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ARTICLES

RECOGNITION: A CASE STUDY ON THE ORIGINAL UNDERSTANDING OF EXECUTIVE POWER

*Robert J. Reinstein **

I. THE POWER OF RECOGNITION

Let's fast-forward to a point in the near future. The President has given up on unsuccessful American mediation attempts to secure a peace treaty between Israel and the Palestinians. To resolve this longstanding impasse, the President offers his own peace plan for the Middle East, which includes the creation of the State of Palestine with defined borders, including the partition of Jerusalem, and the settlement of other outstanding issues that have divided the parties. The plan is accepted by the Palestinian Authority but not by Israel. The Palestinian Authority then declares the independent State of Palestine that has the borders and other conditions prescribed in the President's proposal. The President quickly announces that the United States recognizes the State of Palestine with those borders and conditions. Does he have the constitutional power to so bind the United States? And suppose that Congress passes legislation to override the President's decision. Is that legislation constitutional?

The hornbook answer is that the President would prevail. "Under the Constitution of the United States, the President has exclusive authority to recognize or not to recognize a foreign state or government, and to maintain or not to maintain diplomatic rela-

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tions with a foreign government.”¹ Moreover, “[t]he President’s determinations and actions within the scope of this [power], if they accord with the Constitution in other respects, are binding on Congress and the courts.”² And the President’s recognition power includes the determination of foreign sovereignty over territory and boundaries, and the policies incident to recognition.³

These principles are consistent with the views of scholars on foreign affairs and the Constitution since the latter part of the nineteenth century⁴ and, more importantly, with the view of the Supreme Court since at least 1937.⁵ Thus, under prevailing doc-

1. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 204 (1987).

2. *Id.* § 204 cmt. a.

3. *Id.* § 204 cmt. a, reporters’ note 1.

4. *E.g.*, THOMAS A. BAILEY, A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE 7–8 (10th ed. 1980); EDWARD S. CORWIN, THE PRESIDENT’S CONTROL OF FOREIGN RELATIONS 71, 82 (1917); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 88 (2d ed. 1996); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 69, 78 (1990); H. JEFFERSON POWELL, THE PRESIDENT’S AUTHORITY OVER FOREIGN AFFAIRS app. at 152–53 (2002); MICHAEL D. RAMSEY, THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS 127–28, 328–29 (2007); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 312–13 (2001); *see also* Recognition: By Whom Determinable, 1 Hackworth DIGEST § 31, at 161–66 (discussing the President’s sole authority to recognize new states); States: their Recognition and Continuity: Recognition, By Whom Determinable, 1 Moore DIGEST § 75, at 243–48 (same); Intervention with Foreign Sovereignities: Such Recognition Determinable by Executive, 1 Wharton DIGEST § 71, at 551–52 (same).

I made the same assertion (which I now regret) in a recent article. Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 296 (2009) (citing 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1560 (1883)).

One dissenter is David Gray Adler. He states that the Receive Ambassadors Clause in Article II, Section 3 does grant presidential power to recognize foreign governments but argues that the power is ministerial and not discretionary. His position is that the original meaning of the clause was to limit the recognition power to the strictures of the law of nations as expressed by the foremost treatise writers on that subject. David Gray Adler, *The President’s Recognition Power*, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 133, 133–57 (David Gray Adler & Larry N. George eds., 1996).

5. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) (“Political recognition is exclusively a function of the Executive.”); *Nat’l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 358 (1955) (“The status of the Republic of China in our courts is a matter for determination by the Executive and is outside the competence of this Court.”); *United States v. Pink*, 315 U.S. 203, 207 (1942) (“The authority of the political department is not limited . . . to the determination of the government to be recognized. The President is also empowered to determine the policy to govern the question of recognition. Objections to the President’s determination of the government ‘as well as to the underlying policy’ must be addressed to the political department.” (quoting *Guar. Trust Co. v. United States*, 304 U.S. 126, 138 (1938))); *Guar. Trust Co. v. United States*, 304 U.S. 126, 137 (1938) (“What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government.”); *United States v. Belmont*, 301 U.S. 324, 330 (1937) (“The recognition, establishment of diplomatic relations, the assignment, and agreements with re-

trine, should the President recognize a Palestinian state, that decision, as well as the determination of boundaries and other subjects related to recognition, would be within his constitutional powers and would not be subject to revision by Congress or questioned in the courts.

The recognition (or nonrecognition) of foreign states and governments has certain legal consequences. A nonrecognized state or government cannot sue in the courts of the United States,⁶ except perhaps if given clearance by the State Department.⁷ Nor can it ordinarily invoke the doctrine of foreign sovereign immunity.⁸ When the President recognizes a government, this validates, for United States courts, all of the actions of that government within its own territory, retroactive to the establishment of the government.⁹

However, the recognition power has been most significant as an important weapon in the Executive's foreign policy arsenal for more than a century and as a linchpin for expanding executive power. Some notable examples: To obtain the lease for the Panama Canal, President Theodore Roosevelt used the recognition power to create a new country from within the boundaries of another.¹⁰ President Taft used this power repeatedly as an important element of "dollar diplomacy," to coerce commercial and economic concessions from, and to justify military interventions in, Latin American countries.¹¹ President Wilson continued Taft's

spect thereto, were all parts of one transaction, resulting in an international compact between the two governments. That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted. . . . [I]n respect of what was done here, the Executive had authority to speak as the sole organ of that government."

6. *Guar. Trust*, 304 U.S. at 137 (citations omitted); *Matimak Trading Co. v. Khalily*, 118 F.3d 76, 84 (2d Cir. 1997); *Nat'l Petrochem. Co. of Iran v. M/T Stolt Sheaf*, 860 F.2d 551, 553 (2d Cir. 1988); *KMW Int'l v. Chase Manhattan Bank N.A.*, 606 F.2d 10, 16-17 (2d Cir. 1979); *Republic of Vietnam v. Pfizer, Inc.*, 556 F.2d 892, 894 (8th Cir. 1977) (citing *Guar. Trust Co.*, 304 U.S. at 137).

7. See, e.g., *Matimak*, 118 F.3d at 84.

8. *Nat'l City Bank of N.Y.*, 348 U.S. at 358; see *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 48-49 (2d Cir. 1991).

9. *Banco Nacional*, 376 U.S. at 417; *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302-03 (1918); *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 308-09 (1918).

10. TAYLOR COLE, *THE RECOGNITION POLICY OF THE UNITED STATES SINCE 1901*, at 38-42 (1928); JULIUS GOEBEL, JR., *THE RECOGNITION POLICY OF THE UNITED STATES* 212-17 (1915).

11. SAMUEL FLAGG BEMIS, *A DIPLOMATIC HISTORY OF THE UNITED STATES* 532-33 (4th ed. 1955) [hereinafter BEMIS, *A DIPLOMATIC HISTORY*]; COLE, *supra* note 10, at 44-51; GEORGE C. HERRING, *FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776*, at 373-77 (2008).

policy¹² and also used the recognition power to export democracy. Before the First World War, he refused to recognize undemocratic regimes in Latin America and helped democratic insurgents to oust them;¹³ after the War, he worked with Great Britain and France to carve up Europe by creating new countries based on ethnic concentrations.¹⁴ Upon the overthrow of the Russian Czar in 1917, Wilson promptly recognized the Provisional Government but then refused to recognize the successor Bolshevik regime¹⁵—a policy of diplomatic isolation that lasted until President Franklin Roosevelt recognized the U.S.S.R. in 1933.¹⁶ As part of that recognition package, FDR entered into executive agreements with the Soviet regime that nullified lawsuits pending in United States courts which sought compensation for the expropriations of private property.¹⁷ These actions led to the Supreme Court's unqualified endorsement of the President's recognition power in cases that upheld, for the first time, sole executive agreements, on the theory that they were part of the recognition decision, and also held that those agreements had the same effect as treaties in superseding contrary state legislation.¹⁸

Two more examples, both in 1948, influenced United States foreign policy for many years. President Truman recognized the State of Israel eleven minutes after its declaration of independence, even though Israel was under a military assault from Arab states.¹⁹ But Truman refused to recognize the People's Republic of China ("PRC"),²⁰ even though the Communist regime had won the civil war and controlled the entire country except for the island of Taiwan;²¹ and that policy of isolation lasted until 1979, when President Carter finally recognized the PRC.²² Carter also added to the executive arsenal by unilaterally rescinding the Taiwan

12. See BEMIS, *A DIPLOMATIC HISTORY*, *supra* note 11, at 533–34.

13. The most famous instance was Wilson's refusal to recognize the Huerta regime in Mexico in 1913, which contributed to his overthrow the following year. See COLE, *supra* note 10, at 53–61; HERRING, *supra* note 11, at 391–94.

14. HERRING, *supra* note 11, at 422.

15. *Id.* at 414–15. Wilson also sent an expeditionary force of about 20,000 troops to support the "Whites" in their attempt to overthrow the Bolshevik regime. *Id.* at 415; MICHAEL KETTLE, *CHURCHILL AND THE ARCHANGEL FIASCO* 88 (1992).

16. BAILEY, *supra* note 4, at 7.

17. *United States v. Belmont*, 301 U.S. 324, 326 (1937).

18. *United States v. Pink*, 315 U.S. 203, 229 (1942); *Belmont*, 301 U.S. at 330–32.

19. BAILEY, *supra* note 4, at 7; HERRING, *supra* note 11, at 628–29.

20. BAILEY, *supra* note 4, at 7.

21. *Id.* at 784–85.

22. *Id.* at 968.

Mutual Defense Treaty on the ground that the treaty was with a government that the United States no longer recognized.²³ These actions illuminated the breadth of the recognition power: a treaty that had been made by a President with the approval of two-thirds of the Senate was rescinded by another President without the approval of the Senate.²⁴ A challenge to this exercise of unilateral executive power failed in the Supreme Court.²⁵ And more recently, President Clinton used his executive authority to recognize the de jure government of Haiti as justification for sending American military forces to restore that regime to power.²⁶

None of the incidents described above involved a situation in which Congress attempted to override the Executive's decision by statute. Moreover, although Supreme Court decisions since 1937 have consistently referred to the executive recognition power as plenary and exclusive, the earlier decisions were much more ambivalent.²⁷ Actually, no Supreme Court case (nor any lower court

23. See *Goldwater v. Carter*, 617 F.2d 697, 700, 708 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979).

24. See BAILEY, *supra* note 4, at 968.

25. The Supreme Court vacated the D.C. Circuit's decision in *Goldwater v. Carter* without reaching the merits. 444 U.S. at 996 (1979). Justice Rehnquist, joined by Chief Justice Burger and Justices Stewart and Stevens, concurred in the judgment on the ground that the issue was a nonjusticiable political question. *Id.* at 1002 (Rehnquist, J., concurring). Justice Powell concurred in the judgment on the ground that the case was not ripe for judicial review. *Id.* at 997 (Powell, J., concurring). Justices Blackmun and White thought that the Court's summary disposition was incorrect and voted to hear the case on the merits. *Id.* at 1006 (Blackmun, J., dissenting). Only Justice Brennan reached the merits and relied on the Executive's recognition power as giving the President the authority to nullify the treaty: "Abrogation of the defense treaty with Taiwan was a necessary incident to Executive recognition of the Peking Government, because the defense treaty was predicated upon the now-abandoned view that the Taiwan Government was the only legitimate political authority in China." *Id.* at 1006-07 (Brennan, J., dissenting).

26. See POWELL, *supra* note 4, at 121-22.

27. In the earliest Supreme Court cases, the Marshall Court held that the judiciary could not independently determine the status of a new state or government and suggested that the recognition power was held jointly by Congress and the President. See *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 634 (1818) ("[Recognition decisions] belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise; to whom are entrusted all its foreign relations; than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it."); *id.* at 643 ("[T]he courts . . . must view such newly constituted government as it is viewed by the legislative and executive departments of the government of the United States."); *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246, 324 (1818) ("[I]t belongs exclusively to governments to recognise new states . . . and until such recognition, either by our own government, or the government to which the new state belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered."); *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 272 (1808) ("It is for governments to decide whether they will consider St. Domingo as an independent nation, and until such decision shall be made, or France shall

decision)²⁸ had presented a conflict between the President's exercise of the recognition power and the operation of a congressional statute. The judicial statements that the executive recognition power is plenary in nature are technically dicta, but dicta that is repeated often enough tends to take on the force of a holding.

Zivotofsky v. Secretary of State is the first case to actually present a conflict between a statute and the recognition power²⁹—and in a context that bears some resemblance to the hypothetical with which I began this paper. In 2002, a federal law was enacted that requires the passport office to record Israel as the place of birth of a United States citizen born in Jerusalem.³⁰ However, this law, which appears mandatory,³¹ is in conflict with executive recognition decisions. When President Truman recognized the State of Israel in 1948, he refused to acknowledge that Jerusalem was subject to Israeli sovereignty, leaving that contentious issue open for future resolution; and this has been the policy of each succeed-

relinquish her claim, courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of France over that colony as still subsisting.”)

Williams v. Suffolk Insurance Co. was the first decision to state that recognition was an executive function:

[C]an there be any doubt, that when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? . . . [I]t is not . . . the province of the Court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions, he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union.

38 U.S. (13 Pet.) 415, 420 (1839). To the same effect, see *Kennett v. Chambers*, 55 U.S. (14 How.) 38, 50–51 (1852). Yet in late nineteenth and early twentieth century cases, the Supreme Court returned to Marshall's formulation that the recognition power belonged to Congress and the President. See *Jones v. United States*, 137 U.S. 202, 212 (1890) (“Who is the sovereign, de jure or de facto, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government.”); see also *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) (quoting *Jones*, 137 U.S. at 212).

28. See, e.g., *Matimak Trading Co. v. Khalily*, 118 F.3d 76, 88 (2d Cir. 1997), cert. denied, 522 U.S. 1091 (1998); *United States v. Cnty. of Arlington*, 669 F.2d 925, 929–30 (4th Cir.), cert. denied, 459 U.S. 801 (1982); *Republic of Vietnam v. Pfizer, Inc.*, 556 F.2d 892, 894–95 (8th Cir. 1977); *Nat'l Union Fire Ins. Co. v. Republic of China*, 254 F.2d 177, 186 (4th Cir.) (citations omitted), cert. denied, 358 U.S. 823 (1958); *Latvian State Cargo & Passenger S.S. Line v. McGrath*, 188 F.2d 1000, 1002–04 (D.C. Cir.), cert. denied, 342 U.S. 816 (1951).

29. 571 F.3d 1227, 1228–29 (D.C. Cir. 2009), reh'g en banc denied, 610 F.3d 84 (D.C. Cir. 2010).

30. *Id.* at 1229; see Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1350, 1366 (2002).

31. See *Zivotofsky*, 571 F.3d at 1243 (Edwards, J., concurring).

ing administration.³² Each member of the District of Columbia Circuit panel agreed, however, that the clause in the Constitution providing that the President “shall receive Ambassadors and other public Ministers”³³ gave the President plenary and exclusive authority to recognize foreign states and governments, and that authority included determining the status of disputed territory and other policies incident to recognition.³⁴ The majority concluded that any challenge to that power would present a nonjusticiable political question.³⁵ Judge Edwards, concurring, concluded that the issue was justiciable and that the statute was an unconstitutional infringement on the President’s recognition powers.³⁶ Although the majority and Judge Edwards take different approaches, the result is the same: the President’s recognition decision stands, and a conflicting act of Congress is not enforced.³⁷ Yet no matter how often courts and commentators maintain that recognition is an illusive power of the President, the nagging fact is that the Constitution does not mention recognition. A plenary executive recognition power may be a current reality, but the constitutional source of this power is much harder to identify with confidence.

II. THE UNCERTAIN SOURCES OF THE RECOGNITION POWER

There are four sources from which a plenary executive recognition power is said to derive—one nontextual (Justice Sutherland’s opinion in *Curtiss-Wright*) and three textual (the authority to exchange diplomats, the Receive Ambassadors Clause, and the Executive Vesting Clause). Each is discussed below. Two of these sources are, in my view, simply not tenable—Justice Sutherland’s theory of inherent presidential power because it is anticonstitutional, and the textual power to exchange diplomats because that power is shared with the Senate. The other two constitutional provisions, the Receive Ambassadors and Executive Vesting

32. *See id.* at 1228 (majority opinion); *id.* at 1241 (Edwards, J., concurring) (citing to State Department documents and policy statements).

33. U.S. CONST. art. II, § 3.

34. *Zivotofsky*, 571 F.3d at 1231 (majority opinion); *id.* at 1240–41 (Edwards, J., concurring).

35. *Id.* at 1231 (majority opinion) (citing *United States v. Pink*, 315 U.S. 203, 229 (1942)).

36. *Id.* at 1240 (Edwards, J., concurring).

37. *Id.* at 1232 (majority opinion); *id.* at 1234.

Clauses, are arguable but present serious textual and structural problems.

A. Curtiss-Wright

The nontextual source is the dicta about the President's foreign affairs powers in Justice Sutherland's opinion for the Supreme Court in the 1936 case of *United States v. Curtiss-Wright Export Corp.*³⁸ (It is considered dicta because Congress had in fact authorized the executive action in that case).³⁹ Sutherland's thesis was that the President possesses inherent and exclusive extra-constitutional powers to conduct the nation's foreign affairs.⁴⁰ Sutherland constructed an historical narrative that the external powers of the colonies—which had been controlled by Great Britain—were, at the moment of independence, “passed from the Crown” to the United States but not to the several states.⁴¹ He then claimed that this power belongs solely to the President, positing “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations [is] a power which does not require as a basis for its exercise an act of Congress.”⁴² The next year, in *United States v. Belmont*, the Supreme Court upheld, in another opinion by Sutherland, President Roosevelt's executive agreement with the Soviet Union because, per *Curtiss-Wright*, “[t]he recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto,” were exercises of plenary executive power.⁴³ After the wholesale change in the Supreme Court's composition following 1937, the Court reaffirmed *Curtiss-Wright* and *Belmont* and held that the President has the plenary power to recognize foreign governments and “[t]hat authority is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition,” such as executive agreements which operate domestically to displace state law.⁴⁴

38. 299 U.S. 304 (1936).

39. *Id.* at 311.

40. *See id.* at 318.

41. *Id.* at 316.

42. *Id.* at 320.

43. 301 U.S. 324, 330 (1937).

44. *United States v. Pink*, 315 U.S. 203, 222–23, 229 (1942).

Sutherland's thesis in *Curtiss-Wright* has been the subject of such massive criticism that only a summary is warranted here. That thesis contradicts the fundamental principle that the United States can exercise only those powers that are delegated by the Constitution.⁴⁵ Moreover, the historical narrative is more creative than descriptive. Following the Declaration of Independence and during the entire Confederation period, all national powers were vested in Congress, but Congress did not have, nor did it ever claim to have, complete power over foreign affairs.⁴⁶ Even if Congress had total control over foreign policy in the pre-constitutional period, it hardly follows that the Constitution transferred that entire authority to the President. The Constitution explicitly allocates foreign affairs powers between the President and Congress, with the President given some important powers⁴⁷ and Congress others.⁴⁸ And, unlike the President, Congress is also given the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing [Congressional] Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof."⁴⁹

45. See RAMSEY, *supra* note 4, at 17; see also U.S. CONST. amend. X.

46. Michael J. Glennon, *Two Visions of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright?*, 13 YALE J. INT'L L. 5, 15 (1988). For example, Congress did not have the powers to regulate foreign commerce, tax imports, or enforce the law of nations; the states regularly taxed imports, imposed embargoes on foreign commerce, enforced the laws of nations, and violated United States treaties with impunity (particularly the 1783 Treaty of Peace with Great Britain). RAMSEY, *supra* note 4, at 40–45; see also FREDERICK W. MARKS III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 11–15, 47, 55–83 (1973).

47. The President is vested with the powers of being Commander in Chief of the military, and of the militias when called into service; of nominating ambassadors, other public ministers and consuls; of negotiating treaties; and (assuming it is a power) of receiving ambassadors. U.S. CONST. art. II, §§ 2–3.

