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Arthur Bestor

RESPECTIVE ROLES OF SENATE AND PRESIDENT IN THE MAKING AND ABROGATION OF TREATIES—THE ORIGINAL INTENT OF THE FRAMERS OF THE CONSTITUTION HISTORICALLY EXAMINED

Arthur Bestor*

* Professor Emeritus of History, University of Washington, Ph.B., Yale University, 1930, Ph.D., 1938; M.A., Oxford University, 1956; LL.D., Lincoln University, 1959.

On aspects of the subjects discussed in the present article, Professor Bestor has testified by invitation to the Senate Foreign Relations Committee (July 21, 1976), and the House Subcommittee on International Security (June 23, 1976).

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I. INTRODUCTION

The Constitution of the United States provides 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."[1] It decrees, moreover, that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[2]

A. Recent Developments

On the 2d of December 1954 the United States signed a Mutual Defense Treaty with the Republic of China (in other words, with the government that claimed to be the legal sovereign of the whole of China, though in fact governing only the island of Taiwan and certain adjacent islands). On the 9th of February 1955 the Senate adopted by a vote of sixty-five yeas to six nays (with twenty-five Senators not voting) a resolution in customary form reading: "*Resolved (two-thirds of the Senators present concurring therein),* That the Senate advise and consent to the ratification of . . . the Mutual Defense Treaty between the United States of America and the Republic of China, signed at Washington on December 2, 1954."[3] On the 3d of March 1955 ratifications were exchanged at Taipei and the treaty immediately entered into force. On the 1st of April 1955 the President proclaimed the treaty as part of the law of the land.

The first paragraph of the fifth article of the treaty declared: "Each Party recognizes that an armed attack in the West Pacific Area directed against the territories of either of the Parties would be dangerous to its

1. U.S. CONST. art. II, § 2, cl. 2.
2. *Id.* art. VI, cl. 2.
3. 101 CONG. REC. 1415 (1955).

own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes."[4] The tenth and final article read as follows: "This Treaty shall remain in force indefinitely. Either Party may terminate it one year after notice has been given to the other Party."[5]

The International Security Assistance Act of 1978, which became law with President Carter's signature on the 26th of September 1978, referred to the twenty-four years of faithful performance by the Republic of China of its obligations under the treaty, and went on to make the following declaration: "It is the sense of the Congress that there should be prior consultation between the Congress and the executive branch on any proposed policy changes affecting the continuation in force of the Mutual Defense Treaty of 1954."[6]

Somewhat less than twelve weeks later, on the 15th of December 1978, President Carter read to the nation over television and radio a joint communique announcing the establishment of diplomatic relations between the United States and the People's Republic of China (often referred to as "mainland" China), recognizing the latter as "the sole legal Government of China," and announcing that the United States "acknowledges the Chinese position that there is but one China and Taiwan is part of China."[7] A simultaneous official statement was more specific: "On . . . January 1, 1979, the United States of America will notify Taiwan that it is terminating diplomatic relations and that the Mutual Defense Treaty between the United States and the Republic of China is being terminated in accordance with the provisions of the Treaty."[8]

The President had not received, nor did he request, the formal advice and consent of the Senate to the termination of the Mutual Defense Treaty of 1954 with the Republic of China. Moreover, he had not received, nor did he request, a joint resolution by both Houses of Congress authorizing or approving such termination. In the succeeding weeks the constitutionality of the President's action was challenged both in the federal courts and in Congress itself. Three major developments may be briefly chronicled.

4. Mutual Defense Treaty, Dec. 2, 1954, United States-Republic of China, art. V, para. 1, 6 U.S.T. 433, 436, T.I.A.S. No. 3178.

5. *Id.* art. X, 6 U.S.T. at 437.

6. Pub. L. No. 95–384, § 26(b), 92 Stat. 730, 746 (1978). This clause (in its original form, referring to the Senate rather than to Congress) was adopted by the Senate on 25 July 1978 by a vote of 94 to 0. 124 CONG. REC. S11728 (daily ed. July 25, 1978). A conference committee later reworded the clause to include Congress as a whole. H.R. REP. No. 95–1546, 95th Cong., 2d Sess. (1978).

7. 14 WEEKLY COMP. OF PRES. DOC. 2264, 2264 (Dec. 15, 1978).

8. *Id.* at 2266.

On the 22nd of December 1978, Senator Barry Goldwater, together with twenty-four other members or former members of Congress,[9] brought suit on constitutional grounds against President Carter and Secretary of State Cyrus Vance, praying the United States District Court for the District of Columbia to declare that any decision terminating the treaty must be made "with the advice and consent of the Senate, or with the approval of both Houses of Congress," and, moreover, to "[e]njoin the defendants from taking any further action or making any statements which will have the effect of terminating, or creating any expectations that the Defense Treaty has been or will be terminated."[10]

The second challenge was mounted in Congress itself when it reconvened in January 1979. (It had been in recess when the President made his move.) On the 18th, Senator Harry F. Byrd, Jr. (Virginia) introduced a resolution reading: "[I]t is the sense of the Senate that approval of the United States Senate is required to terminate any mutual defense treaty between the United States and another nation."[11] This was referred to the Foreign Relations Committee "with instructions to report by no later than May 1, 1979."[12] The committee, which had already compiled and published a 423-page volume of reprinted materials under the title *Termination of Treaties: The Constitutional Allocation of Power*,[13] proceeded

9. Bringing the action were seven senators (in addition to Goldwater), one former senator, and sixteen members of the House of Representatives. *See* list in 125 CONG. REC. S14793 (daily ed. Oct. 18, 1979).

10. Complaint for Declaratory and Injunctive Relief, Goldwater v. Carter, No. 78-2412 (D.D.C. Oct. 17, 1979), *appeal docketed*, No. 79-2246 (D.C. Cir. Oct. 18, 1979), *reprinted in Treaty Termination: Hearings Before the Senate Comm. on Foreign Relations on S. Res. 15, Resolution Concerning Mutual Defense Treaties*, 96th Cong., 1st Sess. 551, 564-65 (1979) [hereinafter cited as *Treaty Termination: Hearings on S. Res. 15*].

11. S. Res. 15, 96th Cong., 1st Sess. (1979), *reprinted in Treaty Termination: Hearings on S. Res. 15*, *supra* note 10, at 2. On the same day Senator Goldwater (together with 21 other senators) introduced a concurrent resolution stating the constitutional basis of the challenge more elaborately. The preamble explained that "the termination of a defense treaty is a decision of the highest national importance which, under the checks and balances system, should receive the added deliberation provided by the participation of the Senate or Congress." The body of the resolution declared:

> That, in accordance with the separation of powers under the Constitution, the President should not unilaterally abrogate, denounce, or otherwise terminate, give notice of intention to terminate, alter, or suspend any of the security treaties comprising the post-World War II complex of treaties, including mutual defense treaties, without the advice and consent of the Senate, which was involved in their initial ratification, or the approval of both Houses of Congress.

S. Con. Res. 2, 96th Cong., 1st Sess. (1979), *reprinted in Treaty Termination: Hearings on S. Res. 15*, *supra* note 10, at 11-13. Except for slight verbal changes this was identical with a concurrent resolution that Goldwater had introduced on 10 Oct. 1978, before President Carter announced his unilateral action regarding the treaty with Taiwan. S. Con. Res. 109, 95th Cong., 2nd Sess. (1979), *reprinted in Treaty Termination: Hearings on S. Res. 15*, *supra* note 10, at 573-75. Several other resolutions to the same effect were introduced in January 1979, but the issue was eventually joined over S. Res. 15 which Senator Harry F. Byrd, Jr., had offered.

12. *Treaty Termination: Hearings on S. Res. 15*, *supra* note 10, at 2.

to hold three days of hearings early in April, publishing the testimony in a 589-page volume, *Treaty Termination: Hearings on S. Res. 15*.[14] On the 7th of May, the committee finally reported its own greatly-amended version of the resolution. This began by expressing the sense of the Senate that treaties "should not be terminated or suspended by the President without the concurrence of the Congress," but then went on to add: "except where . . . material breach, changed circumstances, or other factors recognized by international law, or provisions of the treaty itself, give rise to a right of termination or suspension on the part of the United States."[15]

Turning to the third significant development of the period, the Administration proceeded with its plan to provide for "the maintenance of commercial, cultural and other relations . . . on an unofficial basis" with what was no longer to be designated the government of an independent nation, but was referred to instead as "the people on Taiwan."[16] To carry out the plan, an American Institute in Taiwan was incorporated on the 16th of January under the laws of the District of Columbia.[17] Ten days later, on the 26th, President Carter sent Congress the draft of a bill, the title of which included the just-quoted phrases concerning maintenance of relations on an unofficial basis.[18] Hearings on the Administration measure were promptly held by the Senate Foreign Relations Committee, beginning on the 5th of February and concluding on the 22nd.[19] In March the measure passed both Houses, with differences that were ironed out by a conference committee, and was sent to the President, who signed it into law on the 10th of April 1979.[20] The enactment made only a vague and ambiguous allusion to the action of the President in undertaking to terminate the defense treaty unilaterally: "The President having terminated governmental relations between the United States and

13. SENATE COMM. ON FOREIGN RELATIONS, 95TH CONG., 2D SESS., TERMINATION OF TREATIES: THE CONSTITUTIONAL ALLOCATION OF POWER (Comm. Print 1978).

14. *Treaty Termination: Hearings on S. Res. 15*, *supra* note 10. Portions of the present article (primarily Part II) were "inserted for the record," at 25–32, the material having previously been published in 125 CONG. REC. S1607–10 (daily ed. Feb. 21, 1979).

15. S. REP. No. 96–119, 96th Cong., 1st Sess. 1 (1979).

16. The quoted phrases are from the full title of the draft statute proposed by President Carter on 26 January 1979. RELATIONS WITH TAIWAN: MESSAGE FROM THE PRESIDENT, H.R. DOC. No. 96–45, 96th Cong., 1st Sess. 3 (1979).

17. *Taiwan: Hearings Before the Senate Comm. on Foreign Relations on S. 245, A Bill to Promote the Foreign Policy of the United States Through the Maintenance of Commercial, Cultural, and Other Relations with the People on Taiwan on an Unofficial Basis, and for Other Purposes*, 96th Cong., 1st Sess. 15 (1979) (Statement of Warren Christopher).

18. *See* note 16 *supra*.

19. *See* note 17 *supra*.

20. Taiwan Relations Act, Pub. L. No. 96–8, 93 Stat. 14 (1979). For the legislative history of the statute, see [1979] U.S. CODE CONG. & AD. NEWS 650.

the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, the Congress finds that the enactment of this Act is necessary . . . ."[21]

A climax of a sort occurred on the 6th of June 1979. The Taiwan Relations Act was already law. The case of *Goldwater v. Carter* had been argued but not decided. The Senate was finally beginning its debate on the resolution concerning the termination of treaties. Before the House was the substitute proposed by the Foreign Relations Committee, which, in the view of Senator Harry F. Byrd, Jr., and those who sided with him, had turned his original resolution "about-face" and had handed the President "a blank check in the termination of future treaties."[22] Byrd thereupon moved to restore his original wording in place of the committee's substitute.[23]

As the debate neared its agreed-upon time limit, announcement was made on the floor[24] that Judge Oliver Gasch of the United States District Court for the District of Columbia had just handed down an order dismissing without prejudice the suit in which Senator Goldwater had challenged the constitutionality of the President's unilateral termination of the Taiwan defense treaty. The judge had not, however, decided the constitutional issue, as his memorandum supporting the order made clear.[25] In obiter dicta Judge Gasch twice expressed the view that "the power to terminate treaties is a power shared by the political branches of this government, namely, the President and the Congress."[26] His decision turned, however, on the prior question of the standing of the plaintiffs, as members of Congress, to bring suit in the manner they did. The court held that under the circumstances existing at that moment, the plaintiffs lacked such standing.

On the question of standing, the crucial point to the court was the fact that the Senate itself had not yet taken a definitive position, either by retroactively validating the President's action, or, contrariwise, by assert-

21. Taiwan Relations Act, Pub. L. No. 96–8, § 2(a), 93 Stat. 14 (1979). When Senator Goldwater asked members of the Foreign Relations Committee whether their measure implied approval of the constitutionality of the President's unilateral termination of the Taiwan treaty, Senator Jacob Javits replied: "[I]t is my judgment, and I sat through all the sessions of the committee, that the committee did not intend to approve or disapprove of the legality of President Carter's action." Goldwater thereupon announced that he would vote for the act. 125 CONG. REC. S2125 (daily ed. Mar. 7, 1979).

22. 125 CONG. REC. S7022 (daily ed. June 6, 1979).

23. *Id.*

24. *Id.* at S7033.

25. Goldwater v. Carter, No. 78–2412 (D.D.C. June 6, 1979) (mem.), *reprinted in* 125 CONG. REC. S7062–64 (daily ed. June 6, 1979). To emphasize the importance of the decision, two separate requests were made and granted for unanimous consent to print the opinion in the *Record*, and it was accordingly printed twice in the same issue (elsewhere at S7050–52).

26. *Id.* at S7063, col. 2; substantially repeated, *id.* in col. 3.

ing that senatorial consent to the abrogation of a treaty was indispensable. Judge Gasch rejected the contention of the defendants that by passing the Taiwan Relations Act, Congress and the Senate had implicitly accepted the termination as valid.[27] Pending definite action by the Senate one way or the other, therefore, the court ruled that the plaintiffs, as members of Congress, still had open to them the possibility of acting on the matter in the legislative forum. Consequently their "constitutional and statutory rights to be consulted, and to exercise their right to vote on the matter"[28] had not yet suffered irreparable injury. Accordingly they were not entitled to seek judicial relief. This argument was stated as follows by the court:

> At least three resolutions dealing with the treaty termination power . . . are presently pending before the United States Senate. . . . If the Senate as a whole were to take action approving the termination of the Mutual Defense Treaty, the issues raised by this suit would be moot because the President's action would no longer be unilateral. If the Senate or the Congress rejected the President's notice of termination or asserted a right to participate in the treaty termination process, the Court would be confronted by a clash of political branches in a posture suitable for judicial review.[29]

The concluding paragraph of the opinion contained an even more open invitation to the Senate to take action. The court said, "If . . . the result . . . falls short of approving the President's termination effort, then the controversy will be ripe for a judicial declaration respecting the President's authority to act unilaterally."[30]

The Senate, it is proper to say, accepted the invitation with alacrity. It was already approaching a vote on Senator Harry Byrd's motion to restore his original language, in place of the Foreign Relations Committee's, to the pending resolution on the power to terminate treaties. When the rollcall came, fifty-nine senators voted for the unqualified assertion contained in the Byrd text, and only thirty-five voted against.[31] The resolution was still not brought to a final vote,[32] but it now read: "Re-

27. *Id.* at S7064 n.14 (citing, *inter alia*, the statement of Sen. Javits quoted in note 21 *supra*).

28. These were the words used by the plaintiffs in describing the injury they allegedly received. Complaint for Declaratory and Injunctive Relief § 34, Goldwater v. Carter, No. 78–2412 (D.D.C. Oct. 17, 1979), *reprinted in Treaty Termination: Hearings on S. Res. 15*, *supra* note 10, at 561.

29. Goldwater v. Carter, No. 78–2412 (D.D.C. June 6, 1979) (mem.), *reprinted in* 125 CONG. REC. S7062, S7063 (daily ed. June 6, 1979) (three resolutions cited were S. Res. 10, S. Res. 15 (that of Byrd), and S. Con. Res. 2).

30. *Id.* at S7064.

31. 125 CONG. REC. S7038–S7039 (daily ed. June 6, 1979). Six were not voting.

32. The resolution as amended by substitution of Byrd's wording was debated again on the 18th and the 21st of June, but without its finally being passed. 125 CONG. REC. S7861–63 (daily ed. June

solved, that it is the sense of the Senate that approval of the United States Senate is required to terminate any mutual defense treaty between the United States and another nation."[33]

On the 12th of June, six days after the court decision and the Senate vote just narrated, Goldwater and his fellow plaintiffs moved the district court to alter or amend its judgment. They urged as a principal ground the vote on the Byrd Resolution, describing it as "a clear-cut repudiation of proposed language that would have recognized power in the President alone to terminate most treaties, including the Mutual Defense Treaty with Taiwan." The vote was taken, the brief pointed out, "with prior knowledge and publicity of the relevance of the Court's ruling earlier in the same day." The Senate's "decisive action to assert its shared power in the field of treaty termination," the plaintiffs argued, "squarely meets the criteria prescribed by the Court" for judicially determining the constitutional issue.[34] The court heard oral argument on the 12th of July, and written briefs on specific points were submitted in response to successive requests from the court.[35]

The body of this paper had been completed and was being made ready for the press when, on the 17th of October 1979, the district court handed down its decision on the reopened case of *Goldwater v. Carter*.[36] To bring the narrative down to the end of October, an analysis of this opinion must be interpolated at this point.

In brief, developments since the decision of the 6th of June had, in the view of Judge Gasch, given to the congressional plaintiffs the necessary

18, 1979); 125 CONG. REC. S8189–95 (daily ed. June 21, 1979). References to Goldwater's suit were recurrent. The strategy of opponents of a court test of presidential power seemed to be either to amend the resolution so as to except from its operation the action already taken by the President on the Taiwan treaty, or, failing that, to prevent the final adoption of the resolution in the hope that the court would not consider the vote on Byrd's amendment sufficiently definitive to warrant reopening the case.

33. 125 CONG. REC. S7047 (daily ed. June 6, 1979).

34. Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Alter or Amend the Judgment of June 6, 1979 at 1, Goldwater v. Carter, No. 78–2412 (D.D.C. Oct. 17, 1979).

35. Plaintiffs' Supplemental Memorandum in Support of Their Motion to Alter or Amend Judgment (submitted July 24, 1979); Plaintiffs' Memorandum Reporting on the Legislative Efforts Taken Since June 6, 1979 with Respect to Treaty Termination Resolutions (submitted Sept. 19, 1979); Plaintiffs' Memorandum on the Privileged Status in Congress of Presidential Messages (submitted Oct. 3, 1979); Plaintiff's Supplemental Memorandum Providing Authority to Part 2 of Plaintiffs' Memorandum on the Privileged Status in Congress of Presidential Messages (submitted Oct. 9, 1979), Goldwater v. Carter, No. 78–2412 (D.D.C. Oct. 17, 1979). These memoranda were submitted in response to requests of the court made on 12 July, 13 Sept., 28 Sept., and 8–9 Oct. 1979, respectively.

36. Goldwater v. Carter, No. 78–2412 (D.D.C. Oct. 17, 1979) (Order and Memorandum), *reprinted in* 125 CONG. REC. S14787–93 (daily ed. Oct. 18, 1979). In the footnotes that immediately follow, the column number as well as the page is indicated.

standing which he held they had not possessed at the earlier time. Turning then to the second of two "threshold issues," the judge ruled that the suit brought by Goldwater did not raise a nonjusticiable "political question," but instead involved "a clash of authority between the two political branches" which came before the court "in a posture suitable for judicial resolution."[37] Having thus reached the constitutional issue itself, the memorandum opinion set forth the arguments on both sides and concluded as follows:

> [I]t is the declaration of this Court that the President's notice of termination must receive the approval of two-thirds of the United States Senate or a majority of both houses of Congress for it to be effective under our Constitution to terminate the Mutual Defense Treaty of 1954. It is further ordered that the Secretary of State and his subordinate officers are hereby enjoined from taking any action to implement the President's notice of termination unless and until that notice is so approved.[38]

It is important to examine the reasoning of the court on the three points it dealt with separately, namely the "threshold issues" of standing and of political questions, and the central constitutional issue of the allocation of power between the two political branches insofar as the termination of treaties is concerned.

In the discussion of standing, emphasis was placed, as might be expected, on the action of the Senate in reinstating Senator Harry Byrd's language in the pending resolution on the termination of treaties. While admitting that the Senate had not yet taken final action on the resolution, Judge Gasch held that the rollcall on the 6th of June,[39] with its tally of fifty-nine votes to thirty-five, "stands as the last expression of Senate position on its constitutional role," and "clearly falls short of approving the President's termination effort."[40] Having requested and obtained from Senator Goldwater a declaration recounting his unsuccessful effort to bring about a final vote,[41] the judge announced that he was "convinced that there is no apparent risk of circumventing or evading the legislative process by a [judicial] decision on the merits."[42] Accordingly he

37. *Id.* at S14789, col. 2.

38. *Id.* at S14790, col. 3 (footnote omitted). This conclusion was substantially repeated in the court's formal order. *Id.* at S14787, col. 2.

39. *See* note 31 *supra.*

40. Goldwater v. Carter, No. 78–2412 (D.D.C. Oct. 17, 1979) (mem.), *reprinted in* 125 CONG. REC. S14787, S14788, col. 2 (daily ed. Oct. 18, 1979) (footnote omitted).

41. Declaration of Senator Barry Goldwater, accompanying Plaintiffs' Memorandum Reporting on the Legislative Efforts Taken Since June 6, 1979 with Respect to Treaty Termination Resolutions, Goldwater v. Carter, No. 78–2412 (D.D.C. Oct. 17, 1979).

42. Goldwater v. Carter, No. 78–2412 (D.D.C. Oct. 17, 1979) (mem.), *reprinted in* 125 CONG. REC. S14787, S14788, col. 3 (daily ed. Oct. 18, 1979).

ruled that the plaintiffs had standing to sue because Congress had suffered "institutional injury" through President Carter's violation of its constitutional right "to be consulted and to vote on . . . termination," and the actual plaintiffs had suffered "derivative injury, based upon the right of each individual legislator to participate in the exercise of the powers of the institution."[43]

Turning next to the political question doctrine, Judge Gasch listed the criteria for identifying a nonjusticiable political question, as the Supreme Court had set them forth in *Baker v. Carr*.[44] The most relevant appeared to be that which labeled a question political if there existed "a textually demonstrable constitutional commitment of the issue to a coordinate political department."[45] Pointing out that there is no explicit provision of the Constitution dealing with the termination of treaties, the opinion suggested that the assignment of the power to the executive branch alone was not "textually demonstrable." Even so, Judge Gasch was willing to consider whether such a delegation of exclusive power could be inferred from other provisions of the Constitution. He held that it could not, for from the treaty clause "it is just as possible to imply the requirement of a legislative role in the termination process,"[46] as it is to imply an executive role. On the political question issue, the opinion reached the following conclusion:

> Many times in our history, courts have heard and resolved disputes concerning the allocation of power between the legislative and executive branches without raising the bar of the political question doctrine. Rather than presenting a nonjusticiable political question, the procedure required by our Constitution to terminate the Mutual Defense Treaty must be decided on the merits.[47]

In opening its discussion on the merits, the court undertook a review of the instances of treaty termination, commencing with 1798, and summed it up with the observation that "[t]he great majority of the historical precedents involve some form of mutual action, whereby the President's notice of termination receives the affirmative approval of the Senate or the entire Congress."[48]

Turning next to the principal arguments advanced to support a unilateral power of the President to terminate treaties, Judge Gasch first

43. *Id.* col. 1 (footnotes omitted).

44. 369 U.S. 186, 217 (1962).

45. Goldwater v. Carter, No. 78-2412 (D.D.C. Oct. 17, 1979) (mem.), *reprinted in* 125 CONG. REC. S14787, S14788, col. 3 (daily ed. Oct. 18, 1979) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

46. *Id.* at S14789, col. 1.

47. *Id.* col. 2 (footnote omitted).

48. *Id.* (footnote omitted).

examined the significance and relevance of one of the most frequently quoted statements of the Supreme Court concerning presidential power in foreign affairs. The President, said Justice George Sutherland in the arms embargo decision of 1936, *United States v. Curtiss-Wright Export Corp.*, is "the sole organ of the federal government in the field of international relations."[49] The critical question, of course, is the meaning to be given to the word "organ." Without actually tracing the history of the phrase (the analogues of which, often more carefully qualified, are to be found in the writings of Jefferson, Madison, and Marshall[50]), Judge Gasch treated it as synonymous with the expanded expressions: "the sole organ of communication with foreign governments,"[51] or "the nation's spokesman and representative in foreign affairs."[52] This status, he ruled, could not "serve as the basis for exclusive executive power over the entire process of treaty termination."[53] In what was in many ways the most significant passage in the entire opinion, he declared: "While the President may be the sole organ of communication with foreign governments, he is clearly not the sole maker of foreign policy. In short, the conduct of foreign relations is not a plenary executive power."[54]

The court went on to reject as "unpersuasive" the purported analogy between the President's acknowledged power to dismiss executive officers regardless of the fact of Senate concurrence in their appointment and a supposed presidential power to terminate treaties unilaterally. The latter power, in the opinion of the court, would be "a contradiction rather than a corollary of the Executive's enforcement obligation."[55]

Another argument that the court found to be "without merit" was that the President's power to extend recognition to other governments carried with it an exclusive " '[p]ower to remove . . . obstacles to . . . recognition,' "[56] and that the defense treaty with Taiwan was such an

49. 299 U.S. 304, 320 (1936).

50. *See* LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. Doc. No. 92–82, 92d Cong., 2d Sess. 538–42 (1973). Jefferson, as Secretary of State, phrased the principle in 1790: "The *transaction of business* with foreign nations is executive altogether." *Id.* at 538 (emphasis added). Madison in 1793 described the clause on reception of ambassadors as designed "to provide for a particular mode of *communication.*" *Id.* at 539 (emphasis added). It was Marshall, before he became Chief Justice, who seems to have originated the imperious formula: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." *Id.* at 539.

51. Goldwater v. Carter, No. 78–2412 (D.D.C. Oct. 17, 1979) (mem.), *reprinted in* 125 CONG. REC. S14787, S14789, col. 3 (daily ed. Oct. 18, 1979).

52. *Id.*

53. *Id.*

54. *Id.* (footnote omitted).

55. *Id.*

56. *Id.* (quoting United States v. Pink, 315 U.S. 203, 229 (1942); United States v. Belmont, 301 U.S. 324 (1937)).

obstacle so far as the recognition of the government of mainland China (*i.e.*, the People's Republic of China) was concerned. The court distinguished the termination of the Taiwan treaty from the executive agreements settling property claims, which had figured in two cases in which the Supreme Court recognized a Presidential power to remove obstacles to recognition.[57] Judge Gasch regarded as untenable "[t]he argument that any executive action becomes constitutional if it is ancillary to an act of recognition."[58]

Certain other contentions of the defendants that were rejected call for no more than brief mention here. The court held that the Taiwan defense treaty contained provisions that were self-executing and others that had been "implemented by subsequent legislation," thus removing any possible doubt that the treaty formed part of the supreme law of the land, under article VI of the Constitution.[59] Alluding to the "undisputed" principle that the President lacks "power to amend the terms of a treaty," the opinion declared: "If the lesser power to amend treaties is denied the President, a fortiori, the greater power to annul should also be denied."[60] Furthermore, the court provided an authoritative interpretation of the article of the treaty itself which gave a power of termination to "[e]ither Party."[61] The opinion declared: "The 'party' to which the termination provision refers is the United States, not the President alone. . . ."[62] Recognizing that the Constitution did not prescribe a particular procedure for terminating a treaty, the court approved two alternatives: termination with the advice and consent of the Senate, or with the approval of both Houses. "The important point," it said, "is that treaty termination generally is a shared power, which cannot be exercised by the President acting alone."[63] In a footnote, Judge Gasch reiterated the opinion, contained in his earlier memorandum, that the Taiwan Relations Act could not "be construed as legislative approval of or acquiescence in the President's notice of termination."[64]

In its concluding paragraphs, the opinion dealt with the overarching question of the distribution of authority in foreign affairs between the

57. The agreements were a condition precedent to recognition of the Soviet Union, and the Supreme Court held that they superseded New York State laws. *See* cases cited in note 56 *supra*.

58. Goldwater v. Carter, No. 78-2412 (D.D.C. Oct. 17, 1979) (mem.), *reprinted in* 125 CONG. REC. S14787, S14790, col.1 (daily ed. Oct. 18, 1979).

59. *Id.* col. 2.

60. *Id.*

61. Mutual Defense Treaty, Dec. 2, 1954, United States-Republic of China, art. X, 6 U.S.T. 433, 437, T.I.A.S. No. 3178.

62. Goldwater v. Carter, No. 78-2412 (D.D.C. Oct. 17, 1979) (mem.), *reprinted in* 125 CONG. REC. S14787, S14790, col. 2 (daily ed. Oct. 18, 1979).

63. *Id.* col. 3.

64. *Id.* at S14793, col. 2, n.71. *See* note 27 *supra*.

legislative and executive branches and the bearing thereon of the constitutional principle of checks and balances. Though certain "purely executive functions" formed part of the process, the court declared that "[t]he termination of a treaty is not a single act entrusted by the Constitution to one or the other of our political branches."[65] The memorandum opinion continued:

> Like treaty formation, treaty termination is comprised of a series of acts that seek to maintain a constitutional balance. . . .
>
> . . . The mere fact that the President has the authority to make an initial policy determination regarding the exercise of an option to terminate, and to notify the foreign state of termination, does not vest him with the unilateral power to complete the termination process and thereby effect the abrogation of the treaty. . . .
>
> . . . .
>
> . . . In the treaty formation process, the Constitution expressly limits the Executive's role by requiring the advice and consent of two-thirds of the Senate. This constitutional requirement reflects the concern of the Founding Fathers that neither political branch possess unchecked power.
>
> . . . It would be incompatible with our system of checks and balances if the executive power in the area of foreign affairs were construed to encompass a unilateral power to terminate treaties.[66]

From this decision of the district court, the Administration took an appeal to the United States Court of Appeals for the District of Columbia. On the 30th of November 1979 the Court of Appeals, by a six-to-one decision, reversed the lower court. Attorneys for Goldwater immediately announced that an appeal would be taken to the Supreme Court. The present article was in type when the announcement came of the decision by the Court of Appeals, and an analysis of the opinions could not be made.[67]

B. Scope of the Present Study

The reference to the Founding Fathers in the concluding paragraphs of Judge Gasch's decision points out the subject that the present study will investigate. It seeks to determine the original intent of the framers of the American Constitution as evidenced by the documents dating from the period during which the Constitution and its predecessor, the Articles of

65. Goldwater v. Carter, No. 78–2412 (D.D.C. Oct. 17, 1979) (mem.), *reprinted in* 125 CONG. REC. S14787, S14790, col. 1 (daily ed. Oct. 18, 1979).

66. *Id.* cols. 1 & 2 (footnotes omitted).

67. Goldwater v. Carter, Seattle Post-Intelligencer, Dec. 1, 1979, § A, at 2, col. 1 (D.C. Cir. Nov. 30, 1979).

Confederation, were drawn up and adopted—roughly the period from 1776 through 1789. It is not a study of the precedents that have accumulated since that time, whether in the form of actions taken (or not taken) by the political branches or in the form of decisions handed down by the courts. These are subjects exhaustively examined elsewhere, to the neglect, it often seems, of the sources that reveal the original intent of the framers.

This article, it should be emphasized, is an historical study, not a commentary upon or a criticism of current policies, except insofar as a comparison of contemporary developments with the intention of the framers may give rise, in the minds of readers, to reflections of their own. The author himself does not intend in this article to express a personal opinion on the wisdom of the original Mutual Defense Treaty with Taiwan, on the diplomatic or political justification for terminating it, on the necessity or desirability of accommodating the wishes of the People's Republic of China in the matter for the sake of a "normalization" of relations, or on the possibility that unilateral abrogation of a defense treaty without any alleged breach by the other party may undermine the confidence of other allies in the reliability of American commitments to their defense. These are questions of policy that I might be prepared to discuss in another forum, but that are not to be considered here.

The first part of the present article examines the specific question of the placement in the constitutional system of the power to terminate a treaty originally ratified by and with the advice and consent of the Senate, two-thirds of the members present concurring.

The power of terminating a treaty is, of course, only a particular segment or subdivision of the far more inclusive power of determining the foreign policy of the Nation. Accordingly, after considering the evidence bearing directly upon the narrow question of treaty abrogation, the present article turns to the larger question of the relationship the framers intended to establish between the Senate and the President in shaping the nation's course in foreign affairs. The remainder of the article, beginning with Part III, deals with various aspects of this inclusive problem, seeking through contemporaneous historical evidence to ascertain the intention of the framers of the Constitution on each matter.

Among the matters to be examined in successive sections are the following: The definitions given to the concepts of legislative and of executive authority respectively by political theorists of the centuries leading up to the eighteenth; the distinctions that Americans had already drawn between the two sorts of power in the documents and practices of the old congress under the Confederation; the discussions in the Federal Constitutional Convention of 1787 concerning the proper distribution between

Senate and President of responsibility for making—and altering—foreign policy; and finally the precise meaning of the treaty clause that the framers incorporated in the Constitution.

II. CONSTITUTIONAL ANALOGIES: ALTERATION OF THE CONSTITUTION, REPEAL OF STATUTES, REMOVAL FROM OFFICE

The power to abrogate or terminate a treaty that has been completed and put into effect did not figure in the discussions of the Federal Constitutional Convention of 1787 or in the state ratifying conventions that followed. This can hardly be considered remarkable in view of the fact that the framers neither discussed nor provided for other comparable procedures—notably the repeal of a statute once enacted. The principal concern of the members of these conventions was the proper allocation of the various positive powers of government. Only in exceptional instances did they give attention to the negative use of these powers—in other words, to procedures for undoing or reversing what had once been done.

The silence of the Constitution on a particular point does not constitute a license to fill the gap with whatever terms or provisions may happen to strike an official's or a commentator's fancy. Obviously the procedure that is supplied must be consistent with the Constitution's handling of comparable situations and problems. Like things, it is but commonsense to say, ought to be done in like ways; furthermore, the closer the resemblance, the more compelling the analogy. Logic itself prescribes this rule if different procedures appear to be deducible from different provisions of the Constitution.

A. The Authority to Negate a Previous Action

The power to undo an action is obviously a correlative of the power to do it in the first place. The corollary of this is that the two powers normally belong in the same hands. The framers took cognizance of this principle, but they were well aware that it could not be applied without qualification to every situation. They therefore specified certain exceptions, and these were fully accepted by the First Congress, whose principal task, in 1789, was to put the new Constitution into operation. In a discussion at that time of appointments to and removals from office, Representative James Jackson of Georgia summed up the prevailing view: "He agreed with . . . the general principle, that the body who appointed ought to have the power of removal, as the body which enacts

laws can repeal them; but if the power is deposited in any particular department by the Constitution, it is out of the power of the House to alter it."[68]

Speaking generally, there are four important areas where it may become constitutionally important to determine the placement of an authority to negate or reverse or rescind some particular exercise of a power granted by the Constitution in positive terms. The first such area comprises alterations in the Constitution itself, including the elimination of provisions originally contained in it. The second comprises the repeal or alteration of statutes previously enacted. The third comprises the abrogation or termination of treaties, which (like the two preceding classes of documents) are part of the supreme law of the land. The fourth category comprises the removal from office of elected or appointed officials. With respect to the first and fourth of these categories, the Constitution makes explicit provision (though in certain cases only) for the negating of a measure or the dismissal of an official by an authority different from the one responsible for the original enactment or appointment.

These several exceptions to the commonsense rule which links together the power of enactment and the power of repeal must be examined carefully if one is to reach a valid conclusion about the intent of the framers. In particular, the instances in which the Constitution empowers a body with a more inclusive authority to annul the action of one possessing lesser scope must be carefully distinguished from those other instances in which the joint action of two authorities is made reversible by only one of the two, or by a subordinate authority. In the latter case, the rationale for the particular exception to the general rule must be understood before any analogy to the other situations—like the abrogation of treaties—is drawn.

1. Alteration of the Constitution Itself

Future changes in the Constitution were provided for in article V,

68. 1 ANNALS OF CONG. 374 (Gales & Seaton eds. 1834) (May 19, 1789). This compilation of debates in the first seventeen and a half congresses (1789-1824) is customarily cited (as above) by what is actually the wording on its half-title. Its regular title page reads: *The Debates and Proceedings in the Congress of the United States*. Furthermore, to compound the confusion, the running-head on individual pages is History of Congress. The work was compiled principally from newspapers (which contained the only contemporaneously published record of the early debates) and was issued in 42 volumes between 1834 and 1856. There were apparently several printings of certain volumes, varying slightly in pagination, as a result of which there are discrepancies among the citations given in different historical works. Cited herein is the set in the University of Washington Law Library. Volume I is dated 1834 and its text ends at col. 1170 in the middle of a sentence dealing with the debate of Feb. 10, 1790. A 35-page index then follows. The set in the main library of the same university differs in pagination. There this particular quotation is found in col. 389.

which prescribed several procedures for amending the instrument. Recognizing that amendments might be used to subtract from, as well as to add to the document, the framers introduced one permanent restriction on this negative use of the amending process. No state, without its consent, was to "be deprived of its equal Suffrage in the Senate."[69] With this exception (plus a temporary one relating to the importation of slaves[70]), the Constitution tacitly indicated that the repeal of one of its provisions was to be accomplished in precisely the same way as the addition to it of a new provision.

The framers left unsettled—no doubt deliberately—the gravest of all possible questions: whether there existed a power to dissolve the Union. Article VII prescribed the method by which the Constitution was to be established. Could the Union be dissolved by applying the procedure in reverse? If so, could one state, or a minority of all the states, accomplish this with respect to its own membership? Or would the consent of three-fourths of the states have to be obtained, as in the case of amendments? Or was the Union to be perpetual, as it had been described as being in the antecedent Articles of Confederation, now superseded by the "more perfect Union"[71] of the Constitution?[72] These were the constitutional questions posed by secession in 1860–61, and settled—definitively, it is thought—by arms and blood.

