intent, however, is an extremely dif-

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3. C. Rossiter, supra note 1, at 333.
4. In the early years of the republic, legislators shied away from discussing what the Framers intended. James Madison claimed in a speech (Apr. 6, 1796) in the House of Representatives that "he did not believe a single instance could be cited in which the sense of the Convention had been required or admitted as material in any Constitutional question" and he noted that when he made reference to the Convention during a discussion on the national bank several members criticized him. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 372, 373 (rev. ed. M. Farrand ed. 1966) [hereinafter cited as Farrand, RECORDS]. Madison's disavowal of the usefulness of the intentions of the Framers must be viewed, however, with an awareness of the partisan struggle that precipitated his speech: Madison objected to President Washington's use of the Convention journals to justify his decision to withhold information from the House on the Jay Treaty. For Madison and Washington's statements see id. at 371-75.

Elbridge Gerry (a future vice-President), in a speech in the House of Representatives on February 7, 1791, highlighted a crucial problem of attempts to analyze the Convention. He emphasized the difficulty of relying on the members' memories because their recollections would vary. Id. at 362. The factors that constrained the House in the early years from relying on the sense of the Convention are no longer present today. Neither closeness in time between the Convention and debates in the House nor the need to rely on divergent memories of the Convention delegates concern present-day scholars and legislators. Though difficulties remain, modern scholars, by utilizing the Convention records, can at least make an attempt to determine the Framers' intent on a particular issue.

5. This note will cover all the debates in the Convention. Special attention will be given to certain key Framers, principally James Madison, James Wilson, and Gouverneur Morris, who made 161, 168, and 173 speeches, respectively, at the Convention. C. Rossiter, supra note 1, at 252. Wilson played a key role in the details committee and Morris was responsible for the final version of the Constitution. (For discussion of the contribution of Wilson and Morris to the Constitution see id. at 247-48).
The general difficulties encountered in researching the Framers' intent are intensified in the field of foreign policy. The Convention members spent a great deal of their time determining how to apportion representation in Congress and devoted very little time to the question of how to conduct foreign policy. In fact, the delineation of control over treaties was developed by the Committee on Postponed Matters and, in the initial two months of the Convention, the dele-

8. M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 58 (1972). William Paterson, a delegate from New Jersey who had to leave the Convention, wrote to his fellow delegate, Oliver Ellsworth, on August 23, 1787: “[I]t is said, that you are afraid of the very Windows, and have a Man planted under them to prevent the Secrets and Doings from flying out.” 4 Farrand, RECORDS, supra note 4, at 73.
9. Letter from James Madison to Thomas Jefferson (June 6, 1787), in 10 THE PAPERS OF JAMES MADISON, supra note 7, at 28, 29.
10. Letter from James Madison to Thomas Jefferson (July 18, 1787), in id. at 105.
11. M. FARRAND, supra note 8, at 59.
12. See infra text accompanying notes 133-34.
gates adopted only one resolution that dealt explicitly with foreign affairs. By the end of the Convention the delegates were growing weary and simply wanted to conclude their task and return to their homes. The fact that the debate on foreign policy did not begin in earnest until a time when most of the delegates were anxious to leave resulted in little discussion of foreign policy issues. Thus, only a small number of debates offer any insight into the Framers' intended scheme for the direction of foreign policy.

II. Influences On The Framers

To understand the Framers' intent regarding foreign policy and the role of the three branches of government in general, there are three major areas that must be examined: the condition of the government under the Articles of Confederation; the manner in which American foreign policy functioned under the Articles; and the concerns and views of the Framers prior to the Convention. The inadequacies of the Confederation caused many Framers to espouse creation of a strong national government. They felt that the flaws of the Confederation necessitated changes, but were fearful of the wrongful exercise of power. Realizing the need for increased powers in the national government, the Framers sought to develop a governmental structure which could protect against improper use of these powers.

A. The Articles of Confederation

George Washington, on November 5, 1786, wrote to James


14. 2 Farrand, RECORDS, supra note 4, at 328; M. FARRAND, supra note 8, at 134-35. James Madison noted that Colonel Mason had departed from the Convention in "an exceeding ill humour indeed" and that "[a] number of little circumstances arising in part from the impatience which prevailed towards the close of the business, conspired to whet [Colonel Mason's] acrimony." Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 THE PAPERS OF JAMES MADISON, supra note 7, at 206, 215.

15. The inadequacies caused George Washington's early realization that a convention should be called for the purpose of strengthening the Federal government. Letter from George Washington to Reverend William Gordon (July 8, 1783), in 27 THE WRITINGS OF GEORGE WASHINGTON 48, 49 (J. Fitzpatrick ed. 1931) [hereinafter cited as WASHINGTON WRITINGS]. See also J. FLEXNER, GEORGE WASHINGTON IN THE AMERICAN REVOLUTION (1775-1783), 514 (1968). Washington, in a letter to Lafayette, expressed his view that the country needed a new constitution to bolster the government: "To form a constitution that will give consistency, stability, and dignity to the Union, and sufficient powers to the great council of the nation for general purposes is a duty which is incumbent upon every man who wishes well to his country." Id. at 521.
Madison: "How melancholy is the Reflection, that in so short a space, we should have made such large strides towards fulfilling the prediction of our transatlantic foe! 'Leave them to themselves, and their government will soon dissolve.' "

Washington's unhappiness over the flaws of the Confederation was representative of a concern expressed by others about the Confederation's defects. The concern over these defects crystalized at the Annapolis Convention, a gathering of commissioners from five states that met at the urging of the Virginia Assembly. On September 14, 1786, the Annapolis Convention adopted a report calling for delegates to meet in Philadelphia to discuss the situation of the United States and "to devise such further provisions as shall appear to them necessary to render the constitution of the [federal] Government adequate to the exigencies of the Union."

The Framers viewed the lack of adequate authority in the Congress as a major flaw of the Confederation. John Jay, in an address on the Constitution made September 17, 1787, enumerated the powers granted by the Confederation and deplored the great restric-


17. For example, see Otto's discussion of the fact that the condition of Congress caused much concern among patriots. Letter from Louis-Guillaume Otto, French Charge d'Affaires at Philadelphia, to the Comte de Vergennes (June 17, 1786), in R. MORRIS, supra note 7, at 166, 166. Madison spoke of the "mortal diseases of the existing constitution." Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), in 9 THE PAPERS OF JAMES MADISON, supra note 7, at 317, 318 (1975). For Madison's discussion of the defects of the Confederation, see Vices of the Political system of the U. States (Docket Apr. 1787), in id. at 348-58 [hereinafter cited as Vices of the Political system], and NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (REPORTED BY MADISON) 7-16 (A. Koch ed. 1966) (Madison's preface to the debates in the Convention) [hereinafter NOTES OF DEBATES]. Koch believes that the preface was written between 1830 and 1836. Id. at 3 n.2. See also the discussion of Edmund Randolph urging George Washington to attend the Convention that provided the one hope for rescuing "America from the impending ruin," found in 9 THE PAPERS OF JAMES MADISON, supra note 7, at 226 n.2. G. WOOD, in THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1969) notes that "nearly everyone in 1787 conceded 'the weakness of the Confederation' " and that even anti-federalists were willing to alter the Confederation. Id. at 471-72. Thomas Tredwell, a New York opponent of the Constitution, said that "[i]t is on all hands acknowledged . . . that the federal government is not adequate to the purpose of the Union." Id. at 471.


19. Id.

tions on these powers.\textsuperscript{21} Jay, for example, noted that the Congress could make war but was not empowered to raise the men or money needed to wage a war; it could make peace but did not have the power to enforce treaty terms; it could form alliances but had no ability to comply with them; and it could borrow money but had no means to repay the loans. Additionally, he observed that while Congress could deliberate and make requisitions, the states either could follow the Congress or ignore it at their discretion.\textsuperscript{22} This lack of authority in the Congress particularly was felt in the conduct of war, for the states' partial compliance with congressional requisitions increased war expenses and frustrated war plans.\textsuperscript{23}

Likewise, the lack of congressional authority to enforce its policies had serious consequences in the realm of foreign affairs. Congress had no power to force the states to abide by principles of international law and could not compel them to observe treaty provisions.\textsuperscript{24} Consequently, states could ignore treaty provisions and in fact some acted contrary to various treaties made by the United States.\textsuperscript{25} Secretary of Foreign Affairs, John Jay, in a report on violations of the peace treaty of 1783, noted infractions by both sides, but admitted the justice of British claims in his lengthy list of state violations of the treaty.\textsuperscript{26} One extreme example of a state's infringement on congressional power in the Confederation period was the state of Georgia's waging war against and making treaties with the Indians.\textsuperscript{27} Because the states were under no compulsion to obey the treaties, it was likely that they would continue their transgressions unless changes were made in the Confederation government.\textsuperscript{28}

\begin{itemize}
\item 21. Id. at 72-73. For the text of the Articles of Confederation, see Tansill, DOCUMENTS, supra note 18, at 27-37.
\item 22. Ford, PAMPHLETS, supra note 20, at 72-73.
\item 23. George Washington's last "circular letter to the States" (June 8, 1783 letter to the states as he prepared to resign as commander-in-chief), in 26 WASHINGTON WRITINGS, supra note 15, at 483, 495.
\item 24. See the discussion in M. FARRAND, supra note 8, at 46-47.
\item 25. Madison noted that the Treaty of Peace, the treaty with France, and the treaty with Holland were all violated by particular states. Vices of the Political System, supra note 17, at 349.
\item 26. See 9 THE PAPERS OF JAMES MADISON, supra note 7, at 263 (1975) (citing Jay's report, found in 31 JOURNALS OF THE CONTINENTAL CONGRESS 781-874).
\item 27. Vices of the Political System, supra note 17, at 348.
\item 28. For example, John Jay's urging of the states to repeal all laws "repugnant to the treaty of peace," 9 THE PAPERS OF JAMES MADISON, supra note 7, at 263 (quoting 31 JOURNALS OF THE CONTINENTAL CONGRESS 869-70), did not cause Virginia to change its course. Virginia passed a resolution calling for repeal of all acts contrary to the peace treaty, but the resolution was to take effect only when the other states had acted in a similar fashion. Later,
The repeated violations of treaties and the lack of congressional control over relations with foreign countries greatly hindered America’s ability to negotiate treaties with other nations. As James Madison stated, “[t]he confederation is so notoriously feeble, that foreign nations are unwilling to form any treaties with us — they are apprised that our general government cannot perform any of its engagements; but, that they may be violated at pleasure by any of the states.”

No nation would concede any advantages to the United States when it had no means to prevent states from violating a treaty. In fact, Great Britain justified its refusal to give up its frontier posts because of treaty violations by the states, and said that it would perform its part of the agreement only when the states fulfilled their obligations. Most importantly, given the weakness of the government, other nations derived advantages from American trade without granting favors in return. Foreign nations, such as England, France and Spain, sent large quantities of goods into the United States while putting commercial restraints on the United States and preventing it from trading with the foreign countries’ best
The foreign nations had nothing to lose by their monopolistic policy because without the ability to regulate commerce the Congress could not make policies to counter the foreign trade barriers.34

Finally, the Confederation Congress was unable to provide security against invasion because it had neither the power to prevent a war nor the ability to conduct one. Particular states, by their conduct towards foreign nations, might provoke hostilities, yet Congress had no power to check offenses by these states and thereby stave off the possibility of war.35 If war had been declared, the situation would have been quite grave because the Congress could not have commanded the country's resources in a critical situation.36 Moreover, critics of the Constitution believed that the Confederation could not protect the nation against coastal attacks because it lacked

33. See Speech by Madison in the Virginia Convention (June 7, 1788), in 11 THE PAPERS OF JAMES MADISON, supra note 7, at 90, 97. See also John Jay, An Address to the People of the State of New-York on the Subject of the Constitution (Sept. 17, 1787), reprinted in Ford, PAMPHLETS, supra note 20, at 73. For a discussion of British restrictions on American trade see P. VARG, supra note 32, at 51-52. France, though it maintained a less restrictive trade policy toward the states, enforced a tobacco monopoly, thus hindering American trade in one of its crucial export products. F. GILBERT, TO THE FAREWELL ADDRESS: IDEAS OF EARLY AMERICAN FOREIGN POLICY 88 (1961).

34. NOTES OF DEBATES, supra note 17, at 14. See also James Wilson's viewpoint expressed in Wilson, Commentaries on the Constitution 1787 in SELECTED POLITICAL ESSAYS OF JAMES WILSON 163, 177 (R. Adams ed. 1930) (speech in the Pennsylvania Convention, November 24, 1787). Angered by British trade policies, Thomas Jefferson and John Adams (who were representing the United States in Europe at the time) discussed means of retaliation against British policies. Adams suggested possible measures against Britain including enacting tariffs, giving a preference to France and having each state pass a Navigation Act. Letters from John Adams to Thomas Jefferson (Aug. 7, 1785, Oct. 3, 1785, and Oct. 24, 1785), in 1 THE ADAMS-JEFFERSON LETTERS 50, 77-78, 85-86 (L. Cappon ed. 1959). Jefferson hoped that the state assemblies would quickly transfer power to the Congress to enable it to pass a navigation act against England. Letter from Thomas Jefferson to John Adams (Nov. 19, 1785), in id. at 94. George Washington believed that commercial regulations by states could not provide a solution because whenever one state passed prohibitory laws another would seek trade advantages by allowing importation of the goods. S. BEMIS, supra note 30, at 34. The British, in determining their trade policies, understood the fact that it was unlikely that the states could act as a nation and institute retaliatory policies. Lord Sheffield who, according to Bemis, was the principal force behind British trade policy, wrote in his 1784 work, Observations on the Commerce of the American States, that the British "might as reasonably dread the effects of combinations among the Germans as among the American States." Id. at 35.

35. See Letter from Edmund Randolph to the Virginia Speaker of the House of Delegates (Oct. 10, 1787), in Ford, PAMPHLETS, supra note 20, at 261-63. Randolph deplored the fact that the "confederacy should be doomed to be plunged into war, from its wretched impotency to check offenses against [the law of nations]." Id.

36. See David Ramsay, An Address to the Freemen of South Carolina on the subject of the Federal Constitution, in Ford, PAMPHLETS, supra note 20, at 371, 379.
There is no doubt that the difficulties that plagued the Confederation in the area of foreign affairs, and the Confederation's susceptibility to invasion, were important factors in convincing American leaders of the need to make major changes in the Confederation. The Framers realized that the Confederation had to be powerful enough to maintain itself against foreign and domestic dangers. This need to make the country strong was particularly pressing because of America's neutral status. Once the United States had respectable power, it could engage in commerce with belligerents without fears of being dragged into war because no warring party would risk hostilities with a United States capable of defending itself. In addition, a strengthened United States would no longer be forced to accept degrading trade relations. Instead, it would be able to establish favorable commercial treaties and to develop permanent trade relations with other countries.

37. Id.
38. See H. Commager, The Empire of Reason: How Europe Imagined and America Realized the Enlightenment 191 (1977). Alexander Hamilton declared that the government could not provide the country with tranquility at home until it possessed "sufficient stability and strength to make us respectable abroad." 1 Farrand, Records, supra note 4, at 467.
39. 11 The Papers of James Madison, supra note 7, at 109. Hamilton said that a nation could follow a neutral path only if it had a strong government. 1 Farrand, Records, supra note 4, at 473.
40. 11 The Papers of James Madison, supra note 7, at 109. The War of 1812 is the perfect example of the dangers that faced the neutral United States until it developed sufficient military and economic strength.
41. See Iredell (Member of the First North Carolina Convention), Answers to Mr. Mason's Objections to the New Constitution, reprinted in Ford, Pamphlets, supra note 20, at 358; see also Letter from Cyrus Griffin to James Madison (May 19, 1788) (discussing a letter from John Adams), in 11 The Papers of James Madison, supra note 7, at 52, 53. Griffin wrote to Madison that "the Courtiers jest very much upon our debelitated [sic] situation, but all seem to think that the new Constitution if adopted will place this Country upon a respectable foundation—and untill [sic] that period arrives they can have no permanent Intercourse with us." Id. Hamilton noted that when the government could take measures against British merchants, it could force the British to relax its trade restrictions. P. Varg, supra note 32, at 58; The Federalist No. 11, at 85-86 (A. Hamilton) (C. Rossiter ed. 1961). See also J. Combs, supra note 31, at 24. In fact, even after the ratification of the Constitution, the British still restricted American trade. Congress could have promulgated discriminatory policies against the English, but the British might have retaliated with additional measures. Most importantly, the Americans were dependent on British trade. Britain had a great advantage over the United States because as Lord Sheffield argued (1) the states could not produce their own manufactures, (2) the British goods were of better quality and were cheaper than those of the rest of Europe, (3) the British could do without American products and therefore did not have to worry about loss of American products, and (4) only the British could provide the credit that American merchants needed in order to deal in the European trade. S. Bemis, supra note
Given the perceived risk of foreign invasion and the desire for trade benefits, it is no surprise that there was substantial agreement among the American leaders regarding the need for increased powers in the national government over foreign policy matters. A congressional committee recognized the need for increased federal powers in regulating trade, noting that it was necessary for Congress to be able to put restraints on other nations in order to force them to reciprocate in giving trade advantages. Even the Federal Farmer, the most famous opponent of the Constitution, stated that powers respecting external affairs, including actions on the seas, war and peace, and foreign commerce, could properly be lodged only in the national government. Finally, in its draft that accompanied the Constitution that it sent to Congress, the Convention noted that the country’s friends long had desired that the war and treaty powers “should be fully and effectually vested in the general government of the Union.”

It has been argued that the Federalists found foreign affairs to be the crucial element in building a consensus favoring the Constitution. The Federalists stressed the issues of weak national defense,

30, at 37-40; J. Combs, supra note 31, at 7-8.
42. 9 THE PAPERS OF JAMES MADISON, supra note 7, at 84 n.10, 85 (1975) (citing the JOURNAL OF THE CONTINENTAL CONGRESS).
43. The Federal Farmer wrote two pamphlets during the ratification controversy examining the Constitution and promoting efforts to secure amendments to the Constitution. LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN xiii (W. Bennett ed. 1978) [hereinafter cited as FEDERAL FARMER]. As the letters indicate, the Federal Farmer espoused both federalism and republicanism. Id. at xx. Soon after the publication of the first pamphlet, a Connecticut writer attributed the work to Richard Henry Lee and denounced him for writing it. For many years it was generally accepted that Lee wrote the Federal Farmer letters. However, despite similarities between Lee’s proposals and those of the Federal Farmer, there is much doubt regarding the authorship of the pamphlets. Id. at xiv-xx. Bennett, the editor of the complete Federal Farmer letters, says that “[t]he evidence supporting the attribution of authorship of the Federal Farmer’s letters to Lee, while strong, hardly seems sufficient to justify continuing this attribution.” Id. at xx. Gordon Wood feels that Lee probably did not author the pamphlets. Wood, The Authorship of the Letters from the Federal Farmer, WM. & MARY Q., 3rd Ser. XXXI, (April 1974), at 299-308. Instead, Wood feels that the pamphlets were likely written by a New Yorker. Id. at 308. Richard Henry Lee played a prominent role in the revolutionary era. He was a Continental Congress member who introduced the resolution calling for a declaration of independence, a signer of the Declaration of Independence, president of the Continental Congress (1784-1785), and a United States Senator (1789-1792) who argued strenuously for a Bill of Rights. See 6 DICTIONARY OF AMERICAN BIOGRAPHY 117-120 (D. Malone ed. 1961).
44. FEDERAL FARMER, supra note 43, at 18.
45. 2 Farrand, Records, supra note 4, at 666-67.
national honor, and the need to retaliate against trade restrictions because nearly everyone in the country believed that the government needed to be strengthened in the area of foreign affairs.\textsuperscript{47}

\section*{B. Political Beliefs of the Framers}

In the years prior to the Convention, Americans had common notions regarding man's love of power. The Marylander, in 1776, said that men by their nature were fond of power and were unwilling to part with it.\textsuperscript{48} The New Hampshire Convention declared that "[t]he love of Power is so alluring . . . that few have ever been able to resist its bewitching influence."\textsuperscript{49} John Adams was especially distrustful of human nature and man's quest for power. In a letter dated April 5, 1788, Adams expressed a belief that "[m]en are not only ambitious but their ambition is unbounded; they are not only avaricious but their avarice is insatiable."\textsuperscript{50}

It is no surprise, given his view of the human spirit, that Adams was such a persistent advocate of checks and balances.\textsuperscript{51} Still, the need to provide safeguards against the abuse of power was taken for granted by most Americans. Americans generally believed that whoever held the authority would continually seek to increase his influence—"[w]herever power is lodged there is a constant propensity to enlarge its boundaries"\textsuperscript{52}—and, therefore, had to be restrained.\textsuperscript{53}

Closely related to the fears regarding officials' grasping for power was a concern over the possibility that a tyranny might develop in the United States. Initially, Americans believed that the executive presented the greatest danger to the Union.\textsuperscript{54} Filled with strong feelings against executive authority, Americans quickly subordinated the role of the executive branch. Eight state constitutions were adopted between 1776 and 1778, and all except New York reduced the executive to a subordinate position.\textsuperscript{55} When important

\begin{itemize}
\item \textsuperscript{47} Id. at 445-46, 450 n.21. "Of the first 36 articles, 25 concerned the lack of national security." \textit{Id.} at 446.
\item \textsuperscript{48} G. Wood, supra note 17, at 150.
\item \textsuperscript{49} \textit{Id.} at 447.
\item \textsuperscript{50} Letter from John Adams to Thomas Brand-Hollis (Apr. 5, 1788), reprinted in E. Cassara, The Enlightenment in America 97 (1975) (quoting J. Disney, Memoirs of Thomas Brand-Hollis 32-33 (1808)). For the idea that distrust of human nature was a key element of John Adams' political beliefs see H. Commager, supra note 38, at 215-16.
\item \textsuperscript{51} E. Cassara, supra note 50, at 97.
\item \textsuperscript{52} G. Wood, supra note 17, at 447 (quoting the New Hampshire Convention).
\item \textsuperscript{53} See \textit{The Federalist} No. 48, at 308 (J. Madison) (C. Rossiter ed. 1961).
\item \textsuperscript{54} G. Wood, supra note 17, at 432.
\item \textsuperscript{55} A. Sofaer, \textit{War, Foreign Affairs and Constitutional Power: The Origins
powers were assigned to the executive, they were usually given subject to the consent of a council or a legislature.\textsuperscript{66} This prejudice against and fear of the executive was still prevalent in the United States when the delegates convened in Philadelphia. The Convention debates highlight the delegates’ trepidation regarding the increase of executive power,\textsuperscript{67} despite the delegates’ belief in the necessity for a

\textsuperscript{17} (1976),

\textsuperscript{56}. \textit{Id.}

\textsuperscript{57}. Secretary of the Treasury, Alexander Hamilton, the strongest advocate of executive power at the Convention, provides the most striking evidence that the Framers’ fears were justified: Although historians disagree about the significance of Hamilton’s activities, it is clear that he was guilty of gross indiscretion in his dealings with British Ambassador George Hammond and Major George Beckwith, an aide to the British governor of Canada and a British secret agent. Hamilton desired to conceal his relationship with Beckwith, advising him that he “did not ‘chuse to have this go any further in America.’” J. \textsc{Boyd}, \textit{Number 7: Alexander Hamilton’s Secret Attempts to Control American Foreign Policy} 12 (1964) (footnote omitted). Hamilton told Beckwith of America’s desire for a political alliance with Britain and attributed this desire to Washington and a majority of the Senate. Combs has declared that this communication was “way out of bounds [because] Washington had authorized no such statements; and while he certainly did want a commercial treaty with England, he had no predilections for Great Britain and no desire for a political alliance.” J. \textsc{Combs}, \textit{supra} note 31, at 49. At the very least, Hamilton’s relationship with these British officials was indiscreet. Viewed most critically, it furnishes ammunition to attack Hamilton’s foreign policy activities and has been interpreted as an attempt to manipulate the American government’s official policy. J. \textsc{Boyd}, \textit{supra}, at xiii. Boyd has suggested that Hamilton went substantially beyond indiscretion by actually misleading the administration regarding the British position on American relations. Boyd claims that Hamilton deceived Washington because he wanted to offset the damaging effect of a report by Gouverneur Morris questioning Britain’s sincerity in seeking to improve relations. \textit{Id.} at 46; for a discussion of the Morris mission, see \textit{infra} notes 320-23 and accompanying text. Boyd summed up his analysis of the Hamilton-Beckwith affair by declaring that “[t]he calculated and continuing use of deception by the Secretary of the Treasury is thus a major factor that must be reckoned with in the assessment of foreign policy in the first administration and beyond.” \textit{Id.} at 85. But see G. \textsc{Lycan}, \textit{Alexander Hamilton \& American Foreign Policy} 122-23 (1970) (criticizing Boyd’s treatment of Hamilton’s relationship with Beckwith).

Another commentator has suggested that Hamilton seriously undermined America’s bargaining position during the Anglo-Spanish War Crisis of 1790 by assuring Beckwith that the United States would not support the Spanish. Kaplan, \textit{The Consensus of 1789: Jefferson and Hamilton on American Foreign Policy}, 71 \textsc{So. Atl. Q.} 91, 102-03 (1972). Later, Hamilton would substantially destroy Jay’s bargaining chip by informing the British ambassador that the United States would not enter into an armed neutrality with the Baltic powers. J. \textsc{Carroll} \& M. \textsc{Ashworth}, \textit{7 George Washington} 239 n.157 (1957) (completing the biography by D. Freeman); S. \textsc{Bemis}, \textit{supra} note 30, at 337; for a discussion of Jay’s mission and treaty, see \textit{infra} notes 480-517 and accompanying text.

Even Thomas Jefferson, Hamilton’s adversary in the Cabinet and an advocate of a more limited executive role, is not above reproach. While he cannot be accused of the sustained misconduct of Hamilton, his involvement with the French Minister Genet bordered on treason: Genet informed Jefferson of a plan to go to Kentucky to organize an expedition to attack the Spanish city of New Orleans. C. \textsc{Thomas}, \textit{American Neutrality in 1793}, at 183 (1931). Despite the possible consequences of an attack on the Spanish city from American territory,
strong leader. Colonel Mason, a delegate from Virginia, denounced monarchy and warned that the Convention was going too far in granting powers to the executive. Pierce Butler, a delegate from South Carolina, dismissed claims that the United States had no reason to fear the head of the government and stated that "a Cataline or a Cromwell [could] arise in this Country as well as in others." Finally, Benjamin Franklin expressed his concern that giving absolute veto power to the executive would enable him to subject the legislature to his will. He also cautioned the Convention that the chief official could keep increasing his power until he became a monarch. The delegates at the Convention, in developing the Constitution, acted with an acute awareness of the great risks to liberty posed by a powerful executive.

While some Convention delegates feared that an excess of executive power would lead to tyranny, others were just as fearful of legislative tyranny. James Wilson warned that tyranny could come in many forms, noting that besides despotism from the executive and military there could develop a legislative despotism. Thomas Jefferson believed that concentrating legislative, executive and judicial authority in the same hands was the essence of tyranny and concluded that 173 despot in the legislative branch would be just as oppressive as a single despot. The Framers' wariness of the legislature stemmed from their awareness of the state legislatures' usurpation of the powers of the other branches during the Confederation period. The experience of the Confederation had shown the Fram-

Jefferson failed to notify Washington of Genet's plans, S. Bemis, supra note 30, at 198, and assisted Genet by putting him in contact with several people in Kentucky. C. Thomas, supra, at 184.

For a discussion of the questioned allegiance of Edmund Randolph, who replaced Jefferson as Secretary of State, see generally J. Carroll & M. Ashworth, supra, at 265-298.

58. Alexander Hamilton and James Wilson went so far as to advocate an absolute veto. 1 Farrand, Records, supra note 4, at 98.

59. 1 Farrand, Records, supra note 4, at 101-02. Mason hoped that nothing resembling a monarchy would develop in the United States. He objected to giving the Executive an absolute veto saying that it would be enough to allow him "to suspend offensive laws, till they shall be coolly [sic] revised." Id. at 102.

60. Id. at 100.
61. Id. at 103.
62. Id. at 254.


64. See G. Wood, supra note 17, at 550-51. For example, the legislatures "meddled constantly in judicial affairs, nullified court verdicts, vacated judgments, remitted fines . . . ." H. Commager, supra note 38, at 214; see also The Federalist No. 48, at 309 (J. Madison)
ers that they had to protect against legislative as well as executive attempts to aggrandize their respective powers.65

Due to their distrust of power and their worries about tyranny, the Framers desired that the government contain safeguards against the abuse of power. They, like most Americans, were in agreement as to the importance of a separation of powers.66 Madison, for example, "conceived it to be absolutely necessary to a well constituted Republic that the [executive and legislative branches] be kept distinct [and] independent of each other."67 He felt that a concentration of powers in the same hands "may justly be pronounced the very definition of tyranny."68 The ease and speed with which the Convention adopted the doctrine of separation of power indicates that the Convention delegates generally shared Madison's belief in the need to separate powers.69

The Framers, while espousing the doctrine of separation of powers, felt that additional means to protect against tyranny were essential.70 Again, the proposals formulated by the Framers recalled the


65. For Convention proposals to restrain the legislature, see, for example, 1 Farrand, RECORDS, supra note 4, at 158, 254 and 2 id. at 407.

