SEPARATION OF POWERS IN THE DOMAIN OF FOREIGN AFFAIRS: THE INTENT OF THE CONSTITUTION HISTORICALLY EXAMINED

Arthur Bestor

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INTRODUCTION

In 1765, the year of the Stamp Act and of the resulting flare-up of American resistance to British authority, William Blackstone, Vinerian Professor of Law at Oxford, published the first book of his magisterial *Commentaries on the Laws of England.* The four-volume work, completed in 1769, was to play a major role in transmitting to the nascent American republic both the legal principles and procedural details of the English common law. Blackstone's subject was not merely law in the narrow technical sense familiar to members of the Inns of Court—that is, the law that lawyers litigate and that courts adjudicate—but also an exposition of public law, that is, of the principles of the English constitution as they stood on the eve of the American Revolution.

The American attitude toward this aspect of Blackstone's treatise was necessarily ambivalent. On the one hand, the *Commentaries* eulogized those great principles of English liberty which the discontented American colonists felt themselves to be defending against a faithless king and a forgetful Parliament. On these matters Blackstone's authoritative and often eloquent statements commanded unhesitating respect in America, after independence as well as before. On the other hand, Blackstone likewise defended with learning and zeal those elements

* Ph.B., Ph.D., Yale University; M.A., Oxford University; LL.D., Lincoln University; Professor of History, University of Washington, Seattle. The author gratefully acknowledges financial assistance received from the Graduate School Research Fund (Agnes Anderson Fund) of the University of Washington in the preparation of this paper. Substantial portions of the present article will be incorporated in the author's forthcoming book, tentatively entitled *The Power of Determining on Peace and War: An Historical Study of the Original Intent of the American Constitution in the Light of the Preceding Century and a Half of English and Colonial History,* to be published by the Oxford University Press. Some of the material contained herein has been presented in public lectures at Linfield College, McMinnville, Oregon (The Kenneth Scott Latourette Lectures in History), April-May 1973, and at the University of Washington, July 1973; and in a paper read to a joint session of the American Historical Association and the American Section of the International Commission for the History of Parliamentary and Representative Institutions, in San Francisco on December 28, 1973.

in English constitutionalism that were goading the Americans into revolution and propelling them toward independence. As a consequence Blackstone's *Commentaries* are both a source book for American conceptions of law and a concise and illuminating guide to those constitutional principles and practices that Americans were bent on eliminating. To the historian, therefore, the *Commentaries* are peculiarly valuable for the focused light they throw on the divergences between the constitutional principles adopted by the Federal Convention of 1787 and those that underlay the late eighteenth-century English system with which the Americans were dissolving all political connection. Blackstone's book, in short, effectively pinpoints the elements of English constitutionalism that the framers of the American Constitution deliberately rejected.

I. American Departures from English Precedent

It was in the realm of foreign policy that the break was sharpest and clearest. The crucial contrast can be briefly stated. In Blackstone's *Commentaries* the entire range of powers relating to war and peace, to diplomacy and the making of treaties, and to military command is treated within the confines of a single chapter, "Of the King's Prerogative."[1] Though the corresponding chapter on Parliament describes the power of that body as "transcendent and absolute,"[2] Blackstone nowhere mentions a specific role that Parliament is expected to play in the determination of foreign policy, save the negative role of impeaching ministers of the Crown "for improper or inglorious conduct, in beginning, conducting, or concluding a national war,"[3] or for entering into treaties that "shall afterwards be judged to derogate from the honour and interest of the nation."[4]

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1 1 W. Blackstone, Commentaries *237 *et seq.*

2 *Id.* at 160.

3 *Id.* at 258.

4 *Id.* at 257.

By way of contrast, Blackstone listed an impressive set of powers unconnected with foreign affairs which were within the "transcendent and absolute" jurisdiction of Parliament:

> It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal . . . . It can regulate or new model the succession to the crown . . . . It can alter the established religion of the land . . . . It can change and create afresh even the constitution of the kingdom and of parliaments themselves . . . .

Id. at 160-61.

In the American Constitution, by contrast, the vast aggregate of powers connected with foreign affairs is broken down into its constituent parts, and the fragments deliberately placed in separate hands. Thus the power to declare war and to raise armed forces is vested in Congress,[5] while actual military command is assigned to the President.[6] Treaties are to be made by the latter, but only by and with the advice and consent of the Senate.[7] Ambassadors *from* foreign countries may be received by the President without prior approval,[8] but no ambassador *to* a foreign country can be appointed by him except with the advice and consent of the Senate.[9] A system of checks and balances is thus prescribed as explicitly for the conduct of foreign relations as for the handling of domestic matters, even though the precise allocations of power are different in detail.

The intent of the framers of the American Constitution becomes even clearer when the specific provisions of the document they wrote are laid side by side with Blackstone's analysis of comparable elements in the English system. Before commencing such a comparison and contrast, however, it is desirable to clear up one matter of terminology that is potentially confusing to a modern reader. When discussing the prerogative of the King or the powers of the Crown, Blackstone never suggests or implies that these powers were still wielded personally by the monarch. He is careful to point out on more than one occasion that the powers exercised by authority of the Crown constitute simply the "executive part of government,"[10] and he treats the phrase "prerogative of the crown" as an exact synonym of "power of the executive magistrate."[11] Proof that Blackstone's concern is with the power of the executive branch rather than the personal power of the King is furnished, in unmistakable fashion, by a passage in which, after recounting the various measures that had curtailed royal power during the preceding century and a half,[12] he went on to say that during the same period other political developments had "thrown such a weight of

5 U.S. CONST. art. I, § 8, cls. 11-16.

6 *Id.* art. II, § 2, cl. 1.

7 *Id.* cl. 2.

8 *See id.* § 3.

9 *Id.* § 2, cl. 2.

10 1 W. BLACKSTONE, COMMENTARIES *250. *See id.* at 147, 190, 240. This is, of course, the accepted twentieth-century definition. "The term, the Crown, represents the sum total of governmental powers and is synonymous with the Executive." E. WADE & G. PHILLIPS, CONSTITUTIONAL LAW 171 (8th ed. E. Wade & A. Bradley 1970).

11 1 W. BLACKSTONE, COMMENTARIES *334.

12 *See id.*

power into the executive scale of government as we cannot think was intended by our patriot ancestors."[13]

Executive power signified to Blackstone, as it did to the American framers, those powers of decision and action that can be exercised by a chief executive, or in his name, simply by virtue of the authority granted directly to him by the constitution or the laws. Though the executive may ultimately be held responsible—by impeachment or by repudiation at the polls—for executive decisions made or executive actions carried out, executive powers themselves are almost by definition discretionary, and therefore capable of being exercised without the necessity of submitting a proposed course of action to prior legislative deliberation and approval.[14]

Once it is recognized that the nature of executive power—and therefore the boundary between executive and legislative power—is the subject of Blackstone's chapter "Of the King's Prerogative" just as truly as it is the subject of the second or executive article of the American Constitution, point-by-point comparisons become possible between Blackstone's exposition of the foreign-policy aspects of eighteenth-century English constitutionalism and the corresponding provisions of the written Constitution of the United States.

At the outset, Blackstone recognizes two different sources for the authority of the chief executive in the domain of foreign relations. *Vis-à-vis* other nations, the King "is the delegate or representative of his people."[15] Therefore, the handling of all aspects of the "nation's intercourse with foreign nations" is an executive prerogative.[16] The King is also "the generalissimo, or the first in military command, within the kingdom,"[17] and this fact places in executive hands the control of a variety of matters relating to military security. In similar fashion, the American Constitution designates the chief executive as the representative of the nation in its dealings with other nations and makes the President the commander in chief of the armed forces. The

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13 *Id.* at 335.

14 The point is stated succinctly in the following account of present-day English constitutional practice:

> For the exercise of a prerogative power the prior authority of Parliament is not required. . . . Parliament may criticise Ministers for the consequences which result from the exercise of prerogative; Parliament too may abolish or curtail the prerogative by statute; but in regard to the exercise of the prerogative Parliament has no right to be consulted in advance.

E. WADE & G. PHILLIPS, *supra* note 10, at 185 (footnote omitted).

15 1 W. BLACKSTONE, COMMENTARIES *252.

16 *See id.* at 261.

17 *Id.* at 262.

corollaries deduced from these two similar circumstances, however, are profoundly different in the two constitutional systems.

The divergence is apparent from the very beginning of Blackstone's detailed catalogue. Because the chief executive represents the nation in foreign affairs, he must possess, according to Blackstone, "the sole power of sending ambassadors to foreign states, and receiving ambassadors at home."[18] Only the second half of this power, however, is granted exclusively to the executive by the American Constitution. The President may receive foreign envoys on his own authority, but he cannot appoint American ambassadors to serve abroad except with senatorial approval.

Far more significant are the next three powers that Blackstone regards as exclusively executive in nature. One is the "prerogative to make treaties, leagues, and alliances with foreign states and princes."[19] The next is "the sole prerogative of making war and peace."[20] Then, as a corollary of the latter, comes the power "to issue letters of marque and reprisal" and thus to authorize "an incomplete state of hostilities."[21] In its turn, the American Constitution deals specifically with each of these powers, but assigns none of them to the executive exclusively. Treaties, though they are said to be "made" by the President, are to be made only "by and with the Advice and Consent of the Senate."[22] The power to declare war is specifically vested in Congress, not the President,[23] as is the power to "grant Letters of Marque and Reprisal."[24] All these matters, which Blackstone had classified as executive, are thus treated in the American Constitution as proper subjects for legislative deliberation and decision.

From among all the prerogative powers listed by Blackstone as belonging to the British Crown, only one, aside from the formality of receiving ambassadors, was singled out by the American framers as unquestionably and exclusively executive in character and therefore properly delegated to the President alone. This was the power of military command. Blackstone had described the King as "the generalissimo, or the first in military command, within the kingdom."[25]

18 *See id.* at 253.

19 *Id.* at 257.

20 *Id.*

21 *Id.* at 258. Also listed by Blackstone is "the prerogative of granting safe-conducts" and passports. *Id.* at 259-60. No one at the Federal Convention, however, considered the matter important enough for inclusion in the American Constitution.

22 U.S. CONST. art. II, § 2, cl. 2.

23 *Id.* art. I, § 8, cl. 11.

24 *Id.*

25 1 W. BLACKSTONE, COMMENTARIES *262.

The American framers, following Blackstone in this one particular, provided that

> [t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.[26]

But the King's power of command went far beyond the framework of the title of military commander. Blackstone had included within it not only the actual command "of all forces by sea and land, and of all forts and places of strength,"[27] but also many ancillary powers that the American framers decided to bestow elsewhere. Thus, Blackstone had said that the King, as "general of the kingdom," possessed "the sole power of raising and regulating fleets and armies," or "the prerogative of enlisting and of governing them."[28] By contrast, the American framers carefully limited the scope of this power. The Constitution specifically vests every one of the above-mentioned powers in Congress, not the President, employing the very same words that Blackstone had used.[29]

II. The Real Meaning of Separation of Powers

This deliberate fragmentation of the powers relating to peace and war, and the parcelling out of the component parts to different bodies and agencies of government, represented an application to the domain of foreign affairs of the same concept of separation of powers that the framers were applying as rigorously as possible to domestic govern-

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26 U.S. Const. art. II, § 2, cl. 1. The qualifying phrases are often overlooked by those who exalt presidential power. The President does not stand in the relation of commander in chief to any of the civil officers of the government even though they serve under him. A fortiori he is not the commander in chief of an ordinary citizen unless the latter is a member of the armed forces or is serving on active duty in the militia.

27 1 W. Blackstone, Commentaries *262.

28 *Id.*

29 The Constitution states in pertinent part:

> The Congress shall have Power . . .
>
> . . . .
>
> To raise and support Armies . . .
>
> To provide and maintain a Navy;
>
> To make Rules for the Government and Regulation of the land and naval Forces . . . .

U.S. Const. art. I, § 8, cls. 12-14. Moreover, the King was in command of the militia under all circumstances, whereas the American Constitution allowed the President to command the militia only "when called into the actual Service of the United States." *Id.* art. II, § 2, cl. 1. The Constitution also placed in the hands of Congress the power "[t]o provide for calling forth the Militia"—that is, to prescribe by law the circumstances that would warrant a call-up. *Id.* art. I, § 8, cl. 15.

ment. The purpose and effect of any such arrangement is to require the joint participation—the co-operation and concurrence—of the several branches in the making and carrying out of any genuinely critical decision. If the power to raise and finance armies is vested in Congress (with a veto power in the President), and the power to declare war is in the same hands, but if actual military command belongs exclusively to the President, then the power to make war is necessarily a shared power. Like those ancient treasure chests with two locks, only the joint action of the holders of the two keys can open the lid.

At this point the question is bound to be asked whether such mandatory collaboration is not the very antithesis of the idea of separation of powers. Many present-day commentators appear to think so. Separation of powers is assumed by them to mean that each branch of government must go it alone; that each is right in insisting that it must have exclusive control of what is done within the particular sphere it considers to be its own; and that each must jealously conceal from the other branches, on the ground of confidentiality, its own processes of decision. So deeply ingrained has this view become that it will hardly suffice simply to say that it is a complete misinterpretation of the doctrine of separation of powers. The point must be driven home by what will perhaps seem a digression.

From a certain point of view, it is true, the arrangement that Blackstone describes, whereby the executive is vested with complete control over foreign affairs and the legislature retains control of domestic policy-making, can be called a system of separation of powers. This, indeed, was the kind of separation that the Stuart monarchs insisted upon in the seventeenth century. The House of Commons in 1677 refused "to grant Supplies for Maintenance of Wars and Alliances, before they are signified in Parliament," and called upon the King "to enter into a League, offensive and defensive, with the States General of the United Provinces, against the Growth and Power of the *French* King" and "to declare such Alliances in Parliament."[30] King Charles II delivered an indignant reply, excoriating the legislative body for its unconstitutional encroachment on the executive prerogative vested in him:

> Gentlemen,
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> COULD I have been silent, I would rather have chosen to be so, than to call to mind Things so unfit for you to meddle with, as are contained in some Part of your Address; wherein you have entrenched upon so undoubted a Right of the Crown, that I am

[30] 9 H.C. JOUR. 425 (1677) (emphasis in original).

> confident it will appear in no Age (when the Sword was not drawn) that the Prerogative of making Peace and War hath been so dangerously invaded. . . . Should I suffer this fundamental Power of making Peace and War to be so far invaded (though but once) as to have the Manner and Circumstances of Leagues prescribed to me by Parliament, it is plain, that no Prince or State would any longer believe, that the Sovereignty of *England* rests in the Crown; nor could I think Myself to signify any more to foreign Princes, than the empty Sound of a King. Wherefore you may rest assured, That no Condition shall make me depart from, or lessen, so essential a Part of the Monarchy.[31]

This concept of separation of powers was one of the features of a monarchical constitution that the framers of the American Constitution plainly rejected. This divergence can be demonstrated by looking at the formulations of the idea of separation of powers written contemporaneously with the Constitution. The classic statements are in the group of papers that James Madison published in 1788 as Numbers 47, 48, and 51 of *The Federalist*. In an effort to establish the true meaning of the doctrine, Madison took pains to deny that it required the different branches to "be wholly unconnected with each other." He maintained the precise contrary, writing that

> unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.[32]

Instead of prohibiting, the doctrine of separation of powers *required* each branch to maintain a vigilant check upon the doings of the others and to act when necessary to halt encroachments and usurpations. Quoting Montesquieu, Madison insisted that that "oracle" (as he termed him) did not mean that the various departments or branches "ought to have no *partial agency* in, or no *control* over, the acts of each other,"[33] but rather that

> where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.[34]

The evil is "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few or many."

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31 *Id.* at 426 (emphasis in original).

32 THE FEDERALIST No. 48, at 308 (H. Lodge ed. 1888) (J. Madison) [hereinafter cited as THE FEDERALIST].

33 *Id.* No. 47, at 301-02 (J. Madison).

34 *Id.* at 302.

Such an accumulation, said Madison, "may justly be pronounced the very definition of tyranny."[35]

The meaning that he and the other framers attached to the principle of separation of powers was summed up in a constitutional amendment that Madison proposed on the 8th of June 1789 for inclusion in the Bill of Rights:

> [T]he Legislative Department shall never exercise the powers vested in the Executive or Judicial, nor the Executive exercise the powers vested in the Legislative or Judicial, nor the Judicial exercise the powers vested in the Legislative or Executive Departments.[36]

In the Massachusetts constitution of 1780, where this formulation originated, the clause concluded with a memorable reminder of its purpose: "To the end it may be a government of laws and not of men."[37]

The issues of domestic government were obviously uppermost in the minds of most European political theorists who expounded the doctrine of separation of powers. To apply the concept in thoroughgoing fashion to the making of foreign policy was by no means a common idea. Even Montesquieu, who undertook to universalize the theory, cannot be said to have extended it clearly into the domain of foreign relations. Accordingly, the deliberate parcelling out to different hands of the various kinds of power required for the making of war and peace can be considered an essentially American concept, like judicial review. Sensing the danger that could result were any branch of government allowed to accumulate all the powers relating to war and peace, the American framers proposed to prevent it by the same means they were using to prevent a possible monopoly of domestic powers.

III. Separation of Powers Applied to the Handling of Foreign Affairs

In particular, the American framers recognized, as few of their predecessors had done, that the conduct of foreign relations includes

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35 *Id.* at 300.

36 1 Annals of Cong. 435-36 (1789) [1789-1791]. The provision was included in the Bill of Rights as passed by the House on August 24, 1789, but was eliminated when the Senate reduced the number of amendments from 17 to 12. *See* E. Dumbauld, The Bill of Rights and What it Means Today 46-47, 209, 212, 216, 219 (1957).

37 Massachusetts, Colony to Commonwealth: Documents on the Formation of Its Constitution 131, 1775-1780, at (R. Taylor ed. 1961) (Part 1, Article 30).

elements that are essentially legislative in nature, others that are clearly executive, and still others that are primarily judicial. Madison remarked in *The Federalist* that "treaties with foreign sovereigns" take on, once they are made, "the force of legislative acts."[38] In the Constitution itself, the power to declare war was unhesitatingly assigned to the legislative branch, and the power of military command to the executive. The enforcement of treaties, so far at least as their domestic consequences are concerned, was made a judicial responsibility.[39] Foreign affairs, in brief, were brought by the framers under the dominion of all the accepted maxims relating to separation of powers and to checks and balances.

The meaning of these arrangements is obvious. As applied to foreign affairs, separation of powers signified above all that the President should not usurp the congressional power to declare war, that Congress should not usurp the power of the commander in chief by attempting to direct military operations, that the President should not negotiate foreign agreements without first seeking the advice of the Senate or attempt to make them binding without its consent, and that no person should officially represent the nation abroad except after concurrent action on the appointment by President and Senate.

The corollary of the principle of separation of powers is that no program of action of crucial importance can be decided upon and carried through except by the concurrence of the several branches to which the different types of power have been entrusted. This is axiomatic where domestic laws are concerned: the legislature must enact them; the executive must administer or execute them; and the courts must adjudicate the cases that arise under them. Though the parallelism can never be exact, the implication for foreign affairs of the doctrine of separation of powers is essentially the same—the making and carrying out of foreign policy is not the prerogative of any one branch of government. To make war requires a definite decision by Congress to engage in hostilities, a body of legislation providing men and money, an exercise of military command by the President, and an enforcement by the courts of whatever compulsive statutes are necessary and proper. To negotiate a treaty calls for previous advice on policy from the Senate, nomination of envoys by the President and their approval by the Senate, communication with foreign nations through the machinery of the executive branch, submission of the completed treaty to the Senate for its approval, exchange of ratifications by the President as repre-

38 THE FEDERALIST No. 47, at 301 (J. Madison).

39 U.S. CONST. art. I, § 8, cl. 11; *id.* art. II, § 2, cl. 1; *id.* art. VI, cl. 2.

sentative of the nation, enactment by Congress of any measures that the treaty may have made necessary, and enforcement by the courts of such provisions of the treaty as have domestic implications.

The ancient argument nevertheless persists that ultimate powers of decision in foreign affairs must be placed in the hands of one man (a "monarch," in the literal sense of that classic Greek term of political analysis), unhampered by any requirement that basic policy be worked out in consultation with a body representative of the nation as a whole. In every period essentially the same reasons have been given. A consensus between governors and governed is alleged to be impossible because the issues are too complex for the people's representatives to understand, or because secrecy is so imperative that only the executive can be allowed to know what is happening, or because events are too fast-moving for the executive to wait for broadly-based advice before acting.

The Founding Fathers were fully aware of these traditional arguments, but they nevertheless opted for a system founded on what the Declaration of Independence called "the consent of the governed"—a phrase that is, after all, virtually synonymous with "consensus." The corresponding language of the Constitution is "advice and consent." That pair of words—for one must remember that there are two and they connote different things—come close to stating in a nutshell the central intent of the framers of the American Constitution with respect to the conduct of foreign affairs.

The phrase itself—"by and with the Advice and Consent of the Senate"—is applied by the Constitution to only two activities connected with foreign relations, namely the making of treaties and the appointment of ambassadors.[40] The phrase, as such, does not appear in the clauses concerned with declaring war and raising troops; the reason, however, is quite simple. These powers are vested by the Constitution in the legislature, and the legislative process of deliberation and decision is nothing else than a procedure for giving authoritative political advice and consent in the most direct and the most binding fashion possible. By treating a declaration of war as a legislative act, the American Constitution is requiring Congress and the President to reach a consensus before committing the nation to war, just as it requires the Senate and the President to reach a consensus before committing the nation to any international agreement. Moreover, by choosing the phrase "advice and consent" to describe the Senate's role in treaty-making and in the appointment of ambassadors, the framers

40 *Id.* art. II, § 2, cl. 2.

indicated their intention that the determination of foreign policy in peacetime should be a deliberative process, with participation by the Senate at every stage.

IV. The Distinction Between "Advice" and "Consent"

The phrase "advice and consent" contains two distinctively different words, which denote two quite different things—different in nature and different in timing. If language is used rationally, "advice" means counsel offered *before* a decision is reached; "consent" means acceptance of a proposed course of action *after* plans have been worked out in detail and are ready to be carried out. Accordingly, the self-evident meaning of the treaty clause is that the Senate is to reach through discussion a consensus as to the policy to be embodied in a projected treaty; that the President, acting through the nation's diplomatic agents, is to take charge of negotiations designed to realize that policy; and that when an international agreement is negotiated (with concessions necessarily given and received), the Senate is to decide whether its final terms are acceptable.

In actual practice, the Senate's constitutional right and duty to proffer advice on the terms of treaties about to be negotiated has been allowed to dwindle away, until today it is no more than the power to advise the President to ratify or not to ratify a treaty that he has already negotiated at his own discretion. The Senate has accepted this role for itself by adopting the practice of conveying both its advice and its consent in a single resolution, passed at a single time, *after* negotiations have been completed. The following is the formula employed: "*Resolved (two-thirds of the Senators present concurring therein)*, That the Senate advise and consent to the ratification of" the treaty in question.[41] Thus the Senate no longer purports to give advice about

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41 *E.g.*, 87 Jour. Exec. Proceedings of the Senate, 79th Cong., 1st Sess. 505-06 (1945) (resolution of ratification of the Charter of the United Nations). Even when the Senate demands changes in a treaty it does not invoke its constitutional right to give "advice" to the President on the making of treaties, but instead attaches reservations to its resolution giving advice and consent to the ratification of the treaty already drawn up. For example, the Senate gave its approval to the Jay Treaty of 1794 "on condition that" an article be added, and consented to an 1800 treaty with France "provided" one article be expunged and another substituted. 2 U.S. Dep't of State, Pub. No. 175, Treaties and Other International Acts of the United States of America 271, 482 (H. Miller ed. 1931). The Senate's practice of giving advice and consent to the *ratification*, instead of to the *making*, of a treaty can perhaps be traced to the historical accident that the first treaty submitted to it (aside from Indian treaties) was one that had already been negotiated before the Senate

the *making* of a treaty, though "make" is the word in the Constitution, but only about its ratification. This is hardly the sort of continuous, informed, full-bodied advice on foreign policy that the Constitution makes the Senate responsible for giving.

By adopting the clause that gives the President "Power, by and with the Advice and Consent of the Senate, to make Treaties," the framers of the Constitution were not assigning to the Senate the mere function of rubber-stamping such agreements as the President might decide to make in furtherance of his own conceptions of policy. The past history of the phrase "advice and consent" clearly shows that it connoted the very opposite of this to Americans of the constitution-making generation. For a full century, the phrase in question had been a recognized synonym for parliamentary debate and decision and for the comparable procedures of other high governmental bodies charged with reaching, through deliberation and consultation with executive officials, a consensus on policies and courses of action.

V. "ADVICE AND CONSENT" AS A TRADITIONAL FORMULA OF ENGLISH CONSTITUTIONALISM

The twice-repeated formula "by and with the Advice and Consent of" was not invented in the Constitutional Convention of 1787. It was taken verbatim from the enacting clause that had appeared at the head of every English statute since the latter part of the seventeenth century:

> [B]e it enacted by the King's most Excellent Majesty, *by and with the Advice and Consent* of the Lords Spiritual and Temporal, and

came into existence. Precluded as it was from giving advice on the making of that particular treaty, the Senate could only fulfill its responsibility of giving advice by advising the President to ratify it. The Senate managed, in fact, to put the cart before the horse by first consenting to the treaty and then advising its ratification. The situation was this: In 1782 Congress sent instructions to Benjamin Franklin in Paris for the negotiation of a treaty with France for the establishment of consulates. The proposed treaty that resulted in 1784 was unacceptable to Congress, which felt that there were deviations from the plan contained in the instructions. Thomas Jefferson, who had succeeded Franklin, was instructed in 1786 and 1787 to re-negotiate the treaty, and the old Congress promised—with "candor and good faith"—that if the treaty were made to conform with the original plan, and if a time limit were included, then Congress would "immediately ratify it." The treaty was signed on November 14, 1788, after the new Constitution was ratified but before the new government was organized and put in operation. At the request of the Senate, John Jay gave his official opinion on July 25, 1789 that the treaty met the conditions laid down by the old Congress and that "the United States ought to ratify it." 1 JOUR. EXEC. PROCEEDINGS OF THE SENATE, 1st Cong., 1st Sess. 7-8 (1789). On July 29, accordingly, it was *"Resolved, unanimously*, That the Senate do consent to the said convention, and advise the President of the United States to ratify the same." *Id.* at 9.

> . . . the Commons, in this present Parliament assembled, and by the Authority of the same . . . .[42]

These are the opening words of a statute of 1685 in the reign of James II, the words by force of which the enactment became part of the law of the land. The same phrase to this day has been employed to give binding force to any and every statute that the British Parliament has seen fit to enact, whether a public law or simply a money bill.[43]

A glance at history will show the weight of meaning that the brief phrase carried at the time of the making of the American Constitution. Until the latter part of the seventeenth century, it is true, various phrasings had been employed, as generally happens before formulas become fixed. Thus the Treason Act of 1534 was

> enacted by the Assent and Consent of our Sovereign Lord the King, and the Lords Spiritual and Temporal, and the Commons in this present Parliament assembled. . . .[44]

Numerous variants could be quoted, but the sense was the same until, in the 1640's, the Long Parliament began to enact ordinances without the King's approval. In those years, the enacting clauses took such forms as the following: "[I]t is Ordained by the Lords and Commons now in Parliament assembled that . . . ."[45] During the Protectorate of Oliver Cromwell, after both the execution of Charles I and the expulsion of the Rump Parliament, the formula became: "Be it Ordained by His Highness the Lord Protector, by and with the advice of his Council . . . ."[46]

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42 An Act against the Importation of Gunpowder, Arms, and other Ammunition, and Utensils of War, 1 Jac. 2, c. 8 (1685) (emphasis added).

43 A money bill begins with a recital that it is "the Commons of England in Parliament assembled" who "freely and unanimously . . . give and grant" to the King or Queen "the several Rates, Duties, Impositions and Charges herein after mentioned," but it then continues with the enacting clause in regular form. *E.g.*, An Act for the better Support of her Majesty's Houshold, and of the Honour and Dignity of the Crown, 1 Anne, stat. 1, c. 7 (1701/1702). To a public law the royal assent is given (in Norman or law French) by the words "Le Roy le veult;" to a money bill by the words "Le Roy remercie ses bons Sujets, accepte leur Benevolence, et ainsi le veult;" to a private bill (which is in form a petition that has been approved by Parliament) by the words "Soit fait comme il est desiré." *E.g.*, 27 H.L. JOUR. 460-62 (1750).

44 An Act whereby Offences be made High Treason, and taking away all Sanctuaries for all manner of High Treasons, 26 Hen. 8, c. 13 (1534).

45 *E.g.*, An Ordinance of the Lords and Commons in Parliament, for the Safety and Defence of the Kingdom of England, and Dominion of Wales (1641/1642), in 1 ACTS AND ORDINANCES OF THE INTERREGNUM, 1642-1660, at 1 (C. Firth & R. Rait eds. 1911) [hereinafter cited as ACTS AND ORDINANCES]. For variations of this clause, see *id.* at 202, 348, 1261; 2 *id.* at 18.

46 *E.g.*, An Ordinance for the better ordering and disposing of the Estates under Sequestration (1653/1654), in 2 ACTS AND ORDINANCES 839.

When, in 1660, the English constitution was restored to its ancient monarchical form, it became a matter of high constitutional importance to permanently adopt a formula that would recognize both the principle that laws could be made only in the King's name and with his approval (thus repudiating the ordinances of the interregnum), and also the principle that laws could not be made except when formulated, debated, amended, and finally adopted by both houses of Parliament (thus repudiating the attempt of Charles I at personal rule). The enacting formula that resulted and that has ever since remained unchanged thus summed up in capsule form both parts of this fundamental principle of English constitutionalism, a principle of consensus. The phrase "by and with the Advice and Consent of [the two houses of Parliament]" was shorthand for the legislative process itself and all its constitutional implications.

Like most formulas resulting from historical give-and-take, this one did not say exactly what it meant and what everyone understood it to mean. The "advice" that Parliament gave was no mere recommendation; it amounted in fact to a mandate. Furthermore, it was the King, rather than the Lords and Commons, who was cast in the role of giving consent (though in his case it was called "assent")—a formal approval which, by the end of the first decade of the eighteenth century, he had lost the power to withhold.[47] No one acquainted with eighteenth-century English constitutional language and usage could possibly have mistaken the phrase "by and with the advice and consent of . . . ." as signifying no more than a formal, last-stage ratification by the legislature of decisions reached and measures perfected wholly within the executive branch. "Advice and consent" was the formula already in use for more than a century at the time of the American Revolution to signify the active, deliberative, decision-making role that Parliament played in dealing with the great issues of domestic governmental policy.