The framers also left unsettled a relatively minor question relating to the alteration of the Constitution. Can a state which has voted to ratify a proposed constitutional amendment rescind its favorable vote while the amendment is still pending? This question, unanswered by the framers, may have to receive a definitive answer in connection with the pending Equal Rights Amendment.

2. *Repeal of Statutes*

Though the Constitution is silent on the point, there seems never to have been the slightest doubt that the repeal of a law requires action of precisely the same kind, by precisely the same authorities, as its original enactment. In other words, an act of Congress can be repealed only by another act of Congress. No authority to repeal is vested in the President alone, or in either House singly, or even in both Houses concurrently

69. U.S. CONST. art. V.

70. *Id.*

71. U.S. CONST. preamble.

72. Compare Lincoln's remark in his First Inaugural, 4 March 1861: "It is safe to assert that no government proper, ever had a provision in its organic law for its own termination." 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 264 (R. Basler ed. 1953).

(unless a two-thirds majority can be mustered in each of the two Houses to override the President's veto of a bill providing for the repeal of some specified statute).

This principle had been so long established in English law that there seems never to have been a challenge to it in America. In the first volume of his enormously influential *Commentaries on the Laws of England* (which began to issue from the press in 1765), William Blackstone gave repeated emphasis to the idea. Writing of the power of Parliament, he bracketed together the "making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws,"[73] and he went on to say "that what the parliament doth, no authority upon earth can undo."[74]

A few pages later Blackstone returned to the theme: "An act of parliament," he wrote, "cannot be altered, amended, dispensed with, suspended, or repealed, but in the same forms and by the same authority of parliament: for it is a maxim in law, that it requires the same strength to dissolve, as to create an obligation."[75]

There is, of course, another point to consider where American jurisprudence is concerned. A duly enacted law can, in the United States, be voided by a body distinct from the one that enacted it. The judiciary can do so. The theory here is that the court is faced with a conflict of laws, namely, a conflict between a statute and the higher law of the Constitution. The court enforces the latter instead of the former, not because judges are superior in authority to legislators, but because the constitutional provision emanates from an authority which is superior to both—namely the people of the United States, whose will has been expressed through the conventions that ratified the original document and through constitutionally authorized procedures for amendment.[76]

Nothing whatever in the situations examined thus far suggests that the framers of the American Constitution intended to give the President the power to undo by his own unaided authority something that had been done (and had been required to be done) only in concurrence with at least some part of the legislature. Only when an authority of higher or broader scope entered the picture could any enactment of the types thus far dis-

73. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 160 (4th ed. Oxford 1770). The 4th edition will be cited throughout the present article; it is the one from which the first American edition (Philadelphia, 1771–72) was reprinted.

74. *Id.* at 161.

75. *Id.* at 185–86.

76. Classic statements include that by Alexander Hamilton, THE FEDERALIST No. 78 at 521–30, esp. 524–26 (J. Cooke ed. 1961) (May 28, 1788), and that by Chief Justice John Marshall in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–80 (1803).

cussed be voided without the consent of all the authorities that had concurred in its making.

Unless clear evidence to the contrary is offered, it is reasonable to suppose that the framers intended the same principle to apply to the abrogation of a treaty as to the repeal of a statute, both being parts of the supreme law of the land, as defined by the Constitution itself. The principal argument to the effect that an exception was intended in the case of treaties is based upon an analogy drawn from a widely different constitutional area. The relevance and validity of this analogy must next be examined.

3. Removals from Office

The election or appointment of an individual to office bears little resemblance to either the ratification of a treaty or the enactment of a law. All three processes, however, are capable of being reversed: officials can be dismissed, treaties abrogated, and statutues repealed. Though the Constitution says nothing about the procedure for repealing a statute or abrogating a treaty, it does say something about procedures (in the plural) for removal from office. These procedures, it is important to note, differ markedly according to the nature of the office held.

a. The Judiciary

Members of the federal judiciary are nominated by the President and appointed by and with the advice and consent of the Senate, a simple majority being sufficient. The judges are, however, guaranteed tenure during good behavior,[77] which means that they cannot be removed by those who jointly appointed them. The only method for their removal provided by the Constitution is impeachment, commencing with charges brought by the House of Representatives[78] and concluding with trial by the Senate, the latter's members being "on Oath or Affirmation" and a two-thirds majority being required for conviction.[79] The President, though crucially involved in the making of appointments, is completely excluded from impeachment proceedings.

b. Elected Officers

So far as elected officials are concerned, the framers of the Federal

77. U.S. CONST. art. III, § 1.
78. *Id.* art. I, § 2, cl. 5.
79. *Id.* art. I, § 3, cl. 6.

Constitution never contemplated giving the electorate a power of recall, such as several states have provided in twentieth-century amendments to their constitutions. Instead of giving the electorate a power of recall, the Federal Constitution grants each of the Houses of Congress the power to judge and punish its own members and, by two-thirds vote, to expel them.[80] The electorate (which chose the member in the first place) has only the power, at the polls, to deny him another term. The power to remove is thereby separated, in this instance as in that of the judiciary, from the power to appoint.

Only two members of the executive branch are elected, the President and the Vice President, and neither is removable by the electors who chose him or by the wider electorate that chose the electors. As with judges, the only procedure for removal is impeachment, with the added requirement that in the trial of a President the Chief Justice is to preside.[81]

c. Appointed Officials in the Executive Branch

With respect to the dismissal or removal of appointed officers of the federal government, the Consitution is completely silent, except that impeachment is possible for any of them, and except that military officers can be dishonorably discharged by courts-martial if Congress so provides in enactments made under its constitutional authority "[t]o make Rules for the Government and Regulation of the land and naval Forces."[82]

Aside from military officers, four different types of appointed officials are mentioned in the appointing clause of the Constitution, namely: (1) "Ambassadors, other public Ministers and Consuls"; (2) "Judges of the supreme Court"; (3) "other Officers of the United States"; and (4) "inferior Officers."[83] Appointments in the last-mentioned category may be vested, by act of Congress, "in the President alone, in the Courts of Law, or in the Heads of Departments."[84] Except for such "inferior" ones, all officers, civilian and military, are, by the Constitution, to be appointed in exactly the same way: through nomination by the President and approval by a majority of the Senate.

80. *Id.* art. I, § 5, cl. 2.

81. *Id.* art. I, § 3, cl. 6; *id.* art. II, § 4.

82. *Id.* art. I, § 8, cl. 14. *See also id.* cl. 16. Comprehensive Articles of War, drafted by John Adams, had been in effect since their adoption by the Continental Congress on 20 Sept. 1776. 5 JOURNALS OF THE CONTINENTAL CONGRESS 788-807 (Library of Congress ed. Washington 1906) [hereinafter cited as JCC]. *See also id.* at 670-71, n.2.

83. U.S. CONST. art. II, § 2, cl. 2.

84. *Id.*

B. The Appointing Power in the Constitutional Convention

The mingling together in a single appointments clause of such disparate kinds of officials as judges and executive functionaries was the result of a compromise reached in the closing days of the Federal Convention of 1787. On the 6th of August, ten weeks and a half after the beginning of deliberations there, and only six weeks before adjournment, a so-called Committee of Detail reported the first formal draft of a full-fledged constitution, bringing together and elaborating ideas that had previously taken the form merely of resolutions. In this draft two classes of appointed officials—namely, ambassadors and judges—were singled out, and their appointment vested in the Senate, with no participation by the President.[85] On the other hand, the President alone, with no reference to either House of Congress, was empowered to "appoint officers in all cases not otherwise provided for by this Constitution."[86] It follows, as a logical conclusion from these provisions, that the President was expected to control his subordinates by wielding the power to dismiss those whom he alone had appointed, but that he would not have any such power over judges, who could be removed only by impeachment, or over ambassadors, who were to be diplomatic representatives of the Senate, a body which possessed (at this stage of the Convention's proceedings) the exclusive power to make treaties and therefore, appropriately enough, to appoint ambassadors.

The arrangement proposed by the Committee of Detail was not accepted by the Convention. After discussion the provisions in question were sent back to committee, and on the 4th of September a compromise was reported.[87] It was adopted on the 7th, ten days before the Convention ended.[88] The new provision still distinguished from one another (though only in words) the three previously-mentioned classes of officials: ambassadors, judges, and "all other Officers." But it provided the same appointing procedure for all, thereby admitting the Senate to a share in the appointment of purely executive officers (by requiring senatorial advice and consent), while at the same time admitting the President to a share in the appointment of ambassadors and judges (by requiring nominations to come from him).[89]

85. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 177, 183 (1911) (draft constitution reported by the Committee of Detail, art. IX, § 1) (Aug. 16, 1787) [hereinafter cited as FARRAND, RECORDS].

86. *Id.* at 185 (art. X, § 2).

87. *Id.* at 495 (Report of the Committee on Postponed Parts, Brearley ch., Sept. 4, 1787).

88. *Id.* at 533-34 (Journal of the Convention, Sept. 7, 1787); *id.* at 539-40 (Madison's notes).

89. *Id.* at 495 (Report of the Committee on Postponed Parts).

The creation of a common procedure for appointments of all kinds could not possibly have meant that the same procedure for dismissal or removal was to apply to them all. Judges, it had already been decided, were to hold office "during good behavior,"[90] and would thus be removable only by impeachment.[91] Were the same procedure to be required in the case of all other civilian officials, then the latter would in effect enjoy life tenure. This was pointed out in the great debate on the removal power that took place in 1789 in the First Congress. James Madison was most emphatic in repudiating the idea that the Constitution was designed to "establish every officer of the Government on the firm tenure of good behavior." He continued: "If the Constitution means this . . . we must submit; but I should lament it as a fatal error interwoven in the system, and one that would ultimately prove its destruction."[92]

C. The Appointing and Removing Power in the First Congress

The First Congress was obliged to come to grips with the problem to which Madison spoke because it had before it a bill establishing a Department of Foreign Affairs (an executive department later rechristened the Department of State). The principal debate took place in the House of Representatives, where, on the 19th of May 1789, James Madison introduced a resolution proposing the establishment of a Department of Foreign Affairs, headed by a Secretary, "who shall be appointed by the President, by and with the advice and consent of the Senate; and to be removable by the President."[93] Objection was immediately made to the concluding phrase, and the argument against removal by the President alone was stated succinctly by Madison's fellow Virginian, Theodorick Bland:

> He thought it consistent with the nature of things, that the power which appointed should remove; and would not object to a declaration in the resolution . . . that the President shall remove from office, by and with the advice and consent of the Senate. He agreed that the removal by impeachment was a supplementary aid favorable to the people; but he was clearly of opinion, that the same power that appointed had, or ought to have, the power of removal.[94]

90. *Id.* at 186 (Report of the Committee of Detail, Draft Constitution art. XI, § 2); *id.* at 423 (Journal of the Convention, Aug. 26, 1787).

91. A proposal, patterned on the British statute, that judges "may be removed by the Executive on the application by the Senate and House of Representatives," was voted down on Aug. 27, 1787. *Id.* at 423 (Journal); *id.* at 428–29 (Madison's notes).

92. 1 ANNALS OF CONG., *supra* note 68, at 372 (May 19, 1789).

93. *Id.* at 371.

94. *Id.* at 374.

Madison defended his resolution as follows:

> I think it absolutely necessary that the President should have the power of removing from office; it will make him, in a peculiar manner, responsible for their conduct, and subject him to impeachment himself, if he suffers them to perpetrate with impunity high crimes or misdemeanors against the United States, or neglects to superintend their conduct, so as to check their excesses.[95]

At the end of the day the House voted "by a considerable majority, in favor of declaring the power of removal to be in the President."[96]

This did not end the matter, for the vote was in Committee of the Whole and by its own terms simply expressed "the opinion of this committee."[97] The bill that was drafted in consequence was subjected to five full days of debate between the 16th and the 22d of June 1789.[98] Speeches on both sides reiterated the arguments outlined in May, and need not be traced in detail here. In the end a compromise was reached. Congress struck from the bill the explicit provision making the Secretary "removable by the President," but at the same time inserted a provision recognizing such a power by indirection.[99] Specifically, the measure finally adopted (by a vote of twenty-nine to twenty-two), authorized the Chief Clerk (described as an "inferior officer") to take charge of the department "whenever the . . . principal officer shall be removed from office by the President of the United States, or in any other case of vacancy."[100] The compromise meant that those who considered removal by the President alone to be unconstitutional were left free to contest any dismissal that might occur.

On the whole, the Act of the 27th of July 1789 creating the Department of Foreign Affairs embodied Madison's interpretation of the Constitution as he set it forth on the 19th of May. In the meantime, however, on the 29th of June, Madison himself had proposed limiting the scope and applicability of the principle he had originally stated. The occasion

95. *Id.* at 372–73.

96. *Id.* at 383. Because the debate was in Committee of the Whole, no rollcall was recorded.

97. *Id.* at 370 (motion by Madison).

98. *Id.* at 455–585 (June 16–19 & 22, 1789).

99. 1 JOURNAL OF HOUSE OF REPRESENTATIVES 50–52 (Washington 1826) (June 22, 1789). The House first voted, 30 to 18, to add the ambiguous phrase "whenever the said principal officer shall be removed from office by the President . . . or in any other case of vacancy;" then voted, 31 to 19, to strike out the positive phrase "to be removable from office by the President." The meaning that both sides put upon the new language is made clear in the debate. *See* 1 ANNALS OF CONG., *supra* note 68, at 576 (June 19, 1789), 578–85 (June 22, 1789).

100. Act of July 27, 1789, ch. 4, § 2, 1 Stat. 29. The bill passed the House on 24 June. 1 ANNALS OF CONG., *supra* note 68, at 592. The Senate made slight amendments and passed it on 18 July. *Id.* at 50. The House then passed the bill as amended on 20 July. *Id.* at 660.

was the discussion of a bill to establish a Treasury Department, one of whose officers would be a Comptroller. The latter's duties, Madison argued, "are not purely of an Executive nature."[101] The officer would have the responsibility of "deciding upon the lawfulness and justice of the claims and accounts subsisting between the United States and particular citizens."[102] This, continued Madison, "partakes strongly of the judicial character, and there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the Executive branch of the Government."[103] In the face of objections that he was "setting afloat the question which had already been carried," Madison withdrew his proposal.[104] Although the presidential power of removal continued to be challenged over the years,[105] it was only in 1935, in *Humphrey's Executor v. United States,*[106] that the Supreme Court upheld the challenge in any substantial way. In that case the dismissed official, William E. Humphrey, had been a member of a quasi-legislative, quasi-executive, and quasi-judicial regulatory commission (the Federal Trade Commission). The Court held that the Commissioners were intended by Congress "to act in discharge of their duties independently of executive control," and were accordingly given fixed terms and made removable only "for cause,"—an arrangement the Court held to be constitutional.[107]

Madison's interpretation of the Constitution can thus be said to have been sustained. The President can remove on his own authority an officer in the executive branch who has been appointed with the consent of the Senate, but his power (according to the Supreme Court in the *Humphrey* case) is "confined to purely executive officers."[108] In other situations (so Madison had said apropos of the Comptroller), it is necessary "to consider the nature of [the] office."[109] To phrase the idea more comprehensively, it is necessary to consider the nature of the governmental activity involved.

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101. 1 ANNALS OF CONG., *supra* note 68, at 611 (June 29, 1789).

102. *Id.* at 611–12.

103. *Id.* at 612.

104. *Id.* at 614.

105. For example, the Post Office Act of July 12, 1876, ch. 179, § 6, 19 Stat. 78, 80, provided that postmasters in the top three classes "shall be appointed and may be removed by the President by and with the advice and consent of the Senate." The Supreme Court held this provision unconstitutional because the President was thereby denied the unrestricted power of removal of postmasters. Myers v. United States, 272 U.S. 52 (1926).

106. 295 U.S. 602 (1935).

107. *Id.* at 629.

108. *Id.* at 632. *See* Morgan v. T.V.A., 115 F.2d 990 (6th Cir. 1946) (presidential removal of "executive official" upheld).

109. 1 ANNALS OF CONG., *supra* note 68, at 611 (June 29, 1789).

D. The Rationale Behind the President's Power of Removal

Over the determined opposition of many members, the First Congress refused in the end to impose any barrier to the President's assumption of a limited power of removal—limited, that is, to officials in the executive branch (and therefore his subordinates), but applicable to all of them, even though their original appointments had required senatorial consent. The sanctioning of such a power was an exception—clearly recognized as such—to the general rule that both the negative and the positive exercises of a particular power belong in the same hands. The exception was justified, as contemporaries saw it, by one special circumstance only: namely, the evident need for the chief executive to be able to control the members of his own department if he was to be held responsible for what they did.

The rationale was cogently stated on the 19th of May 1789, in the debate in Committee of the Whole, by Representative Benjamin Goodhue of Massachusetts, who spoke as follows:

> He wished to make the President as responsible for the conduct of the officers who were to execute the duties of his own branch of the Government. . . . He admitted there was a propriety in allowing the Senate to advise the President in the choice of officers; . . . but there could be no real advantage arising from the concurrence of the Senate to the removal. . . . Upon the whole, he concluded the community would be served by the best men when the Senate concurred with the President in the appointment; but if any oversight was committed, it could best be corrected by the superintending agent. It was the peculiar duty of the President to watch over the executive officers; but of what avail would be his inspection, unless he had a power to correct the abuses he might discover.[110]

On the 17th of June, as the debate resumed, Madison reiterated the argument, pointing out the bearing of another constitutional provision. Said Madison:

> I agree that if nothing more was said in the Constitution than that the President, by and with the advice and consent of the Senate, should appoint to office, there would be great force in saying that the power of removal resulted by a natural implication from the power of appointing. . . . But there is another part of the Constitution, which inclines, in my judgment, to favor the construction I put upon it; the President is required to take care that the laws be faithfully executed. If the duty to see the laws faithfully executed be required at the hands of the Executive Magistrate, it would seem that it was generally intended he should have that species of power

110. *Id.* at 378 (May 19, 1789).

> which is necessary to accomplish that end. Now, if the officer when once appointed is not to depend upon the President for his official existence, but upon a distinct body, (for where there are two negatives required, either can prevent the removal,) I confess I do not see how the President can take care that the laws be faithfully executed.[111]

It was *opponents* of a Presidential removal power who reasoned by analogy in 1789. Roger Sherman of Connecticut stated the argument forcefully:

> It is a general principle in law, as well as reason, that there shall be the same authority to remove as to establish. It is so in legislation, where the several branches whose concurrence is necessary to pass a law, must concur in repealing it. Just so I take it to be in cases of appointment; and the President alone may remove when he alone appoints, as in the case of inferior offices to be established by law.[112]

Sherman challenged those who thought differently to "produce an authority from law or history which proves, that where two branches are interested in the appointment, one of them has the power of removal." And he asked pointedly whether anyone believed that in matters of legislation, where "the concurrence of both branches is necessary to pass a law, a less authority can repeal it."[113]

E. The Dismissal Power and the Power to Terminate Treaties: An Untenable Analogy

Today it is the *advocates* of a unilateral power in the President who depend on analogy to justify their position. The argument is a curiously circular one. It starts by accepting the view that no significant analogy exists between the power to repeal a statute, which admittedly requires legislative concurrence, and the power to dismiss an appointed official, which does not, even though the concurrence of one House had been required for his appointment. With this lack of analogy firmly established, the next step is to argue that a perfect analogy exists between the Presidential power of removal and the power the President is alleged to have to abrogate unilaterally a treaty ratified by the Senate.[114] Conven-

111. *Id.* at 496–97 (June 17, 1789). Theodore Sedgwick (Massachusetts) put the argument succinctly in the subsequent debate on the Treasury Department: "He . . . conceived that a majority of the House had decided that all officers concerned in Executive business should depend upon the will of the President for their continuance in office; and with good reason, for they were the eyes and arms of the principal Magistrate, the instruments of execution." *Id.* at 613 (June 29, 1789).

112. *Id.* at 491 (June 17, 1789).

113. *Id.* at 538 (June 18, 1789).

114. The validity of such an analogy between the removal power and an alleged Presidential

iently ignored is the analogy between the repeal of a statute and the abrogation of a treaty—surely the most relevant and compelling of any of these analogies, considering the fact that statutes and treaties are alike parts of the supreme law of the land and embody important national policies.

The Presidential removal power which the First Congress finally decided to sanction was an exception to what was otherwise accepted as a general rule. The President's ability to "take Care that the Laws be faithfully executed"[115] does depend, as Madison pointed out, on his possession of a power to discipline his subordinates, and thus to dismiss incompetent or corrupt executive officials. On the other hand, a power to *change* the laws (whether established by statute or treaty) is something utterly different—a contradiction to, rather than a corollary of—the President's responsibility for seeing to their faithful execution. The Presidential removal power was acknowledged by all to be an exception, and as such it testified to both the validity and the acceptance of the general rule itself. To argue that the exception *established* a rule of diametrically *opposite* character is to subvert logic itself.

As an added point, it should be noted that the framers were careful not to treat in exactly the same way the power to make treaties and the power to appoint officials, even though some of the same words were used in connection with both. Two-thirds of the Senate must give advice and consent to a treaty, whereas a simple majority suffices to approve an appointment. Also notable is the fact that the President is given the exclusive power to make nominations to office, whereas in treatymaking the Constitution does not set him apart in this special way from those who advise and share responsibility with him.[116] On both these counts, accordingly, the constitutional role of the President, as compared with that of the Senate, is proportionately far more limited where treaties are in question than where appointments are involved.

The Constitution, according to the original intent of the framers, bestowed upon the President and Congress a shared power to make laws, and by unmistakable implication a shared power to repeal them. It be-

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power to terminate treaties unilaterally is maintained by several commentators. *E.g.*, Nelson, *The Termination of Treaties and Executive Agreements by the United States: Theory and Practice*, 42 MINN. L. REV. 879, 883, 887–88 (1958); letter from Professor Alpheus T. Mason to the New York Times (Jan. 29, 1979), *reprinted in Treaty Termination: Hearings on S. Res. 15, supra* note 10, at 588.

115. U.S. CONST. art. II, § 3.

116. "He 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 . . . . " U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

stowed on the President and Senate a shared power to make treaties. There is no historical evidence whatever to suggest that they intended the correlative power to terminate treaties to be other than a shared power. And a shared power is, by definition, a power that cannot be exercised by one of the partners without the concurrence of the other.

III. THE CONCEPT OF EXECUTIVE POWER

The argument from analogy, as the preceding part has undertaken to show, tends to refute rather than support the executive's claim of authority to terminate a treaty without obtaining the advice and consent of the Senate by which it was originally ratified. The persuasive analogy is not between the power to terminate a treaty and the power to terminate the appointment of a subordinate, but between the power to terminate a treaty and the power to terminate (that is, to repeal) a statute. The reasons justifying an exception to an otherwise controlling rule—that is, an exception in favor of a Presidential dismissal power—are applicable in no logical way to the totally different question of treaties.

Another line of argument must next be considered. This purports to find in the Constitution an assignment to the President of so dominant and overriding an authority in the realm of foreign affairs that his power to terminate a treaty by unilateral action follows as a mere corollary. To examine this contention is the purpose of the remaining parts of this article. From this point on, attention will no longer be directed to the narrow question of treaty termination, but will turn to the more inclusive and more fundamental question of the nature of executive power in general, as the framers of the American Constitution conceived it.

A. Foreign Policy Viewed as Inherently an Executive Prerogative

A major premise of the argument for Presidential dominance in the conduct of international relations is the contention that authority to determine the foreign policy of a nation is inherent in the very concept of executive power. If this is true as a universal principle, then it follows that the constitutional provision vesting "[t]he executive Power" in the President[117] necessarily gives him plenary authority over the foreign relations of the United States, subject to three explicit restrictions and no more. These result from the Constitution's provisions that treaties be submitted to the Senate for its consent to ratification, that nominations to ambassadorships be likewise submitted for Senate approval, and that declarations of war take the form of acts of Congress.

117. U.S. CONST. art. II, § 1.

No serious attempt has ever been made to show that the framers of the Constitution accepted the major premise of the foregoing argument, namely, that executive power by its very nature includes control of foreign affairs. As a matter of historical fact, the only utterances made in the Federal Convention of 1787 on the subject were emphatic rejections. This will be pointed out in due course.[118] To gain a fully satisfactory understanding of the framers' conception of executive power requires, however, more than a list of quotations. What is called for initially is an examination in depth of the sources and the character of the framers' ideas about the definition, the classification, and the distribution of the several kinds of power that governments exercise. Such is the purpose of the remainder of Part III.

In the controversy engendered by President Carter's unilateral termination of the Mutual Defense Treaty with the Republic of China, the idea of the inherent power of the President in foreign affairs came, as might be expected, to the fore. A legal memoradum of the Department of State, dated the 15th of December 1978,[119] argued that "[t]he President's constitutional power to give a notice of termination provided for by the terms of a treaty derives from the President's authority and responsibility as chief executive to conduct the nation's foreign affairs and execute the laws."[120] This memorandum merely reiterated a constitutional theory that the State Department had advanced many times in the past. Even stronger was the statement it had made in 1939 and which was quoted in the 1978 memorandum as follows:

> [T]he power to denounce a treaty inheres in the President of the United States in his capacity as Chief Executive of a sovereign state. This capacity . . . is inherent in the sovereign quality of the Government, and carries with it full control over the foreign relations of the nation, except as specifically limited by the Constitution.[121]

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118. *See* notes 305–09 *infra*.

119. Memorandum from Herbert J. Hansell, State Dept. Legal Advisor, to the Secretary, *President's Power to Give Notice of Termination of U.S.–ROC Mutual Defense Treaty* (15 Dec. 1978), *reprinted in* SENATE COMM. ON FOREIGN RELATIONS, TERMINATION OF TREATIES: THE CONSTITUTIONAL ALLOCATION OF POWER, 95th Cong., 2d Sess. 395 (Comm. Print 1979). Hansell quoted nine legal treatises and commentaries of the recent half century in support of his position. *Id.* at 395–97. The Senate compilation of materials (among which Hansell's memorandum appears) provides a representative sample of present-day legal opinion as do the subsequent published hearings of the same committee. *Treaty Termination: Hearings on S. Res. 15*, *supra* note 10. For a history of the gradual development of the idea of unilateral Presidential authority in foreign affairs, see Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Original Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 527, 581–84 & n.190 (1974).

120. Memorandum from Herbert J. Hansell, *supra* note 119, at 399.

121. *Id.* at 417 (quoting 5 G.H. HACKWORTH, DIGEST OF INTERNATIONAL LAW § 509, at 331–32 (1943)).

That the control of foreign relations inheres in the *Nation* by virtue of its sovereignty is an idea that no one questions. That it inheres in the *Executive* is a different matter, requiring additional reasoning. To support this latter point, a far-reaching meaning is imported into the first words of article II of the Constitution: "The executive Power shall be vested in a President of the United States of America."[122]

This particular clause, it is asserted by advocates of unilateral Presidential authority in foreign affairs, suffices in itself to bestow upon the President a broad, unenumerated, and virtually plenary authority over the whole realm of foreign affairs. This idea has become embedded in many twentieth-century (and some earlier) commentaries on the Constitution. An example in point is the Restatement (Second) of the Foreign Relations Law of the United States, drawn up under the auspices of the American Law Institute and published in 1965. On the specific question of the termination of international agreements, the Restatement asserts categorically that the President has "the authority to . . . take the action necessary to accomplish . . . the suspension or termination of . . . [an international] agreement in accordance with provisions included in it for the purpose."[123] A comment explains that this rule is "based on the authority of the President to conduct the foreign relations of the United States as part of the executive power vested in him by article II, section 1 of the Constitution."[124] In connection with a related topic, where the Restatement likewise upholds action by the President without reference to Congress, the comment reads: "The independent powers of the President involved here are essentially his powers as chief executive, authorized to act on behalf of the United States in the field of foreign relations, and as commander-in-chief of the armed forces."[125]

It was actually a member of the Senate itself, John Spooner of Wisconsin, who voiced in the most imperious language the idea that by vesting the President with "[t]he executive power," the framers of the Constitution intended to give him exclusive control over almost every aspect of foreign affairs. Some seventy years ago, in defending the course of President Theodore Roosevelt in the Caribbean, Senator Spooner made the following assertion: "[S]o far as the conduct of our foreign relations is concerned, excluding only the Senate's participation in the making of treaties, the President has the absolute and uncontrolled and uncontroll-

122. U.S. CONST. art. II, § 1.

123. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 163, at 493 (1965).

124. *Id.*, comment a.

125. *Id.* § 144, comment a, at 442.

able authority."[126] This view, Senator Spooner further alleged, had been "conceded" by all authorities "[f]rom the foundation of the Government."[127]

B. Classification and Distribution of Powers in the Constitution

Spooner's concluding remark is historically untenable. At the most elementary level, the text of the Constitution contains no clause delegating to the Chief Executive anything so inclusive or so extravagant as an "absolute" or "uncontrollable" authority to "conduct the nation's foreign affairs." Nor can any group of clauses be said to add up to such a grant. Only four specific powers in the realm of foreign relations are delegated to the President in article II. Two of these, the power to make treaties and the power to appoint ambassadors, must, by their own terms, be exercised jointly with the Senate.[128] In the other two instances, it is true, a power is delegated exclusively to the Chief Executive, but in each case what is granted him is only half a power—that is to say, a power that must depend for its effectiveness upon the exercise of a complementary power specifically vested elsewhere. Thus, to take the third instance, the President is named "Commander in Chief of the Army and

126. 40 CONG. REC. 1418 (1906). *See generally* Bestor, *supra* note 119, at 661–63 (1974).

127. 40 CONG. REC. 1418. Some commentators, attentive to history, recognize that the prevalent twentieth-century conception of presidential primacy in foreign affairs represents a radical departure from the intention of the framers. Thus Bernard Schwartz acknowledges that the framers "intended to associate the upper House with the President, as an executive council, in the field of foreign policy. This was particularly true insofar as the treatymaking power was concerned." 2 B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 118 (1963). Schwartz then chronicles the successive abandonments of consultation, which (in his opinion) made it "apparent, almost from the beginning, that such intention could hardly be realized in practice." *Id.* He concludes:

> The uniform practice during the present century has been for the President to negotiate treaties with foreign governments without consulting the Senate in advance regarding them. . . . The consistent practice in this respect must be considered as establishing beyond dispute the constitutional monopoly of the President in the negotiation and conclusion of treaties.
>
> . . . [T]here is no organic duty [on the part of the President] to make the Senate his counsellor in the treaty process, which the upper House has a legal right to enforce. In the field of treaty-making, the Senate's organic power to "advise and consent" is thus really only a power to *consent*. Constitutionally speaking, the Senate possesses only a veto power in the treaty-making process.

Id. at 118–19. When statements like those in the paragraph just excerpted are made without alluding in any way to the interpretations placed upon the Constitution at the time it was adopted, then the impression is created that what is today labelled by commentators as being constitutional "beyond question" must represent the intention of the framers rather than a repudiation thereof. History is ignored in such cases, which are numerous. History is actually falsified when it is explicitly affirmed that the exclusive authority of the President in foreign affairs has been recognized "[f]rom the foundation of the Government."

128. U.S. CONST. art. II, § 2, cl. 2.

Navy,"[129] but no less than six of the eighteen clauses in the eighth section of article I are grants *to Congress* of various specific powers crucial to the making of war,[130] and are therefore essential to give substance to the executive power of commanding the Armed Forces. Finally, the provision which empowers the President to "receive Ambassadors and other public Ministers"[131] refers to only one of the two legs on which the conduct of foreign relations stands. The other and more fundamental power is that of appointing the persons who will represent the United States abroad and thus make clear to other sovereigns the foreign policy of this nation. The power to *appoint* ambassadors is a power that the President is required to exercise in conjunction with the Senate: he to nominate, the Senate to approve, and he to make thereafter the formal appointment.[132]

Far from placing matters connected with foreign affairs exclusively in executive hands, the Constitution carefully parcels them out among the three branches. This fact is obvious on the very face of the document. Relationships with foreign countries are mentioned in all three of the crucial distributive articles of the Constitution. The legislative article (the first) gives Congress power over commerce with foreign nations, over declarations of war, and over other vital matters connected with international law and national defense.[133] The executive article (the second) makes the President the commander in chief of the armed forces and gives him a share with the Senate in the making of treaties.[134] The judicial article (the third) gives the federal courts jurisdiction over cases "arising under . . . Treaties," over cases "affecting Ambassadors," and over controversies in which "foreign States, Citizens or Subjects" are involved.[135]

C. *The Principle of Enumeration*

The deliberate parcelling out of authority, illustrated above, is a conspicuous characteristic of the American Constitution. The principle involved—careful enumeration of the powers being delegated along with explicit withholding of various others—was employed in the very first constitutional document adoped for the federal union: the Articles of

129. *Id.* cl. 1.
130. *Id.* art. I, § 8, cls. 11–16.
131. *Id.* art. II, § 3.
132. *Id.* § 2, cl. 2.
133. *Id.* art. I, § 8, cls. 3, 10–16.
134. *Id.* art. II, § 2.
135. *Id.* art. III, § 2.

Confederation, drafted in 1776–77. The longest of its thirteen articles catalogued the particular powers to be exercised by "the United States in Congress Assembled";[136] its next longest listed the powers that individual states might not severally exercise.[137] There was even a separate article setting limits to the powers that Congress might delegate to an interim committee of its own.[138]

At the beginning of the Constitutional Convention of 1787, the delegates toyed with the idea of dropping these lengthy enumerations and substituting a purely abstract formula defining federal power. The earliest plan offered to the Convention—that which the Virginia delegation presented on the 29th of May—proposed "that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation."[139] This sweeping grant of authority was broadened further when, on the 17th of July, the Convention voted to add the phrase: "and moreover to legislate in all cases for the general interests of the Union."[140] This, exclaimed Edmund Randolph, who had introduced the original Virginia Plan, "is a formidable idea indeed."[141] Nevertheless, at the end of its first two months of deliberation the Convention was still divided between those who favored a grant of power in general terms and those who favored enumeration.[142] The issue was finally settled by the Committee of Detail which, on the 6th of August, reported the draft of a constitution embodying the principle of enumeration in a thoroughgoing way. Eighteen particularized powers were bestowed on "the Legislature of the United States," five others were explicitly denied to it, and one was to be exercised only by a two-thirds vote.[143] In other articles, some ten clearly defined powers were denied to the individual states, either ab-

136. ARTICLES OF CONFEDERATION art. 9, *reprinted in* 9 JCC, *supra* note 82, at 915–23.

137. *Id.* art. 6, *reprinted in* 9 JCC, *supra* note 82, at 911–13.

138. *Id.* art. 10, *reprinted in* 9 JCC, *supra* note 82, at 923–24.

139. 1 FARRAND, RECORDS, *supra* note 85, at 21 (Virginia Plan, resolution 6).

140. 2 *id.* at 21, 26–27. The addition was moved by Gunning Bedford, Jr. (Del.).

141. *Id.* at 26.

142. On 16 July 1787, the day before adopting Bedford's amendment, *see* note 140 *supra*, the Convention voted down a motion for sending the whole plan to committee "to the end that a specification of the powers comprised in the general terms, might be reported." 2 FARRAND, RECORDS, *supra* note 85, at 17. The rejection was by a tie vote, however, and eight days later the mover, John Rutledge (S.C.), was elected chairman of the so-called Committee of Detail, which finally decided the question in favor of enumeration. *Id.* at 97.

143. 2 FARRAND, RECORDS, *supra* note 85, at 181–83 (Draft Constitution reported by the Committee of Detail, Aug. 6, 1787, art. VII, §§ 1, 4–7).

solutely or except with federal permission.[144] Generally speaking, the clauses enumerating these various grants and restrictions were taken over by the Committee from the old Articles of Confederation. Eventually the provisions from the original Articles found their way—with two major additions[145] and a few significant modifications[146]—into the completed Constitution as we know it. The original principle of enumeration was thus fully restored.

D. Distribution of Powers by Function Rather than Subject

The constitutional provisions thus far discussed represent a distribution of authority between the federal government on the one hand and the individual states on the other. Above and beyond this, the Constitutional Convention undertook and carried through a distribution of authority of a quite different sort. This was accomplished by enumeration also. The Articles of Confederation had vested all the powers of the federal government in a single body, the old Continental Congress, and had set up neither a separate executive department nor a separate judiciary. In contrast, the Constitutional Convention of 1787 was committed from the start to creating a federal government with three firmly established branches. The finished Constitution was a realization of this purpose. Each of its first three articles is devoted to a particular branch—first the legislative, then the executive, and finally the judicial.

As their very labels indicate, these three branches are differentiated from one another by the functions they are designed to perform and the procedures they are expected to follow. A rational apportionment of power among departments so defined cannot be achieved by assigning certain subjects or areas of concern to one branch and certain others to each of the remaining two. Such a form of distribution—by *subject matter*—belongs among the federalistic features of the Constitution, whereby one level of government (the federal) receives authority to act on certain categories of problems, and a different level of government (comprising the individual states) retains authority over certain others.

144. *Id.* at 187 (arts. 12–13).

145. A primary motive for the calling of the Federal Convention had been the failure of the Articles of Confederation to grant Congress the two powers which eventually headed the list of 18 in the draft of the Committee of Detail. These were the power "to lay and collect taxes, duties, imposts and excises," and the power "[t]o regulate commerce with foreign nations, and among the several States." *Id.* at 181 (Draft of Committee of Detail, art. VII, § 1, cls. 1–2). *Cf.* U.S. CONST. art. I, § 8, cls. 1, 3.