66. The roots of the American theory of separation of powers are found in the writings of Montesquieu. As James Madison said, "The oracle who is always consulted and cited on this subject is the celebrated Montesquieu." THE FEDERALIST No. 47, at 301 (J. Madison) (C. Rossiter ed. 1961). The doctrine comprised the idea that the legislative, executive, and judicial functions had to be entrusted to three separate and distinct branches of government each responsible for one of the functions.

Examples of the belief in the desirability of separation of powers abound in the years prior to the Convention. The instructions of the town of Boston to its representatives in the General Court in May 1776 expressed the view that it was "essential to Liberty" that the three powers should be "as nearly as possible, independent of and separate from each other." G. WOOD, supra note 17, at 150. Thomas Jefferson wrote in a letter to James Madison (Dec. 16, 1786) that for the government to exercise its powers in the best manner it should be organized and separated according to legislative, executive and judicial functions. 9 THE PAPERS OF JAMES MADISON, supra note 7, at 211 (1975). John Jay, in An Address to the People of the State of New-York on the Subject of the Constitution (Sept. 17, 1787) noted that there were numerous instances where governments in which all powers were held by the same body had plunged into tyrannies, and it was therefore prudent that the three governmental functions should be placed in different hands. Ford, PAMPHLETS, supra note 20, at 75.

67. 2 Farrand, RECORDS, supra note 4, at 35.

68. THE FEDERALIST No. 47, at 301 (J. Madison) (C. Rossiter ed. 1961).

69. On May 30, the second day of full business in the Convention, the delegates passed a resolution [ayes-6, noes-1, divided-1] that "a national government ought to be established consisting of a supreme Legislative, Judiciary, and Executive." 1 Farrand, RECORDS, supra note 4, at 30-31.

70. Madison noted that separation of departments on paper was not a sufficient guard against encroachment, and it was therefore necessary to introduce a system of balances to guarantee the separation. 2 Farrand, RECORDS, supra note 4, at 77.
responses of state leaders to the need to provide checks against the concentration of power. The example of the Confederation legislatures had proved to the American political leaders that a pure system of separation of power was an inadequate guard against branches grasping excessive powers. New York, in its 1777 constitution, reacted against pure separation of powers and began the movement toward a system of checks and balances. The shift in the pre-Convention period toward a theory of checks and balances culminated in the Massachusetts Constitution of 1780, which developed a system of separated powers based on checks and balances. The Confederation experience demonstrated that a constitutional separation was not sufficient to guard against encroachment by one branch upon another branch's powers. The Framers, therefore, felt it necessary to construct a system of checks and balances that would effectively restrain each of the branches.

By the time of the Convention, key Framers, such as Madison and Wilson, had developed ideas about the mechanics of the system of checks. Madison and Wilson altered the conception that separa-

71. Pure separation of powers means a rigid separation. Madison claimed that, notwithstanding the sweeping declarations found in the state constitutions, none of them had kept the governmental departments absolutely separate. THE FEDERALIST No. 47, at 303-04 (J. Madison) (C. Rossiter ed. 1961). For Madison's examination of the states' mixing of governmental departments despite the broad statements in the constitutions denouncing such blending of powers, see id. at 304-07.

72. M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 148 (1967). The excesses of radicals in the Pennsylvania legislature and the tendency of state legislatures to accumulate additional powers caused American political leaders to shy away from a pure separation doctrine. Id.

73. Id. at 134, 148. There are numerous ways of defining the concept of checks and balances. The Essex Result, a reply from the town of Essex on the proposed state constitution, that influenced the Massachusetts Constitution, advocated that "[e]ach branch is to be independent, and further, to be so balanced, and be able to exert such checks upon the others, as will preserve it from a dependence on, or a union with them." Id. at 151 (footnote omitted). Thomas Jefferson, in his Notes on the State of Virginia, described a government in which the powers were so divided and balanced "that no one could transcend their legal limits without being effectually checked and restrained by the others." THE FEDERALIST No. 48, at 311 (J. Madison quoting Jefferson) (C. Rossiter ed. 1961). Madison said that the states had to develop a system whereby the branches would, by their mutual relations, provide the means of keeping each other confined to their proper spheres. THE FEDERALIST No. 51, at 320 (J. Madison) (C. Rossiter ed. 1961). Hamilton noted that the doctrine of separation of powers was "entirely compatible with a partial intermixture" of the branches for specific purposes. He stressed that in certain circumstances this intertwining of the departments was "not only proper but necessary to the mutual defense of the several members of the government against each other." THE FEDERALIST No. 66, at 401-02 (A. Hamilton) (C. Rossiter ed. 1961).

74. See M. VILE, supra note 72, at 148.

tion of powers meant that each department exclusively handle different governmental functions. Wilson claimed that “[s]eparation of the departments does not require that they should have separate objects but that they should act separately tho’ on the same objects.”

He cited as an example the fact that the Senate and House, though separate bodies, would act on the same objects. Rather than complete separation, the system required that the departments remain connected. As Madison stated, “unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires... can never in practice be duly maintained.” The Framers desired that each branch carefully scrutinize the others and, when necessary, act to prevent the other branches from usurping the others’ authority.

III. THE CONSTITUTIONAL CONVENTION

With this understanding of the background of the Framers’ beliefs, it is possible to begin a study of the Convention debates. In the opening days of the Convention, the delegates quickly discarded any thoughts of narrowly viewing their purpose. The Continental Congress, by its resolution of February 21, 1787, had summoned the national Convention for “the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions... to render the federal constitution adequate to the exigencies of Government [and] the preservation of the Union.” Delegates like General Charles Cotesworth Pinckney of South Carolina and Elbridge Gerry of Massachusetts asserted a belief that this resolution limited the possible scope of the Convention. As Madison noted, “[General Pinckney]

76. C. SMITH, JAMES WILSON: FOUNDING FATHER 1742-1798, at 258 (1956).
77. Id.
79. Bestor, supra note 13, at 536.
80. 3 Farrand, RECORDS, supra note 4, at 13, 14.
81. His cousin, Charles Pinckney, was a fellow member of the South Carolina delegation. C. Rossiter, supra note 1, at 132.
82. 1 Farrand, RECORDS, supra note 4, at 34. Though Gerry voiced his disapproval he acquiesced in the expanded scope of the Convention because he felt that to “preserve the Union, an efficient government was indispensably necessary, and that it would be difficult to make proper amendments to the Articles of Confederation.” Letter Containing the Reasons of the Hon. Elbridge Gerry, Esq., (For Not Signing the Federal Constitution), in 1 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 492, 493 (1836, revised ed. 1941) [hereinafter cited as ELLIOT, DEBATES].
expressed a doubt whether the act of Congs. recommending the Convention, or the Commissions of the deputies to it, could authorize a discussion of a System founded on different principles from the federal Constitution.\footnote{Stein: The Framers' Intent and the Early Years of the Republic} New York delegates Robert Yates and John Lansing justified their departure from the Convention and their opposition to the Constitution in part on their disapproval of the Convention's acting in contravention of its narrowly defined authority.\footnote{Letter from Robert Yates and John Lansing to the Governor of New York (Clinton), in 1 ELLIOT, DEBATES, supra note 82, at 480.}

The other delegates rejected this viewpoint and began to discuss the radical changes they thought vital to the well-being of the country.\footnote{In fact, on the same day that Pinckney voiced his objections to the Convention acting beyond its powers, the delegates voted that a "national Governt. ought to be established consisting of a supreme Legislative[,] Executive & Judiciary," thus replacing the Confederation Congress with a government comprised of three branches. 1 Farrand, RECORDS, supra note 4, at 35.}

The Randolph Resolutions,\footnote{The Randolph Resolutions (also known as the Virginia Plan) developed out of discussions held by the Virginia Convention delegates just prior to the start of the Convention on a plan for a new government. Randolph presented the plan to the Convention on May 29, 1787. 3 Farrand, RECORDS, supra note 4, at 593. For the text of the resolutions, see 1 Farrand, RECORDS, supra note 4, at 20-22.} which provided the focus for the early Convention debates and from which the basic outline of the Constitution evolved,\footnote{3 Farrand, RECORDS, supra note 4, at 593.} sheds little light on the Framers' intention regarding executive powers\footnote{As illustrated by the Randolph Plan, the delegates at this time did not use the term president. 1 Farrand, RECORDS, supra note 4, at 21. It was not until later in the Convention that the delegates decided that the executive branch should be composed of one man rather than several men. On July 17 the Convention unanimously passed a resolution of the Committee of the Whole House "[t]hat a national Executive be instituted to consist of a Single Person." 2 Farrand, RECORDS, supra note 4, at 22. The draft of the Committee of Detail, presented on August 6, 1787 and the first draft to be presented to the Convention, stated that the executive would be known as "The President." Id. at 185.} and foreign policy authority. The plan does not mention foreign relations and provides no substantive description of the scope of executive power.\footnote{Resolutions 7 and 8 concern the national executive. Resolution 7 gives the executive "general authority to execute the National laws" and says that the executive "ought to enjoy the Executive rights vested in Congress by the Confederation." Section 8 joined the Executive with members of the judiciary as a council of revision that could examine and veto laws. These

\footnote{Madison's notes of the Convention debates comprise the best source about the Convention proceedings. Farrand's first two volumes of Records are a compilation of the notes of the Convention debates kept by Madison and other delegates. Madison provides the only day by day account; other delegates' accounts provide only sketchy glimpses of occasional debates. Quotations from Farrand's Records are not the actual words of the particular Framers but are merely records of the speeches made by delegates.}

\footnote{Letter from Robert Yates and John Lansing to the Governor of New York (Clinton), in 1 ELLIOT, DEBATES, supra note 82, at 480.}

\footnote{In fact, on the same day that Pinckney voiced his objections to the Convention acting beyond its powers, the delegates voted that a "national Governt. ought to be established consisting of a supreme Legislative[,] Executive & Judiciary," thus replacing the Confederation Congress with a government comprised of three branches. 1 Farrand, RECORDS, supra note 4, at 35.}

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sal merely sketches an outline for a national government without addressing the specific powers of the branches it deemed necessary to create.

The first debates on Randolph's seventh resolution, which called for a National Executive, highlighted the delegates' conviction that the executive's powers should be strictly confined. All of the delegates who spoke on this issue indicated their wariness of an executive and proposed limits on executive power. Roger Sherman and James Wilson, at this time, held especially narrow views of executive powers. Sherman "considered the Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect," while Wilson stated that "[t]he only powers he conceived strictly Executive were those of executing the laws, and appointing officers." Wilson and Madison claimed that the power over war and peace was of a legislative nature, and the delegates who expressed their sentiments on this issue likewise hoped that the executive would not be vested with this power. General Pinckney's view illustrates the attitude of the delegates. He advocated a "vigorous Executive" but expressed anxiety about the executive having power over war, asserting that giving an executive such power would create "a Monarchy, of the worst kind, to wit an elective one." Clearly, as the early discussion of the Randolph executive resolution indicates, the delegates as a whole wanted strict limits on the executive and thought that he should not be given power over war and peace.

Alexander Hamilton provided a brief interlude from the debate concerning the Randolph Resolutions. Hamilton's plan, stirred little discussion, and the delegates immediately resumed their examination of the Randolph governmental scheme. Although Hamilton's speech generated little support and his plan was not

powers are the only executive powers included in Randolph's Resolutions. See 1 Farrand, Records, supra note 4, at 21.

91. For the debate, see id. at 64-67, 70.
92. Id. at 65.
93. Id. at 65-66.
94. Id. at 65-66, 70.
95. Id. at 64-65.
96. For the contents of the proposal, see id. at 291-93.
97. The delegates adjourned after the speech. Id. at 293. The next day, June 19, 1787, the body returned to the issues that were being discussed prior to Hamilton's speech. Id. at 312. There was a short discussion, concerning the role of the states in the new government, prompted by Hamilton's speech. See id. at 322-23.
98. William Johnson, a delegate from Connecticut, remarked on Hamilton's plan that "though he has been praised by every body, he has been supported by none." Id. at 363. One
THE FRAMERS' INTENT

considered by the Convention, it remains crucially important to an understanding of the Framers' intent regarding foreign policy. Hamilton's beliefs differed markedly from the average delegate's perspective. Hamilton declared that "the British Govt. was the best in the world" and proclaimed the House of Lords "a most noble institution." He went so far as to claim that the "English model" of an executive was "the only good one." Lastly, he even proposed that the Senate and the executive be appointed to life terms to be served "during good behaviour."

Hamilton's sentiments in favor of an independent executive elected for life furnish the backdrop for a discussion of his outline of a new government. Most importantly, while Hamilton favored a strong executive, he envisioned significant restraints on the executive's role in foreign affairs. Though Hamilton felt that executive qualities were necessary in treatymaking, he constrained the president's power to mold American foreign policy by requiring the Senate's "advice and approbation" for treaties. In addition, Hamilton placed a substantial limitation on the executive's control over war. He proposed that the Senate have "the sole power of declaring war," and that the executive direct the war effort only "when authorized or begun." That one of the Convention's strongest proponents of executive power placed such limits on executive foreign policy authority exemplifies the delegates' desire to have the legislative branch delegate, George Read of Delaware, said that Hamilton's scheme was the best plan proposed. Id. at 471.

99. See infra note 101. Hamilton, in his speech introducing his scheme, stated that he "did not mean to offer the paper he had sketched as a proposition to the Committee," but rather meant to suggest amendments to the Randolph plan. Id. at 291. The Committee of the Whole House referred several plans to the Committee of Detail (which was to draw up the first sketch of a constitution) but did not transmit Hamilton's proposal to it. 2 Farrand, Records, supra note 4, at 106.

100. 1 Farrand, Records, supra note 4, at 291. Hamilton himself said that "[h]e was aware that [his sketch of a government] went beyond the ideas of most members." Id.

101. Id. at 288.

102. Id. at 289. Nevertheless, he realized the need to propose a republican form of government to the nation. Id. at 288-89.

103. Id. at 291-92.

104. See id. at 292.

105. At the end of the Convention, Hamilton presented to Madison his thoughts on the type of constitution he favored. Hamilton still approved of the strict limits on executive authority that he had advocated in his speech early in the Convention. He called for limits on a presidential foreign policy role, proposing that the Senate have exclusive power over declarations of war, and that the Senate give its advice and consent to treaties by the President. In addition, he favored restrictions on the President as commander-in-chief. He sought to prevent the President from taking actual field command without congressional approval and from di-
play, at the very least, a prominent role in foreign policymaking.

The first preliminary draft of a constitution, presented by the Committee of Detail to the Convention on August 6, 1787, illustrated the delegates' leanings toward a predominant legislative role in foreign affairs. The draft gave the legislative bodies nearly exclusive control over the development of foreign policy. At that time, the crucial foreign policy powers concerning war, the high seas, commerce, and treaties were all placed in the legislative sphere. The committee draft called for congressional control over the war power, as it gave Congress control over both making war and fielding an army. It also supplied Congress with authority over the enactment of laws involving the "high seas," the "law of nations," and commerce. The Committee bestowed on the Senate complete control over treaties, including the appointment of ambassadors. The President's powers in the foreign affairs area were limited to acting as commander-in-chief and receiving ambassadors. This distribution of powers, therefore, juxtaposed an executive possessing the ceremonial power to receive ambassadors and the military power to command the armed forces, with a powerful Senate able to control treatymaking.

The Committee's draft also provided that "[t]he Executive Power of the United States shall be vested in a single person." It should be noted that in this draft the Committee used the same wording to introduce the legislative branch—"The legislative power shall be vested in a Congress"—therefore, no special grant of executive authority could be implied from the executive clause. Given the extensive powers granted to Congress, it could be argued}

recting any war efforts until war was actually commenced. 5 ELLIOT, DEBATES, supra note 82, at 584, 586-87.

106. On July 23, 1787, the convention voted unanimously to refer the proceedings (except those regarding the executive) to a "Committee for the purpose of reporting a Constitution conformably to the Proceedings aforesaid." 2 Farrand, RECORDS, supra note 4, at 85. The Convention selected John Rutledge (S.C.), Edmund Randolph (Va.), Nathaniel Gorham (Mass.), Oliver Elsworth (Conn.), and James Wilson (Pa.) to serve on the committee. Id. at 97. For the contents of their draft see 2 Farrand, RECORDS, supra note 4, at 177-89.

107. Id. at 182.

108. Id. at 181-82.

109. Id. at 183. The appointment power was very important because the appointees would be empowered to make treaties. See Bestor, supra note 13, at 595.

110. 2 Farrand, RECORDS, supra note 4, at 185. The draft referred to the executive as the president. Id. See supra note 92 for a discussion of the use of the term "executive."

111. See Bestor, supra note 13, at 594-95.

112. 2 Farrand, RECORDS, supra note 4, at 185.

113. Id. at 177.
that the Committee expected Congress to control policymaking in foreign affairs and did not intend the executive clause to confer any special presidential authority in external matters.

After the Committee presented its report, the delegates seemed to take for granted the fact that the Senate would have complete control over treaties. Charles Pinckney, for example, said that "[a]s the Senate is to have the power of making treaties and managing our foreign affairs, there is peculiar danger and impropriety in opening its door to those who have foreign attachments." There were numerous practical reasons pointing to a Senate rather than a House role in treaty-making. Charles Cotesworth Pinckney thought that the House, with its many members, could not be expected to maintain secrecy, and that it would not be in session often enough to permit it to be entrusted with this power. He felt that the Senate had special advantages for treaty-making in that it had substantially fewer members, six year terms, and equal state representation.

Hamilton similarly concluded that the House should not have treaty power, noting that the requisites for treaties—uniformity, secrecy and dispatch—could not be maintained by such a large body. Hamilton also recognized the inconvenience and expense involved in keeping the members of the House in session for this purpose. Concisely stated:

[T]here apparently was serious question in many Framers' minds whether the House, as opposed to the Senate, had the institutional capacity to deal with foreign affairs. The House was thought too large and infrequently in session for the requisite speed and secrecy, too short-term and fluctuating in its membership for the development of the necessary expertise, and too prone to factions to reflect the national interest.

114. Id. at 235.
115. The Federal Farmer suggested several reasons for a Senate treaty role:
[P]erhaps the senate is sufficiently numerous to be trusted with this power, sufficiently small to proceed with secrecy, and sufficiently permanent to exercise this power with proper consistency and due deliberation. To lodge this power [advice and consent] in a less respectable and less numerous body might not be safe.

FEDERAL FARMER, supra note 43, at 75.

116. See 4 ELIOT, DEBATES, supra note 82, at 280-81. See also id. at 264-65.
117. Id. at 281.
119. Id. at 452-53.
120. Reveley, supra note 6, at 119. For further discussion on treaty-making powers, see the views of Corbin in the Virginia ratifying convention, in ELIOT, DEBATES, supra note 82, Book I, vol. 3, at 509.
A final practical justification for giving the Senate treaty power was the belief that the Senate would be more insulated from the public than the House and would therefore be less likely to "yield to the impulse of sudden and violent passions." ¹²¹

In addition to the practical justifications, there were important political considerations underlying the Senate's treaty role. In a letter dated December 10, 1803, Gouverneur Morris commented that the small states would never have accepted the Constitution if it had placed all of the great powers in the House, and that the Convention, therefore, granted special powers, including treaty authority, to the Senate.¹²² The discussion of treaties by Convention delegates from North Carolina in their state ratifying convention also indicates that the concerns of the small states constituted the chief rationale for Senate influence over treaties. Delegate William R. Davie noted the small states' "extreme jealousy" and their fear that their interests might be sacrificed in negotiations. He felt that these fears prompted the small states' inflexibility and, therefore, he advocated a provision assuring "absolute equality" among the states in treatymaking.¹²³ Delegate Richard Spaight stated that giving the Senate treaty power resulted in "the interest of every state [being] equally attended to in the formation of treaties."¹²⁴ It is impossible to determine from the debates the influence of the small states in promoting the Senate role; but it is obvious that the small states' desires had some impact over its maintenance. James Wilson, in the Pennsylvania ratifying convention, deplored the Senate's popularity with small states and spoke of the great problems in providing checks on the body's power: "[T]he Senate is a favorite with many of the states, and it was with difficulty that these checks could be procured; it was one of the last exertions of conciliation, in the late Convention, that obtained them."¹²⁶

Despite a willingness to placate the small states, there developed

¹²². Letter from Gouverneur Morris to Lewis R. Morris (Dec. 10, 1803), in 3 Farrand, RECORDS, supra note 4, at 404, 405. President Washington, in his message to the House of Representatives in which he refused their request for information about the Jay Treaty, declared that the Senate was given great powers because the "sovereignty and political safety of the smaller States were deemed essentially to depend" on their representation in the Senate. To The House of Representatives (Mar. 30, 1796), in 35 WASHINGTON WRITINGS, supra note 15, at 4.
¹²³. See 4 ELLIOT, DEBATES, supra note 82, at 120.
¹²⁴. Id. at 27; see also Iredell's view, found in id. at 125.
¹²⁵. 2 Id., at 507. See also id. at 466.
a strong opposition to the Senate's exclusive authority over treaty-making. Delegates expressed general disapproval over the Senate's role in the government\(^{126}\) and many were eager to find means of checking its power.\(^{127}\) Madison noted that Colonel Mason had denounced the Senate's ability to make treaties "without legislative sanction," and that Mason had expressed a desire to limit the powers of the Senate which "could already sell the whole Country by means of Treaties."\(^{128}\) Likewise, Gouverneur Morris expressed his misgivings, remarking that he "did not know that he should agree to refer the making of Treaties to the Senate at all."\(^{129}\) Madison advocated presidential involvement in the treaty process, objecting to the fact that the Senate "represented the States alone," and alluding to "other obvious reasons."\(^{130}\) Though the delegates did not eliminate Senatorial domination at this time, there was enough dissatisfaction with the Senate role that changes seemed possible in the future.

Still, on August 31, 1787, the date of the appointment of a Committee on Postponed Matters,\(^{131}\) treaty power remained in the Senate's hands.\(^{132}\)

The Committee on Postponed Matters initiated a startling change in the treaty process. The Committee proposed that the "President by and with the advice and consent of the Senate, shall have power to make treaties. . . . But no Treaty . . . shall be made without the consent of two thirds of the Members present."\(^{133}\) Although it is not important in the context of this article to determine

\(^{126}\) Edmund Randolph observed that "almost every Speaker had made objections to the clause as it stood." 2 Farrand, RECORDS, supra note 4, at 393. See also the discussion of opposition to Senate treaty power in W. HOLT, TREATIES DEFEATED BY THE SENATE 4 (1964).

\(^{127}\) Reveley, supra note 6, at 96. For possible motivations underlying the disapproval with the Senate treaty function see C. THACH, THE CREATION OF THE PRESIDENCY 1775-1789, at 164 (1969).

\(^{128}\) 2 Farrand, RECORDS, supra note 4, at 297.

\(^{129}\) Id. at 392.

\(^{130}\) Id.

\(^{131}\) On August 31, the Convention appointed a committee to produce a report on parts of the Constitution that still had not been acted upon. Id. at 481. Delegate James McHenry spoke of a referral to a "grand committee [of] all the sections of the system under postpone-ment." Id. at 482. The Committee was also referred to as "The Committee of Eleven to whom sundry resolutions . . . were referred on the 31st. of August." Id. at 497. For a listing of the committee members, see id. at 481.

\(^{132}\) The Convention began its formal proceedings May 25, 1787. 1 Farrand, RECORDS, supra note 4, at 1, and concluded its work on September 17. 2 Farrand, RECORDS, supra note 4, at 650. The Committee on Postponed Matters was appointed on August 31 and presented its report containing the treaty clause on September 4. Id. at 481, 498.

\(^{133}\) 2 Farrand, RECORDS, supra note 4, at 495.
the roots of this scheme, it is noteworthy that this radical change came from the Committee rather than from the Convention debates. Moreover, this major change was adopted by the Convention "with surprising unanimity and surprisingly little debate."134

Unfortunately, the motivation for the Convention's acceptance of this significant modification is a matter of pure conjecture. Possibly, the delegates' increasing weariness and their desire to conclude the Convention caused them to accept the changes so willingly.135 Certainly the fact that many delegates had grave misgivings about the Senate contributed to the willingness to have a system with checks to protect against abuses by this body.136 The clause requiring two-thirds consent of the Senate may have helped to engender support for the Committee's proposal, because delegates felt that the two-thirds requirement would prevent Congress from acting against a particular region's interests. For example, many delegates favored the clause because they feared that a simple majority might vote to compromise the country's navigation rights to the Mississippi.137 The eastern states also supported this clause, basically because it protected their interests in Newfoundland fisheries.138 Lastly, the experiences under the Confederation may have helped convince the delegates of the need for an executive role in treatymaking and in foreign policy in general.

During the course of the Revolution, American leaders realized that Congress as a body could not maintain the war effort. The Continental Congress understood that it had to delegate authority over the nation's struggle and established a variety of congressional com-

134. M. FARRAND, supra note 8, at 171.
135. See supra note 14 and accompanying text.
136. See supra notes 132-36 and accompanying text.
137. Letter from Hugh Williamson to James Madison (June 2, 1788), in 3 FARRAND, RECORDS, supra note 4, at 306. Williamson, a delegate from North Carolina, said that this clause had been placed in the constitution for "the express purpose of preventing a majority of the Senate . . . from giving up the Mississippi." Id. at 306-07. Anxiety over the negotiations involving the Mississippi was widespread in states like Virginia because people in those states still remembered with bitterness the course of negotiations with Spain over the river rights. See, e.g., Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), in 9 THE PAPERS OF JAMES MADISON, supra note 7, at 319 (1975). Williamson noted "the Navigation of the Mississippi after what had already happened in Congress was not to be risqued in the Hands of a meer [sic] majority." 3 FARRAND, RECORDS, supra note 4, at 307.
138. Colonel Mason in Debate in Virginia Convention, reprinted in 3 FARRAND, RECORDS, supra note 4, at 335. For differing views about the Eastern states' willingness to relinquish the navigation rights, see speeches in the Virginia convention by Madison, Patrick Henry and William Grayson, in 3 ELLIOT, DEBATES, supra note 82, at 345-49, 351-56.
mittees to conduct the war. These committees, however, proved inadequate because they met irregularly, their membership changed frequently, and the members' congressional responsibilities prevented them from devoting the time required to run the war effort. These problems compelled Congress, in October 1777, to establish a new Board of War, composed of five men who were not members of Congress, with supervisory power over the conduct of war. Still, George Washington informed General Sullivan that Congress could not supply the army unless it established executive departments. Despite its reservations about giving excessive power to one man, the Congress realized that it was necessary to have an executive controlling key departments. As a result, the Congress, in 1781, appointed secretaries of war and treasury.

The Congress also had problems maintaining correspondence with other nations due to delays in relaying messages abroad. These delays convinced Congress that its Committee of Secret Correspondence had to be replaced by an executive agent. In 1781, it named Robert Livingston as Secretary of Foreign Affairs and permitted Livingston to correspond directly with American agents in Europe. Further, members of Congress could inspect his letters only when they concerned "great national objects." John Jay took over as Secretary of Foreign Affairs in 1784, after a brief hiatus during which Congress again attempted to direct diplomatic activity, and he restored the office to the prominent status it enjoyed during Livingston's tenure. Jay became the chief congressional adviser on for-

139. Guggenheimer, The Development of the Executive Departments 1775-1789, in Essays in the Constitutional History of the United States in the Formative Period 1775-1789, at 118-20 (J. Jameson ed. 1889 & photo. reprint 1970). Among committees formed were a committee to introduce the manufacture of saltpetre, a cannon committee and a medical committee. Id. at 119-20.

140. For discussion of the insurmountable flaws of the committees, see F. Gilbert, supra note 33, at 79; Guggenheimer, supra note 139, at 126; T. Frothingham, Washington: Commander in Chief 314 (1930).

141. Guggenheimer, supra note 139, at 125.

142. J. Flexner, supra note 15, at 398. By this time, General Sullivan had resigned his commission and been elected to Congress. Id.

143. For the view that a need for presidential diplomacy was demonstrated by the ineffectiveness of the Congress, see L. Henkin, Foreign Affairs and the Constitution 37 (1972).

144. Guggenheimer, supra note 139, at 126-27.

145. Id. at 161.

146. F. Gilbert, supra note 33, at 82.

147. Id. at 83.
foreign affairs and essentially directed American foreign relations.\textsuperscript{148} Congress had learned that it could not function effectively in areas involving foreign relations or control of the militia. It, therefore, found it necessary, for the smooth functioning of the government, to create executive departments. These departments were given broad discretionary powers to control the conduct of the country's military and foreign affairs.