"Advice and consent" was also the constitutional formula applied to mandatory forms of consultation involving bodies other than Parliament—notably the Privy Council. In this context, as in the parliamentary one, the phrase signified genuine deliberation, not rubber-stamp approval, and it imposed on participants some responsibility for the final decision. This essential identity of meaning was strikingly illustrated in a resolution adopted by the Long Parliament at the beginning of June 1642. In the second of Nineteen Propositions presented

[47] The royal veto was last exercised by Queen Anne in 1707. 1 W. ANSON, THE LAW AND CUSTOM OF THE CONSTITUTION 301 (3d ed. 1897). The form had been "le roy s'avisera."

by Parliament to King Charles I just before the conflict between them broke out into overt civil war, the demand was made:

> That the great affairs of the kingdom may not be concluded or transacted by the advice of private men, or by any unknown or unsworn councillors, but that such matters as concern the public, and are proper for the High Court of Parliament, which is your Majesty's great and supreme council, may be debated, resolved and transacted only in Parliament, and not elsewhere . . . and such other matters of state as are proper for your Majesty's Privy Council shall be debated and concluded by such of the nobility and others as shall from time to time be chosen for that place, by approbation of both Houses of Parliament: and that no public act concerning the affairs of the kingdom, which are proper for your Privy Council, may be esteemed of any validity, as proceeding from the royal authority, unless it be done by the advice and consent of the major part of your Council, attested under their hands . . . .[48]

Compressed into this paragraph are many concepts of vital significance for later British and American constitutional history. Certain of the distinctions made, as well as certain of the definitions implied, will call for comment later, but one point at least should be examined here. As the first quoted clause makes clear, the word "advice" had acquired, before the middle of the seventeenth century, a technical constitutional significance far removed from its everyday sense of an "[o]pinion from one not immediately concerned as to what could or should be done about a problem."[49] When employed in a constitutional context, the term "advice" had come to signify a formal recommendation for action, made to the sovereign by someone of recognized authority, acting in his official capacity and assuming political responsibility for what he might advise. In the seventeenth century, of course, the monarch was still free (as today the occupant of the throne is not) to reject the advice thus tendered. Nevertheless, the consequences of doing so had to be carefully weighed. For both parties, therefore, the giving or receiving of advice involved constitutional responsibilities and liabilities that were not to be taken lightly. Furthermore, the effect of stipulating "consent" as well as "advice" is to reinforce the requirement of genuine consultation, for if the advice at the beginning is disregarded without good reason, the consent at the end is not likely to be forthcoming.

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48 THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION 1625-1660, at 250-51 (3d ed. rev. S. Gardiner 1906) [hereinafter cited as CONSTITUTIONAL DOCUMENTS].

49 THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 19 (1971).

To digress for a moment, one should note that the word "opinion" has retained a far looser meaning. In a political context (though not in a judicial one) an "opinion" generally signifies little more than a suggestion or a tentative judgment or a point of view offered as a basis for discussion. An "opinion" so conceived commits neither the speaker nor the hearer in any final or irrevocable way, but obtains only such weight as the person in authority may choose to give it. This distinction of meaning between "advice" and "opinion" is reflected (though often overlooked) in the American Constitution, the phrasing of which is notable for precision. That document requires the President to obtain the "advice" as well as the consent of the Senate on treaties and appointments, but it gives him the discretion to demand the "opinion" of the head of any executive department.[50] Such an opinion once given may be accepted or rejected as the President wishes, for he is under no necessity of obtaining the consent of any of his subordinates to the course of action he decides to pursue. Quite different is the constitutional "advice" that the President is required to obtain from the Senate. When coupled as it is with "consent," the word "advice" acquires a mandatory force that is unmistakable.

The framers of the American Constitution did not have to look across the Atlantic for examples of this well-understood usage of the phrase "advice and consent." Until late in the seventeenth century American colonial assemblies were allowed to paraphrase the English enacting formula in the laws they passed: "Be it enacted by the King's most Excellent Majesty by and with the consent of the general assembly."[51] Eventually the style was altered in such a way as to emphasize the subordinate position of colonial governments; enactment was simply "[b]y the governor, council, and assembly."[52] The phrase

[50] The President

> may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . . .

U.S. CONST. art. II, § 2, cl. 1. The President's consultation with his Cabinet (a body nowhere mentioned in the Constitution) represents, constitutionally speaking, a canvassing of its members' opinions in accordance with this clause, and is not a request for their advice in the sense in which that word is used in the treaty clause.

[51] *E.g.*, 1 ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS 1670-1776, at 126 (L. Labaree ed. 1935) (style of enacting laws in Virginia, 1679) [hereinafter cited as ROYAL INSTRUCTIONS]. The charter of Maryland of 1632 provided in Article VII that laws should be made "with the Advice, Assent, and Approbation of the Free-Men . . . or of their Delegates or Deputies." DOCUMENTARY SOURCE BOOK OF AMERICAN HISTORY 1606-1898, at 34 (W. MacDonald ed. 1909).

[52] This form "and no other" began to be prescribed as early as 1680 for Jamaica and 1682 for the mainland colonies, commencing with Virginia. 1 ROYAL INSTRUCTIONS 126-27.

"advice and consent" remained in use, however, for the purpose of defining the relationship of consultation and collaboration that the royal governor was required to maintain with the Council of the colony.

The nature of that intended relationship was spelled out in the instructions regularly issued by the English Privy Council to each new governor of a royal colony throughout the century preceding the American Revolution. Typically the governor was instructed

> to fit yourself with all convenient speed and to repair to our said province of ——. And being arrived there you are to take upon you the execution of the place and trust we have reposed in you, and forthwith to call together the members of our council for that province . . . .[53]

Some of the governor's instructions referred to duties that he could perform without consultation, but on most matters he had to be given a large measure of discretion. To guard against abuses of power, especially such arbitrary acts as an administrator from abroad might commit through ignorance of the interests, customs or convictions of the inhabitants, the Privy Council instructed the royal governor, firmly and clearly, to exercise the most crucial of his discretionary powers only "with the advice and consent of our said council."[54] Furthermore, to prevent concealment from the members of the Council of the powers entrusted to them, the governor was ordinarily instructed "forthwith to communicate unto our said council such and so many of our instructions wherein their advice and consent are mentioned to be requisite."[55]

Except in special situations, such as a threatened Indian attack,[56] the power to decide on war and peace remained in the hands of the imperial authorities in London. Therefore the advice and consent that the royal governor was required to obtain from the colonial Council related solely to internal affairs. The situation in England was somewhat parallel, for parliamentary advice and consent was likewise limited to domestic legislation, thanks to the possession by the Crown of a monopoly of the conduct of foreign relations.

It should now be clear how immensely significant was the particular use that was made of the phrase "advice and consent" in the Constitution of the United States. A requirement which under the English

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53 *Id.* at 14-15. On the appointment, function, and power of the provincial Council, see L. LABAREE, ROYAL GOVERNMENT IN AMERICA 134-71 (1930).

54 *See, e.g.*, 1 ROYAL INSTRUCTIONS 82, 88; 2 *id.* at 696.

55 1 ROYAL INSTRUCTIONS 45, 46.

56 *See id.* at 82.

constitution pertained only to internal affairs was extended by the American framers to the making of international agreements. Instead of recognizing an executive "prerogative to make treaties," they prescribed that treaties were to be made by the head of state (in conformity with traditional diplomatic protocol), but only "by and with the Advice and Consent of the Senate"—therein employing the traditional phrase that connoted legislative deliberation and decision and executive concurrence. At the same time that the American Constitution thus assimilated the process of treaty-making into the process of law-making, it also boldly converted a declaration of war from an executive into a legislative act, thereby automatically applying the requirement of congressional advice and consent to the matter in the most direct of all possible ways.

By thus subjecting to legislative deliberation and decision the great issues of war and peace, the framers of the United States Constitution were breaking sharply with English tradition. In so doing, however, the Americans were falling in line with a vigorous dissident strain in English constitutional thinking. For almost a century and a half, the phraseology of "advice and consent" had been employed to voice a recurrent demand in England itself that questions of war and peace be determined not by the will of the executive but by the deliberations of a representative assembly.

VI. Parliament's Demand for a Voice in Foreign Policy

Beginning early in the reign of James I, criticism of the Spanish-oriented foreign policy of the King became rife in Parliament. The Great Protestation of the 18th of December 1621, in which the Commons asserted their right to discuss foreign affairs, was torn from their journals by the King's own hand.[57] In the next reign relations between the King and Parliament reached the breaking-point in the 1640's, and in this context parliamentary demands for a voice in the making of foreign policy began to be formulated definitively in terms of "advice and consent."

When events finally forced Charles I to abandon his attempt to rule without Parliament, and obliged him to summon in 1640 the first meeting of that body since 1629, parliamentary leaders were determined to re-establish their constitutional right of full participation in the making of governmental decisions. The Short Parliament of April

[57] *See* The Stuart Constitution 1603-1688: Documents and Commentary 29-30, 43-48 (J. Kenyon ed. 1966).

and May 1640 was dissolved before it could act, but the Long Parliament, which convened on the 3rd of November 1640, moved rapidly and in dead earnest. It proceeded at once to impeach and then (after substituting a bill of attainder) to send to execution the Earl of Strafford, the King's principal minister, "for endeavouring to subvert the Ancient and Fundamental Laws and Government of His Majesty's Realms . . . and to introduce an Arbitrary and Tyrannical Government against Law."[58] There followed a rapid succession of acts designed to make secure the place of Parliament in the constitutional system. One enactment provided for the summoning of Parliament every three years, whether the King acted or not, and another prohibited the dissolution of the existing Parliament without its own consent.[59] Measures were also taken to reverse the decision in the *Ship-Money* case, in which the judges had upheld the King in imposing a tax without parliamentary grant.[60] Other acts of Parliament abolished the Courts of Star Chamber and High Commission,[61] which had for-

[58] THE TRYAL OF THOMAS EARL OF STRAFFORD 756 (8 J. RUSHWORTH, HISTORICAL COLLECTIONS (1721)) (Bill of Attainder) [the 1721 edition of the *Collections* is a reprinting of the original editions, published between 1659 and 1701]. The phrases quoted above from the act of attainder were a repetition of those contained in the first of the original articles of impeachment, voted by the Commons on November 24, 1640. *Id.* at 8. The trial commenced on March 22, 1641, but on April 9, 1641 the Commons decided that it would be "prejudicial to the Kingdom" to spend "any more [time] than has been spent." *Id.* at 44-45. The next day, therefore, a bill of attainder was introduced, by-passing the impeachment procedure. The bill passed the Commons on April 21 and the Lords on May 7; it received the royal assent on May 10; and Strafford was beheaded two days later. *Id.* at 45, 54, 60, 759-61. In 1662, after the Restoration, Strafford's attainder was reversed and the act provided that all records "be wholly Cancel'd, and taken off the File, or otherwise Defaced and Obliterated, to the intent the same may not be visible in After-Ages." An Act for the Reversing of the Earl of *Strafford* his Attainder, 13 & 14 Car. 2, c. 29 (1662). Eventually, by orders in 1693 and later, the House of Lords authorized a restoration of the record, with the result that the act of attainder is officially published in 5 Statutes of the Realm 177. *See* 3 Cob. St. Tr. 1381-82 n.* (1809).

[59] An Act for the preventing of inconveniences happening by the long intermission of Parliaments, 16 Car. 1, c. 1 (1640/1641), in CONSTITUTIONAL DOCUMENTS 144-55; An Act to prevent inconveniences which may happen by the untimely adjourning, proroguing, or dissolving this present Parliament, 17 Car. 1, c. 7 (1641), in CONSTITUTIONAL DOCUMENTS 158-59.

[60] An Act for the declaring unlawful and void the late proceedings touching Ship-money, and for the vacating of all records and process concerning the same, 17 Car. 1, c. 14 (1641), in CONSTITUTIONAL DOCUMENTS 189-92. Moreover certain of the judges had already been impeached for their role in the case. *See* 2 J. RUSHWORTH, HISTORICAL COLLECTIONS 606-14 (1721) [hereinafter cited as J. RUSHWORTH]; 4 *id.* at 318-46; 5 *id.* at 361 (articles of impeachment). The proceedings in the *Ship-Money* case of 1637, involving John Hampden's refusal to pay, are in 3 Cob. St. Tr. 825-1314.

[61] An Act for the Regulating the Privy Council and for taking away the Court commonly called the Star Chamber, 17 Car. 1, c. 10 (1641), in CONSTITUTIONAL DOCUMENTS 179-86; An Act for the repeal of a branch of a Statute primo Elizabethae, concerning Com-

feited their claim to respect as judicial bodies by becoming primarily agencies for the carrying out of royal policy.[62] With the Thirty Years War still raging on the Continent, England's possible role in the balance of power between the Catholic and Protestant nations could never be far from men's minds. For the moment, however, the reforms that the parliamentarians were demanding had little directly to do with the conduct of foreign relations. Even the gravest of all the challenges to the prerogative, Parliament's demand for control of the militia, resulted from the fear that the armed forces might be used to intimidate the Commons.[63] When compromise on this issue proved impossible, the conflict quickly escalated into full-fledged civil war. As a symbol that the break was complete, the King raised his standard at Nottingham on the 22nd of August 1642, and fighting began at Edgehill on the 23rd of October.[64]

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missioners for causes ecclesiastical, 17 Car. 1, c. 11 (1641), in CONSTITUTIONAL DOCUMENTS 186-89.

62 Especially memorable are the scathing comments of Edward Hyde, later Earl of Clarendon, who observed matters at first hand. *See* 1 EARL OF CLARENDON, THE HISTORY OF THE REBELLION AND CIVIL WARS IN ENGLAND, BEGUN IN THE YEAR 1641, at 68-69 (1707).

63 The Militia Ordinance, adopted by both Houses on March 5, 1642, essayed to put the militia of each county under the command of a lord lieutenant of Parliament's own choosing, to be employed under "directions from the Lords and Commons assembled in Parliament." An Ordinance of the Lords and Commons in Parliament, for the safety and defence of the kingdom of England and dominion of Wales, in CONSTITUTIONAL DOCUMENTS 245-47 (footnote omitted). The preamble referred, by way of justification, to a recent "dangerous and desperate design upon the House of Commons"—an allusion to the incursion of the King with armed supporters into the House of Commons on January 4, 1642, in an attempt to arrest five of the members. *See generally* C. WEDGWOOD, THE KING'S WAR 1641-1647, at 55-60 (1959).

64 On May 27, 1642, the King by proclamation forbade his subjects to obey the Militia Ordinance, warning them that they would be called "to a strict account . . . as violators of the laws and disturbers of the peace of this kingdom." A Proclamation, forbidding all His Majesty's subjects belonging to the trained bands or militia of this kingdom to rise, march, muster or exercise, by virtue of any Order or Ordinance of one or both Houses of Parliament, without consent or warrant from His Majesty, upon pain of punishment according to the laws, in CONSTITUTIONAL DOCUMENTS 249. Parliament reiterated its demand for control of the armed forces in the 9th, 15th, and 16th of the Nineteen Propositions of June 1, 1642. *Id.* at 252, 253. And on June 6, in a declaration defending the Militia Ordinance, Parliament asserted its constitutional authority to take whatever measures might be necessary to "preserve the public peace and safety of the kingdom" even though the King, "seduced by evil counsel, do in his own person oppose or interrupt the same." A Declaration of the Lords and Commons in Parliament concerning His Majesty's Proclamation, the 27th of May, 1642, in *id.* at 256-57. A month later, on July 12, 1642, Parliament voted to raise an army of its own. 4 J. RUSHWORTH, *supra* note 60, at 755. The signal for actual war was the King's raising of his standard at Nottingham on August 22, 1642—the first major battle was fought at Edgehill on the 23rd of October. *See generally* C. WEDGWOOD, *supra* note 63, at 108-45. Though the ultimate causes of the English civil wars were varied and deep-seated, the precipitant of actual hostilities was the conflict over command

Just before the final breakdown, Parliament embodied its constitutional views in the Nineteen Propositions of the 1st of June 1642, especially in the second of these, already quoted.[65] The guiding principle, in brief, was that every exercise of the royal prerogative should be performed only with the advice and consent of some clearly designated and responsible body. Matters traditionally regarded as legislative—taxes and domestic laws generally—would be dealt with in Parliament. Other powers—in other words, those traditionally assigned to the prerogative—would be exercised only with the advice and consent of the Privy Council, appointment to which would be subject to parliamentary approval. Privy councillors, moreover, would be bound by oath to maintain the Petition of Right and other fundamental statutes,[66] and their consent to every executive act would be a matter of record, attested by the signatures of those who made up the approving majority. In two other of the Nineteen Propositions, Parliament itself gave specific advice on matters of foreign policy,[67] but in general, the constitutional scheme set forth in the second proposition paid ostensible respect to the traditional view that "matters of state"—therefore foreign policy—belonged to the prerogative and were to be debated and decided in the Privy Council rather than in Parliament.[68]

Only in the winter of 1644-45, after the first Civil War had been raging for two years, was an explicit demand put forth for parliamentary advice and consent to the making of foreign war and peace. By this time, the Scots had joined the parliamentary forces, and consequently the parleying with the King took place in the name of the representatives of both England and Scotland. Among the propositions presented by them to the King on the 24th of November 1644 and discussed at Uxbridge the following January was one that challenged in explicit and unmistakable terms the contention that the conduct of foreign affairs was a royal prerogative, that is, a power belonging exclusively to the executive. The Propositions of Uxbridge demanded:

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of the militia. The issue can be stated in terms of subsequent distributions of power under the American Constitution by observing that the King was insisting on a range of powers connected with the raising of armed forces which the American Constitution would vest clearly in Congress, while at the same time Parliament was insisting on a power of military command which the American Constitution would vest with equal definiteness in the President.

65 See text accompanying note 48 *supra.*

66 CONSTITUTIONAL DOCUMENTS 253 (Proposition 11).

67 *Id.* at 251-52, 253-54 (Proposition 5 concerned marriage of the King's children with foreign princes; Proposition 17 concerned alliances with Protestant rulers on the continent).

68 *See* text accompanying note 48 *supra.*

> That by Act of Parliament the concluding of peace or war with foreign Princes and States, be with advice and consent of both Parliaments, or in the intervals of Parliaments, by their Commissioners.[69]

No agreement with Charles proved possible, however, either at this time or after his defeat and surrender to the Scots in May 1646.[70] By the summer of 1647, negotiations had broken down so completely that blueprints for a totally reorganized English commonwealth began to be drawn up and discussed. Legislative advice and consent in matters of peace and war formed a common element of all the plans, conservative and radical alike. The "Heads of the Proposals," published on the 1st of August 1647 and embodying the conservative views of the higher officers of the army, proposed to create a Council of State which would control the military forces and would also be vested with "[p]ower as the King's Privy-Council, for and in all foreign Negotiations," but subject to the important proviso "that the making of War or Peace with any other Kingdom or State shall not be without the Advice and Consent of Parliament."[71] The more radical "Agreement of the People," published on the 28th of October and supported by the rank and file of the army and by democratic and republican elements generally, made no mention of either a privy council or an upper house, but prescribed instead an equalitarian redistribution of seats in Parliament, after which the authority of these "Representatives of [the] Nation" would "extend, without the consent or concurrence of any other person or persons," to all proper governmental functions, including "the making war and peace" and "the treating with foreign States."[72]

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69 CONSTITUTIONAL DOCUMENTS 284 (Proposition 23).

70 After the surrender of Charles I to the Scots on May 5, 1646, Parliament sent to the King on the 13th of July the so-called Propositions of Newcastle, which elaborated most of the earlier demands—particularly for control of the militia—but did not reiterate the article requiring parliamentary consent for the making of peace or war with foreign states. *See* 6 J. RUSHWORTH, *supra* note 60, at 309-17 (1722). See C. WEDGWOOD, *supra* note 63, at 565-75, for details concerning the drawing up of the terms, and of the King's subsequent intransigence.

71 The Heads of the Proposals agreed upon by . . . the Council of the Army, in 7 J. RUSHWORTH, *supra* note 60, at 733 (incorrectly numbered 233).

72 CONSTITUTIONAL DOCUMENTS 334. A revised and elaborated version of the "Agreement of the People," drawn up in January of 1649, just before the trial and execution of the King, did provide for a Council of State. Though less explicit on the power of making war and peace, the new Agreement certainly included that power in the grant to the Representatives of "the highest and final judgment, concerning all natural or civil things," though it did specifically deny to government any power "to impress or constrain any person to serve in foreign war." *Id.* at 368. This revised "Agreement of the People"

The "Agreement of the People" was, for the mid-seventeenth century, the climactic expression of faith in genuinely representative parliamentary deliberation and decision-making. Though the execution of the King in January 1649 and the conversion of England into a Commonwealth without King or House of Lords might have been expected to make legislative power supreme over executive, nothing of the sort actually happened. Power of decision in both foreign and domestic matters was concentrated in executive hands as fully under Cromwell as it had been under the Stuarts. Moreover, any contention that Parliament somehow spoke for the nation as a whole ceased to be credible, as blow after blow was struck against its independence. The undermining of confidence and power began with Pride's Purge, engineered by the army in December 1648, which reduced Parliament to a Rump. It continued with the dismissal of even this remnant by Cromwell in April 1653. And it culminated in the farce of the Nominated Parliament of that same year, which might claim to represent the "godly," but hardly anyone else.[73] The naming of Cromwell as Lord Protector in December 1653, under an Instrument of Government drawn up by the Council of Officers, translated the realities of the situation into explicit written form. The Protector's power to "dispose and order the militia and forces" was subject to the "consent of Parliament" (or of the Council when Parliament was not in session). The same advice was to be sought by the Protector in exercising his power to "direct in all things concerning the keeping and holding of a good correspondency with foreign kings, princes, and states." However, in the crucial matter of deciding on war and peace, Parliament was given no role. The Instrument of Government provided "[t]hat the Lord Protector . . . shall . . . with the consent of the major part of the council, have the power of war and peace." [74]

The first Parliament under the Protectorate attempted to amend the Instrument in the direction of full parliamentary participation in the making of foreign policy. Among the resolutions which it adopted were two crucial ones dealing with war and peace, both passed on the 6th of December 1654. One declared "That the Power of making War,

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was approved by the Council of the Officers on January 15, 1649, and thus represented in a sense a combination of and compromise between the two rivals of 1647. *Id.* at 359 n.1.

[73] Members of the Nominated Parliament (also nicknamed "Barebones Parliament") were handpicked by the Council of Officers from names recommended by a select group of religious congregations, and they were officially summoned by Cromwell as "Captain-General and Commander-in-Chief of all the armies and forces raised, and to be raised, within this Commonwealth." *See id.* at 405.

[74] *Id.* at 406.

is only in the Lord Protector and the Parliament"—*i.e.*, in the executive and the legislature jointly. The other provided that when Parliament was sitting,

> no Peace shall be concluded but by Consent of Parliament; and, in the Intervals of Parliament, the Power of making Peace shall be in the Lord Protector and the Council, with such Reservations and Limitations as the Parliament shall approve.[75]

When, however, Parliament proposed a further limitation on Cromwell's military authority by voting, on Saturday, the 20th of January 1655, that "the Militia of this Commonwealth ought not to be raised, formed, or made Use of, but by common Consent of the People assembled in Parliament,"[76] the exasperated Protector responded by dissolving Parliament the first thing on Monday following.[77] With the dissolution died the entire parliamentary bill for "Settling the Government."

The Restoration of Charles II in 1660 was as much a restoration of traditional parliamentary institutions as it was of traditional monarchical ones. This meant, of course, that it was also a restoration to the Crown of its traditional prerogative of making war and peace. Nevertheless, the old ideal remained alive among the small band of republican liberals who had opposed both Stuart and Cromwellian absolutism—the "Commonwealthmen," to use the label that Caroline Robbins has happily revived. In the early 1680's, for example, Henry Neville published a dialogue, *Plato Redivivus*, in which an "English Gentleman" (obviously the author himself) called for "an abatement of [the] royal prerogative," naming, first of all, "the absolute power of making war and peace, treaties and alliances"—a power often misused by rulers (Cromwell being specifically included) to make "confederations and wars, very contrary and destructive to the interest of England."[78] Such a tiny voice of dissent could hardly shake the confidence of Charles II in the constitutional view he proclaimed in 1677 when he denounced Parliament for having "dangerously invaded" his "fundamental Power of making Peace and War" by presumptuously recommending to him the foreign alliances he should make.[79]

So imperious a claim in behalf of the royal prerogative could

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[75] 7 H.C. JOUR. 396 (1654).

[76] *Id.* at 421 (1654/1655).

[77] *Id.*

[78] Neville, *Plato Redivivus*, in TWO ENGLISH REPUBLICAN TRACTS 184-85 (C. Robbins ed. 1969).

[79] *See* text accompanying note 31 *supra*.

not go long unchallenged, however, once the Glorious Revolution of 1688-1689 displaced the last of the Stuart kings and installed as joint sovereigns the prince and princess of Orange, William III and Mary, who occupied the throne not by divine right but simply and obviously by invitation of the Convention Parliament. The Declaration of Rights, which the new King and Queen were required to accept and which was also given statutory form as the Bill of Rights, settled in favor of Parliament one of the bitterly contested questions of the 1640's by providing "That the raising or keeping a Standing Army within the Kingdom in Time of Peace, unless it be with Consent of Parliament, is against Law."[80] The Bill of Rights, however, did not reach so high as to touch the royal prerogative of making war or peace with foreign nations. Indeed, by bringing to the throne the chief architect of a coalition against France—namely William III, the Dutch *stadholder*—the English Parliament was almost necessarily committing the nation to war with France. Not surprisingly, King William's War (as the English called it) began immediately in 1689 and lasted until 1697. Only in the aftermath of that war, with the European diplomatic situation growing ever tenser, was there a renewed challenge in England to the royal prerogative in foreign affairs.

What precipitated the discussion was the handling by the King and his advisers (Dutch as well as English) of the complex diplomatic problems connected with the succession to the throne of Spain, currently occupied by the childless Carlos II. Essentially the issue was whether the Spanish empire, with its vast American possessions, would suddenly be merged (by the accidents of inheritance) with the other Hapsburg empire centered in Austria; united with the French kingdom, which Louis XIV was building up to imperial dimensions; or (as the other powers obviously wished) placed under a ruler independent of both France and Austria.

On the outcome depended the balance of power in Europe, a matter of vital concern to England.[81] Employing the royal prerogative

80. An Act declaring the Rights and Liberties of the Subject, and settling the Succession of the Crown, 1 W. & M., sess. 2, c. 2 (1689). This enactment of December 16, 1689, customarily called the Bill of Rights, recited the provisions of the Declaration of Rights, drawn up by the two Houses and previously accepted by William and Mary on February 13, 1689, at which time they were proclaimed King and Queen of England. *See* 14 H.L. JOUR. 125-27 (1688/1689).

81 On international diplomacy in the closing years of the seventeenth and first years of the eighteenth century, see Clark, *From the Nine Years War to the War of the Spanish Succession*, in 6 THE NEW CAMBRIDGE MODERN HISTORY 381-409 (J. Bromley ed. 1970). On the impact of these developments on English politics, see G. CLARK, THE LATER STUARTS 1660-1714, at 188-99 (2d ed. 1956) (10 THE OXFORD HISTORY OF ENGLAND (G. Clark ed.)).

in its fullest traditional scope, William III and his ministers made England a party to two secret Partition Treaties, first in 1698 and again in 1700.[82] Not only was Parliament kept in the dark, but even the Privy Council was by-passed. Acting on the basis of a letter from the King, then on the Continent, Lord Chancellor Somers affixed the great seal to a crucial diplomatic commission made out in blank and forwarded it to William, without the knowledge, let alone the approval, of his fellow Privy Councillors.[83] The treaties failed, however, to prevent Louis XIV from seizing the advantage, and the War of the Spanish Succession resulted in 1701. Before hostilities commenced, the revelation of the secret treaties and of the manner in which they had been negotiated opened up once more to public consideration the extent of, and the justification for, the royal prerogative of war and peace. One consequence was the impeachment of Somers and three other Whig peers (who were not, however, brought to trial in the end).[84] A second outcome was the inclusion in the Act of Settlement

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82 The Second Partition Treaty is printed in 4 H.L. Mss. (n.s.) 252-58 (1700/1701).

83 The second of the articles of impeachment of Somers, voted on May 19, 1701, charged him with high crimes and misdemeanors for having affixed the great seal to a commission which conferred full power upon persons "whose names were to be afterwards inserted beyond the seas" (that is, by the King, who was in Holland), and of having done so "without communicating the same to the rest of the then lords justices of England, or advising in council with his majesty's privy council thereupon." 5 W. COBBETT, PARLIAMENTARY HISTORY OF ENGLAND 1269 (1809). In his answer of May 24, 1701, Somers quoted a letter from the King commanding him "to send full powers to him, under the great seal of England, with blanks for the names of commissioners," and urging him to take care that the job

> be done secretly; that none but the lord Sommers [*sic*] and Mr. Secretary [James] Vernon, and those to whom the said lord Sommers and Mr. Secretary should communicate it, might have knowledge thereof; and that the clerks who were to write the full powers might not know what they were.

Id. at 1278-79. *See* G. CLARK, *supra* note 81, at 194-96. Whether such actions violated the constitution was debatable at the time, but at least one writer in 1701 stated what would later be accepted as the duty of a minister when faced with an unconstitutional command of the King:

> "[I]n setting the seal to foreign alliances the Chancellor has a safe rule to follow; that is, humbly to inform His Majesty that he cannot legally set the great seal to a matter of that consequence unless the same be first debated and resolved in Council."

A. FITZROY, THE HISTORY OF THE PRIVY COUNCIL 205-06 (1928).

84 Because of a quarrel between the two Houses over procedure, the Commons failed to appear to press the charges, whereupon the Lords acquitted the four peers who had been impeached, namely Lord Somers and the Earls of Portland, Orford, and Halifax. *See* G. CLARK, *supra* note 81, at 194-95; T. TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY 600 (10th ed. rev. T. Plucknett 1946). Despite the acquittals, these impeachments played an important role in defining for the future the individual and the collective responsibility of ministers. See, for example, Castlereagh's classic statement on responsibility

of 1701 (which prescribed the future succession of the Crown) of certain new limitations on royal power.[85]

VII. Criticisms of the Royal Prerogative of War and Peace

The situation produced still a third result, namely a philosophic re-examination of constitutional doctrines regarding the conduct of foreign affairs. In 1701, Charles Davenant, best known as an economist, published a 400-page volume with the long, self-explanatory title, *Essays upon I. The Ballance of Power. II. The Right of making War, Peace, and Alliances. III. Universal Monarchy.*[86] His announced purpose was

> to inquire how far, and in what manner the Right of making War and Peace, Alliances and Treaties is by the Constitution of this Kingdom vested in the Executive Power?[87]

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made in Parliament in 1806, reprinted in The Eighteenth-Century Constitution 1688-1815: Documents and Commentary 123-25 (E. Williams ed. 1960).

[85] The Act of Settlement of 1701 provided that if the Crown should go "to any Person, not being a Native of this Kingdom of *England*," the nation would not be obligated to defend his non-English territories "without the Consent of Parliament." It also barred foreigners from the Privy Council and from Parliament. An Act for the further Limitation of the Crown, and better securing the Rights and Liberties of the Subject, 12 & 13 Will. 3, c. 2 (1700/1701). Furthermore, in a provision repealed shortly after, the Act prescribed that matters

> which are properly cognizable in the Privy Council . . . shall be transacted there, and all Resolutions taken thereupon shall be signed by such of the Privy Council as shall advise and consent to the same.

Id. This was, of course, a reiteration of the principle whose recognition was demanded in the Nineteen Propositions of 1642. *See* text accompanying note 48 *supra*. Not quite to the point is Maitland's witty comment that "it seems to say no more than that things which by law ought to come before the council ought to come before the council." F. Maitland, The Constitutional History of England 390 (1908). The purpose was not to differentiate between matters to be decided by Parliament and those to be decided in the Privy Council, but to make sure that every act of government should be authorized by some known and responsible deliberative body. From this point of view the provision announced a fundamental principle of the English constitution. The defects of the provision were two: it made the mistake of treating the Privy Council, rather than the new and still-suspect Cabinet, as the executive organ of government; and it stood in the way of imposing collective responsibility upon all ministers for Cabinet decisions. By requiring only those members of the Council who approved a measure to sign, it freed the minority members from responsibility. The result, as one constitutional historian has put it, would have been that "their differences of opinion would have come continually before Parliament, and the doctrine of collective responsibility would never have developed." M. Thomson, A Constitutional History of England, 1642 to 1801, at 217 (1938).

[86] [Hereinafter cited as C. Davenant]. Although the book was published anonymously in 1701, the authorship is not in doubt.