146. *See* notes 353–56 and accompanying text *infra* for a discussion of changes in the treaty clause and of the substitution of "declare war" for "make war" in the catalogue of congressional powers.

Quite different from such a distribution by subject or problem area is the distribution that must be worked out when three different *species* of power—legislative, executive, and judicial—are to be allocated among three separate branches of a single level of government. What is necessary for this purpose is not an allocation of subject matter but a careful delineation of the *functions and procedures* that are signified by the three abstract labels "legislative," "executive," and "judicial."

Once the Constitution of the United States is examined with these points in mind, it is easy to identify the two types of distribution that the document prescribes. One type—observable in the Articles of Confederation as well as in the Constitution—reflects the fact that the American constitutional system is a federal one, where many facets of national life fall within the sphere of the central government while others are reserved for handling by the states. In this context, federal powers are differentiated from state powers on the basis of the subjects over which each is supposed capable of exercising the more effective and appropriate authority. Madison stated the principle with clarity in No. 45 of *The Federalist:*

> The powers delegated by the proposed Constitution to the Federal Government . . . will be exercised principally on external objects, as war, peace, negociation, and foreign commerce. . . . The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concerns the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.[147]

With the increasing interdependence of the entire American economy, to be sure, matters that long seemed to be of concern only to the individual states have been recognized by all three branches of the federal government as affecting that "Commerce . . . *among* the several States,"[148] which the Constitution puts within the ambit of federal power. Still excluded, in theory at least, is what John Marshall described as "that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states"[149]—provided, of course, that it is possible to discover any commerce of so limited a sort in the interstices of the complex national (and international) economy of the twentieth century.

Difficult though it may be to draw the line in the domestic realm between activities purely local and those that "extend to or affect other

147. THE FEDERALIST, *supra* note 76, at 313.
148. U.S. CONST. art. I, § 8, cl. 3 (emphasis added).
149. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194 (1824).

states," the difficulty does not arise in the case of foreign affairs. The Constitution, like the Articles of Confederation before it, gives to the federal government a monopoly of the subject, both by enumerating in grants to the three branches almost all conceivable powers connected with foreign relations,[150] and also by specifically forbidding the states to intrude therein.[151] It is vitally important to observe, however, that the Constitution places the control of foreign relations exclusively in *federal* hands, not exclusively in executive ones.

E. Historical Development of Ideas on the Classification and Distribution of Powers

As the foregoing discussion has shown, the American Constitution employs a classification based upon *function,* not upon *subject,* when it undertakes to distribute power among the three branches of government. To work out such a distribution—a distribution in *functional* terms—was one of the important tasks of the Constitutional Convention. Looked at in terms of the history of political philosophy, the framers had much new ground to break. Though there had existed for two thousand years various political theories stressing a three-fold distribution of authority, these analyses had not generally been concerned with differentiating legislative, executive, and judicial powers from one another. Other considerations had underlain these earlier theories.

In classical antiquity the starting point was ordinarily the distinction between rule by one (monarchy), rule by the few (aristocracy or oligarchy), and rule by the many (democracy). As first set forth in the middle of the fifth century B.C. by Herodotus, in the course of an imagined colloquy of Darius with his fellow Persians, the three forms were treated as mutually exclusive types of government.[152] In the hands of later philosophers, beginning with Plato and Aristotle, and culminating in the second century B.C. with Polybius, the three forms of government came to be looked upon as the three constituents of a "mixed" government or constitution.[153] The "monarchical" element or feature of such a mixed

150. *See* notes 128–35 and accompanying text *supra.*

151. U.S. CONST. art. I, § 10. These were not new restrictions, but were copied in essentials from the Articles of Confederation, art. 6. 9 JCC, *supra* note 82, at 911–13.

152. HERODOTUS, bk. 2, chs. 80–84. (A. Godley trans. rev. 1960).

153. ARISTOTLE, POLITICS bk. 3, chs. 6–8 (H. Rackham trans. 1932); CICERO, DE RE PUBLICA bk. 2, ch. 23 (C. Keyes trans. 1928); PLATO, THE STATESMAN 291d–303b (H. Fowler trans. 1925); POLYBIUS, THE HISTORIES bk. 6 (W. Paton trans. 1923). *See* E. BARKER, GREEK POLITICAL THEORY PLATO AND HIS PREDECESSORS (1918); E. BARKER, THE POLITICAL THOUGHT OF PLATO AND ARISTOTLE (1906); K. VON FRITZ, THE THEORY OF THE MIXED CONSTITUTION IN ANTIQUITY (1932). The connection between ideas of this stamp in antiquity, their development in English thought, and their embodiment in the American

constitution may be equated in a general way with the "executive" element in modern constitutional theories. But in designating a role for both "aristocratic" and "democratic" elements in the constitution, classical writers were simply giving recognition to, and advocating balanced representation for, the two polar classes of society: the rich and the poor. By no stretch of the imagination can these theorists be thought of as distinguishing judicial from legislative power and calling one aristocratic and the other democratic, for in the theory of a mixed constitution both social classes were to participate in the legislative function and usually in the judicial as well.

The medieval concept of three "estates" of the realm—clergy, nobility, and commonalty—was even more obviously a theory involving balance among three classes of, or three compelling interests in, society. When, in seventeenth-century England, the King began to be thought of as the first of the three estates,[154] and the lords (both spiritual and temporal) as constituting only one estate rather than two, the resulting constitutional theory approximated that of antiquity. The one, the few, and the many now became the triad of King, Lords, and Commons. On one point, however, a definition in modern terms—that is, on the basis of function—became increasingly common, the King being frequently described as the repository of the "executive" power of the state.[155] There was no tendency, however, to see the two Houses of Parliament in any other light than as representative of differing social classes or interests, even though the House of Lords did have certain high judicial functions in addition to its legislative ones.

F. Locke and Montesquieu

A pioneer effort to establish constitutional analysis on a different theoretical basis was made by John Locke in his *Second Essay of Government,* published in 1689. This was not an attempt to describe the English Constitution as it was or as it had been. It was an attempt to provide a model which the English Constitution might be made to approximate. Abstractions go hand in hand with model building, and Locke depicted government not in terms of the characteristics inherited from the three historic types of rulership (that of the one, the few, and the many), nor in terms of the participation granted to three important classes or interests in

can Constitution is brilliantly treated in F. WORMUTH, THE ORIGINS OF AMERICAN CONSTITUTIONALISM (1949).

154. A classic statement is King Charles I's reply of 18 June 1642 to the "Nineteen Propositions" voted by Parliament on June 1. The statement is reprinted in THE STUART CONSTITUTION, 1603–1688, at 21–23 (J. Kenyon ed. 1966).

155. 1 W. BLACKSTONE, *supra* note 73, at 154–55.

society (king, lords, and commons), but in terms of three abstract functions that governments are said to exercise. Two of these he defined in language that the American framers would have had little difficulty in adopting as their own. "The *Legislative* Power," he wrote, "is that which has a right *to direct* how *the Force of the Commonwealth* shall be imploy'd for preserving the Community and the Members of it."[156] The Executive, he continued, is "a *Power always in being,* which should see to the *Execution* of Laws that are made, and remain in force."[157]

The third of Locke's categories, both in label and content, is surprisingly different, however, from the pattern familiar in American usage—indeed in modern usage generally. Instead of identifying the judiciary as the third basic division of government, Locke treated judicial power as one aspect of executive power, both being concerned with the execution of the law.[158] Accordingly, as the third of the three major species of authority, Locke identified and described a power that he called "Federative" (from *foedus,* covenant)—in essence, the power of making agreements with or enforcing demands upon foreign nations. This was, of course, a power defined wholly by the subjects to which it applied, namely, foreign affairs. It consisted, Locke wrote, of "the Power of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth."[159] This was nothing other than the plenary authority over foreign affairs that English constitutional tradition had ascribed (not without occasional dissent) to the King as part of his prerogative.[160] Locke bowed unhesitatingly to this tradition, acknowledging that the "federative" power was so similar to executive power (in that it employed "the Force of the Commonwealth") that the former could not, in practice, be separated from the latter. He wrote:

> Though . . . the *Executive* and *Federative Power* of every Community be really distinct in themselves, yet they are hardly to be separated, and placed, at the same time, in the hands of distinct Persons, . . . [who] might

156. J. LOCKE, TWO TREATISES OF GOVERNMENT, bk. 2, § 143 (P. Laslett ed. 1960).

157. *Id.* § 144.

158. Locke therefore fell far short of doing what Montesquieu was to do some six decades later. The latter saw clearly that the "power of judging" was, in its very nature, different from the power "to direct [as Locke put it] . . . the Force of the Commonwealth." *See* text accompanying notes 156 *supra,* 166–67 *infra.* Locke, belonging to an earlier generation, shared a view common among his contemporaries. While believing firmly in the importance of judicial impartiality and integrity, he (and they) felt no inconsistency in bracketing executive and judicial authority together as aspects of "the execution of the laws."

159. J. LOCKE, *supra* note 156, at § 146.

160. 1 W. BLACKSTONE, *supra* note 73, at 238–60. *But see* Bestor, *supra* note 119 (discussion of dissenting views in England).

> act separately, whereby the Force of the Publick would be under different Commands: which would be apt sometime or other to cause disorder and ruine.[161]

This passage in itself demonstrates that the doctrine of the separation of powers as received in America owed little or nothing to Locke, however influential his ideas on other aspects of constitutionalism proved to be. By asserting, however, that power over foreign affairs was distinguishable from executive power, Locke did pave the way for American constitution makers to deny, as we shall see they did, the proposition that executive power must be supposed to include by its very nature the power of peace and war.[162] Though Locke asserted that the two powers would have to be placed in the same hands, his argument could—and in America did—lead to the conclusion that they need not be. The theoretical distinction that Locke made between executive and "federative" power became a practical distinction in the hands of the framers of the American Constitution. No longer believing that the powers involved in foreign relations constituted a department or an adjunct of executive power, Americans treated these powers as they did those in the domestic sphere. They broke them into their functional parts and distributed these among the three functionally-defined branches of government, according to whether the problem called for legislative deliberation to determine policy, or executive action to effectuate it, or judicial consideration to determine the rights of affected parties.

It was Montesquieu's book, *Of the Spirit of Laws,* first published in 1748, which recast constitutional thinking—especially of Americans—in the mold of a tripartite conception of legislative, executive, and judicial power, and which set forth the doctrine of separation of powers in its most memorable (and in a way its most extreme) form.[163] Much of what Montesquieu said was contained in a single brief chapter dealing ostensi-

161. J. Locke, *supra* note 156, at § 148.

162. *See* notes 300–11 and accompanying text *infra.*

163. 1 Montesquieu, The Spirit of Laws 215 (3d ed. T. Nugent trans. London 1758). The book first appeared in 1748; the latest critical edition in the original language is the four-volume work Montesquieu, De l'Esprit des loix [sic] (Brethe de la Gressaye ed. 1950–61). Nugent's translation has gone through many editions, with occasional verbal changes. I quote from the 1758 edition as the one available to Americans throughout the Revolutionary period. Where it misses the exact sense on any significant point, I have mentioned the fact in a note. One general observation should be made at the outset. Montesquieu's term "la puissance de juger" is often translated as "judiciary" or "judicial power." Montesquieu, however, did not use the French equivalent of either term, and indeed did not envisage a permanent, separate judicial *branch* of government, though he believed strongly in keeping the *function* of judging from both legislative and executive hands. *See* Bestor, *The American Revolution as World Experiment,* Archiv für Rechts-und Socialphilosophie, Beiheft Neue Folge, Nr. 10, 18, 31, 46–50 (1977).

bly with the Constitution of England. In his first paragraph Montesquieu seemed ready to adopt without reservation the analytical scheme of Locke. "In every government," he wrote, "there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive, in regard to things that depend on the civil law."[164] That the second of these was identical with Locke's "federative power" is made clear by Montesquieu's description of it as the power by which "the prince or magistrate . . . makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions."[165]

By the end of the second paragraph, however, Montesquieu had moved away from Locke's classificatory scheme and was beginning to substitute his own conceptions. Instead of continuing to employ the ponderous phrase "executive [power] in regard to things that depend on the civil law," Montesquieu announced that he would speak thereafter of "la puissance de juger"—the power to judge.[166] He likewise dropped the phrase "in respect of things dependent on the law of nations," and labeled the second of the three powers simply "the executive power of the state."[167] As the balance of the chapter quickly showed, the alterations were not of language only. Montesquieu had separated "the power to judge" from every sort of executive power, and had at the same time brought together in the second of his categories both the domestic and the foreign aspects of executive power.

This transformation having been accomplished—almost, one might say, by sleight-of-hand—Montesquieu made the most famous of all his pronouncements:

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. . . .
>
> There would be an end of every thing, were the same man, or the same body whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and that of judging the crimes or differences of individuals.[168]

164. 1 MONTESQUIEU, *supra* note 163, at 215.
165. *Id.* at 215–16.
166. Bestor, *supra* note 163, at 46.
167. 1 MONTESQUIEU, *supra* note 163, at 216.
168. *Id.*

Montesquieu's book quickly circulated in translation and began to be quoted by American controversialists as early as 1761 or 1762.[169] With the coming of independence, state constitutions not only structured their governments on the basis of the three species of power that figured in Montesquieu's analysis, but also inserted special provisos that translated his ideas on the separation of powers into strict constitutional mandates. The most thoroughgoing of these formulations was that contained in the Massachusetts Constitution of 1780:

> In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.[170]

James Madison proposed, in 1789, to add by amendment a similar provision to the Federal Constitution itself,[171] but Congress eliminated this particular clause in the process of sifting and winnowing that eventually produced the Federal Bill of Rights.

An explicit prohibition like that of the Massachusetts constitution was not adopted by the First Congress, doubtless because it had come to seem superfluous by 1789, the basic idea having already embedded itself so firmly in American constitutional thinking that it could be taken for granted. Indicative of this thoroughgoing acceptance was No. 41 of *The Federalist,* wherein Madison referred to "the celebrated Montesquieu" as the "oracle" on the matter, and paraphrased the French writer's maxim in the following words: "The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."[172]

It is of the very first importance to note that neither Montesquieu's

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169. *See* SPURLIN, MONTESQUIEU IN AMERICA 1760–1801, at 119 (1940).

170. MASS. CONST. of March 2, 1780, art. 30, *reprinted in* JOURNAL OF THE CONVENTION FOR FRAMING A CONSTITUTION OF GOVERNMENT FOR THE STATE OF MASSACHUSETTS BAY 227 (Boston 1832). Though this formula is often attributed to John Adams, the principal draftsman of the report which the Massachusetts Convention took as its starting point, the fact is that Adams's draft of the Declaration of Rights read merely: "The judicial Department of the State ought to be separate from, and independent of, the legislative and executive powers" (art. 31), after which the constitution proper (the "Frame of Government") provided that "the legislative, executive, and judicial power, shall be placed in separate departments to the end that it might be a government of laws and not of men." *Id.* at 197.

171. Proposal for a Bill of Rights presented to the House of Representatives, June 8, 1789. The text of the proposal is in E. DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 209 (1957).

172. THE FEDERALIST No. 41, *supra* note 76, at 324 (J. Madison) (Jan. 30, 1788).

original dictum, nor the formulas contained in the constitutions of Massachusetts and other states, nor Madison's pronouncement in *The Federalist* conveyed even the slightest suggestion that particular *subjects* of governmental action—such subjects as commerce or coinage or war or diplomacy—were to be regarded as the exclusive concern of any one of the three functional branches of government. Every one of these formulas relating to separation of powers made express reference to particular types or species of power: legislative, executive, or judicial; and each species was assigned to one branch of government and not to another. The underlying idea can be interpreted in no other way than that all three species of power are expected to be brought to bear upon every major problem, whatever its subject, which becomes of concern to government, and that every one of the branches must apply to the problem its own particular competence and its own distinctive procedures. The caveat is against an attempt by any branch to exercise *functions* that can only be properly and appropriately performed by a differently constituted branch. This kind of usurpation, not a trespassing upon *subjects* allegedly left to the exclusive and unchecked control of one branch, is the menace that might, in the opinion of the constitution-making generation, result in tyranny.

G. *Constitutional Definitions of Legislative, Executive, and Judicial Power*

If the fundamental powers of government are classified as legislative, executive, and judicial; if each is to be made the adjunct or attribute of one particular branch; and if freedom depends on keeping each branch to its own assigned tasks, then it is obviously essential that the characteristics of each species of power be clearly and accurately delineated. Abstract terms must be given concrete meanings. It must be possible to say what kind of power is peculiarly legislative, such that no other branch than the legislature may be permitted to exercise it. One must likewise have clearly in mind the nature and limits of executive power, and so also of judicial.

Rudimentary definitions were offered by Montesquieu. Legislative power he characterized as the power of "making laws;" executive power as that of "executing the public resolutions;" and judicial power as that of "judging the crimes or disputes of individuals."[173] Phrase-long defi-

173. 1 MONTESQUIEU, *supra* note 163, at 216. Montesquieu spoke of legislative power as "celui de faire des loix," which Nugent translated as "that of enacting laws"; I prefer the more literal "making."

nitions of so general a character are not, however, of much help in drawing precise lines of demarcation. The Constitution of the United States, which provides scarcely more than did Montesquieu in the form of direct *definitions,* nevertheless offers important clarification in a different way by specifying the *procedures* that must be followed in exercising each of the specialized varieties of power. To begin with, legislative power is not even described as the power of making laws; so much is taken for granted. What the Constitution does is specify with care the persons who are entitled to make laws and prescribes the main outlines of the procedures that must be followed if an enactment is to be valid.[174] Judicial authority, to take a different division of governmental power, is given a more explicit definition. It is described as the power to decide cases and controversies, and particular kinds are enumerated. The Constitution prescribes the way judges are to be appointed, and then goes on to indicate several of the procedures they are required to follow. Special clauses prescribe when a jury trial is mandatory, what special precautions are to be observed in trials for treason, and what circumstances determine whether jurisdiction is to be original or appellate.[175] Finally, executive power in domestic affairs is summed up in the directive to the President to "take Care that the Laws be faithfully executed,"[176] and the means he may use are specified: command of the armed forces, appointment of officials (subject to senatorial approval), and recommendation to Congress of "such Measures as he shall judge necessary and expedient."[177]

The conduct of relations with the outside world necessitates arrangements somewhat different from those that are called for in either the making or the executing of laws that operate domestically. Accordingly the Constitution modifies in special ways the procedures of *both* the legislative *and* the executive branches where foreign affairs are concerned. In treatymaking, the House of Representatives is eliminated from the process, and a two-thirds requirement is imposed on the Senate, in part to make up for the absence of a check by the lower house.[178] In the conduct of diplomatic negotiations the President is empowered to receive ambassadors on his sole authority, but he must act jointly with the Senate in appointing them. Finally, in order to make the United States a party to a treaty the President is required both to seek the "advice" and obtain the "consent" of the Senate—two things he is not obliged to do when per-

174. U.S. CONST. art. I, §§ 2–7.
175. *Id.* art. III.
176. *Id.* art. II, § 3.
177. *Id.* art. II, §§ 2–3.
178. *See* 2 FARRAND, RECORDS, *supra* note 85, at 538, 548–50 (debate in the Convention 7 and 8 Sept. 1787).

forming strictly executive functions in the domestic sphere.

Over the whole range of governmental activity, in other words, the completed Constitution of the United States distinguishes, *in functional terms,* the kind of power that is executive from the kind that is legislative and from the kind that is judicial.

IV. ANTECEDENTS OF THE CONSTITUTION: EXPERIENCE UNDER THE ARTICLES OF CONFEDERATION

The problem of distinguishing the three abstract species of power from one another in a constitutionally effective manner was something that had exercised the minds of American political thinkers from, at latest, the beginning of the War of Independence, which had shattered for the colonists the comfortable old model of King, Lords, and Commons. The provisions of the finished Constitution take on an even sharper meaning when one examines the succession of previous constitutional documents wherein Americans undertook to describe in practical as well as theoretical terms the crucial differences, as they understood them, between the three species of power—legislative, executive, and judicial—and wherein they made a particular effort to demarcate with accuracy the areas, respectively, of legislative and of executive activity.

A. Franklin's Proposal for Confederation, 1775

If the development of ideas on the matter is examined chronologically, a proper starting point is the draft of Articles of Confederation and Perpetual Union that Benjamin Franklin presented to the Continental Congress on the 21st of July 1775. Many of its principles had been in Franklin's mind since 1754, when he had drawn up the abortive Albany Plan of Union. And many of the ideas would reappear a year later when Congress finally took up the question of a permanent frame of government for the union of the by-then independent American states.

In his proposed Articles, Franklin vested the supreme authority of the Confederation in a General Congress, with representatives apportioned among the several colonies in rough accord with size.[179] In addition there was to be an "executive Council" of twelve persons, appointed by Congress from among its own members.[180] Its duties, as specified in the plan, show clearly the meaning that Franklin attached to the word "exec-

179. Articles of Confederation proposed by Franklin on 21 July 1775, *reprinted in* 2 JCC, *supra* note 82, at 195–99.

180. *Id.* at 197.

utive'' as used in the title he gave to the Council. The latter was to meet during a recess of Congress, and its duties were listed as follows:

> [T]o execute what shall have been enjoin'd thereby [*i.e.*, by Congress]; to manage the general continental Business and Interests[;] to receive Applications from foreign Countries; to prepare Matters for the Consideration of the Congress; to fill up [*Pro tempore*] continental Offices that fall vacant; and to draw on the General Treasurer for such Monies as may be necessary for general Services, & appropriated by the Congress to such Services.[181]

In brief, the ''executive'' function, as Franklin conceived it, was to carry out the policies that the legislative body, for its part, was expected to decide upon. In particular, the role in foreign affairs of the proposed Executive Council was simply ''to receive Applications from foreign Countries''—a responsibility strikingly parallel both in its phrasing and its limited scope, to the clause of the present-day written Constitution, which authorizes the President to ''receive Ambassadors'' on his own authority but not to appoint them except in conjunction with the Senate.[182]

When Franklin proposed his Articles of Confederation in July 1775, only three months had elapsed since the actual outbreak of war at Lexington and Concord, and the Continental Congress was not yet prepared to consider so irrevocable a step toward independence as Franklin's proposal seemed to imply. Almost a year would elapse before that day of decision arrived. In the meantime, it was at the level of individual states that formal constitution making began.

B. Constitution Making in the States

On the 26th of March 1776 (still three months before the Declaration of Independence), South Carolina adopted the first full-fledged constitution of an independent American state—full-fledged in the sense that it created clearly differentiated departments, including a separate executive. Because the sphere of authority of the Continental Congress had not yet been set forth in a formal document, the makers of the South Carolina constitution undertook to deal with all the powers of a sovereign state, including those involving war and peace, and to allocate these powers among the several branches of government. The constitution bestowed upon the chief executive the double title of ''president and commander-

181. *Id.* Omitted are the square brackets used in this edition to indicate words interlined by the original writer.

182. U.S. CONST. art. II, § 2.

in-chief,"[183] but then immediately guarded against a loose construction of those terms. Though styled "commander-in-chief," the executive was to "have no power to make war or peace, or enter into any final treaty, without the consent of the general assembly and legislative council."[184] The prohibition was made even more explicit in a revision of the constitution adopted two years later, which rephrased the ban so as to deny the executive any power "to commence war, or conclude peace" on his own authority.[185] Although the State and the Nation were at war on both occasions, the makers of the South Carolina constitution did not subscribe to the view that emergencies could be met only by allowing the executive to avoid consultation and evade legislative approval.

The most significant of the earliest state constitutions was that of Virginia, the largest of the thirteen states and the foremost, along with Massachusetts, in the revolutionary effort. The Virginia constitution was drawn up in May and June of 1776, while the Continental Congress in Philadelphia was pondering a Virginia-sponsored motion for independence. Thomas Jefferson was attending the latter body as a delegate, but he drew up and dispatched to Virginia a proposed constitution for the state. His proposal reached its destination in time to be amalgamated into the document on which the Virginia convention was already working.[186]

Jefferson's draft dealt in the most direct way possible with the distinction between legislative and executive power. He began by specifying that "Legislative Executive & Judicial Powers shall be for ever separate,"[187] and he devoted one main division of the document to the second of these branches, bestowing on the chief executive the unpretentious ti-

183. S.C. CONST. of March 26, 1776, arts. 3, 26, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3243 (F. Thorpe ed. 1909) [hereinafter cited as CONSTITUTIONS].

184. *Id.* at 3247.

185. S.C. CONST. of March 19, 1778, art. 33, *reprinted in* CONSTITUTIONS, *supra* note 183, at 3255. In this constitution, the chief executive's title was changed to "governor and commander-in-chief." In a third constitution, adopted on June 3, 1790, the provision respecting war and peace was dropped, the power to determine such matters having by that time been vested completely in the federal government.

186. The Virginia Convention met from 6 May to 29 June 1776. On 15 May it instructed the Virginia delegates in Congress to move for independence, and on 7 June Richard Henry Lee introduced a resolution to that effect. The Virginia Convention adopted a Declaration of Rights on 12 June and the balance of the state constitution on 29 June. Jefferson revised his proposal twice before sending it off. The first of the three versions is conjecturally dated by Julian Boyd as "before 27 May." On 23 June a committee of the Virginia Convention reported a draft based primarily on one drawn up by George Mason. Jefferson's proposal arrived the next day, and on the 24th, the pending draft was amended to include some of Jefferson's proposed provisions. *See* 1 THE PAPERS OF THOMAS JEFFERSON 329–86 (J. Boyd ed. 1950) (several texts and editorial notes).

187. *Id.* at 340.

tle of "Administrator."[188] Recognizing that this official's powers would correspond in part to those attributed to the King in English constitutional theory, Jefferson promptly guarded against the possibility that precedents from this source might be drawn upon to enlarge the authority of the Virginia executive. To preclude such an eventuality, Jefferson's draft specifically denied to the Administrator an assortment of powers that were, in Jefferson's opinion, essentially legislative in character but that had, in effect, been usurped by the British monarch. According to Jefferson's proposal:

> The Administrator shall possess the powers formerly held by the king: save only that . . . he shall not possess the prerogatives . . . of declaring war or concluding peace; of issuing letters of marque or reprisal; of raising or introducing armed forces, building armed vessels, forts or strong holds; . . . of laying embargoes, or prohibiting the exportation of any commodity for a longer space than [40] days. . . . [B]ut these powers shall be exercised by the legislature alone.[189]

When the Virginia Convention received Jefferson's draft, it attempted first to reduce the number of items in his list, while still retaining the specific denial to the executive of "the prerogatives of declaring War or concluding Peace or issuing letters of Marque or Reprisal, of raising or introducing arm'd forces building armed Vessels forts or strong holds."[190] In the end, however, the Convention devised a succinct and undeniably powerful substitute—a clause providing that the "Governour, or chief Magistrate . . . shall, with the advice of a Council of State, exercise the Executive powers of Government according to the laws of this Commonwealth; and shall not, under any pretence, exercise any power or prerogative by virtue of any Law, statute, or Custom, of England."[191]

C. The Articles of Confederation

The constitution of Virginia, with its ban on any loose construction of executive power, was adopted on the 29th of June 1776, five days before the adoption by Congress of the Declaration of Independence. The reso-

188. *Id.* at 341; *see also id.* at 349–50, 359–60.

189. *Id.* at 360. Jefferson made three successive drafts; this is quoted from the third. The list of prerogatives denied to the Administrator appeared in all three, with only very slight verbal differences. *See id.* at 342, 350. The 12 prerogatives involved (including domestic ones not quoted here) were written in the form of a list, but are here run together as a continuous paragraph. The figure 40, illegible in the manuscript of the third draft, is supplied from the first.

190. *Id.* at 373.

191. VA. CONST. of June 29, 1776, *reprinted in* 7 CONSTITUTIONS, *supra* note 183, at 3816–17. *See* THE PAPERS OF THOMAS JEFFERSON, *supra* note 186, at 380.

lution for independence that had been introduced in Congress on the 7th of June on behalf of the Virginia delegation had called also for the preparation of a "plan of Confederation."[192] A committee was put to work almost immediately, and eight days after the Declaration, a draft was ready. It was reported to Congress on the 12th of July by the committee chairman, John Dickinson of Delaware.

This first draft incorporated various ideas from Franklin's proposal of twelve months earlier, and it provided for a smaller body similar to Franklin's "Executive Council," but now denominated a "Council of State." In defining the responsibilities of the Council, however, Dickinson's committee did not adopt Franklin's phrasing but instead borrowed extensively from a report of the 15th of December 1775, which Thomas Jefferson had drawn up when Congress was considering an adjournment over Christmas and needed a committee to sit during the recess.[193] In the end Congress decided not to adjourn and therefore never acted on Jefferson's report. The document was at hand, however, for use by Dickinson's commitee as it worked out a plan for formal Articles of Confederation.

In this new context, the committee originally designed "to sit during the recess of Congress" emerged as a permanent body, comparable to the Councils of State or Privy Councils which the several states were establishing in their own constitutions.[194] Since there was to be no chief executive at the federal level, it was in connection with defining the functions of the Council of State that the questions of the nature of executive power had to be faced. Dickinson's committee, following Jefferson's lead, came up with the following detailed catalogue of executive powers in the draft that it presented for the consideration of Congress:

> This Council shall have Power to receive and open all Letters directed to the United States, and to return proper Answers; but not to make any Engagements that shall be binding on the United States—To correspond with the Legislature of each Colony, and all Persons acting under the Authority of the United States, or of the said Legislatures—To apply to such Legislatures, or to the Officers in the several Colonies who are entrusted with the executive Powers of Government for occasional Aid whenever and wherever necessary—To give Counsel to the Commanding Officers, and to direct military Operations by Sea and Land, not changing any Objects or Expeditions determined on by the United States assembled [*i.e.*, Congress], unless an Alteration of Circumstances which shall come to the Knowledge of the Council after the Recess of the States, shall make such Change abso-

192. 5 JCC, *supra* note 82, at 425.

193. 1 THE PAPERS OF THOMAS JEFFERSON, *supra* note 186, at 272–73.

194. *See* VA. CONST., *supra* note 191, at 3817; notes 461–69 and 504–15 *infra*.

> lutely necessary—To attend to the Defense and Preservation of Forts and strong Posts, and to prevent the Enemy from acquiring new Holds—To procure Intelligence of the Condition and Designs of the Enemy—To expedite the Execution of such Measures as may be resolved on by the United States assembled, in Pursuance of the Powers hereby given to them—To draw upon the Treasurers for such Sums as may be appropriated by the United States assembled, and for the Payment of such Contracts as the said Council may make in Pursuance of the Powers hereby given to them—To superintend and controul or suspend all Officers civil and military, acting under the Authority of the United States . . . To prepare Matters for the Consideration of the United States, and to lay before them at their next Meeting all Letters and Advices received by the Council, with a Report of their Proceedings.[195]

So extensive a quotation is needed to show how wide-ranging were the powers that were considered appropriate for an executive body to exercise: carrying on diplomatic correspondence, directing military operations, spending money, making contracts, suspending civil and military officers. At the same time it is vitally important to note the carefully phrased limitations which kept firmly in legislative hands the ultimate power to determine all issues of fundamental policy. Diplomatic correspondence with foreign powers was not to go so far as to commit the United States to "any Engagements that shall be binding." Military operations, though directed by the Council, were to carry out the strategy (that is, the "Objects or Expeditions") which had been "determined on" by Congress. Money was to be drawn from the treasurers only on the basis of appropriations voted by Congress or for the purpose of making payment on contracts entered into by the Council "in Pursuance of" its authorized executive functions.

The completion of the Articles—laid aside time after time owing to the exigencies of war—took no less than sixteen months; the document being finally approved by Congress on the 15th of November 1777, and thereupon submitted to the states for ratification. The article providing for a Council of State, with its elaborate delineation of executive functions, survived almost to the end despite the alterations constantly being made in other parts of the draft. Finally, however, on the 7th of November 1777 (eight days before the close of deliberations), Congress voted to scrap the article and to substitute a provision establishing a purely interim "Committee of the States," with duties defined in the sketchiest of terms. During the recess of Congress the Committee of the States was to exercise such of the powers of Congress as the latter (by vote of nine

195. First Committee Draft of the Articles of Confederation, art. 19, *reprinted in* 5 JCC, *supra* note 82, at 553–54.

states out of thirteen) might "think expedient to vest them with."[196] There followed a proviso which forbade the delegation to the committee of any powers that Congress might not exercise except by a vote of nine states out of thirteen.[197] Among the powers thereby denied to the committee were the power "to engage in war," to "enter into any treaties or alliances," to "appropriate money," and to "appoint a commander in chief of the army or navy."[198]

Even this truncated provision for a Committee of the States managed to indicate the functions that Congress viewed as legislative in nature and therefore not to be vested elsewhere than in the full legislative body. In effect, however, the promising efforts of Jefferson and of the Dickinson committee to mark out the respective spheres of executive and legislative action had been scuttled, for Congress reserved to itself most of the responsibility for executing policy as well as making it. This fact became abundantly clear when a Committee of the States was finally set up in 1784. The resolution creating it authorized it "to receive communications from foreign ministers, and lay them before the Congress," but went on to say peremptorily that the committee "shall transact no business with them, unless authorised thereto by particular acts of Congress."[199] A committee like this, forbidden to transact business, was no executive committee; it could be little more than a message center.

D. Executive Committees of Congress Under the Confederation

The failure of the Articles of Confederation to establish any kind of permanent executive department meant, of course, that Congress had to carry out its own policy decisions and execute its own ordinances. It did so, to begin with, through a succession of ad hoc committees, each charged with some specific task, on which it would report to Congress and then usually dissolve. More permanence was brought to the system when standing committees began to be created to deal with various im-

196. 9 JCC, *supra* note 82, at 880.

197. *Id.* The substitution of a Committee of the States for a Council of State was described just before the vote by one member of Congress in the following words: "I suppose the Council of State will be thrown out and a Committee of Congress be left in recesses to transact prudentials." Letter from James Lovell to William Whipple (Nov. 3, 1777), *reprinted in* 2 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 540 (E. Burnett ed. 1923) [hereinafter cited as LETTERS OF MEMBERS].

198. ARTICLES OF CONFEDERATION as finally adopted, 15 Nov. 1777, art. 9, 9 JCC, *supra* note 82, at 921–22.

199. 27 JCC, *supra* note 82, at 476–77. The author of this particular paragraph was James Monroe. No effort had been made to set up the Committee of the States until 1784 because Congress did not take a formal recess until then. *See* Burnett, *The Committee of the States, 1784*, in 1 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1913, at 141–58 (1915).

portant categories of problems. Eventually certain of these were given formal status as boards, sometimes with members other than delegates to Congress. Even so, the fluctuating personnel of the committees and boards made continuity difficult. And administrative matters were often left unattended while congressmen performed the legislative duties which were, after all, their prime responsibility.[200]

The situation was described with acute discernment as early as December 1776 by Robert Morris, the delegate from Pennsylvania who would eventually be elected Financier, or head of the Department of Finance, when Congress established the post in February 1781. Writing on the 21st of December 1776 (five days before Washington's victorious crossing of the Delaware), Morris commented to the American commissioners in Paris:

> I will not enter into any detail of our conduct in Congress, but you may depend on this, that so long as that respectable body persist in the attempt to execute, as well as to deliberate on their business, it never will be done as it ought; and this has been urged many and many a time by myself and others, but some of them do not like to part with power, or to pay others for doing what they cannot do themselves.[201]

Criticism of the same sort mounted as the war continued. The commander in chief, George Washington, added his influential voice, emphasizing the costs as well as the delays that were resulting from the lack of system. In a letter of the 20th of November 1780 to General John Sullivan, Washington complained:

> [T]he multiplicity of business in which Congress are engaged will not let them extend that seasonable and provident care to many matters which private convenience and public œconomy indispensably call for; and proves, in my opinion, the evident necessity of committing more of the executive business to small boards, or responsable [*sic*] characters than is practiced at present for I am very well convinced that for want of system in the execution of business and a proper timing of things, that our public expenditures are inconceivably greater than they ought to be.[202]

A month later Washington expressed himself to James Duane, member

200. *See* J. SANDERS, EVOLUTION OF EXECUTIVE DEPARTMENTS OF THE CONTINENTAL CONGRESS 1774–1789 (1935); J. Guggenheimer, *The Development of the Executive Departments, 1775–1789*, in ESSAYS IN THE CONSTITUTIONAL HISTORY OF THE UNITED STATES IN THE FORMATIVE PERIOD 116–85 (J. Jameson ed. 1889).

201. Letter from Robert Morris to American Commission in Paris (Dec. 21, 1776), *reprinted in* 2 THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 238 (F. Wharton ed. 1889) [hereinafter cited as WHARTON, REVOL. DIPLOM. CORRESP.].