Just as the Confederation period provided lessons to the delegates about the need for executive action, it also illustrated the advantages of "executive-style" treaty negotiations. The Continental Congress sent commissioners to Europe to attempt peace negotiations with the British,\textsuperscript{149} carefully instructing them to act closely with the French allies. It ordered the commissioners "to undertake nothing in the negotiations for peace or truce without [the French allies'] knowledge and concurrence," and ordered them to govern themselves "ultimately" by the views of the French government.\textsuperscript{150} At the same time that Congress was assuring France that it would not enter peace talks without first consulting the French monarch, the American commissioners were deliberately ignoring their instructions and arranging a peace treaty without French knowledge.\textsuperscript{151} Congress did not know how to respond to the treaty made by the commissioners.\textsuperscript{152}

\textsuperscript{148} See id. at 82-83.

\textsuperscript{149} The American commissioners were John Adams, Benjamin Franklin, John Jay, and Henry Laurens. R. Morris, The Peacemakers 215-16 (1965). Congress also selected Thomas Jefferson as a commissioner but he did not serve in this capacity. Id. at 376. Jefferson, as a member of Congress, participated in the debate regarding the completed treaty. Id. at 447.

\textsuperscript{150} Id. at 215 (quoting 20 Journals of the Continental Congress 651, 652 (June 15, 1781). For a discussion of Jay's criticisms of the instructions, see R. Morris, supra note 149, at 245.

\textsuperscript{151} Id. at 438-40. See also A. DeConde, Entangling Alliance: Politics and Diplomacy Under George Washington 9 (1958). For the commissioners' justification of their decision not to consult France, see R. Morris, supra note 149, at 382. It should be noted that Jay learned that French Foreign Minister Vergennes had secretly sent his secretary to London. So, Jay had reason to suspect that the French were trying to negotiate a treaty with England without consulting the Americans. T. Bailey, A Diplomatic History of the American People 44-45 (1974). Suspicions serve both to explain and justify the American commissioners' actions.

\textsuperscript{152} The commissioners created a real dilemma for Congress. Congress was especially angered by a secret clause of the treaty, but it did not want to renounce the treaty's liberal terms. R. Morris, supra note 149, at 442. The English treaty concessions shocked and surprised the French Foreign Minister, the Comte de Vergennes. He remarked, "The English buy peace rather than make it. . . . Their concessions exceed all that I could have thought possible." Id. at 383.
retary Livingston, were outraged at the peacemakers for violating the Congressional dictates. Congress, however, did not renounce the treaty primarily because it was quite favorable to the Americans.

Despite their initial mixed feelings toward the commissioners, the Congressmen came to realize that American diplomats negotiating in Europe required greater discretion than their European counterparts. Congress' initial instructions to John Jay, prior to his mission to Spain in 1785, required that he receive advance approval from Congress before proposing treaty provisions. This restriction would have made it very difficult to negotiate given the time required to send messages across the ocean, hold Congressional debates, and forward further instructions. Congress, therefore, modified its instruction, setting forth only the essential provisions and giving Jay flexibility on all other issues. The delegates' own Confederation experience had reinforced their awareness that commissioners had to rely, to a large extent, on their own judgment and that the legislature could not play an effective role in treaty negotiation.

American leaders also believed that the executive had advantages over the legislature in the realm of military and foreign affairs. Delegates catalogued the requirements needed in an executive, often repeating the stock phrases of secrecy, vigor, dispatch and responsibility. Hamilton, writing in 1780, exemplifies this attitude toward executive power: "There is always more decision, more dispatch, more responsibility, where single men than where bodies are con-

153. Id. at 442-43.
154. A congressional committee report shows the contradictory feelings towards the commissioners. The report thanked them for their zealous efforts, but mildly criticized them for disobeying their instructions. C. SMITH, supra note 76, at 188.
155. Benjamin Franklin had suggested this point to Secretary of Foreign Affairs Livingston during the course of the peace negotiations, noting that since America was so far from Europe, the American commissioners had to be given more discretion than their European counterparts. R. MORRIS, supra note 149, at 439. American experience in the Confederation period provides support for Franklin's position. Diplomatic correspondence was so unreliable that at one point in time there was an eleven month hiatus in which the Continental Congress did not receive correspondence from any of its twelve agents in Europe. R. BAILEY, supra note 151, at 28-29.
156. Even under the most favorable weather conditions it took two months for a message from Europe to reach the United States. T. BAILEY, supra note 151, at 28-29.
157. Bestor, supra note 13, at 615.
158. Id.
159. See, e.g., 1 Farrand, RECORDS, supra note 4, at 66, 70 (Madison and Wilson's views). Mason noted that these advantages were often discussed, but said that they might prove "greater in theory than practice." Id. at 112.
cerned.” Hamilton concluded that the executive was therefore “the most fit agent in those transactions.” John Jay, who had served as Secretary of Foreign Affairs, realized the need for presidential involvement in treatymaking. He emphasized that treaty negotiations might require secrecy and quick action. He added that, at times, people might be willing to rely on a president’s promise of confidentiality but would be skeptical of the Senate’s ability to maintain secrecy. American notions of executive characteristics, notably secrecy, dispatch, uniformity and responsibility, coincided with their perception of the requisites for the successful conduct of relations with other countries, and may have convinced them of the value of presidential authority over foreign relations.

The Convention debates and proposals demonstrate the delegates’ belief that Congress should play a predominant role in foreign policy. The earliest draft, by the Committee of Detail, granted extensive powers to the legislature while limiting the President to the powers of commander-in-chief and receiving ambassadors. The great change in the distribution of powers came just two weeks before the end of the debates. The debates on Senate treaty power prior to this time show that the impetus for the committee’s radical revision of the treaty clause was a disapproval of the Senate role rather than a desire to increase presidential power. The Convention intended that Congress have extensive powers over the development of foreign policy, but desired executive control over the conduct of this policy, and provided for a presidential policymaking role, at least in the treatymaking realm.

IV. THE CONSTITUTION

In addition to examining the Convention proceedings, it is necessary to analyze specific constitutional clauses in order to determine

160. Letter from Alexander Hamilton to Gouverneur Morris (1780), quoted in Guggenheimer, supra note 139, at 150.
161. The Federalist No. 75, at 451 (A. Hamilton) (C. Rossiter ed. 1961); see A. Sofaer, supra note 55, at 50.
164. One historian, William Stull Holt, concluded that, given the delegates’ belief that the House could not adequately exercise the treaty power and the strong currents of opposition in the Convention against either the Senate or the President having sole responsibility over treaties, “the compromise giving it jointly to the President and Senate was almost inevitable.” W. Holt, supra note 126, at 8.
the Framers’ intent. Two basic principles underlie the clauses that specifically deal with foreign policy. The crucial notion, which determined the distribution of the foreign policy powers throughout the Constitution, was the subordination of states to the national government in the area of foreign affairs.\textsuperscript{165} The other major principle derived from the Framers’ recognition, on the one hand, that the well-being of the country required the vesting of foreign policy power in a national government and their fear, on the other hand, of the abuse of this immense national power. They, therefore, incorporated into the Constitution a system of checks and a separation of powers,\textsuperscript{166} designed to prevent any of the governmental bodies from exceeding their authority. With these safeguards, the Constitution provides for a predominant national role in foreign relations, destroying pretensions of state authority over external affairs that had thrived during the Confederation period.\textsuperscript{167} Most importantly, the Constitution prevents states from entering into treaties,\textsuperscript{168} limits their authority to conduct war,\textsuperscript{169} and restricts their ability to interfere with foreign commerce.\textsuperscript{170} The Framers realized, however, that states might need some degree of power in each of these spheres. Accordingly, the Constitution provides that states can lay tonnage duties and can enter into “Agreement[s] or Compact[s]” with foreign nations if they secure congressional consent.\textsuperscript{171} In addition, since the Framers feared that the national government would be unable to respond with enough speed in an emergency situation, they allowed states to engage in war if they were invaded or if they were “in such imminent Danger as [would] not admit of delay.”\textsuperscript{172} The Constitution, therefore, places all powers over foreign relations in the federal government, excepting state power in a war emergency and some state ac-

\textsuperscript{165} See Kaplan, supra note 57, at 99.
\textsuperscript{166} For a discussion of the separation of powers among the branches as applied by the Framers, see Bestor, supra note 13, at 531, 534-37.
\textsuperscript{167} Kaplan, supra note 57, at 99.
\textsuperscript{168} U.S. CONsT. art. I, § 10, cl. 1. “No State shall enter into any Treaty, Alliance, or Confederation.” Id.
\textsuperscript{169} The Constitution forbids states from granting Letters of Marque and Reprisal. U.S. CONsT. art. I, § 10, cl. 1. For a discussion of permissible state military action see infra notes 171-73 and accompanying text.
\textsuperscript{170} U.S. CONsT. art. I, § 10, cl. 2: “No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws.”
\textsuperscript{171} See U.S. CONsT. art. I, § 10, cl. 3.
\textsuperscript{172} U.S. CONsT. art. I, § 10, cl. 3. This clause also can be seen as enabling states to “keep Troops, or Ships of War in time of Peace,” provided that Congress gives its consent. Id.
tions subject to congressional control.\textsuperscript{173} Further, state authority is restricted by the supremacy clause mandate that state judges be bound by the Constitution, federal laws, and treaties.\textsuperscript{174}

The Constitution grants extensive and vital powers to Congress with regard to the control of foreign relations.\textsuperscript{175} Regulation of foreign commerce, commencement of war, negotiation of treaties, and involvement in the system of the law of nations were the crucial areas of foreign policy concern at the time of the Convention. The delegates, by placing control over external commerce in the legislative domain,\textsuperscript{176} anticipated that Congress would play an important role in shaping foreign policy.\textsuperscript{177} Congress was given additional powers regarding the high seas and the law of nations,\textsuperscript{178} with which they could greatly affect relations with other countries.\textsuperscript{179} Congress was given further responsibility through its power to control state involvement in the external sphere.\textsuperscript{180} It was only in treatymaking that congressional foreign policymaking was limited, as treaties were to be made by the President with the advice and consent of two-thirds of the Senate.\textsuperscript{181}

The Framers also gave the legislature crucial functions regarding the military. They were frightened that a standing army might endanger liberty and were especially wary of the possibility that a President might utilize the army to usurp control of the government.\textsuperscript{182} The delegates therefore vested Congress with the power to

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\item \textsuperscript{173} For a discussion of the predominance of the national government and the limitation placed on the states in the realm of foreign relations, see Kaplan, \textit{supra} note 57, at 99.
\item \textsuperscript{174} See \textit{L. Henkin, supra} note 143, at 242. The supremacy clause may stem from John Jay's report on violations of the Treaty of Peace. Jay recommended that treaties have the same force as laws, and that states should not be permitted to pass laws contrary to an American treaty. \textit{9 The Papers of James Madison, supra} note 7, at 326 (1975). For a discussion of the report, see \textit{supra} text accompanying note 26.
\item \textsuperscript{175} For a discussion of the congressional powers, see \textit{A. Sofaer, supra} note 55, at 2-3.
\item \textsuperscript{176} \textit{U.S. Const.} art. I, § 8, cl. 3 grants Congress the power "[t]o regulate Commerce with foreign Nations."
\item \textsuperscript{177} For a discussion of the importance to American foreign policy of American commercial relations with other countries, see \textit{L. Henkin, supra} note 143, at 69. The institution of an embargo on foreign trade was an important American foreign policy tool in the late eighteenth century.
\item \textsuperscript{178} \textit{U.S. Const.} art. I, § 8, cl. 10: "To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."
\item \textsuperscript{179} \textit{See The Federalist No. 42, at 265-66 (J. Madison) (C. Rossiter ed. 1961).}
\item \textsuperscript{180} \textit{See supra} notes 171-73 and accompanying text.
\item \textsuperscript{181} \textit{U.S. Const.} art. II, § 2, cl. 2: "He shall have Power, by and with the Advice and Consent of the Senate to make Treaties. . . ."
\item \textsuperscript{182} The Framers knew the lessons of history too well not to fear that a powerful general could eventually become a dictator. Most importantly, the Framers knew from the
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raise the armed forces\textsuperscript{183} and to regulate the militia.\textsuperscript{184} To protect against improper use of the militias, they granted Congress the authority to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”\textsuperscript{185} The delegates provided additional protection against presidential usurpation of authority by making the President commander of the state militias only “when called into the actual Service of the United States.”\textsuperscript{186} Finally, the delegates guaranteed a congressional war-making role by placing control over the declaration of war in Congress’ hands, and by giving Congress authority over military actions short of full-scale war, such as letters of marque and reprisal.\textsuperscript{187}

There is no doubt that the Constitution presumes a prominent congressional role in the development of American foreign policy. The fact that the Constitution gave Congress the war power, the most important facet of foreign policy, lends strong support to this view of congressional preeminence in foreign relations. In determining issues of war, the Congress would be responsible for crucial national policies. Control over foreign commerce, the law of the high seas, the law of nations, and state relations with other countries also result in congressional policymaking.\textsuperscript{188} It has even been suggested that the Constitution gives Congress the right to make foreign policy while it makes the President a mere congressional agent.\textsuperscript{189} The presidential role in treaty-making, however, seems to contradict the theory that the President is simply an agent of Congress. The fact that the President could make treaties and could appoint ambassadors to further his goals certainly furnishes at least some basis for presidential involvement in important policymaking functions.

Revolution experience that a discontented army could endanger the nation. They likely had heard the talk at the end of the Revolution that the army might refuse to disband until the states took steps to enable Congress to pay its debts. J. FLEXNER, supra note 15, at 492. The Framers also were aware of the fact that there was some sentiment in 1783 that Washington should become a monarch. One example of this sentiment was the suggestion by Lewis Nicola, one of Washington’s colonels, that Washington should become king. Id. at 491. For further discussion of the Nicola incident, see L. DUNBAR, A STUDY OF “MONARCHICAL” TENDENCIES IN THE UNITED STATES FROM 1776 TO 1801, at 41-48 (1970).

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  \item \textsuperscript{183} U.S. CONSt. art. I, § 8, cl. 12: “To raise and support Armies. . . .”
  \item \textsuperscript{184} U.S. CONSt. art. I, § 8, cl. 16.
  \item \textsuperscript{185} U.S. CONSt. art. I, § 8, cl. 15.
  \item \textsuperscript{186} U.S. CONSt. art. II, § 2, cl. 1.
  \item \textsuperscript{187} For a full discussion of war-making in the Constitution, see infra notes 223-49 and accompanying text.
  \item \textsuperscript{188} L. HENKIN, supra note 143, at 83.
  \item \textsuperscript{189} Henkin, noting this point of view, commented that the argument concerning the extent of congressional authority is “debatable and continue[s] to be debated.” Id. at 84.
\end{itemize}
From the early years of the Washington administration\textsuperscript{190} to the present, Americans have debated the extent of presidential authority in foreign policy. The Constitution clothes the President with few express delegations of foreign policy power. The only express presidential foreign affairs powers to be found in the Constitution are those of (a) commander-in-chief,\textsuperscript{191} (b) receiving ambassadors,\textsuperscript{192} and (c) nominating ambassadors and making treaties.\textsuperscript{193} Also, the President could indirectly exert additional influence over external matters by the use of his veto power.\textsuperscript{194} These powers comprise the only undisputed constitutional grants of presidential authority in the international sphere. To justify an increased presidential role in the field of foreign relations, proponents of broad executive authority claim that the constitutional clauses concerning the commander-in-chief, executive power, and receiving ambassadors furnish the President with substantial power regarding foreign relations.\textsuperscript{195} Yet, the Framers specifically delegated control over almost the entire sphere of foreign relations to the legislature.\textsuperscript{196} This delegation, in conjunction with their extreme wariness of presidential power, indicates their intention to make Congress the dominant branch in foreign policy, with the President acting solely within his narrowly enumerated powers.\textsuperscript{197}

In determining the constitutional intent regarding foreign policy, it is necessary to examine more closely the meaning of several crucial clauses: the commander-in-chief, the declaration of war, and the treaty clauses.

\textsuperscript{190} For the discussion of the Pacificus-Helvidius debate, see infra notes 423-64 and accompanying text.
\textsuperscript{191} U.S. Const. art. II, § 2, cl. 1.
\textsuperscript{192} U.S. Const. art. II, § 3.
\textsuperscript{193} U.S. Const. art. II, § 2, cl. 2.
\textsuperscript{194} U.S. Const. art. I, § 7, cl. 2.
\textsuperscript{195} The commander-in-chief clause is discussed infra notes 198-222 and accompanying text. For an analysis of the implications of the President's executive power and his authority to receive ambassadors, see infra text accompanying notes 423-79 and 452-58. For another theory of the basis of executive authority see United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).
\textsuperscript{196} See supra notes 175-81 and accompanying text.
\textsuperscript{197} But see C. Thach, supra note 127, at 165. Thach declares:
To interpret the presidency strictly in terms of the language of the enumerated powers can then result only in [an] inadequate concept of what the office signified. At least, we must extend the concept to include the sole right to administrative headship and to the management of the business of foreign affairs. And, we believe, in the last should be included the right to negotiate treaties independently of the Senate.
A. The Commander-in-Chief

Although the commander-in-chief clause has been used to justify enormous presidential war-making power,\textsuperscript{198} evidence of the Framers' intent indicates that this clause provides the President with only limited war powers.\textsuperscript{199} It is especially noteworthy that the Convention accepted the commander-in-chief clause without recorded debate.\textsuperscript{200} As one modern writer has commented, "This expeditious, unremarked assent again suggests a narrow, non-controversial conception of the clause."\textsuperscript{201} The Framers' disavowal of British royal prerogatives also suggests a desire for a limited commander. The King's powers went far beyond that of being "the generalissimo, or the first in military command."\textsuperscript{202} The King had control over all the militia, had "the sole power of raising and regulating fleets and armies"\textsuperscript{203} and had the prerogative of handling the country's foreign relations. In contrast, the President could only control the militia when it was called into the actual service of the United States. In addition, the President's power over the military was significantly restricted, because the Constitution provided that Congress was to have power over raising armies and declaring war.\textsuperscript{204} The Framers repudiated the broad powers of the British monarch, desiring instead a much more confined role for the President.

Hamilton, in \textit{The Federalist Papers}, commented on the limited nature of the powers emanating from the commander-in-chief clause. He noted that the President's authority was vastly inferior to that of the British Crown and claimed that the post amounted "to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy."\textsuperscript{205} Of course, \textit{The Federalist} must be viewed with caution because it was

\begin{flushleft}198. See W. Rhenquist, \textit{The President's Constitutional Authority to Order the Attack on Cambodian Sanctuaries} (Remarks of the then Assistant Attorney General, Office of Legal Counsel, before the Association of the Bar of the City of New York) (May 28, 1970), excerpted in W. Lockhart, Y. Kamisar & J. Choper, \textit{Constitutional Law} 228-31 (1980).
199. Henry Steele Commager's views on presidential power parallels this viewpoint. He claims that it is "inescapably clear" that the Framers intended the Congress to declare war and the President to command the military forces. H. Commager, \textit{The Defeat of America} 61 (1974).
201. \textit{Id.; see also} Reveley, \textit{supra} note 6, at 113.
202. See the discussion of Blackstone's Commentaries in Bestor, \textit{supra} note 13, at 532.
203. \textit{Id.} at 534 (quoting Blackstone).
204. \textit{See} Bestor, \textit{supra} note 13, at 532-34.
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part of a partisan campaign to win support for the Constitution. It is obvious, however, that Hamilton sincerely believed in the concept of the commander as expressed in *The Federalist*, as he had advocated a similar idea in his Convention Plan. Hamilton clearly envisioned a commander who would take control of the troops only after war had been authorized or begun.  

What the Framers, for the most part, seem to have intended by the clause was the post of head general. As a general, the President would not decide the purpose for which troops would be used; rather, he would command the troops as required by the war policy of the legislature. Americans believed that it was crucial that one man control the conduct of the war effort. However, while realizing the advantages of a single unified command during fighting, they feared that the Executive might abuse his war powers. They therefore designed safeguards against this danger by placing control over the commencement of war and the raising of troops in the legislature.

The meaning attributed by the Framers to the role of commander-in-chief is evidenced by the context of Washington's tenure in the post. Throughout the war, the Commander, remained the servant of Congress, removable at its desire. Washington's commission reveals his subordinate position in relation to Congress. The commission ordered that Washington "punctually . . . observe and follow such orders and directions from time to time as he shall receive from this and future Congresses." Though the Congress gave

206. See supra note 105 and accompanying text.
207. See the discussion of Hamilton's views and the nature of a general found in L. Henkin, supra note 143, at 50-51. See also Reveley, supra note 6, at 130.
209. See Madison's speech in the Convention concerning his resolution giving two-thirds of the Senate the power to make peace treaties without the concurrence of the President. In the debate, Pierce Butler, a delegate from South Carolina, stressed that Madison's amendment was needed to secure the nation against "ambitious & corrupt Presidents." 2 Farrand, Records, supra note 4, at 540-41.
210. See supra notes 182-87 and accompanying text.
211. Unfortunately, Washington's diary furnishes no information about his attitudes concerning his position as commander-in-chief. During most of the war he neglected his diary. (It appears that from June 19, 1775 to January 1780 he did not keep a diary.) His diary entries from January-June 1780 contain only accounts of the weather, and it was not until the waning days of the war (May 1781) that Washington renewed his interest in diary writing. 3 The Diaries of George Washington 1771-75, 1780-81, at 338, 356 (D. Jackson ed. 1978).
212. H. Commager, supra note 199, at 61.
Washington great responsibility as commander, Congress was his superior, and, at times, even overruled his military plans. Congress, at one point, informed Washington that he was not to withdraw more than 2,500 troops without first consulting General Horatio Gates and New York Governor Clinton.

Washington showed utmost deference to the Congress. He did not desire to increase his powers and stated his willingness to limit himself to those powers that Congress would delegate to him. He made it known that "if the Congress [says] 'Thus far and no farther you shall go,' I will promise not to offend whilst I continue in their service." On one occasion, Washington sought congressional approval of a crucial military decision regarding his determination to burn New York City before abandoning it to British troops. Congress refused Washington's request and ordered him to avoid damaging the city. Though Washington felt that this decision "may be set down among one of the capital errors of Congress," he obeyed the congressional orders.

Prior to the Convention, the commander-in-chief, as exemplified by Washington, was a powerful military leader who showed great deference to Congress and who followed its military dictates even when he questioned the wisdom of congressional policy. The Framers understood the need for a unified military command and, therefore, made the President the commander-in-chief. However, they most likely viewed this power as a narrow one, as they were aware of

213. See T. Frothingham, supra note 140, at 169-70.
214. See supra text accompanying notes 188-91.
215. T. Frothingham, supra note 140, at 230.
218. Washington desired to set fire to New York City because if it were left standing it would provide shelter to the British troops in the coming winter. Washington, therefore, applied to Congress, for permission to burn the city, "but was absolutely forbid." Letter from George Washington to Lund Washington (Oct. 6, 1776), in 37 Washington Writings, supra note 15, at 532.
219. T. Frothingham, supra note 140, at 142.
221. The Congress earlier had seen the dangers of having several commanders in the field. After a military catastrophe attributed to Horatio Gates (the independent commander of American forces in the South), the Congress placed General Nathaniel Greene, the new Southern Commander, under Washington's control. T. Frothingham, supra note 140, at 335.
the influence and, in crucial matters, the control Congress exercised over Washington during his tenure as commander-in-chief.222

B. War Powers

The view of a restricted commander-in-chief role supports a general hypothesis that the delegates desired to ensure congressional predominance over the outbreak of war. With the exception of the commander-in-chief clause, the delegates placed all of the significant war powers, including the declaring of war, the raising of troops, and the issuing of letters of marque and reprisal, in the legislative branch. Despite this grant of war-making power to Congress, there has been some disagreement over the branch’s authority over war. It has been argued that the declaration of war clause governed merely formal declarations and that the President could act on his own authority without a congressional declaration.223 Examination of the debates and contemporary statements reveals the flaws in any theory favoring a strong executive role and points to congressional command of the war powers.224

Historical evidence shows that the American political leaders did not consider the declaration of war to be a mere formality;225 rather, they viewed it as a critical action. The nature of the Convention debates regarding the declaration of war highlights the delegates’ belief that the declaration of war clause was not devoid of substance; rather, it gave the Congress a legitimate grant of power.226 Madison did not dwell on the power in The Federalist Pa-

222. However, early congressional consideration of a proposed amendment of the commander-in-chief clause suggests that the clause should be given a broader interpretation. Representative Thomas Tucker advocated modifying the clause to a grant of “power to direct (agreeable to law) the operations” of the armed forces. 1 ANNALS OF CONG. 791 (J. Gales ed. 1789). One historian has noted that “[t]he amendment . . . would have immeasurably weakened the position of the Commander in Chief by expressly making his direction of military operations subordinate to the legislative dictates of Congress.” J. HART, THE AMERICAN PRESIDENCY IN ACTION 1789, at 149 (1948). The House’s total lack of enthusiasm for the amendment suggests the fact that the House wanted the President to have leeway in determining on his own when to employ military force.

223. For a refutation of this viewpoint, see L. HENKIN, supra note 143, at 80.

224. See SENATE COMM. ON FOREIGN RELATIONS, S. REP. No. 606, 92d Cong., 2d Sess. 12 (1972). In describing the placement of the war power in the legislative branch, the report proclaimed the fact that “[w]hatever else they may have painted with a ‘broad brush,’ the framers of the American Constitution were neither uncertain nor ambiguous about where they wished to vest the authority to initiate war.” Id.


226. See 2 Farrand, RECORDS, supra note 4, at 318-19.
pers, considering its importance obvious to all Americans: "Is the power of declaring war necessary? No man will answer this question in the negative. It would be superfluous, therefore, to enter into a proof of the affirmative." 227

The implication derived from views of the significance of the clause and from the statements of major figures is that the Framers intended to place control over the commencement of war in legislative hands. James Wilson dreaded the outbreak of war and hoped that the placement of the war power in Congress, rather than in the President or a single house, would provide a safeguard against hasty entry into war. 228 Thomas Jefferson expressed approval over the "check to the Dog of war" that derived from "transferring the power of letting him loose from the Executive to the Legislative body." 229 Robert Livingston, the former Secretary of Foreign Affairs, equated the power derived from the clause with that of the Continental Congress, which during the Confederation had the power of determining war. 230 There is, therefore, significant evidence that American leaders believed that the clause granted Congress control over war.

Unfortunately, the debate on this clause in the Convention does not solve the puzzle concerning the clause's meaning. One major problem is that the report of the proceedings regarding the clause "occupies little more than one page out of the 1,273 which contain the printed records of the Convention." 231 The other critical problem concerns the ambiguity of the debate record. Since the delegates who discussed the clause placed different interpretations on the import of the clause, the debates do not provide a clear picture of the delegates' intentions. 232 Finally, there is a discrepancy between the journal account and Madison's version. 233 The crucial question in determining the Framers' intent centers on the reasons for the choice of wording. The clause originally read that Congress would have the power to "make war." 234 The reason why the delegates decided to alter the phrasing to "declare war" 235 is far from clear. In proposing

228. See the discussion of Wilson's views in Lofgren, supra note 200, at 685.
229. Reveley, supra note 6, at 133.
230. Lofgren, supra note 200, at 685.
231. Id. at 675.
232. For the debate, see 2 Farrand, RECORDS, supra note 4, at 318-19.
233. See infra notes 239-41 and accompanying text.
234. Article VII, Section 1 of the Report of the Committee of Detail vested in Congress the power "[t]o make war." 2 Farrand, RECORDS, supra note 4, at 182.
235. The Constitution says that "Congress shall have Power . . . [t]o declare war." U.S.
the change, Madison and Gerry expressed their desire that the President have "the power to repel sudden attacks." Thus, they thought it necessary to make explicit the President's right to oppose an invading force. Roger Sherman thought that the President could counter invasions even without the change in wording. He opposed the change from "make" to "declare" war, finding it unnecessary and fearing that the change would reduce the Congress' war power. The delegates may have felt the change was needed to guarantee the President's right to combat invasion. Alternatively, they may have believed that the President had the power to confront an attacking force, but desired the change in phrasing as a means of reducing congressional control over war. Both of these reasons for the new phrasing imply important presidential war powers, since even the granting of the authority to repel invasion results in important presidential discretion in war-making.