[87] C. Davenant 131 (1701). It should be noted that Davenant usually spoke not of

The inquiry was an historical one, and Davenant did not confine his attention to the diplomacy of the current reign or even of the whole century just ended, but searched the records as far back as the Norman Conquest of 1066. His emphatic conclusion was that "from the Time of *William* the *Norman* downwards," the proper constitutional practice ("observ'd by all our Ancestors") had been

> not to make Declarations of War, Conclusions of Peace, Truces, Leagues, Alliances, nor indeed to Transact any important Matter, especially with the Realm of *France*, without Advice of Parliament. And this has been so much the constant practice of all former Ages, Two or Three Reigns excepted, that it seems to have been one of the Fundamental Constitutions of this Kingdom.[88]

Like most constitutional arguments of the seventeenth century, Davenant's had an antiquarian flavor, for he was appealing to the ancient constitution against what he considered recent usurpations of power. From the period prior to 1485 he cited numerous instances, beginning with William I and ending with Henry VII, in which English monarchs sought the advice and consent of parliaments or great councils on questions of foreign policy.[89] His highest praise was for Henry V, "that Heroick King" (victor at Agincourt in 1415), who

> thought it no diminution to his Glory, or lessening of his Prerogative, to Advise with and be Advis'd by his Parliament in Matters of Peace, War, and Foreign Alliances . . . .[90]

Davenant's precedents dwindled away, however, with the acquisition of power by the Tudors in 1485. Davenant did not hesitate to describe the reign of Henry VIII as "the most Arbitrary and Tyrannical that *England* ever saw,"[91] and he admitted that Elizabeth I exercised "Arbitrary Power" in foreign affairs, though he excused her on the patriotic and chivalrous ground "that it could never enter into her

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the power of the King, but of the "Executive Power," as did Blackstone half a century later. See text accompanying notes 11-13 *supra*. Davenant also carefully distinguished between the "Authority" which the Prince derives from the laws (and which is therefore "circumscrib'd by Laws"), and his "Prerogative" which is "intrusted with him to Act where the Laws are silent, and sometimes to Act even against the Written Letter of the Law," but which is justified only "by the Necessity" and can only be exercised "upon a great Emergency." C. DAVENANT 204-05. Davenant concludes this passagge with a warning:

> But if this Prerogative were extended to every common Case, or if it were allow'd to Act without the Peoples Consent where their Consent may be had, there would be an end of Liberty.

Id. at 206.

88 C. DAVENANT 92-93 (emphasis in original).

89 *See id.* at 136-93, Appendix.

90 *Id.* at 180.

91 *Id.* at 193 (emphasis in original).

Thoughts to make any Step that should hurt *England*."[92] For the Stuart kings, however, Davenant could find no mitigating circumstances, and his chronicle of their four reigns was one long indictment of absolutism wedded to folly.

Despite appearances, however, Davenant was not really seeking to turn back the clock. As an economist, strongly influenced by the economic determinism of James Harrington's *Oceana* (which he quoted),[93] Davenant argued that the constitutional distribution of political power must reflect the "Ballance of Property." This had now tipped toward the Commons, thereby entitling them to a

> [r]ight to interpose with their Councils, since at their Expence chiefly, Peace was to be preserv'd, Alliances were to be maintain'd, and Wars were to be supported.[94]

Basically, then, Davenant's purpose was to determine, for a modern and not a mediaeval state, the nature of executive power and the way in which it could be made both responsive and responsible to the political representatives of the community as a whole. He described the role of the executive in purely practical terms, devoid of mystical trappings:

> [D]eclaring War, concluding Peace, and Signing or Ratifying Alliances, are Acts requiring the Personal performance of some one or more, and consequently must be vested in the Executive Power . . . .[95]

He pointed out, however, that many other powers—such as those required for "the Protection of Trade" and for "the Administration of the Publick Revenues"—are likewise vested in the executive, and for the same reasons; yet no one has ever questioned the legislative authority "to enquire into, and correct the Errors and Abuses committed by those upon whom the Prince has devolv'd any part of the Executive Power."[96] Accordingly,

> if Ministers of State advise an unnecessary War, a dishonourable Peace, or a dangerous Alliance, they are as much accomptable to

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92 *Id.* at 198 (emphasis in original).

93 *Id.* at 228-29, 232-33.

94 *Id.* at 234-35. These pages refer to the second essay upon "The Right of making War, Peace, and Alliances." There are gaps and overlaps in the pagination of the book—thus, while the aforementioned essay ends at page 237, the third essay upon "Universal Monarchy" begins at page 233.

95 *Id.* at 220.

96 *Id.* at 207, 208.

> Parliament, as for any other Neglect or Crime in the Administration of Affairs.[97]

Furthermore,

> it follows by an inevitable Chain of Consequences, That both Houses have a Right to be consulted in the Beginning concerning those Important Affairs upon which in the Conclusion they must determine.[98]

Davenant was, of course, urging two different, though not necessarily incompatible, procedures. On the one hand, he was insisting that ministers who exercised executive power should be held personally responsible for the decisions they made in the area of foreign affairs. On the other hand, he was insisting that the decisions themselves should be made not by ministers on their own responsibility, but through processes of deliberation in Parliament, to whom the burden of responsibility would be thereby largely transferred.

It was the first alternative—namely, ministerial accountability or responsibility to Parliament—that ultimately prevailed in English constitutional history, rather than the alternative of direct participation by Parliament in foreign-policy decisions. In Davenant's day, accountability tended to signify impeachment, and the proceedings of that sort against Lord Chancellor Somers and the three other Whig peers in 1701 exemplified this approach in the very year of Davenant's *Essays*. A dozen years later, at the end of the War of the Spanish Succession, it was the Tory ministers responsible for the Treaty of Utrecht who were impeached.[99] Half a century later, these precedents indicated to Blackstone—and especially to his Swiss-born contemporary J.L. De Lolme—that the impeachment of ministers was both the appropriate and the available method for dealing with lapses of judgment or

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[97] *Id.* at 208-09.

[98] *Id.* at 221-22.

[99] After the accession of George I in 1714, the Whigs came to power and in 1715 the Commons impeached the four leaders of the Tories for their part in the Treaty of Utrecht of 1713. Charges against one were dropped. Two others fled to the Continent and were declared traitors by acts of attainder. Robert Harley, Earl of Oxford, the leading minister in the Tory cabinet at the time of the Utrecht negotiations, was imprisoned for two years in the Tower, but was acquitted in 1717 by the Lords when the Commons failed to put in an appearance against him. B. WILLIAMS, THE WHIG SUPREMACY 1714-1760 (2d ed. rev. C. Stuart 1962) (11 THE OXFORD HISTORY OF ENGLAND (G. Clark ed.)). These acts, writes Williams,

> were the last of that series of purely political impeachments revived in the seventeenth century by parliament as the only weapon, apart from an act of attainder, then available against servants of the king.

Id. at 156.

dishonorable conduct on the part of ministers in the making of war or peace.[100]

In fact (as historical hindsight permits us to see) impeachment was already obsolescent in England, and a new custom of the constitution was establishing itself, subsequently fully realized in Victorian times. This is the rule that the entire cabinet must resign if a vote on a major measure (or on a motion of no confidence) reveals that it has ceased to command the support of a majority of the House of Commons. This kind of immediate and unremitting responsibility, coupled with the obligation of ministers to answer queries from members during the daily question period,[101] is the method relied on, in present-day English constitutional practice, to bring foreign policy under the ultimate control of public opinion, even without a requirement that treaties and declarations of war are to be made, as statutes are, by and with the advice and consent of Parliament.[102]

Though the direction that English constitutional development

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100 *See* 1 W. BLACKSTONE, COMMENTARIES *257, 258; J. DELOLME, THE CONSTITUTION OF ENGLAND 93 & n.(a) (4th ed. 1784).

101 In sharpest contrast to the doctrine of "executive privilege," frequently invoked by the American Presidents to avoid questioning by Congress, is the question period at the beginning of each day's session of the House of Commons, in which ministers are called upon to reply to questions filed by members. The history and function of this practice are analyzed in I. JENNINGS, PARLIAMENT 99-110 (2d ed. 1969), in which the author labels it as "of the utmost constitutional importance." *Id.* at 99. *See also* 1 A. LOWELL, THE GOVERNMENT OF ENGLAND 331-33 (new ed. 1914).

102 The relevant principles and procedures of the English constitution today are authoritatively stated in E. WADE & G. PHILLIPS, CONSTITUTIONAL LAW, *supra* note 10, and the following excerpts amount to highly condensed summaries of their subjects: Prerogative powers are powers "which the common law recognises as exercisable by the King," and they include "the right to declare war and make peace." Constitutional development, however, has long since established the rule "that the prerogative powers [can] only be exercised through and on the advice of Ministers responsible to Parliament." Responsibility means, among other things, that Ministers are subject to "questions relating to those public duties for which the Sovereign is responsible, provided that the duties fall within the province of the particular Minister." On the other hand, "in regard to the exercise of the prerogative Parliament has no right to be consulted in advance." *Id.* at 183-85. It is obvious, however, that

> [c]ertain prerogative powers could of course only be exercised if the Government were assured of parliamentary support. The Crown may declare war, but no Government could take the risk of declaring war without being assured of popular support, and Parliament alone can vote supplies to enable war to be waged.

Id. at 185.

> Treaties requiring ratification by the Crown are usually laid before Parliament for twenty-one days before the instrument of ratification is submitted to the Sovereign, but there is no legal requirement that the consent of Parliament is required before a treaty is either made or ratified by the Sovereign.

Id. at 279. On the concept of ministerial responsibility, both collective and individual, which underlies the entire system, see *id.* at 86-89.

would take was toward the principle of accountability to, rather than participation by, Parliament in the conduct of foreign affairs, the latter idea remained very much alive among eighteenth-century English political thinkers. A notable argument for direct legislative participation in the making of foreign policy, coupled with a denunciation of executive "usurpation" of the power, was advanced in two pamphlets published in 1760 by Owen Ruffhead. At that particular moment it was Ruffhead's expectation that the recent series of victories over France, newly won through the organizing genius of William Pitt the Elder, would be speedily followed by negotiations for bringing to an end the Seven Years War, known in America as the French and Indian War.

The title of Ruffhead's first pamphlet stated its purpose with complete explicitness: *Reasons Why the Approaching Treaty of Peace Should be Debated in Parliament: As a Method Most Expedient and Constitutional.*[103] The motto on its title-page summed up the philosophical and moral basis of his argument. It was quoted from the writ with which Edward I had summoned Parliament in 1295: "[W]hat concerns all should be approved by all."[104] Ruffhead pressed the aphorism to its logical conclusion:

> Shall the Representatives of the Nation be summoned together to furnish the Means of Victory, and shall not they be consulted about the Disposal of the Fruits of Conquest?
>
> Can any valid Reason be assigned, why a Treaty of Peace should not be debated as well as an Act of Parliament?
>
> . . . .
>
> . . . . Shall the Articles be kept from their Inspection, till the Ratification of them has made it too late for them to offer Objections and propose Amendments?[105]

Like Davenant sixty years earlier, Ruffhead reviewed the history of

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103 [Hereinafter cited as O. RUFFHEAD, REASONS]. This pamphlet was published contemporaneously with the pamphlet entitled *Ministerial Usurpation Displayed* in 1760. Both pamphlets were published anonymously, but Ruffhead's authorship is not in doubt; furthermore the second makes frequent cross-references to the first. A copy of the first pamphlet is in the University of Pennsylvania Library; a copy of the second is in the Yale University Library. I am indebted to both for furnishing photocopies.

104 O. RUFFHEAD, REASONS 14. The motto appeared in Latin on the titlepage: "[U]t quod omnes tangit, ab omnibus approbetur." *See also* O. RUFFHEAD, MINISTERIAL USURPATION DISPLAYED 51 (1760) (where the quotation was printed in both languages). The complete writ of 1285, addressed to the clergy, is printed in SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY 480-81 (W. Stubbs ed.) (9th ed. rev. H. Davis 1913).

105 O. RUFFHEAD, REASONS 13, 34.

England since the Norman Conquest and concluded that, until the reigns of the Tudors and the Stuarts,

> our wisest and greatest Princes . . . absolutely refused to conclude *Treaties of Peace,* till the Parliament, *upon a View of the Articles,* had given their *Advice and Consent.*[106]

Ruffhead's second pamphlet, a reply to critics of his first, made it clear that his fear was not of royal absolutism but of the increase of executive power at the expense of legislative. Again his title was an accurate statement of his position: *Ministerial Usurpation Displayed.* The usurpation to which he referred consisted in the "transfer [of] the Business of Parliament to the Cabinet."[107] Ruffhead stated his own view of the proper constitutional relationship between executive prerogative and parliamentary advice and consent in a passage so compendious that it deserves quotation *in extenso*:

> There are many who talk of the Prerogative, without seeming to have a just Idea of its Nature and Extent. Thus when they say that it is the King's Prerogative to make War and Peace, they say right. But if they mean that, therefore it is needless for the Crown to take the Advice of the great Council, that is, the Parliament, perhaps they say too much.
>
> It is undoubtedly, as it ought to be, the royal Prerogative alone, to make War and Peace, so far as the Power is *executive.*— That is, it belongs to the Crown, as the executive Branch, to ratify Treaties, and issue Proclamations of War and Peace: and such Proclamations have the Force and Effect of a Law.
>
> But it does not follow therefore, that the Great Council have not the Right of giving their Advice upon, and their Consent to, the Terms of such Treaty. It should be remembered that the *executing* an Instrument, and the *framing* of that Instrument, are distinct Points of Consideration.
>
> All Acts of Parliament are executed by the Sovereign, and they are the Acts of the Crown, as appears from the enacting Clause, which always runs thus—"Be it ENACTED *by the* King's most excellent Majesty, by and with the *Advice and Consent* of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and *by the Authority* of the same, that, *&c.*"
>
> Yet no one sure will argue from hence that the Crown has the sole Prerogative of framing such Statutes. No. They are the Acts of the Crown; but framed by Parliament: And the Authority for *executing such Acts,* is the Advice and Consent of Parliament.
>
> In like Manner with respect to Treaties, though they are Acts

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106 *Id.* at 32-33 (emphasis in original). See *id.* at 22-31 for the author's review of historic instances.

107 O. RUFFHEAD, MINISTERIAL USURPATION DISPLAYED 47-48 (1760).

> of Prerogative, yet the Authority for executing such Acts, has been, and we trust will be again, the *Advice and Consent* of Parliament. Execution is the proper Prerogative of the Head of the Commonwealth, Deliberation and Advice is the Priviledge of the Body.[108]

Though writers like Davenant and Ruffhead—to say nothing of the parliamentary leaders of the mid-seventeenth century—used the phrase "advice and consent" to characterize the process of legislative deliberation and decision, and though they applied this concept to the domain of foreign affairs, it was not from them that the framers of the American Constitution borrowed the idea of transferring the powers of war and peace from executive to legislative hands. In fact, the framers did not initiate this transfer; they validated a transfer that had taken place a dozen years earlier and which they sought to modify in only a very limited way. The makers of the American Constitution were not rejecting history in favor of untested theory. To the contrary, they were consulting their own history, building on the precedents it furnished, and taking care to insure continuity with the institutions that had evolved out of their own struggle for independence.

VIII. The Making of War and Peace by the Continental Congress

When the Constitutional Convention assembled in Philadelphia in 1787, the treaty that ended the War of American Independence lay only four years in the past. The victory, both military and diplomatic, had been achieved by a federal government that consisted of a legislative body only, with executive functions performed by its own committees or by officers responsible to it. This was the pattern from the very first stirrings of the American Revolution. Resistance to British measures, in so far as existing governmental agencies were employed, could only be legislative resistance, for executive authority in the colonies was always British authority. Town meetings in New England became forums of revolutionary activity, as did county courts in the South. Colonial assemblies (the lower houses of colonial legislatures) converted themselves into Provincial Congresses and used previously existent machinery of government, so far as possible, to organize the militia, collect taxes, and carry on the public business. In 1774, the Continental Congress came into existence to direct intercolonial ac-

108 *Id.* at 49-50 (emphasis in original). Ruffhead considered it quite clear "that *War*, in Effect, cannot be declared without the Consent of Parliament" because "the Supplies to carry it on must be drawn from Parliament," and he therefore asked, "Why then should Peace be concluded without such Authority?" *Id.* at 50-51 (emphasis in original).

tions. If at the onset it resembled a conference of ambassadors, it quickly developed the corporate sense that made it a legislative body. As such it constituted the legislature of the Union—de facto and then de jure—from 1774 until superseded in 1789 by the first Congress under the new Constitution.

As the sole government of the Union for a decade and a half, this legislative body conducted an ultimately successful war for independence and scored a notable diplomatic victory in the peace negotiations that ended it, securing for the new nation a western boundary at the Mississippi River instead of at the crest of the Appalachian Mountains. During this formative decade and a half, Congress constantly debated the issues of war and peace. On the military side it appointed a commander in chief responsible to it. On the diplomatic side it made decisions binding on its Secretary for Foreign Affairs; formulated instructions to and considered the dispatches from American ministers abroad; and drew up *projets* for treaties, thereby giving mandatory advice to the negotiators, while insisting that any concessions made by the latter would have to receive its final consent.

The Declaration of Independence was obviously the most momentous of the acts of this legislative assembly, and it was an international act of the most solemn character, for it announced that the United States of America had decided "to assume among the powers of the earth, the separate and equal Station to which the Laws of Nature and of Nature's God entitle them." The resolution that committed the nation to independence was actually a tri-partite one, and the second element of it was likewise international in character, for it authorized "effectual measures for forming foreign Alliances."[109] The third provision called for a formalization of the governmental system that had gradually evolved at the federal level.[110] In response to this part of the resolution, a committee of Congress reported, on the 12th of July 1776, the first draft of permanent Articles of Confederation. The document had to be considered by fits and starts, for Congress was preoccupied with the exigencies of war; hence, a completed version was not submitted to the member states until the 15th of November 1777, and was not finally ratified by all until the 1st of March 1781.[111] In

109 5 U.S. LIBRARY OF CONGRESS, JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 425 (W. Ford ed. 1906) [hereinafter cited as JCC] (resolution introduced by Richard Henry Lee, June 7, 1776).

110 *See id.*

111 Three principal stages in the evolution of the text of the Articles of Confederation can be recognized: (1) the first draft, reported to Congress by its committee under the chairmanship of John Dickinson on July 12, 1776. *Id.* at 546-54; (2) the version that

reality, however, the procedures and understandings embodied in the Articles were essentially those already in effect. Thus the Articles summed up the principles of government that operated throughout the period of the Revolution and its immediate aftermath. Accordingly, when revision was finally decided on in 1787, the Articles of Confederation furnished the point of departure for the deliberations of the Philadelphia Convention.

IX. The Articles of Confederation

The Union had been from the beginning, and under the Articles continued to be, a government with a legislative assembly of one house, representing the states as states, with no independent organs of executive or judicial sort. With respect to foreign affairs, the Articles of Confederation sought to place full authority firmly in federal hands. This meant vesting in Congress, a legislative body, most of the powers that were regarded in England as executive and therefore wielded by the Crown. Indeed, many of the characteristic phrases used by Blackstone in describing the royal prerogative reappeared in the Articles, but among the grants of authority to "the United States in Congress assembled."[112] Furthermore, most of these same phrases were carried over into the United States Constitution of 1787, frequently in the list of legislative powers, but sometimes, in crucial instances, in the clauses that distributed responsibility for foreign policy among the several branches of government. Because this shifting about of authority is significant, the exact wording of the pivotal Article IX of the Confederation should be quoted and (as footnotes hereunder will do) compared with subsequent and antecedent constitutional formulations:[113]

> The United States, in Congress assembled, shall have the sole

emerged from the debates of July and August 1776 in a committee of the whole and that was reported on August 20, 1776. *Id.* at 674-89; and (3) the text finally adopted by Congress on November 15, 1777, and eventually ratified by the last of the states on March 1, 1781. 9 *id.* at 907-25 (1907); 19 *id.* at 214-23 (G. Hunt ed. 1912).

112 *E.g.*, 9 JCC 915. This, the official name of the body, echoes the English formula: "the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled." See text accompanying note 42 *supra*. The term Continental Congress, often applied to the "old" Congress from 1774 to 1789, ceased to be used after 1776 and is completely inappropriate for the period after the ratification of the Articles in 1781. For a full discussion of the point by the present writer, see Bestor, *Constitutionalism and the Settlement of the West: The Attainment of Consensus, 1754-1784*, in The American Territorial System 33-34 n.3 (J. Bloom ed. 1973).

113 9 JCC 915-23 (final version adopted November 15, 1777). In the notes immediately following, excerpts are given for purposes of comparison with (1) the United States Constitution (1787); and (2) Blackstone's *Commentaries* (1765) or some equivalent.

and exclusive right and power of determining on peace and war[114] . . . of sending and receiving ambassadors;[115] [of] entering into treaties and alliances[116] . . . of establishing rules for deciding, in all cases, what captures on land or water shall be legal, and in what manner prizes, taken by land or naval forces . . . shall be divided or appropriated;[117] of granting letters of marque and reprisal in times of peace;[118] [of] appointing courts for the trial of piracies and felonies committed on the high seas . . . .[119]

. . . [of] appointing all officers of the land forces in the service of the United States, excepting regimental officers; appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States;[120] [of] making rules

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114 "The Congress shall have Power . . . [t]o declare War." U.S. CONST. art. I, § 8, cl. 11. "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties." *Id.* art. II, § 2, cl. 2. "[T]he king has . . . the sole prerogative of making war and peace." 1. W. BLACKSTONE, COMMENTARIES *257.

115 "[The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, [and] other public Ministers and Consuls." U.S. CONST. art. II, § 2, cl. 2. "[The President] . . . shall receive Ambassadors and other public Ministers." *Id.* § 3. "The king . . . has the sole power of sending ambassadors to foreign states, and receiving ambassadors at home." 1 W. BLACKSTONE, COMMENTARIES *253.

116 "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties." U.S. CONST. art. II, § 2, cl. 2. "It is . . . the king's prerogative to make treaties, leagues, and alliances with foreign states and princes." 1 W. BLACKSTONE, COMMENTARIES *257.

117 "The Congress shall have Power . . . [t]o make Rules concerning Captures on Land and Water." U.S. CONST. art. I, § 8, cl. 11. "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction." *Id.* art. III, § 2, cl. 1. Blackstone discussed prize cases simply as a part of immemorial admiralty law, without reference either to the King or Parliament. *See* 3 W. BLACKSTONE, COMMENTARIES *108.

118 "The Congress shall have Power . . . [t]o . . . grant Letters of Marque and Reprisal." U.S. CONST. art. I, § 8, cl. 11.

> [O]ur laws have in some respects armed the subject with powers to impel the prerogative; by directing the ministers of the crown to issue letters of marque and reprisal upon due demand . . . .

1 W. BLACKSTONE, COMMENTARIES *258.

119 "The Congress shall have Power . . . [t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." U.S. CONST. art. I, § 8, cl. 10. Blackstone treats piracy as a crime, for the punishment of which "the statute law of England interposes to aid and enforce the law of nations, as a part of the common law." *See* 4 W. BLACKSTONE, COMMENTARIES *71-73.

120 The Congress shall have Power

> . . . .
>
> To provide for organizing . . . the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers . . . .

U.S. CONST. art. I, § 8, cl. 16.

> The President . . . .
>
> . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for . . . .

> for the government and regulation of the said land and naval forces,[121] and directing their operations.[122]
>
> . . . to build and equip a navy;[123] [and] to agree upon the number of land forces . . . .[124]

These positive grants of power by the Confederation to the Congress were made exclusive by the device—later employed in the Constitution of 1787—of prohibiting to the individual states the exercise of like powers.[125] The Articles allowed only certain precisely specified exceptions. Thus, a state might "engage" in war if "actually invaded by enemies" or if it received intelligence, which it considered "certain," of a planned attack by Indians "so imminent as not to admit of a delay."[126] A state might also fit out vessels of war to deal with pirates if "infested" by them.[127] For the rest, however, no state might "engage in any war" without the consent of Congress, or issue letters of marque and reprisal "except it be after a declaration of war by the United States, in Congress assembled."[128] Further, to protect the nation

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Id. art. II, § 2, cl. 2. "[The President] . . . shall Commission all the officers of the United States." *Id.* § 3. "Officers, in all branches of the forces, are appointed by the Queen's commission." E. WADE & G. PHILLIPS, *supra* note 10, at 390.

121 "The Congress shall have Power . . . [t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I, § 8, cl. 14. "[T]he king has sole power of raising and regulating fleets and armies . . . [and] the prerogative of enlisting and of governing them." 1 W. BLACKSTONE, COMMENTARIES *262.

122 The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . .

U.S. CONST. art. II, § 2, cl. 1. "The king is . . . the generalissimo, or the first in military command, within the kingdom." 1 W. BLACKSTONE, COMMENTARIES *262. "[T]he sole supreme government and command of the militia within all his majesty's realms and dominions . . . is the undoubted right of his majesty." *Id.* (quoting from An Act declaring the sole Right of the Militia to be in the King, and for the present ordering and disposing the same, 13 Car. 2, c. 6 (1661)).

123 "The Congress shall have Power . . . [t]o provide and maintain a Navy." U.S. CONST. art. I, § 8, cl. 13. "[T]he king has the sole power of raising and regulating fleets and armies . . . [and] the prerogative of enlisting and of governing them." 1 W. BLACKSTONE, COMMENTARIES *262.

124 "The Congress shall have Power . . . [t]o raise and support Armies . . . [and] [t]o provide for calling forth the Militia." U.S. CONST. art. I, § 8, cls. 12 & 15. "[T]he raising or keeping a Standing Army within the Kingdom in Time of Peace, unless it be with Consent of Parliament, is against Law." An Act declaring the Rights and Liberties of the Subject, and settling the Succession of the Crown, 1 W. & M., sess. 2, c. 2 (1689).

125 U.S. CONST. art. I, § 10. The restrictions placed upon the states by Article 6 of the Articles of Confederation were almost the same as those imposed by the Constitution, so far as matters of war and diplomacy are concerned. *See* 9 JCC 911-13.

126 9 JCC 912 (Article 6).

127 *Id.* at 913 (Article 6).

128 *Id.* at 912-13 (Article 6).

against hasty and ill-considered actions in foreign affairs, the Articles imposed severe limits on Congress itself. That body might

> never engage in a war, nor grant letters of marque and reprisal in times of peace, nor enter into any treaties or alliances . . . nor appoint a commander in chief of the army or navy, unless nine states assent to the same . . . .[129]

This meant approval by two-thirds of all the states of the Union, not two-thirds of those that might at the moment be present in the person of their delegates.

Every crucial decision of foreign policy was thus to be arrived at through legislative deliberation—the very antithesis of the idea of vesting the power of war and peace in executive hands. That some kind of executive machinery would be necessary to carry out the resolves of Congress was, of course, recognized. The committee that prepared the first draft of the Articles of Confederation proposed the creation of a "Council of State" to perform a number of executive functions, not in any sense as an independent executive branch, but simply as an executive committee of Congress. Its most extensive powers would have been in military matters. The first draft of the Articles included, in its enumeration of the powers of Congress, the power of "directing the Marches, Cruises and operations of . . . land and naval Forces,"[130] but then assigned to the Council of State the actual exercise of much of this power, using carefully guarded language:

> This Council shall have Power . . . [t]o give Counsel to the Commanding Officers, and to direct military Operations by Sea and Land, not changing any Objects or Expeditions determined on by the United States assembled, unless an Alteration of Circumstances which shall come to the Knowledge of the Council after the Recess of the States, shall make such Change absolutely necessary—To attend to the Defence and Preservation of Forts and strong Posts, and to prevent the Enemy from acquiring new Holds—To procure Intelligence of the Condition and Designs of the Enemy—To expedite the Execution of such Measures as may be resolved on by the United States assembled, in Pursuance of the Powers hereby given to them . . . —To superintend and controul or suspend all Officers civil and military, acting under the Authority of the United States.[131]

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129 *Id.* at 921-22 (Article 9).

130 5 JCC 551 (Article 18). Changes, however, were made on the draft itself, so that in later versions, the phrase read simply "directing their operations." *Id.* at 682 (Article 14, version of August 20, 1776); 9 *id.* at 919 (Article 9, final version of November 15, 1777).

131 5 JCC 553 (Article 19). This article remained unchanged in the version reported by the committee of the whole on August 20, 1776, though it was renumbered Article 15. *See id.* at 686-88.

This extensive delegation to the Council of State of power in military matters was not matched by a corresponding delegation of power in the diplomatic realm. Here its role was to be that of a mere secretariat:

> This Council shall have Power to receive and open all Letters directed to the United States, and to return proper Answers; but not to make any Engagements that shall be binding on the United States . . . .[132]

Even these cautiously circumscribed delegations of power to a mere executive committee went too far for the delegates who were considering the proposed Articles of Confederation. The idea of a Council of State was dropped,[133] and its place was taken by a "committee of the states," which was to act only during the recess of Congress, which would exercise only such powers as the parent body, by vote of nine states, might, "from time to time, think expedient to vest them with," and which was expressly forbidden to exercise any power to which the vote of nine states had been made requisite.[134] At the head of the list of powers thus denied were, as we have seen, the authority to "engage in a war" and to "enter into any treaties or alliances."[135] Congress thus kept firmly in its own legislative hands the powers that it had claimed and drawn up for itself in the Articles of Confederation, namely "the sole and exclusive right and power of determining on peace and war."[136]

X. Pre-Convention Discussions, 1786-1787

This was the base from which the members of the Constitutional Convention of 1787 necessarily took their start as they felt their way toward a more effective government. The problem confronting them was not how great a share in the conduct of foreign affairs they should allow to the legislative branch. The questions—there were really three of them—ran quite the opposite way. In the first place, which particular segments of the authority over foreign policy, hitherto wholly monopolized by Congress, ought to be considered purely executive in character and therefore transferred outright to the newly

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132 *Id.* at 553.

133 9 JCC 848.

134 *Id.* at 923-24 (final version of Article 10). The entire Article 15 that had been reported by the committee of the whole on August 20, 1776 was struck out by Congress on November 7, 1777. *Id.* at 879-80.

135 See text accompanying note 129 *supra*.

136 See text accompanying note 114 *supra*.

created executive branch? Secondly, which other functions seemed to call for such continuous consultation between those who made policy and those who carried it out that machinery should be provided whereby the legislative and executive branches could achieve consensus? Finally, which aspects of foreign affairs involved questions of policy so fundamental that the power of decision ought to be retained firmly in legislative hands, subject only to the check of a presidential veto (a device being incorporated for the first time in the federal constitutional system)?

The purpose of the Philadelphia Convention, according to the resolution that authorized it, was to "render the federal constitution adequate to the exigencies of Government & the preservation of the Union."[137] Among the defects calling for correction were those that weakened the international position of the United States, depriving it of power, in Washington's words, "to meet European nations upon decisive & equal ground."[138] The assertion is often made, especially by those who read present-day conceptions back into history, that the framers of the Constitution attributed the new nation's weakness in foreign affairs to the lack of an independent and forceful executive; that they therefore "found it proper to place the power of external affairs in a single person," and that the Constitution they drafted must therefore be construed as having "invested the Chief Executive with the foreign policy-making powers."[139] Contemporary evidence provides no substantial support for this contention.

The defects of the Confederation as they affected foreign affairs were discussed time after time in the letters and memoranda that passed between American leaders in the twelve months before the Convention. With almost complete unanimity, they blamed the weakness not upon the lack of an independent executive, but upon the failure of the states to honor their federal obligations. Congressional measures, Washington complained, "are a perfect nihility, where thirteen sovereign, independent disunited States are in the habit of

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137 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 14 (M. Farrand ed. 1911) (resolution of Congress, February 21, 1787) [hereinafter cited as RECORDS].

138 U.S. BUREAU OF ROLLS AND LIBRARY, DEP'T OF STATE, BULL. NO. 11, PT. 1, 4 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1786-1870, at 13 (1905) (letter from George Washington to the Marquis de la Fayette, May 10, 1786) [hereinafter cited as 4 DOCUMENTARY HISTORY].