202. Letter from George Washington to John Sullivan (Nov. 20, 1780), *reprinted in* 20 THE WRITINGS OF GEORGE WASHINGTON 371–72 (J. Fitzpatrick ed. 1937).

of Congress from New York, in a letter of the 26th of December 1780: "There are two things (as I have often declared) which in my opinion, are indispensably necessary to the well being and good Government of our public Affairs; these are, greater powers to Congress, and more resonsibility and permanency in the executive bodies."[203]

Duane was already the recipient of an even more detailed criticism of "the defects of our present system," in the form of a letter from Washington's aide-de-camp, Alexander Hamilton, dated the 3d of September 1780.[204] Like his commander in chief, Hamilton considered the "fundamental defect" of the Confederation to be "a want of power in Congress." In a passage eleven paragraphs long he discussed these weaknesses,[205] and in five supplementary paragraphs he proposed, as remedies, the calling of a convention of the states which would vest Congress with added powers—essentially the ones that were finally granted it seven years later by the Constitutional Convention in Philadelphia.[206]

Having made clear his belief that the most important task was to strengthen the hand of Congress, Hamilton went on to discuss (this time in only four paragraphs) the "want of method and energy in the administration," resulting from "the want of a proper executive."[207] He explained:

> Congress have kept the power too much into their own hands and have meddled too much with details of every sort. Congress is properly a deliberative corps and it forgets itself when it attempts to play the executive. It is impossible such a body, numerous as it is, constantly fluctuating, can ever act with sufficient decision, or with system.[208]

Acknowledging that Congress had made an attempt to remedy the defect by establishing boards, Hamilton nevertheless spoke out for "vesting the great executive departments . . . in the hands of individuals."[209] The last word, be it noted, was in the plural. Hamilton did not at this time advocate the creation of a unified executive branch headed by one man. When he went into detail (as he did in five supplementary paragraphs) he proposed the appointment of five "great officers of state"—for foreign affairs, war, marine, finance, and trade—each to be "chief in

203. 21 THE WRITINGS OF GEORGE WASHINGTON 14 (J. Fitzpatrick ed. 1937).
204. Letter from Alexander Hamilton to James Duane (Sept. 3, 1780), *reprinted in* 2 THE PAPERS OF ALEXANDER HAMILTON 400–18 (H. Syrett ed. 1961).
205. *Id.* at 401–04.
206. *Id.* at 407–08.
207. *Id.* at 404.
208. *Id.*
209. *Id.* at 405.

his department."[210] These were to be "offices of real trust and importance," but Hamilton was careful to say that the holders would "be of course at all times under the direction of Congress."[211] The importance of the latter body would not be lessened, Hamilton argued, because Congress "would have precisely the same rights and powers as heretofore, happily disencumbered of the detail."[212] Hamilton elaborated the point:

> They [the members of Congress] would have to inspect the conduct of their ministers, deliberate upon their plans, originate others for the public good—only observing this rule that they ought to consult their ministers, and get all the information and advice they could from them, before they entered into any new measures or made changes in the old.[213]

The lack of efficiently organized executive departments was a perennial theme of criticism throughout the period of the Confederation. The creation of an executive branch headed by a president, was, of course, the ultimate response given by the Constitution of 1787. This being so, the character that the framers of the last-mentioned document intended the office or institution of the presidency to possess can be correctly perceived only by analyzing and assessing the precise nature of the criticisms that preceded its creation. Instead of providing a critical examination of the historical evidence, however, many present-day writers on the American presidency simply assume and assert that the critics of the Confederation in the 1780's were demanding a powerful executive who would take over from Congress not only the running of the administrative machinery but also the shaping of policy, especially in foreign affairs. Nothing to support such an interpretation is to be found in the mass of documents from which excerpts have just been quoted.

Two basic criticisms were voiced and two distinct remedies were, in fact, proposed by such advocates of a more powerful government as Washington and Hamilton. The first criticism involved the "want of power in Congress," and the remedy proposed was the grant to that body of added powers, not the transfer of its authority to executive hands. The other problem was the "want of method and energy in the administration," and the required remedy here was the creation of administrative

210. *Id.* at 408–09.
211. *Id.* at 405.
212. *Id.*
213. *Id.* The last six words have a bearing on the question under discussion in this article. A treaty establishes a particular foreign policy; its termination necessarily changes the diplomatic posture of the nation in a substantial way. Hamilton appears to be saying that such an alteration of overall policy must be made according to the same procedure that established it in the first place.

agencies, shielded from interference or interruption and capable of performing efficiently the tasks required for carrying policy into execution.

By the winter of 1780–81 criticisms like those of Washington and Hamilton began to have their effect, and Congress commenced a reorganization of its systemless system of administration. One aspect of the work was the acceptance of the idea, so strongly urged by Hamilton, that there should be departments headed by single officers. The second task, different but equally fundamental, was that of distinguishing, in each of the fields of governmental concern, the functions that were clearly executive in nature from those that were essentially legislative.

E. Creation of a Department of Foreign Affairs

A serious effort at reorganization got under way on the 10th of January 1781 with the adoption by Congress of a resolution (drafted in a committee headed by James Duane) which established a Department of Foreign Affairs. At its head would be a salaried Secretary for Foreign Affairs, who was not to be a member of Congress but would have the privilege of attending and "explaining his reports."[214] A month later, on the 7th of February, Congress voted to establish three other "civil executive departments," namely, Finance, War, and Marine.[215] Each resolution undertook to delineate, albeit briefly, the executive business that the department in question was supposed to carry on. This was merely the start of a process by which definitions of the scope of executive authority were gradually refined. For present purposes, however, it is necessary to examine only the developments relating to the Department of Foreign Affairs.

In the form in which the Duane committee reported it, the measure defined the duties of the Secretary for Foreign Affairs in the sketchiest terms: "to keep and preserve all the books and papers belonging to the Department," and "to receive and report the applications of all foreigners."[216] Moreover it decreed that the Secretary should be "subject to . . . [the] instructions" of a three-member congressional committee, and should "[s]ubmit all his correspondence and proceedings to their inspection."[217] This last provision was struck out before passage, and Congress expanded the responsibilities of the Secretary by adding the following to the original meagre list: "to correspond with the ministers of the United States at foreign courts, and with the ministers of foreign powers and

214. 19 JCC, *supra* note 82, at 43–44.
215. *Id.* at 125–28.
216. *Id.* at 43–44.
217. *Id.* at 44.

other persons . . . ; also to transmit such communications as Congress shall direct, to the ministers of these United States and others at foreign courts, and in foreign countries."[218]

After three months in office, the first of the Secretaries for Foreign Affairs, Robert R. Livingston, addressed (on the 25th of January 1782) a respectful letter to the president of Congress pointing out various provisions that "ought to be inserted" in the resolution creating his department. In particular, Livingston wished to know whether he might ask questions or "offer his sentiments" when availing himself of the Secretary's special privilege of attending the sessions of Congress. He also desired assurance that he had acted properly when he had taken care of "matters not of sufficient moment to engage the attention of Congress; as, for instance, applications for aid in procuring the release of an American . . . confined in the French West Indies."[219]

Within a month of receiving this communication, Congress adopted a revised measure prescribing, in greater detail than before, the functions and duties of the Secretary and Department of Foreign Affairs. This resolution of the 22nd of February 1782 provided "[t]hat the correspondence and communications with the ministers, consuls and agents of the United States in foreign countries, and with the ministers and other officers of foreign powers . . . [accredited to] Congress, [was to] be carried on through the office of foreign affairs by the . . . Secretary,"[220] who was given the new and more elaborate title of "Secretary to the United States of America, for the department of foreign affairs." An important proviso was attached:

> [P]rovided always, that letters to the ministers of the United States, or ministers of foreign powers, which have a direct reference to treaties or conventions proposed to be entered into, or instructions relative thereto, or other great national subjects, shall be submitted to the inspection and receive the approbation of Congress before they shall be transmitted.[221]

The insistence that basic policy decisions in treaty matters must remain firmly in the hands of a representative body was thus emphasized. After making this reservation of authority clear, the resolution did grant the Secretary authority to arrange a great many minor matters. He was, for example, authorized to "concert measures with the ministers or officers of foreign powers, amicably to procure the redress of private injuries,

218. *Id.*

219. Letter from Robert R. Livingston to the President of Congress (Jan. 25, 1782), *reprinted in* 5 WHARTON, REVOL. DIPLOM. CORRESP., *supra* note 201, at 132–33.

220. 22 JCC, *supra* note 82, at 88.

221. *Id.* at 88–89.

which any citizen of the United States may have received from a foreign power or the subjects thereof."[222] Instead of requiring the approval of Congress in such matters, the Secretary was simply instructed to preserve "minutes of all his transactions relative thereto," including in the record the letters "which have passed on such occasions."[223] Members of Congress were to have access to all documents in the Secretary's custody, but with certain restrictions on the making of copies.

The Secretary continued to have the right to attend Congress "at all times," but elaborate rules were provided to govern his speaking from the floor. He could "explain and answer objections to his reports . . . if required by a member," but only if "no objection be made by Congress."[224] Questions about "matters of fact which lie within his knowledge" could be answered by him, but only if "put from the chair by order of Congress."[225] The Secretary might choose to reply in writing, and in practice usually did.

A paragraph toward the end of the document described in considerable detail the procedure that the statesmen of 1782 considered it proper to follow in the negotiation of treaties and the conduct of foreign relations generally. The clause read:

> All letters to sovereign powers, letters of credence, plans of treaties, conventions, manifestoes, instructions, passports, safe conducts, and other acts of Congress relative to the department of foreign affairs, when the substance thereof shall have been previously agreed to in Congress, shall be reduced to form in the office of foreign affairs, and submitted to the opinion of Congress, and when passed, signed and attested, sent to the office of foreign affairs to be countersigned and forwarded.[226]

Under Livingston's successor, John Jay, this definition of the executive role in the conduct of foreign affairs was eventually given even greater precision. At first, however, a hiatus in leadership set the process back. Livingston resigned in June 1783, and it was not until May 1784 that Congress elected Jay to fill the post. Jay was still in Europe (having served as one of the commissioners negotiating the treaty of peace with Great Britain), and it was September 1784 before he took up his duties. In the interval between Livingston's resignation and Jay's return, foreign correspondence piled up in the hands of various ad hoc committees of Congress, which dealt sporadically with some of the issues involved.[227]

222. *Id.* at 89.
223. *Id.*
224. *Id.* at 90.
225. *Id.*
226. 22 JCC, *supra* note 82, at 87–92.
227. Bonham, *Robert R. Livingston Secretary for Foreign Affairs of the Continental Congress*

This throwback to the old entanglement of executive with legislative business threatened to become permanent, despite the existing provision that diplomatic correspondence was to be "carried on through the office of foreign affairs."[228] Some members of Congress (according to James Monroe) were reluctant to "preclude themselves from a previous consideration" of matters of foreign relations by making it "a matter of right in the minister of foreign aff[ai]rs to advise Congress in the first instance." Instead they were in favor of "consulting when necessary & referring or declining to refer to him, at pleasure, any of the subjects before them."[229]

As late as the 14th of January 1785, after almost four months in office, Jay was reporting to the American commissioners abroad that recent letters relating to foreign affairs "are still, in the hands of a committee to whom they had been referred."[230] Finally, on the 23d of that month, he wrote with asperity to the president of Congress: "I have some Reason Sir! to apprehend, that I have come into the office of Secretary for foreign Affairs, with Ideas of its Duties & Rights somewhat different from those which seem to be entertained by Congress."[231] After urging that these duties and rights be "ascertained with precision," Jay announced that if his conception of the secretaryship proved to be different from Congress', then he would "certainly think it my Duty either to execute it on the plan most agreable [*sic*] to them; or retire from it with as much acquiescence and Respect, as I accepted it with. . . ."[232]

To the committee that Congress immediately appointed, Jay wrote that what he required was an unambiguous commitment to the principle "that all foreign letters & papers wh[ich]may be laid before Congress sh[oul]d *in the first instance* be *referr'd* to him."[233] The committee agreed and reported a resolution, which Congress adopted on the 11th of February

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August 10, 1781 to June 6, 1783, in 1 THE AMERICAN SECRETARIES OF STATE AND THEIR DIPLOMACY 193–94 (S. Bemis ed. 1927).

228. 22 JCC, *supra* note 82, at 88 (resolution of 22 Feb. 1782; *see* text accompanying note 220 *supra*).

229. Letter from James Monroe to James Madison (Feb. 1, 1785), *reprinted in* 1 WRITINGS OF JAMES MONROE 62 (S. Hamilton ed. 1898). Monroe was chairman of the committee appointed to deal with Jay's communication of 23 Jan. 1785. *See* text accompaying notes 233–35 *infra*.

230. Letter from John Jay to the Commissioners, *reprinted in* 1 THE DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES OF AMERICA FROM THE SIGNING OF THE DEFINITIVE TREATY OF PEACE, 10TH SEPTEMBER, 1783, TO THE ADOPTION OF THE CONSTITUTION, MARCH 4, 1789, at 562 (1837).

231. Manuscript in Papers of the Continental Congress, No. 80, vol. 1, fol. 3, National Archives (reproduced in National Archives Microfilm Publication 247, roll 106).

232. *Id.*

233. Quoted by Monroe in his letter of 1 Feb. 1785, *cited in* note 229 *supra*. Jay's original note to the committee has not been located. The underlining (here shown by italics) may have been Monroe's rather than Jay's.

1785, providing that "[a]ll communications as well to as from the United States in Congress assembled, on the subject of foreign affairs, be made through the secretary for the department for foreign affairs, and that all letters, memorials or other papers on the subject . . . be addressed to him."[234] Though never written into the Constitution framed in 1787, this principle has been an unquestioned ingredient of the constitutional definition of executive power ever since its formulation in Jay's time.[235]

F. The Crisis over Negotiations with Spain, 1786

Having defined an area of executive action into which legislative power ought not to intrude, Congress was soon obliged to look at the other side of the coin and to consider how much of the legislative power of decision might be delegated to a committee working closely with the executive. This was one of the crucial questions raised in connection with the negotiations that were opened with Spain in the summer of 1785, and that mounted to crisis level in Congress in the late summer of 1786.

Three major questions were involved in the negotiations with Spain. One was the disputed southern and southwestern boundary of the United States, where it abutted on Spanish possessions. A second was the demand of American settlers in the West for a right freely to navigate the Mississippi River after it ceased to be the international boundary and flowed in its lower course through exclusively Spanish territory. In the background was a third matter: the possibility of a trade treaty, which Spain temptingly dangled.

234. 28 JCC, *supra* note 82, at 56. The committee was appointed on 24 Jan. and reported on 2 Feb. 1785. *Id.* at 17 n.1, 36–37.

235. Thomas Jefferson as Secretary of State reaffirmed the principle as a constitutional one in 1793. The French minister, "Citizen" Genet, had attempted to go over President Washington's head by deliberately addressing an official communication to the Congress of the United States. Jefferson returned the document with a sharp letter of rejection, informing him that the President is "the only channel of communication between this country and foreign nations," that "it is from him alone that foreign nations or their agents are to learn what is or has been the will of the nation," and that "no foreign agent can be allowed to . . . interpose between him and any other branch of Government . . . . " Letter from Thomas Jefferson to the French Minister (Edmond Charles Genet) (Nov. 22, 1793), *reprinted in* 6 THE WRITINGS OF THOMAS JEFFERSON 451 (P. Ford ed. 1895). On "the exclusive right of the President to be the nation's intermediary in its dealings with other nations," see E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787–1957, at 183–84 (rev. 4th ed. 1957). It is not true, however, that the so-called Logan Act of 30 Jan. 1799, forbidding American citizens to communicate directly with foreign governments, was entitled "an Act to Prevent Usurpation of Executive Functions." *Id.* This error was repeated in LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 92–82, 92d Cong., 2d Sess. 538 (1973). The actual title was "An Act for the punishment of certain Crimes therein specified," and neither the phrase "executive functions" nor the word "usurpation" ap-

On the 19th of July 1785, Congress adopted a set of instructions to Jay, the final paragraph of which required the Secretary "previous to his making propositions to Don Diego de Gardoqui [the Spanish envoy], or agreeing with him in any article, compact or Convention, to communicate to Congress the propositions to be made or received relative to such article, compact or Convention."[236] Jay, a diplomat of many years' experience, gently pointed out the impracticableness of so strict a supervision of day-to-day negotiations, while at the same time acknowledging that it was legitimate and wise for Congress to instruct the negotiator and to require approval in advance of any agreement about to be concluded. Jay's letter to the president of Congress, dated the 15th of August 1785, expounded his views on the proper relationship between executive and legislative responsibility in the conduct of foreign affairs:

> The Instruction which restrains me from agreeing to any Article, Compact, or Convention without the previous Approbation of Congress is prudent and wise. But the Instruction which directs me previously to communicate to Congress *every* Proposition which in the Course of the Negociation I may think expedient to make to Mr. Gardoqui, as well as every Proposition which he may in our Conferences throw out to me, will, I apprehend be exceedingly embarrassing.
>
> . . . [I]t is far from my Wishes to be left at Liberty to bind Congress by any Acts of my Discretion,—the first part of the Instruction provides against that. . . .
>
> But when I consider that in the Course of every Negociation, various Propositions will be made and received, which never take Effect; and that Arguments and Answers to Arguments often assume that Form . . . ; I am exceedingly at a Loss to concieve [*sic*] how it will be possible for me to comply with this Instruction and yet do Business in the usual, and in my Opinion the most natural and proper Way.
>
> It is proper and common to instruct Ministers on the great Points to be agitated, and to inform them how far they are to insist on some, and how far they may yield on others. But I am inclined to think it is very seldom thought necessary to leave nothing at all to their Discretion; for where that ought to be the Case, the Man ought not to be employed.
>
> Should Mr. Gardoqui discover (and discover it he will) that every thing he may say to me, which may be denominated a Proposition, is to be reduced to Writing and laid before Congress, I think it probable that he would observe more Caution and Reserve, than he might otherwise deem necessary and it does not strike me as expedient thus to urge him to be circumspect.[237]

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peared anywhere in it. Act of January 30, 1799, ch. 1, 1 Stat. 613 (1799).

236. 29 JCC, *supra* note 82, at 562.

237. *Id.* at 628.

Convinced by Jay's argument, Congress voted ten days later to repeal the paragraph complained of and to substitute a new instruction specifying two American demands from which Jay might not recede. This new instruction of the 25th of August 1785 required that any treaty with Spain should "stipulate the right of the United States to their territorial bounds, and the free Navigation of the Mississippi, from the source to the Ocean."[238]

Negotiations with Spain came to a quick standstill, however, for the Spanish minister's instructions forbade him to concede to Americans any right to navigate the Spanish-owned segment of the river. Faced with this refusal, Jay was unable to obtain guidance from Congress on the course to pursue, for, as he wrote Jefferson on the 9th of January 1786, "Congress has been composed of so few States actually represented as not to have it in their power to pay that attention to their foreign affairs which they would doubtless otherwise have done."[239] The Spanish minister finally prodded Jay on the 25th of May 1786, observing that "for many months" they had both been awaiting "a full meeting of Congress," at which Jay "might refer to them the difficulty . . . respecting the claim to navigate the river Mississippi."[240] His patience running thin, Jay promptly addressed a letter to the president of Congress alluding to the impasse and proposing that Congress consider "whether it might not be adviseable to appoint a committee with power to instruct and direct me on every point and subject relative to the proposed treaty with Spain."[241] The suggested committee would be a secret one, but its proceedings would be discussible in Congress.

Jay was proposing a reasonable way of meeting the situation produced by the inability of Congress to maintain the quorum that was constitu-

238. *Id.* at 658.

239. Letter from John Jay to Thomas Jefferson (Jan. 9, 1786), *reprinted in* 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 178 (H. Johnston ed. 1891). On 18 Nov. 1785 Jay had urged the Secretary of Congress, Charles Thomson, to write to the states to "impress them more strongly with the necessity of their . . . being speedily, fully and constantly represented in Congress." Letter from John Jay to Charles Thomson, *reprinted in* 8 LETTERS OF MEMBERS, *supra* note 197, at 256 n.2. Thomson did so, but with little effect. *Id.* On 5 May 1786 Jay wrote Jefferson, then American minister in Paris: "Until this Week Congress has not been composed of nine states for more than three or four Days since last Fall. This will account for my Silence on Parts of your Letters which required Answers and Instructions, for as their [i.e., Congress's] Sentiments and Decisions must direct the public Conduct of their Officers I must wait with Patience for their Orders." 9 THE PAPERS OF THOMAS JEFFERSON 451 (J. Boyd ed. 1950). The approval of nine states, it must be remembered, was required for anything more than routine business.

240. Communication from Don Diego de Gardoqui, included in Report from John Jay to Congress (Aug. 3, 1786), *reprinted in* 31 JCC, *supra* note 82, at 469.

241. Letter from John Jay to the President of Congress (May 29, 1786), *reprinted in* 30 JCC, *supra* note 82, at 323. Jay's letter was read in Congress on the 31st of May.

tionally required for action to be taken. Jay's plan did, however, call for the delegation of policymaking authority in foreign affairs to a mere committee—something that Congress had consistently refused to permit when, in the past, plans for interim committees had come under consideration. On the present occasion, moreover, several members felt that Jay's proposal was an attempt to take foreign policy decisions out of legislative hands entirely, thus perpetrating, with the connivance of a committee, an outright executive usurpation of power. This, at least, was the way it appeared to James Monroe, who discussed Jay's letter on the day it was read. "It was immediately perceiv'd," wrote Monroe to Madison, "that the object was to relieve him [Jay] from the instruction respecting the Mississippi and to get a committee to cover the measure."[242] Some two weeks later Monroe used even harsher language, charging that Jay acted "with a view of evading his instructions and concluding the treaty before they [*i.e.*, the terms concerted in secret] were known."[243]

Jay's letter was immediately referred to a committee, made up of one delegate each from Virginia (Monroe himself), Massachusetts (Rufus King), and Pennsylvania (Charles Pettit).[244] From the outset the committee was sharply divided. Monroe and King in particular were at loggerheads, denouncing each other in almost scurrilous terms in their private correspondence.[245] So bitter was the feelng that the reputed skill of Pettit as a conciliator[246] seems to have availed nothing. The committee began by interviewing Jay,[247] after which the latter's proposal for a secret committee simply dropped from sight. The three-man committee could not, however, agree upon a report of its own.[248] So, at the end of two months, it gave up and recommended that the whole matter be turned over to Congress itself, which would hear Jay, debate the issues in committee of the whole, and decide for itself the terms that were to be insisted on in

242. Letter from James Monroe to James Madison (May 31, 1786), *reprinted in* 8 LETTERS OF MEMBERS, *supra* note 197, at 375.

243. Letter from James Monroe to Thomas Jefferson (June 16, 1786), *reprinted in* 8 LETTERS OF MEMBERS, *supra* note 197, at 392.

244. 30 JCC, *supra* note 82, at 323.

245. Monroe, for example, accused King of being interested in securing "a market for fish" (a principal export of his state of Massachusetts). Letter from James Monroe to James Madison (May 31, 1786), *reprinted in* 8 LETTERS OF MEMBERS, *supra* note 197, at 377. For his part, King asserted in a speech of 16 August 1786, that failure to reach an agreement with Spain because of the Mississippi would be "sacrificing the interest and happiness of a Million to promote the views of speculating landjobbers." *Id.* at 429.

246. *See* 14 DICTIONARY OF AMERICAN BIOGRAPHY 517 (1st. ed. 1934). *But see* 8 LETTERS OF MEMBERS, *supra* note 197, at 377 (hostile comment by Monroe).

247. *See* 8 LETTERS OF MEMBERS, *supra* note 197, at 375–77.

248. *See* Letter from James Monroe to Thomas Jefferson (June 16, 1786), *reprinted in id.* at 392 (Monroe's comment on the delay). *See also id.* at 407 (letter from King to Monroe 30 July 1786).

further negotiations with Spain.[249]

By the time Congress met for the purpose (on the 3rd of August 1786), conflicting views on the issues raised in the Spanish negotiations had escalated into the gravest sectional crisis in the history of the Confederation. The economic interests at stake were substantial and obvious. The territorial claims of the four southernmost states—Virginia, North Carolina, Georgia, and (though her claim was tenuous) South Carolina—still extended westward to the Mississippi,[250] making it a vital interest of theirs to keep open a free passage to the sea for the commerce of the upper valley and the tributaries of the great river. The prosperity of the growing western settlements depended on such access, and so did the prosperity of the southern region generally, which was banking on rapid and continuing westward expansion. Acquiescence by the United States in the closing of the Mississippi—even for a twenty-five or thirty-year period, which was Jay's actual suggestion[251]—might cost the Nation the allegiance of the western settlers and thus bring about the dismemberment of the Union. As Monroe put it, an agreement to "forbear" using the Mississippi (Jay's phrasing) would "separate those people . . . westward of the mountains from the federal Government and perhaps throw them into the hands eventually of a foreign power."[252]

There was, of course, another side to the coin. In refusing the demand for free navigation of the Mississippi, Spain had shrewdly offered a quid pro quo in the form of a trade treaty. The commercially oriented states of the north and east—with their important ports of Boston, New York, and Philadelphia, to say nothing of a host of lesser ones—were anxious to seize the opportunity of enlarging a trade still suffering from the dislocations and losses occasioned by the Revolution, among which had to be counted the severance of long-established commercial ties with Britain. Failure to take advantage of the opportunity for an expansion of trade, according to spokesmen for northern interests, would be a graver setback to the nation's economy than a temporary abandonment of the Missis-

249. On 1 August 1786 the three-man committee was "discharged after it had recommended that the letter [of Jay] be referred to a Committee of the Whole." 31 JCC, *supra* note 82, at 457 n.1. Jay was asked to attend on 3 August, and he did, giving his report in writing. *Id.* at 467–84.

250. *See* ATLAS OF EARLY AMERICAN HISTORY: THE REVOLUTIONARY ERA, 1760–1790, at 62 (maps), 130–31 (text) (L. Cappon ed. 1976).

251. In his report of 3 August 1786, Jay said he considered it "expedient" to make a treaty "limited to twenty five or thirty years," with an article stipulating "that the United States would forbear to use the Navigation of that River below their territories to the Ocean," and that "the duration of the treaty and of the forbearance in question would be limited to the same period." 31 JCC, *supra* note 82, at 480.

252. Letter from James Monroe to James Madison (May 31, 1786), *reprinted in* 8 LETTERS OF MEMBERS, *supra* note 197, at 376.

sippi claim, which involved, as one speaker put it, "a right which we do not now enjoy and which we cannot use, and have not power to assert."[253]

The diplomatic conflict with Spain took the form, when transferred to the domestic arena, of a fundamental economic conflict with a clear sectional basis. This conflict in turn was translated (as such conflicts are apt to be) into a constitutional conflict, with significant implications for the Federal Convention that assembled in Philadelphia nine months later.

The constitutional situation was this. According to the Articles of Confederation, treaties could not be entered into "unless nine states assent"[254] (unless, in effect, two-thirds of all the states in the Union approved). The rule was considered applicable to the adoption of instructions to diplomatic agents, it being understood that Congress would have at least a moral obligation to ratify a treaty made in full accord with its instructions.[255] Now the original instructions to Jay, including the provision respecting the navigation of the Mississippi, had been adopted when nine states were present and voting.[256] To repeal a set of instructions in their entirety would operate, of course, to terminate the negotiations altogether. For this purpose, it was recognized, a simple majority would suffice, because such a vote would signify that there no longer existed a two-thirds majority for the kind of treaty originally contemplated. What was under discussion in 1786, however, was not the complete termination of negotiations with Spain but the elimination of a major (and in the opinion of some, an indispensable) element in the overall plan

253. Speech of General Arthur St. Clair in the Committee of the Whole (August 18, 1786), *id.* at 440 (as recorded by Charles Thomson).

254. ARTICLES OF CONFEDERATION, art. 9, penultimate para. 19 JCC, *supra* note 82, at 220.

255. On 25 July 1789, after the new Constitution went into operation, John Jay (still acting as Secretary for Foreign Affairs) gave an official opinion to the Senate, arguing that it "ought" to vote its consent to a consular convention with France, even though Jay himself felt that it would "prove more inconvenient than beneficial to the United States." The obligation to ratify, he explained, was a consequence of the fact that the treaty conformed to the instructions voted by the old Congress, and in a few points improved on them. Jay quoted from a document of that Congress, which had said, when it found one of its earlier instructions disadvantageous: "[A] former Congress having agreed to it, it would be improper now to recede." 1 AMERICAN STATE PAPERS, CLASS I, FOREIGN RELATIONS 90 (Washington 1832). This statement provides an imporant clue to the meaning that the founders of the constitutional system attached to the pair of terms "advice" and "consent" in the treaty clause of the Constitution. The Senate was expected to give its advice in the form of instructions (presumably by two-thirds vote of those present). Once the treaty was negotiated, the Senate was entitled to withhold its consent, but was expected to do so only if there were deviations from the instructions, rendering the treaty substantially less acceptable.

256. On 11 February 1785, when the first instructions were adopted, 11 states had sufficient members present to permit their votes to be counted. 28 JCC, *supra* note 82, at 53–55. On 25 August 1785, when the instructions were modified, nine states were fully represented. 29 JCC, *supra*, at 655. Ayes and nays were not recorded on either occasion.

that had been in the minds of the members when Congress approved the original instructions.

The issue came before Congress on the 10th of August 1786, the first day of debate in committee of the whole. The Massachusetts delegation moved that the particular instruction regarding the navigation of the Mississippi be "repealed, and made void."[257] After a debate that spread over almost two weeks and occupied a considerable part of six different days,[258] the committee of the whole made its report to Congress on the 23d of August. The report recommended that Congress, now sitting in its formal legislative capacity, take the action originally proposed by Massachusetts—namely revoking that part of Jay's instructions which required him to demand free navigation of the Mississippi, and instead authorizing him to consent, if necessary, to "a forbearance of the use of the . . . river Mississippi, for a period"—the duration of which was left blank.[259]

This was not, of course, the end of the matter, for regular debate now began in Congress itself. The southerners opened with a parliamentary maneuver, in the form of a motion to repeal the whole set of instructions. This would, of course, have completely terminated the negotiations with Spain. The motion was rejected, with seven states (a simple majority of the entire thirteen) voting against it.[260] As rollcall followed rollcall in the days of bitter debate that followed, the same seven states (from Pennsylvania northward) showed their determination to pursue the quest for a commercial treaty at the cost of accepting exclusion from the lower reaches of the Mississippi. Opposing them was a solid bloc of five southern states. Four were states with land claims reaching to the Mississippi, and they were joined by Maryland,[261] whose stand was a little surprising, given her previous record of hostility to the retention in state hands of those very western claims.[262] The southern bloc was voted down on every rollcall, and finally, on the 29th of August 1786, Congress adopted, by a vote of seven states to five, the resolution repealing the earlier instruction regarding the Mississippi and authorizing Jay to continue the

257. 31 JCC, *supra* note 82, at 510.

258. *Id.* at 509–10, 524–25, 527, 528, 535, 554, 565–68; 8 LETTERS OF MEMBERS, *supra* note 197, at 427–30, 434–37, 438–42, 449–50.

259. 31 JCC, *supra* note 82, at 566.

260. *Id.* at 569–70.

261. *See* 31 JCC, *supra* note 82, at 569, 570, 594, 595, 600, 601, 603, 604, 607, 609, 613, 621, 697 (record of rollcalls from 28 August through 28 September 1786). Though there were occasional absences and split delegations, no state switched sides on any vote. Delaware was not represented during the period.

262. In support of her contention that all western claims should be ceded to the Union, Maryland had held up her ratification of the Article of Confederation until 1 March 1781. *See* M. JENSEN, THE ARTICLES OF CONFEDERATION 150–51, 236–38 (1940).

negotiations with Spain without insisting on an American right to free navigation.[263]

The southern delegations replied the next day with a resolution sponsored by Charles Pinckney of South Carolina and James Monroe of Virgina. Its preamble argued that what purported to be a repeal was not a repeal at all because it had "the effect of enlarging the powers of the . . . negotiator, and granting him an authority he did not possess under the former instructions."[264] The contention was that only with the approval of nine states could new powers be given. The body of the southern-sponsored resolution proposed to inform Jay officially that Congress did "not consider him as authorised to negotiate upon different principles than those under which he was formerly instructed," and warned that if he nevertheless proceeded to do so, the United States would not be "bound under the law of Nations to ratify and confirm a compact formed under powers thus unconstitutional and incompetent."[265] As expected, the resolution was rejected by the familiar vote of seven states to five.[266]

In reality, however, the five protesting states were the victors. Regardless of the fate of their resolution, they had it in their power to block any treaty contravening the original instructions, because without their votes the treaty would fall short of the nine required assents. The threat made further negotiation fruitless,[267] and not until 1795 was a treaty with Spain concluded.[268] By that time American bargaining power had so far increased that the coveted right of free navigation was obtained. And eight years thereafter the United States purchased Louisiana (from Napoleon, as it happened), thereby acquiring both banks of the Mississippi from source to mouth.

The crisis of August 1786 had been severe enough to threaten the breakup of the Union.[269] It is important to note, however, that the question at issue was not whether the making of foreign policy was a legislative or an executive function. The crisis was the product, unmistakably

263. 31 JCC, *supra* note 82, at 595–96.

264. *Id.* at 598–600.

265. *Id.* at 599.

266. *Id.* at 600.

267. *See* 32 JCC, *supra* note 82, 184–89; 34 JCC, *supra* note 82, at 530–35 (Jay's reports to Congress on the state of the negotiations with Spain, 11 April 1787 and 16 Sept. 1788). On 31 August 1787 William Grayson reported to Madison on proceedings in the already moribund Congress of the Confederation, remarking that "[t]he Mississippi is in a State of absolute dormification." 10 THE PAPERS OF JAMES MADISON 159 (R. Rutland ed. 1977).

268. *See* S. BEMIS, PINCKNEY'S TREATY 322 (rev. ed. 1960).

269. *See, e.g.*, Letter from Theodore Sedgwick to Caleb Strong (Aug. 6, 1786), *reprinted in* 8 LETTERS OF MEMBERS, *supra* note 197, at 415–16; letter from James Monroe to the Governor of Virginia (Patrick Henry), (Aug. 12, 1786), *reprinted in id.* at 421; letter from James Monroe to James Madison, *reprinted in id.* at 460.

and undeniably, of a deep-seated conflict of economic interest between two major sections of the country. It was fought out in the legislative arena, and neither side doubted that the final decision belonged there. All participants accepted and acted upon the basis of the same constitutional principle. They agreed that it was a legislative function to deliberate upon and determine the fundamental outlines of foreign policy; the executive function was to carry these policies into effect.

The crisis over the Spanish negotiations did not represent a challenge by Jay, or by any of the factions in Congress, to previous understandings about the relation of executive to legislative power in foreign affairs. No participant in the controversy, on either side or in any responsible post, so much as suggested that there should be a redistribution of authority in foreign affairs, or a diminution of the legislative role in the making of policy in that realm. In particular, no one questioned the legitimacy or appropriateness of the practice whereby Congress approved in advance the instructions that were to guide the officials who, in an executive capacity, conducted the foreign affairs of the nation. No one proposed that Congress should abdicate its responsibility for the making of foreign policy, and should instead vest the executive with a discretionary power to make basic decisions in the field of foreign relations without consulting, and without receiving the advance approval of, the legislative representatives of the nation.

The delegates of the five southern states that had consistently opposed Jay's recommendations respecting a Spanish treaty were obviously in no mood to entertain the idea of turning over to him, or to any successor of his, the power to write his own instructions. Their interest necessarily lay in making sure that the foreign policy of the United States—including any alteration of its direction or posture—should be determined by legislative not executive authority. Nor was the situation essentially different for the other side. Those who favored Jay's proposals in 1786 were not inclined to give the executive a free hand to make foreign policy throughout the indefinite future. They were well aware that a successor to Jay might favor policies the opposite of his. They voted to alter Jay's instructions, not to do away with legislative instructions altogether.

G. *John Jay's Perspective on Constitutional Problems Relating to Foreign Affairs*

Most important of all, Jay himself never at any time proposed that the authority to determine the main lines of foreign policy should be transferred from legislative to executive hands. Frustrated though he was by the dilatoriness of Congress and chagrined, no doubt, by the opposition

to his proposals that often developed there, Jay gave no evidence of doubting that the power to decide in advance the direction and the principal outlines of foreign policy belonged, rightfully and rightly, to the legislative representatives of the Nation. His report of the 3d of August 1786, outlining the terms he thought it wise to accept in a Spanish treaty, concluded with the promise that "whether they [*i.e.*, Jay's "sentiments"] accord with, or vary from, those which may here prevail, yet I shall always remember that I am to be governed by the instructions, and that it is my duty faithfully to execute the orders of Congress."[270] This was not a mere gesture of deference, for it contradicted nothing that Jay had previously said or done. The most radical of his proposals during the Spanish negotiations—a proposal that received no support even from those who favored the substance of his policies—had gone no farther than to suggest the vesting of a certain degree of policymaking authority in a committee. The committee he proposed was not to be appointed by himself as Secretary for Foreign Affairs but was to be elected by Congress from among its own members. Finally, it was to be empowered not simply to advise but to "instruct and direct" the Secretary "on every point and subject" relative to the negotiation in question.[271] Despite the suspicion with which this suggestion was greeted, it was far from a repudiation of Jay's earlier statement that it was "proper . . . to instruct Ministers on the great Points to be agitated, and to inform them how far they are to insist on some, and how far they may yield on others."[272]

Nor can it justly be argued that Jay simply accepted a system that he was bound to accept as a necessary condition of serving in the government of the Confederation as then constituted. Jay had ample opportunity to suggest fundamental changes in the system, and he did so as the movement for a federal convention advanced step by step in 1786 and early 1787.