48. Congress is vested with the powers to lay and collect taxes (including on imports); to provide for the common defense; to regulate foreign commerce; to establish a uniform rule of naturalization; to regulate the value of foreign money; to define and punish felonies committed on the high seas and offenses against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures; to raise and support the military; to provide for calling forth the militia to repel invasions; and to regulate the military and the militia. *Id.* art. I, § 8. In addition, the Senate is given the power to veto treaties and the appointments of ambassadors, public ministers and consuls. See *id.* art. II, § 2.

49. *Id.* art. I, § 8, cl. 18 (emphasis added).

Finally, although the overreaching opinion in *Curtiss-Wright*⁵⁰ continues to be cited,⁵¹ the extra-constitutional theory of presidential power was decisively rejected by the Supreme Court in the *Steel Seizure* case: “The President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.”⁵² Justice Jackson’s concurring opinion has been adopted as the proper framework for determining the scope of executive power.⁵³ Jackson’s opinion acknowledges the obvious—that the President has plenary power only when he or she is acting pursuant to an enumerated power.⁵⁴ Therefore, the three possible textual sources of the recognition power should be considered.

B. *Sending and Receiving Diplomats*

The President has the constitutional “Power” to appoint “Ambassadors, other public Ministers and Consuls,”⁵⁵ and “he shall receive Ambassadors and other public Ministers.”⁵⁶ The exchange of diplomatic envoys is usually considered conclusive evidence of mutual recognition between governments, and this is therefore

50. Professor Powell argues that this interpretation reads too much into *Curtiss-Wright* because Sutherland said that “the executive’s authority over foreign affairs ‘must be exercised in subordination to the applicable provisions of the Constitution.’” POWELL, *supra* note 4, at 127 n.133 (quoting *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936)). This ambiguous qualification adds to the incoherence of the opinion. It certainly means the obvious—that the President’s foreign affairs powers do not trump the Bill of Rights, and that the President still needs senatorial consent for appointments and treaties. But does it also mean that the President cannot exercise foreign affairs powers vested in Congress? That is unlikely. Sutherland concluded that the President could impose an embargo on arms shipments to foreign nations without authority from Congress. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 329 (1936), 299 U.S. at 329. Yet one of Congress’s enumerated powers is the regulation of commerce with foreign nations. The very facts of the case demonstrate the extreme breadth of Sutherland’s thesis.

51. *See, e.g.*, *Republic of Iraq v. Beaty*, 556 U.S. ___, ___, 129 S. Ct. 2183, 2189 (2009); *United States v. Lara*, 541 U.S. 193, 201 (2004); *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414–15 (2003); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 375 (2000).

52. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 585 (1952).

53. *See, e.g.*, *Medellín v. Texas*, 552 U.S. 491, 524–25 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006); *id.* at 638–39 (Kennedy, J., concurring in part); *Dames & Moore v. Regan*, 453 U.S. 654, 668–69 (1981).

54. *Steel Seizure*, 343 U.S. at 640 (Jackson, J., concurring) (“I did not suppose, and I am not persuaded, that history leaves it open to question, at least in the courts, that the executive branch, like the Federal Government as a whole, possesses only delegated powers. The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand.”).

55. U.S. CONST. art. II, § 2, cl. 2.

56. *Id.* art. II, § 3.

said to be a source of the executive recognition power.⁵⁷ There are two problems with this position. First, appointments of ambassadors and public ministers are subject to the consent of the Senate.⁵⁸ It is, to say the least, quite difficult to derive an exclusive executive power from one that is shared with a branch of Congress. Second, as stated by perhaps the leading authority on diplomacy, the recognition decision itself must be distinguished from acts such as the exchange of diplomatic envoys:

The right to send and receive diplomatic agents flows from recognition as a sovereign State and was formerly known as the right of legation (*ius legationis*). *The recognition of a new State, the establishment of diplomatic relations with that State, and the establishment of a permanent diplomatic mission in that State are three distinct steps.* It may however sometimes happen that two of the three steps occur simultaneously or in immediate sequence, which can give rise to confusion between them.⁵⁹

Historically, recognition was given by a written or oral declaration.⁶⁰ Acts such as negotiating a treaty, sending or officially receiving diplomatic envoys, giving exequaturs to foreign consuls, and forming conventional diplomatic relations are also considered evidence of recognition.⁶¹ But these are all distinct acts. For example, the United States recognizes the Castro regime in Cuba, but neither country has sent or received diplomatic envoys, nor have they had diplomatic relations.⁶² The United States has never recognized the Palestinian Authority as a government, but diplomatic relations (at the highest levels) have been ongoing since the

57. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 204 cmt. a, reporters' note 2 (1987).

58. U.S. CONST. art. II, § 2.

59. ERNEST MASON SATOW, A GUIDE TO DIPLOMATIC PRACTICE 71 (Ivor Roberts ed., 6th ed. 2009) (emphasis added).

60. States: Their Recognition and Continuity, 1 MOORE DIGEST, *supra* note 4, § 27, at 73.

61. *Id.* The discretionary use of the recognition power as an instrument of foreign policy created a diplomatic problem: a declaration that recognized a new government was interpreted (sometimes incorrectly) as approving that government and its conduct. To avoid this, the Executive adopted the practice of generally avoiding explicitly to recognize or refusing to recognize a new government. See *Nat'l Petrochem. Co. of Iran v. M/T Stolt Sheaf*, 860 F.2d 551, 554 (2d Cir. 1988). Instead of declarations of recognition or nonrecognition, the more modern practice is to either continue or break off diplomatic relations with the new government. SATOW, *supra* note 59, at 75 (stating that Great Britain also follows this practice). However, there have been situations (such as Haiti, discussed above) in which the President declared that he did not recognize a new government. See JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 156–58 (3d ed. 2010).

62. DEP'T OF STATE, COMM. ON FOREIGN RELATIONS, 88TH CONG., 1ST SESS., EVENTS IN UNITED STATES-CUBAN RELATIONS 1–3, 19 (Comm. Print 1963).

Oslo Accords.⁶³ And, perhaps most famously, when President Nixon made his celebrated trip to China in 1972, the United States had not recognized the PRC but continued to recognize the government in exile in Taiwan as the government of China.⁶⁴ Yet Nixon and Kissinger negotiated directly with the leaders of the PRC and issued the Shanghai Communiqué, which was to be a blueprint for future relations between the two countries, and they promised to recognize the PRC in Nixon's second term.⁶⁵ Following Nixon's visit, diplomatic envoys were exchanged, and permanent (albeit informal) embassies (called "liaison offices") were established in Washington and Beijing.⁶⁶ These conditions continued for seven years, until 1979, when the PRC was recognized and the government in Taiwan was derecognized.⁶⁷

C. *The Receive Ambassadors Clause*

The constitutional provision that the President "shall receive Ambassadors and other public Ministers" is the most often cited source of a plenary executive recognition power and has the longest historical pedigree.⁶⁸ There are textual problems with relying on this Clause also. Like the exchange of diplomatic envoys, the act of receiving ambassadors is evidence of, but distinct from, the recognition decision.⁶⁹ Moreover, as Louis Henkin observed, this

63. See HERRING, *supra* note 11, at 935.

64. *Id.* at 778–79, 791–93.

65. *Id.* at 717–78, 791–92.

66. *Id.* at 793.

67. *Id.* at 839; PHILIP MICHAEL PANTANA, SR., *AMERICA: A PURPOSE-DRIVEN NATION* 119 (2007).

68. U.S. CONST. art. II, § 3. From my research, it appears that the first person to make this argument was Alexander Hamilton, writing as *Pacificus* in 1793. See Alexander Hamilton, *Pacificus No. 1* (June 29, 1793), reprinted in 15 *THE PAPERS OF ALEXANDER HAMILTON* 33, 41 (Harold C. Syrett et al. eds., 1969) [hereinafter *Pacificus No. 1*]. Commentators picked up the argument that the Receive Ambassadors Clause was the source of the President's recognition power, although they left unsettled whether Congress could override an executive decision on recognition. See 1 St. George Tucker, *BLACKSTONE'S COMMENTARIES* app. at 341 (1803) ("[The Receive Ambassadors Clause is] a power of some importance, as it may sometimes involve in the exercise of it, questions of delicacy; especially in the recognition of authorities of a doubtful nature."); see also WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 195 (2d ed. 1829) (noting that the Receive Ambassadors Clause implies presidential recognition power, but that Congress can override it); 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* §§ 1560–1561 (1833) (agreeing with Rawle that the Receive Ambassadors Clause implies executive recognition power, but noting that whether Congress can override it is a difficult question).

69. See *supra* notes 62–67 and accompanying text.

Clause is not written as a “power’ of the President” but is placed in Section 3 of Article II, which contains a list of executive duties.⁷⁰ “Receiving ambassadors seems a function, an assigned duty, a ceremony that in many countries is performed by a figure-head.”⁷¹

Another textual problem is that, unlike the other provisions in the Constitution that relate to foreign diplomats (the Appointments Clause in Article II and the subject-matter jurisdiction clauses in Article III), the Receive Ambassadors Clause omits consuls.⁷² If this Clause is in fact ministerial, the omission of consuls makes sense. Consuls do not have the status, power, or privileges of diplomatic envoys;⁷³ and there is no reason of protocol for a head of state to receive them. On the other hand, if the Clause is a grant of the recognition power, the omission of consuls is troubling. Because of financial constraints and a perceived lack of necessity, many countries at the time of the founding, including the United States, sent few permanent envoys abroad.⁷⁴ Instead, they sent consuls, primarily to oversee their commercial interests.⁷⁵ Consuls could operate formally only if they received exequaturs from the receiving countries, and those documents were evidence that the consuls represented recognized nations.⁷⁶

These textual objections are not conclusive. The omission of consuls from the Receive Ambassadors Clause may well have been an oversight.⁷⁷ And the distinction between power and duty

70. HENKIN, *supra* note 4, at 37–38.

71. *Id.* at 38.

72. That is, the Appointments Clause, discussed above, provides that the President shall nominate and, with the consent of the Senate appoint “Ambassadors, other public Ministers and Consuls.” U.S. CONST. art. II, § 2. The judicial power clause includes as a category of federal court jurisdiction “all Cases affecting Ambassadors, other public Ministers and Consuls,” and vests the Supreme Court with original jurisdiction over such cases. *Id.* art. III, § 2.

73. See M.J. PETERSON, *RECOGNITION OF GOVERNMENTS* 114–15 (1997); 3 STORY, *supra* note 68, § 1559.

74. See HERRING, *supra* note 11, at 58.

75. See *id.* (noting that in the early stages of the Washington administration, the “foreign service” consisted of diplomatic envoys in France, Great Britain, Spain, and Portugal, and an agent in Amsterdam, and in 1790, Washington “appointed twelve consuls and also named six foreigners as vice-consuls”). For example, Prussia, with whom the United States had a treaty of amity and commerce, did not send a diplomatic envoy but did assign a consul. See Letter from Charles Gottfried Paleske to Thomas Jefferson (June 19, 1792), in 24 *THE PAPERS OF THOMAS JEFFERSON* 99, 99–101 (John Catanzariti et al. eds., 1990).

76. *E.g.*, RAWLE, *supra* note 68, at 224–25; 3 STORY, *supra* note 68, § 1559.

77. In *The Federalist No. 42*, Madison asserted, with unusual carelessness, that consuls were included in the Receive Ambassadors Clause. He noted that the power to send and receive ambassadors was vested in Congress by the Articles of Confederation. THE

can be elusive. For example, Section 3 enjoins the President to “take Care that the Laws be faithfully executed.”⁷⁸ This is plainly a duty in that it prohibits the President from suspending laws (as the Stuart kings did in England),⁷⁹ but it may also imply a power to execute the laws.⁸⁰

There is another problem with viewing the Receive Ambassadors Clause as a source of executive power. James Wilson, the leader of the pro-presidential faction in the Constitutional Convention, assured the delegates that “[h]e did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. . . . The only powers he conceived strictly Executive were those of executing the laws, and appointing officers not [connected with and] appointed by the Legislature.”⁸¹ The Constitution allocated the secular royal prerogatives in Articles I and II. Most of these prerogative powers were granted in their entirety to Congress.⁸² Others were given to the President, but qualified by limitations in scope, congressional override, or senatorial veto.⁸³

FEDERALIST NO. 42, at 261 (James Madison) (Clinton Rossiter ed., 2003). According to Madison, the only difference in the Constitution was the expanded “power of appointing and receiving ‘other public ministers and consuls.’” *Id.* (emphasis added). Madison allowed that ministers were included because the United States would prefer to send abroad a lower (and less expensive) grade of diplomatic envoy than ambassadors. *See id.* As for consuls, the problem was that

under no latitude of construction will the term [ambassadors] comprehend consuls. . . . But the admission of consuls into the United States, where no previous treaty has stipulated it, seems to have been nowhere provided for [in the Articles]. A supply of the omission is one of the lesser instances in which the convention have improved on the model before them.

Id. This would have been a good reason for consuls to have been included in the Receive Ambassadors Clause, but, deliberately or not, they were omitted.

78. U.S. CONST. art. II, § 3.

79. Reinstein, *supra* note 4, at 278–80.

80. *See* Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 359–64 (2008).

81. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 65–66 (Max Farrand ed., rev. ed. 1966) (June 1, 1787) [hereinafter RECORDS OF THE FEDERAL CONVENTION].

82. *See* David Gray Adler, *The Constitution and Presidential Warmaking*, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY, *supra* note 4, at 183, 198. Fourteen of the twenty-five specific plenary powers that are vested in Congress in Article I, section 8, were prerogatives of the King. They are listed in Reinstein, *supra* note 4, at 304 n.276.

83. Reinstein, *supra* note 4, at 305 (“The Commander-in-Chief power was limited by vesting the war powers and substantial control over the military in Congress. The treaty and appointments powers (including the appointment of ambassadors and other public ministers) were made subject to the prior approval of the Senate, while the veto power was subject to congressional override. The pardoning power could be applied only to a relative-

The Receive Ambassadors Clause is not qualified. If this clause vests plenary recognition power in the President, it would be a remarkable singularity in the Constitution—giving a unilateral royal prerogative to the President. Did the Convention do this? According to Alexander Hamilton, hardly a shrinking violet where executive power was concerned, it did not.⁸⁴ In *The Federalist No. 69*, Hamilton went clause-by-clause in comparing each presidential power with its royal prerogative counterpart and concluded that none was equivalent.⁸⁵ As for the Receive Ambassadors Clause, Hamilton wrote:

The President is also to be authorized to receive ambassadors and other public ministers. This, though it has been a rich theme of declamation, is more a matter of dignity than of authority. It is a circumstance which will be without consequence in the administration of the government; and it was far more convenient that it should be arranged in this manner than that there should be 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.⁸⁶

This was Hamilton as Publius in 1788. Only five years later, as Pacificus, Hamilton did an about-face in his essays on the Neutrality Proclamation and treaties with France. Now, Hamilton asserted that the Receive Ambassadors Clause empowered the President, in his discretion, to recognize, or to refuse to recognize, foreign states and governments and to rescind treaties with non-recognized governments.⁸⁷ Which Hamilton was correct? According to David Gray Adler, it was Hamilton as Publius.⁸⁸ Adler assumes that the Receive Ambassadors Clause is the source of the Executive's recognition authority,⁸⁹ but he argues, from post-ratification events during the Washington administration, that this authority was intended to be ministerial in nature and does not provide discretionary power for presidents to recognize, or to refuse to recognize, new governments.⁹⁰

ly small percentage of criminal cases [for offenses against the United States].”).

84. THE FEDERALIST NO. 69, *supra* note 77, at 418–19 (Alexander Hamilton).

85. *Id.* at 414–21.

86. *Id.* at 419.

87. *Pacificus No. 1*, *supra* note 68, at 41.

88. Adler, *supra* note 4, at 134.

89. *Id.* at 133.

90. *Id.* at 134; *see infra* Part III.B.5.

However, Hamilton as Publius did not assert that the Receive Ambassadors Clause vested any recognition power in the President. According to Publius, the Clause “is more a matter of dignity than of authority . . . [and] will be without consequence in the administration of the government.”⁹¹ Receiving ambassadors from recognized governments was a ministerial function; but Publius did not identify the branch of government that would have the recognition power or the criteria that would be used for recognition decisions.⁹² The particular language and placement of the Receive Ambassadors Clause cast serious doubt on its being the source of a plenary executive recognition power, whether discretionary or ministerial.

D. *The Executive Vesting Clause*

The final possible textual source for a plenary recognition power is the first section of the article on the presidency. Article II, Section 1 of the Constitution states that “[t]he executive Power shall be vested in a President of the United States of America.”⁹³ Michael Ramsey and Saikrishna Prakash have impressively advanced a theory that the Executive Vesting Clause provides the President with the entirety of the “executive” power, except as specifically limited by other provisions of the Constitution.⁹⁴ This theory posits that the transaction of foreign affairs is executive in nature.⁹⁵ Therefore, the President has sole control over the country’s foreign relations except as specifically restricted by the Constitution (for example, only Congress can declare war, and treaties negotiated by the President must be approved by two-thirds of the senators who are present).⁹⁶ Because the recognition power is an integral part of the conduct of foreign affairs and is not specifically restricted, advocates of this theory maintain that recognition is therefore a plenary power of the President.⁹⁷

91. THE FEDERALIST NO. 69, *supra* note 77, at 419 (Alexander Hamilton).

92. *See id.*

93. U.S. CONST. art. II, § 1.

94. *See* Prakash & Ramsey, *supra* note 4, at 256–57.

95. *See id.* at 257.

96. For the full elaboration of this theory, see generally RAMSEY, *supra* note 4; Prakash & Ramsey, *supra* note 4.

97. RAMSEY, *supra* note 4, at 127–28, 328–29; Prakash & Ramsey, *supra* note 4, at 312–13. This theory has also been used to assert that the President has complete authority to administer the laws. *See, e.g.*, STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE

There is an obvious textual problem with relying on the Executive Vesting Clause as an independent source of presidential power. The structure of Article II is the same as Article I. Section 1 of each Article identifies which department of government possesses the legislative power (Congress) and the executive power (“a President of the United States of America”).⁹⁸ Following sections then proceed to enumerate the powers vested in those departments. No one suggests that there is a residuum of nonenumerated congressional power in the Legislative Vesting Clause; why, then, should the Executive Vesting Clause be construed differently?

Advocates of the executive vesting theory point out that there is a difference in the phrasing of the Legislative and Executive Vesting Clauses—the former, but not the latter, refers to the vesting of powers “herein granted.”⁹⁹ The fallacy in this argument is that the “herein granted” phrase in Article I appears to be a redundancy with no legal significance. Suppose that this phrase had been omitted from the Legislative Vesting Clause. Adapting the executive vesting theory, one could then argue that Congress would possess all legislative powers except those that are specifically restricted by the Constitution (such as the veto power and the joinder of the President and Senate making treaties, which are declared to be “laws” in the Supremacy Clause).¹⁰⁰ It would therefore follow that the enumerated powers in Article I, Section 8 are illustrative only and that Congress possesses a general leg-

UNITARY EXECUTIVE 293 (2008); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 570, 581–82, 594–96 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1207 (1992).

William Casto also relies on the Executive Vesting Clause as a source of presidential power over foreign affairs, although he does not assert that this residual power is plenary. See WILLIAM R. CASTO, *FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL* 61–66 (2006). In Casto's view, the Vesting Clause gives the President the power to make initial decisions over foreign relations, but most (if not all) of those decisions can be reversed by Congress. *Id.* at 180–91.

98. U.S. CONST. art. I, § 1; *id.* art. II, § 1, cl. 1.

99. Prakash & Ramsey, *supra* note 4, at 256–57. For textual arguments contrary to the executive vesting theory, see Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 553–57 (2004); A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346, 1363 (1994); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 22 (1993).

100. U.S. CONST. art. I, § 7, cl. 2; *id.* art. II, § 2, cl. 2; *id.* art. VI, cl. 2; see *Myers v. United States*, 272 U.S. 52, 230–31 (1926) (McReynolds, J., dissenting).

islative power, equivalent to that of the British Parliament.¹⁰¹ This result would not be accepted by any serious student of constitutional law because it would defy the basic principle of delegated powers in the Constitution. The same textual and structural problem applies to the theory that the Executive Vesting Clause contains unspecified plenary powers in the President.