139 *See, e.g.*, Goldwater, *The President's Constitutional Primacy in Foreign Relations and National Defense*, 13 VA. J. INT'L L. 463, 465-66 (1973). For a look at the development of this line of thought, see note 190 *infra*.

discussing & refusing compliance with them at their option."[140] Contemporaries emphasized three adverse international consequences for the United States. In the first place, an exhausted treasury imperilled defense, and (as the congressional delegation from Rhode Island warned) "an enemy on our frontiers stands prepared to take every advantage of our prostrate situation."[141] Secondly, without a power to regulate foreign commerce, Congress had no leverage in bargaining for favorable trade agreements—no means, as Edmund Randolph put it, of "counteraction of the commercial regulations of other nations."[142] Finally—and this point loomed largest in many contemporary discussions—the Union could not prevent a state from violating treaties made in the name of the United States, which meant (to quote Randolph again) "that particular states might by their conduct provoke war without controul."[143]

The important thing to note is that none of these three defects would be removed by a mere augmentation of *executive* power. The remedy for the first two defects was obviously an enlargement and strengthening of *legislative* authority, and this the Constitution ultimately provided through its grant to Congress of adequate powers of taxation and of plenary authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[144] With respect to the third defect—inability to secure state compliance with treaty obligations—a remedy based on *judicial* rather than executive action had been under consideration for at least nine months prior to the opening of the Convention. This judicial approach to the problem was the one finally written into the Constitution as the so-called supremacy clause.[145]

This concern with the enforcement rather than the negotiation of treaties, and the consequent concern with strengthening judicial rather than executive power, was so significant a feature of pre-Convention discussion that it deserves greater attention than has ordinarily been given it in evaluating the original intent of the Constitution. As

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140 4 DOCUMENTARY HISTORY 20 (letter from Washington to John Jay, August 1, 1786).

141 8 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 471 (E. Burnett ed. 1936) (letter to John Collins, Governor of Rhode Island, September 28, 1786) [hereinafter cited as 8 LETTERS OF MEMBERS].

142 1 RECORDS 19 (Madison's notes, May 29, 1787) (Randolph's own summary of the speech in which he "opened the main business" of the Federal Convention).

143 *Id.*

144 U.S. CONST. art. I, § 8, cls. 1 & 3.

145 *Id.* art. VI, cl. 2.

early as the 7th of August 1786, a special committee of the old Congress reported to that body a set of proposed amendments to the Articles of Confederation. One of these called for the creation of a Federal Judicial Court, with jurisdiction to hear appeals

> from the Judicial Courts of the several States in all Causes wherein questions shall arise on the meaning and construction of Treaties entered into by the United States with any foreign power, or on the Law of Nations . . . .[146]

Some two months later, on the 13th of October 1786, Congress received from John Jay, secretary of its Department of Foreign Affairs, a report detailing, state by state, the measures enacted in deliberate disregard of treaty obligations.[147] Like the earlier committee, Jay proposed a judicial solution, using language even closer to that which the Constitutional Convention finally adopted. "When . . . a treaty is constitutionally made, ratified and published by Congress," Jay argued, "it immediately becomes binding on the whole nation, and super-added to the laws of the land, without the intervention, consent or fiat of State legislatures." He continued:

> All doubts, in cases between private individuals, respecting the meaning of a treaty, like all doubts respecting the meaning of a law, are in the first instance mere judicial questions . . . .[148]

In these words, Jay, who was to become the first Chief Justice of the United States under the new Constitution, was adumbrating the doctrine of judicial review which his great successor John Marshall would make the cornerstone of American constitutional law. In 1786, however, Jay could see no possibility as yet of creating a federal judiciary powerful enough to hold state legislatures in check. In the end, therefore, he proposed only that Congress declare by resolution that treaties are "part of the law of the land" and therefore "binding and obligatory" on the states. Leaving further action to the states, it was "recommended" that each of them pass an act ordering its own courts of law and equity to decide cases "according to the true intent and meaning" of national treaties, "any thing in the said Acts or parts of Acts [*i.e.*, in state legislation] to the contrary thereof in any wise notwithstanding."[149] Jay's report made a strong impression,[150] and on the 21st of

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146 31 JCC 497 (J. Fitzpatrick ed. 1934) (proposed Article 19).

147 *Id.* at 781-874.

148 *Id.* at 798.

149 *Id.* at 870.

150 *See, e.g.*, 8 LETTERS OF MEMBERS 542, 545, 560, 565 (letters of James Madison, Feb-

March 1787, Congress, taking cognizance of the report, resolved that the states could not "of right pass any act or acts for interpreting, explaining or construing a national treaty or any part or clause of it," and that all such acts already existing "ought to be forthwith repealed."[151] These resolutions, with their emphasis on the role of the judiciary, were officially transmitted to the states some six weeks before the Federal Convention actually began its work.[152]

The creation of an executive branch was, of course, one of the purposes and one of the achievements of the Federal Convention. Surprisingly little interest in or attention to the matter was manifested, however, in the pre-Convention correspondence of those most concerned with constitutional revision. The need for strengthening the existing government was repeatedly stressed, but rarely in terms of a strengthening of executive power per se. Thus General Henry Knox, Secretary of War to Congress and the most alarmist of all Washington's correspondents, wrote the latter on the 23rd of October 1786 that

> men of reflection, & principle [desired] a government which shall have the power to protect them in their lawful pursuits, and which will be efficient in all cases of internal commotions or foreign invasions.[153]

In diagnosing the situation, however, Knox said nothing at this time about the lack of an executive branch but maintained simply that "[t]he powers of Congress are utterly inadequate."[154] The most specific argument for differentiating executive from legislative powers came, in these closing weeks of 1786, not from proponents of "high-toned" government like Knox, but from Thomas Jefferson, then in Paris as American minister to France. In his eyes the objective was simply administrative efficiency. After urging that the federal government be organized like the states "into Legislative, Executive & Judiciary," Jefferson recalled, in a letter of the 16th of December 1786, his unsuccessful efforts in the past to induce Congress "to appoint a Committee to receive & dispatch all executive business, so that Congress itself should meddle only with what should be legislative."[155]

In the early months of the new year, the idea of separating the

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ruary and March, 1787). *See also id.* at 502-03 (address of Nathan Dane to the Massachusetts House of Representatives, November 9, 1786).

151 32 JCC 124-25 (R. Hill ed. 1936).

152 *Id.* at 177-84 (letter to the States, April 13, 1787).

153 4 DOCUMENTARY HISTORY 32.

154 *Id.* at 30.

155 *Id.* at 43 (Jefferson to Madison).

powers of government into three branches began to figure more frequently in the discussions of constitutional reform. On the 7th of January 1787, Jay mentioned the matter to Washington, saying: "Let congress legislate, let others execute, let others judge."[156] About the same time, Knox proposed, in another letter to Washington, that there be an "executive under the title of Governor General," to be chosen by the federal legislature for a seven-year term and to be subject to impeachment.[157] None of these writers said much concerning the specific functions of the executive, least of all about any role for him in the conduct of foreign relations. This was true even of Madison, who gave more concentrated study than anyone else in this period to the details of constitutional reform. In the middle of the month preceding the Convention, he summed up for Washington his views on what was needed. "A national Executive must also be provided," he wrote in his definitive letter of the 16th of April 1787. But he added immediately:

> I have scarcely ventured as yet to form my own opinion either of the manner in which it ought to be constituted or of the authorities with which it ought to be cloathed.[158]

The only allusion to a specifically executive function was Madison's remark that "[t]he national supremacy in the Executive departments is liable to some difficulty," but "[t]he Militia ought certainly to be placed in some form or other under the authority which is intrusted with the general protection and defence."[159]

XI. The Constitutional Convention: Initial Two Months, May 25-July 26, 1787

When the Federal Convention finally got under way in Philadelphia on the 25th of May 1787, no delegate came forward with any sort of proposal to put a powerful chief executive in charge of the foreign affairs of the nation. The so-called Virginia Plan, which was the subject of the first fourteen-day round of debates, proposed that "a National Executive be instituted," but was almost as vague as Madison had been about its functions. "[B]esides a general authority to execute the National laws," said the resolution, the executive "ought to enjoy the Executive rights vested in Congress by the Confedera-

156 *Id.* at 56. *See id.* at 73 (letter from Jay to John Adams, February 21, 1787).
157 *Id.* at 61 (January 4, 1787).
158 *Id.* at 119.
159 *Id.* at 118.

tion."[160] What these "Executive rights" might be was an unanswered question. The only reference in the Virginia Plan to military affairs was a provision empowering the *legislature* "to call forth the force of the Union ag[ain]st any member of the Union failing to fulfill its duty under the articles."[161] The only reference in the Plan to external affairs was in connection with the proposed national *judiciary*, which would have jurisdiction over piracies, captures from the enemy, and "cases in which foreigners . . . may be interested."[162]

The First Debate on the Power of War and Peace

Whether "Executive rights" should be construed to include any part of that "sole and exclusive right and power of determining on peace and war" previously belonging to Congress was vigorously discussed as soon as the resolution dealing with the executive came up for debate in the Convention. This occurred on the 1st of June. No state dissented from the first of the two phrases that the Virginia Plan had used as a definition of executive power, namely, "a general authority to execute the National Laws."[163] To the second phrase, however, there was general objection,[164] and the Convention promptly rejected the idea of delegating to the executive so vaguely defined an aggregate as "the Executive rights vested in Congress by the Confederation." If interpreted in such a way as to "extend to peace & war &c," said Charles Pinckney of South Carolina, the proposed phrase would "render the Executive a Monarchy, of the worst kind, towit an elective one."[165]

Four delegates in all addressed themselves to this specific point in the debate of the 1st of June, and every one of them emphatically rejected, as Pinckney did, the idea of including the power of peace and war in any constitutional definition of executive power. James Wilson of Pennsylvania, a future member of the Supreme Court

> did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c.[166]

160 1 RECORDS 21 (Madison's notes) (resolution 7 of the Virginia Plan proposed by Edmund Randolph, May 29).

161 *Id.* (resolution 6).

162 *Id.* at 22 (resolution 9).

163 *Id.* at 63 (Journal of the Convention), 67 (Madison's notes).

164 *See id.* at 64-67 (Madison's notes).

165 *Id.* at 64-65 (Madison's notes).

166 *Id.* at 65-66 (Madison's notes).

Looking beyond English precedents to the political theorists of the Continent, Wilson asserted that "[m]aking peace and war are generally determined by Writers on the Laws of Nations to be legislative powers."[167] James Madison of Virginia agreed with Wilson, explaining that "executive powers ex vi termini, do not include the Rights of war & peace &c."[168] John Rutledge, a colleague of Pinckney's from South Carolina, "was for vesting the Executive power in a single person, tho' he was not for giving him the power of war and peace."[169] Not a single delegate spoke to the opposite effect.

As a substitute for the alarmingly ambiguous clause of the Virginia Plan, Madison proposed to specify more exactly the powers to be regarded as executive. One of his proposals—to empower the executive "to appoint to offices in cases not otherwise provided for"—was adopted. The other would have given the executive merely the authority "to execute such powers, not legislative or judiciary in their nature, as may from time to time be delegated by the national legislature." Carefully hedged though it was, this proposal of Madison's was rejected.[170]

The question of the appropriate functions of the executive was allowed to remain unsettled during the two ensuing months of debate. Finally, on the 26th of July 1787, the Convention turned over to a Committee of Detail the task of converting into a draft constitution the various resolutions that had been agreed upon thus far.[171] With respect to the scope of executive authority, the only mandate that the Committee thereby received was embodied in the two resolutions adopted at the beginning of June, which defined executive authority as the power "to carry into execution the national Laws" and "to appoint to Offices in cases not otherwise provided for."[172]

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167 *Id.* at 73-74 (William Pierce's notes).

168 *Id.* at 70 (Rufus King's notes). The Latin phrase can be translated as: "By the force of the term; by definition."

169 *Id.* at 65 (Madison's notes).

170 *Id.* at 63-64 (Journal), 67 (Madison's notes). The phrase "not Legislative nor Judiciary in their nature" was inserted in response to the wariness expressed by General Charles Cotesworth Pinckney of South Carolina, who felt that "improper powers might otherwise be delegated." *Id.* at 67. But with these precautionary words inserted, his kinsman and fellow South Carolinian, Charles Pinckney, then moved to delete the entire proposal—and the motion passed seven to three. *Id.*

171 2 RECORDS 117 (Journal), 128 (Madison's notes).

172 *Id.* at 134 (resolutions turned over to the Committee of Detail). On the creation of this committee, see text accompanying note 232 *infra*.

The Judiciary and the Enforcement of Treaties

During the initial period of two months, moreover, the Convention adopted only one resolution dealing in any explicit way with foreign affairs, and this involved the judiciary, not the executive. What this resolution did was incorporate in the embryo constitutional system the idea of judicial enforcement of treaties, as proposed by John Jay the previous year and as already endorsed by the old Congress. This judicial approach was ignored in the Virginia Plan, which proposed to make enforcement a legislative matter by giving Congress a veto upon all state legislation, including but not confined to enactments in violation of treaty obligations.[173] The judiciary was, however, brought back into the picture by the New Jersey Plan, which delegates from several smaller states presented on the 15th of June as an alternative to the plan of the largest of the states, namely Virginia. In this new context the idea of a determination by the judiciary was pushed a stage beyond pre-Convention ideas. The concept of a supreme law was extended to include federal statutes as well as treaties, thereby making judicial review the basic device for removing state obstructions to any type of federal measure. The New Jersey resolutions provided that acts of Congress, if "made by virtue & in pursuance of . . . powers . . . vested in them," and treaties, if "made & ratified under the authority of the U[nited] States," were to be "the supreme law of the respective States," and the judiciaries of the states would "be bound thereby in their decisions, any thing in the respective laws of the Individual States to the contrary notwithstanding."[174]

Though the New Jersey Plan as a package was rejected, this particular provision was resurrected a month later and adopted by the Convention without dissent on the 17th of July.[175] The Committee of Detail then took over, and in its draft of the 6th of August it reinforced the measure by subordinating the constitutions as well as the

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173 According to resolution 6 of the Virginia Plan, the national legislature would be empowered "to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union." 1 RECORDS 21. That state acts in violation of treaties would be subject to this legislative veto was made explicit on May 31, the second day of debate on the plan, when the Convention voted, on motion of Benjamin Franklin, to add after the words "articles of Union" the phrase "or any Treaties subsisting under the authority of the union." *Id.* at 47, 54 (Madison's notes), 61 (James McHenry's notes).

174 *Id.* at 245 (Madison's notes) (resolution 6). The New Jersey Plan was voted down on June 19. *Id.* at 312-13 (Journal), 322 (Madison's notes), 327 (Robert Yates' notes).

175 2 RECORDS 22 (Journal), 28-29 (Madison's notes).

statutes of the states to the supreme law composed of federal acts and treaties.[176] An even more significant enlargement occurred on the 23rd of August, when the Convention voted to include the Constitution of the United States as part—and, indeed, the first part—of "the supreme law of the several States, and of their Citizens and inhabitants."[177] Finally, five days before the end of the Convention, the Committee of Style restored the felicitious phrasing that Jay had originally used, which spoke not of a supreme law for each separate state but of "the supreme law of the land."[178] Emphasis was thereby placed not only on national unity but also upon the historic tradition of the supremacy of law, for the phrase itself comes from the Magna Carta.[179] The resulting provision of the finished Constitution—the so-called supremacy clause—is too important to go unquoted:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[180]

This clause, which originated as a device for securing state compliance with federal treaties, became the linch-pin of the American federal system,[181] establishing the judiciary as the ultimate guardian of the Constitution itself.

Infrequent Discussion of Executive Powers

No comparable exaltation of executive power in the realm of foreign affairs—indeed, no assignment to the executive of a specific role of any sort in the making of either war or peace—was contained in any resolution adopted by the Convention during its first two

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176 *Id.* at 183 (Article 8).

177 *Id.* at 381-82 (Journal), 389 (Madison's notes).

178 *Id.* at 603 (Committee of Style) (Article 6). For Jay's original proposal, see text accompanying note 149 *supra*.

179 Chapter 39 of the Magna Carta reads as follows:

> No freeman shall be captured or imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we [the King] go against him or send against him, except by the lawful judgment of his peers or by the law of the land.

1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 121 (C. Stephenson & F. Marcham rev. ed. transl. 1972) (footnotes omitted).

180 U.S. CONST. art. VI, cl. 2.

181 *See, e.g.*, A. MCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 183-85 (student's ed. 1935).

months. Particularly surprising is the fact that no motion was made and no vote was passed vesting in the President the command of the military forces in time of war, surely the most unmistakably executive in nature of all the various types of authority belonging to the vaguely-defined category of "war powers." Although the Convention was modifying or supplanting one provision after another of the old Articles of Confederation, no one proposed to replace or even to alter the provision of the earlier document which vested in Congress "the sole and exclusive right and power of determining on peace and war" and of "entering into treaties and alliances."[182] This omission could not possibly be construed as repeal through inaction, for the instructions of the Convention contained in the resolutions referred to the Committee of Detail were quite clear. In the new Constitution, "the Legislature of the United States ought to possess the legislative Rights vested in Congress by the Confederation."[183]

To be sure, certain kinds of authority vested in the old Congress could, on theoretical grounds, be classified as executive rather than as "legislative Rights." In the debate of the 1st of June, however, the Convention refused to reclassify as executive any of the powers connected with foreign affairs.[184] Moreover, on only a few occasions during the initial two months was there any discussion on the floor concerning the command of the armed forces or the possible role of the executive in the negotiation of treaties. These instances, though few, must of course be examined.

On the same day that the Virginia Plan was presented, Charles Pinckney of South Carolina offered a plan of his own, which proposed, among other things, that the President should "by Virtue of his Office, be Commander in chief of the Land Forces of U.S. and Admiral of their Navy."[185] It was the New Jersey Plan in mid-June that next called

182 See the text accompanying notes 114 & 116 *supra* for the relevant parts of the Articles of Confederation.

183 2 RECORDS 131 (resolutions turned over to the Committee of Detail).

184 See the text accompanying notes 163-72 *supra* for details of the debate over the scope of executive power and rights.

185 2 RECORDS 158 (fragment of the Pinckney Plan of May 29, 1787, a two-page manuscript in the handwriting of James Wilson, preserved among the papers of the Committee of Detail). The reconstruction of the lost Pinckney Plan is one of the triumphs of historical criticism and detection. On May 29, Edmund Randolph "opened the main business" of the Convention with a speech presenting and explaining the so-called Virginia Plan. 1 *id.* at 18 (Madison's notes), 24 (McHenry's notes). Thereafter:

> Mr. Charles Pinckney, one of the Deputies of South Carolina, laid before the House for their consideration, the draught of a foederal [*sic*] government to be agreed upon between the free and independent States of America.

Id. at 16 (Journal). Though four delegates took private notes that day, only one, Robert

the attention of the delegates to the question of military command. The proposal, however, reflected more of trepidation than of enthusiasm for placing any sort of miltary force under executive control. The New Jersey resolutions proposed a multi-membered rather than a single executive, one of the powers of which would be "to direct all military operations." There was, though, an important proviso:

Yates of New York, recorded the fact that Pinckney spoke. *Id.* at 24. Madison later copied the Journal entry into his notes. *Id.* at 23 n.13. John Lansing, Jr., of New York, who did not arrive until June 2, copied into his own notes the record that his colleague Yates had made. J. LANSING, THE DELEGATE FROM NEW YORK 10, 23-24 (J. Strayer ed. 1939). No delegate seems to have made a summary, let alone a copy, of Pinckney's plan. The document was presumably filed with the secretary, and the Convention voted to refer it to the Committee of the Whole. 1 RECORDS 16 (Journal), 23 (Madison's notes, copied from Journal), 24 (Yates' *Secret Proceedings).* The plan was never taken up either in Committee of the Whole or on the floor of the Convention, and on July 24 it was referred to the Committee of Detail, along with the resolutions that the Convention had adopted and the New Jersey plan that it had rejected. 2 *id.* at 98 (Journal). The original plan, which presumably was turned over to the committee by the secretary of the Convention, has never been found. Shortly after the Convention ended Pinckney published a pamphlet with the rather ambiguous title: *Observations on the Plan of Government Submitted to the Federal Convention, in Philadelphia, on the 28th of May, 1787, by Mr. Charles Pinckney, Delegate from the State of South-Carolina. Delivered at different Times in the course of their Discussions.* The pamphlet is reprinted in 3 RECORDS 106-23. The fact that the observations were admittedly "[d]elivered at different Times" means that subsequent proposals are included along with provisions of the plan originally presented. Even so, the pamphlet comes far closer to embodying Pinckney's initial ideas than does the purported draft of his original plan that he furnished in 1818 to the secretary of state, John Quincy Adams, when the latter was engaged in editing for official publication the original Journal of the Convention, then in his custody. *See id.* at 425 (resolution of Congress authorizing publication, March 27, 1818), 427-28 (letter from Pinckney to Adams, Dec. 30, 1818), enclosing plan purportedly as he first presented it), 431 (Adams' diary, May 16, 1819). The *Journal* was published in 1819 and included the document furnished by Pinckney, which is reprinted in *id.* at 595-601. James Madison and Rufus King, delegates who were still alive, quickly recognized that the printed text could not have been the plan presented by Pinckney at the outset of the Convention. *See id.* at 481-82 (Appendix A). In the early 1830's Madison carefully compiled from the published sources and his own notes massive evidence of the discrepancies involved, particularly elements in the purported plan that Pinckney was on record as opposing in the debates, and provisions that had never been proposed by anyone until late in the Convention. *See id.* at 479-82, 501-15, 531-32, 534-37 (Appendix A). Historical scholarship has sustained Madison's conclusion that the purported text is spurious. Working from all the available evidence, the historian J. Franklin Jameson determined the points that must have been in the authentic Pinckney plan. Having done so he was able to identify as a set of extracts from that plan the two-page manuscript cited here, which was preserved among the papers of James Wilson and is in his handwriting. This portion is printed in 2 *id.* at 158-59; *see id.* at 157 n.15. On the basis of the same evidence it was possible also to identify a second document in the same collection as an outline of the complete Pinckney plan, which is printed in *id.* at 134-37. A reconstructed text of the original plan, embodying direct quotations from the two documents in the Wilson papers and from Pinckney's pamphlet, *Observations,* is in 3 *id.* at 604-09. See Farrand's summary of this sequence of historical investigation in 1 *id.* at xii, xxii; 3 *id.* at 595-609.

> [T]hat none of the persons composing the federal Executive shall on any occasion take command of any troops, so as personally to conduct any enterprise as General, or in other capacity.[186]

The proviso created some lingering interest,[187] though the entire New Jersey Plan itself was, as we have seen, quickly rejected.[188]

Hamilton's Plan of June 18, 1787

Only one plan presented to the Convention during its first two months dealt explicitly and fully with the allocation of power between the executive and legislative branches in both aspects of foreign relations, the making of war and the negotiation of treaties. The plan deserves careful examination, not only because of its content but because it represented the views of the Convention's most outspoken advocate of a highly centralized government and a puissant executive, namely Alexander Hamilton. His attitude being what it was, the most unexpected and striking fact about his plan and the accompanying speech is the complete absence of anything like a belief in "the unrestricted authority of the Executive to take the initial role in setting America's course in world matters"—a concept that is sometimes alleged to have "prevailed" among the framers of the Constitution.[189]

To support this last-mentioned interpretation of the framers' intentions, which is held by many legal authorities and political scientists,[190] it is necessary to construe every contemporary statement fa-

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186 1 RECORDS 244 (Madison's notes, June 15) (resolution 4).

187 Luther Martin, in his report to the Maryland legislature published under the title *Genuine Information*, complained that though some members wished the power of the President as Commander in Chief "to be so far restrained, that he should not command in person," the desired restriction "could not be obtained." 3 RECORDS 217-18.

188 *See* note 174 *supra*.

189 Goldwater, *supra* note 139, at 466. *See also* note 190 *infra*.

190 The doctrine that the Constitution vests in the President virtually plenary power over foreign relations has a long history, even though (as the present study points out) it was not countenanced in the Federal Convention or in the ratification debates that followed. It was first propounded by Hamilton in his "Pacificus" essays of 1793, wherein (as Madison had quickly pointed out) he contradicted many of the statements he had made five years earlier in *The Federalist*, particularly Nos. 69 and 75. *See* notes 254 & 259 *infra*. For a further discussion of Hamilton's views as set out in *The Federalist*, see the discussion in the text accompanying notes 508-14 *infra*.

The great constitutional commentators of the next generation were not impressed by Hamilton's innovation of 1793. Joseph Story, in his discussion of the treaty in his *Commentaries on the Constitution of the United States*, copied into his text almost verbatim long passages from the *Federalist* papers of Hamilton and Jay, including the former's warning that "it would be utterly unsafe and improper to entrust" to the President "the entire power of making treaties." 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE

voring greater authority for the federal government in the handling of foreign affairs as somehow constituting an argument for vesting that authority in executive hands, whether anything was actually said on

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UNITED STATES 361-62 (1833) (quoting from THE FEDERALIST No. 75, at 467 (A. Hamilton)) [hereinafter cited as 3 J. STORY]. But though Story discussed various early differences of opinion concerning the extent of the Senate's role, particularly whether it should advise the President on the instructions to be issued to ministers (3 J. STORY 370-72), no approval was given—indeed no reference was made—to Hamilton's views in the "Pacificus" essays. Instead, borrowing the very phrases that Hamilton had used in No. 75 of *The Federalist*, Story wrote that the "joint possession" of the treaty power by President and Senate "affords a greater security for its just exercise, than the separate possession of it by either." 3 J. STORY 360 (quoting from THE FEDERALIST No. 75, at 468 (A. Hamilton)).

Chancellor James Kent of New York had taken the same position in his *Commentaries on American Law*, writing as follows:

> As treaties are declared by the constitution to be the supreme law of the land . . . it might seem to be more consonant to the principles of republican government, to consider the right of concluding specific terms of peace as of legislative jurisdiction. This has generally been the case in free governments. . . . On the other hand, the preliminary negotiations which may be required, the secrecy and despatch proper to take advantage of the sudden and favourable turn of public affairs, seem to render it expedient to place this power in the hands of the executive department. The constitution of the United States has been influenced by the latter, more than by the former considerations, for it has placed this power with the president, under the advice and control of the senate, who are to be considered for this purpose in the light of an executive council.

1 J. KENT, COMMENTARIES ON AMERICAN LAW 266-67 (1826).

In Philadelphia during these same decades, several of the leading commentators on the American Constitution brought to the task a European background or European legal training, which seemingly inclined them to accept the idea that treaty-making, regardless of theory, would turn out in practice to be an executive function. Thus William Rawle, Philadelphia-born but trained in England at the Inns of Court while in voluntary exile as a loyalist during the Revolution, remarked in his *View of the Constitution of the United States* (first published in 1826) that though the words of the document

> would imply that a treaty, like an act of congress, should in its progress be the subject of joint deliberation . . . the practice has necessarily been otherwise.

Negotiations, he pointed out, are conducted, whether abroad or at home, "under instructions from the president," and "[t]he senate is not consulted in the first process." Finally, "when the treaty is agreed on, the president submits it to the senate." W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 63 (2d ed. 1829). A quarter of a century later this same point of view was stated, tersely and without qualifications, by John Bouvier, a French-born Philadelphia lawyer. In his *Institutes of American Law* he described treaty-making as a process whereby "the president acts, in the first place, independently and alone," with ministers abroad and the secretary of state at home operating "under the instructions of the president." "Until the treaty has been agreed upon," Bouvier asserted flatly, "the senate is not consulted." 1 J. BOUVIER, INSTITUTES OF AMERICAN LAW 30 (1851).

By diminishing the role of the Senate, mid-century commentators necessarily enhanced that of the President. It was the post-Civil War commentators, however, who first exalted the power of the President in foreign affairs to imperial dimensions. The following excerpts, from John Norton Pomeroy's *An Introduction to the Constitutional Law of the United States*, first published in 1868, exhibit the radically new point of view:

> The President is the sole organ of communication between our own and all

the latter point. It is also necessary to presume that anyone who advocated the establishment of a powerful executive branch was intending that power to be used to the full in diplomatic and military

other governments. . . . Our own ministers are nominated by the President. . . . Instructions are sent to them, despatches forwarded, demands made, claims insisted on, principles adopted and enforced, as the President deems proper. . . .

Over all these proceedings the Congress has absolutely no control. . . . Congress may pass resolves in relation to questions of an international character; but these can only have a certain moral weight; they have no legal effect; they cannot bind the Executive. . . . The President has thus intrusted to him a most momentous power . . . . The magnitude of this function may be easily illustrated. The President cannot declare war; Congress alone possesses this attribute. But the President may, without any possibility of hindrance from the legislature, so conduct . . . the diplomatic negotiations with other governments, as to force a war, as to compel another nation to take the initiative; and that step once taken, the challenge cannot be refused. . . .

I repeat that the Executive Department, by means of this branch of its power over foreign relations, holds in its keeping the safety, welfare, and even permanence of our internal and domestic institutions. And in wielding this power, it is untrammelled by any other department of the government; no other influence than a moral one can control or curb it . . . .

But the other branch of this executive function—the treaty-making power—is even more important. . . . The President must, of course, take the initiative in making all treaties. Congress, as such, has nothing to say in the matter. As a treaty is necessarily the result of negotiation, and as such negotiation is exclusively within the province of the President, the Senate having not the least authority to communicate with a foreign government, it is absolutely impossible for that body to dictate a treaty, or to force the Chief Magistrate into any particular line of action. He must negotiate the treaty, make all the stipulations, determine all the subject-matter, and then submit the perfected convention to the Senate for ratification or rejection. They must take his finished work and approve or disapprove.

J. POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 446-48 (1868).

Pomeroy was the authority quoted at greatest length in the 1906 speech of Senator John Coit Spooner, discussed at length below. See text accompanying note 505 *infra* for excerpts from that speech. Spooner added a grace-note to the argument by asserting that the doctrine propounded in Pomeroy's thirty-eight-year-old treatise had been the theory accepted "[f]rom the foundation of the Government." 40 CONG. REC. 1418 (1906).

A recent article by Senator Barry M. Goldwater places even greater emphasis on the contention that these ideas motivated the framers of the Constitution. Goldwater writes:

The Framers of the Constitution invested the Chief Executive with the foreign policy-making powers because of a realization that a single individual with these powers would not be disturbed by politics of the moment. He would look to the long course of history and use his powers more wisely than a Congress which is constantly looking toward the political results. It is my thought that the Founding Fathers understood that a Congress divided amongst different minority interests might in some crucial moment of history be loath to give proper direction to a single necessary American course. Thus they found it proper to place the power of external affairs in a single person where the probability of minority weight would be much less likely to have this effect.

The emphasis of the Framers upon planning a government which would be guided by a leader who would act on behalf of a single people with a single purpose appears both in the writings of the Federalist Papers and the debates of the First Congress. . . .

Though the debate centered on the Executive power to remove officers who would be appointed with the consent of the Senate, the concept which prevailed

affairs, even though the discussion in its original context had to do solely with the efficient administration of internal affairs and the vigorous execution of domestic laws.

The question is one of evidence. What in fact was said about the conduct of foreign relations, and how much emphasis was actually placed on the matter, during the discussions that led to the establishment of an independent and forceful presidency? Hamilton's speech and plan provide an excellent test case, for he advocated both a powerful central government and a powerful executive. Did he therefore propose "to place the power of external affairs in a single person" as the framers are said to have "found it proper" to do.[191] Tedious though it may be to sift and winnow every detail of his speech, only such a procedure can make clear what Hamilton was *not* saying as well as what he was. Fortunately, Hamilton's own outline, detailed although skeletonized, has been preserved; there also exist four extensive reports of his speech, taken down at the time by four different members of the Convention,[192] two of whom were political antagonists of his, eager for damaging evidence of monarchical or aristocratic heresies on his part. Under the circumstances, there is no likelihood whatever that a vigorous advocacy of "the unrestricted authority of the Executive to take the initial role in setting America's course in world matters"[193] would have escaped notice.