Discerning the exact meaning of the clause is further complicated by the contradictory accounts of the vote on the alteration from "make" to "declare" war. According to Madison's account, the initial vote on the change was 7 to 2 in favor of a new version. After Rufus King suggested that "make war" might be construed to mean the conduct of war, which was an executive function, Oliver Ellsworth decided to vote for the change. Madison's version indicates that only one state switched its vote for the purpose of guaranteeing that the Executive would control the conduct of the armed forces in the event of war. In contrast, the journal details a 4 to 5 vote on the first roll call and an 8 to 1 vote on the second ballot. If this vote was accurate and if King's speech preceded the second vote, then King's argument was the deciding factor in the adoption of the change. This account would suggest that the change to "declare war" was intended by many delegates for the primary purpose of reaffirming the presidential role in the actual conduct of war and was not meant to increase other presidential war powers. The record

236. 2 Farrand, RECORDS, supra note 4, at 318. See also A. SOFAER, supra note 55, at 31.
237. 2 Farrand, RECORDS, supra note 4, at 318.
238. For a discussion of alternative explanations of the implications of the phrasing change, see Lofgren, supra note 200, at 677.
239. 2 Farrand, RECORDS, supra note 4, at 319. According to Madison, Connecticut (because of Ellsworth) changed its vote in order to guarantee that the President would command the army in case of war.
240. Id. at 314.
THE FRAMERS' INTENT

is quite confusing and the discrepancy cannot be resolved. Though the intent underlying the debate must remain clouded, contemporary statements and the nature of the Convention speeches indicate that American leaders envisioned legislative control over the commencement of war.241

Finally, the placement of the power over letters of marque and reprisal242 in the legislative sphere indicates the Framers' desire to ensure that Congress would decide, in all cases except sudden attack, whether to engage military forces.243 The Framers were aware that an outbreak of hostilities could take the form of a general war or could be an "imperfect" war involving the issuance of letters of marque and reprisal.244 In addition, the Framers were quite aware of the possibility that issuance of letters of marque and reprisal could provoke a general war.245 In providing for congressional action regarding marque and reprisal, the Framers placed control over both the actual declaration of war, and the use of military means that would precipitate a war, in the legislature.246 Thus, the Framers acted to prevent the President from embarking on a war or from using armed forces to provoke a war, unless Congress similarly desired to resort to armed force.247

241. See discussion in A. SOFAER, supra note 55, at 31-32. Sofaer says that the new phrasing seems to permit the President to repel sudden attacks but does not show any intent "to allow the President a general authority to 'make' war in absence of a declaration." He added, "indeed, granting the exceptional power suggests that the general power over war was left in the legislative branch." Id. at 32.

242. Letters of marque and reprisal were of great import in the 18th century. A reprisal was a "legal act of redress performed by a state to obtain satisfaction for an injury received." 6 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 152 (1943). Countries issued letters of marque to commission citizens to act as privateers. See 2 id. at 689. (See also id. at 689-90 for discussion of the difference between marque and piracy.) Letters of marque authorized the particular citizen "to seize and take the person and property of the citizens of the offending state wherever found." 6 id. at 153. The marque provided a "means of satisfaction without resort to actual war" as the nation would seek redress by use of privateers rather than by resort to a general war. Id. For an example of the use of letters of marque during the Revolutionary War, see T. FROTHINGHAM, supra note 140, at 279.

244. Reveley, supra note 6, at 89-90, 144.
245. Lofgren, supra note 200, at 693. Secretary of State Thomas Jefferson made this point in an opinion submitted to President Washington. Jefferson noted that "the making of reprisal on a nation is a very serious thing" and admonished Washington that reprisal had never "failed to produce [war] in the case of a nation able to make war." Opinion on "The Little Sarah" May 16, 1793, in 7 THE WORKS OF THOMAS JEFFERSON 332, 335 (P. Ford ed. 1904).

246. U.S. CONST. art. I, § 8, cl. 11.
247. Reveley, supra note 6, at 144. James Wilson, in his law lectures, declared that [t]he power of declaring war, and the other powers naturally connected with it, are
The attitude of the Framers and the constitutional provisions that they adopted point to complete congressional authority, barring a sudden attack, over the commencement of war. The Framers recognized the danger that a President might use a war to aggrandize his powers, and, therefore, incorporated into the Constitution strict limitations on his war-making power. The placement of control over the raising of an army and a navy, the declaration of war, and the issuance of letters of marque and reprisal in the legislature's hands, was designed to guarantee that the legislature would determine whether to commence hostilities. The Framers appreciated the benefits of making the President the commander-in-chief, but they wanted to limit his power solely to the command of troops and not their initial commitment.

C. Treaties

The constitutional provision concerning the making of treaties provided for both presidential action in negotiation and safeguards against his improper use of treaty authority. Though delegates like Hamilton may have considered the President to be "the most fit agent" in negotiations, they perceived great dangers in giving him complete control over treaty power. Hamilton, for example, stated that "it would be utterly unsafe and improper to entrust that power [over negotiations] to an elective magistrate of four years' dura-

vested in Congress. To provide and maintain a navy—to make rules for its government—to grant letters of marque and reprisal—to make rules concerning captures—to raise and support armies—to establish rules for their regulation—to provide for organizing . . . the militia, and for calling them forth in the service of the Union—all these are powers naturally connected with the power of declaring war. All these powers, therefore, are vested in Congress.

Id. at 132.

248. H. COMMAGER, supra note 199, at 60. Commager declared that the Framers "proposed to make it impossible for a 'ruler' to plunge the nation into war." Pierce Butler, who represented South Carolina at the Convention, noted that the delegates opposed a proposal to give the President control over determination of war because it would enable him to behave like a monarch and involve the nation in a war "whenever he wished to promote her destruction." 3 Farrand, RECORDS, supra note 4, at 250.

249. But see Sofaer, The Presidency, War, and Foreign Affairs: Practice Under the Framers, 40 LAW & CONTEMP. PROBS. 12, 15 (Spring 1976) ("Enough has been said to establish that the constitutional allocation of powers relating to war making is far from unambiguous. Clearly, the Constitution accords Congress the upper hand, or final say, on most issues of significance. But it also assigns the President great powers over the military, and in the execution of policy.") (footnote omitted).

To protect against this elective magistrate, it was necessary to provide some legislative checks on the President's power. Therefore, the Constitution counterbalances executive treaty influence by requiring the advice and consent of the Senate. The "joint agency" of the President and the Senate was intended to secure the nation against "corruption and treachery in the formation of treaties."

Although the Framers' desire to protect against abuse of treaty power is obvious, their exact intentions regarding the treaty clause is open to debate. Clearly, Americans expected the clause to prevent the President from entering into a treaty solely on his own judgment. As Charles Pinckney opined, the President could not "take a single step in his government, without their advice." While the delegates all understood the need for Senate consent regarding treaties, they differed as to the nature of the Senate role.

Some of the Framers took an expansive view of the Senate role. Pierce Butler, a delegate from South Carolina, advocated significant Senate input into treatymaking, stating that treaties should "be gone over, clause by clause, by the President and Senate together, and modelled." Hamilton and former Foreign Secretary Robert Liv-
ingston, in voicing their opposition to recall of Senators, stressed the important role played by the Senate in foreign relations and the need to have Senators experienced in the sphere of foreign affairs. Hamilton stated that the Senators, "together with the President, are to manage all our concerns with foreign nations." Livingston detailed a broader and more defined Senate role, claiming that the Senate was "to form treaties with foreign nations" and was to negotiate with foreign diplomats. Roger Sherman's views illustrate the strongest posture in favor of an equivalent treaty role for the President and the Senate. Sherman felt that "the two bodies ought to act jointly in every transaction which respects the business of negotiation with foreign powers."

Though the delegates rejected the argument that treaty power was purely executive in nature, they did not necessarily agree with Sherman about the roles of the two treaty agencies. Hamilton, though speaking about the concept of a joint agency in treatymaking, was of the opinion that "the management of foreign negotiations will naturally devolve" upon the President. Giving the President the power over negotiations and the consequent ability to alter American treaty positions would result in the President having more influence over treatymaking than the Senate. After the Convention, delegates like Charles Cotesworth Pinckney and James Wilson stressed the dominant role of the President. Pinckney, for example, viewed the President as having the power of proposing treaties, while the Senate was limited to accepting or rejecting the proposed treaties. Likewise, Wilson claimed that "[t]he Senate can make no treaties: they can approve of none, unless the President of the United

257. 2 ELLIOT, DEBATES, supra note 82, at 306.
258. Id. at 291.
259. Reveley, supra note 6, at 138 (quoting 1 ANNALS OF CONG. 1122-23 (J. Gales ed. 1789)).
260. Hamilton, for example, argued in THE FEDERALIST that classification of treatymaking as an executive function "is evidently an arbitrary disposition; for if we attend carefully to its operation, it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them." THE FEDERALIST No. 75, at 450 (A. Hamilton) (C. Rossiter ed. 1961).
262. Wilson went so far as to claim that in the treaty sphere the Senators were "only auxiliaries to the President." 2 ELLIOT, DEBATES, supra note 82, at 477. But later in the Convention Wilson stated that the President and Senate were "checks upon each other, and [were] so balanced as to produce security [for] the people." Id. at 507.
263. Even a foe of presidential power like Richard Henry Lee admitted that the President held a greater share of treaty power than the Senate. C. THACH, supra note 127, at 163.
264. 4 ELLIOT, DEBATES, supra note 82, at 265.
Wilson equated the President's control with that of a helmsman who could prevent the ship from moving in a particular direction if he wanted the nation to follow a different course.

The resolution of this dispute over the President's role had great implications. By his management of negotiations, the President could have a crucial impact on treatymaking. More importantly, if Pinckney and Wilson's views prevailed, the President would have sole power over proposing treaties while the Senate would be limited purely to considering the product of the negotiations.

The phrasing of the treaty clause indicates a more restricted role than suggested by Pinckney and Wilson. The clause requires Senate "Advice and Consent." In one commentator's view, the meaning of this phrase is self-evident. The Framers intended the Senate to advise the President on a potential treaty. The President would negotiate with an awareness of Senate concerns and would then present the treaty to the Senate for its approval. This explanation finds support in the historical significance of the phrase "Advice and Consent." The Framers knew that this phrase appeared at the head of all English statutes. From this, it may be inferred that the Framers, in using the same language as that which appeared in British enacting statutes, intended the Senate role to relate to the advice and consent practice of the British Parliament. That is, the Framers most likely intended that the Senate play an important deliberative and decision-making role in the treaty process.

The language of this "carefully phrased section" furnishes additional evidence regarding the desired Senate treaty role. The clause reads that the President "shall have Power, by and with the
Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls. 272 Henry Cabot Lodge, Sr. highlights the contrast between the phrasing of the nomination and treaty clause. Lodge states:

[T]he carefully phrased section gives the President absolute and unrestricted right to nominate, and the Senate can only advise and consent to the appointment of, a given person. All right to interfere in the remotest degree with the power of nomination and the consequent power of selection is wholly taken from the Senate. Very different is the wording in the treaty clause. There the words “by and with the advice and consent of” come in after the words “shall have power” and before the power referred to is defined. The “advice and consent of the Senate” are therefore coextensive with the “power” conferred on the President, which is “to make treaties,” and apply to the entire process of treaty making. 273

The system of international law suggested the need for Senate involvement in developing instructions to diplomats, and also the need for its advice and consent prior to the signing of treaties. According to international law, the “monarch cannot, in honor, refuse to ratify a Convention made by a minister with full powers, unless it can be proved that the minister had remarkably and openly deviated from his instructions.” 274 Thus, if the Senate rejected a treaty negotiated by the President, it would be acting contrary to a basic tenet of international law. It is unlikely that the Framers would have wanted to permit such a serious breach of international law, and therefore they probably contemplated Senate advice and consent prior to the signing of a treaty. 275 Lastly, the juxtaposition of advice with consent indicates a likelihood that the President was thought to be required to get Senate “advice” before embarking on treaty


273. H.C. Lodge, supra note 271, at 231-32. Senator Lodge, who served as chairman of the Senate Foreign Relations Committee at the time of the Versailles Treaty, acknowledged the “obvious fact that the President must be the representative of the country in all dealings with foreign nations, and that the Senate in its very nature could not, like the Chief Executive, initiate and conduct negotiations.” Id. at 230. He claimed that “in every other respect, under the language of the Constitution and in the intent of the framers, they stand on a perfect equality with the President in the making of treaties.” Id. at 232.


negotiation.\textsuperscript{276}

The treaty clause safeguards the treaty process by providing for joint Senate and presidential action regarding all treaties. Delegates differed in their interpretation of the clause, but those favoring a more prominent presidential role ultimately triumphed. As a result, Americans accepted the view that the President would be the chief agent in negotiations. However, presidential control of negotiation does not preclude a significant Senate treaty role, as presidential diplomacy does not prevent the Senate from exercising advice and consent both before and after treaty talks. Regardless of the meaning given to the phrase advice and consent, the Senate can ultimately exert a critical treaty role by refusing to give its consent. Most likely, the Framers intended that the Senate would participate in the developing of instructions, and, also, would exercise its power of advice and consent before the President presented a formal treaty for ratification.\textsuperscript{277}

\textbf{V. THE WASHINGTON ADMINISTRATION}

Enlightenment figures devoted much energy to the formulation of model constitutions whose efficacy would never be tested in real life circumstances.\textsuperscript{278} American leaders, in contrast, faced the rather novel task of having to implement their abstract model. With their awareness of the Confederation’s flaws, their common beliefs about the nature of government, and their knowledge of human nature,\textsuperscript{279} the Framers attempted to lay a framework for the new government. Since the Constitution provided only the barest outline for foreign policy practices,\textsuperscript{280} it was incumbent on the first President and the

\textsuperscript{276} Bestor, \textit{supra} note 13, at 540.

\textsuperscript{277} But see C. Thach, \textit{supra} note 127, at 162-64. While Thach acknowledges that there is much to support the opinion that the Senate had coextensive treaty powers with the President, he emphasizes that the treaty clause must be interpreted in light of the Convention delegates’ disapproval with the Senate role. In addition, Thach states that although few wanted the President to have exclusive treaty power, “it does not follow that these others desired to see the Senate transformed into an executive council. It is this, we believe, that determined the ready acquiescence given by the Senate to presidential negotiation without prior consultation.” \textit{Id.} at 164.

\textsuperscript{278} See generally H. Commager, \textit{supra} note 38, at 109-13. Commager notes that “[a]ll the philosophes were statesmen, or thought they were, ready to draw up a new constitution, draft a new code of laws, or design a new commonwealth on demand.” \textit{Id.} at 109.

\textsuperscript{279} See generally \textit{supra} notes 15-79 and accompanying text. The Framers also acted with an awareness of the history of ancient governments. See 9 \textit{The Papers of James Madison}, \textit{supra} note 7, at 3-4; \textit{Ancient & Modern Confederacies}, in \textit{id.} at 4-22.

\textsuperscript{280} For a discussion of the constitutional distribution of foreign policy power, see \textit{supra} text accompanying notes 175-97.
Congress to develop measures for the successful effectuation of foreign policy goals.

This section examines the course of foreign affairs during Washington's administration, and the gradual evolution of presidential dominance in the external sphere. Special attention is given to the development of the treaty process, the roots of significant diplomatic practices, the gradual expansion of presidential powers, and the course of contemporary debates about the extent of executive authority in the foreign policy realm. In addition to chronicling the growth of presidential powers, an attempt will be made to speculate upon the motives underlying presidential actions in the external sphere.

At the start of his administration, President Washington showed much concern about Senate sensibilities. Washington immediately consulted the Senate and sought their advice on the best manner to exercise their joint treaty responsibilities. He envisioned the Senate as a council on treaty matters and established a scheme for consulting the Senate prior to treatymaking. However, although Washington acted deferentially toward the Senate regarding treaties, he established important precedents for an expanded presidential role by unilaterally making an agreement with Canada and by sending agents to foreign countries without seeking Senate consent. From 1793 to the end of his tenure, Washington embarked on a course of action that resulted in presidential domination over foreign relations. For example, he exercised complete control over the fashioning of the American response to the outbreak of hostilities in Europe in 1793. Further, Washington enhanced presidential control over treatymaking by determining, at the time of the Jay mission, that he should not seek Senate consent on the treaty until after Jay had negotiated and signed a treaty with the British. Finally, Washington's Farewell Address consolidated the President's position as the American spokesman on issues involving foreign relations. By the end of the Washington administration, presidential initiatives in the external sphere and congressional acquiescence in the President's activities had resulted in the President being the dominant force in foreign policymaking.

A. Early Forays Into Treatymaking

At the time they began their respective tenures in office, Washington and the Senators understood the need for Senate advice and consent prior to the negotiation of treaties. Principles of international
law induced them to adopt a system of prior consultation. According to international law, a minister's consent to an agreement obligated his country to ratify the compact unless he had "remarkably and openly deviated from his instructions." Because the Senators dreaded the repercussions that might result from their failure to obey this well-established doctrine, they consciously followed it. The Senate so desired to conform with this doctrine that they consented to a treaty which they felt the nation had promised to ratify, even though they believed the treaty would not be an advantageous one.

A committee report on another treaty emphasized the treaty's conformity with the minister's instructions and implied that this conformity obligated the Senate to give its assent. Only by advising prior to the envoy's completion and signing of a treaty would the Senate be able to exercise meaningful advice and consent while at the same time corresponding to the dictates of international law.

Initially, Washington expressed the opinion to a Senate committee that "[i]n all matters respecting Treaties, oral communications seem indispensably necessary." Two days later, he refined his views regarding the best manner of treaty consultation, noting that for complicated treaties it might be best for him to submit proposals in writing and then consult the Senate after it had time to consider the treaty suggestions. Though Washington expressed his approval of the concept of in-person consultation, he felt that experience and the particular circumstances surrounding a treaty would dictate the most suitable approach for Senate treaty-making.

It took only one attempt at prior consultation to dissuade Washington from ever again seeking advice and consent in person. The details of what one commentator labeled "Washington's Famous Experiment in Prior Consultation of the Senate in Person with Respect

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283. Id. at 34 (Cherokee treaty).
284. Sentiments Expressed to the Senate Committee on the Mode of Communication Between the President and the Senate on Treaties and Nominations (Aug. 8, 1789) (footnote omitted) in 30 WASHINGTON WRITINGS, supra note 15, at 373.
285. See Sentiments Expressed to the Senate Committee at a Second Conference on the Mode of Communication Between the President and the Senate on Treaties and Nominations (Aug. 10, 1789) (footnote omitted), in id. at 377. [hereinafter cited as Sentiments]. See also G. HAYNES, THE SENATE OF THE UNITED STATES 62-63 (1938).
287. Id. at 378-79.
288. See supra text accompanying note 305.
to a Treaty”\textsuperscript{289}\textsuperscript{9} are of great significance and merit discussion. Washington informed the Senate on August 21, 1789 that he would “advise with them on the terms of the treaty to be negotiated with the Southern Indians.”\textsuperscript{289}\textsuperscript{9} At this advisory meeting, Washington played the crucial role by furnishing the questions that formed the basis of the Senate discussions on proposed treaty instructions,\textsuperscript{291} while the Senate was relegated to debating the presidential proposal.

Although the \textit{Annals of Congress} gives little flavor to the proceedings on the treaty instruction,\textsuperscript{292} the diary of William Maclay, senator from Pennsylvania and an outspoken critic of the Washington administration,\textsuperscript{293} provides a colorful account of the famed meeting.\textsuperscript{294} In his description of the meeting, Maclay paints a vivid image of Washington attempting to impose his will upon the Senate, describing Washington as desiring “to tread on the necks of the Senate.”\textsuperscript{295} Maclay’s description of Washington’s attitude regarding the consultation speaks for itself: “He wishes us to see with the eyes and hear with the ears of his Secretary only. The Secretary

\textsuperscript{289} J. Hart, supra note 222, at 86.

\textsuperscript{290} 1 \textit{Annals of Cong.,} supra note 222, at 67.

\textsuperscript{291} For Washington’s statement to the Senate and the questions he addressed to it, see \textit{Id.} at 68-71; 30 \textit{Washington Writings,} supra note 15, at 385-90.

\textsuperscript{292} \textit{See 1 Annals of Cong.,} supra note 222, at 71-72.

\textsuperscript{293} Maclay served as a senator from 1789 to 1791, during which time he kept a rather detailed account of the proceedings of the first Senate. For biographical information on Maclay, see 6 \textit{Dictionary of American Biography,} supra note 43, Part 2, at 123-24. Also, see the introduction by Charles Beard and the preface by Edgar Maclay in \textit{The Journal of William Maclay} v-xviii (C. Beard ed. 1927 & photo. reprint 1965). Edgar Maclay notes that “[f]or a hundred years [the journal had] . . . been jealously guarded from public scrutiny by the descendants of the statesman” and that many passages “were suppressed, as being too caustic in their strictures on eminent personages whom we are accustomed to regard with the highest veneration.” \textit{Id.} at xviii.

\textsuperscript{294} \textit{The Journal of William Maclay,} supra note 293, at 125-30. The historian J. Franklin Jameson “deplores the fact that for much that took place behind the closed doors of the Senate Chamber during the First Congress ‘we have no other ample record except that of this aribilious and parvamus creature. . . . Most readers think that because Maclay says that men acted thus and so, they actually did. “All things look yellow to the jaundiced eye.” Everything this contemptible creature set down is poisoned and distorted by his mean malignancy.” G. Haynes, supra note 285, at 43 n.1 (quoting Dr. J. Franklin Jameson). Haynes pokes fun at Maclay, saying that a “psychiatrist would note that Maclay suffered from dyspepsia, rheumatism, headache, nostalgia, and a pronounced ‘inferiority complex.’” \textit{Id.} Haynes also criticizes Maclay in a more serious manner. He described Maclay as “a man of the bitterest prejudices” who “never hesitated to impute unworthy motives to others.” \textit{Id.} Haynes, though he dislikes Maclay’s personality, notes that Maclay’s diary is a useful historical tool: “With due allowance made for Maclay’s unwholesome personality, his record of the Senate in the First Congress is a valuable source of information, and his acid humor is often highly entertaining.” \textit{Id.}

\textsuperscript{295} \textit{The Journal of William Maclay,} supra note 293, at 128.
to advance the premises, the President to draw the conclusions, and to bear down our deliberations with his personal authority and presence. Form only will be left to us."\textsuperscript{296}

If the senators had just accepted the President's proposals without examining their worth, then their advice and consent power would have been, as Maclay expressed it, "ravished, in a degree."\textsuperscript{297} Maclay, conscious of his fellow senators' unwillingness to confront the President, realized that he had to initiate Senate discussion in order to preserve the Senate's authority in the treaty realm. He therefore requested greater information to enable the Senate to make an informed decision.\textsuperscript{298} Spurred by Maclay's initial speech, the Senate began to debate the treaty provisions.\textsuperscript{299} Maclay and other senators had come to the realization that the Senate could generate a real discussion on the treaty's merits only if the President left the chamber. They therefore called for a committee to examine Washington's questions regarding the Indian treaties.\textsuperscript{300}

Maclay made much of Washington's displeasure regarding the course of the Senate meeting. According to Maclay, the proposal to commit the treaty questions put the President into a "violent fret."\textsuperscript{301} Washington said that the commitment defeated "every purpose" he had for coming to the Senate.\textsuperscript{302} In addition, he voiced a complaint over the delay in resolving the Indian treaties.\textsuperscript{303} Finally, Maclay made note of Washington's disgruntled manner as he left the Senate chamber at the end of the first day of the consultation: "He did so with a discontented air. Had it been any other man than the man whom I wish to regard as the first character in the world, I would have said, [he left] with sullen dignity."\textsuperscript{304} If Maclay's account is an accurate portrayal of the consultation, Washington became angered at the proceedings because he anticipated that the Senate would accede to his wishes without considering the merit of

\begin{itemize}
  \item \textsuperscript{296} Id.
  \item \textsuperscript{297} Id. at 126.
  \item \textsuperscript{298} Id.
  \item \textsuperscript{299} See id. at 126-27.
  \item \textsuperscript{300} Id. at 127. Other senators opposed the commitment. Butler, one of the signers of the Constitution, said that the Senate was acting as a council and that councils did not send issues to committee. Id. Soon after this debate the Senate adjourned for the weekend. On the following Monday, the Senate assembled as a whole, with the President again present, and addressed Washington's treaty questions without sending them to committee. Id. at 128.
  \item \textsuperscript{301} Id.
  \item \textsuperscript{302} Id. (emphasis in original).
  \item \textsuperscript{303} Id. at 128.
  \item \textsuperscript{304} Id.
\end{itemize}
his proposals.

Two significant points arise from the proceedings of Washington's famous prior consultation. Washington's consultation with the Senate prior to sending instructions to the commissioners supports the idea that the Constitution called for advice in the stages prior to the completion of negotiations. Maclay's account elucidates the tension in the chamber and the impossibility of discussing the President's proposals in his presence. Thus, the meeting indicates the importance of having the Senate discuss treaties away from the watchful and imposing glare of the President. Whatever the validity of these points, neither Washington nor his successors ever again sought personal consultation with the Senate prior to the commencement of negotiations.306

Although Washington decided against further attempts at consulting with the Senate in person, he continued to seek Senate advice at early stages in his diplomatic efforts.306 He sought advice and consent on a secret article of an Indian treaty prior to the completion of the treaty negotiations.307 Washington also sought Senate advice prior to negotiations with the Cherokees.308 After examining the completed treaty, the Senate committee announced that the treaty conformed to the instructions "founded on the advice and consent of the Senate."309 It seems that, having exercised its advisory power prior to negotiations, the Senate felt obligated to consent to a treaty that complied with its instructions.310

Treaty negotiations with Spain311 illustrate both the continued

305. R. Hayden, supra note 275, at 22; L. Henkin, supra note 143, at 131.
306. See G. Haynes, supra note 285, at 68. See also R. Hayden, supra note 275, at 59. In a 1790 message to the Senate, Washington dispelled any doubts about his continued approval of prior consultation. Regarding negotiations with the British, he said: "[I]n this instance, I think it advisable to postpone any negotiations on the subject, until I shall be informed of the result of your deliberations, and receive your advice as to the propositions most proper to be offered on the part of the United States." Id. at 59.
308. For the details of the Cherokee treaty negotiation, see id. at 30-34. Washington requested Senate advice about three questions involving the treaty. Id. at 30-31. The Senate carefully discussed the matter, without executive officers present, and then replied to the President's queries with two resolutions. Id. at 31.
309. Id. at 33.
310. Id. at 34. It should be emphasized that the Senate did not consider itself obligated to give its consent in cases where it had not been previously consulted. Prior to the Spanish negotiations, the Senate refused to give its consent to a treaty concluded by General Putnam, based on instructions not approved by the Senate. Id. at 34-35. For a discussion of the Spanish negotiations, see infra notes 311-14 and accompanying text.
311. The treaty negotiations finally resolved the longstanding disputes between Spain
existence of the original conception of treatymaking and the gradual inroads that political necessity had carved out of strict compliance with prior consultation. Washington sought both confirmation of his envoys and consent to his treaty instructions. The Senate consented to additional instructions, and, acting in accordance with doctrines of international law, resolved that it would ratify any treaty made in conformity with its instructions. While the Senate strictly conformed to this doctrine, Washington abandoned strict prior consultation by withholding delicate portions of the instructions and thereby asking prior Senate consent for only part of the instructions. The Spanish Treaty thus contributed to the decay of the system of prior consultation. Still, the Senate, by its advisory power, continued to play an important treaty role in the early 1790's and constantly influenced foreign relations in this period.

B. Diplomatic Activities In General

At the same time that the Senate maintained its advisory role on treaties, the Washington administration established significant precedents in the realm of foreign relations. For example, Washington made executive agreements with other nations and sent agents to Europe without seeking congressional approval. Washington's decision to send agents to Europe without seeking Senate assent had far greater significance at the time than the use of an executive agreement. Washington was unsure whether to consult the Senate "on the propriety of sending public characters abroad, say, to England, Holland, and Portugal" and, therefore, sought Madison and

and the United States over territorial boundaries and navigation of the Mississippi. For background information showing concern over the issue of the Mississippi navigation, see supra notes 137-38 and accompanying text. For a general study of the Spanish negotiations, see S. BEMIS, PINCKNEY'S TREATY: A STUDY OF AMERICA'S ADVANTAGE FROM EUROPE'S DISTRESS, 1783-1800 (1926).

312. R. HAYDEN, supra note 275, at 55-56.
313. Id.
314. Washington decided for reasons of political convenience not to seek consultation on the specific instructions involving territorial boundaries and rights to navigation of the Mississippi. Id. at 56.
315. Id. at 11, 40. The Senate played an important role, for example, concerning negotiations with Algiers and Spain. Id. It even played a significant role in the negotiation of the Jay Treaty. Id. at 40.
316. An executive agreement is a compact with a foreign nation concluded by the President without Senate consent. For an analysis of executive agreements, see L. HENKIN, supra note 143, at 173-85. Historians regard a postal agreement made by Washington with Canada as the first executive agreement. E.g., A. SOFAER, supra note 55, at 97.
317. Letter from George Washington to James Madison [Aug., 1789], in 30 WASHING-
Jefferson's advice on the matter. Jefferson's viewpoint was that the Constitution did not require this consultation. He defined the Senate's role as limited to approving the presidential choice for ambassador and asserted the President's authority to select and place diplomats. Less than two months after this exchange, Washington authorized Gouverneur Morris to embark upon discussions with the British as a private agent to ascertain British sentiments about the unresolved portions of the Treaty of 1783 and to discuss the possibility of a commercial treaty.

Washington most likely resorted to using a private agent as a way to preserve American dignity. He desired a restoration of diplomatic relations with England but felt that, given England's prior disdain of an exchange of ambassadors, America could not send an ambassador until England made the first move to establish relations. Thus, Washington acted with an awareness of important national concerns when he authorized Morris' informal discussions with the British ministry. Washington also appointed a "private character" with confidential instructions to undertake a diplomatic mission to Lisbon. These two missions evidence Washington's willingness to act on sensitive foreign policy issues without requesting congressional approval. By sending diplomatic representatives without seeking Senate confirmation, Washington significantly increased presidential control over American diplomatic activities.