In addition to this textual problem, scholars advocating the executive vesting theory draw supportive inferences from the Constitutional Convention and ratification debates.¹⁰² Like Adler, however, they rely heavily on the postratification actions of the Washington administration,¹⁰³ but they draw diametrically opposite conclusions from Adler.¹⁰⁴

The executive vesting theory has been rigorously challenged by other scholars¹⁰⁵ (and I have joined the ranks of its critics)¹⁰⁶. The recognition power provides a good test case for the validity or invalidity of this theory. Like the Receive Ambassadors Clause, reliance on the Executive Vesting Clause requires further investigation.

III. AN ORIGINALIST INQUIRY

Given the textual uncertainties over the source of an executive recognition power, the remainder of this paper will focus on a question never before examined in the literature: What evidence is there that those who participated in the drafting and ratifying of the Constitution understood that a plenary recognition power was being vested in the President?

This is an originalist inquiry, and my approach is as follows. The debates over any issue in the Constitutional Convention and in the ratification process cannot be fully understood in the absence of historical context. If recognition and diplomatic relations were matters of little or no experience or importance to the founding generation, one would not be surprised if there were sparse

101. See sources cited *supra* note 100.

102. See, e.g., RAMSEY, *supra* note 4, at 70–72.

103. See, e.g., *id.* at 74–81. During Washington's first term as president, Madison, Jefferson, and Hamilton would advocate variations of the Executive Vesting Clause theory. I will address them in a future article on the Washington administration.

104. See *supra* notes 89–90 and accompanying text.

105. The most detailed critique is Bradley & Flaherty, *supra* note 99.

106. Reinstein, *supra* note 4, at 307–09.

discussion over these issues. But the history that I present in the next section of this paper shows that recognition and diplomatic relations were central issues for Congress during the pre-constitutional, Confederation period.¹⁰⁷ That history also shows that the founding generation was aware, from its own experience, of how recognition decisions were made by the European powers, what branches of government held the recognition power, how the recognition power was related to the receipt of ambassadors and establishment of diplomatic relations, and the approach of the European powers towards doctrines of recognition in the law of nations.¹⁰⁸ The founders were also aware from these historical experiences that miscalculations in the use of the recognition power could lead to war.¹⁰⁹

Because recent historical experience had demonstrated the importance of the power of recognition, one would expect that this would be the subject of considerable debate in the drafting and ratifying of the Constitution. However, as shown in succeeding parts of this paper, a thorough review of those debates reveals that no issue concerning the recognition power was even raised.¹¹⁰ The Receive Ambassadors Clause was almost completely ignored, and the Executive Vesting Clause was totally ignored.¹¹¹ No one suggested that either clause independently vested power in the President.¹¹² In striking contrast, the Anti-Federalists attacked, and the Federalists defended, every power that the President was thought to possess under the Constitution.¹¹³

Drawing broad conclusions from silence is treacherous. The evidence presented below does refute any positive assertion that those who participated in the construction of the Constitution understood that the President was being vested with the recognition power. But it does not necessarily follow that they understood that this power was being deliberately withheld from the President. After examining the founders' silence on the recognition power, I suggest a plausible alternative explanation for that silence. If that explanation is correct, the most that can be con-

107. *See infra* Part III.A.

108. *See infra* Part III.B.

109. *See infra* Part III.B.1.

110. *See infra* Part III.B.5.

111. *See infra* Part III.C–D.

112. *See infra* Part III.C–D.

113. *See infra* Part III.E.

cluded from this study is that there is no originalist basis for the proposition that a plenary recognition power was vested in the President. That is, the founders left a void in the Constitution.

A. *The Confederation Period*

1. France

In March 1776, Congress sent one of its members, Silas Deane, to France.¹¹⁴ He was disguised as a merchant, but his purpose was to purchase military equipment.¹¹⁵ France was a natural destination.¹¹⁶ Its defeat in the Seven Years War had been a catastrophe: France not only lost most of its empire in America but was humiliated and reduced to a second-rate power by Great Britain.¹¹⁷ Spurred by desires for revenge and restoration as a great power, King Louis XVI agreed in May 1776—even before the Declaration of Independence was issued—to a plan for supporting the American revolutionaries.¹¹⁸ That plan had been originally hatched by the diplomat-playwright Caron de Beaumarchais' and then adopted and advanced by the Foreign Minister, the Comte de Vergennes.¹¹⁹ It called for secretly providing loans and military supplies to the Americans and building up the French navy should war with Britain occur, while maintaining a public position of neutrality.¹²⁰ Deane had "informal" meetings with Vergennes and Beaumarchais, who were receptive and put their plan into effect.¹²¹ The King gave the first of many large loans to the Americans, and Beaumarchais established a private firm as a front for shipping large quantities of military equipment to George Washington's army.¹²²

114. BAILEY, *supra* note 4, at 27.

115. *Id.* at 27–28.

116. *See id.* at 26.

117. *Id.*

118. *See id.* at 29.

119. *See id.* Beaumarchais wrote *The Marriage of Figaro*, which Mozart transformed into one of the sublime masterpieces of Western art.

120. *See* SAMUEL FLAGG BEMIS, *THE DIPLOMACY OF THE AMERICAN REVOLUTION* 25–28 (Indiana Univ. Press 1957) (1935) [hereinafter BEMIS, *THE DIPLOMACY OF REVOLUTION*]; HERRING, *supra* note 11, at 18.

121. *See* Letter from Silas Deane to the Comm. of Secret Correspondence (Aug. 18, 1776), in 1 *THE DIPLOMATIC CORRESPONDENCE OF THE AMERICAN REVOLUTION* 8, 10–15 (Jared Sparks ed., John C. Rives 1857) (1829).

122. *E.g.*, BEMIS, *A DIPLOMATIC HISTORY*, *supra* note 11, at 212; BEMIS, *THE*

By September 1776, Congress developed “a model treaty of amity and commerce to offer France.”¹²³ Benjamin Franklin, Arthur Lee, and Deane were appointed as the commissioners.¹²⁴ They were instructed to obtain French recognition of American independence and to conclude the treaty.¹²⁵ In October, their instructions were expanded to obtain recognition and treaties from other European countries.¹²⁶ Congress was initially unwilling to conclude a military alliance with France, but by the end of the year, it gave that discretion to the commissioners.¹²⁷

Vergennes met frequently with the commissioners, particularly Franklin, who became something of a cult figure in Paris.¹²⁸ But until early 1778, France publicly proclaimed a position of neutrality.¹²⁹ The French government refused to recognize American independence because it understood that this would be a cause of war with Great Britain, for which it was not yet ready, and also because members of the court, including Vergennes, were uneasy about being formal allies with those who rebelled against a lawful monarch.¹³⁰ French policy remained nonrecognition, giving loans to the United States, covertly supplying the revolutionaries with military supplies, and building its own navy to the point of being able to challenge Great Britain militarily.¹³¹ Vergennes also allowed American privateers to operate out of French ports¹³² and announced that the British navy did not have the right to search

DIPLOMACY OF REVOLUTION, *supra* note 120, at 27; JONATHAN R. DULL, A DIPLOMATIC HISTORY OF THE AMERICAN REVOLUTION 61 (1985).

123. DULL, *supra* note 122, at 55.

124. BEMIS, A DIPLOMATIC HISTORY, *supra* note 11, at 25.

125. 5 JOURNALS OF THE CONTINENTAL CONGRESS: 1774–1789, at 833 (Worthington Chauncey Ford ed., 1906); *see* DULL, *supra* note 122, at 55–56; GOEBEL, *supra* note 10, at 81–82.

126. 6 JOURNALS OF THE CONTINENTAL CONGRESS: 1774–1789, *supra* note 125, at 884.

127. *See* DULL, *supra* note 122, at 53–54. In initially refusing a military alliance, the Congress was not as naïve as it is sometimes portrayed. *Cf.* GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 191 (2009) (calling Congress's “naïveté” in this instance “astonishing”). France had been the colonists' historic enemy, there were concerns that France might try to reestablish its empire in North America, and there was fear that a military alliance could cause future problems for the United States (which it did). *See* HERRING, *supra* note 11, at 14–15.

128. *See* BEMIS, THE DIPLOMACY OF REVOLUTION, *supra* note 120, at 49–50; DULL, *supra* note 122, at 92.

129. BRENDAN SIMMS, THREE VICTORIES AND A DEFEAT: THE RISE AND FALL OF THE FIRST BRITISH EMPIRE, 1714–1783, at 614 (2007).

130. *Id.* at 601.

131. *See* DULL, *supra* note 122, at 60–62.

132. BAILEY, *supra* note 4, at 30; SIMMS, *supra* note 129, at 601.

French merchant ships that were bound to neutral countries or to French colonies.¹³³ This made the French Caribbean islands of Martinique, Guadeloupe, and Saint-Domingue (now Haiti) into way stations for the delivery of contraband to the American army.¹³⁴

Britain repeatedly protested Vergennes's meetings with Franklin and French support for the rebels, but these protests were muted because Britain did not want France to enter the war.¹³⁵ The American commissioners continued to press for French recognition and for treaties. The turning point came after the battle of Saratoga in October 1777 (which the Americans won using French military equipment).¹³⁶ Britain reacted by attempting reconciliation.¹³⁷ Parliament repealed the laws that had so antagonized the colonists, and Lord North sent the Carlisle Commission to negotiate a settlement with the Americans.¹³⁸ Vergennes was alarmed at the possibility of a British-American reunification and, on February 6, 1778, concluded with the American commissioners a treaty of amity and commerce,¹³⁹ which constituted official recognition of the United States,¹⁴⁰ and a "defensive" military alliance,¹⁴¹ in which France guaranteed the independence of the United States.¹⁴² On March 20, Franklin and his colleagues were

133. See BEMIS, *A DIPLOMATIC HISTORY*, *supra* note 11, at 24.

134. DULL, *supra* note 122, at 48.

135. Thus, the Ministry instructed the Royal Navy not to intercept French ships carrying contraband "with too much vigor": the navy could intercept French vessels in American, but not in European, waters. SIMMS, *supra* note 129, at 598.

136. See BEMIS, *A DIPLOMATIC HISTORY*, *supra* note 11, at 27.

137. See SIMMS, *supra* note 129, at 611.

138. See *id.*; BEMIS, *A DIPLOMATIC HISTORY*, *supra* note 11, at 27.

139. Treaty of Amity and Commerce, U.S.-Fr., Feb. 6, 1778, 8 Stat. 12; SIMMS, *supra* note 129, at 611-12.

140. BEMIS, *A DIPLOMATIC HISTORY*, *supra* note 11, at 29.

141. Treaty of Alliance, U.S.-Fr., Feb. 6, 1778, art. II, 8 Stat. 6, 8; EDWARD S. CORWIN, *FRENCH POLICY AND THE AMERICAN ALLIANCE OF 1778*, 140-42 (1916). Actually, there was no chance that the Carlisle Commission would succeed. The British offered autonomy and an exemption from taxation to the Americans—everything but independence. What would have been acceptable in 1775 was out of the question in 1778. Vergennes buttressed his arguments to the King for French intervention into the war by claiming that a British-American coalition would threaten the French possessions in the West Indies. *Id.* Vergennes publicly announced the treaty of amity and commerce. Although the military alliance was supposed to be kept secret, Britain quickly learned about it from its spies in Paris.

142. Treaty of Alliance, *supra* note 141, at art. II, 8 Stat. at 8; BAILEY, *supra* note 4, at 34. The military treaty was called a "conditional and defensive alliance." BEMIS, *A DIPLOMATIC HISTORY*, *supra* note 11, at 29. France relinquished any future claims to territory that it held in North America before the end of the Seven Years War, but this implicitly allowed France to obtain new possessions. BAILEY, *supra* note 4, at 35. Article II of

officially received by Louis XVI.¹⁴³ Congress jubilantly ratified the treaties on May 4.¹⁴⁴ France then sent a Minister to the United States (Gérard), and Congress reciprocated by naming Franklin as the American Minister Plenipotentiary to the court of France.¹⁴⁵

France's actions constituted a *causus belli*. Britain recalled its minister to France and expelled the French minister to England.¹⁴⁶ Britain did not immediately declare war on France because its reconciliation efforts with the Americans were still underway.¹⁴⁷ When those efforts failed, war between Britain and France began in June 1778.¹⁴⁸

2. The Netherlands

The second nation to recognize the United States prior to the 1783 Treaty of Peace was the Netherlands.¹⁴⁹ Nominally an ally of Great Britain, the Netherlands had remained neutral in the Seven Years War and professed neutrality in the American War of Independence.¹⁵⁰ There was considerable support in that country for the American Revolution, although the stadholder (William

the treaty stated: "The essential and direct end of the present defensive alliance is to maintain effectually the liberty, sovereignty and independence absolute and unlimited, of the said united States, as well in matters of gouvernement as of commerce." Treaty of Alliance, *supra* note 141, at art. II, 8 Stat. at 8. The American and French guarantees in the alliance were not reciprocal. Article XI guaranteed:

The United States to his Most Christian Majesty, the present possessions of the crown of France in America, as well as those which it may acquire by the future treaty of peace; And his Most Christian Majesty guarantees on his part to the United States, their liberty, sovereignty and independence, absolute and unlimited . . . and also their possessions . . .

Id. at art. XI, 8 Stat. at 10. The limited American guarantee in Article XI would create major potential problems for the United States following the French Revolution.

143. See BEMIS, *THE DIPLOMACY OF REVOLUTION*, *supra* note 120, at 65.

144. See *id.* at 67–68.

145. DULL, *supra* note 122, at 100–01; see BEMIS, *THE DIPLOMACY OF REVOLUTION*, *supra* note 120, at 67–68.

146. BEMIS, *THE DIPLOMACY OF REVOLUTION*, *supra* note 120, at 31; DULL, *supra* note 122, at 48.

147. DULL, *supra* note 122, at 99–100.

148. BEMIS, *A DIPLOMATIC HISTORY*, *supra* note 11, at 28–31. Vergennes later gave a succinct explanation for France's rationale for the war: it "was the significant weakening of England caused by taking away a third of her empire." ANDREW STOCKLEY, *BRITAIN AND FRANCE AT THE BIRTH OF AMERICA: THE EUROPEAN POWERS AND THE PEACE NEGOTIATIONS OF 1782–1783*, at 131–32 (2001).

149. See FRIEDRICH EDLER, *THE DUTCH REPUBLIC AND THE AMERICAN REVOLUTION* 231–32 (1911).

150. See DULL, *supra* note 122, at 20, 69.

III) supported Britain.¹⁵¹ Dutch merchants saw the revolution as presenting a potential source of huge profits in selling contraband to the Americans.¹⁵² The Dutch trade became a major source of arms and powder for the American army.¹⁵³ The merchants turned the Dutch island colony of St. Eustatius into an enormous supermarket for arms smuggling.¹⁵⁴ When the British protested, the States General passed a law prohibiting the arms trade; but nothing was done to enforce the law.¹⁵⁵ The Dutch also provided sanctuary for American privateers that attacked British shipping¹⁵⁶ and provided France and Spain with naval supplies, such as timber.¹⁵⁷

The American commissioners sought a treaty of friendship and commerce with the Netherlands (through a private intermediary, Charles Dumas), but this overture was ignored because the Dutch wanted to avoid war with Britain.¹⁵⁸ In 1780, one of the commissioners, John Adams, went to the Netherlands to obtain large loans to support the war effort, explaining to Franklin that he wanted to make the United States less dependent on France.¹⁵⁹ Adams arrived in Amsterdam on August 10, 1780.¹⁶⁰ The Dutch bankers told him that they could not provide any loans until the States General recognized American independence.¹⁶¹

By this time, British anger at Dutch duplicity reached the boiling point; Britain declared war on the Netherlands on December 20, 1780.¹⁶² The pretext for this action was a bizarre incident. William Lee and a Dutch representative had taken it upon them-

151. *Id.* at 20, 67. Professor Dull suggests that political opposition to the stadholder helped increase support for the United States. *Id.* at 67.

152. *See id.* at 124.

153. *See id.* at 48.

154. *Id.*

155. *Id.*; SIMMS, *supra* note 129, at 644 ("[T]he Dutch [were] the most flagrant covert traders with the American[s] . . .").

156. SIMMS, *supra* note 129, at 644. For a thorough account of the British-Dutch-American relations during the War of Independence, see generally BEMIS, *THE DIPLOMACY OF REVOLUTION*, *supra* note 120, at 117-63.

157. DULL, *supra* note 122, at 124.

158. BEMIS, *THE DIPLOMACY OF REVOLUTION*, *supra* note 120, at 156-57.

159. JAMES H. HUTSON, *JOHN ADAMS AND THE DIPLOMACY OF THE AMERICAN REVOLUTION* 72-74 (1980).

160. *Id.* at 75.

161. *Id.* at 78.

162. *See* BAILEY, *supra* note 4, at 41; BEMIS, *THE DIPLOMACY OF REVOLUTION*, *supra* note 120, at 160-61.

selves, without any authority from their governments, to draft a commercial treaty.¹⁶³ When Congress later appointed Henry Laurens as minister-designate to the Hague,¹⁶⁴ for some unknown reason he carried Lee's "treaty" with him, which the British found when his ship was captured on September 3, 1780.¹⁶⁵ Although the Dutch government strenuously repudiated the validity of this document, the British claimed that it was proof that the Netherlands had secretly recognized the United States and gave this as one of the reasons for its declaration of war.¹⁶⁶

In early 1781, Adams received authority from Congress to negotiate a treaty of amity and commerce with the Netherlands.¹⁶⁷ This proposal was rejected by the States General.¹⁶⁸ Adams submitted a memorial for recognition to the States General, but it was not received.¹⁶⁹ He then began a propaganda campaign throughout the Netherlands for American recognition.¹⁷⁰ This was initially unsuccessful in part because Vergennes opposed Dutch recognition of the United States, preferring the Netherlands to be neutral and dependent on France.¹⁷¹ The Dutch still proclaimed their neutrality and tried, but failed, to obtain a negotiated peace with Britain.¹⁷²

The continuation of the war by Great Britain provoked more support for the American cause.¹⁷³ The Netherlands had a federal system of government that resembled that of the United States.¹⁷⁴ On March 28, 1782, eight days after the fall of Lord North's ministry,¹⁷⁵ Holland voted to recognize the United States.¹⁷⁶ This was followed by recognition decisions of the other six states; on April

163. DULL, *supra* note 122, at 102.

164. HUTSON, *supra* note 159, at 78.

165. *Id.* at 79.

166. The reasons given were (1) the Dutch refusal to honor its alliance with Great Britain, (2) secret military assistance to rebels, (3) alleged attempts to raise armies against Britain in the East Indies, and (4) a "secret treaty with our rebel subjects." BEMIS, *THE DIPLOMACY OF REVOLUTION*, *supra* note 120, at 160-61.

167. HUTSON, *supra* note 159, at 87.

168. *See id.*

169. *See id.* at 87.

170. BEMIS, *THE DIPLOMACY OF REVOLUTION*, *supra* note 120, at 168.

171. *Id.* at 168-69.

172. *See* HUTSON, *supra* note 159, at 105-06.

173. *See* DULL, *supra* note 122, at 67.

174. *See* BEMIS, *THE DIPLOMACY OF REVOLUTION*, *supra* note 120, at 117.

175. *Id.* at 191.

176. HUTSON, *supra* note 159, at 108.

19, the States General recognized the United States as a sovereign nation.¹⁷⁷ The States General's declaration of recognition instructed the stadholder to formally receive Adams as the Minister Plenipotentiary of the United States, and Adams thereupon became the second accredited American diplomatic envoy abroad.¹⁷⁸ A treaty of commerce between the two countries was concluded on October 8, 1782;¹⁷⁹ and the Netherlands sent its first Minister to the United States on June 23, 1783.¹⁸⁰

3. Spain

Spain was a logical candidate for American recognition and a military alliance because it had a defensive alliance with France and similar motivations for revenge against Great Britain.¹⁸¹ Spain's territorial objectives were to regain Gibraltar and possibly to obtain Florida.¹⁸² When Louis XVI provided the Americans with the first large loan in May 1776, Charles III promptly provided a matching loan.¹⁸³ The Spanish court welcomed the revolution because it thought that both Great Britain and the colonies would be weakened.¹⁸⁴ Spain did not support American independence because that would have been a successful rebellion against a monarch and could have kindled a revolutionary movement in its own colonies in the Americas.¹⁸⁵ Spain also had serious disputes with the colonies over boundaries and navigation rights on the Mississippi.¹⁸⁶ In short, the Spanish court hoped that the outcome of the war would be a bloodied Britain, territorial conquests for Spain, and a failed revolution in America. Thus, Charles III decided that he would not recognize American independence or enter into any treaty or alliance with the United States.¹⁸⁷

177. *Id.*

178. GOEBEL, *supra* note 10, at 95.

179. Treaty of Amity and Commerce, U.S.-Neth., Oct. 8, 1782, 8 Stat. 32.

180. BEMIS, *THE DIPLOMACY OF REVOLUTION*, *supra* note 120, at 171.

181. *See id.* at 83-84.