Hamilton brought his plan forward on the 18th of June, three days after Paterson presented the New Jersey proposals.[194] His speech, one of the most important of his entire career, was a forthright statement of his basic political philosophy, with no attempt to disguise its unpopular features. He deplored what he felt to be the half-way measures proposed not only in the newly-submitted New Jersey Plan but also in the earlier resolutions of the Virignia delegation.[195] With respect to the latter, he exclaimed: "[W]hat even is the Virginia plan,

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in the debates and votes that day is the same concept which supports the unrestricted authority of the Executive to take the initial role in setting America's course in world matters.

Goldwater, *supra* note 139, at 465-66 (footnotes omitted).

191 Goldwater, *supra* note 139, at 465-66.

192 All five documents are reprinted in 4 THE PAPERS OF ALEXANDER HAMILTON 178-211 (H. Syrett ed. 1962) [hereinafter cited as HAMILTON]. In addition to Hamilton's own document, the other reports were provided by James Madison, Robert Yates, John Lansing, and Rufus King.

193 Goldwater, *supra* note 139, at 465.

194 4 HAMILTON 178.

195 *Id.* at 195-202 (Yates).

but *pork still, with a little change of the sauce.*"[196] A loosely-knit confederation, like that which the existing Articles provided, was bound to be "weak and distracted." The remedy, Hamilton insisted, was to "establish a general and national government, completely sovereign, and annihilate the state distinctions and state operations."[197] He spoke of turning the states into "something like limitted Corporations,"[198] and he even mentioned favorably their ultimate extinction, though announcing that he would not "shock the public opinion by proposing such a measure."[199] No stronger plea for centralization was ever spoken on the floor of the convention.

Equally strong was Hamilton's plea for a forceful executive. The powers necessary for an effective central government could not, he argued, be safely delegated to the old Congress, organized as it was without adequate checks and balances. To give it additional powers would be to "establish a *sovereignty* of the worst kind, consisting of a single body."[200] Especially needed was an effective executive. "[C]an there," Hamilton asked, "be a good Gov[ernmen]t without a good Executive[?]"[201] Announcing his opinion that "the British government forms the best model the world ever produced,"[202] he alluded so freely to the advantages of monarchy[203] that it was easy for his critics to accuse him of wishing to give up republican principles entirely.[204] What he specifically proposed was life tenure for the chief executive,[205] and he believed that by making him impeachable (a provision that he insisted on), Americans could prevent their chief executive from be-

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196 *Id.* at 202 (Yates) (emphasis in original).

197 *Id.* at 198 (Yates); *see id.* at 179 (Hamilton), 190 (Madison), 206 (King).

198 *Id.* at 204 (Lansing); *see id.* at 199 (Yates).

199 *Id.* at 191 (Madison); *see id.* at 204 (Lansing).

200 *Id.* at 199 (Yates) (emphasis in original); *see id.* at 181 (Hamilton).

201 *Id.* at 193 (Madison); *cf. id.* at 186 (Hamilton).

202 *Id.* at 200 (Yates); *see id.* at 184 (Hamilton), 192 (Madison), 204 (Lansing); *cf. id.* at 207 (King).

203 *See id.* at 186 (Hamilton), 192-94 (Madison). Two versions stressed that the proposed system would be an elective monarchy which would have built-in safeguards against the problems that befell elective monarchies in the past. *See id.* at 201 (Yates), 204 (Lansing).

204 *See, e.g.*, 3 RECORDS 418 (letter from Gouverneur Morris to Robert Walsh, February 5, 1811). Much was written and spoken in response to the accusation. *See id.* at 395-96 (Hamilton), 397 (Timothy Pickering to Hamilton, April 5, 1803), 397-98 (Hamilton to Pickering, September 16, 1803), 409-10 (Governor Lewis to unknown correspondent), 417-18 (John W. Eppes to Madison, November 1, 1810), 432-33 (memoirs of John Quincy Adams), 466 (T. H. Benton), 480-81 (journal of Jared Sparks).

205 *See* 4 HAMILTON 193 (Madison), 201 (Yates), 204 (Lansing), 207 (King).

coming the equivalent of a British king.[206] Nevertheless, Hamilton was by no means afraid of executive power itself. He summed up his views in a telling sentence: "Let one executive be appointed who dares execute his powers."[207]

Hamilton was concerned, as were many of his colleagues and contemporaries, about the weakness or potential weakness of the new United States in foreign affairs. Under which of the two main headings of his discourse—the need for strengthening the central government or the need for creating a powerful executive—did he deal with the problems of war and peace? To the extent that he discussed them at all, he treated them, as had the leaders who corresponded with one another in the pre-Convention period, as problems resulting from the inadequacy of the powers granted by the states to the Confederation.

Under the rubric of "Objections to the present confederation," Hamilton's outline listed two shortcomings affecting foreign relations: "Power of treaty without power of execution," and "Common defence without power to raise troops—[or] have a fleet—[or] raise money."[208] In his speech he noted that "[d]oubts have been entertained whether the United States have a Right to build a Ship or raise a Reg(imen)t in Time of Peace."[209] He himself believed the power had not been delegated, and that the government under the Confederation "cannot therefore take any preparatory measure before an enemy is at your door."[210] Finally, Hamilton reminded his hearers that the government must "protect your rights against Canada on the north, Spain on the south, and your western frontier against the savages,"[211] and he asked: "How is the expense of supporting . . . these important matters to be defrayed?" and "How are forces to be raised?"[212] The answers, it was obvious, were not to be obtained by creating a powerful executive but by broadening the legislative powers of Congress.

When he did discuss the importance of a powerful executive, Hamilton's emphasis was on the need for internal stability—for that union of "public strength with individual security" which he as-

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206 *Id.* at 201 (Yates), 204 (Lansing). *See also* THE FEDERALIST No. 69 (A. HAMILTON) for a comparison of the positions of the American President and the British King.

207 4 HAMILTON 201 (Yates).

208 *Id.* at 179 (Hamilton).

209 *Id.* at 203 (Lansing); *see id.* at 191 (Madison). Yates' version included even more positive language. "Examine the present confederation, and it is evident they can raise no troops nor equip vessels before war is actually declared." *Id.* at 199.

210 *Id.* at 199 (Yates).

211 *Id.* at 198 (Yates).

212 *Id.* at 198, 199 (Yates).

cribed to the English system.[213] His own outline states in staccato phrases the essence of this particular argument:

> Effect of the British government.
> A vigorous execution of the laws—and a vigorous defence of the people, will result.
> Better chance for a good administration.
> It is said a republican government does not admit a vigorous execution.
> It is therefore bad; for the goodness of a government consists in a vigorous execution.[214]

Another of Hamilton's arguments for a powerful executive, an argument likewise unconnected with foreign affairs, is arranged almost as a syllogism in his outline:

> Society naturally divides itself into two political divisions—the *few* and the *many*, who have distinct interests.
> If government in the hands of the *few*, they will tyrannize over the many.
> If (in) the hands of the many, they will tyrannize over the few. It ought to be in the hands of both; and they should be separated.
> This separation must be permanent.
> . . . .
> And if separated, they will need a mutual check.
> This check is a monarch.[215]

Hamilton's argument, in short, was that a powerful executive is needed for two principal reasons, both of them domestic—to provide an efficient administration, and to protect the rights of the public and the contestants in the unending struggle, basically economic in character, between the few and the many. When Hamilton turned his attention to the role of the executive in the conduct of foreign affairs, the remarks in his speech were off-hand and vague. There were, in fact, only two clear allusions to the matter. The first was simply the contention that an executive for life is the most reliable representative of the nation in its dealings with foreign powers. Hamilton's outline stated:

> The advantage of a monarch is this—he is above corruption—he must always intend, in respect to foreign nations, the true interest and glory of the people.[216]

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213 *Id.* at 192 (Madison); *see id.* at 200 (Yates), 204 (Lansing), 207 (King).

214 *Id.* at 186 (Hamilton).

215 *Id.* at 185 (Hamilton) (emphasis in original).

216 *Id.* at 186 (Hamilton).

As an historical generalization this was dubious to begin with, but it became more so as Hamilton elaborated it in his speech. "[O]ne of the weak sides of Republics," he asserted, "was their being liable to foreign influence & corruption."[217] By way of contrast, Hamilton offered an observation that can only be labelled astonishing:

> The Hereditary interest of the King was so interwoven with that of the Nation, and his personal emoluments so great, that he was placed above the danger of being corrupted from abroad.[218]

One wonders if Hamilton had ever read of the secret Treaty of Dover of 1670 and the £741,985 that Charles II received from Louis XIV in the next eight years, part of the *quid pro quo* being English participation in Louis' war against the Dutch.[219]

Hamilton's other comment on the role of the executive in foreign affairs can hardly have been reassuring to his auditors. Urging again the desirability of life tenure for the chief executive, Hamilton argued that a term as short as seven years would make the executive so dangerous that he "ought to have but little power." His reasoning was as follows:

> He [the executive] would be ambitious . . . and as the object of his ambition w[oul]d be to *prolong* his power, it is probable that in case of a war, he would avail himself of the emergence [*sic*], to evade or refuse a degradation from his place.[220]

Far more enlightening than these somewhat odd remarks were the provisions of the plan of government that Hamilton sketched out in the latter part of his speech.[221] Centralization, for example, was

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217 *Id.* at 193 (Madison).

218 *Id; see id.* at 200 (Yates); *cf. id.* at 204 (Lansing).

219 *See* G. CLARK, *supra* note 81, at 75-76.

220 4 HAMILTON 194 (Madison).

221 Hamilton's plan was copied by Madison into his notes, and this version, printed at 1 RECORDS 291-93 (June 18), is the one quoted herein, unless otherwise stated. Hamilton examined Madison's records shortly after giving the speech and acknowledged its correctness, suggesting only a few minor verbal changes which Madison duly incorporated. *See id.* at 293 n.9. At least nine versions exist, one being Hamilton's own manuscript, printed at 4 HAMILTON 207-11. Hamilton, however, made a few minor alterations in his own copy after reading it; hence Madison's version is a better historical record.

J. Franklin Jameson, early in the twentieth century, carefully collated the eight texts known to him, and published the results. *See* Jameson, *Studies in the History of the Federal Convention of 1787*, 1 AM. HIST. ASS'N ANN. REP. 87, 144-49 (1902). Five of the versions are reprinted together for easy comparison in DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. DOC. No. 398, 69th Cong., 1st Sess. 979-88 (C. Tansill ed. 1927). One additional version, that of John Lansing, Jr., came to light subsequent to those compilations, and is printed in J. LANSING, THE DELEGATE FROM

pushed to the extreme of providing for the governors of the several states to "be appointed by the General Government."[222] Executive authority was exalted by giving the chief executive not only life tenure but also a veto that could not be overridden.[223] Finally, Hamilton assigned specific roles to the executive and to legislative bodies respectively in the conduct of foreign affairs. Much as he admired the English scheme of government, however, he did not propose for a moment to import its doctrine that the powers of peace and war were executive prerogatives. On the contrary, Hamilton took great care in his plan to prevent either the war power or the treaty power from being wielded wholly by one official or one body. The Senate was given "the sole power of declaring war."[224] The chief executive (styled the Governour) would "have the direction of war," but only "when authorized or begun."[225] Finally the Legislature as a whole would, it went without

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NEW YORK 119-22 (J. Strayer ed. 1939). The variants among these versions affect only two of the passages dealing with foreign affairs. *See* notes 224-25 *infra* and accompanying text.

One delegate to the Convention, Robert Yates, included a summary of the plan in his report of Hamilton's speech. 4 HAMILTON 201. It is possible that he incorporated certain "explanatory observations" that Hamilton offered at the end of his speech and that went unreported in other sources, but it is more likely that his variant readings are simply the result of hasty note-taking, as compared with the other members' leisurely copying.

One other version of Hamilton's plan represented his own subsequent elaboration. At a time "near the close of the Convention," Hamilton handed to Madison a draft delineating the Constitution that he would like to have seen the Convention adopt. *See* 3 RECORDS 619 (Appendix F). Besides his own further thoughts, Hamilton incorporated various provisions which the Convention had already adopted and of which he approved. See 4 HAMILTON 253-74 for the complete text of this draft. The changes affecting foreign-policy-making are noted below as "Hamilton's subsequent draft."

222 1 RECORDS 293 (Article 10).

223 *Id.* at 292 (Article 4).

224 *Id.* (Article 6). Yates' summary reads differently: "The executive to have the power . . . to make war or peace, with the advice of the senate." 4 HAMILTON 201. Hamilton's subsequent draft, however, gives the Senate sole power in terms which reaffirm those of the original: "The Senate shall exclusively possess the power of declaring war." *Id.* at 258 (Article 3, section 8).

225 1 RECORDS 292 (Article 4). Several of the other copies (but not Hamilton's manuscript) insert the word "entire" before the phrase "direction of war." DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, *supra* note 221, at 981, 983, 987; 4 HAMILTON 208 & 210 n.11. Hamilton's manuscript does include the clause "to be the Commander in Chief of the land and naval forces and of the Militia of the United States." *Id.* at 208 & 210 n.10. His subsequent draft revives the proviso originally suggested in the New Jersey Plan and states the whole matter as follows:

> He shall be the commander in Chief of the army and navy of the United States and of the Militia within the several states and shall have the direction of war when commenced; but he shall not take the actual command in the field of an army, without the consent of the Senate and Assembly.

Id. at 263 (Article 4, section 10). See the text accompanying note 186 *supra* for the original proviso.

saying, control the power of the purse. So far as other international dealings were concerned, the Governour was "to have with the advice and approbation of the Senate the power of making all treaties."[226] To make sure that the role of the Senate would not be overlooked or downgraded, Hamilton stated the matter twice—the first time (just quoted) as a limitation on the executive, the second time as a positive grant to the Senate of "the power of advising and approving all Treaties."[227] Finally to make clear that ambassadors would not be looked upon as agents and subordinates of the executive alone, appointment procedures were carefully differentiated. The Governour could appoint without any legislative approval the heads of the principal executive departments—Finance, War, and Foreign Affairs. Nevertheless, where "other officers" were concerned, "Ambassadors to foreign Nations" being specifically named, his was a power of nomination only. Reserved to the Senate was "the power of approving or rejecting all appointments" of the sort.[228]

Hamilton frankly conceded that neither the delegates nor the people "out of doors" were ready to adopt such a plan, and therefore he did not "mean to offer the paper he had sketched as a proposition."[229] Accordingly no vote was taken on any of his suggestions. Six days before all matters were turned over to the Committee of Detail, one delegate pointed out that no answer had yet been given to the question whether the chief executive would have a military force "to carry the laws into effect," or whether he would "have the command of the Militia," and he felt that the Committee of Detail ought to have "determinate directions on this great point."[230] Though at least one other member agreed, no resolution on the matter was in fact adopted.[231]

This lack of interest in defining a role for the executive in military and diplomatic matters amounts, in itself, to a refutation of the view that the framers were determined to create a powerful presidency

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226 1 RECORDS 292 (Article 4).

227 *Id.* (Article 6). Hamilton's subsequent draft states the matter even more forcefully: "No treaty shall be made without their advice and consent." 4 HAMILTON 258 (Article 3, section 8).

228 1 RECORDS 292 (Articles 4 & 6). Yates' summary gives the executive power "to send ambassadors," without any qualifications. 4 HAMILTON 201. Hamilton's subsequent draft no longer singles out ambassadors for special mention, but otherwise deals with appointments as before. *See id.* at 258 (Article 3, section 8), 263-64 (Article 4, section 10).

229 4 HAMILTON 194-95 (Madison).

230 2 RECORDS 69 (Madison's notes, July 20) (speech of James McClurg).

231 *Id.* at 70 (Madison's notes) (remarks of James Wilson). Rufus King nonetheless felt that the matter could be left to the "discretionary power" of the Committee of Detail. *Id.*

for the purpose of giving it primary responsibility for foreign affairs. The colloquy just quoted took place half way through the proceedings of the Convention, at a time when the major constitutional proposals had been worked over twice—first in committee of the whole for three weeks, then for five weeks in formal convention. In every area of concern *except* foreign affairs, the great points at issue had been fully debated, and on many crucial questions compromises had been hammered out. By the 26th of July more than a score of specific resolutions had been adopted, providing a tolerably clear outline of the kind of federal system that the Convention had decided to establish, so far, at least, as domestic functioning was concerned. On that date matters were turned over to a Committee of Detail, whose five members were charged with "reporting a Constitution conformably to the Proceedings" of the Convention thus far.[232] The Convention then adjourned for ten days to permit the committee to do its work. Finally on the 6th of August the delegates received from the committee a printed draft of 23 articles in which the resolutions adopted during the preceding two months were arrayed for the first time in the format of an actual constitution.[233]

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232 *Id.* at 85 (Journal, July 23). *See* note 151 *supra*. This original resolution, which set up the Committee of Detail, reserved for further consideration by the Convention everything that "respects the Supreme Executive." 2 RECORDS 85. There were three additional days of debate which concentrated on the manner of choosing the President. *See id.* at 97-128. But this problem was turned over to the Committee of Detail along with all others on July 26. *See id.* at 117 (Journal), 128 (Madison's notes). The committee was deliberately kept small. A motion that it consist of one member from each state was defeated, as was another for a committee of seven. *Id.* at 77 (Madison's notes, July 21).

Men of a judicious and conciliatory temper were chosen for the Committee. Three were future members of the United States Supreme Court (two of them serving as Chief Justice): John Rutledge of South Carolina, chairman of the committee; Oliver Ellsworth of Connecticut; and James Wilson of Pennsylvania. The other two were Edmund Randolph, Governor of Virginia, who had introduced the original Virginia Plan; and Nathaniel Gorham of Massachusetts, who had served both as president of Congress and as chairman of the Committee of the Whole at the Convention. *See id.* at 106 (Madison's notes, July 24).

233 2 RECORDS 177-89.

The resolutions that were turned over to the committee by the Convention are compiled in *id.* at 129-34 (Committee of Detail). Three drafts that circulated within the committee, plus miscellaneous papers, are printed in full or in part in *id.* at 134-75 (Committee of Detail); 4 *id.* at 37-51 (rev. ed. 1937) [all subsequent citations to volume 4 involve revisions in the original manuscripts made or discovered subsequent to the publication of the first edition in 1911].

The resolutions adopted by the Convention provided, of course, the primary mandate of the committee, but the committee was also expected to take from the old Articles of Confederation such provisions possessing continuing relevance which had not been altered or repudiated by action of the Convention. Furthermore, both the Pinckney Plan and the New Jersey Plan were officially referred to the committee for whatever use it might choose

XII. The Draft Constitution of the Committee of Detail, June 18, 1787

Though a multitude of specific points had to be settled by the Committee of Detail—its title was no misnomer—the major task confronting it was to define with precision the expanded powers being conferred on the federal government and to allocate these powers among the three branches of the reorganized constitutional system. The Convention had indicated quite clearly how these various agencies were to be set up and how their members were to be chosen. Yet the Convention failed to agree on any satisfactory listing of the authority and functions of the new executive branch, and it had dealt in broad generalities when describing the new powers to be conferred on the federal government as a whole. Whereas the Articles of Confederation had carefully enumerated the powers delegated to Congress, the resolution adopted by the Convention took the form of a blanket authorization resolving

> [t]hat the Legislature of the United States ought to possess the legislative Rights vested in Congress by the Confederation; and moreover to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation.[234]

In some ways the resolution was ambiguous. Its first clause seemed to suggest enumeration, and the remaining two-thirds of the resolution could therefore be interpreted as furnishing the guide-lines for an expanded enumeration. On the other hand, when the question of enumeration had been put to the Convention on the 16th of July, a tie vote resulted. Five states voted in favor of sending this particular resolution to committee "to the end that a specification of the powers comprised in the general terms, might be reported." Five states voted against committal, which therefore lost.[235] The negative vote, however,

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to make of them. 2 *id.* at 128 (Madison's notes, July 26). Hamilton's Plan, though not officially of record, clearly had some influence. And the two preceding months of debate were, of course, in the minds of the five committee members.

234 2 Records 131-32 (Committee of Detail). This resolution originated as Article 6 of the Virginia Plan of May 29. *See* 1 *id.* at 21 (Madison's notes). The clause reading "to legislate in all Cases for the general Interests of the Union" was, however, added on July 17, on a motion made by Gunning Bedford of Delaware, seconded by Gouverneur Morris of Pennsylvania, and adopted by a vote of six states to four. 2 *id.* at 21 (Journal), 26-27 (Madison's notes).

235 2 Records 17 (Madison's notes). The New Jersey Plan, offered on June 15 as an alternative to the Virginia Plan, had carefully enumerated the additional powers to be given

was not necessarily a vote against the principle of enumeration. Nathaniel Gorham, who became one of the five members of the Committee of Detail, opposed the motion for referral on the ground that the Convention was "now establishing general principles, to be extended hereafter into details which will be precise & explicit."[236] Such, indeed, was the procedure which the Committee of Detail adopted. This course might well have been foreseen when the Convention elected Rutledge chairman of the committee, for it was he who had made the referral motion of the 16th of July for the sake of bringing about "a specification of the powers comprised in the general terms."[237]

This decision for enumeration obliged the committee not only to spell out in specific detail the new powers that the federal government would receive, but also to take a fresh and searching look at each of the powers already granted to the Confederation by the existing Articles. On the basis of this careful scrutiny, moreover, the committee could proceed to make the kind of decision that the Convention had been reluctant to make—to wit, whether a power possessed by the old Congress was truly a legislative power or whether, being of some other nature, it ought rather to be vested in the newly created executive branch or in the judiciary. Subjected to analysis like this, many existing grants of authority were seen to be conglomerations, and the committee accordingly dissected them into their component parts and distributed the fragments to different bodies. In a few complex and delicate areas legislative and executive elements were so inextricably intertwined that the committee had to make provision for certain powers to be exercised jointly.

These problems arose with particular acuteness in connection with the allocation of authority in the conduct of foreign relations—the realm with which, of course, we are here primarily concerned. The Articles of Confederation had vested in Congress—on paper at least—

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the federal government. *See* 1 *id.* at 243-44 (Madison's notes) (Articles 2 & 3). In the roll call on July 16, however, New Jersey's vote was cast against referral, while Virginia's was cast in favor of referral and hence of enumeration. The four other states that voted with Virginia were Connecticut, Maryland, South Carolina and Georgia. 2 *id.* at 15 (Journal), 17 (Madison's notes). The next day, four of the five voted against Bedford's expansive grant of power. *Id.* at 24 (Journal), 27 (Madison's notes). But the resolution was adopted six to four when Maryland defected from this group. *See* note 208 *supra.*

236 2 RECORDS 17 (Madison's notes).

237 *Id.* Three of the five members of the Committee of Detail, it should be noted, came from states that had voted for enumeration on July 16. *See* notes 232 & 235 *supra.* Moreover, Randolph, a committee member, had vehemently opposed Bedford's proposal, exclaiming that "[i]t involves the power of violating all the laws and constitutions of the States." 2 RECORDS 26 (Madison's notes, July 17).

so complete a monopoly of the powers of war and peace that the Committee of Detail was not faced with the task of working out precise definitions of new powers in this realm to be delegated to the federal government. Its task was to quarry out from the mass of powers already possessed by Congress those that might appropriately be made the building stones of the new executive and judicial edifices.

It will be well to look at a few of the powers that the Articles had delegated to the old Congress and to note what disposition was made of them in the draft constitution reported by the Committee of Detail on the 6th of August 1787. The ninth article of the Confederation—the provision enumerating the powers of the old Congress—had begun by vesting in it "the sole and exclusive right and power of determining on peace and war."[238] This treatment of the so-called power of peace and war as if it were in reality a single indivisible type of authority instead of a pair of related but easily distinguishable powers, was characteristic of English thinking on the matter, as we have observed in Blackstone's *Commentaries*.[239] At the beginning of the Convention, delegates still bracketed the two powers, while at the same time insisting (in opposition to English precedent but in accord with the precedent of the American Articles) that both types of authority were legislative in nature.[240] What the Committee of Detail recognized was that the two elements traditionally linked in a single phrase were in fact perfectly separable, and it therefore proceeded to separate them. The Legislature of the United States—that is to say, the two houses acting concurrently, with final approval by the President—was empowered to "make war," whereas the power to "make treaties" was vested exclusively in the upper house, the Senate.[241]

The Committee of Detail, though it separated the war power from the treaty-making power, continued to look upon both as essentially legislative. It was obvious, however, that certain aspects of each partook of an executive character, and that even the judiciary might be given some responsibility. Accordingly the Committee of Detail carried even further its process of subdividing the traditional delegations of power

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238 *See* text accompanying note 114 *supra*.

239 *See* text accompanying note 20 *supra*.

240 *See* text accompanying notes 163-69 *supra* (debate of June 1).

241 2 RECORDS 182, 183 (draft constitution reported by the Committee, Article 7, section 1, clause 14, and Article 9, section 1). The committee also eliminated a tautology that was present in the traditional English analysis and in the Articles, both of which listed the power of making or entering into treaties as something quite different from the power of making peace. *See* text accompanying notes 19, 20, 114 & 116 *supra*. The Committee of Detail simply eliminated the redundant power of determining on peace.

and redistributing the components among different agencies of government. One illustration of this carefully considered fragmentation is worth citing. English tradition had recognized as a royal (and thus an executive) prerogative "the sole power of sending ambassadors to foreign states, and receiving ambassadors at home."[242] The Articles of Confederation transferred this power intact to Congress.[243] The Committee of Detail, however, split it in two. Recognizing that the envoys appointed by the United States, not the envoys accredited to it, were the ones who would speak for the nation and should therefore be responsible to the treaty-making authority, the committee vested in the Senate the power "to appoint Ambassadors," while assigning to the President the rather more ceremonial function of receiving them.[244]

Of crucial importance, of course, were the decisions of the Committee of Detail that allocated among the several branches the powers connected with war and those connected with treaty-making. With respect to the former, the committee continued to use the vaguely inclusive phrase "make war" to describe the authority of the federal legislature, but it carefully eliminated the clause of the Confederation that had given the old Congress the power of "directing [the] operations" of the land and naval forces of the union.[245] The Continental Congress had recognized the need for unified command when it unanimously appointed George Washington commander in chief on the 15th of June 1775, less than two months after the beginning of hostilities at Lexington and Concord. When the Articles of Confederation were drawn up more than a year later, the power to make such an appointment was explicitly vested in Congress; but authority was divided by the ambiguous, if not outright contradictory, provision just quoted, which seemed to give Congress rather than the commander the responsibility of "directing" military operations. The Committee of Detail eradicated such past and potential conflicts of authority by making the President *ex officio* commander in chief of all the armed forces, including the militia of the several states. It also transferred to him the authority (previously vested in Congress) not only to "commission all the officers of the United States" but also to "appoint officers in all cases not otherwise provided for by this Constitution."[246] The President as com-

242 *See* text accompanying note 18 *supra*.

243 *See* text accompanying note 115 *supra*.

244 2 RECORDS 183, 185 (Article 9, section 1; Article 10, section 2). *See* note 254 *infra* and accompanying text.

245 *See* text accompanying notes 121-22 *supra*.

246 2 RECORDS 185 (Article 10, section 2).

mander in chief was thereby empowered both to appoint and to commission all military and naval officers under his command, there being in the draft constitution no specified procedures for the appointment of any officer other than the President himself, a treasurer, the judges of the Supreme Court, and ambassadors.[247] Though the clause concerning "directing" military operations was not transferred to the executive article, its elimination from the legislative one made the authority of the commander in chief unambiguous. By permanently annexing to the presidency the title and functions of commander in chief, the Committee of Detail seems clearly to have intended exactly what Hamilton intended when in his plan of the 18th of June he proposed that the chief executive should "have the direction of war when authorized or begun." [248]

Everything necessary to secure unity of command over the armed forces and unhampered direction of military operations in wartime was vested in the President by the draft constitution—indeed more unreservedly than by the Constitution finally adopted.[249] At the same time, everything connected with determining the size of the armed forces, with actually raising the troops and providing money and material, and with deciding whether and when war should be waged—in short, everything necessary to guarantee that the armed forces would be used to serve the purposes of the nation rather than the will of the commander—was vested by the Committee of Detail clearly and unequivocally in legislative hands. This vital control was spelled out, succinctly but comprehensively, in the form of a cluster of specific grants to the federal legislature, comprising the power:

> To make war;
> To raise armies;
> To build and equip fleets;
> To call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions . . . .[250]

The first of these clauses—"To make war"—was broader and more in-

247 *See id.* at 182, 183, 185 (Article 7, section 1, clause 9; Article 9, section 1; Article 10, sections 1 & 2).

248 See text accompanying note 225 *supra*.

249 The Constitution as adopted gives the President command of the militia only "when called into the actual Service of the United States." U.S. CONST. art. II, § 2, cl. 1. The draft of the Committee of Detail, by comparison, put no such limitation on the President. *See* 2 RECORDS 185 (Article 10, section 2). Furthermore, the President's power to appoint officers was modified in the finished Constitution so as to require Senate confirmation. U.S. CONST. art. II, § 2, cl. 2.

250 2 RECORDS 182 (Article 7, section 1, clauses 14-17).

clusive than the corresponding clause of the Articles of Confederation, which spoke of the "power of determining on . . . war."[251] Whatever else it might mean, therefore, the power to "make war" must at the very least have included the power of "determining on" war. The Committee of Detail, one may safely say, was attempting to make sure that the nation would embark on war only for purposes clearly understood and openly approved by the legislative representatives of the people.

Treaty-making, the other crucial aspect of foreign affairs, was dealt with in the draft constitution as a special case, neither wholly legislative nor wholly executive. In the first place, it was divorced completely from the power to make war. In the catalogue of powers vested in the legislature as a whole (and thus requiring concurrent action by both houses), a wide range of matters relating to war and to offenses of an international character were specifically mentioned, but there was not a single word bearing on the negotiation of treaties.[252] In the executive article ample powers of military command were vested in the President, but no such copious authority was bestowed upon him in connection with peaceable negotiations.[253] The only diplomatic function that the President was authorized to perform on his sole responsibility was that of receiving ambassadors. This power was separated completely from the power to appoint foreign envoys, while at the same time being linked (as part of the same sentence) with the power to "correspond with the supreme Executives of the several States."[254] Thus,

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251 See text accompanying note 114 *supra*.

252 *See* 2 RECORDS 181-82 (Article 7, section 1).

253 *See id.* at 185-86 (Article 10, section 2).

254 *Id.* at 185 (Article 10, section 2). The reference to domestic communications with state governors was subsequently deleted as unnecessary. *Id.* at 411 (Journal, August 25), 419 (Madison's notes). The completed Constitution reads: "[H]e shall receive Ambassadors and other public Ministers." U.S. CONST. art. II, § 3. The year following the convention, Hamilton described this function as "more a matter of dignity than of authority," insisting that it would be "without consequence in the administration of the government." THE FEDERALIST No. 69, at 433 (A. Hamilton). He also defended the arrangement on the grounds of convenience, pointing out that it eliminated the "necessity of convening the legislature, or one of its branches, upon every arrival of a foreign minister." *Id.* Reversing himself five years later, Hamilton cited that clause as one foundation for an argument that the Constitution vested in the President major discretionary powers in the area of foreign affairs. 15 HAMILTON 39, 41, 42 (1969) ("Pacificus" No. 1). *See* note 259 *infra*. In a detailed rebuttal, Madison quoted with telling effect Hamilton's earlier views as expounded in *The Federalist*, and proceeded to give his own interpretation of the clause in question. It had, said Madison, little purpose beyond "pointing out the department of the government most proper for the ceremony of admitting public ministers, [and] of examining their credentials;" hence "it would be highly improper to magnify the function into an important prerogative." 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 631 (1865) ("Helvidius" No.

in the realm of diplomacy, the President was in effect made the secretary-general of the union, handling official communications, foreign and domestic.