318. *The Papers of Thomas Jefferson* 245 (J. Boyd ed. 1965) [hereinafter cited as *Jefferson Papers*].
321. H. Wriston, *Executive Agents in American Foreign Relations* 370-71 (1967). In his message to Congress on the Morris mission, Washington expressed his belief that sending an informal agent best suited America's interests, as it was impossible to determine how the British would respond to a formal diplomatic mission. Message of the President of the United States, relative to a Commercial Treaty with Great Britain (Feb. 14, 1791), in 1 A.S.P.F.R., *supra* note 320, at 121.
322. Washington sent Colonel David Humphreys to Lisbon. For the text of Washington's message to the Senate regarding the Lisbon mission, see 1 A.S.P.F.R., *supra* note 320, at 127.
323. As one commentator has stated, Washington's appointment of Morris "constituted a practical assertion of a right on the part of the President to appoint agents for diplomatic
Had Congress voiced strong disapproval, presidents might have acted cautiously before again attempting this action on their own; however, as Congress expressed no opposition to Washington's extension of his foreign policy powers, his early actions set a precedent for greater presidential authority. Congress' positive response to Washington's diplomatic moves and its enactment of legislation granting him important powers concerning the use of secret envoys, helped to strengthen presidential prerogatives in the foreign policy sphere. The Congressional Act of July 1, 1790,324 in providing a lump sum grant to the President for diplomatic expenditures, delegated to him control over placement of American representatives.325 The Act required the President to "account specifically" to the Congress for all expenditures "as in his judgment may be made public," and gave him discretion on what he thought "it advisable not to specify."326 Thus, Congress allowed the President to authorize and conceal those sensitive missions that required secrecy. It was not until months after the enactment of this law, and long after he had sent the envoys on their respective missions, that Washington notified the Congress about the missions.327 Possibly, the legislature's awareness of the need for secret presidential diplomatic maneuvers lay behind the fact that there was almost no disapproval expressed over Washington's action. The only evidence of discontent is found in Maclay's writings which displayed his anger about Washington sending the envoys and asking approval only after the completion of their mission.328 Congress,

324. An Act providing the means of intercourse between the United States and foreign nations. 1 Stat. 128, ch. 22 (1790).
325. See id.
326. Id. § 1, at 129. For a discussion of the Act, see A. SOFAER, supra note 55, at 80; 6 THE DIARIES OF GEORGE WASHINGTON, supra note 211, at 78-79.
328. See G. HAYNES, supra note 285, at 69. Maclay wrote in his diary that Morris "has acted in a strange kind of capacity, half pimp, half envoy, or perhaps more properly a kind of political eavesdropper about the British court." THE JOURNAL OF WILLIAM MACLAY, supra note 293, at 389.

Charles Beard, who wrote an introduction for an edition of Maclay's journal and who had a high regard for its historical value, suggests reasons why Maclay's journal has such a caustic tone at various points. Among other reasons, Beard notes:

Maclay was unacquainted with that great law of political science according to which the bee fertilizes the flower that it despoils, working wonders in destiny beyond the purposes of the hour; and being ignorant of that law, he allowed his bitterness to get the better of his discretion, filling his pages with savage comment and
however, by its legislation and by its failure to evince any displeasure with Washington over his protracted delay in informing the Senate of the private diplomatic missions, buttressed Washington's dominant position in the international sphere.

C. The Neutrality Proclamation and War Powers

The French declaration of war against Great Britain on February 1, 1793329 alarmed American leaders and prompted concern that the conflict would disrupt American shipping and draw the country into the hostilities. Government leaders quickly realized the need to establish neutral policies330 and began Cabinet discussions about the proper response to the European situation.331 Prior to the Cabinet meeting, Washington sent the Cabinet officers “sundry questions” for the purpose of “forming a general plan of conduct for the Executive.”332 Among the questions that Washington submitted to the Cabinet were: “Shall a proclamation issue for the purpose of preventing interferences . . . ?”333 and “Is it necessary or advisable to call together the two Houses of Congress with a view to the present posture of European Affairs? If it is, what should be the partic-

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331. In a letter to C.W.F. Dumas, Jefferson expressed beliefs on the European war that mirrored the attitude of the Cabinet. Jefferson stated that “[w]e wish not to meddle with the internal affairs of any country, nor with the general affairs of Europe.” Letter from Thomas Jefferson to C.W.F. Dumas (Mar. 24, 1793), quoted in 3 D. MALONE, supra note 330, at 62-63 (emphasis omitted). As he told Dumas, the American government desired to keep the nation at peace and to secure neutral rights for its ships. See id.
333. Questions Submitted to the Cabinet by the President (Apr. 18, 1793) (footnote omitted), in 32 WASHINGTON WRITINGS, supra note 15, at 419, 419.
ular object of such a call?” The Cabinet members all agreed that the government should issue a proclamation forbidding American citizens to take part in hostilities and decided unanimously against calling the Congress into special session. Thus, the Cabinet decided that it could make momentous foreign policy decisions on neutrality without even seeking congressional participation.

The text of the proclamation demonstrates the importance of the proclamation in the growth of presidential power. In the proclamation, Washington declared “the disposition of the United States” to maintain an impartial stance and exhorted American citizens to avoid any acts contrary to this posture of impartiality. In addition, Washington instructed American officials “to cause prosecutions to be instituted against all persons, who shall, within the cognizance of the courts of the United States, violate the law of nations, with respect to the Powers at war, or any of them.”

The significance of the proclamation cannot be overemphasized. Without consulting Congress, Washington had proclaimed that the United States would maintain a position of neutrality and ordered

334. Id. at 420. Though Washington submitted the questions to the Cabinet it seems that Hamilton actually wrote the questions. Jefferson expressed this idea in his journal, stating that it was “palpable from the style, their ingenious tissue and suite, that [the questions] were not the President’s . . . that the language was Hamilton’s, and the doubts his alone.” The ANAS OF THOMAS JEFFERSON 118 (F. Sawvel ed. 1903 & photo. reprint 1970) [hereinafter cited as THE ANAS] (According to the Oxford English Dictionary, eighteenth century Englishmen defined “ana” as a collection of notable sayings or table-talk of modern authors. 1 OXFORD ENGLISH DICTIONARY 299 (1933 & photo. reprint 1961)). One scholar of the neutrality states that Hamilton was undoubtedly responsible for the questions, and that the Cabinet members must have known that he was the author. See C. THOMAS, supra note 57, at 29-30 & n.3.

335. Questions Submitted to the Cabinet by the President (Apr. 18, 1793), supra note 333, at 420 n.14.

336. It should be noted that war issues first came up during the Nootka Sound Incident, also known as the Anglo-Spanish War Crisis of 1790. See Søfaer, supra note 249, at 18. The circumstances of the Nootka Sound Incident were quite unusual in that the nation was so new and so weak militarily that the Cabinet was faced with the question of how to respond should a foreign army cross America to attack another nation’s territory. Because of the uniqueness of the circumstances and the fact that discussions merely involved a theoretical possibility of a foreign army crossing American borders, discussion of the war issues is confined to the section on the neutrality proclamation and the war powers. See supra text accompanying notes 329-35; infra text accompanying notes 339-61: For sources on the Nootka Sound Incident, see J. BOYD, supra note 57, at 3.

337. Washington issued the proclamation on April 22, 1793 declaring the United States' impartial stance on the European conflict. For the text of the proclamation, see 1 A.S.P.F.R., supra note 320, at 140.

338. Id.

339. Id.
officials to prosecute those who violated the neutrality. He thus boldly asserted a presidential right to issue a proclamation of neutrality, ignoring any arguments that Congress, by virtue of its power to declare war, had ultimate authority over whether the nation should adopt a belligerent posture. Additionally, it certainly can be argued that Washington may have usurped legislative authority by threatening prosecutions based on his proclamation and international law, rather than on legislative enactment. By his proclamation, Washington exercised exclusive control over the determination of an American neutrality policy and made an initial inroad into congressional war-making power.

Cabinet members expressed divergent opinions about the precise nature and scope of the proclamation. During the Cabinet meeting called to address the American stance, Secretary of State Thomas Jefferson voiced objections to a "declaration of neutrality," but supported the issuance of the proclamation after the Cabinet came to an understanding that the proclamation would not bind the incoming Congress and would not contain the word "neutrality."

340. Both Jefferson and Madison questioned the propriety of the President's proclamation. In a letter dated June 29, 1793, Jefferson wrote Madison that "[t]he declaration [by the President] of the disposition of the U.S. can hardly be called illegal, tho' it was certainly officious [and] improper." Letter from Thomas Jefferson to James Madison (June 29, 1793), in 7 JEFFERSON WORKS, supra note 330, at 418, 421. In a later letter to Madison, Jefferson declared that "[t]he instrument was badly drawn, and made the P. go out of his line to declare things which, tho' true, it was not exactly his province to declare." Letter from Thomas Jefferson to James Madison (Aug. 11, 1793), in id. at 471, 473. Madison questioned the constitutionality of the proclamation, saying "[a]nd it seems to violate the forms & spirit of the Constitution, by making the executive Magistrate the organ of the disposition, the duty and the interest of the Nation in relation to War & peace, subjects appropriated to other departments of the Government." Letter from James Madison to Thomas Jefferson (June 10, 1793), quoted in 3 D. MALONE, supra note 330, at 72.

341. J. CARROLL & M. ASHWORTH, supra note 57, at 48. In the Cabinet meeting Jefferson offered two reasons for his opposition to a neutrality proclamation. First, he argued that the President did not have the power to declare neutrality, which amounted to a declaration that the United States was not at war, because Congress alone had the power to determine issues of war. Id. In a similar vein, Jefferson claimed that since the President could not affirmatively declare war he should not declare a state of neutrality. See C. THOMAS, supra note 57, at 35-36. Second, Jefferson wanted the United States to hold off before issuing a proclamation in order to exact some British concessions. Id. at 36; see J. CARROLL & M. ASHWORTH, supra note 57, at 48. C. Thomas notes that partisan motives had also likely influenced Jefferson, who expected people sympathetic with his views to control the next Congress. See C. THOMAS, supra note 57, at 37. For a discussion of the possible reasons underlying Jefferson's ultimate conclusion that the Congress should not be immediately called, see A. SOFAER, supra note 55, at 104.

342. J. CARROLL & M. ASHWORTH, supra note 57, at 48. Thus, the "neutrality proclamation" does not specifically use the word neutrality. C. HYNEMAN, THE FIRST AMERICAN NEUTRALITY 12 (1974). Hyneman states that the omission of the word neutrality had no real
Despite apparent agreement on the proclamation at the date of its issuance, by the time that Washington began preparing his fifth annual address,\textsuperscript{343} Cabinet members differed sharply about presidential powers in the foreign affairs sphere. In the Cabinet discussion over the forthcoming address, Hamilton disagreed with fellow Cabinet members, Attorney General Edmund Randolph and Jefferson, over how the President should handle the proclamation issue. Though Hamilton grudgingly admitted that the proclamation could not legally bind Congress,\textsuperscript{344} he stressed the President’s right to declare to the United States’ citizens and to foreign nations his support “for a future neutrality.”\textsuperscript{345} Hamilton wanted the President to avoid the issue in his speech as a way of leaving open the question of presidential rights over the proclamation of neutrality.\textsuperscript{346} In contrast, Randolph felt that the President should discuss the context in which he issued the proclamation in order to affirm the limited nature of the proclamation.\textsuperscript{347} Randolph took the view that foreign nations should consider the proclamation as only reflecting the President’s belief that neutrality best served the nation’s needs.\textsuperscript{348} Jefferson stressed the fact that the President had no power to guarantee neutrality\textsuperscript{349} and provided his own interpretation of the meaning of the proclamation, saying that Congress adjourned with the nation at peace and that Washington was bound to preserve this state until Congress reconvened.\textsuperscript{350} He added that a proclamation could go no further than to proclaim this present state of peace.\textsuperscript{351} Thus, Randolph and Jefferson envisioned a far more limited view of presi-

\textsuperscript{343} Fifth Annual Address to Congress (Dec. 3, 1793), in 33 \textit{WASHINGTON WRITINGS}, supra note 15, at 163.

\textsuperscript{344} \textit{THE ANAS}, supra note 334, at 175. \textit{But see} C. THOMAS, supra note 57, at 241. (Thomas states that at the time of the address Hamilton took a broad view of the proclamation, claiming that the President was competent to give it, and that it bound the nation. Washington disavowed Hamilton’s approach.)

\textsuperscript{345} \textit{THE ANAS}, supra note 334, at 178 (emphasis in original). \textit{See also} 15 \textit{THE PAPERS OF ALEXANDER HAMILTON} 425-26 (H. Syrett ed. 1969) [hereinafter cited as \textit{HAMILTON PAPERS}].

\textsuperscript{346} \textit{HAMILTON PAPERS}, supra note 345, at 426.

\textsuperscript{347} \textit{See id.}

\textsuperscript{348} \textit{THE ANAS}, supra note 334, at 176.

\textsuperscript{349} \textit{See id.}

\textsuperscript{350} \textit{Id.}

\textsuperscript{351} \textit{Id.} For Jefferson’s reasons for supporting the proclamation and his view on the meaning of it, see Letter from Thomas Jefferson to James Madison (Aug. 11, 1793), in 7 \textit{JEFFERSON WORKS}, supra note 330, at 471.
dential authority than that proposed by Hamilton. 352

Randolph and Jefferson also refuted Hamilton’s pronouncement concerning the President’s general ability to determine America’s war footing. Hamilton took the position that the President and the Senate could make a treaty that would have the effect of stripping Congress’ power to declare war in the event that certain prescribed conditions occurred. 353 Randolph stated that, if the government desired to act by a treaty in a field exclusively in the legislative domain, it was incumbent on the treatymakers to seek legislative confirmation of the treaty. 354 Jefferson, fearing that the Senate and President might act beyond their powers, wanted the Constitution to be construed narrowly. He viewed the possibility of amendment as the proper means for expanding treaty power, rather than the expansion of power by the acceptance of the President and Senate acting in a manner forbidden by the Constitution. 355

Washington, both in Cabinet discussions and in his Fifth Annual Address to Congress, rejected Hamilton’s approach to presidential war powers. At the Cabinet meeting, Washington stated that he never intended that the proclamation “look beyond the first day” of the next session of Congress. 356 Similarly, in his address to Congress, Washington reiterated this limited view of presidential war-making authority. Washington told the Congress that he thought it was his duty to make known the nation’s “disposition for peace” and therefore concluded that it was necessary to issue a proclamation. 357 He stressed the fact, however, that it rested “with the wisdom of Congress to correct, improve or enforce this plan of procedure.” 358 Though political considerations motivated Washington’s expression of congressional authority over neutrality, it is clear from his views expressed in the Cabinet meeting regarding his address that Washington truly believed that his proclamation was meant only for the period prior to the reconvening of Congress.

Despite Washington’s view of his restricted powers to determine

352. Jefferson expressed basic agreement with Randolph’s views, but felt that the proclamation should have even a more limited scope than that suggested by Randolph. See The Anas, supra note 334, at 180.

353. Id. at 179.

354. Id.

355. Id. at 179-80.

356. Id. at 176.

357. Fifth Annual Address to Congress (Dec. 3, 1793), in 33 Washington Writings, supra note 15, at 164.

358. Id.
neutrality, the neutrality proclamation proved to be a watershed in the development of expanded presidential power in foreign policy. By issuing the proclamation, the President asserted his exclusive right to determine national policies and "assumed the power to make unilateral decisions in foreign affairs that could have led to war." Although Washington's proclamation failed to become a precedent for presidential neutrality declarations, it signalled the beginning of presidential domination over foreign policymaking.

D. Additional Issues Involving Neutrality

Besides the actual proclamation, there are other important issues that surfaced involving neutrality. Principally, these issues revolve around the relationship of the branches of government, the enforcement of neutrality and the administration's refusal to convene Congress. Discussion of the diametrically opposed interpretations of presidential powers formulated in response to the neutrality proclamation will be addressed in a later section.

To the modern observer, one of the most unusual aspects concerning the enforcement of neutrality is Washington's attempt to solicit Supreme Court advice on a number of unresolved legal questions about neutrality. The Supreme Court refused, for

359. Sofaer, supra note 249, at 18.
360. In subsequent administrations, Congress has proclaimed and implemented neutral policies. L. Henkin, supra note 143, at 85; Loss, Introduction to The Letters of Pacificus and Helvidius (1845) with The Letters of Americanus at xiii (1845 & photo. reprint 1976) [hereinafter cited as PACIFICUS-HELVIDIUS LETTERS]. Henkin notes that while Congress has made subsequent neutrality proclamations, presidents have not admitted that they could not act unilaterally, and have strayed on occasion from congressionally proclaimed neutrality. L. Henkin, supra note 143, at 48.
361. See A. DeConde, supra note 151, at 90. DeConde refers to the proclamation's "precedent-making significance" and labels it a "bold step" in establishing the executive's claim to the "exclusive right to determine policy." Id.
362. See infra notes 423-64 and accompanying text.
363. Jefferson, Hamilton, and Knox wrote an opinion that the President should seek the Supreme Court's advice on "certain matters of public concern." Cabinet Meeting, Opinion on Vessels Arming and Arriving in United States Ports (July 12, 1793), in 15 HAMILTON PAPERS, supra note 345, at 87. The President sent a list of twenty-nine questions on the European war to the Supreme Court, with an accompanying letter written by Secretary of State Jefferson. Jefferson made note of the executive department's limited experience in interpreting laws and treaties and stated that the Supreme Court would provide security against error in interpretation. Letter from Thomas Jefferson to the Chief Justice and Judges of the Supreme Court of the United States (July 18, 1793), in 7 JEFFERSON WORKS, supra note 330, at 451, 452. Jefferson added that "[t]he President would . . . be much relieved if he found himself free to refer questions of this description to the . . . Judges. . . ." Id. His letter shows the Cabinet's awareness of possible constitutional limitations on giving this advice. Jefferson stated that the President desired to know "[w]hether the public may, with propriety, be availed of [the
constitutional reasons, to consider Washington's questions. The Justices stated:

The Lines of Separation drawn by the Constitution between the three Departments of government—their being in certain Respects checks on each other—and our being Judges of a Court in the last Resort—are Considerations which afford strong arguments against the Propriety of our extrajudicially deciding the questions alluded to; especially as the Power given by the Constitution to the President of calling on the Heads of Departments for opinions, seems to have been purposely as well as expressly limited to the executive Departments. 364

The Court's action was of crucial importance because it cemented the political separation of the branches and reaffirmed the Court's purely judicial role. 365 If the Court had responded to Washington's entreaties, constitutional development might have been radically different because the Court might have assumed an advisory role to the President on issues involving foreign policy.

While Washington had narrowly interpreted his power to issue a neutrality proclamation, 366 he took an expansive view of his power to enforce the neutrality. Despite the absence of any congressional legislation granting the President power to implement neutral policies, Washington began to enforce the neutrality. He issued instructions in May, 1793 to state governors and port collectors requiring them to prevent any foreign vessels from arming and to notify him whenever ships began to arm. 367 Furthermore, the administration issued a code comprised of eight rules—referred to as "deductions [Court's] advice on these question[s]!!"—"Id. For the text of the questions, see Questions Proposed to be Submitted to the Judges of the Supreme Court (July 18, 1793) (footnote omitted), in 33 Washington Writings, supra note 15, at 15-19.

366. 15 Hamilton Papers, supra note 345, at 111 n.1 (emphasis in original).

367. This refusal to address Washington's questions especially was significant because earlier relations between the branches had suggested the possibility that the Supreme Court would advise the President. Chief Justice Jay had responded to a question posed by Washington concerning the Anglo-Spanish War Crisis of 1790, also known as the Nootka Sound Incident. See C. Thomas, supra note 57, at 149 n.5. In addition, prior to the issuance of the neutrality proclamation, Jay replied to an April 9, 1793 letter in which Hamilton had asked his views about the wisdom of issuing a proclamation and had requested that Jay submit a draft of a proclamation. Letter from Alexander Hamilton to John Jay (Apr. 9, 1793), in 14 Hamilton Papers, supra note 345, at 299-300. Not only did Jay advise Hamilton, but he also sent a proposed draft for Washington's use. See Letter from John Jay to Alexander Hamilton (Apr. 11, 1793), in id. at 307-10.

368. See supra text accompanying note 356.

369. C. Hyneman, supra note 342, at 77.

from the laws of neutrality—to provide guidelines to port collectors in their enforcement of the President’s measures. The administration’s neutrality measures resemble a legislative enactment rather than a mere executive enforcement of the laws.

Washington took another significant step without congressional consultation when he expressed his opinion to the French and English ambassadors that he considered it “incumbent upon the United States” to compensate, in certain circumstances, parties who lost ships. Washington told Hamilton that he had “pointedly desired” the letter to the ambassadors to “be so guarded as to convey nothing more than an opinion of the Executive.” There is no doubt that Washington and Jefferson believed that only Congress could provide compensation to foreign ship owners. The carefully phrased letter to the ambassadors demonstrates Washington’s concern that the ambassadors realize that he could give only his opinion and could not guarantee compensation.

Notwithstanding Washington’s stated intentions, his letter to the ambassadors had significant implications for both Congress and foreign relations. According to diplomatic conventions of the age, foreign countries would have expected that Washington’s “opinion” essentially amounted to a commitment by the country. Washington’s action placed great pressure on Congress to provide funds for compensation because its refusal could have had serious international consequences and could have greatly embarrassed the President. Nevertheless, Congress did not feel

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HAMILTON PAPERS, supra note 345, at 168-70. Washington enclosed these rules in the Treasury Department Circular to the Collectors of the Customs, in id. at 179 n.2.

369. Treasury Department Circular to the Collectors of the Customs (Aug. 4, 1793), in id. at 178, 178-79.

370. Id. at 178-81.

371. C. THOMAS, supra note 57, at 200. For the letter to the French ambassador Genet, see Letter from Thomas Jefferson to the French Minister (Aug. 7, 1793) (footnote omitted), in 7 JEFFERSON WORKS, supra note 330, at 468.


373. See C. THOMAS, supra note 57, at 200. Thomas states that while Washington and Jefferson took care to follow constitutional mandates on this matter, Hamilton had no such scruples. Id.

374. Letter from Alexander Hamilton to George Washington (June 22, 1794), in 16 HAMILTON PAPERS, supra note 345, at 513, 514. Hamilton wrote Washington that “between nation & nation [a President's opinion] is equivalent to a virtual engagement that compensation will be made.” Id. at 514 (emphasis in original).

375. As Hamilton said, “[N]on compliance with [the President’s opinion] would be a serious commitment of the character of the Nation the Government and the President. Indeed if the Legislature should not do its part, under such circumstances, it would necessarily give
bound by Washington's opinion and ignored his request to provide funds to compensate the shipowners. By its action, the Congress asserted its authority over expenditures and reinforced the need for presidents to proceed cautiously before declaring their thoughts on the nation's financial obligations. 

In regard to issues involving the law of nations, it can certainly be argued that Washington acted beyond the scope of his powers. The Constitution provides that "Congress shall have Power to... make Rules concerning Captures on Land and Water." In addition, it gives to Congress the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." Yet, notwithstanding these grants of power to Congress, Washington instituted rules concerning captures on the high seas. He set United States' jurisdictional limits at three miles (one sea league) and prohibited the warring nations from engaging in hostilities within this territorial limit. Also, in accordance with the law of nations, he determined that war ships could not give chase after a vessel leaving port until twenty-four hours had elapsed. He announced that the government would view any vessel violating this rule as being in contravention of the law of nations and that would take action against prizes seized by the offending ship. Washington thus had acted to make "Rules concerning Capture" and had defined "Offenses against the Law of Nations" even though the Constitution to considerations very embarrassing to the delicacy of the President." Id. at 514 (emphasis in original).

376. Ultimately, the issue of compensation was resolved by the Jay Treaty. C. THOMAS, supra note 57, at 200 n.4. For a discussion of the Jay Treaty and constitutional questions concerning it, see infra notes 480-574 and accompanying text.

377. Washington explained why the Congress did not feel obliged to furnish the funds: "[A]lthough the usage of other Nations may be opposed to [the Congress' action], the difference may result from the difference between their Constitutions and ours, and from the prerogative of their Executives." Letter from George Washington to the Secretary of the Treasury [Alexander Hamilton] (July 2, 1794), supra note 372, at 422.

378. U.S. CONST. art. I, § 8, cl. 11.


381. C. HYNEMAN, supra note 342, at 69. Randolph, in announcing the rule, stated that it was "reasonable in itself, and conformable to the law of nations." Id.

382. Id. The British ambassador scorned Washington's failure to act more quickly to implement a twenty-four hour rule, saying that Washington did not make a decision until the arrival of a British fleet in American waters compelled him to do so. See id. at 70.
stitution explicitly granted this authority to the legislative branch. 383

In addition to establishing rules for captures on the high seas, the executive branch went so far as to contemplate and ultimately institute prosecutions against Americans accused of violating the neutrality. The Cabinet asked Attorney General Edmund Randolph to determine whether the government could punish American seamen who joined French privateers. 384 Randolph informed the Cabinet that since the United States had a treaty with Great Britain and treaties were law, citizens who acted contrary to the treaties could be prosecuted at common law. 385 Besides Randolph, all the lawyers consulted by the Cabinet felt that the government could prosecute American citizens who served on French privateers. 386 Bolstered further by a jury instruction by Chief Justice John Jay indicating that he thought such prosecutions permissible, 387 the government decided to prosecute American seaman, Gideon Henfield, for serving on a French ship. 388

Despite Supreme Court Justices Wilson and Iredell’s acquiescence in the prosecution, 389 Henfield’s case raises serious constitutional questions. The fact that the Constitution delegated to Con-

383. The Cabinet did show some awareness of the constitutional limitations on its right to act without congressional consent. For example, the Cabinet decided that it should refrain from preventing the sale of legally condemned prizes because this action could only be made by the legislature. Feeling that it was important to prevent these sales, the Cabinet believed that Washington should recommend to Congress that it prohibit them. C. Thomas, supra note 57, at 219 n.3.

384. Id. at 170.

385. Id. at 170 & n.3.

386. Id. at 171. But other lawyers questioned whether the government could prosecute people for violating the law of nations. Even the district judge and the prosecuting attorney had some reservations about the prosecution. Id. at 172.

387. See id. at 172 n.1; see also C. HyneMan, supra note 342, at 129.

388. For a discussion of the Henfield affair, see C. HyneMan, supra note 342, at 129-31; F. Wharton, State Trials of the United States During the Administrations of Washington and Adams 49-89 (1849).

389. They presided at the trial along with federal district judge Richard Peters. F. Wharton, supra note 388, at 83. Wilson charged the jury that “[i]t is the joint and unanimous opinion of the Court, that the United States, being in a state of neutrality relative to the present war, the acts of hostility committed by Gideon Henfield are an offence against this country, and punishable by its laws.” Id. at 84. Wharton provided a concise summary of Justice Wilson’s several justifications in support of the government’s right to prosecute violators of the neutrality: (1) citizens of a neutral state who aided in attacks on belligerents were guilty of an offense against the law of nations and could be punished by the neutral state for this action; (2) the federal courts had jurisdiction over such offenses and could punish offenders according to “the forms of the common law,” even though Congress had not defined any offenses against the law of nations; and (3) a citizen could be punished for violating a treaty with a foreign government. Id. at 85.
gress sole authority to define crimes against nations, and the Congress had not prohibited Americans from serving on belligerent's ships, prompts one to agree with contemporary critics of Washington who felt that he was improperly "trying to give a proclamation the force of a law." Henfield's acquittal only increased suspicions that Washington was exceeding his authority. The lack of congressional authorization posed a related question: Did "the federal judiciary have jurisdiction under the common law even though Congress [had] not given it the statutory jurisdiction[?]" One neutrality scholar has declared: "One may well doubt that the federal courts would uphold in the twentieth century the acts of a president who, without statutory authority, issued such important rules as many of those announced by President Washington prior to the act of June 5, 1794."

Besides seemingly usurping the legislative function, the President acted in a judicial capacity. Washington established a procedure for impartial arbitration, but ordered district attorneys, in the event that ship owners and captors could not agree on a panel of arbitrators, to collect evidence and submit the data to the President for resolution. In one case, involving the Fanny, the President evaluated the evidence and determined the fate of the ship. Thus, the President decided the dispute over possession of a ship arising from rules that he had issued.