182. *See id.* at 86-87.

183. *Id.* at 28.

184. *Id.* at 41.

185. *See id.*; SIMMS, *supra* note 129, at 601.

186. BEMIS, *THE DIPLOMACY OF REVOLUTION*, *supra* note 120, at 94.

187. DULL, *supra* note 122, at 109; GOEBEL, *supra* note 122, at 91.

In February 1777, Arthur Lee was sent to Spain to seek recognition and treaties.¹⁸⁸ Lee was rebuffed but promised secret military aid.¹⁸⁹ When France recognized the United States in 1778, Vergennes tried to convince the Spanish ministry to join the military alliance; but Spain again refused to enter into any alliance with the United States.¹⁹⁰ Spain entered the war as an ally of France following the Convention of Aranjuez of April 12, 1779, in which France pledged to support Spanish territorial ambitions.¹⁹¹

Spain engaged in some military activities against Britain, but it continued to reject any formal relationship with the United States and provided little direct military support to the Americans.¹⁹² A Spanish "observer" was sent to the United States, who was treated ceremonially like a minister, but this observer could not perform any official functions and avoided any action that would imply recognition of American independence.¹⁹³ In late 1779, John Jay was sent to Madrid as a diplomatic envoy in an attempt to obtain recognition and a military alliance and to resolve the disputes over boundaries and navigation rights on the Mississippi.¹⁹⁴ The ministry negotiated with him informally, but he was never officially received in the two-and-one-half fruitless years that he spent in Madrid.¹⁹⁵ Instead, Jay was treated as a private person by the Spanish court so as to not imply recognition of the United States.¹⁹⁶

Jay attributed his failures to congressional insistence that the United States would not give up its claims to navigation rights on the Mississippi.¹⁹⁷ In early 1781, Congress passed a resolution authorizing Jay to acknowledge exclusive Spanish navigation rights on the river in exchange for recognition and a military alliance.¹⁹⁸ Spain rejected this proposal.¹⁹⁹

188. BEMIS, *THE DIPLOMACY OF REVOLUTION*, *supra* note 115, at 52–53.

189. *Id.* at 53.

190. DULL, *supra* note 122, at 90–91.

191. BEMIS, *THE DIPLOMACY OF REVOLUTION*, *supra* note 120, at 79–80, 86–87.

192. *Id.* at 82–83.

193. *Id.* at 88–89.

194. *Id.* at 101.

195. *See id.* at 104.

196. *Id.* at 216.

197. *Id.* at 107.

198. *Id.*

199. *Id.* at 107–08.

When the war ended, Spanish policy towards the United States turned hostile. It refused to enter into a commercial treaty, claimed territory that Britain recognized as belonging to the United States in the Treaty of Peace, closed the ports of Havana and New Orleans to American products, and denied American ships access to the Mississippi.²⁰⁰ In July 1784, with relations between the two countries disintegrating, Charles III decided that the time had come to recognize the United States and to attempt to resolve all outstanding issues. He sent Diego de Gardoqui as a formal diplomatic envoy to the United States (at the grade of *chargé d'affaires*), with power to deal not only with commercial issues but also to settle the boundary question and navigation rights on the Mississippi.²⁰¹ The King then formally received William Carmichael as the *chargé d'affaires* of the United States.²⁰²

John Jay, then the Secretary for Foreign Affairs, asked Congress for authority to negotiate a treaty with Gardoqui in which the United States would acknowledge Spain's exclusive navigation rights to the Mississippi for twenty-five or thirty years.²⁰³ In 1786, following a debate so heated that it provoked the first southern threats of secession, Congress voted seven states to five, on purely sectional lines, to support Jay's request as the price for negotiating a treaty with Spain that was favorable to northern commercial interests.²⁰⁴ However, nine votes were necessary for treaty ratification, the Jay-Gardoqui negotiations failed,²⁰⁵ and the United States and Spain did not resolve their disputes until Pinckney's Treaty was concluded in 1795,²⁰⁶ which, among other things, settled the boundary dispute in America's favor and guaranteed American access to the Mississippi River.²⁰⁷

200. HERRING, *supra* note 11, at 38, 46.

201. SAMUEL FLAGG BEMIS, *PINCKNEY'S TREATY* 71 (1926) [hereinafter BEMIS, *PINCKNEY'S TREATY*].

202. *Id.* at 189. Carmichael had accompanied Jay and, after Jay returned to the United States, remained in Madrid as an unofficial representative of the United States. *Id.*

203. *Id.* at 79, 87.

204. 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*, 55 WASH. L. REV. 1, 66–67 (1979); see HERRING, *supra* note 11, at 47–48.

205. BAILEY, *supra* note 4, at 62; see also MARKS, *supra* note 46, at 26–35.

206. Treaty of Friendship, Limits and Navigation, U.S.-Spain, Oct. 27, 1795, 8 Stat. 138. For an excellent account, see BEMIS, *PINCKNEY'S TREATY*, *supra* note 201.

207. See Treaty of Friendship, Limits and Navigation, *supra* note 206, at arts. II, III, 8 Stat. at 138–40 (setting boundaries); *id.* at arts. IV, XXII, 8 Stat. at 140, 150–52 (guaranteeing United States citizens free access to the entire Mississippi River).

4. Great Britain

General Cornwallis surrendered to the American and French forces at Yorktown in October 1781.²⁰⁸ Opposition in Britain to continuing the war became so great that Lord North and the entire Ministry resigned following the passage of a Parliamentary resolution repudiating the Ministry and declaring as enemies of the country anyone who would support an offensive war against America.²⁰⁹ In the following peace negotiations, the American commissioners, led by Franklin, initially demanded that Britain recognize the United States as a precondition for further negotiations.²¹⁰ The British commissioners refused, and the Americans backed off.²¹¹ Preliminary Articles of Peace were signed on November 30, 1782.²¹² The first article was British recognition of American independence,²¹³ and this effectively ended the fighting in America.²¹⁴ The terms of the preliminary articles were so generous to the United States²¹⁵ that in February 1783, the House of Commons, by a narrow majority, voted to censure the agreement.²¹⁶ But the government did not withdraw it, and George III announced that it was in effect on April 9.²¹⁷ The Definitive Treaty of Peace was signed in Paris on September 3,²¹⁸ and the treaty

208. SIMMS, *supra* note 129, at 654.

209. BEMIS, *THE DIPLOMACY OF REVOLUTION*, *supra* note 120, at 191.

210. *Id.* at 209.

211. *Id.* at 209, 212–13.

212. Provisional Articles, U.S.-Gr. Brit., Nov. 30, 1782, 8 Stat. 54.

213. *Id.* at art. I, 8 Stat. 55 (“His Britannic Majesty acknowledges the said United States, viz. [the thirteen states] to be free, sovereign and independent States; that he treats with them as such; and for himself, his heirs and successors, relinquishes all claims of the government, propriety and territorial rights of the same, and every part thereof.”).

214. France and Spain signed separate preliminary articles with Britain on January 20, 1783, and that ended the fighting among the European powers. DULL, *supra* note 122, at 158. A formal American-British armistice was signed the same day. Armistice, U.S.-Gr. Brit., Jan. 20, 1783, 8 Stat. 58.

215. For details on the negotiations, see HERRING, *supra* note 11, at 30–34; BEMIS, *THE DIPLOMACY OF REVOLUTION*, *supra* note 120, at 200–38.

216. DULL, *supra* note 122, at 159.

217. BEMIS, *A DIPLOMATIC HISTORY*, *supra* note 11, at 71.

218. Definitive Treaty of Peace, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80.

was ratified in 1784.²¹⁹ John Adams was received by George III as the Minister Plenipotentiary of the United States in June 1785.²²⁰

Americans were soon disabused of the hope that the peace treaty would bring normal relations with Britain. Parliament passed a law giving "the King in Council temporary authority to regulate Anglo-American commerce."²²¹ The Order in Council of July 2, 1783, excluded all American ships from the carrying trade to the British West Indies, and the order was reaffirmed in 1784.²²² The New England fishing and shipping industries collapsed.²²³ Britain also tried to devastate American manufacturing by flooding the American market and prohibiting the export of anything that would help American manufacturers.²²⁴ Adams's protests were ignored.²²⁵

Adams requested that Britain reciprocate his appointment by sending a minister to the United States. Adams later claimed that the King agreed and then reneged.²²⁶ Instead of sending a minister, Britain insultingly sent a consul.²²⁷ Nor was Britain willing to enter into a commercial treaty with the United States,²²⁸ and, to stick the knife in deeper, Britain concluded a commercial treaty with its archenemy France in 1787.²²⁹

219. See Proclamation of Congress Respecting the Definitive Treaty (Jan. 14, 1784), in 6 THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 755-57 (Francis Wharton ed. 1888) (ratified by Congress on Jan. 14, 1784); *id.* at 757-58 (ratified by King George III on Apr. 9, 1784).

220. See HERRING, *supra* note 11, at 38.

221. CHARLES R. RITCHESON, AFTERMATH OF REVOLUTION: BRITISH POLICY TOWARD THE UNITED STATES 1783-1795, at 6 (1969).

222. *Id.* at 6, 12.

223. HERRING, *supra* note 11, at 37.

224. *Id.*

225. See MARKS, *supra* note 46, at 66-67; RITCHESON, *supra* note 221, at 26-27.

226. See Opinion of Vice President Adams (Aug. 29, 1790), reprinted in 17 THE PAPERS OF THOMAS JEFFERSON 137, 139 (Julian P. Boyd ed., 1965). Because Britain had refused to send a minister to the United States, Washington left vacant the position of U.S. minister to London. See Letter from Thomas Jefferson to Gouverneur Morris (Aug. 12, 1790), in 17 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 127 (telling Morris that an exchange of ministers could occur only if unequivocally requested by Great Britain). For the sake of brevity, subsequent citations to volumes of *The Papers of Thomas Jefferson* edited by Julian P. Boyd omit editor and publication information. For those volumes that contain an editor other than Julian P. Boyd, the editor's name and year of publication have been reprinted in full.

227. RITCHESON, *supra* note 221, at 40.

228. See *id.* at 98.

229. *Id.* at 30.

British-American diplomacy during the Confederation period consisted of repeated claims by each side that the other violated the Treaty of Peace: the British by maintaining military posts in the western territories,²³⁰ occupying a swath of northern American territory, inciting the Indian tribes to violence against American settlers and refusing to make compensation for the “abduction” of slaves;²³¹ and the Americans by the states blocking the payment of debts owed to British merchants and by massive retaliation (especially by the southern states) against Loyalists.²³² Repeated requests for a British minister to the United States were met with evasive answers, and none was sent during the entire Confederation period.²³³ Full diplomatic relations were first established during the Washington administration.²³⁴

230. On April 8, 1783, the day before he announced the Treaty of Peace to be in effect, George III issued a secret order to the Governor-General of Canada to retain the military posts. BEMIS, *A DIPLOMATIC HISTORY*, *supra* note 11, at 71.

231. At the last minute of the preliminary negotiations, Henry Laurens (of the Netherlands “treaty” fame) and Richard Oswald (representing Great Britain) agreed to a provision prohibiting the carrying away of slave property by evacuating British armies. They agreed to this easily because both were slave traders. THOMAS FLEMING, *THE PERILS OF PEACE* 237 (2007). When Secretary of State Jefferson later complained to the newly appointed British Minister that this provision of the treaty had been violated, and that the United States was entitled to compensation, the response was that Britain did not violate this provision because the black people who left with the Royal Navy (and their families) had been freed for fighting with the British army. See Editor’s Note to Letter from Thomas Jefferson to George Hammond (Dec. 15, 1791), in 22 *THE PAPERS OF THOMAS JEFFERSON* 411 (Charles T. Cullen et al. eds., 1986). Hamilton told the British Minister that he understood Britain’s position and thought that this was a minor issue for the United States. Conversation with George Hammond, in 10 *THE PAPERS OF ALEXANDER HAMILTON*, *supra* note 68, at 493, 493–96.

232. RITCHESON, *supra* note 221, at 49, 63. After a British Minister to the United States (George Hammond) finally arrived in late 1791, he and Secretary of State Jefferson exchanged detailed bills of particulars showing how the other country had violated the treaty and their own country was blameless. See Letter from George Hammond to Thomas Jefferson (Mar. 5, 1792), in 23 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 231, at 196, 196–213; Letter from Thomas Jefferson to George Hammond (May 29, 1792), in 23 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 231, at 551, 551–601.

233. BAILEY, *supra* note 4, at 54.

234. In late 1789, the British Ministry sent an “informal” representative (George Beckwith) to the United States, who had inconclusive discussions with Secretary of the Treasury Hamilton. See STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788–1800*, at 212 (1993). Britain continued to be evasive as to whether it would send a Minister. Relations between the two countries continued to deteriorate, to the point that on February 14, 1791, President Washington gave a hard-line message to Congress, which blamed Britain for not negotiating an end to violations of the Treaty of Peace, for not agreeing to a commercial treaty, and for not sending a Minister. RITCHESON, *supra* note 221, at 107; The President to the Senate (Feb. 14, 1791), in 18 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 226, at 305, 305–06. In Congress, there was a strong move, led by Madison, to impose discriminatory trade restrictions on

5. Other Countries

Before independence, the United States had secured recognition from and treaties with only two countries—France and the Netherlands. The United States was unable to replicate this success with any other European nation.²³⁵ This was not for lack of trying. In 1777, Congress dispatched diplomatic envoys to Prussia, Austria, and Tuscany, three countries that were notoriously anti-British, to obtain recognition and treaties of amity and commerce. They failed: no recognition, no treaty.²³⁶

In 1780, Congress sent Francis Dana to Russia.²³⁷ Catherine II had, that same year, sponsored a declaration of neutral rights that barred Britain from intercepting any Russian commerce to America.²³⁸ She then organized the League of Armed Neutrality, which was joined by Sweden, Denmark, Austria, Prussia, Portugal, and the Kingdom of Naples.²³⁹ This coalition ensured continued supplies for America and meant that Britain was now opposed by practically all of Europe.²⁴⁰ But, Catherine refused to receive Dana or to have any official relations with the United States.²⁴¹ He stayed in Russia for two years, accomplishing nothing.²⁴²

John Adams attributed these failures to the reluctance of European states to offend Great Britain.²⁴³ There is some truth to

Britain. See BEMIS, *A DIPLOMATIC HISTORY*, *supra* note 11, at 90–91. To head off a trade, and perhaps war, Britain appointed George Hammond as Minister to the United States, and he arrived in October 1791. See RITCHESON, *supra* note 221, at 140–41, 231. Hammond's negotiations with Secretary of State Jefferson were not successful, partly because of Hammond's limited authority and because of Hamilton's propensity to meddle and undermine Jefferson. See BEMIS, *A DIPLOMATIC HISTORY*, *supra* note 11, at 91; ELKINS & MCKITRICK, *supra*, at 244–56. The United States and Great Britain finally concluded a treaty of amity and commerce in the controversial Jay Treaty. Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116.

235. See BEMIS, *THE DIPLOMACY OF REVOLUTION*, *supra* note 120, at 113.

236. GOEBEL, *supra* note 10, at 88–89, 93.

237. DULL, *supra* note 122, at 129–30.

238. See *id.* at 129.

239. *Id.*

240. See HERRING, *supra* note 11, at 23.

241. BEMIS, *A DIPLOMATIC HISTORY*, *supra* note 11, at 44.

242. BEMIS, *THE DIPLOMACY OF REVOLUTION*, *supra* note 120, at 164–65. At least Dana was allowed to reside in Russia. Even that courtesy was denied to the American envoys to Austria and Tuscany. GOEBEL, *supra* note 10, at 93.

243. Letter from John Adams to Robert Livingston, Sec. for Foreign Affairs (Sept. 17, 1782), in 13 PAPERS OF JOHN ADAMS 475, 476 (Gregg L. Lint et al. eds., 2006) (“A Doctrine prevails, that an Acknowledgement of the Independence of America is an Hostility against England, and consequently a Breach of Neutrality. . . . Sending or receiving Ambassadors;

that claim;²⁴⁴ but it cannot be the complete story in light of the large number of countries that greatly offended Britain by forming the League of Armed Neutrality. The major reason for America's diplomatic isolation was that, outside of France and the Netherlands, there was very little support for the American War of Independence; most European monarchs viewed this rebellion as a threat to their sovereign rights to rule.²⁴⁵ As with Spain, these monarchies would have liked Britain to be weakened and the revolution to fail.²⁴⁶

Following independence, Congress renewed its efforts to engage Europe.²⁴⁷ It commissioned Franklin to obtain a treaty of amity and commerce with Sweden,²⁴⁸ and this effort was successful.²⁴⁹ Congress then commissioned Adams, Jefferson, and Franklin, for a term of two years, to obtain treaties of amity and commerce with sixteen named countries (the commissioners would later add two more) that had diplomatic envoys in Paris.²⁵⁰ Jefferson thought that the most important objective was to obtain favorable treaties with the countries holding possessions in the valuable West Indies market—Great Britain, Spain, Portugal, and France.²⁵¹ The British and Spanish refusals are described above.

entering into peaceful Commercial Treaties, or at least negotiating at Philadelphia the Rights of Neutral Nations, is not taking Arms against Great Britain. But if the Acknowledgement of our Independence is an Hostility, a Denial of it is so too . . .").

244. When Arthur Lee went to Berlin to obtain recognition from Prussia, Frederick told him that his treaty with Great Britain prohibited him from doing anything that could be seen as recognizing American independence. GOEBEL, *supra* note 10, at 88–89.

245. See BEMIS, *THE DIPLOMACY OF REVOLUTION*, *supra* note 120, at 113–15; see also MARKS, *supra* note 46, at 97 ("Americans after 1783 became increasingly aware of their country's position as a fledgling republic in the midst of hostile monarchs. They looked about and could not be sure of a single ally among the world powers. Indeed it appeared that the European nations, though divided on most issues, might find a cause for unity in their opposition to the United States."). For the change in French policy following American independence, see *id.* at 106–11.

246. BEMIS, *THE DIPLOMACY OF REVOLUTION*, *supra* note 120, at 41–42, 113.

247. For details on the negotiations, see HERRING, *supra* note 11, at 30–34; BEMIS, *THE DIPLOMACY OF REVOLUTION*, *supra* note 120, at 215–27.

248. 23 *JOURNALS OF THE CONTINENTAL CONGRESS: 1774–1789*, at 621 (Gailliard Hunt ed., 1914).

249. Treaty of Amity and Commerce with Sweden, U.S.-Swed., Apr. 3, 1783, 8 Stat. 60.

250. 26 *JOURNALS OF THE CONTINENTAL CONGRESS: 1774–1789*, *supra* note 248, at 356–57; see also Commission for Negotiating Treaties of Amity and Commerce (May 16, 1784), reprinted in 7 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 226, at 262, 262–63. The nations specified by Congress were Russia, Austria, Prussia, Denmark, Saxony, Hamburg, Great Britain, Spain, Portugal, Genoa, Tuscany, Rome, Naples, Venice, Sardinia, and Turkey. Instructions to Commissioners for Negotiating Treaties of Amity and Commerce, reprinted in 7 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 226, at 266, 267. The commissioners added France and Morocco. *Id.* at 269.