Throughout the period leading up to the federal convention, Jay freely expressed in letters and reports his views on constitutional reform. In none of them, however, did he suggest a change in the existing distribution of authority between legislative and executive agencies in the conduct of foreign affairs. The fundamental change he sought was an increase in the authority of the federal government itself over the individual states, not some increased authority of the executive over the legislature. Commenting to Jefferson on the lack of punctuality of the United States in meeting its financial commitments abroad, Jay wrote on the 14th of July 1786: "This is owing, not to anything wrong in Congress, but to

270. 31 JCC, *supra* note 82, at 484; *see* text accompanying note 230 *supra*.
271. 30 JCC, *supra* note 82, at 323; *see* text accompanying note 241 *supra*.
272. 29 JCC, *supra* note 82, at 628; *see* text accompanying note 237 *supra*.

their not possessing the power of coercion without which no government can possibly attain the most salutary and constitutional objects."[273]

In a general statement like this, Jay was expressing an opinion shared by the other leaders working for a revitalization of the Federal Union. On one point, however, Jay made a unique, and uniquely important, contribution to the ideas that went into the Constitution as finally written. Although first offered as an answer to a problem arising in the realm of foreign affairs, Jay's proposal was the germ of what has proven to be in many ways the most significant of all the provisions of the finished Constitution, its so-called supremacy clause. Jay's proposal stemmed from his belief that the most serious weakness of the Confederation, so far as foreign relations were concerned, lay in the unwillingness of individual states to abide by the treaties made in their name and on their behalf by the United States in Congress Assembled. The inability of the latter to compel obedience not only cast dishonor on the new nation and invited retaliation, but also virtually destroyed the bargaining power of American diplomatic representatives in negotiating badly needed trade agreements.

In a long and powerful report to Congress on the 13th of October 1786, Jay examined the treaty violations that the states had perpetrated, and urged Congress to adopt a resolution which would declare that when national treaties have been "constitutionally made, ratified and published, they become, in virtue of the [Articles of] Confederation, part of the law of the land, and are not only independent of the will and power of . . . [state] Legislatures, but also binding and obligatory on them."[274] The old Congress did pass such a resolution on the 21st of March 1787.[275] It was, however, the empty gesture of an already moribund body.

Jay's idea took on new life with the meeting of the Federal Constitutional Convention two months later. The applicability of his proposal to the problem of enforcing federal laws as well as national treaties was quickly recognized.[276] Eventually the Convention broadened the scope of the principle so significantly that it became the guarantor of the constitutional system in its entirety. The clause that finally emerged in the writ-

273. 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 207 (H. Johnston ed. 1891).

274. 31 JCC, *supra* note 82, at 870.

275. 32 JCC, *supra* note 82, at 124–25; *see also id.* at 177–84.

276. The so-called New Jersey Plan, presented to the convention on 15 June 1787, provided that all acts made "by virtue & in pursuance of the powers" granted to Congress, and all treaties "made & ratified under the authority of the U. States" were to be "the supreme law of the respective States," binding their judiciaries, "any thing in the respective laws of the Individual States to the contrary notwithstanding." 1 FARRAND, RECORDS, *supra* note 85, at 245. For a more detailed account of the evolution of the clause, see Bestor, *supra* note 119, at 571–73, 577–78.

ten Constitution stipulated that the Constitution itself, federal laws "made in Pursuance thereof," and treaties entered into "under the Authority of the United States" were to be "the supreme Law of the Land," every judge, federal or state, being, by oath, "bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[277]

By his initial proposal, Jay had sought to strengthen the diplomatic standing of the United States, not by enhancing *executive* authority but by bringing *judicial* authority to bear upon the problem. The acceptance of this particular idea was important in itself. But the expansion of Jay's original idea by the Convention gave it even greater significance, for it resulted in making judicial power for the first time a genuinely effective third element in a comprehensive system of checks and balances.

This idea of checks and balances—together with its corollary, the idea that powers of different kinds must be kept separate in order to make checks and balances possible—was mentioned in Jay's preconvention writing as frequently, perhaps, as in that of any contemporary save John Adams. But Jay—unlike Adams (and unlike Montesquieu before him)—was not expressing alarm at the possibility that tyranny might result from the placement of all the various species of power in a single body. What particularly concerned Jay was a more prosaic, but more immediate, threat to representative government, one with which he had had personal experience. This was inefficiency, with all the debilitating effects that were apparent in the currently dejected state of the Confederation. "Our government," he wrote John Adams on the 21st of February 1787, "is unequal to the task assigned it, and the people begin also to perceive its inefficiency."[278] One essential remedy, as Jay saw it, would be "to distribute the federal sovereignty into its three proper departments of executive, legislative, and judicial."[279] Mentioning the departments in the same order, Jay had remarked to Jefferson on the 14th of December 1786 that "Congress is unequal to the first, very fit for the second, and but ill calculated for the third."[280] And to Washington he wrote on the 7th of January 1787: "Let Congress legislate—let others execute—let others judge."[281]

It was "[t]he executive business of sovereignty" (as contradistinguished from its legislative business) which suffered whenever undertaken by "[l]arge assemblies" with their "many wills, and those wills

277. U.S. CONST. art. VI, cl. 2.
278. 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 234 (H. Johnston ed. 1891).
279. *Id.*
280. *Id.* at 223.
281. *Id.* at 227.

moved by such a variety of contradictory motives and inducements."[282] Jay was not denying that these motives and inducements must have free play in the making of *legislative* decisions in foreign affairs as in domestic. It was for this task of seeking a consensus that Congress was judged by Jay to be "very fit." On the other hand, as Jay saw it, the carrying out of policy—its *execution*—called for organization of a different sort. To mix up and confuse the two functions of policymaking and execution was to hamper both. To sort them out and assign each to the department best fitted to perform it was, in Jay's opinion, the need of the moment. As he put it in one of his earliest letters on the subject, addressed to Jefferson on the 18th of August 1786:

> To vest legislative, judicial, and executive powers in one and the same body of men, and that, too, in a body daily changing its members, can never be wise. In my opinion, these three great departments of sovereignty should be forever separated, and so distributed as to serve as checks on each other.[283]

H. *Pre-Convention Ideas: A Summary*

The idea that powers should be *distributed* (to use Jay's term) is the very antithesis of the idea that plenary power over any one subject, whether domestic or foreign, should be vested in a single branch of government. On the eve of the Federal Convention of 1787, neither Jay nor any other leader, whether in private correspondence or public utterances, seems ever to have suggested that the making of foreign policy was exclusively, or even primarily, an executive responsibility. On the contrary, the documents of this formative period of American constitutionalism consistently treated the conduct of foreign relations as a shared responsibility, requiring action both of a legislative and of an executive kind. The distribution of power that Jay and others advocated was one that would factor out from the agglomerate of governmental functions and capabilities those that were basically executive in character, in order thereby to render unto the executive the things which are the executive's, and unto the legislature the things that are the legislature's.

Two functions and two sorts of power were involved. There was nothing abstruse or mysterious about the essential character of each. Contemporaries showed that they grasped the distinction between them, and that they understood what the difference meant where foreign affairs were concerned. Their documents were formulations of the idea that the function of the legislature was to make policy in foreign as in domestic matters; the function of the executive, to carry these policies into effect. De-

282. *Id.* at 226–27.
283. *Id.* at 210.

scending into detail, these formulations pointed out the duty of the executive to gather and communicate the information needed for wise decisions, and to recommend the best course to follow. But it was seen to be the duty of the legislature to decide, at first as well as at last, what the foreign policy of the nation should be. The aim of its deliberations should be to arrive at a consensus among the interests represented in it, and a consensus, moreover, with which the executive could agree. Once a policy should have been thus determined, it would become the executive's turn to act—to communicate with foreign governments, to negotiate or to direct negotiations, and to bring back for final approval by the legislature any agreements that he may have made in pursuance of the policy initially approved by that body. With the performance of these strictly executive functions, legislative interference was not to be countenanced, for it could produce nothing but confusion and inefficiency. If, however, circumstances should require a major reconsideration of policy, then legislative deliberation would become mandatory once more, as would also be the case whenever a negotiated agreement should become ripe for final approval or rejection.

To Jay, to the members of the old Congress, and to politically informed Americans on the eve of the Federal Constitutional Convention, the term "executive power" did not denote a concept with a vague and indefinitely extensible meaning. The evidence shows that the term had as definite and limited a purport as the companion term "legislative power." In foreign affairs, equally with domestic ones, the distinction between legislative and executive authority had been formulated in a succession of American documents stretching from Franklin's sketch of Articles of Confederation in 1775 through the reports and resolutions that stemmed from the abortive treaty negotiations with Spain in 1786. Together these documents clearly delineated—and also rigorously delimited—the specific functions that were considered executive in nature. From these varied writings one can derive a working definition of the term "executive power" as that term was used in the debates and resolutions and drafts of the Federal Constitutional Convention of 1787 and as it was incorporated in the written Constitution that came forth therefrom.

V. THE INITIAL MONTHS OF THE CONSTITUTIONAL CONVENTION, 1787

A. The Monarchical Tradition in the Conduct of Foreign Affairs

The Americans' conception of the nature of executive power differed sharply from that which had prevailed in English constitutional thinking.

The monarchical tradition of Europe had looked upon the making of foreign policy as an exclusively executive function—that is, as an inseparable part of the royal prerogative. When in 1621 the English House of Commons presumed to adopt a resolution recommending an alteration in foreign policy,[284] King James I promptly warned that body not "to argue and debate publickly of the matters far above their reach and capacity, tending to . . . breach of Prerogative Royal," and he peremptorily forbade them "to meddle with any thing concerning our Government, or deep matters of State."[285] Having remonstrated but finding their remonstrance rejected, the Commons then adopted a formal Protestation, asserting that "the arduous and urgent affairs concerning the King, State and Defence of the Realm" were "proper Subjects and matter of Counsel and Debate in Parliament," such being "the ancient and undoubted Birth-Right and Inheritance of the Subjects of England."[286] The King's response was reported as follows in the quaint language of the official record:

> His most Excellent Majesty coming this day [the 30th of December 1621] to the Council, . . . all the Lords and others of his Majesties Privy Council sitting about him, and all the Judges then in London . . . there attending upon his Majesty; the Clerk of the Commons House of Parliament was called for, and commanded to produce his Journal-Book, wherein was noted, and Entries made of . . . a Protestation concerning sundry Liberties, Priviledges, and Franchises of Parliament; with which form of Protestation His Majesty was justly offended. . . . [T]his Protestation of the Commons House, so contrived and carried as it was, His Majesty thought fit to be razed out of all Memorials, and utterly to be annihilated. . . .
>
> These things considered, His Majesty did this present day, in full assembly of his Council, and in the presence of the Judges, declare the said Protestation to be invalid, annulled, void, and of no effect: And did further, *manu sua propria* [with his own hand], take the said Protestation out of the Journal Book of the Clerk of the Commons House of Parliament, and com-

284. Commons' Petition, 3 Dec. 1621, 1 J. RUSHWORTH, HISTORICAL COLLECTIONS OF PRIVATE PASSAGES OF STATE 40–43 (1721) [hereinafter cited as HISTORICAL COLLECTIONS], *reprinted in* THE STUART CONSTITUTION, *supra* note 154, at 43–47 (also reprinted in most modern collections of English constitutional documents).

285. Letter from King James I to the Speaker of the House of Commons (Dec. 3, 1621), *reprinted in* 1 HISTORICAL COLLECTIONS, *supra* note 284, at 43–44.

286. Commons' Protestation, 18 Dec. 1621, 1 HISTORICAL COLLECTIONS, *supra* note 284, at 53, *reprinted in* THE STUART CONSTITUTION, *supra* note 154, at 47–48. The Commons had responded to the King's rebuke with the somewhat more conciliatory Commons Petition of 9 December 1621, 1 HISTORICAL COLLECTIONS, *supra* note 284, at 44–60, but the King gave another harsh answer on 11 December, *id.* at 46–52, and this provoked the Protestation here quoted.

> manded an Act of Councel [*sic*] to be made thereupon, and this Act to be entred in the Register of Council-causes.[287]

Half a century later, James's grandson, Charles II, defended with equal brusqueness what he asserted to be the royal "prerogative of making peace and war." He utterly refused "to have the manner and circumstances of leagues prescribed to me by Parliament"—something that Parliament had indeed attempted to do. "[Y]ou may rest assured," he told the members, "that no condition shall make me depart from, or lessen, so essential a part of the monarchy."[288]

By the time of the American Revolution, the prerogative was becoming less a personal power of the King and was beginning to be viewed simply as the powers exercised by the "executive part of government"[289]—that is, by ministers of the crown and by civil servants. As the ministers composing the Cabinet came to be responsible to Parliament rather than to the King for continuance in office, the distinction between prerogative (*i.e.*, executive) powers and legislative ones was in no way erased. English constitutional theory continued—and still continues—to place the control of foreign relations in the first of the two categories.[290] On the eve of the American Revolution, Sir William

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287. 1 HISTORICAL COLLECTIONS, *supra* note 284, at 53–54. Raoul Berger quotes the Commons' petition of 9 Dec. 1621 to support his contention that "legislative supervision of administration," with no "exception made for foreign affairs," had already "become a familiar parliamentary function." R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 20–21 (1974). Berger completely ignores this emphatic rejection of the Commons' claim by James I, and he likewise makes no mention of such subsequent statements as that of Charles II in 1677. *See* note 288 and accompanying text *infra* (quoting Charles II). Such a selective use of historical evidence tends to reduce to a mock-battle the constitutional struggles of the 17th century. These were the struggles that eventually achieved the rights to which Berger assigns a completely unhistorical antiquity.

288. THE STUART CONSTITUTION, *supra* note 154, at 400–01 (message of Charles II to Parliament, 28 May 1677).

289. As Blackstone put it, the prerogative vests in the King "a number of authorities and powers; in the exertion whereof consists the executive part of government." 1 W. BLACKSTONE, *supra* note 73, at 250. Elsewhere he uses the expression "the power of the executive magistrate, or prerogative of the crown," and ends with discussing "executive power" pure and simple. *Id.* at 333–35.

290. The present-day usages and terminology of the English Constitution are explained as follows in the standard manual, E. WADE & G. PHILLIPS, CONSTITUTIONAL LAW (8th ed. E. Wade & A. Bradley 1970): "The term, the Crown, represents the sum total of governmental powers and is synonymous with the Executive." *Id.* at 171. The chapter titled "The Crown" is announced to be "primarily concerned with those powers which may be exercised by the Crown without the authority of Parliament." *Id.* at 181. The manual continues:

> The prerogative powers of the Crown are with very rare exceptions to-day exercised by the Government of the day. . . . For the exercise of a prerogative power the prior authority of Parliament is not required. . . . Parliament may criticise Ministers for the consequences which result from the exercise of prerogative; Parliament too may abolish or curtail the prerogative by statute; but in regard to the exercise of the prerogative Parliament has no rights to be consulted in ad-

Blackstone in his *Commentaries on the Laws of England* dealt with the conduct of foreign affairs in a chapter with the significant title "Of the King's Prerogative." Though he used the exalted language considered appropriate to royalty, he (and at least the knowledgeable part of his readers) were aware that he was talking about "the executive part of government."[291] A few excerpts will give the flavor as well as the content of his commentary on these matters:

> With regard to foreign concerns, the king is the delegate or representative of his people. . . . In the king therefore, as in a center, all the rays of his people are united, and form by that union a consistency, splendor, and power, that make him feared and respected by foreign potentates; who would scruple to enter into any engagement, that must afterwards be revised and ratified by a popular assembly. . . .
>
> I. The king therefore, considered as the representative of his people, has the sole power of sending embassadors to foreign states, and receiving embassadors at home . . . .
>
> . . . .
>
> II. It is also the king's prerogative to make treaties, leagues, and alliances with foreign states and princes. For it is by the law of nations essential to the goodness of a league, that it be made by the sovereign power; . . . and in England the sovereign power, *quoad hoc* [as regards this particular matter], is vested in the person of the king. . . .
>
> III. Upon the same principle the king has also the sole prerogative of making war and peace. . . . [T]he reason . . . a denunciation [*i.e.*, a declaration] of war ought always to precede the actual commencement of hostilities, is not so much that the enemy may be put upon his guard, (which is matter rather of magnanimity than right) but that it may be certainly clear that the war is not undertaken by private persons, but by the will of the whole community; whose right of willing is in this case transferred to the supreme magistrate by the fundamental laws of society. . . . And whenever the right resides of beginning a national war, there also must reside the right of ending it, or the power of making peace.[292]

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vance. Certain prerogative powers could of course only be exercised if the Government were assured of parliamentary support. The Crown may declare war, but no Government could take the risk of declaring war without being assured of popular support. . . .[P]rerogative matters in relation to foreign affairs . . . and to general defence policy are the occasion of principal debates in both Houses, although legislation is not usually required, action being taken by the Government on the authority of the prerogative alone.

Id. at 184–85 (footnotes omitted).

291. 1 W. BLACKSTONE, *supra* note 73, at 250. *See also id.* at 147, 190, 240.

292. *Id.* at 252–53, 257–58.

It is obvious from all this that the constitutional theory of Great Britain (and of many other countries as well) had vested authority over foreign affairs squarely in the executive, leaving to the representative body only a right to discuss and recommend, or, in the extreme case, to deliberately block the carrying out of a foreign policy by refusing appropriations—an archaic check, too dangerous to contemplate under the circumstances of a war involving the national states of post-medieval times. The term "executive power" (to state the matter somewhat differently) was defined, in the constitutional traditions of most European countries, in such a way as to include the plenary power to decide, as well as to carry out, the foreign policy of the nation.

As the work of the Federal Convention is reviewed, the central question, so far as foreign policy is concerned, is whether the framers of the written Constitution of the United States intended to reinstate this essentially monarchical definition of executive power, substituting it for the republican constitutional arrangements that had been worked out by the old Congress and its foreign secretaries—arrangements that had marked out, along lines quite different from those employed by other nations, the respective roles of legislative and executive authority in foreign affairs.

Many twentieth-century commentators allege that the Federal Convention of 1787 did exactly that. Thus Senator John Coit Spooner, in the Senate speech of 1906 already quoted, offered this historical interpretation: "Under the confederation there was felt to be great weakness in a system that made Congress the organ of communication with foreign governments; but when the Constitution was formed, it being almost everywhere else in the world a purely executive function, it was lodged with the President."[293] As a matter of historical fact, the old Congress had not been "the organ of communication with foreign governments" in the years just before the Constitution was formed. Both Livingston and Jay had insisted, and Congress had acceded to their demand, that all communications received from or directed to foreign nations must pass through the hands of the executive (in this instance the Secretary for Foreign Affairs) in order to insure that the foreign relations of the United States were handled in an orderly and responsible fashion. In this matter the new Constitution did no more than the old Congress had done—and done more explicitly and with fuller detail—in its resolutions of the 22d of February 1782 and the 11th of February 1785.[294]

293. 40 CONG. REC. 1418 (1906). *See* note 127 and accompanying text *supra*.

294. *See* notes 226 & 234 and accompanying text *supra*.

Senator Spooner's misstatement of historical fact might be looked upon as trivial were it not for the conclusions he drew from it. The framers of the American Constitution, so Spooner argued, did more than adopt one particular practice of European origin when they made the President "the organ of communication with foreign governments."[295] According to this interpretation, the framers purposed something more fundamental. They must be understood to have imported, deliberately and intentionally, the entire English and European conception of the scope of executive power. "[T]he Constitution," said Spooner, "vests . . . the conduct of our foreign relations exclusively in the President."[296] He continued: "[S]o far as the conduct of our foreign relations is concerned, . . . the President has the absolute and uncontrolled and uncontrollable authority,"[297] save for the power of the Senate to refuse ratification of a treaty once the President has negotiated it according to his own conception of the national interest.[298]

It is the ambiguity of phrases referring to a power "to conduct the nation's foreign relations," which gives to statements like Spooner's whatever plausibility they have. The word "conduct" does not appear in the written Constitution in this context. Nevertheless it is an appropriate word to use when speaking of the power to handle the nation's negotiations with, and its communications to and from, foreign countries. Jay had "conducted" the foreign relations of the United States in this sense, while still accepting without question the right of Congress to instruct him and to decide all major questions of policy—including changes of policy—that might arise.

A radically different meaning is given to the extraconstitutional phrase about "the power to conduct the nation's foreign relations," when commentators employ it as if it signified a power in the executive to determine on his personal authority alone the foreign *policy* of the nation. It is a gross misinterpretation of the Constitution to assert (as did Spooner) that a formal expression of opinion on foreign policy by the Senate can be dismissed as "purely advisory, and not in the slightest degree binding in law or conscience upon the President."[299]

295. 40 CONG. REC. 1418 (1906).
296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.*

B. Refusal to Treat the Making of War and Peace As Executive Prerogatives

At the very outset of the Federal Constitutional Convention of 1787, the mere possibility that "executive power" might be construed to include the power to make war and peace produced an adverse reaction, immediate and sharp. The date was the 1st of June 1787, only three days after the Convention received the first of the plans presented to it, the so-called Virginia Plan. Under consideration was the plan's seventh provision, which began by proposing "that a National Executive be instituted," and ended by defining its powers in the following words: "besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation."[300]

The old Congress of the Confederation had, of course, possessed both legislative and executive powers. Powers of both sorts were bound up together in the delegation to it of the "right and power of determining on peace and war."[301] When the Federal Convention undertook to create a separate executive branch, it was obliged to consider which part of this formidable power of peace and war was legislative in nature and which executive. As we have seen, the old Congress had worked out an answer, embodied in the already-quoted resolutions creating executive departments. Delegates to the Convention were acquainted with these arrangements, but they were also aware of the tradition that Blackstone had expounded so confidently—a tradition making the executive the repository of all authority in the realm of foreign affairs. The danger that the latter concept might insinuate itself into American constitutional interpretation prompted immediate opposition to the part of the resolution that proposed to transfer to the national executive "the Executive rights"[302] formerly vested in Congress, unless and until a stricter definition of the last-quoted phrase might be forthcoming.

In the discussion of the matter on the 1st of June 1787, four of the most influential and active members of the Convention spoke directly and forcefully to the question. One was James Madison of Virginia, future President of the United States and frequently characterized as "the father of the Constitution." Also among the four speakers were two future justices of the Supreme Court, James Wilson of Pennsylvania and John Rutledge of South Carolina. Another South Carolinian was the

300. 1 FARRAND, RECORDS, *supra* note 85, at 21, 63.
301. ARTICLES OF CONFEDERATION, art. 9, *reprinted in* 9 JCC, *supra* note 82, at 915.
302. 1 FARRAND, RECORDS, *supra* note 85, at 21, 63.

other speaker: Charles Pinckney, who in 1786 had led the opposition to Jay's proposal to "forbear" navigation of the Mississippi in order to reach an agreement with Spain, but who in 1795 would himself succeed, as minister to Spain, in securing a treaty without this sacrifice.[303] All four attended the Convention from beginning to end,[304] and none of them repudiated in any later speech there the view he expressed in this initial discussion.

Pinckney was the first to speak. According to Madison's notes, "Mr. Pin[c]kney was for a vigorous Executive but was afraid the Executive powers of the existing Congress might extend to peace & war &c which would render the Executive a Monarchy, of the worst kind, towit an elective one."[305] Rutledge spoke shortly thereafter saying that "he was for vesting the Executive power in a single person, tho' he was not for giving him the power of war and peace."[306] Wilson discussed the issue more fully, his speech being reported by two of his hearers. As Madison recorded it, Wilson "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c. The only powers he conceived strictly Executive were those of executing the laws, and appointing officers, not appertaining to and appointed by the Legislature."[307] Another remark of Wilson's was recorded by William Pierce: "Making peace and war are generally determined by Writers on the Laws of Nations to be legislative powers."[308] Madison followed Wilson, and his speech (not set down in his own notes) was recorded by Rufus King as follows: "Mad[ison] agrees w[ith] Wilson in his difinition [*sic*] of executive powers—executive powers ex vi termini [by force of the term itself], do not include the Rights of war &

303. *See* note 268 *supra*.

304. *See* 3 FARRAND, RECORDS, *supra* note 85, at 586–90 (attendance record). In the final period of the Convention three committees were largely responsible for shaping the provisions of the finished Constitution, and three of the speakers quoted in the text were placed on one or another of these committees. Rutledge was chairman and Wilson a member of the Committee of Detail which was appointed on 24 July 1787 and which reported on 6 August the first draft of a constitution in fully worked-out form. 2 FARRAND, RECORDS, *supra* note 85, at 177–89. Madison was a member of the Committee on Postponed Parts (the Brearley committee), which, among other things, reported on 4 September a treaty clause in roughly the form that was finally incorporated in the finished Constitution. *Id.* at 473, 495. Madison was also a member of the Committee of Style, which gave the final polish to the document. *Id.* at 547, 582–603.

305. 1 FARRAND, RECORDS, *supra* note 85, at 64–65 (angle brackets used by the editor to distinguish interlineations or linings out in the manuscript are omitted).

306. *Id.* at 65.

307. *Id.* at 65–66 (angle brackets used by the editor to distinguish interlineations or linings out in the manuscript are omitted).

308. *Id.* at 73–74.

peace &c. but the powers sh[ould] be confined and defined—if large we shall have the Evils of elective Monarchies."[309]

At the end of the day, the Committee of the Whole (in which form the Convention at this stage was sitting) amended the proposed resolution so as to grant the national executive only the "power to carry into execution the national laws" and "to appoint to offices in cases not otherwise provided for."[310] Wilson's minimum definition of executive power was thus vindicated. Madison had sought one additional authorization: "to execute such other powers as may from time to time be delegated by the national Legislature." After objection was voiced that "improper powers might . . . be delegated," the Convention rejected this clause, even with the safeguard of an inserted qualifier, "not Legislative nor Judiciary in their nature."[311]

During the next eight weeks of debate no one moved to add anything to the extremely limited definition of executive power adopted on the 1st of June 1787.[312] Even Alexander Hamilton, the most outspoken advocate of centralization in the government and energy in the executive, accepted without question the principle that there must be a sharing of power by the legislature and the executive, both in the making of war and the making of treaties. In a plan offered to the Convention on the 18th of June, he proposed that the chief executive (whom he termed the governor) should "have the direction of war,"[313] but only "when authorized or begun,"[314] the Senate being vested with "the sole power of declaring

309. *Id.* at 70.

310. *Id.* at 63.

311. *Id.* at 66–68. It should be noted that the written Constitution contains no provision authorizing the delegation of power by Congress to the President. All such delegations of power—and they are innumerable—presumably find their justification in the so-called "elastic" or "coefficient" clause, giving Congress power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18.

312. *See* 2 FARRAND, RECORDS, *supra* note 85, at 132, 134 (compilation of resolutions adopted by 23 July). The New Jersey Plan, presented on 15 June 1787 and rejected on the 19th, contained the following definition of the powers of what was proposed to be a plural executive: "besides their general authority to execute the federal acts they ought to appoint all federal officers not otherwise provided for, & to direct all military operations; provided that none of the persons composing the federal Executive shall on any occasion take command of any troops, so as personally to conduct any enterprise as General, or in other capcity." 1 FARRAND, RECORDS, *supra* note 85, at 244; *see also id.* at 312–13. Though various provisions of the New Jersey Plan were later resurrected and formally adopted, this particular one was not. There seems, however, to have been a general consensus that the power in question was clearly an executive one, and the Committee of Detail unhesitatingly named the President commander-in-chief. *See* note 335 and accompanying text *infra*.

313. 1 FARRAND, RECORDS, *supra* note 85, at 292.

314. *Id.*

war."[315] Hamilton's language respecting the treaty power closely approximated that which the Convention in its final days decided to incorporate in the written Constitution. The chief executive, according to Hamilton's proposal, should "have with the advice and approbation of the Senate the power of making all treaties."[316] That Hamilton intended the power to be a joint one was emphasized by his reiteration of the requirement of Senate participation. In addition to the qualification that was contained in the just-quoted grant of power to the executive, there was a positive grant to the Senate of "the power of advising and approving all treaties."[317] Moreover, in a version of the plan that Hamilton subsequently elaborated, this provision was also given an emphatically negative form: "No treaty shall be made without their advice and consent."[318] Despite the acknowledged brilliance of Hamilton's speech, the Convention accepted neither his plan as a whole, nor (for the time being, at least) his suggestion of providing a role for the executive in the making of treaties.

By the end of July 1787, two months after the Convention began, a body of resolutions had accumulated which set forth various major principles of political organization, together with a few specifications of the powers to be exercised by the several contemplated governmental organs. Neither military nor diplomatic matters, however, were touched upon, except for a provision making treaties a judicially enforceable part of the supreme law of the land.[319] Executive functions were still confined to the two listed in the resolution of the first of June: carrying "into Execution the national Laws" and appointing "to Offices in Cases not otherwise provided for."[320]

C. *Work of the Committee of Detail*

On the 26th of July the Convention took a ten-day recess, having appointed a five-man committee—the so-called Committee of Detail—to produce on the basis of these resolutions a draft constitution, appropriately structured and worded to perform its ultimate legal purpose.[321] For the first time in the history of the Convention the question of explicitly

315. *Id.*
316. *Id.*
317. *Id.*
318. 3 FARRAND, RECORDS, *supra* note 85, at 622. Hamilton's speech and plan, and the several drafts and reports of it, are analyzed in detail in Bestor, *supra* note 119, at 581–91.
319. 2 FARRAND, RECORDS, *supra* note 85, at 132; *see* note 276 and accompanying text *supra*.
320. *See* note 310 *supra*.
321. 2 FARRAND, RECORDS, *supra* note 85, at 85–87, 97, 128.

distinguishing executive from legislative functions had to be squarely faced.

The process of classification began with the very first surviving document of the Committee of Detail. This was a memorandum in the handwriting of Edmund Randolph of Virginia (future attorney general of the United States). It bears evidence of having been laid before the entire five-man committee in what was apparently a "mark-up" session, for the chairman of the committee, John Rutledge, entered the word "agreed" alongside several items, and added in the margin (or by interlineation) various revisions and substitutions.[322] Both the classifications proposed in Randolph's draft and the reclassifications presumably made by the whole committee are worth examining, because they reveal not only what the committee judged the sentiments of the Convention to have been but also how few were the points on which they disagreed among themselves.

Four separate categories were recognized in Randolph's draft. After prescribing the composition of the two houses of the legislature, the document offered a list of what it labelled "the legislative powers."[323] The memoradum then went on to distribute these powers under two headings: "The powers belonging peculiarly to the representatives" (*i.e.*, to the House of Delegates, as it was denominated in this draft), and "The powers destined for the senate peculiarly."[324] Finally, under the heading "The executive," came a fourth list beginning "His powers shall be . . . ."[325]

As originally drawn up by Randolph, the general list of legislative powers consisted of nineteen numbered items, of which three were concerned with treaties and ambassadors, three with the armed forces and the making of war, two with piracy and offenses against the law of nations, four with internal threats to the peace (treason, rebellion, disputes among states, and forces permitted to be kept up by individual states),

322. The document is printed in 4 FARRAND, RECORDS, *supra* note 85, at 37–51 (a corrected version of the document printed in 2 FARRAND, RECORDS, *supra* note 85, at 137–50). For greater clarity in determining the form of Randolph's original draft and tracing the emendations made by Rutledge, it is well to consult the facsimile, consisting of nine plates, published in W. MEIGS, THE GROWTH OF THE CONSTITUTION IN THE FEDERAL CONVENTION OF 1787 (1900) (the nine plates follow page 316). The footnotes immediately following will cite both Farrand's printed text and Meigs's facsimile. That the emendations reflected committee decisions rather than the chairman's personal views is the present author's surmise, based on a comparison with comparable documents among the papers of the Continental Congress.

323. 4 FARRAND, RECORDS, *supra* note 85, at 43; W. MEIGS, *supra* note 322, at plate v.

324. 4 FARRAND, RECORDS, *supra* note 85, at 46; W. MEIGS, *supra* note 322, at plate vi.

325. 4 FARRAND, RECORDS, *supra* note 85, at 46; W. MEIGS, *supra* note 322, at plate vi.

and one with the regulation of commerce. The remaining six could be characterized as wholly domestic, though one, the power to tax, was the sine qua non of them all.[326]

Of the lists allocating power between the two houses, the first read simply: "The powers belonging peculiarly to the representatives are those concerning money-bills."[327] The second list, specifying "[t]he powers destined for the senate peculiarly" was the important one where foreign affairs were concerned, for it comprised the following three powers:

1. To make treaties of commerce
2. to make peace
3. to appoint the judiciary.[328]

Especially important, as showing what the Committee believed the Convention intended, was Randolph's list of the powers of the executive.[329] Two of the five items in this list of executive powers were taken directly from the resolution that the Convention had adopted on the 1st of June as one of its earliest acts.[330] These clauses empowered the executive "to carry into execution the national laws" and "to appoint to offices. not otherwise provided for." [331] The remaining three provisions in Randolph's list concerned the handling of the militia.[332] No role whatever

326. 4 FARRAND, RECORDS, *supra* note 85, at 43–45; W. MEIGS, *supra* note 322, at plate v.

327. 4 FARRAND, RECORDS, *supra* note 85, at 45; W. MEIGS, *supra* note 322, at plate vi.

328. 4 FARRAND, RECORDS, *supra* note 85, at 45–46; W. MEIGS, *supra* note 322, at plate vi.

329. The Committee considered giving the executive the title "Governor of the united People & States of America." 4 FARRAND, RECORDS, *supra* note 85, at 46; W. MEIGS, *supra* note 322, at plate vi. Randolph's draft had originally read "The executive"; the suggested title was added in the margin in Rutledge's hand. The Committee of Detail decided on the title "President of the United States of America" only at a later stage. It appeared in the final draft that circulated within the Committee, a document in Wilson's hand, with emendations by Rutledge. 2 FARRAND, RECORDS, *supra* note 85, at 171. The language was repeated verbatim in the draft Constitution reported to the Convention on 6 August. *Id.* at 185. This particular clause was adopted on 24 August, *id.* at 396, 401, which can be taken as the date when the title "President" was definitively adopted. Prior to the meeting of the Committee of Detail, the resolutions adopted by the Convention had referred only to "the national Executive," without giving him a specific title. *Id.* at 132, 134. Individual members, it is true, had used various terms in their remarks and plans. Most notable was Charles Pinckney's use of the term "President" in the plan he presented on 29 May 1787, the first day on which the content of the Constitution (as distinct from the rules of the Convention) was considered. 3 FARRAND, RECORDS, *supra* note 85, at 606. This may have reflected the fact that Pinckney's state of South Carolina had given that title to its chief executive in its first constitution, which was in effect from 1776 to 1778. CONSTITUTIONS, *supra* note 183, at 3243; *see also id.* at 3249. Under the Confederation there had been a president of Congress, but he was simply the officer who presided over its meetings and was in no valid sense a chief executive. ARTICLES OF CONFEDERATION, art. 9, para. 5, 19 JCC, *supra* note 82, at 219.

330. 1 FARRAND, RECORDS, *supra* note 85, at 63.

331. 4 FARRAND, RECORDS, *supra* note 85, at 46; W. MEIGS, *supra* note 322, at plate vi.

332. The three powers were as follows: "to command and superintend the militia," "to direct

was assigned to the executive in connection with treatymaking or diplomacy generally.

The alterations entered in Rutledge's hand—presumably as a result of decisions by the Committee itself[333]— effected a certain redistribution of the powers relating to foreign affairs. For the sake of completeness all should be noted, though some were so minor as actually to point up the general satisfaction of the Committee with what had originally been proposed.

The first group of changes had to do with military matters. Randolph's original draft had given the legislature power to "draw forth the militia, or any part, or to authorize the Executive to embody them." Apparently feeling that the actual drawing forth of the militia was an executive act (as the second part of this rather ambiguous clause suggested), the Committee rephrased it to read: "make Laws for calling forth the Aid of the militia."[334] The legislative function having thus been defined with greater precision, the three items dealing with the executive's power in military matters were pulled together into a single succinct but comprehensive clause. Instead of empowering him (as the original draft had rather diffusely done) to "command and superintend the militia," to "direct their discipline," and to "direct the executives of the state to call them," the executive was named the "Commander in Chief of the Land & Naval Forces of the Union & of the Militia of the sev[eral] states."[335]

Treaties had been dealt with in two places in Randolph's original memorandum—once among general legislative powers and again under "powers destined for the senate peculiarly." To avoid confusion, all mention of treaties was eliminated from the first of these lists, thereby emphasizing the unique role of the Senate.[336] A similar process of clarifi-

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their discipline," and "to direct the executives of the states to call them or any part for the support of the national government." 4 FARRAND, RECORDS, *supra* note 85, at 46; W. MEIGS, *supra* note 322, at plate vi. Oddly enough, nothing was said about commanding the *regular* armed forces, though Congress was to be authorized to "raise armies." 4 FARRAND, RECORDS, *supra* note 85, at 44; W. MEIGS, *supra* note 322, at plate v.

333. *See* note 322 *supra*.

334. 4 FARRAND, RECORDS, *supra* note 85, at 45; W. MEIGS, *supra* note 322, at plate v.

335. 4 FARRAND, RECORDS, *supra* note 85, at 46; W. MEIGS, *supra* note 322, at plate vi. It should be noted that the Committee did not include the restrictions on the military role of the executive which had been in the rejected New Jersey Plan. The New Jersey Plan "provided that none of the persons composing the federal Executive shall on any occasion take command of any troops, so as personally to conduct any enterprise as General, or in other capacity." 1 FARRAND, RECORDS, *supra* note 85, at 244.

336. The following items had been listed among legislative powers in Randolph's original draft and were stricken when it was revised by the Committee: "To make treaties of commerce Under the foregoing restrictions" (*i.e.*, the requirement of consent by 11 states to the passage of a navigation

cation resulted in the Committee's one addition to the executive's authority in foreign affairs. The power to "send Embassadors"[337] had originally been listed among general legislative powers, but had not been repeated among "powers destined for the senate peculiarly."[338] The Committee transferred it from the former to the latter, thereby placing it alongside the treatymaking power of the Senate.