The power to make treaties, together with the power to appoint the ambassadors who would be essential agents in the negotiation of those treaties, was unhesitatingly classified by the Committee of Detail as a legislative power, but not, however, as a legislative power to be wielded by Congress as a whole. As one of the preliminary memoranda of the committee makes clear, its procedure was to first identify all the powers that could be considered legislative and then to pick out from the entire mass certain "powers belonging peculiarly to the [house of] representatives" and certain others "destined for the senate peculiarly." Among the latter were the powers of making treaties and of appointing ambassadors.[255] The Senate was entrusted with these high powers because its small size would make secrecy easier to preserve and because its members (thanks to the indirect mode of their election and the long tenure of office allowed them) could be expected to resist popular hysteria and improper pressure by special interests. Accordingly the first section of the article detailing the powers of the Senate read as follows in the draft constitution reported by the committee: "The Senate of the United States shall have power to make treaties, and to appoint Ambassadors, and Judges of the supreme Court."[256] The President was

3) [hereinafter cited as 1 MADISON]. Under the Confederation, Congress had received foreign envoys with an elaborate ceremonial that was exceedingly wasteful of time. *See, e.g.*, 3 U.S. DEP'T OF STATE, THE DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES OF AMERICA, FROM THE SIGNING OF THE DEFINITIVE TREATY OF PEACE, 10TH SEPTEMBER, 1783, TO THE ADOPTION OF THE CONSTITUTION, MARCH 4, 1789, at 145-46, 148-49, 150-52 (1837) (John Jay's report on ceremonial etiquette for the arrival of the Spanish envoy Don Diego de Gardoqui in 1785, and subsequent documents on the same subject).

It should be noted that the authority granted to the President in the draft constitution of the Committee of Detail was virtually identical with the executive power that would have been delegated to a Council of State had the initial draft of the Articles of Confederation been adopted in 1776. The provision in question, subsequently rejected, treated the direction of military operations as an executive function and therefore bestowed extensive military authority on the Council, but in the diplomatic realm gave it purely secretarial functions, authorizing it to open and answer official letters "but not to make any Engagements that shall be binding on the United States." *See* notes 131-34 *supra* and accompanying text.

255 4 RECORDS 45-46 (Committee of Detail) (preliminary draft in the handwriting of Edmund Randolph, with emendations by John Rutledge). Randolph originally listed as "powers destined for the senate peculiarly" the following: "1. [T]o make treaties of commerce. 2. to make peace. 3. to appoint the judiciary." Rutledge amended the second to read "to make Treaties of peace. & Alliance," and he added a fourth: "to send Embassadors."

256 2 RECORDS 183 (Article 9, section 1). Since officers were in general to be appointed by the President on his own authority, the vesting elsewhere of the appointment of am-

not so much as mentioned. Though he was to be the channel of communication with foreign powers, he was not even called upon to nominate, let alone to appoint, the ambassadors to be sent abroad. Even the President's veto power over congressional legislation was not extended to senatorially negotiated treaties.[257]

One final point about the committee's draft constitution bears remark. In the Constitution of the United States as finally adopted, Article II begins: "The executive Power shall be vested in a President of the United States."[258] It is frequently argued that the phrase "executive Power" was designed to convey, through its own intrinsic force and without any additional specific grant, the power to conduct the foreign relations of the United States.[259] The English definition of

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bassadors and Supreme Court judges signified that these two classes of officials were not to be considered agents of or dependent on the President. The same independence was provided for the Treasurer, who was to be appointed by ballot of the two legislative houses and thus made responsible to the appropriating rather than to the expending branch of government. *Id.* at 182 (Article 7, section 1, clause 9). This special provision respecting a Treasurer was struck out only three days before the end of the Convention. *Id.* at 614 (Madison's notes, September 14).

257 The veto power applied to "[e]very bill, which shall have passed the House of Representatives and the Senate." *Id.* at 181 (Article 6, section 13). Treaties obviously do not fit that description. As pointed out below, it took subsequent action by the Convention to give the President a role in treaty-making and to make his approval indispensable.

258 U.S. CONST. art. II, § 1, cl. 1.

259 The first fully-developed argument along these lines would appear to have been that which Hamilton offered six years after the Convention in the "Pacificus" essays. *See* note 254 *supra*. He took the position there (foreshadowed neither in his speeches to the Convention nor in *The Federalist*) that the vesting of the "executive Power" in the President constituted a "comprehensive grant," which included not only the powers explicitly mentioned, but major powers connected with foreign affairs. *See* 15 HAMILTON 38-39 ("Pacificus" No. 1). The executive department, commented Hamilton, was

> the *organ* of intercourse between the Nation and foreign Nations . . . the interpreter of the National Treaties in those cases in which the Judiciary is not competent, that is in the cases between Government and Government . . . that Power, which is charged with the Execution of the Laws, of which Treaties form a part [and] that Power which is charged with the command and application of the Public Force.

Id. at 38 (emphasis in original). These powers were "subject only to the *exceptions* and *qu[a]lifications* which are expressed in the instrument," namely the participation of the Senate in appointments, its participation in treaty-making, and the power of Congress to declare war and grant letters of marque and reprisal. *Id.* at 39 (emphasis in original). "With these exceptions," he wrote, "the EXECUTIVE POWER of the Union is completely lodged in the President." *Id.* at 40 (emphasis in original).

Though the grants of power to the executive could properly be derived by implication from general terms and were to be construed broadly, any grants to legislative bodies of war and treaty-making powers—the "exceptions" to executive authority—were to be limited to those expressly mentioned and were to be construed with the utmost strictness. Hamilton's language is worth quoting exactly:

> It deserves to be remarked, that as the participation of the senate in the

executive power is often cited as proof of this contention. But a quite different conception of executive power prevailed in the Convention, as can be seen by a careful scrutiny of the draft constitution of the

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> making of Treaties and the power of the Legislature to declare war are exceptions out of the general "Executive Power" vested in the President, they are to be construed strictly—and ought to be extended no further than is essential to their execution.

Id. at 42. Hamilton, it is true, was defending Washington's Neutrality Proclamation of April 22, 1793, which was designed to keep the United States from involvement in the war that had resulted from the French Revolution. He could, therefore, suggest a beguiling antithesis:

> It is the province and duty of the Executive to preserve to the Nation the blessing of peace. The Legislature alone can interrupt those blessings, by placing the Nation in a state of War.

Id. In developing this notion of the essentially pacific nature of executive power, Hamilton came close to denying to the President the authority to initiate any sort of belligerent action. It is, he wrote, "the duty of the Executive to preserve Peace till war is declared." *Id.* at 40. In reality, however, his argument would permit the President on his own authority to put the nation into a position that would make war inescapable. Thus he wrote:

> [T]he right of the Executive, in certain cases, to determine the condition of the Nation . . . may consequentially affect the proper or improper exercise of the Power of the Legislature to declare war. . . . [by] establish[ing] an antecedent state of things which ought to weigh in the legislative decisions.

Id. at 41-42. He asserted unequivocally that the power to declare war "naturally includes the right of judg[ing] whether the Nation is under obligations to m[ake] war or not," and that since "the Legislature can alone declare war," it "can alone actually transfer the nation from a state of Peace to a state of War." *Id.* at 40, 42.

In refuting Hamilton, Madison quoted *The Federalist* Nos. 69 & 75, both written by Hamilton and both contradicting his new doctrine. In the first of the "Helvidius" letters, Madison examined Hamilton's contention that "'the participation of the senate in the *making of treaties*'" is one of the "'*exceptions* out of the general *executive power*, vested in the president.'" Such an assertion implied (as Madison pointed out with impeccable logic) that in the absence of such an exception the treaty-making power would belong exclusively to the executive. 1 MADISON 613 ("Helvidius" No. 1) (quoting from 15 HAMILTON 42 ("Pacificus" No. 1)) (emphasis added by Madison). In refutation Madison quoted Hamilton's statement in *The Federalist* that the treaty-making power

> "will be found to partake *more* of the *legislative* than of the *executive* character, though it does not seem strictly to fall within the definition of either of them."

1 MADISON 620 ("Helvidius" No. 1) (quoting from THE FEDERALIST No. 75, at 466 (A. Hamilton)) (emphasis added by Madison). On a second point, Hamilton's inflation of the clause empowering the President to receive ambassadors into a wholesale grant of authority over the conduct of foreign relations, Madison quoted from the 69th number of *The Federalist*, Hamilton's assurance that this power was "'more a matter of *dignity* than of *authority*'" and would "'be *without consequence* in the administration of the government.'" 1 MADISON 632 ("Helvidius" No. 3) (quoting from THE FEDERALIST No. 69, at 433 (A. Hamilton)) (emphasis added by Madison). Finally, Hamilton's general argument for comprehensive presidential authority in negotiating treaties was met by Madison by quoting from Hamilton's 75th *Federalist* the paragraph concluding:

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

Committee of Detail. Article X of that draft, employing the same general phraseology as Article II of the completed Constitution, announced: "The Executive Power of the United States shall be vested in a single person" to be styled the President.[260] In this document, the immediate ancestor of the Constitution finally adopted, "executive power" did not include, and could not have been supposed by any member of the Convention to include, the crucial powers to "make war" or to "make treaties" or to "appoint ambassadors," for these particular powers were expressly delegated to legislative bodies. Historically speaking, the American constitutional term "executive power" cannot be defined by reference to English or other foreign usage. In employing the phrase, as they did throughout the Convention and in the completed Constitution, the framers consistently rejected many of its traditional connotations. They did so by the simple act of explicitly assigning to the legislative branch many of the powers which other systems labelled "executive." The original intent of the Constitution with respect to the meaning of "executive power" can only be ascertained by noting the kinds of authority that the framers withheld from the executive as well as those they vouchsafed to it.

XIII. THE CONSTITUTIONAL CONVENTION: FINAL SIX WEEKS OF COMPROMISE AND DECISION, AUGUST 6-SEPTEMBER 17, 1787

The report of the Committee of Detail came at a point some three-fifths of the way through the labors of the Convention. Deliberations had begun ten weeks and a half earlier, and exactly six weeks remained before the Convention would wind up its work and submit the finished Constitution to public consideration and ultimate ratification. During this final period of debate every clause—one might almost say, every word—came under scrutiny. Some important provisions were added, but for the most part the Convention was engaged in examining and either approving or modifying the specific details of the draft constitution which the Committee of Detail had prepared.[261] Thus, an objec-

1 MADISON 644-45 ("Helvidius" No. 4) (quoting from THE FEDERALIST No. 75, at 467-68 (A. Hamilton)) (emphasis added by Madison).

260 2 RECORDS 185 (Article 10, section 1).

261 In general, the procedure was to take up each clause in order, but when controversy developed, the clause in question was likely to be postponed or referred to a committee for possible compromise. Moreover, topics were often brought forward in other than their expected order because one subject could easily lead to another. Thus the provision giving Congress the power to "make war" (Article 7, section 1, clause 14 of the committee draft) came before the Convention in the regular course of the proceedings on the 17th of August, and the one crucial decision, to change the wording to "declare

tive and accurate assessment of the amendments adopted during these six final weeks of debate is absolutely essential if one is to understand the intent of the framers. The crucial historical question is whether the changes indicated an intention on the part of the Convention to alter fundamentally the distribution of authority in foreign affairs which the Committee of Detail had proposed in its original draft of the 6th of August, or whether the changes represented mere modifications of detail, leaving essentially unaltered the balance between legislative and executive power which the committee had sought to establish.

The Power of Congress to "Make" or to "Declare" War

The first of the decisive debates occurred on the 17th of August, eleven days after the Committee of Detail presented its report. At this time the provision delegating to Congress the power to "make war" came up for discussion.[262] The first issue raised was whether Congress as a whole was the proper body to decide on war. Charles Pinckney of South Carolina favored vesting the war power in the Senate alone, because, as he explained, that body would be responsible for making

war," was reached that day. See notes 262-71 *infra* and accompanying text for a discussion of the day's proceedings. However the point had been touched upon briefly four days earlier in connection with another issue. *See* 2 RECORDS 279 (Madison's notes). For another example the crucial debate on the treaty-making power (Article 9, section 1) took place on three separate occasions: first on the 15th of August when general relations between Senate and House were under discussion, then on the 23rd of August when the treaty clause was actually reached, and finally on the 7th and 8th of September when the Convention considered the report of a committee to which the controversial issues had been referred. *Id.* at 297-98 (Madison's notes, August 15), 382-83 (Journal, August 23), 392-94 (Madison's notes), 395 (McHenry's notes), 533-34 (Journal, September 7), 538-41, 543 (Madison's notes), 544 (Journal, September 8), 547-50 (Madison's notes). The so-called Brearley committee, which revised the treaty clause, reported on September 4. *Id.* at 495 (Journal, September 4), 498-99 (Madison's notes). *See* notes 414-20 *infra* and accompanying text.

262 The proceedings are reported in three sources: (1) the Journal, which records five votes three of them by roll call), but no speeches; (2) Madison's notes, which summarize remarks and motions by seven delegates, and report three votes; and (3) McHenry's notes, which provide a 24-word summary, without speakers' names. 2 RECORDS 313-14 (Journal), 318-19 (Madison's notes), 320 (McHenry's notes). Two distinct questions were debated, and in Madison's notes, the speeches overlap, perhaps because they have not been set down in the order in which they were actually delivered. In the account in the text above, the two sets of speeches are separately analyzed. On the question whether the legislature as a whole was the proper repository for the power to make war, speeches were made by Charles Pinckney, Pierce Butler, Elbridge Gerry, Oliver Ellsworth, and George Mason. Though Gerry's exclamation on this point would seem to have been an immediate reaction to Butler's proposal vesting the war-making power in the President, Madison interpolates between them not only the motion of Madison and Gerry to change "make" to "declare," but also Roger Sherman's comment thereon.

treaties and would therefore be "more acquainted with foreign affairs." Furthermore, said Pinckney, action by both houses would make the proceedings "too slow," particularly since the entire Congress "w[oul]d meet but once a year." His colleague from the same state, Pierce Butler, went further and favored "vesting the power in the President," who, he was sure, "will not make war but when the Nation will support it." Immediately an indignant New Englander, Elbridge Gerry of Massachusetts, exclaimed that he "never expected to hear in a republic a motion to empower the Executive alone to declare war."[263] And a liberal Virginian, George Mason, author of that state's precedent-setting Bill of Rights, chimed in, saying that he

> was ag[ain]st giving the power of war to the Executive, because not safely to be trusted with it; or to the Senate, because not so constructed as to be entitled to it.[264]

He said he "was for clogging rather than facilitating war; but for facilitating peace." Arguing the same point, Oliver Ellsworth of Connecticut considered it an advantage, not a disadvantage, that declarations of war might be slow in coming should action by the whole Congress be required. The secrecy and dispatch that could be expected from a smaller body like the Senate was valuable where "intricate & secret negociations" were involved. But, argued Ellsworth, "[i]t sh[oul]d be more easy to get out of war, than into it."[265] No one appears to have spoken in support of the position either of Pinckney or of Butler, and the former's motion to strike out the whole clause was defeated without a roll-call vote.[266]

The power "to make war" having thus been emphatically denied to the executive, the question arose whether a grant to Congress of an exclusive power couched in such extremely comprehensive language might not tie the President's hands as commander in chief in the event of a surprise attack. Madison and Gerry therefore moved to alter the word "make" to "declare," for the clearly announced purpose of "leaving to the Executive the power to repel sudden attacks." Roger Sherman of Connecticut, however, took the position that a commander in chief was empowered to resist an unexpected attack without further authorization, and that there was danger in "narrowing" the exclusive

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263 *Id.* at 318.

264 *Id.* at 319.

265 *Id.*

266 The Journal indicates that Pinckney's motion was rejected after the first vote of the Convention on the proposed change from "make" to "declare" and before the second vote, when the change was accepted. *See id.* at 318. *See also* note 268 *infra.*

power of Congress to "make" war, because of the loophole it might leave for the President to "commence" war. "The Executive," said Sherman, "sh[oul]d be able to repel and not to commence war."[267] At this point in the discussion the Convention rejected the change from "make" to "declare" by a vote of four states in favor to five against. Immediately afterwards, however, a new argument was advanced by Rufus King of Massachusetts, who feared that the original wording might encourage encroachments by Congress on the President's exclusive power of military command. His point was that the phrase "make war" might be interpreted to mean that Congress had power "to 'conduct' it," which was clearly "an Executive function." King's argument convinced the Connecticut delegates and undoubtedly changed the votes of three other states as well, so that the motion was reconsidered and the alteration to "declare" was adopted by a vote of eight states to one.[268]

The discussion ended with a reprise. Pinckney and Butler had begun the debate by proposing to vest the war power elsewhere than in the legislature as a whole. They returned to the fray with a pair of motions. Pinckney moved to strike out the entire clause, but his motion was rejected without a roll call of the states.[269] Butler's proposition was something of an about-face. The Convention having decided, against his wishes, to allow Congress to declare war, Butler now moved that the "power of peace" be placed there also. Gerry who had reacted violently against Butler's first motion supported his second one. Even so, a roll call brought negative votes from ten states and an affirmative from none.[270] Though the Journal recorded a final vote (but not a

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267 *Id.* at 318.

268 The Journal records two separate votes on the question, both by roll call. The change was first rejected, with the five states of New Hampshire, Connecticut, Maryland, South Carolina, and Georgia making up the majority for the negative. When the same question was repeated, only New Hampshire remained in opposition. *Id.* at 313-14. Madison reports only a single roll call, the eight to one vote, but with a change of a state in the middle of the vote. According to him, the only negative votes at the beginning were those of New Hampshire and Connecticut, and the latter was the one that reversed its stand. Madison interpolated a note at this point which read as follows:

> On the remark by Mr. King that "*make*" war might be understood to "conduct" it which was an Executive function, Mr. Elseworth [*sic*] gave up his objection and the vote of Con[necticu]t was changed to—ay.

Id. at 319 (emphasis in original). Undoubtedly this was the remark that led to the second vote as recorded in the Journal. Though the secretary was often careless, it is hardly conceivable that he would have invented for the Journal a second complete roll call if there had been only one.

269 *Id.* at 313, 319.

270 *Id.* at 313, 314, 319.

roll-call one) for adoption of the clause as amended, James McHenry reported that the day's session was "adjourned without a question on the clause" and that final action took place the next day.[271] Whichever the time, the matter was settled for good and all.

Rarely if ever has the alteration of a single word assumed so momentous a significance for constitutional interpretation. That it represented a deliberate and wholesale transfer from legislative to executive hands of the power to involve the nation in war is the contention of those who uphold the legitimacy of what Arthur M. Schlesinger, Jr., has labelled "The Imperial Presidency."[272] According to this interpretation, the Convention, on the 17th of August 1787, voted to divest Congress of the power which the Articles of Confederation had described as the "right and power of determining on peace and war," and which the Committee of Detail had described as the power to "make war." What it left in the hands of the legislature was little more than an empty husk—the largely ceremonial function of declaring to the world (should it appear desirable to do so) the existence of a war to which the President had already committed the nation by exercising his allegedly plenary control of diplomatic negotiations and his power as commander in chief of the armed forces.

Such a sweeping interpretation will not hold water for a moment if attention is paid to what was actually said and if the brief debate is examined in proper perspective. Its brevity is worth noting. The entire debate that resulted in altering "make war" to "declare war" occupied the attention of the Convention for only a fraction of a day. It was the last of four issues discussed on the 17th, and Madison's report of it fills slightly less than a quarter of the space that he devoted in his notes to that day's proceedings. By comparison, one of the other discussions occupies close to a third of the space in Madison's record, and two of the others involved a greater number of speakers than participated in the war-power debate.[273] Though eight different members offered mo-

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271 *Id.* at 313, 320. *See id.* at 333 (McHenry's notes, August 18). Madison's notes are silent on the matter. *See id.* at 319.

272 A. SCHLESINGER, THE IMPERIAL PRESIDENCY (1973).

273 A detailed analysis follows. Quantitative data represents the inches of space in the literal reprint of Madison's notes published by the Department of State in 3 U.S. BUREAU OF ROLLS AND LIBRARY, DEP'T OF STATE, DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1786-1870, H.R. Doc. No. 529, 56th Cong., 2d Sess. (1900). For reference, it should be noted that in this edition, the entire corpus of Madison's notes (exclusive of introductions and appendices) occupies 765 pages; the portion following the report of the Committee of Detail on August 6 occupies 314 pages; and the proceedings of August 17 occupy 6 pages, amounting to 45-1/2 inches. The four debates of that day were as follows: (1) on the method of appointing a treasurer, 6 different speakers, 2

tions or comments on the making of war, ten felt impelled to speak on the clause empowering the federal legislature to "subdue a rebellion in any State." On the far more technical question of punishing felonies on the high seas and other offenses of a specialized character, nine different delegates stated their views. This particular discussion was, in fact, the longest of the day, and its outcome—like the outcome of the war-power debate—was a change of wording. The draft of the Committee of Detail had empowered Congress to "declare the law and punishment" of these various offenses. After a discussion of the meaning of various alternative terms—"declare," "designate," and "define"—and after two roll-call votes, the provision emerged as a grant of power to "define and punish" the same group of enumerated offenses. This concern with subtle shades of meaning, this careful refinement of language in the interest of precision, furnished the context in which, later the same day, the Convention voted to change "make war" to "declare war."

Only by disregarding the statements made in the Convention and looking instead at definitions offered in quite different contexts, at other times and places, and for dissimilar purposes, is it possible to construct an argument reducing to a mere formality the power to "declare war," which the Convention continued to vest in Congress. European writers on the law of nations pointed out how the Romans had punctiliously announced to a future enemy their intention to engage in war if their demands were not met, and these authors also referred with approval to the custom, once widely respected, of sending heralds to an enemy's capital to declare war.[274] A declaration of war in this sense was obviously a mere announcement or proclamation, notifying an enemy of a decision reached elsewhere, by constitutional processes that were none of his affair. The purpose of such a

roll calls, totalling 6-1/4 inches, or 13.7% of the space for the day; (2) on the punishment of offenses on the high seas, etc., 9 speakers, 2 roll calls, totalling 14-3/4 inches, or 32.4%; (3) on subduing rebellion in a state, 10 speakers, 2 roll calls, totalling 11-1/2 inches, or 25.3%; and, (4) on the war power, 7 speakers, 3 roll calls, totalling 13 inches, or 28.6%. In addition, two provisions of the draft were adopted without debate. *See id.* at 548-54.

274 *See, e.g.*, E. DE VATTEL, THE LAW OF NATIONS 473 (1792). In a meticulously documented article, Charles A. Lofgren has reviewed the statements on a declaration of war contained in the writings of seven leading 17th and 18th century authorities on the law of nations, namely: Grotius, Pufendorf, Vattel, Burlamaqui, Thomas Rutherforth, Richard Lee, and Bynkershoek. *See* Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 689-93 (1972). It is interesting to note that in the index to Farrand's collection of the records of the Federal Convention, there are four page-references to Vattel, but none to such towering figures as Grotius, Pufendorf, and Burlamaqui. Montesquieu was quoted far more often, of course, but he is not usually classified among the technical writers on the law of nations.

declaration was simply to give legality to the hostile acts that would follow. Writers on the law of nations were concerned with declarations of war primarily as they figured in the relations between sovereign states. In this context, therefore, a declaration of war was by very definition a formality, whether regarded as essential to the proper conduct of international relations or recognized (as it was beginning to be) as a custom that had fallen into desuetude.

The status *in international law* of a declaration of war, and the question whether such a declaration was still required, were not, however, the issues before the Federal Convention on the 17th of August 1787. The delegates had in mind the impact *domestically* of a declaration of war, and they were being called upon to decide a question of internal constitutional authority—namely, the proper location of the authority to decide whether to commit the nation, its people, and its resources to the direful hazards of war. In terms of its international implications a declaration of war might be viewed as a pure formality, more or less optional. In terms of its domestic implications, however, a declaration of war constituted a decision of momentous importance. To make that decision was to put the whole country on a wartime footing and to impose heavy added responsibilities and stringent new restrictions on every citizen.

Writers on the law of nations recognized this fact, despite their primary concern with the relations between states. The Swiss authority Emeric de Vattel wrote about the formalities used by one sovereign in declaring war on another, but before he turned to such technical matters he had this to say:

> A right of so great moment, the right of judging whether a nation has a real cause of complaint; whether its case allows of using force, and having recourse to arms; whether prudence admits, and whether the welfare of the state demands it; this right, I say, can belong only to the body of the nation, or to the sovereign, its representative. . . .
>
> Thus the sovereign power has alone authority to make war. But as the different rights which constitute this power, originally resident in the body of the nation, may be separated or limited according to the will of the nation . . . we are to seek the power of making war in the particular constitution of each state.[275]

Even more directly to the point was the statement of Chancellor James Kent of New York, whose *Commentaries on American Law* (first published in 1826-30 but an outgrowth of lectures delivered as early as

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[275] E. DE VATTEL, *supra* note 274, at 439 (citation omitted).

1794) were rivalled in authority only by those of Joseph Story. In the opening part of the work, treating "Of the Law of Nations," Kent described, as Vattel had done, the traditional practice of communicating a public declaration of war to the enemy, and he noted its growing disuse:

> But, though a solemn declaration, of previous notice to the enemy, be now laid aside, it is essential that some formal public act, proceeding directly from the competent source, should announce to the people at home their new relations and duties growing out of a state of war . . . . As war cannot lawfully be commenced on the part of the United States, without an act of Congress, such an act is, of course, a formal official notice to all the world, and equivalent to the most solemn declaration.[276]

Even though Alexander Hamilton by 1793 was constructing a theory of the Presidency that purported to endow that officer with a vast inherent power in foreign affairs, over and above those expressly delegated to him, he continued (even in the essay that broached his new doctrine) to interpret the exclusive congressional power to declare war as signifying that "the Legislature . . . can alone actually transfer the nation from a state of Peace to a state of War."[277]

As in these examples, so throughout the discussions in the Convention and afterwards, the phrase "declare war" was universally understood as synonymous with what the Articles of Confederation had described as "the sole and exclusive right and power of determining on . . . war."[278] No contemporary commentator or pamphleteer, so far as I can discover, suggested that there was any significant difference between "declaring" war and making the "determination" to engage in it.[279] Indeed, it would have been inconsistent and absurd to bestow upon Congress the power to "declare" war, if "declare" meant the act

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276 1 J. KENT, *supra* note 190, at 52-53.

277 15 HAMILTON 42 ("Pacificus" No. 1).

278 See text accompanying note 114 *supra*.

279 Charles Lofgren cites a number of contemporary statements in which such men as Hamilton, Madison, Wilson, Jay, and Gerry used the word "declare" in the sense of making the decision for war. *See* Lofgren, *supra* note 274, at 680-81 & nn.30-31, 684-85 & nn.48 & 50. He comments that the words were used in a "loose sense" and constituted a "deviation from international usage." *Id.* at 680 n.31, 695. In the absence of statements by the framers showing that any of them believed that the word "declare" had to be understood in a narrower or stricter sense, applicable only to the formalities involved in announcing a state of war, then this evidence from contemporary usage would seem to establish the meaning of the term in the Constitution, regardless of technical definitions found only in treatises on international law. Accordingly Lofgren's conclusion that a contemporary would find it merely "plausible" to equate "declare" with "commence" strikes me as over-cautious and consequently somewhat unhistorical. *See id.* at 695.

of communicating a warning or a notice to the enemy. Communicating with foreign powers was an executive function not a legislative one, as the framers saw it.[280] Only if the power to "declare" war meant the authority to decide whether and when the United States should engage in war would there have been any point in listing it in the catalogue of congressional functions alongside the power to "raise and support Armies."[281]

The alteration from "make" to "declare" was, in fact, simply one example of a process of textual refinement that was going forward continuously during the final weeks of the Convention—one aspect of the unremitting quest for words that would convey exactly the intended shades of meaning. The phrase "make war" was marred by two types of ambiguity. It was possible to interpret it as an implied limitation on the President's power to act in the emergency of a sudden attack. Fear of such enshacklement prompted the motion to change the wording, as the movers themselves made clear. But the phrase might also be interpreted in such a way as to encourage Congress to usurp the President's power of military command in wartime. Fear of this, expressed by Rufus King, tipped the balance, and the change was made. Both ambiguities were thus removed. Only in the eyes of much later generations of interpreters, not (so far as the records show) in the eyes of contemporaries, was a new ambiguity introduced—the possibility that "declare war" might be interpreted simply as the performance of an obsolete ritual of international intercourse, and nothing more.

Any assumption that the Convention intended to transfer the power to "make war" from legislative to executive hands is completely untenable. No transfer took place. The phrase "make war" was simply eliminated, outright and forever. Not a single phrase in the executive article was altered by the vote taken on the 17th of August. Furthermore no new authority of a military character was added thereafter to the catalogue of executive powers furnished by the Committee of Detail. The changes that were made were all in an opposite direction. Three new restrictions were in fact placed on presidential military authority as a result of the same continuing process of textual refinement that produced the change from "make" to "declare."

The Articles of Confederation had given Congress the power "of granting letters of marque and reprisal in times of peace"[282]—something that Blackstone described as the authorization of "an incomplete

280 *See* note 254 *supra*.

281 *See* U.S. CONST. art. I, § 8, cls. 11 & 12.

282 See text accompanying note 118 *supra*.

state of hostilities"[283] and that he treated as part of the royal prerogative. In its draft constitution the Committee of Detail forbade the individual states to grant such letters[284] but failed to indicate where the power should reside. Thus it might conceivably be regarded as a mere adjunct to the power of the commander in chief. To forestall the possibility of such an interpretation, Elbridge Gerry, who had spoken out on the 17th of August against empowering "the Executive alone to declare war," brought forward the very next day a proposition to add to the list of *legislative* powers that of granting letters of marque and reprisal.[285] On the 5th of September the Convention voted without a dissenting voice to make this new phrase part of the clause dealing with a declaration of war.[286]

A second change was made in the provision of the draft constitution which had designated the President as commander in chief not only of the forces raised by the federal government but also, without restriction, of "the Militia of the Several States."[287] On the 27th of August the Convention voted, six states to two, to restrict the President's command of the state militia to occasions when it was "called into the actual service of the United States,"[288] the principle having already been established that the authority "[t]o call forth the aid of the militia" was a legislative not an executive power.[289]

In the third place, the Convention, as far back as the 1st of June, had decided that the executive should make appointments "to offices in cases not otherwise provided for."[290] That this would apply to military officers became clear in the report of the Committee of Detail, which made the President commander in chief, altered the wording of the appointments provision slightly so that he was empowered to "appoint officers in all cases not otherwise provided for by this Constitution," and included no specific constitutional provision for the appointment of military and naval officers.[291] On the 7th of September, after a heated debate on the appointing power, the Convention adopted a committee report which made the appointment of "all other officers" (except "in-

283 *See* text accompanying note 21 *supra*.

284 2 RECORDS 187 (Article 12).

285 *Id.* at 322 (Journal), 326, 328 (Madison's notes).

286 *Id.* at 505 (Journal), 508, 509 (Madison's notes).

287 *Id.* at 185 (Article 10, section 2).

288 *Id.* at 422, 426 (Journal), 426-27 (Madison's notes).

289 *Id.* at 182 (Article 7, section 1, clause 17).

290 See text accompanying note 170 *supra*.

291 *See* 2 RECORDS 185 (Article 10, section 2).

ferior" ones) contingent on senatorial advice and consent.[292] The commander in chief was thus obliged to submit for senatorial scrutiny the names of those whom he proposed to appoint as officers to carry out his military commands.