251. See Letter from Thomas Jefferson to James Monroe (Feb. 6, 1785), in 7 *The*

A new commercial treaty with France was needed because the United States had given up its trading rights in the West Indies in the 1778 treaty,²⁵² but Vergennes rejected a new treaty because of opposition by French merchants.²⁵³ After two years of painstaking efforts, Adams and Jefferson²⁵⁴ were able to conclude treaties with only two countries—Prussia and Morocco—which, along with Sweden, were “peripheral powers with little overseas trade.”²⁵⁵ Nothing except an occasional insult was forthcoming from the rest of the countries.²⁵⁶

There were two reasons for these post-independence diplomatic failures. First, the United States had little to offer. American officials, particularly Madison and Jefferson, continually overestimated the importance of U.S. commerce as a tool of international diplomacy.²⁵⁷ Three-quarters of all American trade (includ-

PAPERS OF THOMAS JEFFERSON, *supra* note 226, at 637, 638.

252. See Letter from Thomas Jefferson to James Monroe (June 17, 1785), in 8 THE PAPERS OF THOMAS JEFFERSON, *supra* note 226, at 227, 230–32.

253. See Jefferson's Report on Conversations with Vergennes (Dec. 1785), in 9 THE PAPERS OF THOMAS JEFFERSON, *supra* note 226, at 139, 139–46.

254. The commission was reduced to Adams and Jefferson when Franklin returned to the United States and was succeeded by Jefferson as Minister Plenipotentiary to France. DAVID McCULLOUGH, JOHN ADAMS 328–29 (2001).

255. WOOD, *supra* note 127, at 192. For the treaties with Prussia and Morocco, see Treaty of Amity and Commerce, U.S.-Prussia, July–Sept. 1785, 8 Stat. 84; Treaty of Peace and Friendship, U.S.-Morocco, Jan. 1787, 8 Stat. 100. The commissioners came closest with Portugal. The Portuguese minister to Britain told Adams that the Queen wanted to conclude a treaty of amity and commerce and was willing to exchange diplomats. Letter from John Adams to Thomas Jefferson (Nov. 5, 1785), in 9 THE PAPERS OF THOMAS JEFFERSON, *supra* note 226, at 18, 21–22. Adams and Jefferson negotiated a treaty with the Portuguese commissioner (Del Pinto), but it was never ratified by the Queen. Letter from American Commissioners to John Jay (Apr. 25, 1786), in 9 THE PAPERS OF THOMAS JEFFERSON, *supra* note 226, at 406, 407; see also Editorial Note to Negotiations for a Treaty of Amity and Commerce with Portugal, in 9 THE PAPERS OF THOMAS JEFFERSON, *supra* note 226, at 410, 411. Jefferson and Adams signed, but Del Pinto did not, claiming that he had authority only to negotiate. See Letter from Thomas Jefferson to William Carmichael (May 5, 1786), in 9 THE PAPERS OF THOMAS JEFFERSON, *supra* note 226, at 448, 448. On Portugal's failure to ratify, see Letter from William Carmichael to Thomas Jefferson (Dec. 25, 1786), in 10 THE PAPERS OF THOMAS JEFFERSON, *supra* note 226, at 606, 607.

256. The commissioners left negotiations with Russia to Francis Dana, whom Congress sent back as the Minister to the court of Catherine II. She again refused to recognize the United States, and he was recalled. BEMIS, A DIPLOMATIC HISTORY, *supra* note 11, at 44–45 (noting also that Russia would not recognize the United States until 1809).

As the eternal optimist (except where Great Britain was concerned), Jefferson wanted to continue this mission beyond its two-year term but Jay advised him that Congress declined because it was concentrating on domestic issues. Letter from John Jay to Thomas Jefferson (Oct. 27, 1786), in 10 THE PAPERS OF THOMAS JEFFERSON, *supra* note 226, at 488, 488.

257. This is one of the themes of Gordon Wood's outstanding book, *Empire of Liberty*, *supra* note 127. For more on this point, see BEMIS, THE DIPLOMACY OF REVOLUTION, *supra*

ing ninety percent of all imports) was with Great Britain, which left very little for the rest of the world.²⁵⁸ Second, the monarchs of Europe were not reconciled to the success of the American Revolution.²⁵⁹ Viewing the United States as weak, they expected (and hoped) that it would collapse.²⁶⁰ The Anglophobic Jefferson blamed this widespread perception of American weakness on British press publications, circulated throughout Europe, which constantly portrayed the United States as beset by “anarchy, tumult, and civil war.”²⁶¹ However, the fact is that the United States was weak because Congress was weak; and the Europeans knew it.²⁶² Congress defaulted for six straight years on paying the interest or principal of its debt to France;²⁶³ it could not secure the territory of the United States against Great Britain or Spain;²⁶⁴ and it was unable to prevent the states from violating the Treaty of Peace.²⁶⁵ The European view of congressional weakness was exemplified when a British commercial treaty negotiator taunted Jefferson and Adams by asking whether they really had the power to bind the United States.²⁶⁶ Were they, he asked, authorized by each state, given that experience showed that Congress had little power and could be thwarted by the action of a single state?²⁶⁷

note 120, at 30.

258. JERALD A. COMBS, *THE JAY TREATY* 40 (1970); WOOD, *supra* note 127, at 191–93. And, as Jefferson and Madison should have realized, but found out the hard way, the United States had little leverage on Great Britain because only one-sixth of British trade was with America. *Id.* at 193. A trade war with Britain was bound to inflict disproportionate harm on the United States, which is what happened during the later Jefferson-Madison embargoes.

259. *See* HERRING, *supra* note 11, at 35.

260. *Id.*

261. *See* Letter from Thomas Jefferson to James Madison (Sept. 1, 1785), in 8 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 226, at 460, 460–61.

262. *See* BEMIS, *THE DIPLOMACY OF REVOLUTION*, *supra* note 120, at 68; RITCHESON, *supra* note 221, at 39.

263. BEMIS, *A DIPLOMATIC HISTORY*, *supra* note 11, at 82.

264. *See id.* at 70, 73.

265. David M. Golove & Danial J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 *N.Y.U. L. REV.* 932, 941 (2010).

266. Dorset to the American Commissioners (Mar. 26, 1785), in 8 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 226, at 55, 55–56.

267. *Id.* After some delay, Jefferson responded with the remarkable assertion that Congress could bind the states on all matters of foreign commerce through the treaty power. Letter from Thomas Jefferson to David Hartley (Sept. 5, 1785), in 8 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 226, at 481, 484. Jefferson made the same argument to an incredulous James Monroe, *see* Letter from James Monroe to Thomas Jefferson (Apr. 12,

B. *Lessons from the Confederation Period*

1. The Importance and Dangers of Recognition

The history recounted above demonstrates the exceptional importance that Congress placed on recognition during the pre-constitutional period. Recognition was of course critical during the War of Independence²⁶⁸—from France in order to obtain active military support (and not just the clandestine provision of contraband),²⁶⁹ and from the Netherlands to obtain the loans necessary to fund independence.²⁷⁰ However, even after the Treaty of Peace, Congress committed to a substantial (although largely unsuccessful) effort to secure recognition from European nations because that meant acceptance into the community of nations and was the necessary prerequisite for establishing diplomatic relations and obtaining treaties of friendship and commerce.²⁷¹

1785), in 8 THE PAPERS OF THOMAS JEFFERSON, *supra* note 226, at 75, 76–77; Letter from Thomas Jefferson to James Monroe (June 17, 1785), in 8 THE PAPERS OF THOMAS JEFFERSON, *supra* note 226, at 227, 230–31, at that very time that Monroe was leading the (unsuccessful) effort to amend the Articles to give Congress the power to regulate foreign commerce. See MARKS, *supra* note 46, at 86–88.

Even more remarkably, Jefferson caused to be published in a French encyclopedia the amazing proposition that Congress could, by military force if necessary, coerce states into obeying its laws and treaties. Answers to Dèmeunier's First Queries (Jan. 24, 1786), in 10 THE PAPERS OF THOMAS JEFFERSON, *supra* note 226, at 11, 19 ("It has been often said that the decisions of Congress are impotent, because the Confederation provides no compulsory power. But when two or more nations enter into a compact, it is not usual for them to say what shall be done to the party who infringes it. Decency forbids this. And it is as unnecessary as indecent, because the right of compulsion naturally results to the party injured by the breach. When any one state in the American Union refuses obedience to the Confederation by which they have bound themselves, the rest have a natural right to compel them to obedience. Congress would probably exercise long patience before they would recur to force, but if the case ultimately required it, they would use that recurrence.").

268. This lesson was fresh in the minds of the Confederate government during the Civil War. FRANK LAWRENCE OWSLEY, KING COTTON DIPLOMACY: FOREIGN RELATIONS OF THE CONFEDERATE STATES OF AMERICA xvi (2d ed. rev. 1959). On its extraordinary efforts to obtain recognition from Great Britain and France, and on the extraordinary efforts of the Lincoln administration to prevent such recognition, see LYNN M. CASE & WARREN F. SPENCER, THE UNITED STATES AND FRANCE: CIVIL WAR DIPLOMACY 129 (1970); OWSLEY, *supra*, at 1, 547.

269. See *supra* Part III.A. In contrast, Spain, which refused to recognize the United States, did not provide active military support for the revolution. Instead, Spain's military efforts against Great Britain were concentrated on seizing Gibraltar and obtaining Florida. See *supra* Part III.A.3. These efforts indirectly helped the Americans by diverting portions of the Royal Navy, but they do not compare with France's direct (and decisive) actions at Yorktown. BEMIS, A DIPLOMATIC HISTORY, *supra* note 11, at 31.

270. See *supra* Part III.A.2.

271. See BEMIS, A DIPLOMATIC HISTORY, *supra* note 11, at 44.

The experience during the Confederation period also showed the dangers inherent in the recognition power. France delayed recognizing the United States because it understood that such an action would be the cause of war with Great Britain.²⁷² Britain in turn used the Americans' secret "treaty" with the Netherlands as a cause for declaring war against that country.²⁷³ This was almost certainly pretextual; but, to be effective, pretexts must have some underlying basis—and the basis here was the connection between recognition and war. In short, a miscalculation in the use of the recognition power could embroil a country into war.

2. Recognition and the Exchange of Diplomats

The experience of the United States during the Confederation period also shows that recognition was considered distinct from the sending or receiving of diplomats. France recognized the United States by treaty and then received and sent accredited ministers.²⁷⁴ The Netherlands recognized the United States by resolution of the States General, and the mutual exchange of accredited ministers followed.²⁷⁵ Charles III of Spain decided to recognize the United States after the Treaty of Peace and then sent a diplomat to the United States and formally received an American *chargé d'affaires* in Madrid.²⁷⁶ Great Britain recognized the United States in the Treaty of Peace of 1783, and George III received John Adams as the accredited American minister in 1785.²⁷⁷ Great Britain's actions also showed that the exchange of ambassadors was not automatically tied to recognition: despite repeated requests from the United States, Britain refused to send a Minister for eight years following the Treaty of Peace.²⁷⁸

272. See *supra* notes 128–30 and accompanying text.

273. See *supra* notes 162–66 and accompanying text.

274. See *supra* notes 139–45 and accompanying text.

275. See *supra* notes 177–78 and accompanying text.

276. See *supra* notes 200–02 and accompanying text.

277. See *supra* notes 218–20 and accompanying text.

278. See *supra* note 233 and accompanying text. The three other countries (Sweden, Prussia and Tuscany) that recognized the United States by concluding treaties of amity and commerce did not send or receive accredited diplomats. However, this appears to have been with the agreement of all parties. See *supra* notes 247–55 and accompanying text.

3. How Recognition Was Effected

Five countries recognized the United States during the Confederation period through treaties.²⁷⁹ Spain's recognition was done by a decision of Charles III.²⁸⁰ In the Netherlands, the United States was recognized by a resolution of the States General.²⁸¹

4. Who Held the Recognition Power

That depended on the form of government of the recognizing power. The five treaties recognizing the United States were concluded in the names of the countries' monarchs, and Spanish recognition was also a monarchical decision.²⁸² But in the Netherlands, which had a weak monarch and a form of federal government that was somewhat analogous to the Confederation,²⁸³ the recognition decision was made by the States General, with the Prince of Orange performing the ceremonial function of receiving Adams as the American minister.²⁸⁴ Recognition was not exclusively an executive function; it depended on the form of government of the recognizing power.

5. The Ministerial Thesis

David Gray Adler's theory that recognition was understood to be a ministerial function of the Executive is flawed because it rests on the premise that the Receive Ambassadors Clause is the source of the recognition power. The history described above shows that the founders well understood the distinction between recognition and receiving ambassadors. Adler's theory is never-

279. See Treaty of Friendship, Limits and Navigation, *supra* note 206 (Spain); Definitive Treaty of Peace, *supra* note 218 (Great Britain); Treaty of Amity and Commerce with Sweden, *supra* note 249; Treaty of Amity and Commerce, *supra* note 179 (Netherlands); Treaty of Amity and Commerce, *supra* note 139 (France).

280. See *supra* notes 201–06 and accompanying text.

281. See *supra* note 178 and accompanying text.

282. See Treaty of Friendship, Limits and Navigation, *supra* note 206 (Spain); Definitive Treaty of Peace, *supra* note 218 (Great Britain); Treaty of Amity and Commerce with Sweden, *supra* note 249; Treaty of Amity and Commerce, *supra* note 179 (Netherlands); Treaty of Amity and Commerce, *supra* note 139 (France).

283. See *supra* note 174 and accompanying text. Also see Madison's and Hamilton's fascinating analysis of the weakness in the government of the United Netherlands in THE FEDERALIST NO. 20, *supra* note 77, at 130 (James Madison & Alexander Hamilton).

284. See GOEBEL, *supra* note 10, at 95.

theless important because he, virtually alone among scholars, argues that both recognition and the receipt of ambassadors were originally understood as ministerial functions, and not discretionary powers.²⁸⁵

Adler's emphasis is on the conduct of the Washington administration.²⁸⁶ Following the suspension and then execution of Louis XVI, Washington recognized the revolutionary governments of France in 1792 and 1793 by adopting the rule of de facto recognition set out by Emmerich de Vattel, the most influential writer on the law of nations.²⁸⁷ Vattel's doctrines rest on two principles: that all nations are equal and possess the same rights,²⁸⁸ and that every nation has the right to determine its form of government through its own will and without outside interference.²⁸⁹ Thus, no foreign state may set itself up as the judge of how another sovereign rules.²⁹⁰ It therefore follows, according to Vattel, that any new government is entitled to recognition when it is in "actual possession" of national powers, regardless of how it gained power or the form of government that was established.²⁹¹ This is precisely the explanation that Washington gave for recognizing the French revolutionary regime:

We certainly cannot deny to other nations that principle whereon our own government is founded, that every nation has a right to govern itself internally under what forms it pleases, and to change these forms at it's own will: and externally to transact business with other nations thro' whatever organ it chuses, whether that be a king, convention, assembly, committee, president or whatever it be. The only thing essential is the will of the nation.²⁹²

285. Adler, *supra* note 4, at 140–49.

286. *Id.* at 141–45.

287. *Id.* at 141. On Vattel's preeminent position among the writers of the law of nations during the latter part of the eighteenth and early part of the nineteenth century, see, for example, FRANCIS S. RUDDY, *INTERNATIONAL LAW IN THE ENLIGHTENMENT: THE BACKGROUND OF EMMERICH DE VATTEL'S LE DROIT DES GENS* 281–286, 307–10 (1975). See also MARK WESTON JANIS, *THE AMERICAN TRADITION OF INTERNATIONAL LAW* 128 (2004); Stéphane Beaulac, *Emer de Vattel and the Externalization of Sovereignty*, 5 *J. HIST. OF INT'L L.* 241 (2003).

288. There is "a perfect equality of rights among Nations in the conduct of their affairs and in the pursuit of their policies." *Introduction to EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* 7 (Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758).

289. *Id.*, bk. I, § 4, at 11.

290. *Id.*, bk. II, §§ 54–55, at 131.

291. *Id.*, bk. IV, § 68, at 365–66.

292. Letter from Thomas Jefferson to Thomas Pinckney (Dec. 30, 1792), in 24 *THE*

Having recognized the French government, Washington received its controversial minister, Edmund Genet.²⁹³ This action was also consistent with Vattel. Because all nations, no matter how powerful or weak, have the same rights, and because of the importance of diplomatic relations to preserving peace,²⁹⁴ Vattel asserted that every recognized government has an absolute right to send and receive ambassadors.²⁹⁵ Thus, the recognition of a foreign government and the receipt of its ministers are, according to Vattel, ministerial functions: if a sovereign determines factually that a foreign government is in actual possession of a nation's powers, it is duty bound to recognize that government and to receive its ambassadors.²⁹⁶

The actions of the Washington administration in recognizing the revolutionary French governments and receiving its minister were then, and remain now, of profound importance and will be discussed in detail in a following paper. But these post-ratification actions cannot be turned back in time; and, more importantly, one must take into account how European nations treated Vattel's doctrines during the Confederation period.

In eighteenth century Europe, there was a disjunction between the theoretical doctrines of the law of nations and the actual practices of governments. Those doctrines, as ably articulated by Vattel and other theorists, were simply not followed by European powers when it was against their self-interest.²⁹⁷ Consider first the issue of recognition. Premature recognition—that is, recognition before actual possession was accomplished—violated the law of nations and was a *causus belli*.²⁹⁸ Yet one can hardly imagine a clearer case of premature recognition than France's recognition of the United States in early 1778.²⁹⁹ The Netherlands is a closer case, but even that recognition occurred before the Preliminary

PAPERS OF THOMAS JEFFERSON 802, 803 (John Catanzariti et al. eds., 1990). For Washington's pre-approval of this letter, see Letter from George Washington to Thomas Jefferson (Dec. 30, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON *supra* note 75, at 804, 804 (John Catanzariti et al. eds., 1990).

293. HERRING, *supra* note 11, at 70–71.

294. VATTEL, *supra* note 288, bk. II, § 236, 233; *id.* bk. IV, §§ 55–57, at 362.

295. See *id.*, bk. IV, § 63, at 364; see also *id.*, bk. IV, § 78, at 369 (noting that the refusal to receive an ambassador, even from a small or weak state, is a violation of the law of nations).

296. *Id.* §§ 57, 63, 65, at 362, 364.

297. See, e.g., CORWIN, *supra* note 141, at 9–11, 20; *supra* notes 128–31 and accompanying text.

298. See BEMIS, THE DIPLOMACY OF REVOLUTION, *supra* note 120, at 60.

299. *Id.* at 61–62; see *supra* notes 139–42 and accompanying text.

Articles of Peace were signed and while the British army was in control of a substantial portion of its rebellious colonies.³⁰⁰

Consider next the actions of European nations following the Treaty of Peace. Under Vattel's doctrine of actual possession, the United States was now clearly entitled to recognition.³⁰¹ Russia refused to recognize the United States until 1809, and most of the countries approached by the American commissioners wanted nothing to do with the new republic.³⁰²

Then there is Vattel's doctrine that nations have a duty to exchange foreign ministers in order to conduct diplomatic relations and preserve the peace.³⁰³ Catherine II sent Francis Dana packing in 1785,³⁰⁴ and Great Britain refused to have full diplomatic relations with the United States for eight years following its recognition of American independence.³⁰⁵

These actions were not atypical of the behavior of European powers in the eighteenth century.³⁰⁶ There was a law of nations that was supposed to govern international behavior. Some rules were clearly established while others were not; but for even the most rigid rules,

the whole diplomacy of the time aimed to evade or to violate them as much as was consistent with political safety, with the result that there existed a régime of policies rather than of laws, and one which pretended an observance of forms rather than the spirit of international equity.³⁰⁷

300. See Provisional Articles, *supra* note 212; Treaty of Amity and Commerce, *supra* note 179; BEMIS, *THE DIPLOMACY OF REVOLUTION*, *supra* note 120, at 113, 123, 125.