A final subject of importance concerning neutrality is Washington's refusal to convene Congress to address problems in enforcing America's impartial posture. Prior to the issuance of the proclamation, the Cabinet members had decided unanimously against convening the Congress at that time to deliberate upon American policy regarding the European war. On August 3, 1793, Washington,
noting among other reasons the "general complexion of public matters" and the jury verdict in the Henfield case, again consulted the Cabinet about whether he should assemble the legislature at an earlier date than scheduled.\textsuperscript{397} No doubt Washington's desire for legislation to support his neutrality program underlay his thoughts about convening the Congress.\textsuperscript{398} The Cabinet decided, however, against calling the Congress into session early, with only Jefferson favoring an early date for the next session.\textsuperscript{399} Hamilton justified this decision by noting that the Constitution mandated that the President convene a special session only in extraordinary circumstances. He also emphasized that the saving in time would not compensate for the resulting public alarm.\textsuperscript{400} Jefferson's discussion of the Cabinet meeting sheds much light on the decision not to convene Congress. Jefferson declared:

Knox said we should have had fine work, if Congress had been sitting these two last months. The fool thus let out the secret. Hamilton, endeavored to patch up the indiscretion of this blabber, by say-

\textsuperscript{397} See Letter from George Washington to the Heads of Departments and the Attorney General (Aug. 3, 1793), in 33 \textsc{Washington Writings}, supra note 15, at 35, 36 (emphasis omitted). The Cabinet discussion of whether to convene Congress at an earlier time than scheduled so concerned Washington that he wrote Jefferson on the next day to inquire about whether the Cabinet had reached any conclusions on this question. Letter from George Washington to Thomas Jefferson (Aug. 4, 1793), in \textit{id.} at 37-38.

\textsuperscript{398} This point is evidenced by Washington's Fifth Annual Address to Congress. Fifth Annual Address to Congress (Dec. 3, 1793), in 33 \textsc{Washington Writings}, supra note 15, at 163. In this Address, he informed the Congress that "it will probably be found expedient, to extend the legal code, and the Jurisdiction of the Courts of the United States, to many cases, which, though dependent on principles already recognized, demand some further provisions." \textit{id.} at 164-65. Washington made note of the Henfield circumstances, stating that the Congress should quickly examine offences against the law of nations in cases where the penalties were "indistinctly marked." \textit{id.} at 165.

\textsuperscript{399} See Letter from George Washington to the Heads of Departments and the Attorney General (Aug. 3, 1793), in 33 \textsc{Washington Writings}, supra note 15, at 36 n.48. Hamilton opposed the idea of advancing the date on which Congress was to be called, but said that he would follow the majority. \textsc{The Anas}, supra note 334, at 160. Washington informed the Cabinet that he personally favored calling Congress prior to the scheduled date, but decided to follow the Cabinet's advice. \textit{id.} at 161.

\textsuperscript{400} Letter from Alexander Hamilton to George Washington (Aug. 5, 1793), in 15 \textsc{Hamilton Papers}, supra note 345, at 194, 195. Jefferson felt that starting the first Monday in November would enable Congress to begin earlier than scheduled without causing public alarm. Opinion on Calling of Congress (Aug. 4, 1793), in 7 \textsc{Jefferson Works}, supra note 330, at 465, 466. Jefferson proposed an early meeting of the Congress because among other reasons, "several legislative provisions are wanting to enable the government to steer steadily through the difficulties daily produced by the war of Europe, and to prevent our being involved in it by the incidents and perplexities to which it is constantly giving birth." \textit{id.} at 465.
ing "he did not know; he rather thought they would have strengthened the executive arm." 401

Jefferson followed this discussion by expressing his belief that the Cabinet’s real motivation for not convening Congress was that the Cabinet did “not wish to lengthen the session of the next Congress.” 402

Most likely Washington and his Cabinet acted without calling Congress because they were wary of popular enthusiasm and congressional support for the French. 403 Feelings were so strong that, after a French military victory in September 1792, there were “[p]opular demonstrations, almost unprecedented in fervor,” from Boston to Charleston. 404 The Cabinet clearly perceived the strong popular feelings toward the French. Hamilton wrote in a February 5, 1793 letter that “[t]he popular tide in this country is strong in favor of the last revolution in France; and there are many who go, of course, with that tide, and endeavour always to turn it to account.” 405 Jefferson wrote to the same man that ninety-nine in one hundred Americans favored the French cause. 406 Although quite sympathetic to the French cause, Jefferson expressed his wish that “we may be able to repress the spirits of the people within the limits of a fair neutrality.” 407 Undoubtedly, the Cabinet’s perception of the fervent public approval of the French Revolution, and its fear that Congress might jeopardize the neutrality because of its French sympathies, underlay the Cabinet’s decision to delay the convening of Congress until months after the neutrality proclamation took effect.

401. THE ANS, supra note 334, at 160.
402. Id. at 160-61 (emphasis in original).
403. For a discussion of the enthusiastic American response to the French Revolution, see C. HAZEN, CONTEMPORARY AMERICAN OPINION OF THE FRENCH REVOLUTION 164-87 (1897).
404. J. CARROLL & M. ASHWORTH, supra note 57, at 24. The residents of Charleston showered their affection on newly arrived French Ambassador Genet, and Genet was accorded enthusiastic receptions throughout the Carolinas. See id. at 69-70; C. HAZEN, supra note 403, at 173-89. But see J. CARROLL & M. ASHWORTH, supra note 57, at 70 n.163 (noting that the local newspapers do “not substantiate . . . altogether” the traditional view of Genet’s reception).
405. Letter from Alexander Hamilton to William Short (Feb. 5, 1793), in 14 HAMILTON PAPERS, supra note 345, at 7, 7. According to Jefferson, Hamilton considered the public disposition towards France to be a “serious calamity.” THE ANS, supra note 334, at 182 (Nov. 28, 1793).
407. 3 D. MALONE, supra note 330, at 73.
Though Washington's decision not to assemble the Congress to address the neutrality issue, in retrospect, seems to be justified on grounds of expediency,\textsuperscript{408} this justification does not eliminate constitutional questions regarding Washington's determination not to call Congress. Thomas Jefferson, in a statement made several weeks prior to the Cabinet meeting in which he voted against calling Congress, provides an important insight on this issue. Jefferson stated that since the President could not declare war he should not determine the issue of war "on the negative side, by preventing the competent body from deliberating on the question."\textsuperscript{409} The contradiction between Jefferson's statement and his actions suggests that, despite his reservations about the constitutionality of presidential actions, Jefferson felt that the preservation of peace was too important to risk trusting to the francophile Congress. Madison, in a letter inquiring of Jefferson why the President had not summoned Congress into session, decried the "assumption of prerogatives, not clearly found in the Constitution and having the appearance of being copied from a monarchical model."\textsuperscript{410} Madison's outburst provides a summary of the crucial constitutional issue involving the neutrality; that is, whether Washington's neutrality measures violated the constitutional distribution of foreign policy power. Ignoring the substantial congressional role in foreign policy dictated by the Constitution,\textsuperscript{411} Washington instituted a series of enforcement measures without convening Congress. In enforcing the neutrality, Washington seems to have exercised distinctly legislative and judicial functions. Washington's actions must be considered, however, in light of a developing nation whose existence would have been endangered had Congress decided against a neutral stance toward the British.\textsuperscript{412}

Congressional action in the foreign policy realm furnishes a convenient epilogue for the neutrality issue. Early in its session, Congress asserted itself in foreign affairs. In March 1794, Congress reacted angrily to increased British captures of American ships, by passing an embargo that restricted all shipping in American ports

\textsuperscript{408} See C. Thomas, \textit{supra} note 57, at 33 (Thomas noted the need for quick action before Americans had a chance to join in the hostilities).

\textsuperscript{409} Letter from Thomas Jefferson to James Madison, (Mar. 1793), in 7 \textit{Jefferson Works}, \textit{supra} note 330, at 250, 250.

\textsuperscript{410} Letter from James Madison to Thomas Jefferson (June 13, 1793), \textit{quoted in J. Carroll & M. Ashworth, supra} note 57, at 53 n.47.

\textsuperscript{411} See \textit{supra} text accompanying notes 175-80.

\textsuperscript{412} For a discussion of the American leaders' concern over possible American entanglement in the European hostilities, see \textit{supra} notes 330-31 and accompanying text.
for a month.\textsuperscript{413} For the most part, however, rather than adopting its own position in foreign policy matters, Congress just showed its approval of Washington's action during the congressional recess. It endorsed Washington's broad exercise of power prior to the convening of Congress by permitting the President, while Congress was in recess, to impose an embargo "whenever, in his opinion, the public safety shall so require."\textsuperscript{414} In addition, since this embargo act permitted the President to determine whether to lay an embargo, it signalled congressional willingness to allow the President to use his discretion in a field that the Congress had a right to control.\textsuperscript{415} On June 5, 1794, Congress enacted a general neutrality act that provided the statutory authority needed for effective enforcement of Washington's neutrality program.\textsuperscript{416} The Act eliminated the difficulties that plagued Washington concerning the refusal of the courts to assume jurisdiction over captures, because it provided that district courts would "take cognizance of complaints by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of the coasts or shores thereof."\textsuperscript{417} Further, the Act authorized Washington to prevent foreign vessels fitted out in the United States from carrying out hostile acts and to force vessels to depart whenever the law of nations or American treaties indicated a need to demand their departure.\textsuperscript{418} One scholar notes that the Act of June 5, 1794 incorporated "the essence of [Washington's

\textsuperscript{413} S. BEMIS, supra note 30, at 267. Congress extended the embargo for another month, but the Senate later defeated a non-intercourse bill as Vice President Adams cast the deciding vote. C. THOMAS, supra note 57, at 246-47; see infra text accompanying notes 501-03. It should be noted that in authorizing an embargo, the Congress gave Washington much leeway over how to enforce it, as the Congress resolved that Washington should issue instructions to the revenue officials that were "best adapted" to give the embargo "full effect." Res. 2, 3d Cong., 1st Sess., 1 Stat. 400 (1794).

\textsuperscript{414} An Act to authorize the President of the United States to lay, regulate and revoke Embargoes, ch. 41, 1 Stat. 372 (1794). The emergency nature of the statute is shown by the fact that the statutory authority expired fifteen days after the convening of the next session of Congress. See id.

\textsuperscript{415} See id. It should be noted that the Congress carefully restricted the President's discretion, since the President had discretion to lay an embargo only when Congress was not in session, and the presidentially authorized embargo would expire fifteen days "from the actual meeting of Congress." Id.

\textsuperscript{416} See An Act in addition to the act for the punishment of certain crimes against the United States, ch. 50, 1 Stat. 381 (1794).

\textsuperscript{417} Id. § 6, at 384. Also, the Act made it illegal for an American citizen to assist a "foreign prince or state in war by land or sea." Id. § 1, at 382. The Act outlawed a number of offenses against the neutrality and imposed different fines and prison sentences, depending on the offense. For the offenses and punishments, see id. §§ 1-7, at 382-84.

\textsuperscript{418} Id. § 8, at 384.
measures] into statute." Thus, congressional enactments gave Washington the statutory authority to enforce the neutrality, and indicated congressional approval of the President's broad exercise of power.

Congressional response to Washington's message on the neutrality further demonstrates the legislative branch's favorable opinion of Washington's actions. Washington addressed the Congress in an extremely deferential manner, explaining his issuance of the proclamation as "my duty to admonish our Citizens." Later in his address, Washington emphasized that future enforcement and modification of the American neutrality depended on congressional action. The Congress praised Washington for his conduct, with the House voting unanimously to approve all of his actions regarding neutrality. While there is no doubt that the Congress favorably viewed Washington's actions, it cannot be determined to what extent Washington's deferential tone and his personal popularity induced Congress' positive response. Neither congressional approval of Washington's measures nor the wisdom of his decision not to convene the Congress and risk its embroiling the country in a disastrous war, should obscure the critical constitutional issues concerning Washington's unilateral actions in enforcing the neutrality. The uniqueness of the circumstances involving the neutrality, including the country's possible extinction and Washington's special status as the hero of the Revolution and a man above parties, indicates that the precedents of the first neutrality should be viewed cautiously. Arguments that Washington's actions are solid precedent for a dominant presidential foreign policy role, and that Washington's neutrality measures demonstrate the Framers' true intentions concerning the distribution of authority in the external sphere, must be viewed in relation to arguments addressing the weak constitutional underpinnings of Washington's actions and the special circumstances that prompted his particular response to the European war.

VI. THE PACIFICUS-HELVIDIUS LETTERS

Observing the popular uproar over the neutrality proclamation.
tion,\textsuperscript{423} Hamilton justified the declaration in a newspaper series using the pen name Pacificus.\textsuperscript{424} Hamilton’s celebrated articles prompted Jefferson to ask Madison to “[s]elect the most striking heresies and cut him to pieces in the face of the public” since “[t]here is nobody else who can and will enter the lists against him.”\textsuperscript{425} Madison responded to Jefferson’s entreaties by publishing a series of letters under the pseudonym Helvidius.\textsuperscript{426} The Pacificus-Helvidius letters are of great interest to students of presidential power because the letters illustrate the views of two men who played critical roles in the development of the structure of the government in the area of presidential authority and its constitutional foundation.

A. Pacificus

Given Hamilton’s views as expressed in the Constitutional Convention,\textsuperscript{427} it is not surprising that Hamilton broadly defined the executive’s role in foreign policy. Basing his theory of presidential powers on his interpretation of the executive clause,\textsuperscript{428} Hamilton claimed that the Constitution cloaked the President with extensive authority in foreign affairs.\textsuperscript{429} Further, Hamilton argued that presidential authority derived from the president’s role as the organ of foreign relations, his power to receive ambassadors and his duty to preserve the peace all pointed toward a prominent presidential role in foreign affairs.

Hamilton stressed the difference between the phrasing found in the constitutional grants of legislative and executive power. He noted that the Constitution says “[a]ll legislative powers herein granted shall be vested in a congress,” and “[t]he executive power shall be vested in a president.”\textsuperscript{430} Hamilton concluded that the Framers’ use of the phrasing “powers herein granted” was meant to limit the legislature to specifically enumerated powers, while their decision not to use this phrasing for the executive clause signified their desire to grant all executive power to the President. According to Hamilton,

\begin{itemize}
  \item \textsuperscript{423} See Pacificus-Helvidius Letters, supra note 360, at 5.
  \item \textsuperscript{424} E. Corwin, The President: Office and Powers 1787-1957, at 179 (1957).
  \item \textsuperscript{425} 6 J. Madison, The Writings of James Madison 138 (G. Hunt ed. 1906), quoted in Pacificus-Helvidius Letters, supra note 360, at ix (footnote omitted).
  \item \textsuperscript{426} Pacificus-Helvidius Letters, supra note 360, at xi.
  \item \textsuperscript{427} See supra notes 96-105 and accompanying text.
  \item \textsuperscript{428} U.S. Const. art. 2, § 1, cl. 1.
  \item \textsuperscript{429} See Pacificus-Helvidius Letters, supra note 360, at 10-11.
  \item \textsuperscript{430} Id. at 10 (emphasis in original) (quoting U.S. Const. art. I, § 1; id. art. II, § 1, cl. 1).
\end{itemize}
the enumerated powers in the executive section were just the "principal articles implied in the definition of executive power," with additional authority being derived "from the general grant of [the executive] power."431

Hamilton argued that the general grant of executive power supplies the President with the whole gamut of executive power "subject only to the exceptions and qualifications, which are expressed in the instrument."432 Hamilton considered treaty power, appointment power and congressional war power as exceptions to the general rule that executive power is lodged in the President. He declared that since the placement of treaty and war powers were mere exceptions to the general distribution of executive powers, "they are to be construed strictly, and ought to be extended no further than is essential to their execution."433 Because he claimed that war power should be construed very narrowly, Hamilton could justify a proclamation of neutrality as an executive function rather than as a legislative function derived from the war power.434 Though admitting that only the Congress could declare war, Hamilton claimed that the executive had a duty to preserve peace (for example, by making a neutrality proclamation) until Congress decided otherwise.435

Hamilton found additional bases for presidential authority in the foreign relations sphere. He claimed that since the President was "the organ of intercourse between the nation and foreign nations,"436 the President could pronounce his views on treaty relations with other governments.437 In addition, Hamilton argued that presidential power over the receiving of ambassadors enabled the President to decide whether or not to recognize new rulers. Hamilton noted that by making the decision whether to recognize a government, the President would also determine whether the United States would honor its treaty obligations with the newly established foreign government.438 Ultimately, Hamilton declared that the President, by his exercise of authority, could create a state of affairs that would have a great effect on the legislature's own ability to decide whether to de-

431. Id.
432. Id. (emphasis in original).
433. Id. at 14.
434. See id. at 12.
435. Id. at 14.
436. Id. at 9 (emphasis omitted).
437. See id. at 8-9.
438. Id. at 12-13.
B. Helvidius

Madison’s Helvidius articles refute Hamilton’s argument in support of a dominant presidential role in external matters. Madison counts Hamilton’s assertions by examining both the nature of executive authority and the nature of presidential war and treatymaking powers. According to Madison, war and treaties “can never fall within a proper definition of executive powers.” Madison notes that executive action presupposes “the existence of the laws to be executed.” He further states that treaties have the force of law and, like other laws, have a legislative nature, and that declaration of war is not the execution of a law but instead is “one of the most deliberative acts that can be performed.” Finally, he notes that the declaration of war “has the effect of repealing all the laws” contrary to the state of war “and of enacting, as a rule for the executive, a new code adapted to the relation between the society and its foreign enemy.”

After showing that war power and treaty power did not fit the classic definition of executive power, Madison presented additional arguments to show that the powers were not executive in nature. He dismissed the notion that treaty and warmaking are executive functions, noting that this conception derived from spurned English royal prerogatives. Madison then quoted Hamilton’s statement in The Federalist that treaty power was more of a legislative than executive function though it did not really belong in either branch. Madison utilized Hamilton’s article to show that even Hamilton in The Federalist was “clear, consistent, and confidant [sic], in deciding that the power is plainly and evidently not an executive power.” After concluding that war and treaty powers were substantially legislative

439. Id. at 13. Hamilton gave as an example a hypothetical situation in which the United States had a treaty of alliance with France requiring it to aid France in the event that France became embroiled in a war. Hamilton noted that the President, by acknowledging the new French government, “would have put the United States in a condition to become an associate in the war with France, and would have laid the legislature under an obligation, if required, and there was otherwise no valid excuse, of exercising its power of declaring war.” Id.
440. Id. at 57.
441. Id.
442. Id.
443. Id. at 57-58 (emphasis in original).
444. See id. at 62.
445. Id. at 63 (quoting The Federalist No. 75).
446. Id. at 64 (emphasis in original).
functions, Madison then adopted Hamilton's approach regarding the limited scope of exceptions.\(^{447}\) He declared that since war and treaty powers were basically legislative functions, exceptions to legislative exercise of these functions should be interpreted in a narrow fashion in order to avoid "executive pretensions."\(^{448}\)

Madison's posture that exceptions to legislative control of war-making be construed narrowly results in a greatly restricted presidential war role. Claiming that the Constitution vests war power "fully and exclusively . . . in the legislature," Madison declares that the President has no right to decide whether some incident is or is not a cause for declaring war.\(^{449}\) He goes so far as to state that the executive must faithfully execute the laws even if the laws may lead to war, and that he must let the legislature decide whether to change the laws.\(^{450}\) Madison concluded that the executive cannot decide the war issue but instead must convene the Congress to determine the proper course of action.\(^{451}\)

In addition to demonstrating that war power was a legislative function and that exceptions to congressional warmaking, therefore, should be construed narrowly, Madison refuted Hamilton's claims that power to receive ambassadors furnished the President with substantial policy authority. Madison again used Hamilton's statements in *The Federalist* to counter Hamilton's assertions. As Madison noted, Hamilton said in *The Federalist* that "though [the receiving of ambassadors] has been a rich theme of declamation, [it] is more a

\(^{447}\) *Id.* at 58.

\(^{448}\) *Id.*

\(^{449}\) *Id.* at 89 (emphasis in original).

\(^{450}\) *Id.* at 73. Madison was quite wary of the possibility that a presidential statement on a war question would interfere with the congressional war power. He argued:

In exercising the constitutional power of deciding a question of war, the legislature ought to be as free to decide, according to its own sense of the public good, on one side as on the other side. Had the proclamation prejudged the question on either side, and proclaimed its decision to the world; the legislature, instead of being as free as it ought, might be thrown under the dilemma, of either sacrificing its judgment to that of the executive; or, by opposing the executive judgment, of producing a relation between the two departments, extremely delicate among ourselves, and of the worst influence on the national character and interests abroad. *Id.* at 96.

\(^{451}\) *Id.* at 73-74. Underlying Madison's viewpoint was his belief about the need to maintain a separation of powers. Madison declared that "[t]hose who are to conduct a war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded." *Id.* at 61. Madison then alluded to the "great principle in free government" whereby the power to execute laws is separated from the power to enact laws. *Id.*
matter of *dignity* than of *authority,*” and “is a circumstance, that will be *without consequence* in the administration of the government.” Madison argues that “little, if any thing, more was intended by the clause” than to establish the mode of communication and the ceremony for admitting ministers of foreign governments. Finally, he pronounces his belief that it “would be highly improper to magnify the function into an important prerogative, even where no rights of other departments could be affected by it.”

Madison opposed presidential discretion over the receiving of ambassadors. According to Madison, the President should just inquire whether the ambassador’s credentials are from an existing government and are properly authenticated, and—should not question the legitimacy of the government from which the representative was sent. He rejected arguments that the President had the right, by his ability to refuse to receive a minister, to decide against acknowledging a new government. Madison suggested the possibility that the government might decide against recognizing a new government, but he said that the decision should not be made by the President, and should “certainly not to be brought by any torture of words, within the right to receive ambassadors.” Ultimately, Madison dismissed any claims of power derived from the presidential authority to receive ambassadors and declared that the President had no discretion to refuse recognition to a government. Madison’s analysis of the clause thus conflicts sharply with Hamilton’s position that the President could decide for himself whether to recognize a government and could even cause a suspension of a treaty by this clause.

The Pacificus-Helvidius letters illustrate two radically different views of presidential power. Madison, as Helvidius, argues for a dominant congressional role, advancing a theory that only Congress can decide issues of war and peace, and deploring any presidential discretion over whether he should receive ambassadors from a particular country. In addition, he considers war and treaty powers to

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452. *Id.* at 76 (emphasis in original) (quoting *The Federalist* No. 69).
453. *Id.* For a discussion of the power to receive ambassadors, see L. Henkin, *supra* note 143, at 41.
455. *Id.* at 77-78.
456. *Id.* at 78, 83.
457. *Id.* at 78.
458. For a discussion of Hamilton’s position, see *supra* text accompanying note 438.
460. *See supra* text accompanying notes 456-58.
be legislative activities, and says that exceptions to legislative power over these areas should be construed narrowly. In contrast, Hamilton claims that congressional power over war, appointments and treaties were exceptions to the general executive power, and as exceptions were to be viewed narrowly. He develops a theory espousing broad executive powers, and he envisions presidential actions that could possibly undermine congressional ability to make its own determination on crucial foreign policy matters. Prior to the Pacificus-Helvidius debate, the President had already issued his proclamation and had begun to institute a series of neutrality measures without seeking congressional approval. Thus, by the time the letters circulated throughout the country the President had already begun to dominate foreign policy even in areas where the Constitution pointed to a significant congressional role.

VII. Excursion Into Executive Power

Since politicians and historians have often based theories of presidential power on the executive clause, it seems valuable to examine briefly the attitudes held at the time of the Convention and in the early years of the republic regarding the clause. At the Convention, the Committee of Detail, which originated the clause's phrasing, used similar phrasing to define the legislative power; this language suggests the Committee did not intend any special powers from this grant. Further, the executive powers granted by the Constitution cannot be equated with the English executive powers because the Framers purposefully rejected presidential exercise of many traditional executive powers. In view of the Framers' distrust of the executive and their distribution of foreign policy authority in the Constitution, it is unlikely that they would have intended a broad interpretation of the executive clause.

461. See supra text accompanying notes 447-48.
462. See supra text accompanying note 433.
463. See supra note 439 and accompanying text.
464. See Sofaer, supra note 249, at 18.
466. See Bestor, supra note 13, at 601.
467. See supra text accompanying notes 54-61.
468. See supra text accompanying notes 165-97.
469. See Reveley, supra note 6, at 143 (who notes that evidence of the ratification debates show that the ratifiers read presidential powers as being limited to those enumerated, and had no desire to cloak the president with powers that were not specifically delegated). But it has been suggested that Federalist expressions of a limited presidential role were part of their ratification strategy. See id.
Whatever the Framers' view of the clause, at an early stage in the Washington administration American leaders began to interpret the executive clause as a significant grant of power. For example, Oliver Ellsworth, a Convention delegate from Connecticut, argued in a Senate debate on removal power[470] that the Constitution granted executive power and thereby removal power, rather than just the enumerated executive powers, to the President.[471] Most surprisingly, Jefferson and Madison, who later would prove to be the strongest opponents of Hamilton's Pacificus, advanced a broad view of executive power. Jefferson claimed that control of relations with foreign governments was "Executive altogether" and that the President could exercise this power except to the extent that he needed Senate approval.[472] During the removal debate, Madison put forth ideas similar to those later pronounced by Pacificus, claiming that appointment power was an exception to the general rule that the Constitution vested the executive power in the President.[473] It is possible that at the time of the Helvidius articles Madison still believed in a broad reading of the executive clause; in any event, Madison did not attempt in his Helvidius articles to counter Hamilton's assertions regarding the clause.[474] Instead, Madison based his arguments on the substantive foreign policy powers that the legislative bodies derived from the Constitution.[475]

South Carolina Representative William Smith's speech, made in

470. At the time that the Congress established the executive departments, heated debate ensued over the question of who would have the authority to remove the officials in charge of the departments. The removal question sparked a great deal of debate about appointment power and the nature of executive powers. For a discussion of the removal debate, see C. THACH, supra note 127, at 140-65.

471. Id. at 155 (quoting 3 J. ADAMS, WORKS 409 (1851)).

472. L. HENKIN, supra note 143, at 297 n.10 (quoting 5 T. JEFFERSON, WRITINGS 162 (P. Ford ed. 1892) (emphasis in original)). Jefferson added that exceptions to the executive power were "to be construed strictly." Id. at 298 n.10 (emphasis in original).

473. J. HART, supra note 222, at 179-80.

474. Madison did distinguish, however, between removal power and war and treaty making powers. Madison declared:

To justify any favourable inference from this case, it must be shown, that the powers of war and treaties are of a kindred nature to the power of removal, or at least are equally within a grant of executive power. Nothing of this sort has been attempted, nor probably will be attempted. Nothing can in truth be clearer, than that no analogy, or shade of analogy, can be traced between a power in the supreme officer responsible for the faithful execution of the laws, to displace a subaltern officer employed in the execution of the laws; and a power to make treaties, and to declare war.

PACIFiCUS-HELVIDIUS LETTERS, supra note 360, at 62.

475. See id. at x.
the House of Representatives on June 18, 1789 during the removal
debate, presents the case against executive removal power. Smith
criticized Madison’s arguments that “all powers incidental to the ex-
cecutive” were vested in the President. As Smith rightly pointed
out, “What powers are executive, or incidental to the executive de-
partment, will depend upon the nature of the Government.” Smith’s point illustrates the flaws in Madison’s removal posture and in Hamilton’s Pacificus. With regard to monarchies, Hamilton and Madison are right in claiming broad executive powers. However, as Smith pointed out, the Constitution did not vest all the executive powers in the President. The Framers’ care in delegating responsibil-
ities over foreign policy weighs against Hamilton’s sweeping claims of foreign policy authority derived from the executive clause.

VIII. THE JAY TREATY

The controversy regarding the Jay mission sheds light on a myriad of constitutional questions. The circumstances surrounding the appointment of Jay, the issuance of his instructions, the Senate’s action on the treaty, and the House response to the treaty highlight the interplay of constitutional and political motivation concerning the Jay mission. In addition the debates over the treaty furnish insight into the constitutional interpretations espoused by American political leaders during the years of Washington’s presidency. Most importantly, despite the possible constitutional infirmities involving the Jay mission, the ratification of the treaty established a precedent for future American treatymaking.

American consternation over British policies in general, and British harassment of American shipping in particular, provides the context of the Jay mission. Britain’s continued refusal to relinquish the northwestern trading posts, and its encouragement of Indian attacks in that area, provoked much resentment towards the British. Americans also were angered because the British continued to reap the benefits of American trade while maintaining their discrimina-
tory trade policies against American shipping. A British order in

476. 1 ANNALS OF CONG., supra note 222, at 566.
477. Id.
478. Id.
479. See supra text accompanying notes 165-97.
481. T. BAILEY, supra note 151, at 72.
482. See supra notes 32-34, 41 and accompanying text. British discriminatory trade pol-
council that authorized seizure of neutral ships carrying goods to or from the French West Indies and the resultant capture of a great number of American vessels further contributed to American exasperation over British policies. Finally, Britain's seeming encouragement of Barbary depredations against American shipping in the Atlantic added to American irritation at the British government. The British demeanor and policies regarding the United States caused great stirrings of public and congressional outrage.

Several influential senate Federalists, realizing that an embargo would not assuage American ill feelings toward the British and believing that war would likely result unless American anger subsided, met to discuss possible courses of action. These senators concluded that the United States should build fortifications, fill arsenals, increase the size of the armed forces and send an "Envoy extraordinary" to Great Britain "to require satisfaction for the loss of our Property and to adjust those points which menaced a war between the two Countries."