These several decisions imposing additional limitations on the executive make it clear that the Convention was not disposed casually and lightly to enlarge the war powers of the President. To be sure, some additional authority did accrue to him—or at least some implied powers of his were validated—by the action of the Convention in altering "make war" to "declare war." Precisely what power was thereby recognized as belonging to the commander in chief? The answer is perfectly clear from the record of the debate. The change was proposed for the sole purpose of "leaving to the Executive the power to repel sudden attacks."[293]

Now a strictly analogous power had been left in the hands of the individual states, despite the delegation to the federal Congress of "the sole and exclusive right and power of determining on . . . war." This reserved power of a state to take military action in an emergency was not left to mere implication (as was the President's emergency power), but was spelled out in an express constitutional provision. Such an exception was contained in the original Articles of Confederation, which forbade any state to engage in war without congressional consent

> unless such state be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay till the united states in congress assembled can be consulted . . . .[294]

In its draft constitution of the 6th of August 1787, the Committee of Detail took over this clause from the Articles, merely striking out the reference to the Indians and broadening the permission so as to cover imminent danger of invasion from any source.[295] At the next to the last day's session of the Convention the clause was "remoulded" into the slightly more concise form in which it appears at the very end of Article I of the finished Constitution: "No State shall, without the Con-

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292 *See id.* at 495 (Journal, September 4) (section 4 of Committee Report), 539-40 (Madison's notes, September 7).

293 *Id.* at 318 (Madison's notes, August 17). This is Madison's explanation of the motion he made himself.

294 19 JCC 216 (final draft, Article 6).

295 *See* 2 RECORDS 187 (Article 13).

sent of Congress . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."[296]

The power of the President "to repel sudden attacks" was a similar exception to the otherwise plenary authority of Congress to declare war. In his case the exception was implicitly acknowledged rather than expressly granted, and was thus less firmly grounded than the power that a state might claim. In any case, there is nothing in the records of the Convention to indicate that the President's implied power was so different from a state's expressed power that it would extend to situations less exigent than actual invasion or the "imminent Danger" thereof.

Only if a surprise attack should force war upon the nation would there be any diminution of the intended power of Congress to weigh and decide the question of a resort to war. But the act of repelling such an attack would not signify that the power of decision had passed from Congress to the President; it would mean that the enemy had taken the decision out of the hands of both. If foreign danger merely threatened and time for deliberation still remained, contemporaries never doubted that the power to determine on war belonged to Congress as it had from the beginning of the Revolution. Indeed the placement of this power firmly in legislative hands represented one crucial point of difference between the American republic and the British monarchy, according to such advocates of the new Constitution as Hamilton[297] and James Wilson. The latter, indeed, offered the quaint argument that the Americans were restoring to its original purity the Anglo-Saxon constitution that had existed before the Norman Conquest. In his *Lectures on Law*, delivered some three years after the Convention, Wilson remarked:

> As the law is now received in England, the king has the sole prerogative of making war. On this very interesting power, the constitution of the United States renews the principles of government, known in England before the conquest. This indeed . . . may be accounted the chief difference between the Anglo-Saxon and the Anglo-Norman government. In the former, the power of making peace and war was invariably possessed by the wittenagemote . . . . In the latter, it was transferred to the sovereign . . . .
>
> There is a pleasure in reflecting on such important renovations of the ancient constitution of England. We have found, and we shall find, that our national government is recommended by the

296 U.S. CONST. art. I, § 10, cl. 3. *See* 2 RECORDS 626 (Madison's notes, September 15).
297 *See* THE FEDERALIST No. 69, at 430-31 (A. Hamilton).

antiquity, as well as by the excellence, of some of its leading principles.[298]

The Treaty Power, Sectionalism, and the Two-Thirds Rule

The counterpart of the power to "make war" (or to "declare" it) was the power to "make peace." The Articles of Confederation had linked the two powers in the single phrase that granted Congress the "right and power of determining on peace and war."[299] The Committee of Detail, however, not only separated the two kinds of power, but also used different language for the latter, speaking instead of a "power to make treaties."[300] This was not a narrower but a more inclusive phrasing of the matter, for the new clause comprised commercial treaties and alliances as well as agreements ending a war. The kind of treaty most needed by the United States in the years following the acknowledgment of independence was the kind that would open up trade with other nations, especially with the one-time mother country, Britain. When treaty-making was debated in the Convention, therefore, treaties of commerce were clearly the prime concern of most delegates—not only of those who felt that such agreements were vital to the economic welfare of the nation, but also of those who feared an adverse impact on the economic interests of their own state or section. The priority of trade agreements in the thinking of the Convention was reflected in one of the earliest memoranda drawn up within the Committee of Detail—a memorandum that dealt first of all with "treaties of commerce," and then, separately and thereafter, with "treaties of peace or alliance."[301]

This preoccupation with the effect of treaties upon domestic economic interests underlay all discussions of the treaty power in the final weeks of the Convention, rendering these debates quite different in character and motivation from those over the war power, and pushing far off to the periphery of attention the question of the role that the President might properly play in the process of treaty-making. This relative indifference to the latter question can be demonstrated in quantitative terms. During the three debates that took place on the treaty clause—on the 23rd of August and the 7th and 8th of September —a total of fifty speeches were delivered, by sixteen different members.

298 1 THE WORKS OF JAMES WILSON 433-34 (R. McCloskey ed. 1967) (footnote omitted).

299 See text accompanying note 114 *supra*.

300 2 RECORDS 183 (Article 9, section 1).

301 4 RECORDS 44, 45-46 (memorandum in handwriting of Edmund Randolph, with emendations by John Rutledge).

In only eight of these speeches on treaty-making, delivered by only five of the sixteen speakers, was the President mentioned in any way whatever. By contrast, more than two-thirds of all the speeches (thirty-six out of fifty), by three-fourths of all the speakers (twelve out of sixteen), dealt with two interrelated issues affecting the balance of power within the legislative body engaged in treaty-making.[302] One question was whether responsibility for treaties ought not to be vested in both houses of Congress jointly, rather than in the Senate alone. The other was whether a simple majority could be entrusted with treaty-making or whether a two-thirds vote should be required. Abstract though these questions may appear, they were vitally significant to the members of the Convention because of their economic and sectional implications. The way that voting was managed would determine the weight that each section could expect to have in determining trade policies that could directly affect its economic welfare.

The treaty clause took final shape in this context of sectional economic conflict. Only by recognizing the nature of the controversies with which the question of treaty-making became inescapably intertwined can one correctly assess the significance of the various modifications made by the Convention in the draft it received from the Committee of Detail.

A Background of Suspicion: The Spanish Negotiations of 1786

The dangerous height to which sectional animosity might be raised as a result of disagreements over treaty negotiations was dramatically illustrated in the summer of 1786, a year before the meeting of the Constitutional Convention. Under way were negotiations with Spain involving two unsettled problems of long standing, together with the possibility (essentially a new possibility) of a trade agreement. The unsettled issues were of vital concern to the southern states. One was the conflicting territorial claims of the two countries in the area between the Appalachians and the Mississippi, and between the 31st parallel, which the United States claimed as its southern boundary, and the mouth of the Ohio River, which represented Spain's northernmost claim.[303] This was the area into which southerners expected popu-

302 *See* 2 RECORDS 392-94, 538, 540-41, 543, 547-50 (Madison's notes). The total of fifty speeches comprised a certain number of seconding speeches which did not include actual comment, but which did indicate the speaker's stand on the issue.

303 See maps showing various boundary claims and proposals for adjusting them opposite pages 41, 77, and 118, in S. BEMIS, PINCKNEY'S TREATY (1926). The first five chapters of this work provide a lucid historical account of the boundary and navigation questions from the Peace of Paris of 1763 through the negotiations of 1786 that are discussed below.

lation to flow, carrying their institutions, their ideas, and their agricultural way of life with them. "The people & strength of America," boasted Pierce Butler of South Carolina in the Convention, "are evidently bearing Southwardly & S[outh]westw[ar]dly."[304] Now the economic imperative for "men of the western waters" was freedom to export their products down the Mississippi River to the open sea. But the lower course of that river flowed through exclusively Spanish territory, and Spain refused to allow it to be treated as an international waterway. The second outstanding conflict, therefore, involved the free navigation of the Mississippi, and southerners considered it the *sine qua non* of any agreement with Spain. Neither of these issues mattered much to the merchants and shipowners of New England and the Middle States, some of whom were quite ready to let the West go its separate way,[305] and all of whom were anxious for an expansion of trade across the Atlantic.

Exercising the authority that it had exercised since the beginning of the Revolution, the Congress of the Confederation drew up the instructions to the American negotiator, John Jay, its Secretary for Foreign Affairs. In their original form, adopted on the 20th of July 1785, these required Jay to communicate in advance every proposition he was disposed to offer the Spanish envoy.[306] Recognizing that such a requirement would impede negotiation, Congress modified the instructions on the 25th of August, specifying the provisions that it regarded as indispensable but allowing the Secretary flexibility in negotiating other points. Whatever else might be agreed to, Jay was instructed

> particularly to stipulate the right of the United States to their territorial bounds, and the free Navigation of the Mississippi, from the source to the Ocean.[307]

The Spanish envoy's instructions were equally strict; he was not to concede the right to navigate the Mississippi. After almost a year of futile negotiation, Jay began casting about for a way of obtaining some modification of his instructions. On the 29th of May 1786, he suggested that Congress appoint a secret committee "with power to instruct and direct me on every point and subject relative to the proposed treaty with Spain."[308] From Jay's point of view this would trans-

304 1 RECORDS 605 (Madison's notes, July 13).

305 *See, e.g.*, 8 LETTERS OF MEMBERS 458 (letter from Rufus King to Jonathan Jackson, September 3, 1786).

306 29 JCC 562 (J. Fitzpatrick ed. 1933).

307 *Id.* at 658.

308 30 JCC 323 (J. Fitzpatrick ed. 1934).

fer to a committee the onus for any contravention of Congress' instructions. From Congress' point of view it meant surrendering to a committee its constitutional responsibility for determining the foreign policy of the United States. This Congress declined to do. Instead it called upon Jay to explain the problems in a full meeting of the entire Congress. This he did on the 3rd of August 1786, expatiating on the advantages of a commercial treaty with Spain and proposing, as the price to be paid, that the United States should agree to "forbear" navigation of the Mississippi during the 25 or 30-year life of the treaty.[309] A week later, on the 10th of August, the Massachusetts delegation filed a motion to repeal the earlier instructions to Jay regarding the navigation of the Mississippi.[310] This move precipitated the gravest sectional crisis in the history of the Confederation—a crisis that led both sides to ponder the possibility of separation into regional confederations.[311]

The sectional alignment was unmistakably clear, and it held firm through a succession of more than a dozen roll calls on the matter in the late summer of 1786.[312] Various amendments having been rejected, Congress finally voted on the 29th of August to rescind the instruction requiring Jay to insist on free navigation of the Mississippi. The crucial vote, like those on related questions that preceded or followed, was seven states to five, Delaware being absent. The five states from Maryland southward through Virginia and the two Carolinas to Georgia held firm on the original instructions. The seven states north of Mason and Dixon's line voted with equal solidarity to allow Jay to "forbear" the right to navigation in order to obtain a favorable trade agreement.[313]

As often happens when struggles over policy mount to an irreconcilable level, the economic conflict was metamorphosed into a consti-

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309 31 JCC 467-84. Jay's specific proposal is at *id.* at 480.

310 *Id.* at 510. The motion was made in committee of the whole, which was considering Jay's communication of August 3. The committee made its report on August 23, recommending the repeal of the earlier instructions, but reinstating the requirement that the Secretary of Foreign Affairs insist on a recognition of American boundary claims in the southwest. *Id.* at 566, 567. The dispute therefore involved the committee's recommendation that Jay be allowed to consent to "a forbearance of the use of the . . . river Mississippi" for an undetermined period of years. *Id.* at 566.

311 *See, e.g.*, 8 LETTERS OF MEMBERS 415-16, 421-25, 460-62 (letters from Theodore Sedgwick to Caleb Strong, August 6, 1786; James Monroe to Patrick Henry, August 12, 1786; Monroe to Madison, September 3, 1786).

312 *See* 31 JCC 569, 570, 594, 595, 600, 601, 603, 604, 607, 609, 613, 621, 697 (August 28-September 28). On a few of these votes there were absences, and occasionally a state delegation split its vote; but there was no actual switching of sides by any state.

313 *Id.* at 595.

tutional one.[314] The Articles of Confederation had prescribed that Congress "shall never . . . enter into any treaties or alliances . . . unless nine states assent to the same."[315] The original instructions to Jay had been voted when nine states were present; hence Congress would be morally obligated to ratify any treaty that conformed to these instructions. Had Congress rescinded its instructions in order to break off negotiations completely, then a simple majority would have sufficed, for it would have indicated that nine states no longer supported the plan. But Congress had not voted this kind of repeal. Instead it had determined, with only seven states concurring, to abrogate not Jay's authority to negotiate, but the restrictions on that authority. In effect it had given him new and positive instructions to reach an agreement on terms quite different from those originally sanctioned.

In the eyes of southern delegates this action was flagrantly unconstitutional. The point was fully argued in a resolution presented on the last day of August by Charles Pinckney, who would sit in the next year's Federal Convention. The repeal, Pinckney's proposed resolution asserted,

> has the effect of enlarging the powers of the . . . negotiator, and granting him an Authority he did not possess under the former instructions to which the assent of nine States is alone constitutionally competent under the Confederation . . . .[316]

The right to make a treaty, however, "cannot be exercised by seven states;" hence instructions voted by seven states have no standing as "instructions constitutionally sanctioned by the authority required under the confederation."[317] The proposed resolution ended by warning the Secretary for Foreign Affairs that any treaty he might negotiate under the new instructions would be met by a refusal "to ratify and confirm a compact formed under powers thus unconstitutional and incompetent."[318] Though the resolution was defeated by the familiar vote

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314 For a look at, in another context, the process by which conflicts over policy are transformed under the pressure of crisis into constitutional issues, see the present author's discussion in Bestor, *The American Civil War as a Constitutional Crisis*, 69 AM. HIST. REV. 327, 327-28 (1964).

315 19 JCC 220 (Article 9).

316 31 JCC 611.

317 *Id.* at 611, 612.

318 *Id.* at 612. The same resolution had been offered the preceding day, and an excised passage in Pinckney's manuscript shows that it had been drawn up while the motion to alter the instructions was still pending. *See id.* at 598. Two different procedures were used to defeat the resolution on the two successive days, and additional parliamentary maneuvers were subsequently employed to prevent its being brought up again. *See id.* at 600, 613, 621, 696 (votes taken August 30 & 31, September 1 & 28). On September 28, Congress

of seven states to five, the warning lost none of its potency, for the five protesting states could always refuse to ratify, whatever the fate of their resolution. And their refusal would make it impossible to muster the requisite nine affirmative votes.

The memory of this bitter controversy colored all discussions of the treaty-making clause in the Federal Constitutional Convention of the following year. A two-thirds rule—that is to say, a rule requiring approval by a two-thirds vote instead of a simple majority—became the central issue.[319] Such a rule had been applied to all major questions under the Articles of Confederation, and in the most extreme of its possible forms. Required were the affirmative votes of nine states—two-thirds of all those in the Union, not two-thirds of those whose delegates might happen to be present and voting on a particular occasion. In the Constitutional Convention of 1787 an equally iron-clad rule was desired by most southern delegates, still distrustful of the bloc of seven northern and eastern states that had been prepared to bargain away the vital interest of the south and west in the free navigation of the Mississippi. On the other hand, the commercial states were convinced that a two-thirds rule would permit a minority to extort concessions from the majority by threatening to block some measure regarded by the latter as vital. In the end a compromise was reached. The finished Constitution applies a two-thirds rule to treaty-making, but in the form least capable of operating as an automatic and

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even refused to lift the injunction of secrecy on the Spanish negotiations to permit delegates to communicate information to their state legislatures and executives. *Id.* at 697. The Convention, of course, was fully aware of what had gone on, for many of its members had been in Congress at the time. The ratifying conventions of the states, however, still had to be briefed in 1788. *See, e.g.*, 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 333-66, 499-516 (2d ed. J. Elliot 1836) (discussion in the Virginia convention, June 13-18, 1788) [hereinafter cited as DEBATES].

319 In the midst of the discussion of ratification in the summer of 1788, Hugh Williamson, one of the delegates from North Carolina, pointed out

> that there is a Proviso in the new Sistem [*sic*] which was inserted for the express purpose of preventing a majority of the Senate . . . from giving up the Mississippi. It is provided that two thirds of the Members present in the senate shall be required to concur in making Treaties and if the southern states attend to their Duty, this will imply 2/3. of the States in the Union together with the President, a security rather better than the present 9 States especially as Vermont & the Province of Main[e] may be added to the Eastern Interest . . . .

3 RECORDS 306-07 (letter from Williamson to Madison, June 2, 1788). This private letter reminded Madison of a point which he might make in meeting the rumor then circulating in Kentucky (still part of Virginia) to the effect that "in case of a new Gov[ernmen]t the Navigation of the Mississippi would infallibly be given up." *Id.* at 306.

absolute bar to action, the concurrence required being that of two-thirds of the Senators *present*.[320]

The crisis of 1786 over negotiations with Spain made the two-thirds rule the bone of contention whenever the treaty-making power was discussed during the final six weeks of the Federal Convention of 1787. It all but crowded out any discussion of the role of the executive in treaty-making. But the crisis of 1786 affected the discussion of the latter question in an even more important way. Had there been any disposition to transfer to the executive branch the authority to determine the main lines of foreign policy and to leave to a legislative body merely the power to approve or reject a treaty once made, such an arrangement was rendered quite unthinkable by the events of 1786. The five southern states distrusted Jay, a New Yorker, for having suggested a change in his instructions with respect to the navigation of the Mississippi. That they would have consented to vest in an independent executive the power to write his own instructions is inconceivable. For their part, the commercial states had used their majority for the purpose of rewriting the instructions, because the policy involved was one which they favored. But they did not propose that the power to determine that policy should be taken from the hands of the legislature and handed over, with no strings attached, to the Secretary of Foreign Affairs. The majority and minority were in agreement on one point—that foreign policy should be determined by legislative deliberation and that the executor of that policy should be the agent of the legislature, bound by the instructions it formulated.

Views of John Jay on Legislative Participation in Foreign Affairs

Nor did the Secretary himself, John Jay, hold a different view. He had been many times frustrated by the fluctuations of opinion in Congress,[321] by its frequent periods of paralyzing inaction, and by the parochialism that put national interests at the mercy of sectional rivalry. If anyone, Jay might have been expected to favor a transfer of

320 U.S. CONST. art. II, § 2, cl. 2.

321 Congress was fully as inconsistent as Jay in its changing views on the question of free navigation of the Mississippi. When Jay went to Spain as envoy in 1780, he took with him instructions to insist on the right of navigation. In 1781, over his objections, he was instructed to waive the demand if necessary to obtain an alliance. *See* S. BEMIS, *supra* note 303, at 29-34. The uproar in 1786, when he felt it necessary to recommend a "forbearance" of the right, was hardly fair, given this ambiguous record.

the power of decision on foreign policy to an executive officer charged with conducting foreign relations on his own authority rather than in accord with instructions from Congress. Jay, however, advocated no such thing. In the pre-Convention discussions of constitutional reform, as we have seen, his major concern was to secure state compliance with federal treaty obligations, and he sought the answer (as the Convention finally did also) through a strengthening of judicial not of executive power.[322]

Jay was, of course, profoundly interested in measures that would improve the conduct of foreign affairs. His own views concerning what was desirable were expressed most clearly in 1788 in the 64th number of *The Federalist*, where he not only gave his own interpretation of the relationship that the new Constitution intended to establish between the Senate and the President in the conduct of foreign affairs, but also indicated clearly that the arrangement accorded with his own view of what the situation required. At bottom, what he favored and what he looked for was not some by-passing of legislative deliberation and decision-making, but some reorganization that would insure better informed, less mutable, and more responsible judgments from the body charged with determining policy.

Jay's answer could, in classical terminology, be termed aristocratic, but not, in any legitimate sense, monarchical. He believed that decisions on foreign policy should not be entrusted to "a popular assembly, composed of members constantly coming and going in quick succession," but should be vested in a body made up of "those who best understand our national interests," whose "reputation for integrity inspires and merits confidence," and who would be chosen for terms long enough to "give them an opportunity of greatly extending their political information and of rendering their accumulating experience more and more beneficial to their country." Under such auspices, foreign policy—including "the affairs of trade and navigation" —would "be regulated by a system cautiously formed and steadily pursued."[323]

Jay spoke always in the plural of the men with whom "the power of making treaties may be safely lodged."[324] The President and the Senators were all alike included. Within this partnership Jay recognized certain special tasks that the President would necessarily perform alone, but always as his part of a collective enterprise. In the

322 *See* text accompanying notes 147-52 *supra*.

323 THE FEDERALIST No. 64, at 401-02 (J. Jay).

324 *Id.* at 401.

first place, Jay pointed out, information can often be obtained from those who would not confide in even a small body like the Senate but who would "rely on the secrecy of the President." Therefore, said Jay,

> although the President must, in forming [treaties] act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest.[325]

In the second place, Jay pointed out, unexpected events—"[t]he loss of a battle, the death of a prince, the removal of a minister"—may suddenly "change the present posture and aspect of affairs," and require immediate action.

> As in the field, so in the cabinet, there are moments to be seized as they pass, and they who preside in either should be left in capacity to improve them.[326]

Fortunately, Jay went on,

> [t]hose matters which in negotiations usually require the most secrecy and the most dispatch, are those preparatory and auxiliary measures which are not otherwise important in a national view, than as they tend to facilitate the attainment of the objects of the negotiation.[327]

The power of the President to take care of details, in other words, did not imply that he was to make the great decisions or in general to conduct on his own authority the foreign relations of the nation. Jay's carefully worded conclusion on the matter of ultimate responsibility in foreign affairs should be quoted in full:

> Thus we see that the Constitution provides that our negotiations for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigations, on the one hand, and from secrecy and dispatch, on the other.[328]

In this contribution to *The Federalist* Jay was of course examining the completed Constitution, not offering suggestions to those about to frame it. As an interpretation of the original intent of the document, Jay's essay is of the highest importance. His diplomatic experience—commencing with his appointment as minister to Spain in 1779; followed by his participation, as one of the commissioners, in the negotiation of peace with Great Britain; and continuing, from 1784

325 *Id.* at 403.
326 *Id.*
327 *Id.* at 403-04.
328 *Id.* at 404.

on, with his service as Secretary of the United States for the Department of Foreign Affairs[329]—fitted him better than anyone else to judge the intended effect of the new Constitution both on the actual process of negotiation and on the character of the relationship that would have to be maintained between executive and legislative authorities.

But the 64th number of *The Federalist* is also relevant for the light it throws on attitudes prior to the Convention, in the aftermath of the bitter treaty dispute of 1786. Jay was, by implication at least, discussing that crisis and indicating his own answer to the problem of reconciling sectional interests and assuaging sectional animosities. The most important point was a negative one. Jay did not say in his essay —and in the pre-Convention period he had never said—that matters should be removed from the arena of congressional debate and decided by firm executive fiat. Jay can be labelled a conservative, but his brand of conservatism did not involve the exaltation of executive power and the denigration of legislative debate. Jay concluded his essay in *The Federalist* not by prescribing a set of procedures for resolving conflicts over foreign policy, but by voicing his faith that the unhampered deliberations of a body of reasonable men will produce acceptable, because reasonable, policies. Commenting on the fear "that the President and Senate may make treaties without an equal eye to the interests of all the States," Jay wrote as follows:

> As all the States are equally represented in the Senate, and by men the most able and the most willing to promote the interests of their constituents, they will all have an equal degree of influence in that body, especially while they continue to be careful in appointing proper persons . . . . In proportion as the United States assume a national form and a national character, so will the good of the whole be more and more an object of attention . . . .
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> . . . [A]s the Constitution has taken the utmost care that they [the President and the Senators] shall be men of talents and integrity, we have reason to be persuaded that the treaties they make will be as advantageous as, all circumstances considered, could be made . . . .[330]

The Articles of Confederation had vested in Congress "the sole and exclusive right and power of determining on peace," together with the related powers of "sending and receiving ambassadors" and of "entering into treaties and alliances."[331] Though the crisis of 1786

329 This is the title used in his report of October 13, 1786, mentioned in the text accompanying notes 147-49 *supra*. *See* 31 JCC 781.

330 THE FEDERALIST No. 64, at 405-06 (J. Jay).

331 See text accompanying notes 115-16 *supra*.

over negotiations with Spain had revealed how dangerous to the effective conduct of foreign affairs the divisive force of sectionalism in Congress could be, no important contemporary leader took the view that some twentieth-century commentators on the Constitution ascribe to the framers—the view, namely, that because "a Congress divided amongst different minority interests might . . . be loath to give proper direction to a single necessary American course," it would therefore be

> proper to place the power of external affairs in a single person where the probability of minority weight would be much less likely to have this effect.[332]

No such idea was hinted at in the opening stages of the Convention. On the contrary, in the debate of the 1st of June 1787, where the issue was the power of making both war and peace, four speakers vehemently opposed granting either power to the executive, and no member took the other side.[333] That treaty-making might be the peculiar province of the upper house was perhaps implicit in the decision to establish a bicameral legislature, and on the 26th of June, James Wilson remarked in an off-hand way that since "[t]he Senate will probably be the depositary of the powers" needed to avoid war and to obtain treaties, that body ought "to be made respectable in the eyes of foreign nations."[334]

The Committee of Detail and the Treaty Power

Without any evidence of doubt or hesitation, the Committee of Detail accepted what it apparently conceived to be the double mandate of the Convention—that treaties were to be made by a legislative body, and that the appropriate body was the Senate. To make the control of the latter perfectly clear, the committee draft also gave to the Senate the power to appoint ambassadors. It specified no role for the President in diplomatic negotiations, save the ceremonial one of receiving ambassadors.[335]

The assignment of the treaty-making power exclusively to the

332 Goldwater, *supra* note 139, at 465-66.

333 *See* text accompanying notes 163-69 *supra*.

334 1 RECORDS 426 (Madison's notes). Wilson's words were that every nation "has wars to avoid & treaties to obtain from abroad." He was not, therefore, referring to the power to make war (which he presumably would place in both houses), but the power to conduct negotiations aimed at avoiding war (which he would place in the Senate).

335 2 RECORDS 183, 185 (Article 9, section 1; Article 10, section 2). On the ceremonial nature of this function, see note 254 *supra*.

Senate—and even the omission of any reference to the President in this connection—created no difference of opinion within the Committee of Detail. The truly controversial issue there (and afterwards on the Convention floor) was whether treaties should require a two-thirds vote of approval, as had been the case under the Articles of Confederation, or whether a simple majority would suffice. This question was an integral part of a far more inclusive one: What kind of balance should be struck, and how could it be upheld, between the principle of majority rule and the legitimate demand of particular economic interests and particular geographic regions (each, by definition, a minority of the whole) for protection of what they deemed their vital interests?

In broad terms, some five principal devices can be incorporated in a constitutional system to impose limits on the power of a majority. An authority external to the legislature may be empowered to invalidate the oppressive acts of an overweening majority; judicial review and the presidential veto are examples of such devices. The checks may, however, be built into the legislature itself. Thus bicameralism requires a given measure to run the gauntlet twice, in bodies where interest groups are differently weighted. Alternatively one or the other house can be excluded from participation in certain matters—for example, money bills or treaties—thereby favoring one kind of majority over another. More powerful as a check is a two-thirds rule, which places a veto power in the hands of any minority that is able to command a single vote more than one-third of the total. This check, moreover, can vary in stringency, depending on whether the approval of two-thirds of all the members is required (as under the old Articles), or two-thirds of those present (which means that abstentions count against the measure), or two-thirds of those voting. The most absolute of all the possible checks is an outright prohibition of certain kinds of enactments—that is to say, a ban on the use for specified purposes of powers otherwise granted.

Under the Articles of Confederation certain of these checks were completely unavailable, for there was no second chamber and no independent executive. Furthermore the delegated powers were so narrowly defined that it was hardly necessary to prohibit specific kinds of enactments. Accordingly a two-thirds rule was the major check built into the structure of the Confederation, and it was applied in blanket fashion to every kind of major decision.[336]

336 In one of its final paragraphs, Article 9 of the Confederation catalogued the things that Congress "shall never" do "unless nine states assent to the same." 19 JCC 220.

To end the paralyzing effect of this blanket rule was one of the objectives of those who brought about the meeting of the Convention. The prompt decision of that body to create a bicameral legislature and an independent executive armed with a veto brought two new checks into operation, lessening the need for so drastic a one as the two-thirds rule. In the resolutions turned over to the Committee of Detail on the 26th of July, which summed up the work of the first two months of the Convention, a two-thirds vote was required only for the overriding of a presidential veto.[337]

The Convention had decided, however, to vest in Congress for the first time a broad sweep of powers in the economic realm, notably taxing and other financial powers and the power to regulate foreign and interstate commerce.[338] When, therefore, the Committee of Detail commenced to spell out the particulars of these grants it was obliged to decide what restrictions, if any, should be placed on the right of a majority to wield powers that could so easily be used to the detriment and even the ruin of minority economic and sectional concerns. The central problem of the final six weeks of the Convention was to achieve a balance, satisfactory to all competing groups, between the powers needed to advance national purposes and the restraints needed to prevent injury to regional interests.

Within the Committee of Detail various memoranda and tentative drafts circulated, two being of particular importance. The earliest was a document in the handwriting of Edmund Randolph of Virginia, with emendations by John Rutledge of South Carolina—the two southern members of the five-man committee.[339] The southern states had found themselves a minority of five in the bitter struggle of 1786 over

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337 2 RECORDS 132 (Committee of Detail). The way was left open for some such requirement in connection with the admission of new states. *See id.* at 133. It was also expected that amendments to the Constitution would require more than a simple majority, though the resolutions did not spell out the procedure. *Id.*

338 The resolution turned over to the Committee of Detail was actually phrased in even more sweeping terms. Congress would be empowered

> to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation.

Id. at 131-32. It was perfectly clear that this included (and transcended) the specific grant of powers to tax and to "pass Acts for the regulation of trade & commerce as well with foreign nations as with each other," which had been detailed in the New Jersey Plan of June 15. 1 *id.* at 243 (Madison's notes). The Committee of Detail give these two powers first place in the enumeration of legislative powers in the draft constitution. *See* 2 *id.* at 181 (Article 7, section 1, clauses 1 & 2).

339 4 RECORDS 37-51 (Committee of Detail).

the Spanish negotiations, and in other controversies as well. As might be expected, therefore, the Randolph/Rutledge draft applied the various available checks on majority action to a wide range of powers having economic and regional implications. It proposed an absolute constitutional ban on the levying of export duties[340]—a form of taxation that would fall almost exclusively on the staples produced on southern plantations and sold on a world market. Likewise prohibited outright was any federal measure that might interfere with the continued importation of slaves,[341] this being an uncompromisable demand of South Carolina and Georgia.[342] What particularly characterized the Randolph/Rutledge draft, however, was its rigorous application of a two-thirds rule to every measure with a potential economic impact, whether a statute or a treaty. Cross-references, indeed, tied these seemingly disparate matters together. To start with, a two-thirds rule was applied to navigation acts,[343] which, if and when adopted, would undoubtedly give preference to American ships, thus increasing freight rates for southern exporters by excluding foreign competition. Recognizing that navigation acts were not the only form that potentially discriminatory commercial legislation might take, Randolph and Rutledge went on to say that "this rule [*i.e.*, the two-thirds requirement] shall prevail, whensoever the subject shall occur in any act."[344] Their attention next turned to "treaties of commerce," and the draft provided that these were to be made "[u]nder the foregoing restrictions"[345]—that is, under a two-thirds rule. Next came "treaties of peace or alliance," to which were applied not only "the foregoing restrictions," but also the requirement that any "surrender of territory" should be "for an equivalent."[346] Finally the two-thirds rule was applied to the admission of new states.[347]

The other significant draft that circulated within the Committee

340 *Id.* at 43 (the restriction is mentioned twice).