301. See VATTEL, *supra* note 288, bk. I, § 208, at 85.

302. BEMIS, *THE DIPLOMACY OF REVOLUTION*, *supra* note 120, at 113, 164–66.

303. VATTEL, *supra* note 288, bk. IV, §§ 55–56, at 362.

304. BEMIS, *A DIPLOMATIC HISTORY*, *supra* note 11, at 44–45.

305. See BAILEY, *supra* note 4, at 54. Consider also Vattel's laws on neutrality, which require strict impartiality among the belligerents. VATTEL, *supra* note 288, bk. III, § 104, at 268. Could anyone say with a straight face that these principles were followed by France or Spain? While claiming neutrality, they actively intervened on behalf of the revolutionaries, providing huge loans and equipping Washington's army through a flourishing trade in contraband. See BEMIS, *THE DIPLOMACY OF REVOLUTION*, *supra* note 120, at 28; DULL, *supra* note 122, at 48; HERRING, *supra* note 11, at 18.

306. Nor were these atypical actions of European powers before and after the eighteenth century. The Swiss Confederation was independent for almost two centuries before it was officially recognized by the Empire in 1648; Spain did not recognize the independence of low countries until 1648, or of Portugal until 1668 (the latter had separated in 1640); and Belgium was not recognized by Holland until 1839. States: Their Recognition and Continuity, 1 MOORE DIGEST, *supra* note 4, § 27, at 72.

307. GOEBEL, *supra* note 10, at 73.

Major powers were not constrained by norms of legality. The ministries violated treaty obligations in times of crisis³⁰⁸ and unhesitatingly adopted practices (including secretly using “dissimulation, deception, espionage, bribery, treachery, robbery and even assassination”) that advanced the interests of their nations at the expense of others.³⁰⁹

Given the rapaciousness of the European powers, and their unwillingness to be constrained by rules of law, on what basis can one attribute to the founders a belief that their new government would follow Vattel’s doctrines during periods that could threaten the new nation’s existence?

Considering the importance of recognition and the establishment of diplomatic relations during the Confederation period, one would assume that these subjects would take on equivalent importance in the debates over the construction and ratification of the Constitution. From the available records that I have reviewed, it appears clear that they did not. The discussion that follows focuses on the two textual provisions of the Constitution that arguably give the President a plenary recognition power—the Receive Ambassadors and Executive Vesting Clauses. It also deals more broadly with the then-prevailing understanding of executive power because, in the ratification debates, the Anti-Federalists identified and challenged, and the Federalists identified and defended, every power that was thought to be vested in the President.

C. *The Receive Ambassadors Clause*

1. The Constitutional Convention

Article IX of the Articles of Confederation had granted many of the royal prerogatives to Congress, including the “sole and exclusive right . . . of sending and receiving ambassadors.”³¹⁰ In the Constitutional Convention, the prerogative of sending and receiving ambassadors was split in two.³¹¹ The first reference to receiv-

308. HERRING, *supra* note 11, at 69.

309. See BEMIS, A DIPLOMATIC HISTORY, *supra* note 11, at 15–16.

310. ARTICLES OF CONFEDERATION art. IX. Reinforcing Congress’s exclusive power, Article VI prohibited the states from exercising this right without the consent of Congress. *Id.* art. VI.

311. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 81, at 144–46 (July

ing ambassadors is contained in the Committee of Detail's draft of the Constitution, which was released on August 6, 1787.³¹² The draft listed powers and duties of the President, including provisions that are very similar to what would become Article II, Section 3 of the Constitution.³¹³ One of those provisions was that the President "shall receive Ambassadors."³¹⁴ But the appointment of ambassadors was dealt with differently. The Senate was given power to appoint ambassadors and judges of the Supreme Court, while the President was given the power to appoint all other officers; the Senate was also given the power to make treaties.³¹⁵

The appointment power was extremely controversial and provoked considerable debate both before and after this draft was issued. As James Madison reported to Jefferson:

On the question whether [the Executive] should consist of a single person, or a plurality of co-ordinate members, on the mode of appointment, on the duration in office, on the degree of power, on the re-eligibility, tedious and reiterated discussions took place. . . . The questions concerning the degree of power turned chiefly on the appointment to offices, and the controul of the Legislature. An *absolute* appointment to all offices—to some offices—to no offices, formed the scale of opinions on the first point.³¹⁶

Following the issuance of the Committee of Detail's draft, both Elbridge Gerry and Madison opposed the proposal to give the Senate power to appoint ambassadors.³¹⁷ On the other hand, the proposed Receive Ambassadors Clause did not engender any recorded discussion.³¹⁸ It was amended by the delegates, without debate, to add "and other public Ministers."³¹⁹ As the Convention neared an end, the Committee of Eleven issued a revised draft of

14, 1787).

312. *Id.* at 177, 185 (Aug. 6, 1787).

313. *Compare id.* at 185–86, with U.S. CONST. art. II, § 3.

314. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 81, at 185 (Aug. 6, 1787).

315. *Id.* at 183, 185.

316. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON, *supra* note 226, at 270, 272–73. The second contentious issue of executive power that Madison discussed in this letter was the veto. *Id.* at 273. Madison also noted that the debates concerning the Executive were "peculiarly embarrassing," presumably because they were made in the presence of George Washington, who chaired the Convention, and whom almost everyone assumed would be the first chief executive. *Id.* at 272.

317. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 81, at 285 (Aug. 14, 1787).

318. *Id.* at 419 (Aug. 25, 1787).

319. *Id.*

the Constitution on September 7.³²⁰ This draft gave the President the appointment power, subject to the consent of the Senate, of ambassadors, other public ministers, judges of the Supreme Court, and all other officers of the United States.³²¹ Finally, after inserting "Consuls" into the draft of the appointments power in Article II, Section 2 (but not in the Receive Ambassadors Clause in Section 3), the delegates voted to give the President the power to appoint, with the consent of the Senate, ambassadors, other public ministers and consuls, judges of the Supreme Court and all other officers of the United States.³²²

There is another piece of evidence that supports a limited view of the Receive Ambassadors Clause. On June 18, 1787, Hamilton made his famous all-day speech on his preferred constitution.³²³ No other delegate came close to matching Hamilton's zeal for a strong Executive, who, he argued, should serve during good behavior (thus the later charge that Hamilton wanted an elected king).³²⁴ So it is interesting to revisit Hamilton's proposal on executive powers:

The authorities & functions of the Executive to be as follows: to have a negative on all laws about to be passed, and the execution of all laws passed, to have the direction of war when authorized or begun; to have with the advice and approbation of the Senate the power of making all treaties; to have the sole appointment of the heads or chief officers of the departments of Finance, War and Foreign Affairs; to have the nomination of all other officers (Ambassadors to foreign Nations included) subject to the approbation or rejection of the Senate; to have the power of pardoning all offences except Tréason; which he shall not pardon without the approbation of the Senate.³²⁵

Notably, Hamilton includes the nomination of ambassadors as a presidential power (subject to Senate approval) but omits any reference to receiving ambassadors.³²⁶ It appears that not even Hamilton regarded that function as consequential.

320. *Id.* at 532–43 (Sept. 7, 1787).

321. *See id.* at 533. The President was also given the power to make treaties, subject to confirmation by two-thirds of Senators present. *Id.* at 540.

322. *Id.* at 533 (Sept. 7, 1787).

323. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 81, at 304–11 (June 18, 1787).

324. *Id.* at 310.

325. *Id.* at 292.

326. *See id.* at 292–93.

Thus, although the records of the Convention are incomplete, there is no discussion in the available documents of the Receive Ambassadors Clause. What conclusion can we draw from this history? Certainly nothing definitive. But the casual way in which the Convention dealt with the Receive Ambassadors Clause is more consistent with the notion that the delegates regarded it as a simple ministerial function of the President rather than an important executive power.³²⁷ There is no evidence that the delegates viewed the Receive Ambassadors Clause as vesting the recognition power in the President. This is consistent with the distinction between recognition and the receipt of ambassadors that characterized United States experiences during the Confederation period. Indeed, there is no record that the subject of recognizing foreign states or governments ever came up in the Convention.

2. The Ratification Debates

The ratification debates took place in two forums. The public understanding of the Constitution was addressed and debated in pamphlets and countless letters and articles in the newspapers.³²⁸ Those debates were carried forward by leading advocates and opponents of the Constitution in the Ratification Conventions.³²⁹

The records of the ratification debates are incomplete, but they are nevertheless voluminous and it is unlikely that any issue of importance is largely missing.³³⁰ Although Hamilton complained in *The Federalist* that the Receive Ambassadors Clause “has been a rich theme of declamation[s],”³³¹ a comprehensive search of the

327. Arthur Bestor points out the Receive Ambassadors Clause in the draft of the Committee of Detail was paired with a clause in the same sentence that the President shall “correspond with the supreme Executives of the several States.” Bestor, *supra* note 204, at 87. He presents this coupling as evidence that the delegates viewed the Receive Ambassadors Clause as primarily a ceremonial function that provided a channel of communications with foreign nations. *Id.* at 86–87.

328. See, e.g., JOHN K. ALEXANDER, *THE SELLING OF THE CONSTITUTIONAL CONVENTION: A HISTORY OF NEWS COVERAGE* 126–27 (1990).

329. See, e.g., Letter from George Washington to James Madison (Oct. 10, 1787), in *THE ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY* 56, 57 (Michael Kammen ed., 1986).

330. Of course, debates also took place in oral discussions and private letters. What little evidence we have of these are diary entries and subsequently published letters.

331. *THE FEDERALIST* NO. 69, *supra* note 77, at 419 (Alexander Hamilton); see *supra* notes 84–86 and accompanying text.

available records did not uncover anything resembling such “declamations.”³³² Indeed, there is practically nothing of substance about the Receive Ambassadors Clause in all of these materials that were reviewed. This turned out to be different than trying to find a needle in a haystack. There is no needle there.

In all of the state convention materials currently available, there is only one reference to the Receive Ambassadors Clause. In this lone reference, Archibald Maclaine, a Federalist in the North Carolina Convention, argued that the President is the obvious person to receive foreign diplomats because Congress is often not in session, while the President is “perpetually acting for the public.”³³³ And there is only one reference to the subject of receiving

332. The primary source that my research assistants and I used is THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (John P. Kaminski et al. eds., 2009) [hereinafter THE DOCUMENTARY HISTORY]. For the sake of brevity, subsequent citations to volumes of *The Documentary History* edited by John P. Kaminski omit editor and publication information. For those volumes that contain an editor other than John P. Kaminski, the editor's name and year of publication have been reprinted in full. This series, which currently has twenty-three volumes, is considered the most comprehensive source of information on the ratification debates. See, e.g., Jeffrey S. Sutton, *The Role of History in Judging Disputes About the Meaning of the Constitution*, 41 TEX. TECH L. REV. 1173, 1189 n.91 (2009). In addition to including a vast amount of commentary from newspapers and pamphlets, it contains a more thorough account of state convention debates than *Elliot's Debates* (a fact confirmed by comparing the respective accounts of the New York and Pennsylvania conventions). The entire twenty-three volume series is now searchable online at <http://rotunda.upress.virginia.edu>. However, this series presents two limitations. It is still a work in progress and does not contain the ratification debates from every state. At present, it contains the debates from eight states: Connecticut, Delaware, Georgia, Massachusetts, New Jersey, New York, Pennsylvania, and Virginia. In addition, its coverage of the state convention debates is sometimes limited by the sparse minutes available for some of the conventions. See, e.g., 3 THE DOCUMENTARY HISTORY, *supra*, at 44–45 (Delaware). In Massachusetts, for example, very few minutes were recorded for the two days in which Article II of the Constitution was debated, while in Georgia, the minutes for the convention as a whole are rather rudimentary. See 3 THE DOCUMENTARY HISTORY, *supra*, at 212–14 (Georgia).

We also used THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION OF PHILADELPHIA IN 1787 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter ELLIOT'S DEBATES]. It provides a useful addition to *The Documentary History* because it contains lengthy accounts of the state conventions in North and South Carolina, as well as coverage (albeit limited) of the Maryland and New Hampshire conventions.

We also searched the collection of writings by John Adams, Madison, Jefferson and Washington. In addition, we read BERNARD BAILYN, THE DEBATE ON THE CONSTITUTION (1995); ESSAYS ON THE CONSTITUTION OF THE UNITED STATES (Paul L. Ford ed., 1892); PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES (Paul L. Ford ed., 1888); THE ANTI-FEDERALIST PAPERS (Morton Borden ed., 1965); THE COMPLETE ANTI-FEDERALIST (Herbert L. Storing ed., 1981), and of course *The Federalist*. Finally, because *The Federalist* was published in New York City newspapers, we read the newspapers published in that city from October 1787 through May 1788.

333. Archibald Maclaine, Debates in North Carolina Convention (July 28, 1788), in 4

ambassadors. In the Virginia Convention, William Grayson, a leading Anti-Federalist, sought to bolster the opposition's argument that the President and Senate could, by treaty, violate the laws of nations and relinquish navigation rights on the Mississippi River without the consent of the House of Representatives.³³⁴ Grayson cited several examples of countries not following the law of nations.³³⁵ Grayson's first example was that "several Oriental nations . . . receive no ambassadors."³³⁶ He also said that "[i]t is a custom with the grand seignior to receive, but not to send ambassadors. It is a particular custom with him, in time of war with Russia, to put the Russian ambassador in the Seven Towers."³³⁷

In all of the extant materials on the ratification debates in newspapers and pamphlets, there are, outside of *The Federalist*, only ten references to the authority or practice of receiving ambassadors. Five merely cited Congress's authority under the Articles of Confederation to receive ambassadors.³³⁸ Two dismissed

ELLIOT'S DEBATES, *supra* note 332, at 1, 135. Maclaine was actually responding to the claim that the President's power in Article II, Section 2 to fill vacancies while Congress was in recess smacked of "a monarchical power." *Id.* Maclaine's rejoinder was:

Congress are not to be sitting at all times; they will only sit from time to time, as the public business may render it necessary. Therefore the executive ought to make temporary appointments, as well as receive ambassadors and other public ministers. This power can be vested nowhere but in the executive, because he is perpetually acting for the public; for, though the Senate is to advise him in the appointment of officers, &c., yet, during the recess, the President must do this business, or else it will be neglected; and such neglect may occasion public inconveniences.

Id.

334. William Grayson, Debates in Virginia Convention (June 18, 1788), in 3 ELLIOT'S DEBATES, *supra* note 332, at 1, 506.

335. *Id.* at 505.

336. *Id.*

337. *Id.*

338. A Federal Republican, *To the People of Virginia*, NORFOLK & PORTSMOUTH J. (Va.), Mar. 5, 1787, reprinted in 8 THE DOCUMENTARY HISTORY, *supra* note 332, at 457, 457 (listing "sending and receiving ambassadors" as one of several powers for which Congress was granted "sole and exclusive" authority under the Articles of Confederation); P. Valerius Agricola, *An Essay, on the Constitution Recommended by the Federal Convention to the United States*, ALBANY GAZETTE, Dec. 6, 1787, reprinted in 19 THE DOCUMENTARY HISTORY, *supra* note 332, at 361, 363 (describing sending and receiving ambassadors as one of the "rights of a state" that Congress had been exercising); CUMBERLAND GAZETTE (Va.), Nov. 15, 1787, reprinted in 4 THE DOCUMENTARY HISTORY, *supra* note 332, at 245, 245-46 (arguing that most powers granted to the federal government under the Constitution, including sending and receiving ambassadors, had already been granted under the Articles of Confederation); *Letter IV, AN ADDITIONAL NUMBER OF LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN* (Dec. 25, 1787), reprinted in 17 THE DOCUMENTARY HISTORY, *supra* note 332, at 265, 274 (citing, without criticism, the sole authority of Congress under the Articles of Confederation to send and receive ambassadors); James Mo-

the importance of the Receive Ambassadors Clause in terms consistent with Hamilton's comments in *The Federalist No. 69*.³³⁹ One letter writer expressed concern about funding a federal government populated by aristocrats who like to spend money lavishly, such as in entertaining foreign ambassadors and consuls.³⁴⁰ Only one letter, written by Cato (probably the Anti-Federalist Governor George Clinton), described the Clause in terms that are apparently critical.³⁴¹ However, it is difficult to assess his views about the Receive Ambassadors Clause because he lumped it to-

noe, SOME OBSERVATIONS ON THE CONSTITUTION (May 25, 1787), reprinted in 9 THE DOCUMENTARY HISTORY, *supra* note 332, at 844, 848-49 (describing Congress's "extensive" powers under the Articles of Confederation as including the authority to "send and receive ambassadors"). Also see the sources mentioned in *supra* note 332, in which some of these letters, as well as pamphlets and letters in the succeeding notes, are reprinted.

339. (1) *A Native of Virginia*: This pamphlet, which was advertised in Virginia newspapers in April 1788, provides a clause-by-clause defense of the Constitution. A NATIVE OF VIRGINIA, OBSERVATIONS UPON THE PROPOSED PLAN OF FEDERAL GOVERNMENT (Apr. 2, 1788), reprinted in 9 THE DOCUMENTARY HISTORY, *supra* note 332, at 655, 655-56. With respect to Article II, Section 3, the author states: "The powers given by this section are such as in all governments, have always been, and must necessarily be, vested in the first magistrate." *Id.* at 682. (2) *Albany Federal Committee*: In this Federalist pamphlet, the authors provide a point-by-point refutation of an April 10 circular published by the Albany Anti-Federal Committee. See ALBANY ANTI-FEDERAL COMMITTEE CIRCULAR (Apr. 10, 1788), reprinted in 21 THE DOCUMENTARY HISTORY, *supra* note 332, at 1379, 1380-81; Albany Federal Committee, AN IMPARTIAL ADDRESS (Apr. 20, 1788), reprinted in 21 THE DOCUMENTARY HISTORY, *supra* note 332, at 1388, 1394. While the Anti-Federalists did not discuss the Receive Ambassadors Clause, the Federal Committee refers to the Clause in their refutation of the claim that the President has too much power. See ALBANY ANTI-FEDERALIST COMMITTEE CIRCULAR, *supra*, at 1380-81; Albany Federal Committee, AN IMPARTIAL ADDRESS, *supra*, at 1394. The Federal Committee argued that the President's limited power is evident by the fact that he can do virtually nothing without the advice of the Senate except receive ambassadors. *Id.* The fact that the Committee felt no need to defend the unchecked power of receiving ambassadors suggests that it believed the power to be merely ministerial. See *id.* The entire passage is as follows:

He cannot touch a shilling of money unless a law is passed for the purpose— He can make no treaty, no permanent appointment to offices, nor, in fact, do any thing whatever but by and with the consent of the Senate; except receiving Ambassadors, and the common official powers that are vested in the Governor of our state by our Constitution—and in general, his powers are so far from being superior to an European king that, on many occasions, they are inferior to the Governor of our state.

Id.

340. Letter from A Briton, GA. GAZETTE, Dec. 13, 1787, reprinted in 3 THE DOCUMENTARY HISTORY, *supra* note 332, at 254, 256-57 (Merrill Jensen et al. eds., 1978).

341. In Cato's fourth letter, he refers to the Receive Ambassadors Clause twice. *Cato IV*, N.Y.J. (Nov. 8, 1787), reprinted in 19 THE DOCUMENTARY HISTORY, *supra* note 332, at 195, 198. Each time, he includes it in a laundry list of presidential powers, including the power to appoint ambassadors, make treaties, veto legislation, command the military, and pardon. *Id.* His argument was that the President was in fact given the same prerogatives as the King of Great Britain, "by which means an imperfect aristocracy bordering on monarchy may be established." *Id.* at 197-98.

gether with all of the enumerated presidential powers in an attempt to demonstrate that the President was given the prerogatives of the King.³⁴² The powers that he singled out as particularly excessive did not include receiving ambassadors.³⁴³ The fifth letter is Americanus's response to Cato in which he refuted the claim that the President has the same powers as the King.³⁴⁴ In making this argument, Americanus listed numerous *sole* prerogatives of the King, including sending and receiving ambassadors.³⁴⁵ Most of those prerogatives were denied to the President or were subject to a check by the Senate.³⁴⁶ This, he said, shows the "immense disparity" between the powers of the King and the President.³⁴⁷ Although Americanus never expressly referred to the President's sending and receiving powers under the Constitution, the implication of the argument is that the President's power is less than the King's because the Senate has a veto power over the appointment of ambassadors.