At the same time, the power of "receiving embassadors" (a power not mentioned separately in the original draft) was split off from the power of sending them and added to the list of executive powers.[339] Not until some years after the Convention was it suggested that the authority to receive ambassadors is somehow the crucial power in the realm of international relations, and that the Constitution's vesting of it in the President gives him primacy in all aspects of the conduct of foreign affairs.[340] Hamilton, who first came up with this argument in 1793,[341] said exactly the opposite on the 14th of March 1788 when, in No. 69 of *The Federalist,* he urged his fellow countrymen to ratify the new Constitution, solemnly assuring them that the clause empowering the President to receive ambassadors "is more a matter of dignity than of authority."[342] It is, he continued, "a circumstance, which will be without consequence in the administration of the government," and he went on to explain that the provision was introduced for convenience' sake, to preclude the "necessity of convening the Legislature, or one of its branches, upon every arrival of a foreign minister; though it were merely to take the place of a departed predecessor."[343] The Committee of Detail and the Convention

act), and "To make treaties of peace or alliance under the foregoing restrictions, and without the surrender of territory for an equivalent, and in no case, unless a superior title." 4 FARRAND, RECORDS, *supra* note 85, at 44; W. MEIGS, *supra* note 322, at plate v. The original list of senatorial powers had included a power "[t]o make treaties of commerce" and a separate power "to make peace." The distinction between treaties and peacemaking was retained, but the second item was rephrased to read: "to make Treaties of peace & Alliance." 4 FARRAND, RECORDS, *supra* note 85, at 45–46; W. MEIGS, *supra* note 322, at plate vi.

337. 4 FARRAND, RECORDS, *supra* note 85, at 46.

338. *Id.* at 45.

339. *Id.* at 45–47; W. MEIGS, *supra* note 322, at plate v–vii. The words "receiving embassadors" are squeezed in, out of their logical order, but the handwriting is Randolph's rather than Rutledge's. This may therefore have been an afterthought of the former rather than an addition made by the Committee. W. MEIGS, *supra* note 322, at plate vii.

340. Thus Senator Spooner, in the speech of 1906 already quoted in part, spoke of the reception of ambassadors as "a tremendous power given by the Constitution to the President." 40 CONG. REC. 1418 (1906). *See* text accompanying notes 126–27 *supra.*

341. 15 THE PAPERS OF ALEXANDER HAMILTON 39, 41, 42 (Pacifus No. 1) (H. Syrett ed. 1969). *See* Bestor, *supra* note 119, at 597 n.254.

342. THE FEDERALIST No. 69 (A. Hamilton), *supra* note 76, at 468.

343. *Id.*

as a whole evidently believed that it was the sending of American ambassadors abroad that had implications for policy, not the reception of foreign ones, which they viewed as primarily a ceremonial function. Indeed, the Committee of Detail treated the power to "receive Ambassadors" as a matter of providing a channel of communication, for they coupled it, in the same sentence of their draft constitution, with the President's power to "correspond with the supreme Executives of the several States."[344]

The draft constitution which the Committee of Detail submitted to the Convention on the 6th of August 1787 allocated the various responsibilities and powers connected with foreign affairs in strict accord with the classifications proposed in Randolph's first draft as amended in Rutledge's hand. In the report it made to the Convention, various items were rearranged and rephrased, but the powers relating to foreign policy remained where they had been placed from almost the beginning of the Committee's deliberations.

The tenth article of the draft Constitution prepared by the Committee of Detail began as follows: "The Executive Power of the United States shall be vested in a single person. His stile shall be 'The President of the United States of America'. . . ."[345] The second article of the completed Constitution uses almost identical language: "The executive Power shall be vested in a President of the United States of America."[346] Unless the simple phrase "Executive Power" underwent an explosive expansion of meaning in the six weeks that elapsed between distribution of the Committee's draft and the adoption of the finished Constitution, it is impossible to argue that "Executive Power" in itself signified to the members of the Convention a wide-ranging Presidential authority to determine virtually all aspects of American foreign policy. The term could not possibly have had that meaning in the report of the Committee of Detail, for the essential powers in the realm of diplomacy were specifically bestowed elsewhere—that is to say, on the Senate exclusively. In their use of general terms like "Executive Power," the framers obviously intended that the meaning should be arrived at by observing the particular powers actually enumerated in the relevant article of the Constitution.

The draft constitution reported by the Committee of Detail did provide this kind of definition by example. A brief recapitulation is in order. The Committee's list of legislative powers continued to include the authority

344. 2 FARRAND, RECORDS, *supra* note 85, at 185.
345. *Id.*
346. U.S. CONST. art. II, § 1, cl. 1.

to "make war," "raise armies," "build and equip fleets," "call forth the aid of the militia," and "declare the law and punishment" of piracy and other acts of violence on the high seas.[347] The Senate alone, without participation either by the President or the other House, was empowered "to make treaties, and to appoint Ambassadors, and Judges of the supreme Court."[348] The President, so far as foreign relations were concerned, was made "commander in chief of the Army and Navy of the United States, and of the Militia of the Several States," and was authorized to "receive Ambassadors."[349]

VI. THE DRAFT OF THE COMMITTEE OF DETAIL UNDER DISCUSSION

Substantial changes were made by the Convention in the six weeks that remained to it after receiving in printed form the draft constitution prepared by the Committee of Detail. Some of the alterations voted during this concluding period had to do with the Presidency. The method of electing him, for example, was considered, modified, and reconsidered time after time until a complicated scheme of electors was finally accepted.[350] With respect, however, to the content and scope of the substantive powers delegated to the President, the Convention manifested no comparable discontent with the Committee's original decisions and no comparable fluctuations of opinion concerning what was desirable. The alterations actually made in provisions relating to these matters did not represent the settlement of sharply controverted issues. Instead, new phrasings often resulted from an unspectacular process that was going forward simultaneously—to wit, the gradual refinement of clauses that had been ambiguously worded or that had failed to express with sufficient exactness a consensus that already existed.

The particular alterations made by the Convention in the Committee's distribution of authority in foreign affairs must therefore be examined individually if their significance is to be accurately assessed. The task is not without its difficulties, for the Convention settled many issues by compromises that were reached by bargains within committees rather more often than by debate on the floor. Moreover, the modification of a

347. 2 FARRAND, RECORDS, *supra* note 85, at 182.

348. *Id.* at 183.

349. *Id.* at 185.

350. The long-drawn-out process of arriving at a decision is exhibited in the two and one-half columns devoted to the entry "Election of executive" in the index to 4 FARRAND, RECORDS, *supra* note 85, at 148–49.

provision dealing with domestic matters was frequently balanced by the modification of one involving foreign affairs. The Committee of Detail, for example, required a two-thirds vote for passage of a navigation act by Congress, but in a succession of steps the Convention transferred the two-thirds rule from that clause to the one relating to approval of treaties by the Senate.[351] The whole range of issues raised during the final six weeks of the Convention, and the interplay among them, having been examined at length by the present writer in another place,[352] it will here suffice to focus attention upon two groups of changes made by the Convention, which had the effect (or have been interpreted as having had the effect) of enlarging the role of the President in foreign affairs.

A. Powers Involved in the Making of War

The first of these Convention-engendered changes affected the group of powers that are connected with the waging of war. In its original catalogue of legislative powers the Committee of Detail had given Congress the power "[t]o make war."[353] When closely examined, however, the word "make" struck many delegates as ambiguous. It connoted not only the kind of decision which the framers considered to be legislative—that is, in the words of the old Articles of Confederation, "the sole and exclusive right and power of *determining* on peace and war"[354]—but also the kinds of action they conceded to be executive in nature. Among the latter were included, by common consent, both "the *direction* of war when authorized or begun" (to quote the language of Hamilton's earlier plan[355]) and "the power to repel sudden attacks" (as Madison phrased it[356]). To make sure that the President would possess unquestioned authority to do the latter was the specific and only reason given by James Madison when he and Elbridge Gerry moved, on the 17th of August 1787 "to insert *'declare,'* striking out *'make'* war."[357] The motion teetered on the brink of defeat until a second kind of ambiguity was pointed out. Rufus King

351. *Compare* draft of the Committee of Detail, art. VII, § 6 and art. IX, § 1 in 2 FARRAND, RECORDS, *supra* note 85, at 183 *with* U.S. CONST. art. II, § 2, cl. 2. *See also* text accompanying notes 452–56 *infra*.

352. Bestor, *supra* note 119, at 601–60.

353. 2 FARRAND, RECORDS, *supra* note 85, at 182.

354. ARTICLES OF CONFEDERATION, art. 9, *reprinted in* 9 JCC, *supra* note 82, at 915 (emphasis added).

355. 1 FARRAND, RECORDS, *supra* note 85, at 292 (emphasis added).

356. 2 FARRAND, RECORDS, *supra* note 85, at 318. *Compare* ARTICLES OF CONFEDERATION, art. 6, *reprinted in* 9 JCC, *supra* note 82, at 912–913 *with* U.S. CONST. art. I, § 10, cl. 3 (provisions permitting individual states to repel sudden attacks).

357. 2 FARRAND, RECORDS, *supra* note 85, at 318.

(another Massachusetts man like Gerry) remarked "that *'make'* war might be understood to 'conduct' it which was an Executive function."[358] A five-to-four majority against the motion became an eight-to-one majority in its favor, and "declare" went into the completed Constitution.[359]

The action taken on this day did not constitute a transfer of authority from the legislative branch to the executive. By clarifying the phrasing of one clause of the constitutional draft, the Convention simply recognized an executive power that had generally been considered implicit from the beginning. Not a single phrase was added to the previous definition of executive power, not even the words that Madison had used in his speech: "the power to repel sudden attacks."

The military powers of the President were, indeed, modified by later votes of the Convention, but these changes represented curtailments, not expansions, of his powers. The Committee of Detail had proposed that the President should be commander in chief of "the Militia of the several States."[360] On the 27th of August the Convention appended a qualifying phrase, "when called into the actual service of the United States,"[361] the authorization for calling it forth having already been designated a legislative power.[362]

Another significant change made by the Convention pertained to the issuance of letters of marque and reprisal—a traditional (but now obsolete) procedure which amounted (in Blackstone's words) to "an incomplete state of hostilities."[363] To Blackstone the authority to issue such commissions was part of the royal prerogative.[364] The Articles of Confederation vested this, like all other war powers, in Congress.[365] The Committee of Detail, while forbidding the power to the individual states,[366] did not assign it to either the legislative or the executive branch.

358. *Id.* at 319.

359. *Id.* at 313–14 (Journal). Madison in his Notes reported only a single rollcall, with one state (Connecticut) shifting sides in the middle. *Id.* at 319. There is no reason to doubt the accuracy of the Journal of the Convention in this instance. The detailed tally there shows four states (Connecticut, Maryland, South Carolina, and Georgia) shifting sides between the two votes. Both records agree that New Hampshire was the one state consistently voting against the alteration.

360. 2 FARRAND, RECORDS, *supra* note 85, at 185.

361. *Id.* at 422. *Cf.* U.S. CONST. art. II, § 2.

362. 2 FARRAND, RECORDS, *supra* note 85, at 182. *But cf.* U.S. CONST. art. I, § 8, cl. 15. The alteration from "call forth" to "provide for calling forth" the militia was voted on 23 August 1787, and furnished a good example of the Convention's care in distinguishing the legislative from the executive component in a particular power. 2 FARRAND, RECORDS, *supra* note 85, at 390.

363. 1 W. BLACKSTONE, *supra* note 73, at 258.

364. *Id.* at 258–59.

365. ARTICLES OF CONFEDERATION, art. 9, para. 1, *reprinted in* 9 JCC, *supra* note 82, at 915–16.

366. 2 FARRAND, RECORDS, *supra* note 85, at 187.

Had this ambiguity been allowed to remain, the British precedent might, at some future time, be invoked to justify the executive in gradually leading the nation into war,[367] ignoring the constitutional right of the legislature to participate in so crucial a decision. To foreclose such a possibility, the Convention, on the 5th of September, added a provision placing squarely in *legislative* hands the power to "grant letters of marque and reprisal."[368]

In *The Federalist,* published on the 14th of March 1788, Hamilton presented a direct comparison between the powers the British King possessed as commander in chief and those that the proposed Constitution would allow to the American President under a like rubric. Though nominally the same, the latter would be "in substance much inferior," because major elements of the royal prerogative in military affairs would "by the Constitution under consideration . . . appertain to the Legislature." In sum, said Hamilton, the military authority of the President "would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy."[369]

B. Issues Connected with the Treaty Power

The alterations voted by the Convention in the treaty clause were more extensive than those made in the provision regarding the power to make or declare war. In both cases, however, the precise meaning of the words ultimately selected must be ascertained from the debates themselves, not from a dictionary. Moreover, an exhaustive examination rather than a mere sampling of the sources is necessary if an unconscious bias toward present-day interpretations is to be avoided.

The Committee of Detail, as we have seen, proposed to vest exclusive

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367. Blackstone realistically observed that an "incomplete state of hostilities," commencing with letters of marque and reprisal, generally ended up "in a formal denunciation [*i.e.*, declaration] of war." 1 W. BLACKSTONE, *supra* note 73, at 258.

368. 2 FARRAND, RECORDS, *supra* note 85, at 505. The motion had first been made on August 18, the day after the vote to change "make" to "declare" war. *Id.* at 326.

369. THE FEDERALIST, No. 69 (A. Hamilton), *supra* note 76, at 465. In his own plan, presented to the Convention on 18 June 1787, Hamilton emphasized that the Senate was "to have the *sole* power of declaring war" and that the executive was "to have the direction of war *when authorized or begun*". 2 FARRAND, RECORDS, *supra* note 85, at 292 (emphasis added). In the elaborated plan he presented to Madison "about the close of the Convention," Hamilton added a further qualification, that the President, as commander in chief, "shall have direction of war when commenced, *but he shall not take the actual command in the field of an army without the consent of the Senate and Assembly.*" 3 FARRAND, RECORDS, *supra* note 85, at 624 (emphasis added). The last-mentioned restriction had been included in the New Jersey Plan of 15 June. *See* note 335 *supra.*

authority over treatymaking in one part of the *legislative* branch, its suggested clause reading as follows: "The Senate of the United States shall have power to make treaties, and to appoint Ambassadors . . . ."[370] The Committee did not so much as mention the President in this particular article; and in a later one dealing specifically with the executive, it assigned him only a single function in the diplomatic realm, the power to *receive* ambassadors. In sharp contrast, the finished Constitution, approved six weeks later, placed the treaty clause in the executive not the legislative article, and worded it as follows:

> He [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 . . . .[371]

The difference between these corresponding provisions of the two documents is striking enough to lend color to the contention that a momentous reversal of opinion occurred during the final weeks of the Convention. The delegates, it might appear, had abruptly abandoned their previous conviction that it was a legislative function to determine the objectives to be sought and the course to be pursued in foreign negotiations. By altering the wording and changing the location of the treaty clause, the framers might be supposed to have shown an intention to transfer the control of foreign policy from legislative to executive hands, retaining for the Senate only a last-stage power of veto over treaties brought to final form by the President and therefore embodying his own personal conception of the national interest. The result, in the opinion of influential commentators, was so unmistakable that Senator Spooner could boldly allege on the floor of the Senate itself that "under the Constitution the absolute power of negotiation is in the President and the means of negotiation subject wholly to his will and his judgment." In this already-quoted speech of 1906, Spooner explained that by "absolute power" he meant that the President "may issue to the agent chosen by him . . . such instructions as seem to him wise" and "may vary them from day to day," leaving the Senate "no right to demand that he shall unfold . . . to it, even in executive session, his instructions or the prospect or progress of the negotiation."[372]

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370. 2 FARRAND, RECORDS, *supra* note 85, at 183.

371. U.S. CONST. art. II, § 2, cl. 2.

372. 40 CONG. REC. 1418 (1906). *See also* notes 120, 124–27 and accompanying text *supra* (views similar to Spooner's).

One searches in vain the records of the Convention and the discussions of the period for the slightest bit of evidence that the framers intended any such result or that contemporaries expected the proposed Constitution to operate in this way. No one hinted that the legislature of the Union was to be deprived of its long-established authority to instruct the diplomatic representatives of the Nation. Even the opponents of ratification did not charge the document with so massive a surrender of authority to the executive. Had such an intention been suspected, the outcry against monarchical tendencies would have been even shriller than it was.

Substantial criticisms were, it is true, directed against the treaty clause as proposed by the Committee of Detail, and the resulting debates did lead, via a maze of compromises, to the revision ultimately embodied in the finished Constitution. But it was not the exclusion of the President from the treatymaking process which engendered controversy in the Convention; it was the exclusion of the House of Representatives. In addition, issue was joined over a closely-related deficiency (as critics saw it) of the draft reported by the Committee of Detail. This was the absence of any requirement for a greater-than-simple-majority vote for the approval of treaties. Though both objections sprang from the same soil—economic and sectional rivalry—each had a somewhat different background and produced a somewhat different alignment. The nature of each issue, and the past episodes that imbued each with political virulence, require preliminary examination, if a narrative of the confused debates on the treaty provision is to be understandable.

1. Objections to the Senate as the Exclusive Treatymaking Authority

That the treatymaking power should be vested in the small upper chamber of a bicameral legislature became the tacit assumption of most delegates, once the principle was accepted that two Houses should be constituted in place of the old unicameral Congress of the Confederation.[373] In the early stages of the Convention most delegates perceived the difference between the two Houses as the difference between a small body of elder statesmen holding office for long, overlapping terms, and a large popular assembly with a membership constantly changing in the

373. Under the Articles of Confederation the Congress had consisted of a single chamber. The New Jersey Plan, presented on 15 June 1787 by a group of delegates from the smaller states, proposed that the new legislature should likewise be unicameral. After the plan was voted down on 19 June, however, there was no further challenge to the idea of a bicameral legislature, which had been proposed to the Convention at the very outset in the Virginia Plan of 29 May. 1 FARRAND, RECORDS, *supra* note 85, at 20–22, 242–45, 252, 260, 276, 312–13.

aftermath of frequent elections. A body constituted in the first way would possess, it was felt, the continuity and the accumulated experience desirable for dealing with foreign relations from a long-range and national—rather than a short-range and parochial—point of view. James Wilson of Pennsylvania, for example, predicted in a speech of the 26th of June that the upper House would "probably be the depositary of the powers" relating to treaties, and he pointed out with satisfaction that its stability, resulting from the long terms of its members, would make the body "respectable in the eyes of foreign nations," thus winning for the young republic the kind of confidence prerequisite to fruitful negotiations.[374] Wilson continued to see the matter in the same light when serving on the Committee of Detail, and the other Committee members thought no differently. From the very first, accordingly, their drafts assigned the treaty power exclusively to the Senate.[375]

What no one seems to have recognized at this stage—and what historians seldom take note of, even today—was the profound alteration in the essential character of the Senate which was sure to come about as a side-effect of the so-called "great" compromise that the Convention had accepted in mid-July,[376] only ten days before turning matters over to the Committee of Detail. This, the best known of all the bargains written into the Constitution, had ended a deadlock over representation by inducing each of the competing blocs of states to settle for half a loaf. In the Senate each state was given equal voting power regardless of size, thus granting the smaller states partial satisfaction of their demand that both Houses be governed by this principle (which had prevailed under the Articles of Confederation). In the House of Representatives, on the other hand, representation was made proportionate to population, exactly as a bloc comprising the three largest states and certain allied southern ones had been demanding; but the application of the principle was limited (contrary to their wishes) to the lower House.

In its effects on domestic lawmaking, where the concurrence of the two Houses was required, this compromise struck a reasonable balance between competing interests. But if the Senate were scheduled to exercise exclusive control over treatymaking, then a significant moiety of the

374. 1 FARRAND, RECORDS, *supra* note 85, at 426. Hamilton's plan of 18 June 1787 had already proposed that the Senate (to the exclusion of the lower House) should be the repository of the power both of "approving all Treaties" and of "declaring war." *Id.* at 292. *See* note 318 *supra*.

375. 2 FARRAND, RECORDS, *supra* note 85, at 169, 183; 4 *id.* at 45–46.

376. The decisive vote was on 16 July 1787, but not until the next day did the large states decide to acquiesce. 2 FARRAND, RECORDS, *supra* note 85, at 13–14, 19–20, 25. The Convention recessed on 26 July to permit the Committee of Detail to prepare a draft constitution "conformable to the Resolutions passed by the Convention." *Id.* at 106.

intended compromise was in fact non-existent. The larger states would not have the weight to which they felt entitled when it came to the making both of commercial treaties and of agreements regarding territory and other rights—matters with an impact on domestic interests fully as great as most acts of ordinary legislation. Not, however, until the plan as a whole was on paper in the report of the Committee of Detail, did the members of the Convention awake to this unanticipated situation. When they did so, the inclusion of the House of Representatives in the treatymaking process became the first major demand to be discussed.

It is worth observing, parenthetically, that the long-range consequence for foreign affairs of the constitutional compromise on representation has largely escaped the notice even of present-day students of constitutional history. By giving each state, regardless of size, an equal vote in the Senate, the compromise made that body almost automatically the arena for last-ditch defenses of special state and sectional interests—a fact spectacularly demonstrated during the slavery dispute of the ensuing century. As the result of a compromise which left foreign affairs out of account, the legislature's share in the making of foreign policy ended up in the more sectionally-minded branch, rather than in the kind of body envisaged by the framers at the outset of the Convention—to wit, a council-like chamber, with balanced representation of all parts of the country, its members protected by long terms of office from undue local pressures.

The loss of such a nationally oriented and nationally minded legislative body to take responsibility for foreign affairs has undoubtedly facilitated the increasing dominance of the executive over foreign policy, for there is considerable plausibility to the argument that the President is the only elected official with a national constituency and thus the only one free enough from local pressures to be able to make foreign policy in terms of the interests of the nation as a whole rather than of one or more of its parts.

Consequences of this ultimate sort are well worth pondering today, but they were beyond the horizon of the men who debated the treaty clause in the final weeks of the Federal Convention. The immediate question for them was the way the interests of particular states would be affected if the treaty power were to belong to a body that represented the states as states, thereby denying due weight to the major centers of population. James Wilson of Pennsylvania had, at an earlier stage in the proceedings, expressed the opinion that the treaty power belonged in the small upper house, and as a member of the Committee of Detail he had given that principle embodiment in its draft constitution. But it was he who, on the 7th of September, moved an amendment to the treaty clause which would

"add, after the word 'Senate' the words, 'and House of Representatives.' "[377] He was responding to the realization that populous commercial states like his own might find their interests neglected or even discriminated against in treaties negotiated under the auspices of a body dominated by the less populous states, with economic interests of a different and perhaps antithetical sort.[378]

Other interests besides those connected with foreign commerce might also be at stake in treaty negotiations, and these could be jeopardized in treaties made by a body wherein representatives of a majority of the population could be outvoted by those representing merely a majority of the states, many of them small. One other such interest was brought to the fore by delegates from the largest of all the states in population, namely Virginia, which was also the largest in terms of territory claimed in the West. George Mason of that state voiced alarm on the score of possible territorial cessions when he delivered the very first speech of the Convention denouncing the monopoly of the treatymaking power by the Senate. On the 15th of August Mason made the startling assertion that the Senate could "sell the whole Country by means of treaties," by which he meant (as he went on to explain) that the body could "alienate territory, &c. without legislative sanction."[379] Another economic interest that could be harmed by an ill-considered treaty was the fishing industry of New England. Elbridge Gerry of Massachusetts (the third of the trio of states contemporaneously recognized as "large") made the point in a speech of the 7th of September. "In Treaties of Peace," he said, "the dearest interests will be at stake, as the fisheries, territories &c."[380]

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377. *Id.* at 538.

378. Wilson, in a speech on 23 August 1787, warned that "the Senate alone can make a Treaty, requiring all the Rice of S[outh] Carolina to be sent to some one particular port." *Id.* at 393. What he had in mind were commercial treaties which, in line with mercantilist thinking, would confine the export of certain commodities to designated ports, thus discriminating against others, as well as burdening the exporter.

379. *Id.* at 297.

380. *Id.* at 541. Though Mason was actually speaking to the question of a two-thirds rule, others were thinking in terms of the inclusion of the House of Representatives as a safeguard of the fisheries. Under this same date of 7 September, Madison recorded a motion, perhaps never actually offered, which would have provided that:

> no Treaty shall be made without the concurrence of the House of Representatives, by which the territorial boundaries of the U.S. may be contracted, or by which the common rights of *navigation* or *fishery* recognized to the U. States by the late treaty of peace, or accruing to them by virtue of the laws of nations may be abridged.

4 FARRAND, RECORDS, *supra* note 85, at 58 (emphasis in original). This draft may have been intended as a consolidation of points made in a motion actually offered by Williamson and Spaight of North Carolina and in an amendment by King of Massachusetts. 2 FARRAND, RECORDS, *supra* note 85, at 543; *see also id.* at 534.

2. *A Two-Thirds Rule for Treaties*

Failure to include in the treatymaking process the legislative branch wherein size of population carried weight, had raised in new form the conflict between large states and small that was as old as the Confederation itself. Likewise deeply rooted in the past was the second major issue that figured in the Convention debate on the treaty clause. This was the question whether a two-thirds vote should be required for the approval of treaties or whether a simple majority would suffice. Instead of pitting large states against small, however, this issue produced an alignment of a different sort—a confrontation between the southern states with their plantation base and their extensive interests in western land, and the maritime and commercial states of the north and east, small and large alike.

Upon the minds of most delegates were the scars of the bitter conflict (already examined) that had arisen the previous year, 1786, over negotiations with Spain.[381] The bloc of five southern states had then fought to the bitter end against modifying the instructions to the Secretary for Foreign Affairs, a modification that would have permitted him to "forbear" the claim to free navigation of the Mississippi River. They had won a de facto victory by invoking and ingeniously construing the two-thirds requirement in the Articles of Confederation. To these states, and to those that feared the possible surrender of other rights, a continuance of the two-thirds rule seemed imperative as a defense of regional economic interests.

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381. *See* text accompanying notes 238–69 *supra*. Frequent allusions to the issue of Mississippi navigation were made in the Federal Convention and in the subsequent state ratifying conventions. Especially interesting in this connection is a letter to Madison from Hugh Williamson, who had served in the Convention as a delegate from North Carolina. Writing when the Virginia ratifying convention was about to begin, Williamson alluded to the widespread belief in Kentucky (still part of Virginia) "that in case of a new Gov[ernmen]t the Navigation of the Mississippi would infallibly be given up." Williamson then suggested an argument for Madison to use in rebuttal:

> Your Recollection must certainly enable you to say that there is a Proviso in the new Sistem which was inserted for the express purpose of preventing a majority of the Senate or of the States, which is considered as the same thing, from giving up the Mississippi. It is provided that two thirds of the Members present in the senate shall be required to concur in making Treaties, and if the southern states attend to their Duty, this will imply 2/3. of the States in the Union together with the President, a security rather better than the present 9 States, especially as Vermont & the Province of Main[e] may be added to the Eastern Interest; and you may recollect that when a Member, M[r.] [James] Willson [*sic*] objected to this Proviso, saying that in all Gov[ernments] the Majority should govern, it was replyed that the Navigation of the Mississippi, after what had already happened in Congress, was not to be risqued in the Hands of a meer Majority, and the Objection was withdrawn.

Letter from Hugh Williamson to James Madison (June 2, 1788), *reprinted in* 11 THE PAPERS OF JAMES MADISON 71 (R. Rutland ed. 1977) (punctuation added and footnote omitted). *See also* Letter from James Madison to George Nicholas (May 17,1788), *id.* at 44. Numerous references under "Mississippi River" are also found in the indexes to volumes 10 and 11 of this work, and in the index to FARRAND, RECORDS, *supra* note 85.

On the other hand, the commercial states had hoped in 1786 for a treaty with Spain that would open up trade across the Atlantic, and seven of these states, comprising a simple majority of the whole number in the Union, had been willing to alter Jay's instructions in such a way as to permit negotiation of a trade treaty with Spain, even at the price of "forbearing" the Mississippi navigation as Spain was demanding. To these states, whose need for better access to foreign markets was urgent, a two-thirds rule was a roadblock that any minority could erect at will against a treaty beneficial to a majority, or even against a preliminary negotiation looking toward such a possibility.

Requirements for a two-thirds vote rather than a simple majority had been a central feature of the Articles of Confederation, reflecting the fact that the Confederation was a union of states each of which reserved "its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not . . . expressly delegated to the United States, in Congress assembled."[382] Accordingly the Articles forbade the exercise of any but the most routine functions "unless nine states assent to the same"[383]—that is, two-thirds of the total number, the Union being then composed of thirteen states. Among the substantive powers specifically subjected to this stringent two-thirds rule were those involved in the making of war and the making of treaties or alliances, as well as those connected with finance.[384]

3. *The Balancing of Sectional Economic Interests*

The growing ineffectuality of the Confederation could be traced in part to the nine-states rule, for the absences of only five state delegations sufficed to paralyze Congress completely. A stated purpose of the Philadelphia Convention was to "render the federal constitution adequate to the exigencies of Government,"[385] and this implied rather clearly the elimination or reduction or modification of rules restricting the power of Congress to act by majority vote. On the other hand, restrictions of some sort on majority rule seemed to many even more necessary, in view of the extensive new powers that the Convention was delegating to the federal govenment. Certain of these—especially the power to regulate foreign and interstate commerce and the power to tax—would have as enor-

382. ARTICLES OF CONFEDERATION, art. 2, *reprinted in* 19 JCC, *supra* note 82, at 214.

383. *Id.*, art. 9, para. 6, *reprinted in* 19 JCC, *supra* note 82, at 220.

384. *Id.*

385. Resolution of [the old] Congress, 21 February 1787, 3 FARRAND, RECORDS, *supra* note 85, at 14 (declaring it "expedient" that the Constitutional Convention be held).

mous an impact on regional economic interests as the pre-existent treaty power itself. In connection with matters like these there was steady pressure for a continuance of the kind of veto that a two-thirds rule would furnish to a well-organized minority.

The struggle that resulted was described by Madison in a detailed summary of Convention proceedings that he set down for Jefferson's benefit in a letter written less than six weeks after adjournment. Discussing the problem of "the adjustment of the different interests in different parts of the Continent," Madison noted the shades of opinion among the delegates:

> Some contended for an unlimited power over trade including exports as well as imports, and over slaves as well as other imports, some for power, provided the concurrence of two thirds of both Houses were required; some for such a qualification of the power, with an exemption of exports and slaves, others for an exemption of exports only. The result is seen in the Constitution.[386]

It was the Committee of Detail that first attempted to find an acceptable balance among the various demands. Out of the question was a blanket rule requiring a two-thirds majority for all decisions. The Committee was obliged to pick and choose among the powers to which restrictions might appropriately be applied. It concluded to prohibit completely any taxes on exports and any laws that would forbid or tax the importation of slaves. It applied a two-thirds rule (in the form of a requirement of "the assent of two thirds of the members present in each House") to navigation acts and to the admission of new states. And it left the Senate free to make treaties by simple majority vote.[387] Every single one of these recommendations was sharply challenged in the subsequent debates on the floor of the Convention. All became involved, one way or another, in the complicated series of compromises that were then worked out.[388] In the end, only the ban on taxation of exports emerged unchanged in the finished Constitution.[389]

The Committee's decision to leave the treatymaking power free of restraints was among the most controversial of its several recommendations. On this particular matter there had been disagreement within the Committee itself, as there does not appear to have been on other deci-

386. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *reprinted in* THE PAPERS OF THOMAS JEFFERSON, *supra* note 186, at 279.

387. Draft Constitution of the Committee of Detail, art. VII, §§ 4 & 6; art. IX, § 1; art. XVII; 2 FARRAND, RECORDS, *supra* note 85, at 183, 188.

388. *See* Bestor, *supra* note 119, at 623–60 (detailed analysis of various compromises).

389. U.S. CONST. art I, § 9, cl. 5.

sions. The first preliminary draft considered within the Committee (drawn up by Edmund Randolph of Virginia) had tied together commercial regulations, navigation acts, and treaties, and had subjected all alike to a restriction even more stringent than a two-thirds rule. Randolph's original manuscript had presented a list of "the legislative powers; with certain exceptions; and under certain restrictions." The relevant sections, before committee emendation, read as follows:

2. To regulate commerce
   Exceptions
   1. no Duty on exports
   2. no prohibition on such Importations of inhabitants or People as the sev[era]l States think proper to admit
   3. no duties by way of such prohibition.
   Restrictions
   1. A navigation act shall not be passed, but with the consent of eleven states in the senate and 10 in the house of representatives.
   2. Nor shall any other regulation—and this rule shall prevail whensoever the subject shall occur in any act.
3. To make treaties of commerce under the foregoing restrictions
4. To make treaties of peace or alliance
   [1] under the foregoing restrictions, and
   [2] without the surrender of territory for an equivalent
   [3] and in no case, unless a superior title.[390]

In what appears to have been its mark-up session, the Committee substituted "2/3ds of the Members present of the senate and the like No. of the house of representatives" in the clause on navigation acts, and it struck out the paragraphs under the main headings numbered 3 and 4, dealing with (and restricting) treatymaking. These changes left untouched a later section of Randolph's manuscript, which mentioned treatymaking again among "[t]he powers destined for the Senate peculiarly," but which said nothing about a two-thirds or other restrictive rule.[391] The final report of the Committee of Detail conformed to these changes, applying (as we have seen) a two-thirds rule to navigation acts but none to treaties.

390. 4 FARRAND, RECORDS, *supra* note 85, at 43–44; W. MEIGS, *supra* note 322, plate v. (In the extract as printed here, the numerals in square brackets have been supplied in order to indicate more clearly the subdivisions implicit in the manuscript. Also deleted, without marks of elision, have been the words "The lawful territory," obviously Randolph's false start on the wording of paragraph 3: "To make treaties . . .").

391. 4 FARRAND, RECORDS, *supra* note 85, at 45–46; W. MEIGS, *supra* note 322, at plate vi.

4. Earliest Discussions of the Treaty Power on the Floor of the Convention.

All the controversies within the Committee of Detail moved to the Convention floor, of course, once the draft constitution was reported to it. On his printed copy, George Mason (like Randolph, a Virginian) wrote in the margin opposite the treaty clause as reported: "As Treaties are to be the Laws of the Land & commercial Treaties may be so framed as to be partially injurious, there seems to be some necessity for the same Security upon this subject as in the 6th. Section of the 6th. Article."[392] The reference was to the provision reading: "No navigation act shall be passed without the assent of two thirds of the members present in each House."[393]

As Mason's comment indicated, commercial treaties rather than treaties of peace were at the forefront of members' minds. Problems raised by the treaty power were so intertwined with issues relating to federal powers of economic regulation that each of the important debates on the treaty clause occurred in the context of efforts, under way or just completed, to work out compromises on questions that were largely of a domestic nature. When treatymaking was discussed, attention focussed primarily on the two issues (already analyzed) that had the clearest sectional implications, namely: the Senate monopoly of treatymaking and the absence of a two-thirds rule.

From time to time, but only sporadically, the idea of giving some recognized role to the President crept into the discussion, but without any fanfare of advocacy or any outcry of disapproval. The absence of controversy on the matter is almost conclusive proof that no radical change from previously established practices was contemplated or apprehended. The casual way in which the idea of Presidential participation in treatymaking was brought forward, and the equanimity with which it was accepted into the constitutional scheme, can best be shown be examining systematically and in their entirety the debates that took place on the treaty clause.

The draft constitution prepared by the Committee of Detail was distributed to the delegates in printed form on the 6th of August 1787, and the Convention proceeded to consider it clause by clause. Though discus-

392. 4 FARRAND, RECORDS, *supra* note 85, at 53. Moreover, in the margin opposite the provision empowering the executive to "receive Ambassadors" and to "correspond with the Supreme Executives of the Several States," Mason wrote: "This was not the Idea of the Convention." *Id.* Mason was presumably objecting to the grant to the executive of the power to receive ambassadors.

393. 2 FARRAND, RECORDS, *supra* note 85, at 183.

sion did not reach the article dealing with the Senate and the treaty power until the 23d of August (two and a half weeks later), at least one significant debate occurred earlier, on the 15th,[394] when treatymaking was brought into the discussion of a different aspect of senatorial power, namely, the role of that chamber in the enactment of money bills.

The background of the dispute was a provision of the so-called "great" compromise, which had resolved the dispute over representation in the two Houses. One provision of the compromise, considered important by many (but not all) delegates from the larger states, had directed that "all Bills for raising or appropriating money" were to originate in the lower House, where representation was proportionate to population, and were not to be amended by the upper House.[395] The model, of course, was the English Parliament, and the interests protected were those of the larger states, from which the major portion of federal revenue would have to come.

The Committee of Detail included this provision, as it was bound to do, in its draft constitution.[396] Delegates from the smaller states immediately mapped a campaign to eliminate the restriction on Senate participation.[397] By the 8th of August they were successful,[398] owing largely to the fact that several delegates from the larger states agreed with Madison, who announced that he considered the provision to be "of no advantage to the large states."[399] The issue was far from dead, however. The

394. Prior to the 15th of August, treaty matters were mentioned in an incidental way on two occasions. After providing for two Houses of Congress, the draft of the Committee of Detail had gone on to say that "each . . . shall in all cases have a negative on the other." *Id.* at 177. On the 7th of August Mason pointed out that "[t]reaties are in a subsequent part declared to be laws," and "will be therefore subjected to a negative; altho' they are to be made as proposed by the Senate alone." *Id.* at 197. Madison recorded an incidental remark by Gouverneur Morris: "Treaties he thought were not laws." *Id.* This did not develop into a debate on treaties, and the phrase about a negative was struck out as unnecessary, the requirement of assent by both houses being a full equivalent. *Id.*

On the 11th of August the requirement that each House publish its journals came up for discussion. The Committee of Detail had required publication and had provided no exceptions. *Id.* at 180. Several were proposed on the 11th of August, among them the following: "except such as relate to treaties & military operations." *Id.* at 260. This phrase was rejected, and instead the Convention adopted essentially the same formula that appears in the finished Constitution: "except such parts thereof as in their judgment require secrecy." *Id.* at 257, 260; *cf.* U.S. CONST. art. I, § 6, cl. 3.