These senators decided to send Senator Ellsworth to President Washington in order to attempt to persuade him of the need for sending a special envoy to England. After Ellsworth's presentation...
helped convince Washington of the need for a special envoy, the senators, together with Alexander Hamilton, waited on Chief Justice Jay and induced him to take the post. In addition, they urged him to stress to Washington that proposed retaliatory measures against Britain, under discussion in the House, would destroy any chance for a successful mission. On April 16, 1794, one day after Jay met with these prominent Federalists, Washington nominated Jay as a special envoy. Thus, Federalist senators played a critical role in initiating the special mission to Great Britain.

The nomination of Jay as special envoy provoked strong protests from some senators. These senators voiced three basic objections to the Jay mission: The mission was unnecessary because the American ambassador to Great Britain could perform the same role as Jay; Jay was not the proper person for the mission; the appointment of the Chief Justice as special envoy violated the principle of separation of powers.

Republican senators dwelled on the constitutional and practical problems involved with the appointment of the Chief Justice as Envoy extraordinary. In introducing a resolution designed to forestall the sending of a special envoy, Senator Aaron Burr declared:

[T]o permit Judges of the Supreme Court to hold at the same time any other office or employment, emanating from and holden at the

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490. King noted that “[t]he President was at first reserved—finally more communicative and apparently impressed with Ellsworth’s representation.” Id. at 518. The senators recommended that Washington select Hamilton to be envoy, but, as King noted, Washington had reservations about nominating Hamilton because he “did not possess the general confidence of the Country.” Id. at 518.

491. See id. at 520.

492. See id.

493. Id. at 521.

494. For the reasons underlying Republican dissatisfaction with Jay’s nomination, see id. at 521-22 (noting Senate speeches by Virginia Senators John Taylor and James Monroe opposing the Jay nomination); D. Stewart, supra note 483, at 188-89. Monroe declared that Jay “was not a suitable character, since he held opinions as appears by his Reports while Secy. of for, affairs, against the interest and just claims of the Country.” 1 King Correspondence, supra note 487, at 521. Monroe gave three examples of these opinions: (1) that Jay decided in favor of allowing interest on British debts, id. at 521-22; (2) that Jay “had acknowledged that we were the first aggressors agt. the Treaty, and therefore that the Detention of the Posts, &c., was justifiable on the part of G. Britain,” id. at 522; (3) that Jay’s attitude regarding American navigation of the Mississippi was “unfriendly to our Rights and too complaisant to those of Sp.;” id. at 522. One historian has noted that only the nomination of Hamilton would have incensed Republicans more than the selection of Jay. See D. Stewart, supra note 483, at 188.

495. See R. Hayden, supra note 275, at 69-70. See also 1 King Correspondence, supra note 487, at 522.
pleasure of the Executive, is contrary to the spirit of the Constitution, and, as tending to expose them to the influence of the Executive is mischievous and impolitic.\(^6\) Senator John Taylor of Virginia voiced opposition to the Jay appointment on "the ground of incompatibility in the office of [Chief] Justice and Envoy extraordinary," and because the "appointment would destroy the independence of the Judiciary by teaching them to look for lucrative employment from and dependent on the pleasure of the Executive."\(^7\) Taylor and Burr's views illustrate the Republican fear that the President might resort to using his appointment power as a way to sway judges, and the Republican awareness of the problem of having the Chief Justice negotiate treaties that he might later be called upon to judge.\(^8\)

Although the nomination of Jay as Envoy extraordinary did not immediately defuse anti-British sentiment,\(^9\) Federalist senators were able to amass enough votes to affirm Jay's nomination and to defeat proposed retaliatory measures against the British. Washington had requested that the legislature refrain from passing these measures because he felt that such measures would destroy any chance of Jay achieving redress of American grievances.\(^0\) Despite this importuning, the House easily passed a non-intercourse resolution (58 to 34) that would have halted trade relations with Great Britain.\(^1\) The Senate voted 13 to 13 on the resolution\(^2\) with only Vice President Adams' deciding vote preventing the Congress from passing legislation that Federalists feared would have doomed Jay's mission to failure.\(^3\) After the defeat of this measure, Republican agitation for legislation directed against Britain ebbed, and the House overwhelmingly voted against extending an embargo meant to

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496. R. HAYDEN, supra note 275, at 70 n.1 (quoting 1 SEN. EXEC. JOUR. 152).
497. 1 KING CORRESPONDENCE, supra note 487, at 522.
498. See D. STEWART, supra note 483, at 189.
499. Negative feelings toward the British proved strong enough to result in an extension of the trade embargo for another month. J. CARROLL & M. ASHWORTH, supra note 57, at 168. Rufus King deplored the fact that "[a]s the prospects of peace brighten, the Efforts of these Sons of Faction are redoubled." Letter from Rufus King [to unknown recipient] (Apr. 16, 1794), in 1 KING CORRESPONDENCE, supra note 487, at 562.
501. 3 ANNALS OF CONG. 605-06 (1794). The House passed the resolution despite arguments that it "would be a bar" to the Jay negotiations. For the opposing positions on the issue of non-intercourse with Great Britain, see id. at 600.
502. Id. at 89-90.
affect British interests.504

The crucial precedent of the Jay mission lies not in the choice of envoy but rather in Washington's determination not to seek Senate advice and consent on Jay's instructions.508 Washington's determination mirrored the views of key Federalist confidants.508 Rufus King's views indicate what may have been the motivating factor underlying Washington's decision. King wrote: "From the Difficulty of passing particular instructions in the Senate, it seems to me to be most suitable that the [President should] instruct, and that the Treaty [should] be concluded subject to the approbation of the Senate."507 Because Washington did consult with the Senate on earlier negotiation instructions,508 his decision to avoid the Senate's input on the Jay mission most likely stemmed from the difficulty he anticipated in receiving Senate instructions that would meet his approval and not from any belief that the Constitution dictated such a procedure.509 Although the Jay mission was not the first time that Washington departed from the system of prior consultation,510 it was the Jay mis-

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504. British seizures of American shipping had prompted the Congress to impose a thirty-day embargo on all shipping to foreign ports (Mar. 26, 1794). Congress later extended the embargo for an additional month. T. Bailey, supra note 151, at 74. The House vote was 73 to 13 against extending the embargo beyond its second month. 3 Annals of Cong. 683 (1794). For a discussion of the erosion of congressional support for retaliatory measures against Great Britain, see J. Carroll & M. Ashworth, supra note 57, 172-73.

505. For the text of the instructions to Jay (May 6, 1794), see 1 A.S.P.F.R., supra note 320, at 472-74.

506. Hamilton, Ellsworth, Cabot, King, and Jay all believed that Washington should issue instructions to Jay without consulting the Senate. 1 King Correspondence, supra note 487, at 523. The Federalists were able to defeat a Senate resolution requesting Washington "to inform the Senate of the whole business with which the proposed Envoy is to be charged." R. Hayden, supra note 275, at 71 (quoting 1 Sen. Exec. Jour. 151).

507. 1 King Correspondence, supra note 487, at 521. The text of Washington's instructions to Jay would not likely have received Senate approval. The instructions gave Jay great discretion. With the exception of two mandatory guidelines—that Jay enter into no commercial treaty contrary to American agreements with France and that he enter into no treaty unless it provided for admission of American ships into the British West Indies, the instructions amounted to "recommendations only," which Jay could modify at his discretion. S. Bemis, supra note 30, at 291. Bemis states that "[p]erhaps never in the history of the United States has a plenipotentiary been vested with more unfettered discretion than was Jay in the critical negotiations of 1794." Id. Given the great distrust of Jay, many Senators would have balked at letting him have such responsibility over the content of any treaty that might be negotiated and, given Senate anger at Great Britain, many Senators likely would have demanded a firmer American position regarding negotiations.

508. See supra notes 288-91, 306-13 and accompanying text.

509. Alexander DeConde postulates that reasons of political expediency underlay Washington's precedent-making decision not to seek prior consultation. A. DeConde, supra note 151, at 104.

510. See supra note 310 (General Putnam's treaty).
sion that permanently destroyed this scheme. As one scholar declared: “Senate partnership in formulation of foreign policy was thus smothered in infancy.” Though a trifle dramatic, this statement presents an essential truth. After the Jay mission, the President would take the initiative in treatymaking and foreign policy in general, and would not consult the Senate prior to the completion of a treaty, even though he eventually needed the approval of two-thirds of the Senate. Clearly, Washington decided not to consult the Senate on treaty instructions because he was afraid that public resentment towards the British and Senate displeasure over the proposed instructions, would have doomed the treaty to defeat. He subverted the constitutional manner of treatymaking because he desired to avoid the political difficulties that prior consultation would have entailed.

In assessing Washington’s determination not to consult the Senate, it is necessary to consider the objections to Washington’s decision in conjunction with those factors indicating a need to depart from a rigid system of prior consultation. Secretary of State Edmund Randolph voiced his belief that the doctrines of international law necessitated prior consultation. He maintained:

To permit such a treaty to be signed by Mr. Jay, and transmitted for ratification, is to abridge the power of the senate to judge of its merits. For according to the rules of good faith, a treaty, which is stipulated to be ratified, ought to be so, unless the conduct of the minister be disavowed and punished.

During the fight over the treaty ratification some senators called for Washington’s impeachment because, among other things, he had violated the Constitution by not seeking Senate advice prior to negotiating the Jay Treaty. Whatever the merit of the Senate’s constitutional position, it is clear that there are practical advantages in not seeking prior consultation. One scholar notes “the practical necessity for creative presidential diplomacy without the necessity of obtaining at every juncture the ‘advice and consent’ of the Senate by prior consultation”

511. A. DeConde, supra note 151, at 104.
512. See J. Hart, supra note 222, at 94.
513. Letter from Edmund Randolph to George Washington (May 6, 1794), in 33 Washington Writings, supra note 15, at 355 n.90. However, according to Randolph, Treasury Secretary Wolcott and Secretary of War Pickering believed it to be “constitutional and expedient” for Jay to conclude a treaty without prior consultation. Id. For a discussion of the doctrine of international law that Randolph referred to, see supra text accompanying note 281.
514. L. Henkin, supra note 143, at 375 n.8.
consultation."\footnote{515}{The need for secrecy and the special benefits of presidential diplomacy—speed, uniformity, and responsibility\footnote{516}{suggests the value of the President being free to initiate negotiations on occasion without having previously consulted the Senate.\footnote{517}{A. Senate Ratification

Publication of the text of the Jay Treaty provoked public outrage and calls for the Senate to reject the Treaty.\footnote{518}{Republican pamphleteers heaped much vitriol upon Jay and his Treaty,\footnote{519}{and

\begin{enumerate}
  \item J. HART, \textit{supra} note 222, at 100 (emphasis omitted).
  \item See \textit{supra} notes 159-61 and accompanying text.
  \item DeConde notes that, given the size and divisiveness of the Senate, secrecy would have been impossible to maintain. He took special note of the usefulness of presidential diplomacy in enabling the government to engage in the "[g]ive and take necessary in diplomatic negotiation." A. \textit{DeConde, supra} note 151, at 104 n.8. DeConde declared that "Jefferson recognized this and on more than one occasion viewed conduct of foreign affairs as belonging to the President exclusively." \textit{Id.}
  \item Secretary of Treasury Oliver Wolcott wrote to his father that there was "most violent opposition from a certain party in most of our great towns, but in the southern states the opposition is pretty general." Letter from Oliver Wolcott to Oliver Wolcott, Sr. (Aug. 10, 1795), in \textit{1 Memoirs of the Administrations of Washington and John Adams, Edited from the Papers of Oliver Wolcott, Secretary of the Treasury} 224 (G. Gibbs ed. 1846) [hereinafter cited as \textit{WOLCOTT PAPERS}]. Washington apprehensively viewed the "extraordinary proceedings which have, and are about taking place, in the Northern parts of the union; and may be expected in the Southern." Letter from George Washington to the Secretary of State (July 29, 1795), in \textit{34 Washington Writings, supra} note 15, at 254, 254-55. On the same day Washington wrote that "at present the cry against the Treaty is like that against a mad-dog; and every one, in a manner, seems engaged in running it down." Letter from George Washington to Alexander Hamilton (July 29, 1795), in \textit{id.} at 262, 262.
  \item Republican denunciation of Jay's treaty is best shown by a small sampling: (1) A Kentucky newspaper published a "review" of a new play, "the noted burlesque of \textit{Amity, Commerce and Navigation}, featuring 'Mr. Envoy' and 'that much-despised song,' \textit{Give up All for Nothing at all.}" South Carolina State Gazette (Nov. 11, 1795), \textit{quoted in D. Stewart, supra} note 483, at 220. (2) A Richmond treaty opponent referred to the treaty "'entered into by that damned arch-traitor John Jay and the British tyrant.'" D. \textit{Stewart, supra} note 483, at 216. (3) A sample stanza of anti-Jay poetry reads:

\begin{verbatim}
United to the British crown
  By treaty firm and binding,
\textit{Republicans} must knuckle down,
  For now they're not worth minding.
\textit{Transported} with the glorious thought,
  Each tory then will sing,
"Your Freedom's sold—your country's bought!
  Huzza for \textit{George our King}!"
\end{verbatim}

  \item As a crowd hanged Jay in effigy, one American declared,
    I think j-y's treaty is truly a farce,
    Fit only to wipe the national ____.
\end{enumerate}
towns throughout the country showed their disapproval.\textsuperscript{520} Partisan maneuvering flourished in the Senate as the parties battled over the Treaty's ratification.\textsuperscript{621} Senator Aaron Burr proposed a resolution to postpone consideration of the Treaty and to recommend to Washington that he reopen negotiations on several Treaty articles.\textsuperscript{622} Passage of this resolution would have had a dramatic effect on subsequent presidential treatymaking, since the defeat of the Treaty would likely have convinced presidents of the need to consult with and get the prior approval of the Senate before commencing negotiations.\textsuperscript{623} The Federalist party's success in mustering just enough votes for Senate consent\textsuperscript{624} derailed any Senate assertion of its right to prior consultation and served to establish the President's right to initiate treatymaking without first consulting the Senate. Thus, out of a circumstance in which there was heated opposition in the country and

\begin{footnotesize}
\begin{itemize}
\item[520.] Inhabitants of towns across the country approved and forwarded resolutions to Washington condemning the Treaty and calling on him to reject it. Washington responded to some of these resolutions. \textit{See, e.g.}, Letter from George Washington to the Boston Selectmen [July 28, 1795] (footnote omitted), in 34 \textit{Washington Writings}, \textit{supra} note 15, at 252. However, some letters he found so objectionable that he did not answer them. For example, he did not answer letters from Petersburg, Virginia ("Tenor indecent No answer returned"), Bordentown, New Jersey and its neighbors ("No answer given. The Address too rude to merit one"), and Scott County, Kentucky ("The Ignorance and indecency of these proceedings forbidd an answr [sic]"). 34 \textit{Washington Writings}, \textit{supra} note 15, at 253-54 n.66.

\item[521.] The Treaty even sparked a drive to amend the Constitution. Virginia proposed, with Madison's approval, a series of constitutional amendments that would have made treaties subject to a majority vote in the House, would have increased public control over the Senate, and would have prohibited a federal judge from holding any other federal appointments. South Carolina, Kentucky, and Georgia joined Virginia in endorsing similar constitutional amendments but nine states rejected them. J. Combs, \textit{supra} note 31, at 172.

\item[522.] J. Carroll & M. Ashworth, \textit{supra} note 57, at 253. There was some precedent for Burr's action, since the Senate had passed a similar resolution in 1793 when it recommended that Washington reopen negotiations over General Putnam's treaty with the Wabash and Illinois Indians. R. Hayden, \textit{supra} note 275, at 78-79. While the Federalists might have believed that Burr's resolution passed constitutional muster, they rejected the resolution because it would have destroyed the treaty. \textit{See id.} at 78-79.

\item[523.] R. Hayden, \textit{supra} note 275, at 79.

\item[524.] The Senate approved the treaty by a 20 to 10 vote, R. Hayden, \textit{supra} note 275, at 82-83, the bare two-thirds required by the Constitution, U.S. Const. art. II, § 2, cl. 2. The circumstances of the vote indicate that if the vote had occurred a few months earlier the treaty might have gone to defeat. British Ambassador Hammond believed that it was fortunate that the treaty deliberations were not started until June, because two Senators favorable to the treaty were seated prior to the debate. J. Carroll & M. Ashworth, \textit{supra} note 57, at 254 n.91. A Republican broadside described the treaty as an "imp of darkness, illegitimately be- gotten, [which] commanded but the bare constitutional number required for ratification." Philadelphia Aurora, June 26, 1795, \textit{quoted in D. Stewart, supra note} 483, at 198.
\end{itemize}
\end{footnotesize}
in which the President’s Treaty got a bare two-thirds majority, was born a radically different form of treatymaking from that envisioned by the Framers.

The precise manner of ratification proved to be crucial to the development of the modern concept of the Senate treaty role. The Senate did not consent to the Treaty as negotiated, but instead conditioned its assent on the addition of a supplemental article suspending a portion of the Treaty that unduly restricted American trade with the British West Indies. By its action, the Senate established its right to reject specific provisions of treaties negotiated without its prior consent. This conditional ratification presented Washington with the question of whether the new Treaty article had to be submitted for Senate confirmation. Washington asked his Cabinet to submit opinions on whether the Constitution permitted the “President to ratify the Treaty, without submitting the new article, after it shall be agreed to by the British King, to the Senate for their further advice and consent?” The Cabinet members were in agreement that there was no need to seek Senate approval for the new twelfth article. In contrast, Hamilton initially advised Washington that he felt that the revised article required Senate consent. Ultimately, Washington decided to proclaim the Treaty without seeking further consultation. It is unclear whether political motive or constitutional belief underlay the decision. Secretary of Treasury Wolcott and Secretary of State Randolph expressed doctrinal justifications for refusing to submit the Treaty provision to Senate confir-

525. See R. Hayden, supra note 275, at 76 (quoting 1 Sen. Exec. Jour. 182). Further, the Senate recommended that Washington reopen negotiations over the British West Indies trade. Id. Hamilton had written to fellow Federalists recommending a conditional assent. Id. at 75-76. Treaty proponents aligned with Hamilton were responsible for originating the plan to vote a conditional consent to the treaty. See id. at 75.


527. According to Carroll and Ashworth, Secretary of Treasury Wolcott and Secretary of War Pickering unequivocally declared that the President did not have to deliver the revised clause to the Senate, while Randolph spoke in “slightly less positive” terms. J. Carroll & M. Ashworth, supra note 57, at 257.

528. See R. Hayden, supra note 275, at 84. For evidence of Washington’s uneasiness at Hamilton’s belief that the administration had to submit the renegotiated article to the Senate, see Letter from George Washington to Alexander Hamilton (July 14, 1795), in 34 Washington Writings, supra note 15, at 241-42.

529. R. Hayden, supra note 275, at 88. Washington proclaimed the treaty on February 29, 1796. Id.
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mation. Wolcott declared that if the President decided to approve
the Treaty with the exceptions imposed by the Senate, he could rat-
ify the Treaty without resubmitting for advice and consent “such
rescinding clauses or articles, as it may be necessary to introduce
into the treaty, for the mere purpose of giving effect to the concur-
rent decisions of the President and Senate.”

According to one his-
torian who is familiar with Randolph’s writings, Randolph stated
that the President was responsible for the ratification of the Treaty
and that if he

should ratify the treaty without again consulting that body he
would be responsible for the accuracy with which its advice was
followed; that if he should ratify what had not been advised [,] the
treaty would not be the supreme law of the land, and that the
rights of the Senate would for this very reason be safeguarded.

Notwithstanding possible constitutional considerations, the Cab-
inet likely was influenced by a fear that the Senate might defeat the
Treaty if Washington submitted the provision for Senate confirma-
tion, instead of just proclaiming the Treaty to be ratified. The
Cabinet’s justification of Washington’s course of action must be
viewed with skepticism. Wolcott’s reasoning would enable the Presi-
dent, by claiming to give “effect to the concurrent decisions of the
President and Senate,” to ratify a treaty which on the whole may
not be acceptable to the Senate. The Senate could make known its
anger at the President’s unilateral action by repudiating the Treaty,
but this repudiation would have significant international repercus-
sions. Randolph’s view that a provision contrary to what was advised
would not be law leaves the Senate in a similar quandary: The Sen-
ate could deny that the treaty was a law but this would risk possible
negative consequences involving the conduct of American foreign re-
lations. Washington’s action can be viewed as a purposeful rejection

530. Letter from Oliver Wolcott to George Washington (June 30, 1795), in 1 WOLCOTT
PAPERS, supra note 518, at 204, 205.

531. S. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 80 (1916) (footnote
omitted).

532. Treaty opponents like former Secretary of State Thomas Jefferson hoped that
Washington would submit the treaty. Jefferson wrote Virginia Senator Henry Tazewell that he
was “not without hopes that the operations on the 12th article may render a recurrence to the
Senate yet necessary, and so give to the majority an opportunity of correcting the error into
which their exclusion of public light has led them.” Letter from Thomas Jefferson to Henry
Tazewell (Sept. 13, 1795), in 8 JEFFERSON WORKS, supra note 330, at 190, 191.

533. Letter from Oliver Wolcott to George Washington (June 30, 1795), in 1 WOLCOTT
PAPERS, supra note 518, at 204-05.
of the Constitution, since Washington intentionally decided not to seek Senate advice on a treaty provision.\footnote{But see R. Hayden, supra note 275, at 88 (Hayden notes that American politicians of the time seem not to have questioned the constitutionality of Washington's action). Washington's decision not to resubmit the treaty for Senate approval set a precedent that had been uniformly followed prior to the publication of Hayden's work (1920) in cases where the Senate had given a conditional assent. \textit{Id.} at 85.}

\section*{B. The House and the Jay Treaty}

The House effectively could have destroyed the Jay Treaty by refusing to vote appropriations to effectuate its specific provisions. House debate on the Jay Treaty focused on the House's right to request documents related to the negotiations, and ultimately to prevent implementation of the Treaty. Congressman Edward Livingston of New York introduced a resolution\footnote{4 ANNALS OF CONG. 400-01 (1796).} that served as the focal point for much House debate regarding the nature of treaty power and the House's authority over treaties.\footnote{See J. Combs, supra note 31, at 175-76.} Livingston prefaced the introduction of his resolution by declaring that the House should have all the documents that potentially could shed light on the "important Constitutional questions" that the House would address in its Jay Treaty debate.\footnote{4 ANNALS OF CONG. 400 (1796).} He proposed the following resolution:

\begin{quote}
Resolved, That the President of the United States be requested to lay before this House a copy of the instructions given to the Minister of the United States who negotiated the Treaty with Great Britain, communicated by his Message on the first instant, together with the correspondence and other documents relative to the said Treaty—excepting such of said papers as any existing negotiation may render improper to be disclosed.
\end{quote}

It is clear from statements made at the time that the American leaders understood the constitutional significance of the House attempt to seek documents about and ultimately to pass judgment on the
Critics of the Resolution refuted Livingston's notion that the House could request official documents relating to treaty negotiations, and strenuously objected to the House meddling with the treaty power. They emphatically denied the House's right to determine whether the President should renegotiate the Jay Treaty or even to "investigate the merits of the Treaty." According to Representative William Smith of South Carolina, the House had "no agency in [treaties], except to make laws necessary to carry them into operation." Both he and Alexander Hamilton felt that the Constitution obligated the House to implement ratified treaties. In a draft proposed by Hamilton for Washington's message to Congress in response to Livingston's Resolution, Hamilton declared that the House had no moral power to refuse the execution of a treaty, which is not contrary to the Constitution, ... and have no legal power to refuse its execution because it is a law—until at least it ceases to be a law

540. Washington deplored the House action, which he believed brought the Constitution to the "brink of a precipice," Letter from George Washington to Charles Carroll (May 1, 1796), in 35 WASHINGTON WRITINGS, supra note 15, at 29, 30, and denounced the House for "striking at once, and boldly too, at the fundamental principles of the Constitution." Letter from George Washington to Edward Carrington (May 1, 1796), in id. at 31, 32. Washington felt so strongly about the House resolution because he believed that the House desired to "render the Treaty making Power not only a nullity, but such an absolute absurdity as to reflect disgrace on the framers of it." Id. at 32. Representative Theodore Sedgwick of Massachusetts considered the Livingston Resolution "in principle, and in its consequences, as the most important question which had ever been debated in [the] House." 4 ANNALS OF CONG. 514 (1796). For a discussion of Jefferson's view of the issue, see infra note 562.

541. Representative William Smith of South Carolina expressed this point in a most vivid manner. He declared that the "House had no more right to send to the President for the papers in question, than the printer of a newspaper had; he might communicate them to either voluntarily, but neither had a right to demand them." 4 ANNALS OF CONG. 444 (1796).

542. See id. at 440 (speech by William Smith). Washington said that the real dispute was "whether there should be a Treaty at all without the concurrence of the House of Representatives." Letter from George Washington to Edward Carrington (May 1, 1796), in 35 WASHINGTON WRITINGS, supra note 15, at 29, 32 (emphasis in original). Former constitutional delegate and Constitution signer, Oliver Ellsworth, who at the time of the House debate was the Chief Justice of the Supreme Court, privately advised Washington that Livingston's presumption to participate in treatymaking was "as unwarranted as it [was] dangerous." Letter from Oliver Ellsworth to Jonathan Trumbull (Mar. 13, 1796), quoted in J. CARROLL & M. ASHWORTH, supra note 57, at 349.

543. E.g., 4 ANNALS OF CONG. 440 (1796) (speech of Representative William Smith).

544. Id. at 439.

545. For a biography of Smith, see G. ROGERS, EVOLUTION OF A FEDERALIST: WILLIAM LOUGHTON SMITH OF CHARLESTON (1758-1812) (1962).

546. 4 ANNALS OF CONG. 438 (1796) (speech of Representative William Smith).
by a regular act of revocation of the competent authority.\(^{547}\)

Smith asserted that the House had no constitutional prerogative to judge the propriety of implementing a treaty, and that the Constitution obligated the House to execute a treaty.\(^{548}\) According to Smith, only in the exceptional case where an “instrument was clearly unconstitutional” could the House refuse to execute a treaty.\(^{549}\)

In a letter to Rufus King, Hamilton posited thirteen points in support of his conclusion that Washington should resist House “usurpation” of treaty authority.\(^{550}\) Hamilton distinguished legislative enactments from treaties: “The Treaty Power binds the will of the nation, [and] must within its constitutional limits be paramount to the Legislative Power, which is that will; or, at least, the last law being a Treaty must repeal an antecedent contradictory law.”\(^{551}\) He pronounced his belief that if the legislature could repeal a treaty it had to be done by legislative enactment and not by one branch refusing to follow the law.\(^{552}\) Finally, Hamilton stated that if any other interpretation of the House’s powers was permitted the House would exercise a treaty power that the Constitution clearly forestalled.\(^{553}\)

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548. 4 Annals of Cong. 439 (1796). Former Virginia Senator John Taylor, who had opposed Jay’s nomination as envoy, believed that “the House should have executed [the Treaty] ‘with groans and execrations,’ on the ground that they could not constitutionally refuse.” H. Simms, Life of John Taylor 63 (1932) (quoting letter from John Taylor to Senator Henry Tazewell). Taylor would then have used this result as a basis for a campaign to amend the Constitution and check the Federalist system. Id.

549. 4 Annals of Cong. 438 (1796). The issue of whether the House had a duty to implement treaties was sharply presented during Washington administration discussions about whether to ransom from Algiers those American seamen captured by the Barbary Pirates. Jefferson felt that a treaty would obligate the House to supply the funds, but he believed that the House might ignore its duty. He did note, however, that it was possible to conceive of treaties that the House would not be obligated to implement. The Anas, supra note 334, at 73. Jefferson had noted earlier in The Anas that the House had a right to expect to be consulted when a treaty called for the legislature to provide funding, id. at 63, and he indicated that “it would be prudent to consult them previously,” when a treaty required implementing legislation. Id. at 73. He advised against Washington committing himself to the treaty when he might be put in a most embarrassing situation if the House refused to execute the treaty. Id.

550. Letter from Alexander Hamilton to Rufus King (Mar. 16, 1796), in 2 King Correspondence, supra note 487, at 56, 57-58.