That's it, except for *The Federalist*, in which the Receive Ambassadors Clause is mentioned in five numbers. Madison and Hamilton described the authority to send and receive ambassadors as a standard political practice of other nations (contemporary and ancient)³⁴⁸ and an "obvious and essential" practice of a sovereign state that belongs to the federal government.³⁴⁹ And, as discussed above, Hamilton stated that, despite some controversy

342. *See id.* at 197.

343. *Id.* at 197–98 (identifying the power of nomination and influence over all appointments, control of the military, unrestrained pardoning power, and the absence of an executive council).

344. *Americanus IV*, N.Y. DAILY ADVERTISER, Dec. 5–6, 1787, reprinted in 19 THE DOCUMENTARY HISTORY, *supra* note 332, at 354, 358–59. Since *Cato IV* was probably written by Hamilton's political archenemy in New York, reprinted in two other New York newspapers, and led to lengthy responses from Americanus, *see Americanus II* (John Stevens, Jr.), N.Y. DAILY ADVERTISER, Nov. 23, 1787, reprinted in 1 THE DEBATE ON THE CONSTITUTION, *supra* note 332, at 415, 416–17, it is possible that Hamilton had this exchange in mind when he referred to a "rich theme of declamation" concerning the Receive Ambassadors Clause. *See THE FEDERALIST NO. 69*, *supra* note 77, at 419 (Alexander Hamilton).

345. *Americanus IV*, *supra* note 344, at 358.

346. *See Americanus II*, *supra* note 344, at 416–18; *id.* at 358.

347. *Americanus IV*, *supra* note 344, at 358.

348. THE FEDERALIST NO. 18, *supra* note 77, at 120 (James Madison & Alexander Hamilton); NO. 20, *supra* note 77, at 130 (James Madison).

349. THE FEDERALIST NO. 42, *supra* note 77, at 260 (James Madison).

surrounding the Receive Ambassadors Clause, it is merely ministerial in nature.³⁵⁰

There is another striking pattern of omission with respect to the Receive Ambassadors Clause. Both Federalists and Anti-Federalists who conducted a thorough review of presidential powers ignored the existence of the Clause.³⁵¹ For example, Cassius (a Federalist) recited with approval all of the duties and powers in Article II, Section 3, but left out the Receive Ambassadors Clause.³⁵² The Anti-Federalists Old Whig,³⁵³ Philadelphiensis³⁵⁴ and Vox Populi,³⁵⁵ and the Federalists Plain Truth,³⁵⁶ Tench Coxe,³⁵⁷ and John Dickinson³⁵⁸ all compared the powers of the President to the royal prerogatives and did not mention the Receive Ambassadors Clause. If anyone would think that the Clause vested power in the President, it would have been John Jay, the Secretary for Foreign Affairs. But he did not mention it in his address on the Constitution.³⁵⁹ In the North Carolina Convention, James Iredell examined the President's powers in Article II one by one and showed that they were much less substantial than the King's.³⁶⁰ He did not mention the Receive Ambassadors Clause.³⁶¹

350. THE FEDERALIST NO. 69, *supra* note 77, at 419 (Alexander Hamilton); NO. 77, *supra* note 77, at 462 (Alexander Hamilton).

351. The exceptions are Cato, *see supra* note 341 and accompanying text; Americanus, *see supra* notes 344–47 and accompanying text, who mentioned it briefly; and Publius, *see supra* note 350 and accompanying text.

352. Cassius, X, MASS. GAZETTE, Dec. 21, 1787, *reprinted in* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 332, at 38, 38–39.

353. *Essays of An Old Whig*, INDEP. GAZETTEER (Phila.), Oct. 1787–Feb. 1788, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 332, at 17, 37–38.

354. *Philadelphiensis XII*, INDEP. GAZETTEER (Phila.), Nov. 1787–Apr. 1788, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 332, at 136, 136–38.

355. *Essay by Vox Populi*, MASS. GAZETTE, Oct.–Nov. 1787, *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 332, at 41, 52–53.

356. *Rebuttal to "An Officer of the Late Continental Army": "Plain Truth,"* INDEP. GAZETTEER (Phila.), Nov. 10, 1787, *reprinted in* 1 THE DEBATE ON THE CONSTITUTION, *supra* note 332, at 105, 109–10 (stating the President does not have the power of a king because he is constrained by obtaining the approval of the Senate "and can in no instance act alone, except in the cause of humanity by granting reprieves and pardons").

357. Tench Coxe, *An Examination of the Constitution of the United States of America*, *in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 332, at 134, 137–39.

358. John Dickinson, *The Letters of Fabius (Letter IX)*, *in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 332, at 211, 211–12.

359. *See* John Jay, *Debates in New York Convention (June 23, 1787)*, *in* 2 ELLIOT'S DEBATES, *supra* note 332, at 205, 282–86.

360. James Iredell, *Debates in North Carolina Convention (July 25, 1788)*, *in* 4 ELLIOT'S DEBATES, *supra* note 332, at 1, 106–14.

In the Pennsylvania Convention, James Wilson responded to those who claimed that the Executive would be a tool of the Senate by saying that the Senate could do nothing without the Executive.³⁶² He then stated that the President has powers that are independent of the Senate.³⁶³ Of course, if Wilson viewed the Receive Ambassadors Clause as a presidential power, this would have been a perfect occasion for mentioning it. Instead, Wilson identified the unilateral powers of the President as being commander-in-chief of the military, having the authority to require written opinions from the heads of departments, and granting reprieves and pardons.³⁶⁴

D. *The Executive Vesting Clause*

Like the Receive Ambassadors Clause, the Executive Vesting Clause first emerged in the draft presented by the Committee of Detail.³⁶⁵ The article dealing with the presidency began with this statement: "The executive power of the United States shall be vested in a single person. His style shall be, 'The President of the United States of America,' and his title shall be, 'His Excellency.'"³⁶⁶ As Madison had reported to Jefferson, one of the main disputes concerning the Executive was whether it "should consist of a single person, or a plurality of coordinate members."³⁶⁷ This provision resolved the dispute in favor of a single Executive. It was then changed by the Committee of Style by merging and tightening the two sentences into one, and by eliminating the title "His Excellency," which was bound to incite true republicans.³⁶⁸ Thus, the Executive Vesting Clause took its present form in Article II,

361. See *id.* Iredell was the leading Federalist in North Carolina and would be a Supreme Court Justice.

362. James Wilson, Debates in Pennsylvania Convention (Dec. 4, 1787), in 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 81, at 161, 162. Wilson led the pro-executive faction in the Constitutional Convention and would be a Supreme Court Justice.

363. James Wilson, Debates in Pennsylvania Convention (Dec. 11, 1787), in 2 ELLIOT'S DEBATES, *supra* note 332, at 415, 510.

364. *Id.* at 512.

365. Draft of Constitution, Debates in the Federal Convention of 1787 (Aug. 6, 1787), reprinted in 5 ELLIOT'S DEBATES, *supra* note 332, at 123, 380.

366. *Id.*

367. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *supra* note 316, at 272.

368. See REPORT OF COMM. OF STYLES (Sept. 12, 1787), reprinted in 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 81, at 590, 597.

Section 1: "The executive Power shall be vested in a President of the United States of America."³⁶⁹

As Arthur Bestor has observed, the origin of the Executive Vesting Clause in the draft of the Committee of Detail, and the lack of discussion of that Clause for the remainder of the Convention, makes it unlikely that the Clause was viewed as an independent source of presidential power over foreign affairs:

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.³⁷⁰

There is no recorded discussion of the Executive Vesting Clause,³⁷¹ nor any indication that any delegate suggested that either version of the Executive Vesting Clause would be an independent source of presidential power. It is also noteworthy that Hamilton's proposed constitution did not contain an executive vesting clause.³⁷² Like the other delegates, Hamilton dealt with the scope of presidential authority by proposing powers that would be specifically enumerated in the Constitution.³⁷³

This silence over the Executive Vesting Clause is replicated in the ratification debates. There is no record that any participant in those debates suggested that this Clause was an independent source of presidential power, or that it had any relevance to the conduct of foreign affairs.

369. U.S. CONST. art. II, § 1.

370. Bestor, *supra* note 204, at 87.

371. See RAMSEY, *supra* note 4, at 115.

372. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 81, at 292; see *supra* notes 324–26 and accompanying text.

373. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 81, at 292; see *supra* notes 324–26 and accompanying text.

E. Criticisms of Executive Power

The silence in the ratification debates concerning the Receive Ambassadors and Executive Vesting Clauses might be explainable if other presidential powers had passed unremarked. On the contrary, however, the Anti-Federalists attacked practically everything about the Executive. They objected to the President's mode of election³⁷⁴ and his or her term of office and unlimited eligibility for reelection, which, they claimed, could lead to an elected monarch.³⁷⁵ They attacked *every* power which they perceived to be vested in the Executive: the veto power,³⁷⁶ the com-

374. In *The Federalist No. 68*, Hamilton claimed that the mode of electing the President "is almost the only part of the system, of any consequence, which has escaped without severe censure, or which has received the slightest mark of approbation from its opponents." THE FEDERALIST NO. 68, *supra* note 77, at 410 (Alexander Hamilton). Actually, most Anti-Federalists "strongly disapproved of the procedures for selecting the President." THE ANTI-FEDERALIST PAPERS, *supra* note 332, at 199 (editor's comment); *see, e.g.*, William Grayson, Debates in Virginia Convention (June 18, 1788), in 10 THE DOCUMENTARY HISTORY, *supra* note 332, at 1371, 1373-74.

375. *E.g.*, THE ANTI-FEDERALIST PAPERS, *supra* note 332, at 205-06; ALBANY ANTI-FEDERALIST COMMITTEE CIRCULAR, *supra* note 339, at 1381; *Cato IV*, N.Y.J., Nov. 18, 1787, *supra* note 341, at 195, 196-97; Samuel Chase, Notes of Speeches Delivered to the Maryland Ratifying Convention (April 1788), in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 332, at 79, 83; William Davie, Debates in North Carolina Convention (July 26, 1788), in 4 ELLIOT'S DEBATES, *supra* note 332, at 1, 102-04; George Mason on the President: He Will Serve for Life and Be Corrupted by Foreign Powers, Debates in Virginia Convention (June 17, 1788), in 2 THE DEBATE ON THE CONSTITUTION, *supra* note 332, at 718, 718-19; Governor Edmond Randolph's Reasons for Not Signing the Constitution (Dec. 27, 1787), in 8 THE DOCUMENTARY HISTORY, *supra* note 332, at 260, 273-74; William Grayson, Debates in Virginia Convention (June 18, 1788), *supra* note 374, at 1373; William Lancaster, Debates in North Carolina Convention (July 30, 1788), in 4 ELLIOT'S DEBATES, *supra* note 332, at 1, 213; *Letter XIV*, AN ADDITIONAL NUMBER OF LETTERS TO THE REPUBLICAN (Jan. 17, 1788), *reprinted in* 20 THE DOCUMENTARY HISTORY, *supra* note 332, at 1035, 1040-41; James Lincoln, Debates in South Carolina Convention (Jan. 18, 1788), in 4 ELLIOT'S DEBATES, *supra* note 332, at 22, 314; Luther Martin, *Genuine Information IX*, MD. GAZETTE (Balt.), Jan. 29, 1778, *reprinted in* 15 THE DOCUMENTARY HISTORY, *supra* note 332, at 494, 494-97; George Mason, Debates in Virginia Convention (June 17, 1788), in 10 THE DOCUMENTARY HISTORY, *supra* note 332, at 1338, 1365-66.

376. The presidential veto was seen as a blatant violation of the separation of powers and the means by which the Executive could control the Legislature. Anti-Federalists argued that this gave the President more power than the British King, because, although the veto was nominally a royal prerogative, it had not been used in almost a century. They also argued that, if a veto power were given to the President, it should be restrained by an independent council. *See, e.g.*, *Cato IV*, *supra* note 341, at 197-98; *Essays by a Farmer II*, MD. GAZETTE (Balt.), Feb. 29, 1788, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 332, at 16, 21-22; *Essay by the Impartial Examiner IV*, VA. INDEP. CHRON., June 11, 1788, in 10 THE DOCUMENTARY HISTORY, *supra* note 332, at 1609, 1610-12; *Essays by William Penn I*, INDEP. GAZETTEER (Phila.), Jan. 3, 1788, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 332, at 168, 173; *Letter by an Officer of the Late Continental Army*, INDEP. GAZETTEER (Phila.), Nov. 6, 1787, *reprinted in* 2 THE DOCUMENTARY HISTORY, *supra* note 332, at 210, 211-12; *Letter from Luther Martin to the Md. Legislature* (1787),

mander-in-chief power;³⁷⁷ the appointments power (including the power to make recess appointments);³⁷⁸ and the pardon power.³⁷⁹

in 1 ELLIOT'S DEBATES, *supra* note 332, at 344, 367; *Philadelphiensis XII*, PHILA. FREEMAN'S J., Apr. 9, 1788, *reprinted in* 12 THE DOCUMENTARY HISTORY, *supra* note 332, at 60, 61–63; William Lancaster, Debates in North Carolina Convention (July 30, 1788), in 4 ELLIOT'S DEBATES, *supra* note 332, at 1, 74.

377. The Anti-Federalists expressed fear that the President would command the armies in person and could thereby establish a military dictatorship or involve the nation in foreign wars. As one influential letter-writer put it:

[L]et us suppose, a future President and commander in chief adored by his army and the militia to as great a degree as our late illustrious commander in chief; and we have only to suppose one thing more, that this man is without the virtue, the moderation and love of liberty which possessed the mind of our late general, and this country will be involved at once in war and tyranny. So far is it from its being improbable that the man who shall hereafter be in a situation to make the attempt to perpetuate his own power, should want the virtues of General Washington; that it is perhaps a chance of one hundred millions to one that the next age will not furnish an example of so disinterested a use of great power.

An Old Whig V, INDEP. GAZETTEER (Phila.), Nov. 1, 1787, *reprinted in* 13 THE DOCUMENTARY HISTORY, *supra* note 332, at 538, 542; *see also* Essay by a Georgian, GA. GAZETTE, Nov. 15, 1787, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 332, at 129, 133–34; Essays by Republicus, KY. GAZETTE (Lexington), Mar. 1, 1788, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 332, at 165, 169; Essay by Tamony, VA. INDEP. CHRON., Jan. 9, 1788, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 332, at 145, 146–47; Patrick Henry, Debates in Virginia Convention (June 5, 1778), in 9 THE DOCUMENTARY HISTORY, *supra* note 332, at 943, 963–65; Letter by an Officer of the Late Continental Army, *supra* note 376, at 212–13; Letter from Rev. James Madison to James Madison (Oct. 1, 1787), in 8 THE DOCUMENTARY HISTORY, *supra* note 332, at 31, 32; Luther Martin, Information to the General Assembly of the State of Maryland (1788), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 332, at 67–68; George Mason, Debates in Virginia Convention (June 18, 1778), in 10 THE DOCUMENTARY HISTORY, *supra* note 332, at 1371, 1378–79; Robert Miller, Debates in North Carolina Convention (July 28, 1788), in 4 ELLIOT'S DEBATES, *supra* note 332, at 1, 114; *Philadelphiensis IX*, INDEP. GAZETTEER (Phila.), Nov. 1787–Apr. 1788, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 332, at 127, 127–30; *Philadelphiensis XII*, *supra* note 376, at 61–62; Reply to Cassius by Brutus, VA. INDEP. CHRON., May 14, 1788, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 332, at 201, 203.

378. Because of the involvement of the Senate, the appointments power was viewed as another violation of the separation of powers. But the more fundamental complaint was that this provision of Article II, Section 2 would give the President enormous power over the government. Luther Martin's attack on appointments is hyperbolic but representative of Anti-Federalist thought:

The person who *nominates*, will always in reality *appoint*, and that this was giving the president a power and influence which together with the other powers, bestowed upon him, would place him above all restraint and controul. . . . That the army and navy, which may be encreased without restraint as to numbers, the officers of which from the highest to the lowest, are all to be appointed by him and dependant on his will and pleasure, and commanded by him in person, will, of course, be subservient to his wishes, and ready to execute his commands; in addition to which, the militia also are entirely subjected to his orders—That these circumstances, combined together, will enable him, when he pleases, to become a king in *name*, as well as in substance

Luther Martin, *Genuine Information IX*, MD. GAZETTE (Balt.), Jan. 29, 1788, reprinted in 15 THE DOCUMENTARY HISTORY, *supra* note 332, at 494, 496; *see, e.g., An Antifederalist View of the Appointing Power Under the Constitution*, in THE ANTIFEDERALIST PAPERS, *supra* note 332, at 216, 216–22; *An Old Whig V*, INDEP. GAZETTER (Phila.), Nov. 1, 1787, reprinted in 13 THE DOCUMENTARY HISTORY, *supra* note 332, at 538, 543; *Anti-Federalist, No. 1, A Friend to the Rights of the People*, FREEMAN'S ORACLE (N.H.), Feb. 8, 1788, in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 332, at 235, 241; *Cato I*, S.C. GAZETTE, Nov. 26, 1787, reprinted in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 332, at 137, 139 (opposing the recess appointments of judges); *Cato IV*, N.Y.J., Nov. 8, 1787, reprinted in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 332, at 260, 261–62; Samuel Chase, Notes of Speeches Delivered to the Maryland Ratifying Convention (Apr. 1788), in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 332, at 79, 87; *Essays by Republicus*, *supra* note 377, at 168; William Findley, Debates in Pennsylvania Convention (Dec. 7, 1787), in 2 THE DOCUMENTARY HISTORY, *supra* note 332, at 512, 512–13 (objecting to the appointment powers of the President because they lacked the proper separation of powers between the executive and legislative branches); Governor Edmund Randolph's Reasons for Not Signing the Constitution (Dec. 7, 1787), *supra* note 375, at 273 (objecting to the recess appointment power); William Lenoir, Debates in North Carolina Convention (July 30, 1788), in 4 ELLIOT'S DEBATES, *supra* note 332, at 1, 204–05 (opposing the adoption of the Constitution because of the broad powers of the President, including his power to nominate); Letter from Luther Martin to the Md. Legislature, in 1 ELLIOT'S DEBATES, *supra* note 332, at 344, 366; *Letter XIII, AN ADDITIONAL NUMBER OF LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN* (Jan. 14, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 332, at 300, 301–07; Luther Martin, Speech to the Convention (Nov. 29, 1787), in 14 THE DOCUMENTARY HISTORY, *supra* note 332, at 292; George Mason, Objections to the Constitution of Government Formed by the Convention (1787), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 332, at 9, 12; James Monroe, Debates in Virginia Convention (June 10, 1788), in 9 THE DOCUMENTARY HISTORY, *supra* note 332, at 1092, 1115 (arguing the Constitution created a dangerously powerful President by giving him nomination powers); *Sydney II*, N.Y.J., June 14, 1788, reprinted in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 332, at 307, 311. On the other hand, John Adams thought that the appointments powers should be solely in the hands of the President. Letter from John Adams to Thomas Jefferson (Dec. 6, 1787), in 1 THE DEBATE ON THE CONSTITUTION, *supra* note 332, at 473, 473.

379. There were two major objections to the pardon power: first, the President could employ the pardon power without the restraint of an executive council; and second, the President could pardon for treason, when he himself may have been a party to the treasonous activities. *See, e.g., Centinel II*, FREEMAN'S J. (Phila.), Oct. 24, 1787, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 332, at 143, 151; Samuel Chase: Notes of Speeches Delivered to the Maryland Ratifying Convention (July 30, 1788), *supra* note 375, at 87; George Mason's Objections to the Constitution of Government formed by the Convention (October 7, 1799), in 8 THE DOCUMENTARY HISTORY, *supra* note 332, at 42, 45; Governor Edmond Randolph's Reasons for Not Signing the Constitution, *supra* note 375, at 274; William Lenoir, Debates in North Carolina Convention, *supra* note 378, at 204; *Letter XVIII, AN ADDITIONAL NUMBER OF LETTERS TO THE REPUBLICAN*, Jan. 25, 1788, reprinted in 20 THE DOCUMENTARY HISTORY, *supra* note 332, at 1070, 1081; Luther Martin, *Genuine Information IX*, *supra* note 375, at 495; George Mason, Debates in Virginia Convention (June 18, 1778), in 10 THE DOCUMENTARY HISTORY, *supra* note 332, at 1371, 1378–79; Thomas McKean, Debates in Pennsylvania Convention (Dec. 10, 1787), in 2 THE DOCUMENTARY HISTORY, *supra* note 332, at 532, 534; Melancton Smith, Debates in New York Convention (July 4, 1788), in 22 THE DOCUMENTARY HISTORY, *supra* note 332, at 2094, 2096; *Sydney*, N.Y.J., June 14, 1788, reprinted in 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 332, at 115, 117–18; The Dissent of the Minority of the Pennsylvania Convention, PA. PACKET, Dec. 18, 1787, in 15 THE DOCUMENTARY HISTORY, *supra* note 332, at 7, 30.