395. 2 FARRAND, RECORDS, *supra* note 85, at 14.

396. *Id.* at 178.

397. *See id.* at 191, 210–11 (James McHenry's memoranda relating to caucuses of the Maryland delegation).

398. *Id.* at 224–25. The motion to strike out the section carried by seven states to four with only Massachusetts among the three largest states voting to retain it.

399. *Id.* at 224 (statement made on 8 August). *See id.* at 233, 276–77 (Madison's later statements on the 9th and 13th). *See also id.* at 224, 233–34, 274–76 (speeches on the same side by two Pennsylvania delegates, Wilson and Gouverneur Morris).

decision was reconsidered; a substitute formulation was voted down;[400] and then, on the 15th of August, a compromise was proposed, which would forbid the Senate to originate financial measures but permit it to amend them.[401]

It was in this context, on this same day, that the treaty clause was brought into discussion. George Mason of Virginia had consistently fought to keep the purse strings firmly in the hands of the popular as against the "aristocratic" branch.[402] Pursuing this point, he alluded in his opening speech on the 15th of August to the exclusive power of the Senate over treaties, which must, he felt, be balanced by an exclusive power in the House to determine the provisions of money bills. Elaborating on the theme that the Senate "could already sell the whole Country by means of Treaties,"[403] he addressed an *argumentum ad hominem* to the southernmost of the states. "If," he said, "Spain should possess itself of Georgia therefore the Senate might by treaty dismember the Union."[404]

There were speeches on both sides of the question of money bills, but only two of the seven speakers brought up the matter of treaties, and only one of these said anything about a possible role for the executive branch in the process of treatymaking.[405] This speaker was a newly arrived delegate from Maryland, John Francis Mercer. Madison's notes provide the only record of his speech—an entry that must be quoted here in full:

> Mr. Mercer should hereafter be ag[ain]st returning to a reconsideration of this section. He contended (alluding to Mr. Mason's observations) that the Senate ought not to have the power of treaties. This power belonged to the Executive department; adding that Treaties would not be final so as to alter the laws of the land, till ratified by legislative authority. This was the

400. *Id.* at 230, 232–34, 262–63, 273–80. The debate on 13 August was recorded with exceptional fullness by Madison who felt strongly on the issue. *Id.* at 273–80. In the vote at the end of the day, the Virginia delegation was so divided that Washington, though chairman of the Convention, cast his vote as a member of the Virginia delegation, privately explaining to Madison why he took the opposite side from the latter. *Id.* at 280.

401. *Id.* at 294, 297. At the end of the day it was voted to postpone the matter, which did not come up again until 5 September, when the Committee on Postponed Parts reported a compromise essentially the same as that incorporated in the finished Constitution. Like the proposal made on 15 August, it required that measures originate in the House but permitted the Senate to amend them. The final version applied, however, only to "Bills for raising revenue," not to appropriations. *Id.* at 505. *See id.* at 552, 568 (later history of the clause); U.S. CONST. art. I, § 7, cl. 1 (final version).

402. *See* 2 FARRAND, RECORDS, *supra* note 85, at 224, 233, 273–74 (Mason's speeches on 8, 9, and 13 August 1787).

403. 2 FARRAND, RECORDS, *supra* note 85, at 297.

404. *Id.* at 297–98.

405. Treatymaking was discussed by Mason in two separate speeches, and by Mercer in one. The other speeches and motions did not stray from the subject of money bills. *Id.* at 297–98.

> case of Treaties in Great Britain; particularly the late Treaty of Commerce with France.[406]

Mercer's principal object, it is clear, was to take the treaty power away from the Senate. He seems to have been saying that he would turn most of that power over to the executive, though he did demand participation by both Houses in the ratification of treaties, whenever the latter operated to alter the laws of the land. It is legitimate to interpret him as proposing to vest the control of foreign policy almost wholly in the President, subject only to the aforesaid ratification of a particular class of treaties. Mercer's speech has therefore become a prime text in arguments upholding the principle of the Presidential dominance over foreign affairs and attributing that principle to the Founding Fathers.

The question, of course, is how far one is entitled to regard Mercer's speech as representing the views of anyone but himself. No statement comparable to his is to be found anywhere else in the records of the Convention. Furthermore, his contact with the other delegates was of the briefest sort. He did not arrive until the 6th of August, the day the Committee of Detail distributed its draft, and he departed after the end of the session of the 17th, never to return.[407] He made no apparent effort to discover the ideas and arguments put forth in the Convention during the initial two and a half months that he missed. Instead, on the second day of his attendance he peremptorily announced "that he did not like the system" and "would produce a better one."[408] He then proceeded to make no less than seventeen speeches during the ten or eleven sessions at which he was present.[409] No coherent political philosophy is discoverable in this display of loquacity. On one occasion Mercer denounced "those speculating legislatures which are now plundering [the people];"[410] but on another he criticized "the mode of election by the peo-

406. *Id.* at 297. One earlier remark by Mercer is relevant. Under discussion was a provision directing the regular publication of the journals of the two Houses, "except such part of the proceedings of the Senate, when acting not in its Legislative capacity as may be judged by that House to require secrecy." *Id.* at 259. Mercer objected to the exception, not because of the secrecy involved but because the provision "[i]mplies that other powers than legislative will be given to the Senate, which he hoped would not be given." *Id.* at 259 (punctuation supplied).

407. *Id.* at 173, 317; 3 *id.* at 589.

408. 2 FARRAND, RECORDS, *supra* note 85, at 212. This remark was made to a caucus of the Maryland delegation. The next day (8 August) on the floor of the Convention he "expressed his dislike of the whole plan, and his opinion that it never could succeed." *Id.* at 215.

409. *Id.* at 205, 215, 216, 217, 218, 251, 259, 262, 270, 272, 284–85, 288–89, 297, 298, 307–08, 309, 316. This does not include certain parliamentary moves (such as the seconding of motions) for which no accompanying speech was recorded.

410. *Id.* at 285.

ple'' and suggested ''that Candidates ought to be nominated by the State Legislatures''[411]—on holiday, one must suppose, from their everyday business of plundering.

Thomas Jefferson had observed Mercer at close range three years earlier when both were members of the Virginia delegation to the Congress of the Confederation. Jefferson's characterization of his colleague in a letter of the 24th of April 1784 to Madison corresponds to the picture that emerges from the records of the Federal Convention. Wrote Jefferson:

> Mercer is acting a very extraordinary part. He is a candidate for the secretaryship of foreign affairs and tho' he will not get the vote of one state, I beleive [*sic*] he expects the appointment . . . . Vanity and ambition seem to be the ruling passions of this young man, and as his objects are impure, so also are his means. Intrigue is a principal one on particular occasions, as party attachment is in the general. He takes now about one half of the time of Congress and in conjunction with [Jacob] Read [of South Carolina] and [Richard Dobbs] Spaight [of North Carolina] obstruct business inconceivably.[412]

Jefferson retained the same opinion to the end of his life. In his autobiography, written at the age of seventy-seven, he described Mercer as ''afflicted with the morbid rage of debate,'' who ''heard with impatience any logic which was not his own.''[413]

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411. *Id.* at 216. A masterpiece of confused thinking was his speech supporting a motion by Madison to give a veto power over legislation both to the executive and to the judiciary. Mercer ''heartily approved the motion,'' on the extraordinary ground that ''that the Judiciary ought to be separate from the Legislative'' and also ''independent of that department.'' *Id.* at 298. Oblivious to any inconsistency with the motion he was supporting, Mercer went on to announce that ''[h]e disapproved of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be uncontroulable.'' *Id.*

On the executive power Mercer was equally inconsistent. By his second day at the Convention he was compiling a list of delegates whom he suspected of being ''for a king.'' *Id.* at 192; *see also* 3 *id.* at 319–24 (subsequent controversy). A week later however, he was insisting that the executive must be given extensive patronage powers to strengthen it for a battle against the aristocratic tendency of legislatures. 2 *id.* at 284–85, 288–89. One consistent position Mercer did maintain: opposition to residence requirements for election to federal office. *Id.* at 217, 218, 270, 272. He himself had just transferred his residence from Virginia (for which he had sat in the old Congress) to Maryland (which he now represented in the Convention).

412. Letter from Thomas Jefferson to James Madison (April 24, 1784), *reprinted in* 7 THE PAPERS OF THOMAS JEFFERSON, *supra* note 186, at 119. (The italics used by this editor to indicate words written in code are here omitted; some punctuation has been added). *See also* 7 LETTERS OF MEMBERS, *supra* note 197, at 49, 536 (characterizations of Mercer by Madison and Monroe). As a sample of Mercer's rhetorical style, see his letter of 23 Sept. 1784 to Jacob Read, wherein he wrote that it would be ''a prostitution of the name of Government to apply it to such a vagabond, strolling, contemptible Crew as Congress.'' *Id.* at 591. In the midst of these controversies he challenged another member to a duel. *Id.* at 534. On Mercer, see also J. GOEBEL, JR., ANTECEDENTS AND BEGINNINGS TO 1801, at 366 (1971) (1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES (P. Freund ed.)).

413. 7 LETTERS OF MEMBERS, *supra* note 197, at 501 n.8.

Mercer was obviously the last person to whom one should turn for an accurate reflection of the mood and the prevailing ideas of the Convention. He was also the least likely of all the delegates to have swept the Convention into a repudiation of precedent and of its own previously-enunciated views on the essentially legislative character of the treaty power. His ill-digested proposals, reflecting more vanity than thought, would hardly have exercised much influence, even if he had bothered to remain until the treaty clause came up for formal consideration in the regular course of proceedings. By that time, however, Mercer had drifted off home, there to fight against ratification.[414]

VII. THE CRUCIAL DECISIONS ON THE TREATY POWER

When the Convention finally reached the treatymaking provision, on the 23d of August 1787, it was again in the throes of a search for compromise, this time on issues with economic implications similar to those raised by the treaty clause itself. The report of the Committee of Detail, it will be remembered, had allowed treaties to be made by simple majority vote, an idea that was anathema to the southern states, which had relied on a two-thirds rule in the bitter sectional conflict of 1786 over negotiations with Spain.[415] At the same time, however, the Committee of Detail did adopt the southern position on three other issues by proposing an absolute bar to federal interference with the slave trade, another absolute prohibition of export duties, and a requirement that navigation acts receive the approval of two-thirds of the members present in each house.[416]

A divisive and largely sectional debate on these three issues reached menacing proportions on the 21st and 22d of August,[417] just before the treaty provision came up for discussion. The ban on export taxes was accepted by a vote of seven states to four on the 21st,[418] but on the 22d the other two clauses (relating to the slave trade and to navigation acts) were sent to committee, in the hope (as Gouverneur Morris put it) that

414. In his battle against ratification by Maryland, Mercer, it was reported, went so far as to circulate a rumor that certain features of the proposed Constitution were the fruit of a plot involving the French minister. Letter from Daniel Carroll to James Madison (May 28, 1788), *reprinted in* 3 FARRAND, RECORDS, *supra* note 85, at 305.

415. *See* text accompanying notes 238–69 & 381 *supra*.

416. Draft Constitution reported by the Committee of Detail, art. VII, §§ 4 & 6. 2 FARRAND, RECORDS, *supra* note 85, at 183. *See also* note 387 *supra*.

417. 2 FARRAND, RECORDS, *supra* note 85, at 359–75.

418. *Id.* at 363–64.

"[t]hese things may form a bargain among the Northern and Southern States."[419]

A. The Debate of the 23d of August 1787

While sectional bargaining went on behind the scenes in committee, the Convention itself, on the 23d of August, confronted the treatymaking provision for the first time face to face instead of by indirection. The proceedings of this day began with a sharp debate on the control of the militia, in the course of which states-rights views were so heatedly canvassed that a moderate member had to remind the assembly that "[t]he General & State Govts. were not enemies to each other, but different institutions for the good of the people of America."[420] This might be so, but the wrangle continued when an unsuccessful attempt was made by Charles Pinckney of South Carolina to revive an extremely radical provision for federal supremacy which the Convention had once approved and then rejected. The motion would permit Congress "[t]o negative all laws passed by the several States interfering in the opinion of the Legislature [of the United States] with the General interests and harmony of the Union."[421] Wilson of Pennsylvania "considered this as the key-stone wanted to compleat the wide arch of Government we are raising,"[422] whereas Rutledge of South Carolina exclaimed: "If nothing else, this alone would damn and ought to damn the Constitution."[423] The proposal was finally withdrawn by the mover,[424] and at the end of the day the Convention took up the provision giving the treaty power to the Senate without restrictions.

In the end, the debate of the 23d of August on treatymaking was in-

419. *Id.* at 374.

420. *Id.* at 386 (speech of John Langdon of New Hampshire).

421. *Id.* at 390. The original Virginia Plan of 29 May 1787 had included a similar provision, but with a somewhat more limited scope, the proposed congressional veto reaching only to state laws "contravening in the opinion of the National Legislature the articles of Union." 1 *id.* at 21. This was accepted without dissent on 31 May, on motion of Benjamin Franklin. *Id.* at 54. Then on 8 June Charles Pinckney moved to extend this veto power to "all Laws which they [the National Legislature] sh[oul]d judge to be improper." *Id.* at 164. Despite vigorous advocacy by Madison and Wilson, the change was voted down. *Id.* at 164–68. Finally, on 17 July the entire provision for a federal veto of state laws was rejected. 2 *id.* at 27–28.

422. *Id.* at 394.

423. *Id.*

424. This action was taken by the mover, Charles Pinckney. *Id.* at 391–92. Madison continued for some time to feel that such a veto ought to have been adopted, and in a letter to Jefferson on 24 October 1787 (a little more than five weeks after the conclusion of the Convention), he gave his reasons at length. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *reprinted in* 7 THE PAPERS OF THOMAS JEFFERSON, *supra* note 186, at 273–79.

conclusive, for the entire provision was finally referred back to the Committee of Detail,[425] after Randolph observed "that almost every Speaker had made objections to the clause as it stood."[426] The debate did, however, raise certain important questions that would eventually have to be answered, and did bring to the fore one idea that deserves attention in any consideration of the implications of the treaty provision as finally adopted.

Though far from uppermost in the minds of the delegates themselves, the question of Presidential participation in treatymaking was (from the point of view of this article) the most significant of the matters discussed on this occasion. In assigning the treaty power to the Senate alone, the Committee of Detail (as already noted) had given no indication of a possible role for the President, despite the inescapable fact that various functions connected with diplomacy were necessarily executive in nature. The Congress of the Confederation had recognized this truth when it created an executive Department of Foreign Affairs and charged its Secretary with responsibility for the day-to-day handling of foreign correspondence and the carrying on of negotiations.[427] Under the constitution proposed by the Committee of Detail, the Senate would obviously have need of an agent of similar character. If this executive officer were to be anyone other than the President, then a plural executive would in effect be created, contrary to the clear constitutional mandate that "[t]he executive Power shall be vested in a President."[428] To many of the delegates, however, this logical consequence seems not to have been self-evident. Even Hamilton, for example, argued the next year in *The Federalist* that for the treaty power to have been vested solely in the Senate would have meant relinquishing "the benefits of the constitutional agency of the President, in the conduct of foreign negotiations." The Senate, he conceded, "would in that case have the option of employing him in this capacity; but they would also have the option of letting it alone" and instead turning negotiations over to a "ministerial servant of the Senate."[429]

It was Madison who made the first clear suggestion that the President should be recognized as the appropriate officer to perform the executive functions involved in negotiating any treaty that the Senate might decide to seek. He brought the matter up when the discussion of the treaty clause began on the 23d of August, expressing himself in a low-keyed

425. 2 FARRAND, RECORDS, *supra* note 85, at 394.
426. *Id.* at 393.
427. *See* notes 201–34 and accompanying text *supra*.
428. U.S. CONST. art. II, § 1.
429. THE FEDERALIST No. 75, *supra* note 76, at 506.

speech which he himself reported as follows: "Mr. <Madison> observed that the Senate represented the States alone, and that for this as well as other obvious reasons it was proper that the President should be an agent in Treaties."[430] Madison's choice of the word "agent" (like Hamilton's use of "agency" in the passage just quoted) indicates clearly enough that he was not proposing a wholesale transfer of foreign-policy making from legislative to executive hands. When he recurred to the idea later in the day he spoke of "[a]llowing the President & Senate to make Treaties,"[431] thus demonstrating that he had in mind what Hamilton later described as "the joint possession of the power in question by the president and senate."[432]

Madison, in short, was not proposing an innovation. He merely wished to write into the new Constitution the relationship that already existed between the old Congress and its Secretary for Foreign Affairs, substituting for the former the about-to-be-created Senate, and for the latter the head of the about-to-be-created executive branch, the President. Had he been proposing something more far-reaching, some comment—some outcry, more probably—would have followed his speech. There was none whatever. Madison had made an observation, not a motion, and the Convention immediately directed its attention elsewhere. In this day's discussion of treatymaking, the President was mentioned by no one but Madison.

The speech that followed Madison's was by Gouverneur Morris of Pennsylvania, and it raised an issue that was genuinely controversial, to wit, the exclusion of the House of Representatives from the treatymaking process and the placement of the treaty power in a body where differences of size among the states counted for nothing. Morris began by saying that he was not sure "that he should agree to refer the making of Treaties to the Senate at all," but that "for the present" he would merely move an amendment.[433] His substitute read as follows: "The Senate shall have power to treat with foreign nations, but no Treaty shall be binding on the United States which is not ratified by a Law."[434] The proposed arrangement was awkward and its basic defect became the principal focus of debate.

Morris's obvious intent was to make the House of Representatives a partner in important treaty matters. Instead of doing this directly, how-

430. 2 FARRAND, RECORDS, *supra* note 85, at 392.
431. *Id.* at 394.
432. THE FEDERALIST No. 75, *supra* note 76, at 506.
433. 2 FARRAND, RECORDS, *supra* note 85, at 392 (Madison's Notes).
434. *Id.* at 382–83 (Journal).

ever, he proposed a scheme that would split apart the treatymaking process, placing in different hands the responsibility for negotiating (the "power to treat") and the responsibility for ratification. It was this disjunction that was objected to. "American Ministers," Nathaniel Gorham pointed out, "must go abroad not instructed by the same Authority . . . which is to ratify their proceedings."[435] And Dr. William Samuel Johnson "thought there was something of solecism in saying that the acts of a Minister with plenipotentiary powers from one Body, should depend for ratification on another Body."[436] Little seems to have been said on the merits of including or excluding the lower house. With the objection to separating negotiation from ratification as the most prominent idea before them, the delegates of nine states voted against Morris's motion, leaving only his own state of Pennsylvania in favor.[437]

B. Digression on the Connection Between the Power to Instruct Negotiators and the Power to Ratify Their Handiwork

By decisively rejecting a motion that would have dissevered negotiation from ratification, the Convention was reaffirming a tradition as old as the Republic. The power to instruct the agents who were to carry on diplomatic negotiations had always belonged to the body that would be called upon to ratify the treaty at the conclusion. A digression at this point will be worthwhile for the purpose of examining the procedure for formulating instructions that was established at the very moment independence was being declared, and of observing how it was adhered to when well-defined executive departments began to be established.

The resolution that led directly to the Declaration of Independence was actually a tripartite one. Introduced on the 7th of June 1776 in the Continental Congress by Richard Henry Lee, the resolution called upon Congress not only to take the step of declaring independence, but also "forthwith to take the most effectual measures for forming foreign Alliances."[438] A definite procedure began to be established when, four days later, Congress resolved to set up a committee "to prepare a plan of treaties to be proposed to foreign powers."[439] The committee, which was formed the next day, reported on the 18th of July, two weeks after the adoption of the Declaration of Independence. It presented a "Plan of

435. *Id.* at 392.
436. *Id.* at 393.
437. *Id.* at 384 (vote 351), 394.
438. 5 JCC, *supra* note 82, at 425.
439. *Id.* at 433.

Treaties," which was actually a full-fledged draft or *projet* of a treaty, ostensibly general in its terms but obviously designed with France in mind.[440] The report was ordered printed and was discussed in committee of the whole on the 22d and 27th of August.[441] With the amendments there made it was referred back to the original committee "in order to draw up instructions."[442] This was done, and the instructions were debated, amended, and then agreed to on the 24th of September.[443] In the meantime, on the 17th of September, Congress definitely decided to seek a treaty with France, voting that the draft or *projet* previously approved "be proposed to His Most Christian Majesty."[444] Finally on the 26th of September 1776, three Commissioners (Benjamin Franklin, Thomas Jefferson, and Silas Deane) were appointed to negotiate with France, after being furnished with the instructions that Congress had already drawn up and approved.[445]

In 1776, to be sure, executive functions were not differentiated from legislative ones. When later they were, by the creation of the Department and Secretaryship of Foreign Affairs, it is notable that the formulation of diplomatic instructions remained a jealously guarded prerogative of the legislature. This was demonstated in 1786 at the time of the negotiations with Spain over the navigation of the Mississippi. A reminder is perhaps in order. The original instructions to govern the negotiations were drawn up by a committee of Congress and were adopted by that body.[446] When revisions were requested by the Secretary for Foreign Affairs, it was Congress that approved the alterations.[447] Finally, when a change amounting to a reversal of policy was proposed, the southern minority insisted that the requirement of approval by nine states, which the Articles of Confederation applied to the ratification of treaties, must apply also to any crucial modification of the instructions given to diplomatic agents.[448] The practical effect of this stand by the minority was to bring negotiations to a halt.

That episode and its outcome underlined the principle, already well established in American federal constitutionalism, that the power to give

440. *Id.* at 575–89.
441. *Id.* at 594, 696, 709.
442. *Id.* at 710.
443. *Id.* at 813–17.
444. *Id.* at 768.
445. *Id.* at 827–28.
446. *See* note 236 and accompanying text *supra.*
447. *See* note 238 and accompanying text *supra.*
448. *See* notes 254–68 and accompanying text *supra.*

final approval to a treaty implied a power *in the same hands* to instruct the negotiators. It was the violation of this principle that Gorham and Johnson urged against Gouverneur Morris's motion. No speaker defended the idea of vesting the power to ratify and the power to instruct in different (even though overlapping) authorities. The rejection of Morris's motion (which did not foreclose consideration of subsequent moves to include the House of Representatives in treatymaking) seems to indicate that the Convention accepted as common sense the principle that the authority which must eventually ratify is the authority which must initially instruct.

The phrase of the completed Constitution, which requires that treaties be made "by and with the Advice and Consent of the Senate"[449] should be read in the light of this tradition established under the Articles of Confederation and reiterated (by implication, at least) in the Convention debate of the 23d of August 1787. "Advice" and "consent" are not synonyms in everyday usage and are not defined as such in any known dictionary. They stand for two quite different things—indeed, two quite different stages in what may be a continuing process. They are erroneously treated as synonyms when it is alleged that the constitutional requirement is satisfied by submitting a completed treaty to the Senate and calling upon it to give its advice and consent in one single resolution, as in actuality it now does.[450] The word "advice," if given any defensible meaning, signifies with great precision the task of deciding upon the policy to be pursued in a treaty negotiation and of formally approving the diplomatic instructions embodying this policy. It goes without saying that concessions have to be made in the course of any complicated negotiation. Instructions cannot be mandatory except, perhaps, on a small number of extremely critical points. "Advice" in this context derives its force from the obligation it imposes on the executive to explain why various departures from the instructions were necessary in order to achieve some more fundamental aim of the agreed-upon policy. To examine and discuss these—rather than to debate the policy that ought to have been laid down at the beginning—is surely the logical purpose of the second and basically different kind of action mandated by the Constitution: namely, *consent* to the ratification of the treaty that has finally emerged from the negotiations.

449. U.S. CONST. art. II, § 2, cl. 2.

450. The formula used by the Senate has always been: "*Resolved (two-thirds of the Senators present concurring therein),* That the Senate advise and consent to the ratification of" a particular treaty. For a history of and comment on the formula, see Bestor, *supra* note 119, at 540–41 n.41 (1974).

C. *Work of the Committee on Postponed Parts*

This reference to "advice and consent" has taken us a little ahead of the story, for a revised treaty clause making use of this particular phrase was not laid before the Convention until the 4th of September and was not debated until the 7th and 8th. The new provision was reported, not by the Committee of Detail to whom the matter had been referred on the 23d of August, but by a so-called "grand" committee (composed of a member from each state) that was created on the 31st of August to deal with "such parts of the Constitution as have been postponed, and such parts of reports as have not been acted on."[451] A great variety of matters had been left dangling as the Convention approached its end, and this committee, chaired by David Brearley of New Jersey, was obliged to consider each issue in terms not only of its own merits but also of its bearing on all the others. Accordingly, several matters, though seemingly unrelated to foreign affairs, nevertheless entered into the calculations of this Committee on Postponed Parts as it gave new shape to the treatymaking provision.

This balancing of changes in one provision against changes in another is illustrated by the shifting about of the two-thirds rule. The Committee of Detail, as we have seen, had applied such a rule to the passage of navigation acts, but had left the treaty power free of any such restriction.[452] On the 29th of August, however, the Convention voted to drop the restriction on navigation acts.[453] This action was in accord with a compromise that was being worked out while the treaty power was under debate, though the actual recommendation and the decision did not come until after the treaty clause had been sent back to committee.[454] The rescinding of the restriction on navigation acts, albeit part of a compromise, was so signal a victory for the maritime and commercial states that the plantation (and exporting) ones believed themselves entitled to compensation elsewhere. The Committee on Postponed Parts acceded to the

451. 2 FARRAND, RECORDS, *supra* note 85, at 473.

452. *Id.* at 183.

453. *Id.* at 453.

454. The compromise deleted the two-thirds requirement for the enactment of navigation acts (a requirement favored by the southern states) in return for retaining a ban on legislation restricting the importation of slaves (a ban favored by many, though not all, of the same states). *Id.* at 400. The ban, however, was to be in effect only until 1800, not permanently as in the draft of the Committee of Detail. *See id.* at 183. The issues had been referred to a "grand" committee (composed of a member from each state) on 22 August. *Id.* at 375. It reported on the 24th. *Id.* at 400. The part dealing with the slave trade was adopted on the 25th, *id.* at 417, and the part eliminating the two-thirds requirement for navigation acts on the 29th, *id.* at 453. There was an unsuccessful attempt to restore this two-thirds requirement on 15 September. *Id.* at 631.

demand by inserting into the treatymaking procedure a requirement for approval by two-thirds vote, thus giving roughly equivalent protection in another form to the regional economic interests involved.

After sifting and winnowing the diverse propositions passed on to it, and after balancing various considerations against one another, the Committee on Postponed Parts came up with a set of reports, delivered on three separate days.[455] Its draft of a revised provision on treatymaking was included in the second of these, presented on the 4th of September 1787, and read as follows:

> The President by and with the advice and Consent of the Senate, shall have power to make Treaties; and he shall nominate and by and with the advice and consent of the Senate shall appoint ambassadors, and other public Ministers, Judges of the Supreme Court, and all other Officers of the U[nited] S[tates], whose appointments are not otherwise herein provided for. But no Treaty shall be made without the consent of two thirds of the members present.[456]

Before looking at the debate that subsequently took place, it will be useful to examine the changes for which the Committee on Postponed Parts was responsible. Since no records of its deliberations are extant, one must proceed by examining and attempting to account for the differences between the revision produced by the new Committee and the version referred to it. The latter had read as follows: "The Senate of the United States shall have power to make treaties, and to appoint Ambassadors and other public ministers, and Judges of the supreme Court."[457] Now at first glance (or perhaps, at second) it is apparent that only one feature of the previous version remained wholly unchanged. This was the exclusion of the House of Representatives from the treatymaking process. Gouverneur Morris had challenged this exclusion on the 23d of August, but his somewhat ill-considered motion to require ratification by the entire legislature of treaties negotiated under the authority of one house, had been formally voted down.[458] Consequently the Committee on Postponed Parts was hardly warranted to reopen the question of participation by the lower house. As for the details that the Committee did alter, its introduction of a two-thirds rule requires no further discussion.[459]

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455. *Id.* at 483–84, (first report, 1 Sept.); 493–95, 496–99 (second, 4 Sept.); 505–06, 508–09 (third, 5 Sept.). The text given by Madison (who was a member of the Committee) is more accurate than that copied into the Journal; references hereafter are to Madison unless indicated otherwise.

456. *Id.* at 498–99.

457. *Id.* at 183, 383, 394.

458. *Id.* at 383, 394. *See* note 437 and accompanying text *supra*.

459. *See* notes 452–54 and accompanying text *supra*.

Four of the additions or alterations made by the Committee, all closely related to one another, do call for careful examination, for these are the changes which indicate how far the Committee on Postponed Parts intended to go in redistributing, between Senate and President, the treatymaking power originally destined for the former alone. The first of these changes, obviously, was the definite assignment of a role to the President. The second was use of the phrase "advice and consent" to define the function of the Senate in treatymaking. The third was the provision of a common procedure for all appointments, whether diplomatic, judicial, or executive (below the level of President and Vice President). The fourth was the use of the words "shall nominate and by and with the advice and consent of the Senate shall appoint"—a formula for appointments that was subtly different from the one pertaining to treaties.

1. Changes in the Appointments Provision

The provision respecting appointments to office may well be taken up first. In the report of the Committee of Detail at the beginning of August, appointments of two kinds of officers, diplomatic and judicial, had been assigned to the Senate without participation in any way by the President. In a separate provision of the same report, the power to "appoint officers in all cases not otherwise provided for"—essentially, all executive and military officers—had been delegated to the President, without participation by the Senate.[460] Quite otherwise, however, was the tradition embodied in state constitutions. There non-elective officers were rarely if ever appointed by either the executive alone or by a council (or a single legislative chamber) without the executive's participation. The Committee on Postponed Parts brought the federal procedure into conformity with that which prevailed in the states by providing for non-elective officers of every sort to be appointed in the same way, through joint action of the executive and the upper house of Congress.

Furthermore, the Committee on Postponed Parts accomplished this end by adopting the terminology generally employed in state constitutions, which in turn derived from the charters of the colonial period.[461] A fully developed example of this usage is furnished by the first constitution of Maryland, adopted on the 11th of November 1776. This document provided for a Council consisting of five "sensible, discreet, and

460. 2 FARRAND, RECORDS, *supra* note 85, at 183, 185 (Draft Constitution of Committee of Detail, art. IX, § 1; art. X, § 2).

461. On the history of the phrase "by and with the advice and consent of," see Bestor, *supra* note 119, at 541–47.

experienced men," to be elected by joint ballot of the two houses of the legislature. The Council was to appoint its own clerk, was to sit as "a board for the transacting of business" under the chairmanship of the Governor, was to give its advice in writing "if so required by the Governor," and was to record its proceedings (including dissenting opinions) in a form that could be laid before the legislature on request.[462] So far as appointments were concerned, its role was specified in the following constitutional provision: "[T]he Governor . . . with the advice and consent of the Council, may appoint the Chancellor, and all Judges and Justices, . . . officers in the regular land and sea service, . . . [etc.] and all other civil officers of Government,"[463] with certain specified exceptions. Actions other than appointments were also to be taken by the Governor "by and with the advice and consent of the Council."[464] The particular decisions and actions to which this procedure applied were carefully specified, after which the Maryland constitution provided that the Governor "may alone exercise all other the executive powers of government, where the concurrence of the Council is not required." Even this liberalizing provision, however, ended with a caveat: "but the Governor shall not, under any pretence, exercise any power or prerogative by virtue of any law, statute, or custom of England or Great Britain."[465]

Similar uses of the phrase "by and with the advice and consent" of some executive council or upper legislative chamber were duplicated in most of the state constitutions of the period following independence. Procedures were not always so elaborate or so fully spelled out, and the requirements for consent not always so strict as in the Maryland constitution,[466] but all the documents indicated clearly the meaning to contemporaries of what was actually a term of art: "by and with the advice and consent of . . ." The phrase signified consultations on policy or on appointments between the executive and a small body, independently chosen, which gave its advice as an organized entity and in relatively formal terms, and which thereafter had the power to give or refuse final consent to the action that the executive might decide to take.

Within the individual states, controversy sometimes arose over who was entitled to put names before the council to be considered for appointment. Could any member offer a nomination? Or was this the privilege of the Governor alone? In New York the first interpretation eventu-

462. 3 CONSTITUTIONS, *supra* note 183, at 1686–94, 1695 (art. 26), 1697 (art. 36), 1698–701.
463. *Id.* at 1699 (art. 48).
464. *Id.* at 1696 (art. 33).
465. *Id.*
466. *See* Bestor, *supra* note 119, at 643–47 (especially nn.424, 429–35).

ally won out. The article of the 1777 constitution which provided that the Governor "with the advice and consent of the said council shall appoint . . ."[467] was, by constitutional amendment in 1801, declared to mean that "the right to nominate . . . is vested concurrently in the person administering the government of this State . . . and in each of the members of the council of appointment."[468] Massachusetts foreclosed this possibility by removing all ambiguity. Its constitution of the 2nd of March 1780 provided, quite simply, that judicial officers "shall be nominated and appointed by the governor, by and with the advice and consent of the council."[469] In the Federal Convention the Committee on Postponed Parts was careful to follow the Massachusetts example, and the completed Constitution incorporated the Committee's language. The President, according to the second section of article II, "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint."[470]

2. *Changes in the Treatymaking Provision*

By providing so carefully for the President alone to initiate the appointments, and by granting him no comparable initiative in treaty matters, the Committee on Postponed Parts (and the finished Constitution, which incorporated the Committee's wording) made a significant distinction, often overlooked. In connection with appointments the formal role of the Senate is limited to the approval or rejection of the President's nominees. Its "advice" as to candidates worth considering can only take the form of suggestions devoid of legal force. Nothing in the phrasing of the treaty clause, on the other hand, gives the President any exclusive right to propose the course of action to be taken in foreign affairs. Nothing, in other words, precludes the Senate from giving formal advice before the beginning or during the progress of any treaty negotiation. Moreover it is the advice of the Senate as an organized body, not the advice of individual senators (over coffee and doughnuts at the White House, perhaps) which the Constitution calls for. Properly understood, the treaty clause in no way repudiates, or requires the abandonment of, the procedure that had developed over the years between independence

467. 5 CONSTITUTIONS, *supra* note 183, at 2633–34 (art. 23).

468. *Id.* at 2639 (amendment 5).

469. 3 CONSTITUTIONS, *supra* note 183, at 1902 (ch. 2, art. 9, § 1). The inclusion of the word "advice" was doubtless a carryover from the usage connected with decisions on other matters than appointments. As the next paragraph of the text suggests, its inclusion tends to obscure the difference between procedures in the two situations.

470. U.S. CONST. art. II, § 2, cl. 2.

and the adoption of the Constitution. This procedure, as we have seen, assumed that it was a legislative responsibility to determine the objectives of any contemplated treaty negotiation. Policy matters were to be considered, at the beginning as well as at the end of negotiations, by some kind of legislative body, in active collaboration with whatever executive officer might be charged with carrying through or superintending the face-to-face bargaining with other foreign ministers. Though the executive might be called upon to formulate the required instructions to diplomatic agents, the legislative body would still be called upon to approve the formulation, thereby giving "advice" in a formal mode.

The treaty clause reported by the Committee on Postponed Parts was designed to make the President a joint participant in the treatymaking process, not to transfer that process to him. One test is the attitude of James Madison, who on the 1st of June 1787 had maintained, along with three other leading delegates, that the term "executive powers," if properly defined, did not include "the Rights of war & peace."[471] Almost three months later, in the debate of the 23d of August, Madison made the first suggestion "that the President should be an agent in Treaties."[472] He was, in fact, the only speaker to allude to the President on that occasion, and at the end of the particular session he returned to the subject, speaking this time of "[a]llowing the President & Senate to make Treaties" of certain kinds.[473] Madison, finally, was one of the members of the Committee on Postponed Parts,[474] and presumably approved the formula which that Committee used in the revised treaty clause. At no time did he indicate that he sensed any inconsistency among the several statements just quoted, nor did anyone else accuse him of having altered, let alone reversed, his position.