551. Id. at 57 (emphasis in original).

552. Id.

553. See id. at 57. Similarly, Washington opined: “[F]or will any one suppose, that they who framed, or those who adopted that Instrument, ever intended to give the power to the President and Senate to make Treaties (and declaring that when made and ratified, they should be the Supreme law of the land) wd. in the same breath place it in the powers of the
Besides having constitutional reservations about the Livingston Resolution and the House attempt to involve itself in treatymaking, opponents of the Resolution feared that the Resolution could adversely affect the practice of diplomacy. Critics of the Resolution admonished their colleagues of the disastrous impact that a House refusal to implement the treaty could have on the conduct of foreign relations. Congressmen like Fisher Ames expressed concern over the diplomatic repercussions of repudiating a good faith agreement.\textsuperscript{564} As a constituent of Theodore Sedgwick rightly warned, countries would be unwilling to make treaties with the United States if the House could nullify them by refusing to execute them.\textsuperscript{565} Alexander Hamilton noted that a House decision not to implement the treaty would cause “extreme embarrassment in proceeding in any pending or future negotiation which the affairs of the U. States may require, inasmuch as [the President] cannot look for due confidence from others, nor give them the requisite expectation that stipulations will be fulfilled on our part.”\textsuperscript{566} Finally, the Resolution opponents voiced their disapproval because they perceived a need for secrecy in diplomatic transactions, and because they feared that House treaty involvement could result in the publication of matters at great inconvenience to the United States and Great Britain.\textsuperscript{567}

Supporters of the Livingston Resolution and the House’s right to make an independent determination on any expenditure by the government advanced a series of arguments to counter the Federalist orators.\textsuperscript{568} Emphasizing the constitutional underpinnings of their viewpoint,\textsuperscript{569} they stressed the responsibilities of the House and the

\footnotesize{\textsuperscript{554} See J. Carroll & M. Ashworth, supra note 57, at 371-72.\\
\textsuperscript{555} Id. at 349.\\
\textsuperscript{556} Letter from Alexander Hamilton to Rufus King (Apr. 15, 1796), reprinted in 2 King Correspondence, supra note 487, at 59. But see Jefferson, Manual of Parliamentary Practice, reprinted in S. Doc. No. 1, 92d Cong., 1st Sess. 435 (1971). Jefferson declares that “as the negotiations are carried on by the Executive alone, the subjecting to the ratification of the Representatives such articles as are within their participation is no more inconvenient than to the Senate.” Id. at 517-18.\\
\textsuperscript{557} See 4 Annals of Cong. 441-42 (1796) (speech by Smith).\\
\textsuperscript{558} Some Republicans did begin “to express doubts as to the constitutionality of the House of Representatives mixing in the treaty-making province of the president and the Senate.” J. Combs, supra note 31, at 173 (Combs draws his conclusion from a letter written by James Madison to Thomas Jefferson on December 13, 1795).\\
\textsuperscript{559} For example, Representative William Giles of Virginia based one of his arguments on the system of checks and balances, admonishing his fellow legislators that “a despotism of the worst kind” would result if the House could not check treatymaking. See J. Carroll &
limits of treatymaking. Some House members argued that treaties could only regulate areas that could not be properly governed by legislation. Some claimed that treaties could not concern matters delegated by the Constitution to the Congress since such treaty subject matter would exclude the House from exercising its rightful legislative role. At the heart of the position taken by the Livingston Resolution supporters was the belief that treaty power could not override the House’s right to act on all matters within its constitutional power. This belief resulted in the passage of a House Resolution which said that in instances where a treaty called for congressional enactment, the House had a constitutional right “to deliberate on the expediency or inexpediency of carrying such Treaty into effect.”

As was his usual practice on important matters, Washington consulted his Cabinet and his confidant, Hamilton, before determin-
ing how to respond to the House request for documents relating to the Jay Treaty negotiations. Washington inquired whether they believed that the House had a constitutional right to call for the diplomatic correspondence and, if they did not, whether he should furnish the documents anyway.\footnote{Letter from George Washington to the Secretaries of State, Treasury, War and the Attorney General (Mar. 25, 1796), in 34 \textit{Washington Writings}, supra note 15, at 505. Before reaching a final decision on the matter, Washington asked two members of the Cabinet to examine the Journal of the House to see whether he had inadvertently provided some precedent for the House treaty request. J. Carroll \& M. Ashworth, supra note 57, at 354.} The Cabinet was unanimous in its belief that the Constitution did not authorize the House to request such documents.\footnote{J. Carroll \& M. Ashworth, supra note 57, at 354. Attorney General Charles Lee felt that Washington should accommodate the House by transmitting the Jay papers to it, even though he believed that the House had no constitutional right to demand these documents. Id. Secretaries Wolcott and McHenry voiced strong objections to giving into the House demand. Id.} Hamilton reached the same conclusion, and urged the President to refuse the House request.\footnote{See Letter from Alexander Hamilton to George Washington (Mar. 28, 1796) (footnote omitted), in 20 \textit{Hamilton Papers}, supra note 345, at 83, 83-85. For Hamilton's reasons for concluding that Washington should not furnish the House with any of the Treaty documents, see supra text accompanying notes 550-53.} A few days after the Cabinet submitted their opinions to Washington, he wrote Hamilton:

> From the first moment, and from the fullest conviction in my own mind, I had resolved to \textit{resist the principle} [which] was evidently intended to be established by the call of the House of Representatives; and only deliberated on the manner, in which this could be done, with the least bad consequences.\footnote{Letter from George Washington to Alexander Hamilton (Mar. 31, 1796), in 35 \textit{Washington Writings}, supra note 15, at 6 (emphasis in original). Washington did consider submitting some of the papers with a "pointed protest" because of "the peculiar circumstances of this case." Id. at 7. He felt that "[i]t merited consideration, if the principle [that the House had no right to interfere with treaties] could be saved, whether facility in the provisions might not result from a compliance." Id. Washington decided against furnishing any of the documents to the House. He stated his reasons: An attentive examination however of the Papers and the subject, soon convinced me that to furnish \textit{all} the Papers would be highly improper; and that a \textit{partial} deliver of them would leave the door open for as much calumny as the entire refusal, perhaps more so, as it might, and I have no doubt would be said, that all such as were essential to the purposes of the House, were withheld. Id.} In a message to the House on March 30, 1796, Washington rejected the House request.\footnote{See Message from George Washington to the House of Representatives (Mar. 30, 1796), in id. at 2.}

Washington stressed that treaty power rested exclusively with
the Senate and the President, and that treaties were the law of the land. In turning down the House request, Washington declared that it was essential to the well-being of the government to maintain constitutional boundaries, such as those involving treaty power. In addition to advancing constitutional motivations for his determination, Washington noted that disclosure of the details of negotiations to the House "would be extremely impolitic: for this might have a pernicious influence on future negotiations." Thus, Washington declared that separation of powers and the difficulties that would result in negotiations precluded him from acceding to the House demands.

Washington's refusal to furnish the Treaty documents to the House left unresolved the question of whether the House would vote the funds required to implement the Treaty. Fearing that the House might refuse to execute the Treaty, some Federalist representatives considered political maneuvers to garner the necessary votes. It took the vote of the chairman of the committee of the whole House called to debate the Treaty to break a 49 to 49 deadlock and save the Treaty appropriation from being killed in committee. By the

569. Id. at 3.

570. Id. at 5. Washington made special note of the fact that the Constitutional Convention had considered and rejected House involvement with treaties when it defeated a proposed constitutional provision "that no Treaty should be binding on the United States which was not ratified by a Law." Id. For Madison's opinion of the speech, see James Madison in the House of Representatives (Apr. 6, 1796) (footnote omitted), reprinted in 3 Farrand, Records, supra note 4, at 372, 372-75.


572. Representative Theodore Sedgwick attempted to tie together the vote on the implementation of the Jay Treaty with the votes on the implementation of popular treaties with Spain and Algiers. J. Combs, supra note 31, at 180. The Senate considered refusing appropriations for these treaties until the House passed the funding for the Jay Treaty. Federalist Representative Chauncy Goodrich even expected the Senate to delay other bills and disrupt the operation of the government until the House gave in. Id. at 181. Alexander Hamilton opposed moves to bind funding of the two popular treaties to the passage of Jay Treaty funding, stating: "But this will be altogether wrong & impolitic. The misconduct of the other party cannot justify in us an imitation of their principles." Letter from Alexander Hamilton to Rufus King (Apr. 15, 1796), reprinted in 2 King Correspondence, supra note 487, at 59, 60. Hamilton added that he thought it best not to encumber the other treaties, and that "if a feint of opposition is deemed advisable, it ought to be left to the Senate by postponement &c. But even this is very delicate and very questionable." Id. at 60.

573. 4 Annals of Cong. 1280 (1796). It is stated that, considering the absent members, a majority of the House opposed implementing the treaty. House Speaker, Frederick Muhlenberg, spurned his Republican allies by casting the deciding vote in favor of the Treaty. See J. Carroll & M. Ashworth, supra note 57, at 375. The personal history of Muhlenberg evidences the intensity of feelings regarding the treaty. The Federalist father of the girl Mu-
narrowest of margins, the House voted to implement the Treaty; but the actions of the deeply divided body left open the question of whether the House had the right to refuse to enact legislation needed to implement a Treaty.\footnote{574}

**IX. THE FAREWELL ADDRESS**

Washington's Farewell Address\footnote{575} is the final significant landmark in the growth of presidential foreign policy power to come out of the Washington years. In one part of the Address, Washington offered his sentiments about the best course for the nation to follow in its foreign relations. Washington's admonishment to his fellow citizens about the virtue of steering "clear of permanent Alliances" is so well known that it need not be quoted here.\footnote{576} The Farewell Address had such a profound impact because, as one scholar has noted, "[i]t was the first statement, comprehensive and authoritative at the same time, of the principles of American foreign policy."\footnote{577} The Address proved to be an important milestone in the growth of presidential power, since it enhanced the President's position as the American foreign policy spokesman.\footnote{578} From the beginning of his administration and culminating in the Farewell Address, Washington undertook to develop and pronounce American policy in the foreign relation sphere.

**X. WASHINGTON IN PERSPECTIVE**

American leaders in the early years of the Republic proved to be acutely aware of the importance of the precedents that their ac-

\begin{footnotes}
\footnote{574. Louis Henkin notes that although Congress has asserted the right to refuse to implement treaties, it has not failed to carry out American treaty obligations. L. Henkin, supra note 143, at 162. The final vote was 51 to 48 in favor of the appropriation. 4 ANNALS OF CONG. 1291 (1796).}

576. Farewell Address (Sept. 19, 1796), in 35 Washington Writings, supra note 15, at 234. See generally id. at 231-36.

577. F. Gilbert, supra note 33, at 135.

\end{footnotes}
tions would create. Washington, for example, stated on May 10, 1789: "Many things which appear of little importance in themselves and at the beginning, may have great and durable consequences from their having been established at the commencement of a new general government."579

Although most Americans trusted Washington, some worried about the precedents that Washington would set.680 Also, there was some concern about how his successors would act once those precedents were firmly in place.681 In evaluating the precedents of the Washington administration, one must not lose sight of the special circumstances that shaped his presidency. Washington had not desired the presidency682 which was thrust upon him by a nation that clamored for him to become its president.683 This reluctance gave credence to those who claimed that Washington had the country's interest solely in mind and had no wish to expand his authority. Washington had such strong popular appeal that he was able to garner a unanimous vote in the electoral college.684 Even after four years as president and during a time when partisan politics began to

579. Queries on a Line of Conduct to be Pursued by the President (May 10, 1789), in 30 WASHINGTON WRITINGS, supra note 15, at 319, 321.

580. Senator Maclay said about Washington: "He... is but a man, but a really good one, and we can have nothing to fear from him, but much from the precedents which he may establish." G. Haynes, supra note 285, at 40.

581. See J. Carroll & M. Ashworth, supra note 57, at 366. Representative Rutherford of Virginia stated:

To tell the people that a Washington presides, and therefore all must be right, is feeble language. . . . Though we all concur respecting that honest man, we know at the same time that he . . . must ere long yield to an immutable clause in the universal law. And have this people any security for the upright actings and doings of his successor, perhaps a mere Nero, though he has been an Octavius, an Alfred?

Id. (quoting 4 ANNALS OF CONG. 1116-20 (1796)).

582. Washington said about his presumed selection by the electors: "[I]f I should receive the appointment and if I should be prevailed upon to accept it, the acceptance would be attended with more diffidence and reluctance that I ever experienced before in my life." Letter from George Washington to Alexander Hamilton (Oct. 3, 1788), in 30 WASHINGTON WRITINGS, supra note 15, at 109, 111. For a discussion of Washington's reluctance to accept the presidency and his reasons for hesitating, see 6 D. Freeman, George Washington 147-50, 153-54 (1954).

583. Friends such as Lafayette and Hamilton called on Washington to accept the presidency. See D. Freeman, supra note 582, at 146, 147-48. Douglas Southall Freeman notes that the July 4, 1788 celebration "became in large part a general call for the election of Washington as President." Id. at 146. Jefferson wrote to a correspondent: "I presume there will not be a vote against him in the U.S." Letter from Thomas Jefferson to William Carmichael (Aug. 12, 1788), in 13 JEFFERSON PAPERS, supra note 318, at 502, 502.

584. ENCYCLOPEDIA OF AMERICAN HISTORY: BICENTENNIAL EDITION, supra note 486, at 145.
flourish, Washington still commanded almost total support in the electoral college. Still, the electoral figures do not give a complete picture of Washington's popularity. The country idolized their President; the people showered him with affection as he journeyed to New York for his inauguration. Masses of people thronged the inaugural route to see and pay homage to the man they viewed as the "Father of his Country."

Washington had a special relationship with the Congress which is worthy of attention. While modern day presidents have flaunted the president's foreign policy powers, Washington, particularly in the early years of his administration, showed much deference to the Congress and hesitated before overstepping his authority. Besides

585. Washington received 132 electoral votes and there were three abstentions. The party split is exemplified by the vice-presidential contest, where Federalist John Adams was reelected with 77 votes and anti-Federalist George Clinton garnered 50 votes. Id. at 149.

586. Washington's reception as he passed through Trenton on his way to the inauguration is quite revealing about popular opinion of Washington. Girls in white dresses and prominent Trenton matrons lined his route and sang an ode to Washington:

Welcome, mighty Chief! once more
Welcome to this grateful shore!
Now no mercenary foe
Aims again the fatal blow—
Aims at thee the fatal blow.

Virgins fair, and Matrons grave,
Those thy conquering arms did save,
Build for thee triumphant bowers
Strew, ye fair, his way with flowers—
Strew your Hero's way with flowers.

W. STRYKER, WASHINGTON'S RECEIPTION BY THE PEOPLE OF NEW JERSEY IN 1789, at 7, quoted in D. FREEMAN, supra note 582, at 175-76 (footnote omitted). The French Minister in the United States, who was present at Washington's inauguration, wrote to his government that "never has [a] sovereign reigned more completely in the hearts of his subjects than did Washington in those of his fellow-citizens. . . . He has the soul, look and figure of a hero united in him." Letter from Moustier to the Comte de Montmorin (June 5, 1789), quoted in D. FREEMAN, supra note 582, at 195 (footnote omitted).

587. See generally D. FREEMAN, supra note 582, at 167-84.
588. See id. at 183.
589. Id. at 280. Washington's deferential manner is exemplified by his message informing the Congress of his neutrality proclamation. See supra text accompanying note 420. For Washington's views on the expansion of executive power, see Letter from George Washington to the Secretary of the Treasury (July 2, 1794), in 35 WASHINGTON WRITINGS, supra note 15, at 420, 422. Washington stated:

The powers of the Executive of the U. States are more definite, and better understood perhaps than those of almost any other Country; and my aim has been, and will continue to be, neither to stretch, nor relax from them in any instance whatever, unless imperious circumstances shd. render the measure indispensable.
acting in a deferential manner, Washington refrained from involving himself in the legislative disputes of the early years of the new government.\textsuperscript{590} Throughout his tenure Washington attempted to project an image of being above party squabble.\textsuperscript{591} There can be no doubt that Washington's image and his immense popularity contributed to the Congress' acquiescence to the President's increasing control of American foreign policy. Senator Maclay,\textsuperscript{592} in a manner of expression extreme even for him, illustrates a crucial point about the Washington administration. Maclay declared:

Republicans are borne down by fashion and a fear of being charged with a want of respect to General Washington. If there is treason in the wish I retract it, but would to God this same General Washington were in heaven! We would not then have him brought forward as the constant cover to every unconstitutional and ir-republican act.\textsuperscript{593}

It is clear, as Maclay states, that the special relationship Washington had with his countrymen greatly tempered criticism of Washington\textsuperscript{594} and enabled him to exercise authority in a manner that would have been condemned if another man had acted in such a fashion.

\section*{XI. Conclusion}

No matter what the Framers had intended concerning the distribution of foreign policy authority, by the end of the Washington administration the President had come to dominate foreign policy making. Although the Framers desired a significant congressional role\textsuperscript{595} and early precedents reflected the prominent Senate treaty role envisioned by the Framers,\textsuperscript{596} in the early years of the Republic there was a gradual evolution of a prominent presidential foreign

\textit{Id.}

590. \textit{See id.} at 280.
591. This image is highlighted by Washington's cautioning his fellow citizens in his Farewell Address about the "mischiefs of the spirit of Party." Farewell Address (Sept. 19, 1796), in \textit{35 Washington Writings}, \textit{supra} note 15, at 227. \textit{See generally id.} at 226-28.
592. \textit{See supra} notes 293-94, 328.
593. \textit{The Journal of William Maclay}, \textit{supra} note 293, at xi.
594. Washington was not immune however to criticism. The neutrality measures and the Jay Treaty sparked numerous writers to heap abuse on Washington. \textit{See D. Stewart, supra} note 483, at 147-48, 225-26. A pamphlet that Washington found especially galling was titled "the funeral of George W._n, and James Wilson, King and Judge, &c., where the President was placed on a guillotine." \textit{The Anas}, \textit{supra} note 334, at 159.
595. \textit{See supra} text accompanying notes 175-97.
596. \textit{See supra} notes 284-87, 306-10, 315 and accompanying text.
policy role. Washington's exercise of authority over American neutrality in 1793 and over the Jay mission resulted in presidential control over decisionmaking regarding external affairs.

It is impossible to be certain about the true intentions of the Framers on any particular issue. But the historical background of the Convention, the debates in the Convention, and the statements of prominent American leaders provide guidance concerning the proper interpretation of the Constitution's distribution of foreign policy authority. These sources indicate that the Framers shared both an awareness of the problems that confronted the country during the Confederation period and a common world view. Influential American leaders recognized the flaws of the Articles of Confederation and realized that the weakness of the Confederation government greatly hindered American diplomatic efforts. Perception of these flaws prompted many prominent American figures to see the need for a convention to amend the Articles of Confederation.

While the delegates elected to this Convention recognized the need for an overhaul of the Articles and for a drastic increase in the power of the federal government, they worried about the risks to liberty that a strong government would pose. Americans at the time of the Convention generally distrusted human nature and believed that men always sought greater power. Derived from this view of humanity was the Framers' trepidation over the possibility that the executive or legislative branches might foster a tyranny. Due to their awareness of both the need for and the dangers of a strong central government, the Framers were determined to incorporate a system of checks into the Constitution to forestall any branch from exceeding its powers.

Despite the fact that the delegates engaged in an exceedingly small number of debates on the distribution of authority over the military and foreign relations, the Convention proceedings provide

597. See supra text accompanying notes 311-14, 316, 320-23.
598. See supra notes 329-422 and accompanying text.
599. See supra notes 480-517 and accompanying text.
600. See supra notes 1-14 and accompanying text.
601. See supra notes 16-47 and accompanying text.
602. See supra notes 80-164 and accompanying text.
603. See supra notes 16-47 and accompanying text.
604. See supra notes 15-21 and accompanying text.
605. See supra notes 54-79 and accompanying text.
606. See supra text accompanying notes 48-53.
607. See supra notes 66-79 and accompanying text.
608. See supra text accompanying notes 12-14.
some clues about the Framers’ intent regarding the allocation of these powers. Early debates in the Convention demonstrate a great mistrust of the executive and a strong desire on the part of most of the delegates to constrain the executive in external matters. The initial draft debated by the delegates evinces the delegates’ desire to create a system of checks and to insure congressional control of foreign relations. The Committee of Detail, which prepared the first working draft of a constitution, delegated the crucial aspects of foreign affairs—war power, commerce power, treaty power and control over the high seas and the law of nations—to the legislative branch. The fact that the same Committee also originated the executive clause shows that the men responsible for the executive clause did not equate it with any substantive foreign policy power. Regarding treaty power, it was not until two weeks before the end of the Convention that the delegates changed the mode of treatymaking from a purely senatorial function to one that mixed presidential and Senate authority. The debates indicate that dissatisfaction with the exclusive Senate role and realization of the need for executive negotiating underlay the acceptance of the treaty scheme. 

The final text of the Constitution points to a dominant congressional role in foreign policy. It provides for congressional control over foreign commerce, the declaration of war, letters of marque and reprisal, the raising of armed forces, rules concerning the law of nations and the high seas, and state involvement with foreign countries. In addition, it calls for a joint Senate-presidential treaty role. In stark contrast, the president was limited to his treaty role, the role of commander-in-chief and the power to receive ambassadors.

Thus, the distribution of power shows clearly that the Framers intended the Congress to predominate in foreign policy. Not only did they delegate almost the entire scope of foreign relations power to Congress, but they provided safeguards against the limited powers given to the President. The Framers desired the President to be commander-in-chief because they felt it was vital to have a unified mili-

609. See supra text accompanying notes 91-95.
610. See supra text accompanying notes 106-11.
611. See supra text accompanying note 112.
612. See supra notes 131-34 and accompanying text.
613. See supra notes 135-63 and accompanying text.
614. See supra text accompanying notes 175-80.
615. See supra note 181 and accompanying text.
616. See supra text accompanying notes 191-93.
tary command. Nevertheless, they feared presidential exercise of war power and, therefore, delegated control of the raising of armed forces and control over any outbreak of hostilities to the Congress. They envisioned a commander who would direct the troops only after the Congress had declared war or had instigated military action short of war by issuing letters of marque and reprisal. Regarding treaty power, the Framers restricted the President by requiring Senate advice and consent. By using the term advice and consent, with its historical connotations implying significant parliamentary input into policymaking, the delegates selected phrasing suggestive of a critical Senate treaty role. The remaining presidential power, that of receiving ambassadors, was viewed at the time to be purely a ceremonial function. The delegates thus provided for a dominant congressional role and carefully guarded against the President’s abuse of his power.

Notwithstanding this constitutionally ordained congressional pre-eminence in foreign policy matters, presidents from the early days of the Washington administration to the present day have controlled American relations with other countries. Initially, Washington showed great deference towards the Congress and shied away from exceeding his constitutional powers. Still, early in his administration, Washington established precedents, involving executive agreements and the sending of executive agents abroad, that would come to have much historical importance. The sending of the executive agents was especially important because by this act Washington made a major policy decision without consulting the Senate. Probably because of their understanding of Washington’s reasons for sending an executive agent, the senators, with the exception of Maclay, do not seem to have voiced any criticism of Washington’s delaying for months before telling the Senate of the missions. The legislature’s recognition of the need on occasion for informal and secret diplomatic missions, as evidenced by congressional legislation

617. For a discussion of the commander-in-chief clause, see supra notes 198-222 and accompanying text.
618. For a discussion of the treaty clause, see supra notes 250-77 and accompanying text.
619. See supra text accompanying notes 452-54.
620. See supra note 316 and accompanying text.
621. See supra notes 320-23 and accompanying text.
622. See supra note 323 and accompanying text.
623. See supra note 328 and accompanying text.
funding American diplomats, also likely influenced congressional acquiescence in the unauthorized missions. The resulting precedent enabled presidents to send informal messengers even though the Constitution did not address this power.

Early attempts at treatymaking caused a change in the system of advice and consent. As the background of the famed first attempt at prior consultation indicates, Washington desired leeway to choose the best means of consultation, but envisioned face-to-face consultation with the Senate prior to most negotiations. The experience of in-person consultation proved so unpleasant to Washington and the Senate, however, that Washington never tried it again. Nevertheless, Washington continued to seek prior Senate advice by submitting written questions to it, and the Senate exercised an important treaty role in the years following the first treaty consultation.

One historian has stated that "[t]he Washington administration made its most significant contribution to the growth of presidential power by its clear and uncompromising assumption of responsibilities not clearly and precisely outlined in the Constitution." Washington's proclamation of an impartial stance regarding the European hostilities was just such an assumption of responsibility in a circumstance where it was not clear which branch had the right to issue such a proclamation. In two momentous foreign policy moves, the enforcement of neutrality and the sending of Jay as a special envoy, Washington totally ignored constitutional mandates. Washington enforced the neutrality that he had unilaterally proclaimed, and he even issued a code of rules to port collectors about how to enforce the neutrality. By enforcing his own proclamation and by making rules to govern the neutrality, Washington acted in both legislative and executive capacities. In addition, Washington promulgated a series of rules regulating captures at sea, thereby exceeding his authority since the Constitution delegated to the Congress the authority to make rules concerning captures at sea, to define and punish felonies committed on the high seas, and to define offenses

624. See supra text accompanying notes 324-28.
625. See supra text accompanying notes 284-87.
626. See supra notes 306-10 and accompanying text.
628. See supra text accompanying notes 337-39.
629. See supra notes 366-412 and accompanying text.
630. See supra notes 490-517 and accompanying text.
631. See supra text accompanying notes 368-70.
632. See supra notes 380-83 and accompanying text.
against the law of nations. Further, Washington placed the Congress in an awkward position by informing the French and British ambassadors that, in his opinion, it was incumbent on the United States to compensate, in certain instances, parties who lost their ships because of hostilities committed in contravention of American law. Washington created a dilemma for congressmen who were forced to choose between abandoning their position or risking damage to Washington's and to the nation's prestige. Finally, Washington even acted in a judicial capacity by making determinations in cases involving prize disputes where the parties could not agree on a panel of arbitrators to determine the ship's rightful owner.

Due to the American government's need to take immediate action to prevent its citizens from engaging in the European hostilities and possibly drawing the United States into the conflict, Washington was justified in quickly issuing a neutrality proclamation. There was no such urgent need, however, for implementation of enforcement measures. Washington could have convened the Congress to deal with neutrality measures, but he decided against doing so because he feared public and congressional sympathy toward the French cause. Probably because it recognized the need for neutrality and expected that Washington would act in the nation's best interest, the Congress did not criticize Washington for not convening it to address neutrality questions. Even if one concedes the wisdom of Washington's neutrality measures, one cannot ignore his blatant usurpation of congressional power. The critical circumstances facing the nation and his special relationship with his countrymen allowed Washington to exercise great power; these factors call for restraint in using his action as a precedent. Although Washington's moves succeeded, it would be unwise to risk allowing another president to exercise such extensive powers while ignoring the authority of Congress and the wishes of the country at large.

Regarding the circumstances surrounding the Jay mission, it is clear that Washington ignored any constitutional problems and decided that the risk of war with Great Britain necessitated his sending Jay without seeking prior congressional approval of Jay's instruc-

633. See supra text accompanying notes 378-79.
634. See supra notes 371-77 and accompanying text.
635. See supra text accompanying notes 394-95.
636. See supra text accompanying notes 403-07.
637. See generally supra notes 580-94 and accompanying text.
Washington's early forays into treatymaking demonstrate his belief that constitutional advice and consent mandated Senate approval prior to the completion of negotiations. At the time of the Jay Treaty, however, he decided to abandon prior consultation because he faced great difficulty obtaining Senate consent to Jay's instructions, and he feared that rejection of the instructions and the resulting collapse of the mission might have led to the outbreak of war with Great Britain.

By the end of his administration Washington, with the acquiescence of a Congress comprised of many former Convention delegates, had greatly expanded presidential authority over foreign relations. Of course, if the Constitution is interpreted in light of this history, it appears that the Framers intended a greater presidential role than seems evident from the face of the document. Alternatively, Washington's actions can be viewed as a drastic departure from intended practices, which were acquiesced to by a Congress that recognized the serious dangers facing the country and felt confident with Washington at the helm.

Examination of the history of the United States in the administrations following Washington's, brings into focus the troubles that have plagued the country as a result of the move away from the Constitution. Presidents have engaged the country in a series of military confrontations despite the constitutional allocation of war powers to the Congress. Regarding treatymaking, the abandonment of prior consultation has had a tremendous impact on American history. Senate defeat of treaties, such as the Versailles Treaty, and

638. For Federalist fears about the risk of war and the possible defeat of any treaty with Great Britain, see supra text accompanying notes 487, 506-12.
639. See supra text accompanying notes 284-87.
640. See C. Thach, supra note 127, at 141-43. Thach notes that eighteen of the fifty-five Convention delegates served in the first Congress and half of the Senators had been Convention delegates. Id.
641. See Indochina: the Constitutional Crisis, in 116 Cong. Rec. 15,409-16 (1970). The authors of this study point to the early twentieth century as a critical period in the growth of presidential warmaking. In addition, the authors note that since 1945, presidents have often used military force abroad without getting congressional consent. Id. at 15,410. The authors view this trend toward presidential warmaking as a departure from the Framers' intent and the practice in the nineteenth century where presidents, as a general rule, tended to defer to congressional warmaking power. Id. For an analytical survey of warmaking throughout American history, see R. Berger, Executive Privilege: A Constitutional Myth 75-88 (1974).
the resulting international repercussions show the great dangers in not consulting the Senate before the completion of treaties. In addition, the elimination of prior consultation has significantly undermined the Senate treaty role. Senators are often faced with presidential declarations of the harm that would result to presidential prestige and American diplomacy if they should refuse to consent to a negotiated treaty. Thus, the Senators are no longer free to judge a treaty solely on its merits, and the critical check on treatymaking, whereby two separate bodies must both independently approve the worth of a treaty, has been significantly eroded. Recent history has substantiated the Framers’ worries about possible encroachments by one branch on another’s authority and has vindicated the system of checks they developed to prevent abuses in the foreign relations sphere.  

Bruce Stein

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