They complained that the President was not restrained by an independent council,³⁸⁰ and they said that the office of the Vice-President was both useless and dangerous.³⁸¹ The legislative checks on the veto, appointments and treaty-making powers were dismissed as illusory.³⁸² Recalling how the British monarchs had "influenced" (i.e., corrupted) the entire Parliament,³⁸³ they thought it would be easy for the President to use similar techniques to corrupt a Senate of only twenty-six members (or, some predicted, the Senate would corrupt the President).³⁸⁴ And remov-

380. *E.g.*, *Cato IV*, *supra* note 341, at 261–62; Letter from George Lee Turberville to James Madison (Dec. 11, 1787), in 1 THE DEBATE ON THE CONSTITUTION, *supra* note 332, at 477, 478; Letter from Rev. James Madison to James Madison (Oct. 1, 1787), in 1 THE DEBATE ON THE CONSTITUTION, *supra* note 332, at 48, 49; Letter from Richard Henry Lee to Governor Edmund Randolph, VA. GAZETTE (Petersburg), Dec. 6, 1787, reprinted in 1 THE DEBATE ON THE CONSTITUTION, *supra* note 332, at 465, 470–71; Letter XIII, AN ADDITIONAL NUMBER OF LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN, *supra* note 378, at 306–07; George Mason, Debates in Virginia Convention (June 18, 1778), in 10 THE DOCUMENTARY HISTORY, *supra* note 332, at 1371, 1378; George Mason's Objections to the Constitution of Government Formed by the Convention, *supra* note 379, at 44; *Philadelphiensis XII*, *supra* note 354, at 62; Melancton Smith, Debates in New York Convention (July 4, 1788), in 22 THE DOCUMENTARY HISTORY, *supra* note 332, at 2094, 2098; The Dissent of the Minority of the Pennsylvania Convention, *supra* note 379, at 30.

381. It was useless because Congress could elect a president if the incumbent died or was disabled. It was dangerous because there would be direct executive involvement in the Senate, and because the Vice President likely would be from and beholden to one of the large states. *E.g.*, David Caldwell, Debates in North Carolina Convention (July 24, 1788), in 4 ELLIOT'S DEBATES, *supra* note 332, at 1, 26; *Cincinnatus IV*, N.Y.J., Nov. 22, 1787, reprinted in 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 332, at 17, 19; Luther Martin, *Genuine Information IX*, *supra* note 375, at 495; George Mason's Objections to the Constitution of Government Formed by the Convention, *supra* note 379, at 45; Luther Martin, Speech to the Convention, *supra* note 378, at 292; George Mason, Debates in Virginia Convention (June 18, 1778), in 10 THE DOCUMENTARY HISTORY, *supra* note 332, at 1338, 1367–68; James Monroe, Debates in Virginia Convention (June 18, 1778), in 10 THE DOCUMENTARY HISTORY, *supra* note 332, at 1371, 1373; Richard Henry Lee's Proposed Amendments (Sept. 27, 1787), in 1 THE DOCUMENTARY HISTORY, *supra* note 332, at 337, 338; Robert Whitehill, Debates in Pennsylvania Convention (Dec. 10, 1787), in 2 THE DOCUMENTARY HISTORY, *supra* note 332, at 512, 512.

382. See *An Old Whig V*, *supra* note 377, at 541.

383. See 10 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 412–13 (A.L. Goodhart & H.G. Hanbury eds., Little, Brown & Co. 1938); DAVID LINDSAY KEIR, THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485, at 281–88 (9th ed. 1969); 5 GOLDWIN SMITH, A CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 401–02 (1955); see also BERNARD BAILYN, THE ORIGINS OF AMERICAN POLITICS 27–38 (1968); Reinstein, *supra* note 4, at 287–95.

384. See, e.g., *Centinel II*, *supra* note 379, at 150–51; Dissent of the Minority of the Pennsylvania Convention, PA. PACKET (Phila.), Dec. 18, 1787, in 1 THE DEBATE ON THE CONSTITUTION, *supra* note 332, at 526, 547; *Essay by Cornelius*, HAMPSHIRE CHRON., Dec. 18, 1787, in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 332, at 138, 143–44; *Essays by a Farmer V*, MD. GAZETTE (Balt.), Mar. 25, 1788, in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 332, at 40, 44–45; *Essays of John DeWitt*, AM. HERALD (Boston), Oct.–Dec. 1787, in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 332, at 15, 26–27; Letter from

ing a despotic President through impeachment was not a realistic possibility because the jurors would be his or her partners in the Senate, who might be conspirators to the crime.³⁸⁵

Arguments over foreign policy were central to the ratification debates. The Federalists pressed the necessity for a strong central government to protect the country from predatory designs by European powers, while the Anti-Federalists discounted those dangers and stressed that American liberty would be at risk with a strong central government and entanglements in foreign politics.³⁸⁶ These were arguments over the scope of federal power as a whole, and not about the allocation of powers within the federal government. However, there was one major exception—the treaty-making power.

A common Anti-Federalist charge was that the treaty power in Article II, in combination with the Supremacy Clause in Article VI, gave legislative power to the President and Senate at the expense of the only popularly elected branch, the House of Representatives.³⁸⁷ The treaty power was debated most intensely in the

Luther Martin to the Md. Legislature, *supra* note 376, at 366; Samuel Spencer, Debates in North Carolina Convention (July 28, 1788), in 2 THE DEBATE ON THE CONSTITUTION, *supra* note 332, at 879, 879–81.

385. *E.g.*, *Cincinnatus IV*, *supra* note 381, at 17–20; William Grayson, Debates in Virginia Convention (June 18, 1778), *supra* note 374, at 1374; Patrick Henry, Debates in Virginia Convention (June 19, 1788), in 10 THE DOCUMENTARY HISTORY, *supra* note 332, at 1387, 1394; *Leonidas*, N.Y.J., July 3, 1788, reprinted in 21 THE DOCUMENTARY HISTORY, *supra* note 332, at 1262, 1262–63; Luther Martin, *Genuine Information IX*, MD. GAZETTE (Balt.), Jan. 29, 1788, reprinted in 1 THE DEBATE ON THE CONSTITUTION, *supra* note 379, at 631, 654–55; Luther Martin, *Genuine Information IX*, *supra* note 375, at 495; Luther Martin, Speech to the Convention, *supra* note 378, at 289; George Mason, Debates in Virginia Convention (June 18, 1788), in 10 THE DOCUMENTARY HISTORY, *supra* note 332, at 1371, 1378–79; James Monroe, Debates in Virginia Convention (June 10, 1788), in 3 ELLIOT'S DEBATES, *supra* note 332, at 1, 220–21; James Monroe, Some Observations on the Constitution (1788), in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 332, at 278, 302; Samuel Spencer, Debates in North Carolina Convention (July 28, 1788), in 4 ELLIOT'S DEBATES, *supra* note 332, at 1, 116–18.

386. HERRING, *supra* note 11, at 53–55.

387. The Anti-Federalists claimed that this would give the President and the Senate more power than the King of Great Britain because, although the King could make treaties, they were not binding as domestic law without Parliamentary legislation. *See, e.g.*, CUMBERLAND GAZETTE (Va.), Nov. 22, 1787, reprinted in 4 THE DOCUMENTARY HISTORY, *supra* note 332, at 296, 296; William Grayson, Debates in Virginia Convention (June 24, 1788), in 10 THE DOCUMENTARY HISTORY, *supra* note 332, at 1473, 1496; William Grayson, Debates in Virginia Convention (June 18, 1788), *supra* note 374, at 1382–83; William Grayson, Debates in Virginia Convention (June 12, 1788), in 10 THE DOCUMENTARY HISTORY, *supra* note 332, at 1184, 1192; Patrick Henry, Debates in Virginia Convention (June 12, 1788), in 10 THE DOCUMENTARY HISTORY, *supra* note 332, at 1184, 1211; William Lenoir, Debates in North Carolina Convention (July 24, 1788), in 4 ELLIOT'S

Virginia Convention, where the Anti-Federalists charged that the President and northern Senators could (and probably would) give away American navigation rights on the Mississippi River.³⁸⁸ This charge was hammered home, over and over, by Anti-Federalist heavyweights³⁸⁹ and came close to causing the defeat of ratification in this critical state.³⁹⁰

DEBATES, *supra* note 332, at 1, 27; *Letter IV, A NUMBER OF LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN* (Oct. 12, 1787), in 19 *THE DOCUMENTARY HISTORY*, *supra* note 332, at 231, 232–33; *Letter by an Officer of the Late Continental Army*, *supra* note 376, at 211–12; Rawlins Lowndes, *Debates in South Carolina Legislature and Convention* (Jan. 16, 1788), in 4 *ELLIOT'S DEBATES*, *supra* note 332, at 253, 265–66; George Mason, *Debates in Virginia Convention* (June 19, 1788), in 10 *THE DOCUMENTARY HISTORY*, *supra* note 332, at 1387, 1390–91; George Mason, *Objections to the Constitution of Government formed by the Convention* (Oct. 7, 1787), in 8 *THE DOCUMENTARY HISTORY*, *supra* note 332, at 43, 44–45; Joseph M'Dowall, *Debates in North Carolina Convention* (July 28, 1788), in 4 *ELLIOT'S DEBATES*, *supra* note 332, at 1, 119, 124; James Monroe, *Debates in Virginia Convention*, *supra* note 378, at 1115; William Porter, *Debates in North Carolina Convention* (July 28, 1788), in 4 *ELLIOT'S DEBATES*, *supra* note 332, at 1, 115; *Reply to Cassius by Brutus, VA. INDEP. CHRON.*, May 14, 1788, *reprinted in* 9 *THE DOCUMENTARY HISTORY*, *supra* note 332, at 798, 800–01; Samuel Spencer, *Debates in North Carolina Convention* (July 28, 1788), *supra* note 385, at 124–25; *The Dissent of the Minority of the Pennsylvania Convention*, *supra* note 379, at 30.

388. See William Grayson, *Debates in Virginia Convention* (June 12, 1788), *supra* note 387, at 1191–92.

389. See, e.g., John Dawson, *Debates in Virginia Convention* (June 24, 1788), in 10 *THE DOCUMENTARY HISTORY*, *supra* note 332, at 1473, 1492–93; William Grayson, *Debates in Virginia Convention* (June 12, 1788), in 10 *THE DOCUMENTARY HISTORY*, *supra* note 332, at 1184, 1192; William Grayson, *Debates in Virginia Convention* (June 18, 1788), *supra* note 374, at 1382–83; William Grayson, *Debates in Virginia Convention* (June 24, 1788), in 10 *THE DOCUMENTARY HISTORY*, *supra* note 332, at 1473, 1496; Patrick Henry, *Debates in Virginia Convention* (June 12, 1788), *supra* note 387, at 1211–12, 1220; Patrick Henry, *Debates in Virginia Convention* (June 9, 1788), in 9 *THE DOCUMENTARY HISTORY*, *supra* note 332, at 1050, 1051; Patrick Henry, *Debates in Virginia Convention* (June 7, 1788), in 9 *THE DOCUMENTARY HISTORY*, *supra* note 332, at 1006, 1039; George Mason, *Debates in Virginia Convention* (June 18, 1788), *supra* note 377, at 1380–81; George Mason, *Debates in Virginia Convention* (June 19, 1788), in 10 *THE DOCUMENTARY HISTORY*, *supra* note 332, at 1387, 1390–91; James Monroe, *Debates in Virginia Convention* (June 13, 1788), in 9 *THE DOCUMENTARY HISTORY*, *supra* note 332, at 1228, 1235. The Anti-Federalists made the same charge in the North Carolina Convention. See, e.g., Jas. Bloodworth, *Debates in North Carolina Convention* (July 29, 1788), in 4 *ELLIOT'S DEBATES*, *supra* note 332, at 1, 167–68; William Porter, *Debates in North Carolina Convention* (June 28, 1788), *supra* note 387, at 115.

390. This was obviously a tactical maneuver aimed especially at the delegates from Kentucky, who were a swing bloc in the closely divided convention, see, e.g., 1 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 399, 405–06, 431 (1916); MARKS, *supra* note 46, at 197–98, but the charge also had substance. As noted above, in 1786 Congress voted seven states to five, on purely sectional lines, to authorize Jay to cede navigation rights on the river to Spain for twenty-five to thirty years. See MARKS, *supra* note 46, at 29–30. The problem for the Anti-Federalists in the Virginia Convention was that the 1786 vote on yielding the Mississippi River had led to the constitutional requirement for a two-thirds Senate vote to approve treaties. BEMIS, *A DIPLOMATIC HISTORY*, *supra* note 11, at 80; Bester, *supra* note 204, at 97–98. The Anti-Federalists' rejoinder was that, unlike the Articles,

The intensity with which the Anti-Federalists attacked every perceived power of the President highlights the complete lack of discussion of the Receive Ambassadors Clause. If anyone had supposed, as Hamilton asserted as *Pacificus* in 1793, that this Clause gave the President the discretionary power to recognize foreign governments, with the consequent power to unilaterally nullify treaties with nations whose governments he or she did not recognize,³⁹¹ the Anti-Federalists almost surely would have challenged this zealously; and the Federalists would have had to explain how such an innocuous looking clause actually vested important and unchecked powers in the President. The executive vesting clause theory would have presented even greater problems for the Federalists. The Anti-Federalists' attack on executive power, and the Federalists' defense (as in *The Federalist* itself)³⁹² focused entirely on the enumerated powers specifically given to the President in the Constitution.³⁹³ The common premise of this debate was that executive powers were limited to those listed in Article II. If anyone thought the Executive Vesting Clause might provide a residuum of additional, unspecified, and unchecked powers to the President, that was a closely held secret. Given the extent of public opposition to the Constitution, the fears of a president with prerogative powers, and the close votes in favor of ratification in such key states as New York, Virginia, and Massachusetts, an assertion by the Federalists that one person would

which required two-thirds of all states to agree to a treaty, the Constitution required the approval only of two-thirds of the Senators "present." They then constructed scenarios in which the Senators from the seven northern states, or perhaps even five, could approve a treaty that would cede navigation rights in the Mississippi and lead to the dissolution of the Union. See MARKS, *supra* note 46, at 34. With a Senate of twenty-six members, only fourteen present would be a quorum. If all fourteen were from northern states, the treaty could be approved by seven states. Even if some senators from southern states were present, ten senators from five northern states (two-thirds of the fourteen present) could approve the treaty. This argument failed not because of any inherent trust in the President or in the northern states, but because the scenario presupposed a fantasy: that the southern senators would either fail to show up for such a critical vote, or would be bribed to support a treaty that would be disastrous for their states. That is, this Anti-Federalist argument barely failed. Only four of the fourteen delegates from Kentucky voted to ratify the Constitution, see 1 BEVERIDGE, *supra*, at 432, but the Anti-Federalists understood that they needed the support of the entire Kentucky delegation, *id.* at 442–43. The four votes from Kentucky made the difference in the crucial vote (88–80) on George Wythe's motion to vote on the Constitution without the precondition of prior amendments. *Id.* at 475.

391. *Pacificus No. 1*, *supra* note 68, at 41.

392. See RAMSEY, *supra* note 4, at 122 (noting that in his discussion of the presidency, Hamilton omitted any claim that the Executive Vesting Clause is the source of any power).

393. See *supra* Part III.E.

possess such unspecified powers, without any check by Congress, might have endangered ratification of the Constitution.

IV. THE OMISSION

In the records that I have examined, there is no affirmative evidence that those who participated in drafting or ratifying the Constitution understood that this organic document would give the President the power to recognize foreign states or governments. On the other hand, extreme care must be taken in drawing conclusions from silence, and I do not believe that one can assert with confidence that there was a contrary understanding to deny that power to the President.

The importance of recognition to the United States and the establishment of diplomatic relations during the Confederation period make mysterious the total absence of discussion of these issues by those who participated in the drafting and ratification of the Constitution. A natural assumption is that the founders would have paid special attention to these powers—and in particular, to which branch of government should exercise them. Instead, we are faced with an originalist vacuum.

One explanation for this silence is that the founders carefully enumerated the powers of the President and deliberately omitted the recognition power. That explanation is consistent with the entire tenor of the ratification debates. But if the Constitution was understood as denying the recognition power to the President, one would expect some record of such a significant decision to limit executive power. No such record has been found. There is another plausible explanation for this silence.

Recognition is important for a new state or government to be accepted into the community of nations. It is a necessary, but not sufficient, prerequisite for establishing normal diplomatic relations and securing favorable treaties and alliances with members of that community.³⁹⁴ The problem facing the United States during the Confederation period was obtaining that acceptance from the nations of Europe.³⁹⁵ There was no question of the authority of the United States to “recognize” the European nations and their

394. General Principles, 1 Moore DIGEST, *supra* note 4, § 27, at 72.

395. See BEMIS, A DIPLOMATIC HISTORY, *supra* note 11, at 64–65.

monarchies, which had existed for centuries, and mutually recognized each state and government in the 1648 Treaties of Westphalia.³⁹⁶ Whether the European nations would accept the United States into their community was of considerable importance to the new nation, but whether the United States would “recognize” the European nations was a nonsequitur.

As an example, consider the Treaty of Peace. In article I of that treaty, King George III, on behalf of Great Britain, recognized the independence of the United States.³⁹⁷ Suppose that the American commissioners had proposed, for article II, that the United States recognized the independence of Great Britain and George III as that country’s head of government. That would have been, well, laughable.

There is no evidence in the existing records that the founding generation foresaw a situation in which the United States would have to decide whether to recognize a new state or government. This would indeed occur, and fairly quickly, in the revolutionary overthrow of monarchical rule in France and the resulting cataclysm that engulfed Europe for a generation.³⁹⁸ These events would put the United States in the position of having to make decisions on recognition and diplomatic relations that, if done mistakenly, could have involved the country in war. But these events were not foreseen, certainly not as happening in the early stages of the Republic’s history. Unless we are to attribute clairvoyance to the founders, it is understandable that they would concentrate on the clear and pressing issues of creating a new government, as opposed to theoretical questions of power that could be expected to arise, if at all, in a distant future. It is quite possible that the recognition power was not discussed in the drafting and ratification of the Constitution because it was not then considered particularly relevant to the new Republic.

V. CONCLUSION—AND POSTSCRIPT

The Constitution, by its terms, does not give the President the power to recognize foreign states or governments. Such a power is

396. See HERRING, *supra* note 11, at 12–13; Prakash & Ramsey, *supra* note 4, at 312–13.

397. Definitive Treaty of Peace, *supra* note 218, at art. I, 8 Stat. at 80.

398. See BEMIS, A DIPLOMATIC HISTORY, *supra* note 11, at 94–95.

said to derive from four sources, but this paper refutes those claims. There is no recorded evidence that any of the participants in the drafting and ratifying of the Constitution—Federalists and Anti-Federalists alike—understood that any provision in the Constitution *vested* such a power in the presidency, and certainly not a power that is plenary in nature. On the other hand, one cannot conclude with confidence that the founders deliberately *denied* such a power to the President. If such an executive power does exist, either as plenary or subject to congressional override, its constitutional source must be found in post-ratification theory and practice.

A void was left in the Constitution, and it was addressed in the first instance by the Washington administration. The recognition of the revolutionary government of France and reception of its minister were part of a larger package of actions (also including the interpretation of the treaties with France, the issuance of the Neutrality Proclamation and Rules on Neutrality, and the control over diplomacy and diplomats) by which our first President exercised control over foreign policy in a crisis that threatened to draw the nation into European wars. How Washington asserted such executive authority and the source of constitutional power upon which he relied are the subjects of my next paper.