Madison, indeed, may have been the Committee member who suggested the use of the traditional phase "advice and consent." If so, the ultimate source could have been Alexander Hamilton. At a time described only as "about the close of the Convention," Madison received from Hamilton an elaboration of the plan that the latter had presented to the Convention on the 18th of June.[475] Hamilton described the new document as "the Constitution which he would have wished to be proposed by the Convention,"[476] and his purpose, quite possibly, was to influence

471. 1 FARRAND, RECORDS, *supra* note 85, at 70. *See* note 309 *supra*.
472. 2 FARRAND, RECORDS, *supra* note 85, at 392. *See* note 546 *infra*.
473. 2 FARRAND, RECORDS, *supra* note 85, at 394.
474. *Id.* at 473 (Journal).
475. 3 *id.* at 619–30.
476. *Id.* at 619.

the deliberations going on during the first days of September in the Committee on Postponed Parts. Be that as it may, Hamilton included in a section dealing with the President the following clauses:

> All treaties, conventions and agreements with foreign nations shall be made by him, by and with the advice and consent of the Senate. He shall have . . . the nomination; and by and with the Consent of the Senate, the appointment of all other officers to be appointed under the authority of the United States, except such for whom different provision is made by this Constitution. . . .[477]

Hamilton had used almost identical language in the plan that he read to the Convention on the 18th of June. Even if the elaborated version handed to Madison never came to the attention of the Committee on Postponed Parts, the earlier plan was a familiar source, because many delegates, including Madison, had taken down Hamilton's words at the time he spoke. As Hamilton phrased the matter then, the following were among the powers to be vested in the executive: "to have with the advice and approbation of the Senate the power of making all treaties," and "to have the nomination of all other officers (Ambassadors to foreign Nations included) subject to the approbation or rejection of the Senate."[478]

Having himself regularly employed the phrase "advice and consent" or its equivalent in discussing treatymaking, Hamilton was uniquely qualified to interpret the meaning the framers intended to convey when they wrote into the Constitution the provision that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties." When the Constitution went before the people for ratification in 1787–88, no one used more emphatic language than Hamilton in refuting the idea that the treaty clause would make the shaping of foreign policy exclusively or even predominantly a Presidential prerogative. In No. 75 of *The Federalist,* published in the newspapers on the 26th of March 1788, Hamilton had this to say:

> However proper or safe it may be in governments where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, it would be utterly unsafe and improper to entrust that

477. *Id.* at 624–25 (art. 4, § 10). By using the phrase "advice and consent" in the clause concerning treaties and omitting the word "advice" in connection with appointments (where nomination is reserved to the executive), Hamilton's terminology is more logical than that of the Constitution. The Committee on Postponed Parts followed the Massachusetts constitution of 1780 in requiring both "advice and consent" in appointments. *See* text accompanying note 469 *supra.*

478. 1 FARRAND, RECORDS, *supra* note 85, at 292. The words "all *other* officers" referred to the plan's provision for the heads of the executive departments of finance, war, and foreign affairs to be appointed by the executive (the "Governour") *without* Senate confirmation.

> power to an elective magistrate of four years duration . . . . The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind as those which concern its intercourse with the rest of the world to the sole disposal of a magistrate, created and circumstanced, as would be a president of the United States.[479]

Hamilton's point, of course, was that the Constitution did no such thing. Nor did it, in his opinion, entrust the power of making treaties to the Senate alone. "It must indeed be clear to a demonstration," he continued, "that the joint possession of the power in question by the president and senate would afford a greater prospect of security, than the separate possession of it by either of them."[480] To the task the two branches would bring different but complementary characteristics. "The qualities . . . indispensable in the management of foreign negotiations, point out the executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a part of the legislative body in the office of making them."[481]

As Hamilton thus interpreted it in 1788, the constitutional provision giving the President "Power, by and with the Advice and Consent of the Senate, to make Treaties" made the President the "agent" in "the management of foreign negotiations," and in no way decreased "participation" of the Senate "in the office of making them."[482] The same word "agent" had been the one that Madison chose to use when he made the first suggestion on the floor of the Convention that the Constitution should explicitly recognize a role for the President.[483] Both Madison and Hamilton were apparently satisfied that the formula finally adopted signified (in Hamilton's words) "the joint possession"[484] of the treatymaking power, or (in the phrase that Madison used at the close of the treaty debate in August) the power of "the President & Senate to make Treaties."[485]

D. Compromises Relating to the Election of the President

When the newly-rephrased clause making the President a participant in

479. THE FEDERALIST No. 75, *supra* note 76, at 505–06.
480. *Id.* at 506.
481. *Id.* at 505.
482. *Id.* at 506.
483. 2 FARRAND, RECORDS, *supra* note 85, at 392. *See* note 430 *supra*.
484. THE FEDERALIST No. 75, *supra* note 76, at 506.
485. 2 FARRAND, RECORDS, *supra* note 85, at 394. *See* note 431 *supra*.

the treatymaking process was laid before the Convention, the reaction of the delegates—or rather the absence of any negative reaction—was similar to Madison's, who saw in the wording no departure from the spirit of his original suggestion. A Convention debate extending over two days (the 7th and 8th of September) did take place upon the new treaty provision, but no delegate portrayed it (unfavorably or favorably) as creating a Presidential monopoly of the treatymaking power. On the contrary, the fear most often expressed continued to be fear of the inordinate power of an "aristocratic" Senate.

This view of the matter was strikingly illustrated in a debate that took place on the 6th of September, the day before the treaty clause itself was taken up. Under discussion was the mode of electing the President—the problem which of all others the Convention was finding it hardest to resolve. Out of the innumerable proposals that had been made in previous weeks, the Committee on Postponed Parts had selected a plan based on election by electors chosen in the several states. The aim was to prevent a dangerous dependence of the executive on the legislature (to which the old Committee of Detail had assigned the task of choosing the President). The weakness of the plan was the probability—and in the opinion of some, the virtual certainty—that the electors would scatter their votes so widely that a final choice would have to be made elsewhere. The Committee on Postponed Parts proposed to place this runoff election in the Senate, allowing that body to choose from among the top five candidates in the poll.[486]

This proposal raised once more the spectre of an all-too-powerful Senate. Mason had sounded the alarm when the question had been that of allowing the Senate to amend money bills.[487] He raised it again,[488] and brought up, as on the former occasion, the Senate's possession of a treatymaking power unshared by the House. The most remarkable speech was that of James Wilson, who brought under review the whole set of Committee proposals relating to the executive. Combining the electoral provision "with other parts of the plan" obliged him, he said, "to consider the whole as having a dangerous tendency to aristocracy; as throw-

486. 2 FARRAND, RECORDS, *supra* note 85, at 497–98.

487. *See* notes 402 & 404 *supra*.

488. Apropos of the Senate's ultimate power to make the choice of President, Mason said on 5 Sept.: "Considering the powers of the President & those of the Senate, if a coalition should be established between these two branches, they will be able to subvert the Constitution." 2 FARRAND, RECORDS, *supra* note 85, at 512. At the end of the day he declared: "He would prefer the Government of Prussia to one which will put all power into the hands of seven or eight men, and fix an Aristocracy worse than absolute monarchy." *Id.* at 515. See also his speeches on 4 and 6 September. *Id.* at 500, 527.

ing a dangerous power into the hands of the Senate."[489] The latter, he continued:

> will have in fact, the appointment of the President, and through his dependence on them, the virtual appointment to offices; among others the offices of the Judiciary Department. They are to make Treaties; and they are to try all impeachments. In allowing them thus to make the Executive & Judiciary appointments, to be the Court of impeachments, and to make Treaties which are to be the laws of the land, the Legislative, Executive & Judiciary powers are all blended in one branch of the Government. The power of making Treaties involves the case of subsidies, and here as an additional evil, foreign influence is to be dreaded—According to the plan as it now stands, the President will not be the man of the people as he ought to be, but the Minion of the Senate.[490]

What is most surprising about this speech is the fact that Wilson, with the committee's revised treaty clause before him, could refer, not once but twice, to the Senate's power "to make Treaties" thereby indicating a belief that the naming of the President in the rephrased treaty clause did not give that officer an independent, let alone a dominant, role in treatymaking.

Even more surprising was a reference to the same matter in a speech of Gouverneur Morris who, as a member of the Committee on Postponed Parts, rose to defend its handiwork against the strictures of his fellow Pennsylvanian Wilson. Morris argued that the Senate's power had been limited rather than enhanced by the changes proposed in matters concerning elections and appointments. His argument on the latter point was followed by a statement about treatymaking. The passage dealing with these two points should be quoted as a continuous whole:

> They [the Senate] are now to appoint Judges nominated to them by the President. Before they had the appointment without any agency whatever of the President. Here again was surely not additional power. If they are to make Treaties as the plan now stands, the power was the same in the printed plan [*i.e.*, the report of the old Committee of Detail].[491]

The speech was recorded without comment by Madison, who had like-

489. *Id.* at 522.

490. *Id.* at 522–23 (Madison's Notes). According to the equally full report of this speech set down by James McHenry, Wilson said flatly, "The Senate may make treaties and alliances." *Id.* at 530. In his remarks on the mixture of powers, Wilson is further reported to have explained that "[t]o make treaties [is] legislative, to appoint officers Executive . . . [and t]o try impeachments judicial." *Id.* Wilson's earlier speech on 4 Sept. criticized the committee report in much milder tones. *Id.* at 501–02. Warnings against "aristocracy" were voiced by Williamson and Randolph as well as by Mason and Wilson. *Id.* at 512, 513, 524.

491. *Id.* at 523.

wise been a member of the Committee on Postponed Parts and who apparently sensed no serious inaccuracy in Morris's ascription of the treaty power to the Senate, as though the new wording of the treaty clause did not significantly increase the President's involvement.

Controversy over the Senate's role in choosing the President was finally defused by the adoption of an ingenious suggestion made by Williamson and Sherman. The runoff election was moved to the House of Representatives, while at the same time the relative weight that the various geographic (and economic) sections enjoyed in the Senate was preserved by giving each state a single vote in this special situation.[492] Despite the lessening of tension that resulted, the allegedly excessive power of the Senate remained an issue in connection with treaties and figured in the two-day debate that began the next day, when the Convention finally reached the treatymaking provision as revised and recommended by the Committee on Postponed Parts.

E. The Debate of the 7th and 8th of September 1787

This final debate on the treaty provision, extending from the 7th into the 8th of September, is most easily followed if one notes that the provision under discussion consisted of three clauses, which were debated in order, with only the last one ever called up for reconsideration. The first clause comprised the crucial formula: "The President by & with the advice and consent of the Senate shall have power to make Treaties."[493] The second clause, concerning appointments, gave the President the exclusive power to nominate but made actual appointment dependent on the advice and consent of the Senate.[494] The third clause—an entirely separate sentence—contained the requirement of a two-thirds vote for consent to a treaty.[495]

The debate on the first clause was the briefest of all. James Wilson began it by moving an amendment that would add the House of Representatives to the Senate in specifying those whose advice and consent to treaties was required. Said Wilson: "As treaties . . . are to have the operation of laws, they ought to have the sanction of laws also."[496] Sher-

492. *Id.* at 527. *See also id.* at 518–19, 531.

493. *Id.* at 538.

494. *Id.*

495. *Id.* at 540.

496. *Id.* at 538. Unlike the motion of Gouverneur Morris on 23 August, Wilson's proposal would have made the House an integral part of the treatymaking process at all stages, thus avoiding the "solecism" of requiring ratification of a treaty by a body that had not participated in instructing the negotiators. *See* text accompanying note 434–37 *supra*.

man, defending the action of the Committee on Postponed Parts, on which he had served, responded that he believed "the power could be safely trusted to the Senate . . . ; and that the necessity of secrecy in the case of treaties forbade a reference of them to the whole Legislature."[497] After this brief exchange, the Convention voted, ten states to one, against Wilson's motion to include the House of Representatives in treatymaking.[498] Having disposed of this matter, it went on to accept the first clause in exactly the form reported by the Committee on Postponed Parts.[499]

The last-mentioned decision not only settled the question of a role for the House, but also validated both the principle and the form of Presidential participation in treatymaking. This decision of the 7th of September 1787 was final and definitive, for the first clause was never reconsidered.[500] A notable fact about the final brief debate—true also of the earlier ones—was that no one spoke against the inclusion of the President in the making of treaties, and no one, on the other hand, felt it necessary to defend the idea. Furthermore, no one objected to the phrase "advice and consent" on the ground that it might confine legislative participation to the final stage of ratification, and no one advocated the clause because he favored such a limitation.

Though the really crucial clause (as it would be considered today) was conclusively accepted on the 7th of September, at almost the beginning of the discussion, debate continued on that day and the next on the other

497. 2 FARRAND, RECORDS, *supra* note 85, at 538. Where secrecy is particularly required, one must observe, is in discussing the terms to be offered in a projected treaty or the response to be made to those proposed by the other party, rather than in discussing the acceptability of an ordinary treaty (other than one designed to be kept secret) once it has been put in final form and submitted for legislative approval. *See also* Jay's discussions of secrecy in *The Federalist* No. 64; text accompanying notes 547–48 *infra*.

498. 2 FARRAND, RECORDS, *supra* note 85, at 532, 534 (vote 475), 538. The reference in the Journal to the "5 sec. of ye report" is confusing, for the treaty clause bears no such number in the version of the original report entered in the Journal or in that given by Madison. *See also id.* at 495, 498–99.

499. 2 FARRAND, RECORDS, *supra* note 85, at 538. The clause definitively accepted was the one reading: "The President by and with the advice and Consent of the Senate, shall have power to make Treaties." *Id.* at 498. After recording the rollcall vote rejecting the idea of House participation in treatymaking, Madison noted: "The first sentence as to making treaties, was then Agreed to: nem: con:"—that is, *nemine contradicente*, no one opposing. *Id.* at 538. The Journal included no record of this decision by unanimous consent. The omission was not unprecedented, for the secretary's attention was focused on the recording of rollcall votes. In any case, the subject of the first clause (quoted above) was in fact never reopened. *See* note 500 *infra*.

500. On 8 September, at the beginning of a renewed discussion of that part of the treaty provision which imposed a two-thirds requirement, Madison noted: "A reconsideration of the whole clause was agreed to." 2 FARRAND, RECORDS, *supra* note 85, at 548. The context proves conclusively that what was reopened was simply the whole of the clause embodying the two-thirds rule, as contradistinguished from one detail which had been added to that particular clause by amendment.

two parts of the Committee's draft, relating respectively to appointments and to the two-thirds rule. In the course of this continuing discussion, occasional references were made to the role of the executive in treatymaking. A brief examination of the remainder of the debate is therefore necessary, with the particular purpose of discovering the interpretation that delegates placed upon the clause they had just adopted.

The issue of the appointing power, to which the Convention next turned, raised questions of a different sort, though still involving the respective roles of the President and Senate. The Committee on Postponed Parts had deprived the President of any power to appoint on his own authority, thereby requiring all appointments in the executive branch to run the gauntlet of senatorial confirmation. At the same time the Committee took from the Senate the exclusive power to make diplomatic and judicial appointments, and prescribed the same procedure for them as for executive appointments, commencing in all cases with Presidential nomination. To the latter half of this arrangement there was little objection, though Charles Pinckney thought that ambassadors "ought not to be appointed by the President"[501]—a fairly clear indication that he believed the primary responsibility for setting policy in treaty matters would lie with the Senate under the clause just adopted.

Two main objections were made to the appointments clause as the Committee reported it. One was that the President could not be held to strict responsibility for the affairs of the executive branch if he did not have a free hand in appointing his subordinates. After considerable debate, however, the Convention accepted the Committee's proposal to subject executive officers, along with all the rest, to senatorial confirmation.[502]

The other objection to the proposed procedure for appointments rested upon the feeling that the Senate was not the appropriate body to act in the matter, because its participation would mean, in Wilson's words, "blending a branch of the Legislature with the Executive."[503] At this point in the discussion a renewed attempt was made to provide an Executive Council, or Privy Council, or Council of State to advise the President generally. State constitutions had established such councils, and Mason, for one, complained that to go ahead without "a Council to the President" would be "to try an experiment on which the most despotic Governments had never ventured."[504]

The idea of a council had been discussed by the Convention in mid-

501. *Id.* at 539.
502. *Id.* at 533, 534 (vote 479), 538–40.
503. *Id.* at 538.
504. *Id.* at 541.

August; a formal proposal for what was styled a Council of State had been introduced by Gouverneur Morris and Charles Pinckney;[505] and the Committee of Detail (to whom the matter was referred) had reported a scaled-down draft, which called for a Privy Council.[506] No action was taken at the time, whereupon the Committee on Postponed Parts stripped away every reference to a council and simply appended to the list of Presidential powers a few words from previous proposals, giving the President authority to "require the opinion in writing of the principal Officer in each of the Executive Departments, upon any subject relating to the duties of their respective offices."[507] The written "opinion" of a subordinate to his superior on matters within the former's range of responsibility could hardly be the equivalent of "advice" given by an independent body on major questions of state, even if (as most delegates seemed to believe) the function of the latter should be to "advise but not conclude the President."[508] There would be teeth to an independent council's advice, especially if its "consent" were required at the end. Madison put the matter cogently at an early session of the Convention when he suggested in connection with foreign affairs that "probably the best plan will be a single Executive of long duration w[i]th a Council, with liberty to depart from their Opinion at his peril."[509]

George Mason, ever distrustful of the Senate, opposed the idea of giving it a role in appointments, but at the same time "was averse to vest so dangerous a power in the President alone."[510] In the debate of the 7th of September, accordingly, he raised again the idea rejected by the Committee on Postponed Parts, and moved the establishment of "an Executive Council, as a Council of State for the President," with members

505. *Id.* at 328–29, 335–44.

506. *Id.* at 367.

507. *Id.* at 499. This provision was entirely separate from the appointments clause, but the discussion in the Convention moved from one to the other without much distinction. The provision itself originated in one of the concluding sentences of Gouverneur Morris's elaborate proposal for a Council of State, where the wording was as follows: "The President may from time to time submit any matter to the discussion of the Council of State, and he may require the written opinions of any one or more of the members." *Id.* at 343 (20 Aug.). The Committee of Detail reported back an abbreviated version wherein the heads of departments were charged with the duty "to advise him [the President] in matters respecting the execution of his Office." *Id.* at 367 (22 Aug.). The ambiguity, if any, of the two final words was resolved by the Committee on Postponed Parts, which adopted the most limited of the possible meanings by using the phrase "their respective offices." *Id.* at 499 (Sept. 4, 1787).

508. *Id.* at 329 (Ellsworth's phrase). The Committee of Detail used the word "conclude" in the same sense. *Id.* at 367.

509. 1 FARRAND, RECORDS, *supra* note 85, at 70 (King's Notes). As Pierce reported the speech: "Mr. Maddison [sic] was of opinion that an Executive formed of one Man would answer the purpose when aided by a Council, who should have the right to advise and record their proceeedings, but not to control his authority." *Id.* at 74.

510. 2 FARRAND, RECORDS, *supra* note 85, at 537.

appointed by the legislature (or the Senate alone) for fixed, overlapping terms[511]—a body as independent of the President as the Senate, and far more independent than any council previously proposed.[512] This Executive Council would replace the Senate as the giver of "advice" to the President, not only on appointments but also on policy generally. The "concurrence" of the Senate, however, would still be required in Mason's plan, but "only in the appointment of Ambassadors, and in making treaties, which are more of a legislative nature."[513]

Though Benjamin Franklin seconded Mason's motion, and though Wilson, Madison, and Dickinson supported it,[514] the Convention rejected

511. *Id.* at 533, 542.

512. In the proposal of Gouverneur Morris all but one of the seven members of the Council of State would "be appointed by the President and hold his office during pleasure," the exception being the life-tenured Chief Justice. *Id.* at 335–36, 342–43. The abbreviated measure reported by the Committee of Detail substituted the President of the Senate and the Speaker of the House for two of the presidential appointees, but left the latter in a majority of five out of eight councilors. *Id.* at 367. At one of the early discussions of a council, Dickenson had maintained that it "might properly be consulted by the Executive" if appointments to the body were made by the legislature, "but not if made by the Executive himself." *Id.* at 329.

513. *Id.* at 537. In proposing to deny the Senate a role in appointments (other than diplomatic ones), Mason was altering a stand he had taken in a memorandum of 31 August 1787, only a week earlier. His words then were that "[t]he appointm[ent] to all offices estab[lished] by the legisl[ature] to be in the Executive with ye. concurrence of ye. Senate." 4 *id.* at 57. In the same memorandum Mason dealt with treatymaking as follows: "The power of making Treaties & app[ointing] ambas[sadors] &c to be in ye. Senate with the concurrence of ye. Council of St[ate] or vice versa." *Id.* The phrasing was interesting. The initiative in treatymaking, Mason appeared to assume, would often (perhaps usually) be taken by the Senate, though it might be by the Council of State, but not by the Executive alone (except as he might act through the Council of State). In his speech and resolution of 7 September, Mason took the view that the Senate's function of giving "advice," whether on treaties or appointments, should be transferred completely to the Council, reducing the Senate's role to "concurrence" on treaties and ambassadorial appointments. 2 *id.* at 537. Eliminating the Senate's function of giving advice would, in Mason's opinion, "prevent the constant sitting of the Senate." *Id.* Though Mason was thinking primarily of the time required to consider appointments, others saw the Senate's role in treatymaking as the principal reason for expecting frequent and extended sessions. In the First Congress, for example, Representative Theodorick Bland pointed out that the Senate had duties "which would require them to be pretty constantly sitting," and he instanced particularly "the part they were called upon to perform in making treaties." 1 ANNALS OF CONG., *supra* note 68 at 382. The most significant statement of all was Alexander Hamilton's in *The Federalist*. The exclusion of the House of Representatives from participation in treatymaking was justified, he argued, because of the frequency and the length of time "which it would often be necessary to keep them together . . . to obtain their sanction *in the progressive stages of a treaty*." THE FEDERALIST NO. 75 (Mar. 26, 1788), *supra* note 76, at 507 (emphasis added). Hamilton's statement effectively negates the contention of Senator Spooner that when, and only when, the President "shall have negotiated and sent his proposed treaty to the Senate the jurisdiction of this body attaches and its power *begins*." 40 CONG. REC. 1418 (1906) (emphasis added). *See also* note 127 and accompanying quotations *supra*.

514. 2 FARRAND, RECORDS, *supra* note 85, at 542. Gouverneur Morris, again speaking for the Committee, opposed the idea of a council and revealed that the Committee on Postponed Parts actually had considered and rejected it.

it by a vote of eight states to three.[515] In effect, the framers of the Constitution reached a final decision: that the Senate should serve both as the upper house of the legislature and as a council of state to approve or disapprove the President's nominations, to advise him on foreign negotiations (and hence on foreign policy as a whole), and to give or withhold consent to such treaties as he might be able to arrange either in accordance with the proffered advice, or—"at his peril" (as Madison had said)—in disregard thereof.

As the Convention finally disposed of the questions relating to appointments, it was beginning to debate the last of the three provisions of the Committee's proposal—namely, the two-thirds rule.[516] This was the longest of the three debates, begun on the 7th of September and not concluded until the next day. It commenced with a speech by Wilson, who criticized the two-thirds requirement as putting it "in the power of a minority to countroul the will of a majority."[517] King supported him, "remarking that as the Executive was here joined in the business, there was a check which did not exist in Congress [*i.e.*, under the Confederation] where the concurrence of 2/3 was required."[518] In applying the

515. *Id.* at 533 n.5, 534 (vote 482), 542, 542 n.23.

516. The order in which topics were discussed on 7 September is hard to follow, for there was much jumping back and forth from one subject to another. The first part of the debate was concerned with the electoral system. *Id.* at 532 (Journal), 535–38 (Madison's Notes). Before it ended, Mason reopened the question of a Privy Council, but apparently without making a motion. *Id.* at 537–38 (Madison's Notes). Next the treaty provision came up, and after rejecting Wilson's motion to include the House of Representatives, the Convention definitively adopted the clause that read: "The President by & with the advice and consent of the Senate shall have power to make Treaties." *Id.* at 538 (Madison's Notes). Then began a debate on the appointments clause, in the course of which the idea of a council was again discussed but without a motion. Different parts of the appointments clause were voted on separately and adopted. *Id.* at 533 (Journal), 538–40 (Madison's Notes). The next question was the two-thirds rule, with Madison proposing two amendments, one of which was adopted and one defeated, after which the clause dealing with the two-thirds rule was adopted. *Id.* at 533 (Journal), 540–41 (Madison's Notes). The provision authorizing the President to obtain the written opinions of the heads of departments was then reached. This gave Mason a chance to present a formal motion for an Executive Council, which was debated and voted down. The Convention then adopted the clause relating to opinions from department heads. *Id.* at 533 (Journal) (suggesting that Mason may have moved his plan just after his first broaching of the subject), 541–43 (Madison's Notes). Finally, Williamson's motion brought up again the question of the exception made for peace treaties, and proposed an exception to the exception. *Id.* at 534 (Journal), 543 (Madison's Notes).

517. *Id.* at 540.

518. *Id.* Without using the word "check," Nathaniel Gorham conveyed the same idea the next day when he remarked that unlike the situation under the old Articles, where the treaty power was vested exclusively in Congress, "the President's consent will also be necessary" under the new Constitution, thus removing the need for a stringent two-thirds rule. *Id.* at 549. This way of putting the matter implied that the Senate and the President were each to have an equal right to shape the terms on which a treaty would be negotiated. Hamilton also referred in *The Federalist* to the "additional security, which would result from the co-operation of the executive" in treatymaking. THE FEDERALIST No. 75 (A. Hamilton), *supra* note 76, at 506. *See also* note 513 *supra*.

term "check" to the President's function in treatymaking, King was in effect recognizing and affirming an analogy to the relationship that would exist between the President and Congress in domestic legislation. The ability to interpose a "check" is, after all, the ability to block (permanently or temporarily) a policy concerted elsewhere. It implies a clear right on the part of both agencies to a share in the making of policy.

No formal motion to delete the two-thirds requirement having been made by Wilson or King, Madison took the floor to propose two successive motions. The first was to except treaties of peace from the two-thirds rule, on the ground that they should "be made with less difficulty than other treaties."[519] Because the two-thirds rule seemed relevant primarily to commercial treaties, with their obvious economic impact, the Convention immediately accepted Madison's proposal without dissent[520]—*until later*.

Madison's second motion was highly significant, not because it was accepted (which it wasn't) but because it revealed with unmatched clarity the conception that he and other delegates had formed of the respective roles that the Senate and the President would play in the making of treaties. Madison himself recorded his remarks as follows:

> Mr. Madison then moved to authorize a concurrence of two thirds of the Senate to make treaties of peace, without the concurrence of the President—The President he said would necessarily derive so much power and importance from a state of war that he might be tempted, if authorized, to impede a treaty of peace.[521]

Underlying Madison's motion there had to be the assumption that the Senate would possess the authority and the means to force the continuance of treaty negotiations along lines which the President opposed, and to take up for ratification a treaty that he refused to recommend. What the procedure might be was never spelled out, but Madison's conception of the Senate's authority was quite clear. He obviously did not believe that the already-adopted clause providing for the making of treaties was intended or would operate to confine the Senate's role to that of sitting in final judgment on treaties negotiated without its prior policymaking participation. No delegate, moreover, argued that the Senate would be incapable of acting in the way Madison proposed, independent of the President. Of the three members who spoke to Madison's motion, one, Butler, seconded it, and "was strenuous for the motion, as a necessary

519. 2 FARRAND, RECORDS, *supra* note 85, at 540.

520. *Id.* In this instance the Journal did record the action taken. *Id.* at 533. *See also* note 499 *supra*.

521. 2 FARRAND, RECORDS, *supra* note 85, at 540 (emphasis supplied and punctuation corrected).

security against ambitious & corrupt Presidents.''[522] The two who disagreed did so on grounds that called in question simply the wisdom of the proposal. Gorham ''thought the precaution unnecessary as the means of carrying on the war would not be in the hands of the President, but of the Legislature.''[523] Gouverneur Morris ''thought the power of the President in this case harmless; and that no peace ought to be made without the concurrence of the President, who was the general Guardian of the National interests.''[524] Morris's choice of the phrase ''concurrence of the President,'' like King's choice of the word ''check,'' underlines the belief of both men that decisions on the policies to be advanced through treaties were not in the province of the President alone to decide, but that the initiative could come as well from the Senate. The fact that Madison's motion was eventually voted down, eight states to three,[525] presumably reflected the feeling of the Convention that the plan was awkward and unnecessary, not that it would trespass upon a policymaking authority in foreign affairs that supposedly had already been assigned to the President alone.

Madison's other motion, making an exception from the two-thirds rule where treaties were concerned, had been adopted earlier in the day by unanimous consent.[526] Misgivings began, however, to arise. As Madison reported it:

> Mr. Gerry was of opinion that in treaties of peace a greater rather than less proportion of votes was necessary, than in other treaties. In Treaties of peace the dearest interests will be at stake, as the fisheries, territory &c. In treaties of peace also there is more danger to the extremities of the Continent, of being sacrificed, than on any other occasions.[527]

Despite this objection, the two-thirds clause, including Madison's exception in favor of peace treaties, was adopted by a vote of eight states to three,[528] and the Convention turned back to, and disposed of, the idea of an executive council.[529]

Time still remained at the end of the day, and the nagging question raised by Gerry was taken up again. Williamson, seconded by Spaight, moved to subject even a treaty of peace to the two-thirds requirement if it would deprive the United States of ''any of their present Territory or

522. *Id.* at 541.
523. *Id.*
524. *Id.* at 540–41.
525. *Id.* at 533, 534 (vote 480), 541.
526. *See* text accompanying note 520 *supra.*
527. 2 FARRAND, RECORDS, *supra* note 85, at 541.
528. *Id.*
529. *Id.* at 541–43. *See* notes 504–16 *supra.*

rights."[530] Actual discussion of the matter had to go over to the next day, the 7th of September, when a reconsideration of the two-thirds clause (though not the rest of the treaty provision) was agreed to.[531] This loosed a flood of motions to modify the requirement, ranging from Wilson's proposal that treaties be made by a simple majority,[532] to that of Rutledge and Gerry, who wanted the requirement increased so that two-thirds of all the members of the Senate (not two-thirds of those present) would have to give consent.[533] Opposing the latter motion, Gorman said: "There is a difference in the case, as the President's consent will also be necessary in the Gov[ernmen]t."[534] So far as the records of the Convention show, this was the very last utterance to mention in any way the President's role in the making of treaties.

F. The Treaty Clause in Final Form

The debate on the treaty provision came to an end in the middle of the day, the 8th of September, after the defeat of all motions save one that struck out the exception for treaties of peace.[535] At the end of this same session, the Convention appointed a five-man Committee of Style to arrange and to polish all the various provisions that had been approved at different times in the course of the preceding month.[536] To this Committee went the treaty provision in precisely the form it had had when it emerged from the Committee on Postponed Parts. From the new Committee of Style it emerged with some reordering of its phrases,[537] and on the 15th of September the Convention loaded it down with additional details relating to appointments.[538] On the 17th the engrossed copy of the

530. 2 FARRAND, RECORDS, *supra* note 85, at 534 (Journal). Madison recorded the motion of Williamson and Spaight as referring only to treaties of peace affecting "Territorial rights," and noted that King "moved to extend the motion to—'all present rights of the U[nited] States.' " *Id.* at 543. The fisheries were undoubtedly in King's mind. Another amendment, probably not actually presented on the floor, would have required House concurrence on any treaty of peace "by which the territorial boundaries of the U.S. may be contracted, or by which the common rights of *navigation* or *fishery* recognized to the U. States . . . may be abridged." 4 *id.* at 58 (emphasis in original). If actually presented, this would have reopened the question of participation by the House of Representatives.

531. 2 *id.* at 548. *See* note 500 *supra*.

532. 2 FARRAND, RECORDS, *supra* note 85, at 544, 546 (vote 485), 547–49.

533. *Id.* at 544, 546 (vote 486), 549.

534. *Id.* at 549.

535. *Id.* at 548–50.

536. *Id.* at 553. The members were Johnson, Hamilton, Gouverneur Morris, Madison, and King.

537. *Id.* at 574 (treaty provision as referred by the Convention to the Committee of Style), 599 (treaty provision as recommended by the Committee of Style).

538. *Id.* at 621, 627–28.

Constitution of the United States was laid before the Convention, agreed to, and signed.[539] The second clause of the second section of the second article read—and reads—as follows:

> He 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, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[540]

VIII. THE INTERPRETATION OF THE TREATY CLAUSE BY JOHN JAY, SECRETARY FOR FOREIGN AFFAIRS, 1788

No one can have read the treaty provision with more compelling interest and closer attention than John Jay. He had not been a member of the Convention, but had continued (and would still continue) to serve as Secretary for Foreign Affairs to the old Congress while it struggled to keep itself alive during the long transition to the new constitutional system. No one could apply so wide a range of experience as Jay to the evaluation of the foreign-affairs provisions of the instrument drafted at Philadelphia. No one was better equipped than he to measure and interpret the changes that were being made in previous practices and theories. No one outside the membership of the Convention itself was in a better position than Jay to get at the intention of the framers with respect to the handling of foreign relations.

In No. 64 of *The Federalist*, published on the 5th of March 1788, Jay set forth his reading of the particular provisions of the pending Constitution which prescribed the respective responsibilities of the Senate and the President in the conduct of foreign relations.[541] Jay had experienced at first hand the weaknesses of the system that existed under the Articles of Confederation. He now welcomed the proposed Constitution as a manifest improvement. What then constituted for Jay the superiority of the new constitutional arrangements over the old? In particular, what changes did he believe the framers intended to make where foreign affairs were concerned?

To begin with, Jay was enheartened, as might be expected, by the in-

539. *Id.* at 641, 648.
540. U.S. CONST. art. II, § 2, cl. 2.
541. THE FEDERALIST No. 64, *supra* note 76, at 432–38.

clusion in the proposed Constitution of the clause making treaties part of the supreme law of the land. On the eve of the Convention he had urged the principle as something implicit both in the very system created by the Articles of Confederation and in international law. He continued to insist, in *The Federalist,* that this had been true and that "[t]he proposed Constitution therefore has not in the least *extended* the obligation of treaties."[542] But he was of course pleased that the principle was being explicitly stated.

More important for the questions examined in the present paper were Jay's views on the alterations that the Constitution would make in the structure of government and the interplay of its parts. And here the most notable fact is a negative one. Nowhere in the essay did Jay suggest that the innovations proposed by the Convention were intended to transfer from legislative to executive hands the authority to deliberate upon and determine the foreign policy of the nation. Indeed, he never so much as implied that under the proposed system the President would perform a different or more expanded function than he, Jay, had done in an executive capacity as Secretary for Foreign Affairs.

The redistribution of power that Jay considered a major contribution of the Convention was that which resulted from the adoption of bicameralism. No longer would the treaty power be exercised by "a popular assembly, composed of members constantly coming and going in quick succession"[543]—that is, by a body like the old Congress of the Confederation. Instead the power was to be committed to a body whose members would "continue in place a sufficient time to become perfectly acquainted with our national concerns, and to form and introduce a system for the management of them."[544] The words "to form and introduce," as applied to foreign affairs, could only mean deliberation upon the ultimate aims of foreign policy and formulation of the objectives to be sought in actual diplomatic negotiations. Jay was convinced that the Senate would be a fitter body than the old Congress of the Confederation to perform this policymaking task. Clearly he did not expect or advocate that this high responsibility would or should be taken out of legislative hands entirely and transferred to executive ones. In discussing the Senate and the qualifications its members would have, Jay was obviously not talking about a body whose function in foreign affairs would be limited to the casting of a yes-or-no vote on an international agreement already worked out, down to the final details, by the executive, on the basis of his own individual conception of desirable policy.

542. *Id.* at 437 (emphasis added). *See* notes 274–77 and accompanying text *supra.*
543. THE FEDERALIST No. 64, *supra* note 76, 433–34.
544. *Id.* at 434.

Descanting upon the high character of the persons who would be involved in the conduct of foreign affairs, Jay exclaimed: "With such men the power of making treaties may be safely lodged."[545] Significant is the fact that throughout the essay, just as here, Jay consistently referred in the plural to those in whom the power of making treaties would be lodged. In Jay's exposition, it was always the President *and* Senate who were empowered to make treaties. That the two authorities had different functions to perform within the common enterprise was a fact that Jay knew better, perhaps, than anyone else, for in the documents that he communicated to the old Congress he had labored hard to define and establish the distinction between deliberative and executive functions. He did so again in *The Federalist*. Having emphasized the qualities that would be required of Senators if the "great objects" of foreign policy were "to be steadily contemplated in all their relations and circumstances,"[546] he turned to the requisites for a successful conduct of actual negotiations, the foremost of which were "perfect *secrecy* and immediate *dispatch*."[547] His examples revealed his meaning more tellingly than these cliches. As for "secrecy," Jay explained that intelligence must sometimes be obtained from persons "who would rely on the secrecy of the president, but who would not confide in that of the senate, and still less in that of a large popular assembly."[548] With reference to "dispatch," Jay wrote:

> [T]here frequently are occasions when days, nay even when hours are precious. The loss of a battle, the death of a Prince, the removal of a minister, or other circumstances intervening to change the present posture and aspect of affairs, may turn the most favorable tide into a course opposite to our wishes. As in the field, so in the cabinet, there are moments to be seized as they pass, and they who preside in either, should be left in capacity to improve them.[549]

And that these remarks applied to the conduct of negotiations, not to longterm deliberations on policy, was made clear by Jay's subsequent sentence: "Those matters which *in negociations* usually require the most secrecy and the most dispatch, are those preparatory and auxiliary measures which are no otherwise important in a national view, than as they tend to facilitate the attainment of the objects of the negociation."[550]

545. *Id.* at 433.
546. *Id.* at 434.
547. *Id.* at 434 (emphasis in original).
548. *Id.* at 435.
549. *Id.*
550. *Id.* (emphasis added).

Jay's interpretation of the foreign-affairs provisions of the Constitution as they left the hands of the framers was summed up in two sentences of *The Federalist* No. 64:

> The Convention have done well . . . in so disposing of the power of making treaties, that although the president must in forming them act by the advice and consent of the senate, yet he will be able to manage the business of intelligence in such a manner as prudence may suggest.
>
> . . . Thus we see that the constitution provides that our negociations for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigations on the one hand, and from secrecy and dispatch on the other.[551]

On the one hand, the Senate; on the other, the President—treatymaking was to be a cooperative venture from the beginning to the end of the entire process. This, the evidence shows, was the true intent of the framers.

551. *Id.* at 436.