341 *Id.* at 44. Randolph originally wrote: "[N]o prohibition on such Importations of inhabitants." Rutledge altered this to read: "[N]o prohibition on ye Importations of such inhabitants or People as the sev[era]l States think proper to admit."

342 *See, e.g.*, the remarks of Charles Pinckney, Charles Cotesworth Pinckney, and John Rutledge, delegates from South Carolina, and Abraham Baldwin, delegate from Georgia, in 2 RECORDS 364-65, 371-73 (Madison's notes, August 21 & 22).

343 4 RECORDS 44. Randolph originally proposed an even more restrictive rule: "A navigation act shall not be passed but with the consent of eleven states in the senate and 10 in the house of representatives." Rutledge changed this to "2/3ds. of the Members present of the senate and the like No. of the house of representatives."

344 *Id.*

345 *Id.*

346 *Id.*

347 *Id.* at 48-49.

of Detail was in the handwriting of James Wilson of Pennsylvania, and it likewise bore emendations by Rutledge,[348] who, as chairman of the committee, was appropriately concerned. Wilson's version was probably the last to be circulated before the writing of the final report, and it is a carefully finished draft, not a memorandum of points to be covered (as the Randolph/Rutledge document in part had been). Thus Wilson carefully inserted, whereas the other draft had merely alluded to, the important check that the Convention had adopted as part of the "great" compromise on representation. As rephrased by Wilson this read:

> All Bills for raising or appropriating Money, and for fixing the Salaries of the Officers of Government, shall originate in the House of Representatives, and shall not be altered or amended by the Senate.[349]

The Wilson draft tended to reflect the views of the three northern members—a majority—of the committee. But the intention, quite evidently, was to present not an opposition document, but a compromise; and Rutledge furthered this purpose by reviewing, emending, and then presumably supporting the draft. That it was a compromise is evident from the fact that it included all the restrictive provisions of the Randolph/Rutledge draft (many of which were unfavorable to northern interests), with but one sole exception. Wilson's version eliminated the two-thirds requirement for approval of treaties.[350] On all the points in question, the final report of the Committee of Detail followed Wilson's draft, and thus, in all but the treaty clause, the wishes of the southern minority on the committee.[351]

Six Issues in Search of a Compromise

In the contest over economic and sectional issues that dominated most of the debates of the final month and a half of the Convention, six particular matters were crucial. The report of the Committee of

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348 2 RECORDS 163-75.

349 *Id.* at 164. For the original proposal, as part of the compromise on representation, see 1 *id.* at 524 (Journal, July 5). It was included among the resolutions turned over to the Committee of Detail. 2 *id.* at 131 (Committee of Detail). In the Randolph/Rutledge memorandum, there was merely a descriptive sentence: "The powers belonging peculiarly to the representatives are those concerning money-bills." 4 *id.* at 45.

350 *See* 2 RECORDS 169.

351 *See id.* at 178 (money bills—Article 4, section 5), 183 (export taxes and importation of slaves—Article 7, section 4; navigation acts—Article 7, section 6; treaties—Article 9, section 1), 188 (new states—Article 17).

Detail dealt with them all, and constituted in effect the first effort at an all-inclusive compromise. In the ensuing debates every one of the committee's decisions was challenged and all but one were modified, but always within a framework of compromise, whereby alterations favorable to one interest were balanced by alterations elsewhere favorable to another. The treaty clause was one of the six that figured in this process of economic and sectional bargaining. The other five ought, however, to be looked at first.

The provision forbidding the Senate to originate or to amend a money bill of any sort was, of course, a relic of the first great compromise of the Convention, which had granted each state, regardless of size, an equal vote in the upper house, but had carefully reserved the exclusive power to lay taxes and make appropriations to the lower house, the only one that was to be elected directly by the people and in which representation was to be proportionate to population.[352] This provision was incorporated unchanged in the draft constitution prepared by the Committee of Detail,[353] but it was there balanced by the provision vesting the treaty-making power exclusively in the upper house,[354] a small body which not only accorded each state equal representation but also possessed a distinctly aristocratic character, thanks to the indirect mode of election of its members and their longer terms. In subsequent debates, members clearly recognized the deliberate balancing of interests that was implicit in the assignment of money bills to the House and treaties to the Senate. Indeed, the very first debate on the former question trailed off into a discussion of the latter.[355] Eventually the clause relating to money bills became the make-weight in a compromise involving not treaty-making, but the machinery of presidential elections.[356]

352 The text of the so-called "great" compromise, as proposed on July 5, is in 1 RECORDS 524 (Journal). The provision respecting money bills was approved the next day by a vote of five states to three, with three divided. *Id.* at 547 (Madison's notes). The compromise itself was finally adopted on July 16. 2 *id.* at 13-14 (Journal).

353 2 RECORDS 178 (Article 4, section 5).

354 *See* note 241 *supra* and accompanying text.

355 *See* text accompanying note 366 *infra*.

356 Several veiled allusions to a compromise in the making were contained in the speeches of the period, and Madison explained the situation in occasional footnotes to his private record of the debates. See 2 RECORDS 509-10 (speech of Gouverneur Morris, September 5), 514 n.* (explanatory footnote by Madison, September 5), 552 n.* (another explanatory footnote, September 8). The situation was as follows. The provision restricting money bills to the House was struck out on August 8, and the decision reaffirmed on August 13. *Id.* at 224-25, 263, 280 (Madison's notes, August 8, 11, 13). Discontent continued, however, and on September 5, a compromise reported a watered-down version, which gave the House sole power to originate money bills, but permitted the Senate to amend them. *Id* at 508-09

A second issue was the absolute prohibition imposed in the committee's draft constitution upon any use whatever of Congress' taxing power and commerce power to impede in any way the importation of "such persons as the several States shall think proper to admit"[357]—a euphemism for slaves. Though the clause would be bitterly attacked by many southern as well as northern delegates—notably by George Mason of Virginia[358]—the intransigence of the two southernmost states (South Carolina and Georgia) kept it from being struck out.[359] Its retention, though with a time limit, was part of the most conspicuous of the bargains made in the final weeks of the Convention (the other part being the elimination of the two-thirds requirement for navigation acts).[360]

This question of navigation acts was, of course, another of the six major issues. And still another (the fourth) was the question of taxes on exports. On both these matters the Committee of Detail acceded to the wishes of the southern bloc, imposing a two-thirds rule on the former and an absolute prohibition on the latter.[361] In connection with a fifth matter, the admission of new states, the Committee of Detail likewise imposed a two-thirds rule. This was eventually eliminated as part of a compromise involving other elements in the committee's proposed article on the creation of new states in the west.[362]

(Madison's notes). This was tied in with a proposal made by the same committee the previous day, concerning election of the President. The committee scheme, which with modifications was finally included in the Constitution, called for electors to be chosen by the states, but went on to provide for an election by the Senate should the electoral college fail to produce a majority for any candidate. *Id.* at 497-98 (Madison's notes). It was to balance this bestowal of additional power on the Senate that the old provision barring the Senate from originating money bills was revived. It was adopted September 8. *Id.* at 552 (Madison's notes). By this time, however, the Convention had transferred the reversionary power of choosing the President from the Senate to the House, with voting to be by states. *Id.* at 527 (Madison's notes, September 6).

357 *Id.* at 183 (Article 7, section 4).

358 *See* text accompanying note 385 *infra*. Other southerners attacking the clause were Luther Martin of Maryland and Edmund Randolph of Virginia. *See* 2 RECORDS 364, 374 (Madison's notes, August 21 & 22).

359 *See* notes 383-84 *infra* and accompanying text.

360 *See* notes 401-11 *infra* and accompanying text.

361 2 RECORDS 183 (Article 7, sections 4 & 6 of the draft constitution).

362 The Articles of Confederation had promised Canada admission into the Union, but had provided that "no other colony shall be admitted into the same, unless such admission be agreed to by nine states"—that is by a two-thirds vote of all the original states. 19 JCC 221 (Article 11). The resolutions referred by the Convention to the Committee of Detail spoke vaguely of "the Consent of a number of Voices in the national Legislature less than the whole." 2 RECORDS 133 (Committee of Detail). In its draft, the committee provided for decision by "two thirds of the members present in each House." *Id.* at 188 (Article 17).

Four of these six issues had markedly sectional implications: the further importation of slaves, the taxation of exports, the adoption of navigation acts, and the making of treaties. On the first three, the Committee of Detail adopted the restrictions advocated by the staple-producing southern states and opposed by the commercially oriented northern and eastern ones. As compensation to the latter, the committee gave the Senate power to make treaties by simple majority vote,[363] thereby rejecting the proposals of its two southern members, who would not only have imposed a two-thirds rule but would have forbidden cessions of territory unless "for an equivalent."[364]

The absence of a two-thirds requirement for treaty-making was promptly criticized once the committee distributed its proposed draft. Opposite this particular item in his copy of the printed report of the Committee of Detail, George Mason of Virginia made the following marginal note:

> As Treaties are to be the Laws of the Land & commercial Treaties may be so framed as to be partially injurious, there seems to be some necessity for the same Security upon this Subject [as upon navigation acts].[365]

In other words, there was to be a two-thirds requirement. Mason had

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The really controversial issues, however, were those dealt with in two other sentences of the same article in the committee's draft:

> If a new State shall arise within the limits of any of the present States, the consent of the Legislatures of such States shall be also necessary to its admission. If the admission be consented to, the new States shall be admitted on the same terms with the original States.

Id. The compromise finally reached was to strike out the guarantee of equality on admission, silently eliminate the two-thirds requirement, but retain (with slightly modified wording) the ban (for it amounted to such) on admitting a new state carved out of territory claimed by an older state unless the latter gave permission. *See id.* at 454-56, 461-66 (Madison's notes, August 29 & 30). The search for an acceptable wording of the last-mentioned provision reflected the clash of views that resulted from the various frontier movements to establish new states in areas claimed by the established seaboard states. At the time of the Convention the most prominent situation involved Vermont, where a government had been established and a constitution adopted in defiance of the territorial claims both of New York and New Hampshire. Her admission as the fourteenth state did not come until 1791. In the Convention debate of August 30, 1787, there were frequent references not only to Vermont, but also to Maine (which remained part of Massachusetts until 1820), to "the people of Virginia beyond the Mountains" (*i.e.*, in Kentucky, which became a state in 1792), and to "the Western people, of N[orth] Carolina. & of Georgia" (where settlers were struggling to maintain a separate state that they called Franklin). *Id.* at 462-63. *See* R. BILLINGTON, WESTWARD EXPANSION 203-06 (2d ed. 1960); 3 R. HILDRETH, THE HISTORY OF THE UNITED STATES OF AMERICA 406-10 (rev. ed. 1856); 4 *id.* at 267-72.

363 *See* 2 RECORDS 183 (Article 9, section 1).

364 *See* text accompanying note 346 *supra*.

365 4 RECORDS 53.

even darker fears, which he expressed on the floor of the Convention well before the treaty clause itself came up for discussion. Arguing for retention of the clause restricting Senate action on money bills, Mason charged on the 15th of August that that body "could already sell the whole Country by means of Treaties." Challenged on the point, Mason explained that "the Senate by means of treaty might alienate territory &c. without legislative sanction." He had in mind the lands in dispute with Spain in the lower Mississippi Valley, and he voiced a warning: "If Spain should possess herself of Georgia . . . the Senate might by treaty dismember the Union."[366]

This particular debate of the 15th of August included a speech by John Francis Mercer of Maryland in which he spoke of the negotiation of treaties as an executive function. This being the only clearcut statement of the kind in the records of the Convention, its significance needs to be carefully assessed. Mercer was expressing agreement with Mason's view that the power of the Senate was excessive and dangerous. As Madison reported his words, Mercer

> contended, (alluding to Mr. Mason's observations) that the Senate ought not to have the power of treaties. This power belonged to the Executive department; adding that Treaties would not be final so as to alter the laws of the land, till ratified by legislative authority. This was the case of Treaties in Great Britain; particularly the late Treaty of Commerce with France.[367]

Before examining his words on this occasion in the context of his other remarks in the Convention, one should note that Mercer was not expressing thoughts that had long been circulating in the Convention. He had taken his seat only nine days earlier, on the very day that the Committee of Detail brought in its report.[368] Far from attempting to find out what had been happening during the ten weeks of discussion he had missed, he announced to his colleagues in the Maryland delegation, on only his second day in the Convention, "that he did not like the system" and that therefore "he would produce a better one since the convention had undertaken to go radically to work."[369] He did not stay long enough to do so, however. Two days after his speech describ-

366 2 RECORDS 297-98 (Madison's notes).

367 *Id.* at 297 (Madison's notes).

368 *Id.* at 176 (Journal, August 6). Though appointed with the rest of the Maryland delegation on May 26 (3 *id.* at 586 (Appendix B)), Mercer was still in Annapolis on June 29, when he wrote the governor of the state that he did not have the personal resources to attend unless given "assurance of a speedy restitution of my expences." 4 *id.* at 67 (letter from Mercer to Governor Smallwood).

369 2 RECORDS 212 (McHenry's notes, August 7).

ing treaty-making as an executive power, he made his last recorded remarks and left for home, there to battle against ratification.[370] He was no longer present on the 23rd of August when the treaty clause actually came before the Convention for debate.

Though Mercer can hardly be described as either representative or influential, the exact character of his views should nevertheless be ascertained. His remark on treaties would seem to make him an advocate of a powerful executive, but in fact his first enterprise after reaching the Convention was to compile a kind of blacklist of those who leaned toward a "kingly," or at least a "high-toned," government.[371] His first speech in the Convention was against allowing representatives to be chosen by popular vote, on the ground that "[t]he people can not know & judge of the characters of Candidates."[372] On the other hand, his most elaborate and impassioned speech was a diatribe against aristocracy, in which he seemed to be saying that the executive ought to be allowed to dispense patronage in order to acquire enough influence to "protect the people ag[ain]st those speculating Legislatures which are now plundering them throughout the U[nited] States."[373]

It is time to return to the mainstream. The remarks on the treaty power that Mason and Mercer made on the 15th of August were actually incidental to a discussion of the clause relating to money bills. The first regular debate on the treaty clause itself did not occur until the 23rd of August. And at this moment in time the Convention had just reached a critical stage in the struggle over the three interrelated issues of export duties, navigation acts, and slave importations. On the 22nd, the day before the treaty clause was taken up, the Convention had appointed a committee to seek a compromise on these other issues,[374] and at the end of the first day of debate on treaty-making this latter issue also was referred to a committee.[375] Sectional economic interests were

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370 *Id.* at 317 (Madison's notes, August 17); 3 *id.* at 589 (Appendix B). Mercer was a signer of the dissenting statement of the minority at the Maryland ratifying convention. *See* 2 DEBATES, *supra* note 318, at 547-56.

371 *See* 2 RECORDS 191-92 (McHenry's notes, August 6). There was subsequent controversy over the exact nature of the charges leveled by Mercer. *See* 3 *id.* at 305-06 (letter from Daniel Carroll to Madison, May 28, 1788), 319-24 (correspondence of delegates from Maryland).

372 2 RECORDS 205 (Madison's notes, August 7).

373 *Id.* at 284-85, 288-89 (Madison's notes, August 14). Though denouncing speculation in this speech, he announced himself two days later as "a friend to paper money." *Id.* at 309 (Madison's notes, August 16).

374 *Id.* at 366 (Journal), 375 (Madison's notes).

375 *Id.* at 383 (Journal, August 23), 394 (Madison's notes).

at the forefront of attention in every instance, not the question of the proper balance between executive and legislative power.

The tug-of-war on these interrelated economic and sectional issues had begun the moment the Committee of Detail reported. In a caucus of the Maryland delegation on the very day of the report, James McHenry urged a concerted move to change the requirement on navigation acts from a favorable vote by two-thirds of the members present to a favorable vote by the delegations from two-thirds of the states.[376]

Two days later, on the 8th of August, two of the other issues were brought up on the floor of the Convention and discussed in heated terms. Rufus King of Massachusetts opened an attack on the provision (agreed upon early in the Convention) which allowed three-fifths of the slaves to be counted in determining a state's representation in the House. As he continued his speech, however, he widened the attack by criticizing the committee's draft constitution for its denial to the federal government of any power to control the further importation of slaves. King concluded with a complaint that the ban on export duties aggravated the unfairness of the proposed constitutional arrangements. "If slaves are to be imported," King argued, "shall not the exports produced by their labor, supply a revenue the better to enable the Gen[era]l Gov[ernmen]t to defend their Masters?"[377] Gouverneur Morris of Pennsylvania delivered an even harsher attack upon slavery and upon the economic favoritism being shown to the slaveholding interests.[378] On the opposite side, Charles Pinckney of South Carolina was goaded into retorting that he "considered the fisheries & the Western frontier as more burdensome to the U.S. than the slaves."[379]

On this occasion the flare-up was brief, but two weeks later, on the 21st and 22nd of August, the debate was resumed with an intensity and scope that assumed, in the eyes of one delegate, such a "threatening aspect" that he feared that the quarreling states of the Union might "fly into a variety of shapes & directions, and most probably into several confederations and not without bloodshed."[380] This portentous

376 *Id.* at 191 (McHenry's notes, August 6). McHenry's actual formula was ambiguous: "'[N]o navigation act shall be passed without the assent of two thirds of the representation from each State.'" The meaning accorded it in the text would seem to follow from McHenry's statement of the problem the next day. Pointing out that "a quorum consisted of a majority of the members of each house," he argued that "the dearest interest of trade were under the controul of four States or of 17 members in one branch and 8 in the other branch." *Id.* at 211 (McHenry's notes).

377 *Id.* at 220 (Madison's notes).

378 *See id.* at 221-23 (Madison's notes).

379 *Id.* at 223 (Madison's notes).

380 *Id.* at 375 (Madison's notes, August 22) (speech of Oliver Ellsworth).

two-day debate broke out as soon as the Convention, following its regular progression through the provisions of the draft constitution, reached the section which combined (rather oddly) clauses dealing with export duties and with the importation of slaves. The first of these questions produced a debate that was vigorous but unemotional, at the end of which the ban on export duties was upheld by a small majority.[381] Immediately after the vote, Luther Martin of Maryland tossed in the apple of discord by proposing to strike out the restrictions that protected the foreign slave trade against federal interference of any kind. Though from a slaveholding state, Martin denounced the continued importation of slaves as "inconsistent with the principles of the revolution and dishonorable to the American character."[382] Two delegates from South Carolina immediately declared that their state could "never receive the plan if it prohibits the slave trade," and that the "true question at present is whether the South[er]n States shall or shall not be parties to the Union."[383]

The debate continued on the 22nd of August, with other disunionist threats by Georgians as well as South Carolinians,[384] but with spokesmen of the upper South speaking (as Martin had done) on the other side. It was Mason of Virginia, in fact, who delivered the most withering attack of all, denouncing not only the "infernal trafic [*sic*]" in slaves, but the institution of slavery itself.[385] To halt the devastating cross-fire, General Charles Cotesworth Pinckney of South Carolina proposed a compromise by which the importation of slaves would "be made liable to an equal tax with other imports."[386] His motion involved sending this particular clause to committee, whereupon Gouverneur Morris proposed that "the whole subject" should be so committed, and he specifically included "the clauses relating to taxes on exports & to a navigation act." He explained with complete frankness that he expected and hoped that "[t]hese things may form a bargain among the Northern & Southern States."[387] There was vigorous opposition to reopening the question of export duties, and accordingly

381 *See id.* at 359-64 (Madison's notes, August 21).

382 *Id.* at 364 (Madison's notes).

383 *Id.* (speeches of Charles Pinckney and John Rutledge, respectively).

384 Abraham Baldwin of Georgia saw regulation of the slave trade as strictly a prerogative of the states, local in nature and not a fitting subject for deliberation. General Charles Cotesworth Pinckney of South Carolina did not veil his threats, stating that he would "consider a rejection of the clause as an exclusion of S[outh] Carol[in]a from the Union." *Id.* at 372 (Madison's notes).

385 *Id.* at 370 (Madison's notes).

386 *Id.* at 373 (Madison's notes).

387 *Id.* at 374 (Madison's notes).

the ban on them, approved the day before, was allowed to stand.[388] The upshot was that the Convention voted to refer to an *ad hoc* committee consisting of a member from each state the clauses relating to the importation of slaves and also the one dealing with navigation acts.[389]

The First Debate on the Treaty Clause, August 23, 1787

On the very next day, the 23rd of August, the Convention was obliged to come to grips with the question of treaty-making, for the section of the draft constitution which specified the powers of the Senate was finally reached. The very first speech was by Madison and it appeared for a moment that the question of executive-legislative relationships in the conduct of foreign affairs would be fully opened up. "Mr. Madison," said his own third-person record,

> observed that the Senate represented the States alone, and that for this as well as other obvious reasons it was proper that the President should be an agent in Treaties.[390]

If Madison's intention had been—or if his hearers had understood his intention to have been—the wholesale transfer from legislative to executive hands of the power of deliberating upon and deciding the course that diplomatic negotiations should take, then some discussion was certainly to be expected. If the proposal had been of this sort, it would have involved a complete reversal of every principle with respect to treaty-making which the Convention had thus far approved or favorably considered. Those who had been outspoken in their insistence that the powers of peace and war were legislative and not executive powers would surely have reiterated their views. In fact, however, no comment whatsoever was forthcoming. Madison made no motion, hence no second was required. And not a single delegate spoke up either to support or to oppose Madison's low-keyed suggestion.[391]

The obvious explanation is that Madison was proposing no change more extensive than that implied by the literal sense of the words he used: the President should be an "agent" in treaty-making. Now an agent acts for his principal, and the principal in this matter,

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388 *See id.*

389 *Id.* at 366 (Journal), 374, 375 (Madison's notes). There were separate votes on committing the slave-trade clauses (which passed seven states to three) and then also the clause on navigation acts (which passed nine to two).

390 *Id.* at 392.

391 *See id.* at 392-93 (Madison's notes).

as the report of the Committee of Detail explicitly provided, was the Senate of the United States. The word "agent" described with substantial accuracy the position that John Jay as Secretary for Foreign Affairs occupied *vis-à-vis* the old Congress. He was appointed by it, he executed the policies it instructed him to pursue, and he was in every political sense responsible to it. Now Madison was, in effect, calling attention to an oversight in the draft constitution reported by the Committee of Detail. The President would certainly be called upon to execute whatever foreign policies might be decided upon.[392] But under the new system he would be neither appointed by nor responsible to Congress as the Secretary for Foreign Affairs of the old Congress had been. And under the doctrine of separation of powers he might even be denied the kind of participation in decision-making that had been Jay's unquestioned right as a responsible officer of the old Congress. For the new President to play the kind of role in policy-making that Jay had played called for some definition of the relationship between the Senate and the now-independent chief executive. Madison's statement would fill this lacuna: "[T]he President should be an agent in Treaties." The Convention apparently accepted this as the common sense of the matter. Madison, at least, seems to have believed that his suggestion had been silently accepted, for by the end of the day he was referring quite casually to the power of "the President & Senate to make Treaties."[393]

Since no one offered to comment on Madison's opening remark, the discussion of the 23rd of August turned immediately thereafter to the controversial question uppermost in the minds of most delegates —namely, what weight each state or section could expect to have in the negotiation of treaties, especially those having an economic or a regional impact. Because treaties would be binding as part of the supreme law of the land, the treaty-making power was necessarily a form

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392 The obvious fact that the executive branch would have many duties to perform in connection with foreign affairs received recognition in the proposals that had been offered three days before for organizing executive departments. There was to be a Secretary of Foreign Affairs, appointed by and removable by the President. The list of his duties represents, in a sense, a definition of what the movers, Gouverneur Morris and Charles Pinckney, considered to be the executive (as distinguished from the legislative) component in foreign relations. The Secretary was

> to correspond with all foreign Ministers, prepare plans of Treaties, & consider such as may be transmitted from abroad; and generally to attend to the interests of the U[nited] S[tates] in their connections with foreign powers.

Id. at 343 (Madison's notes, August 20). The proposal never came to a vote, and the organization of the executive departments was left to the First Congress.

393 *Id.* at 394 (Madison's notes).

of legislative power. If vested in the Senate alone, rather than in both houses, then the small states (over-represented there) would be in a position to advance their own interests at the expense of the larger (and hence wealthier) states. At the first opportunity, therefore, Gouverneur Morris, from the large state of Pennsylvania, moved a proviso that "no Treaty shall be binding on the U.S. which is not ratified by a law."[394]

Two delegates were quick to point out certain technical difficulties. If ambassadors were to receive their instructions from the Senate but were to submit the results of their negotiations for approval by both houses, then, said Nathaniel Gorham of Massachusetts, they "would be at a loss how to proceed."[395] And William Samuel Johnson of Connecticut

> thought there was something of solecism in saying that the acts of a Minister with plenipotentiary powers from one Body, should depend for ratification on another Body.[396]

From the perspective of the present day, the most significant fact about this argument was its underlying, uncontroverted assumption that a legislative body rather than the executive would continue to formulate the policy and issue the instructions which American diplomats would be expected to carry out.

Though there was some support for Gouverneur Morris' proposal to require the concurrence of both houses in the ratification of treaties, his motion was finally voted down with only his own state in favor.[397] Madison then sought a compromise. He proposed that treaties affecting domestic interests—commercial treaties being an obvious example—should be binding as municipal law only after action by Congress as a whole. But he was in favor of "[a]llowing the President & Senate to make Treaties . . . of Alliance for limited terms"—presumably because of the need for secrecy in such negotiations.[398] As the

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394 *Id.* at 392 (Madison's notes).

395 *See id.* McHenry gives an even more lucid summary of the argument in his notes:

> It was said that a minister could not then be instructed by the Senate who were to appoint him, or if instructed there could be no certainty that the house of representatives would agree to confirm what he might agree to under these instructions.

Id. at 395 (footnote omitted).

396 *Id.* at 393 (Madison's notes).

397 *Id.* at 383, 384 (Journal), 394 (Madison's notes).

398 *Id.* at 394 (Madison's notes). To understand Madison's proposed distinction between treaties that ought to receive the approval of both houses and those for which senatorial approval would suffice, one should examine not only his two speeches on the matter on August 23 (*id.* at 392, 394 (Madison's notes)), but also a speech of his on September 7

debate wore on, Randolph remarked "that almost every Speaker had made objections to the clause as it stood."[399] At the end of the day the entire section dealing with the authority of the Senate in treaty-making and appointments was sent to committee—not, however, to the eleven-man compromise committee appointed the previous day to wrestle with the questions of slave importation and navigation acts, but to the original five-man Committee of Detail.[400] Though no instructions were given, this committee was presumably expected to reconsider the treaty provision in the light of whatever compromises might be reached on other economic issues.

The Sectional Compromise on the Slave Trade and Navigation Acts

The most important of the compromise proposals was in fact ready the very next morning. After only one day and two evenings of work, the special committee laid before the Convention on the 24th of August a double-barreled proposition respecting the importation of slaves and the passing of navigation acts. With respect to the foreign slave trade, the committee proposed to fix a date—the year 1800 being specified—before which Congress might not prohibit the importation of slaves, but after which it would be free to use both its taxing and its commerce power for the purpose. During the interval, however, such importation could be taxed, but only " 'at a rate not exceeding the average of the Duties laid on Imports.' " With respect to navigation acts, the compromise committee eliminated the requirement of a two-thirds vote for approval.[401] This victory for the commercial states was probably as much a *quid pro quo* for the retention of the ban on export taxes as for the continued tolerance of the foreign slave trade.[402]

Debate on this compromise began the next day, the 25th of August. The matter first discussed was the importation of slaves. Madison

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(*id.* at 540 (Madison's notes)), a memorandum of his of the same date (4 *id.* at 58), a letter of his to Jefferson on April 4, 1796 (3 *id.* at 372), and a speech of his before the House of Representatives on April 6, 1796 (*id.* at 373-74).

399 2 RECORDS 393 (Madison's notes).

400 *Id.* at 394 (Madison's notes). The original Committee of Detail continued to be asked to reconsider specific provisions, as in this instance. It was sometimes simply referred to as the Committee of Five. *See id.* at 334 (Journal, August 20), 341, 342 (Madison's notes), where both terms are used for the same committee.

401 *See id.* at 396 (Journal), 400 (Madison's notes).

402 The committee, of course, had no authority to reopen the question of export duties, the ban having been voted by the Convention itself. *See* text accompanying notes 381 & 388 *supra*. The existence of the ban (which southern states desired) was, however, a factor that the committee presumably bore in mind.

announced that he "thought it wrong to admit in the Constitution the idea that there could be property in men,"[403] but efforts by anti-slavery men to modify the clause in various ways were all rejected. The only substantive change that was approved was of opposite tenor. At the behest of one of the South Carolina delegates, and over the opposition of Madison, the period during which the slave trade would be allowed to continue without control was extended from 1800 to 1808. On this question the vote was seven states in favor and only four (including Virginia) opposed. The fact that the measure was part of a compromise put enough northern votes in the favorable column to carry this amendment and then to adopt the clause as amended.[404]

On the 29th of August the Convention considered the other half of the compromise, whereby navigation acts were to require no more than a simple majority for passage. The sectional conflict came to the fore immediately as Charles Pinckney of South Carolina moved not merely to restore the two-thirds requirement but to apply it to every enactment whatever affecting commerce, interstate or foreign.[405] Gouverneur Morris branded the proposal "highly injurious," and his fellow-Pennsylvanian George Clymer exclaimed that "[t]he Northern & middle States will be ruined, if not enabled to defend themselves against foreign regulations."[406] On the other side, Mason of Virginia protested that the southern states could not be expected to "deliver themselves bound hand & foot to the Eastern States."[407] And Randolph (who had presented the Virginia Plan at the outset of the Convention) announced that "[a] rejection of the motion would compleat the deformity of the system," already becoming "odious" to him because

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403 2 RECORDS 417 (Madison's notes).

404 *See id.* at 414-17 (Madison's notes). It was General Charles Cotesworth Pinckney of South Carolina who made the motion for a change of date, but it was Gorham of Massachusetts who, dramatizing the existence of a compromise, seconded the motion. *Id.* at 415. Three New England states joined four southern ones in passing both the amendment and the provision itself; Virginia joined three middle states in opposition. *Id.* A minor amendment fixed the maximum tax on the importation of a slave at ten dollars instead of "the average of the Duties laid on Imports." *Id.* at 417.

405 Pinckney's motion read:

> That no act of the Legislature for the purpose of regulating the commerce of the United States with foreign powers or among the several States shall be passed without the assent of 2/3rds of the Members of each House.

Id. at 446 (Journal), 449 (Madison's notes). Compare the provision in the Randolph/Rutledge draft that had circulated within the Committee of Detail. See text accompanying notes 343-45 *supra*.

406 2 RECORDS 450 (Madison's notes).

407 *Id.* at 451 (Madison's notes).

of "an accumulation of obnoxious ingredients."[408] Disunionist sentiments rose dangerously close to the surface in Gorham's reply:

> If the Government is to be so fettered as to be unable to relieve the Eastern States what motive can they have to join in it, and thereby tie their own hands from measures which they could otherwise take for themselves.[409]

Two South Carolina delegates, General Charles Cotesworth Pinckney and Pierce Butler, came to the rescue of the compromise, opposing the motion of their colleague Charles Pinckney, and reminding the Convention (implicitly at least) that the commercial states had already kept their part of the sectional bargain by voting to leave the slave trade open for twenty-one years.[410] By throwing the vote of South Carolina against the motion to restore the two-thirds requirement, these two delegates helped bring about the defeat of the proposal.[411] Butler was able to collect an extra dividend for the slaveholding section by securing unanimous consent for a fugitive-slave clause that he had proposed the day before.[412]

The passage of the compromise involving the slave trade and navigation acts did not end the conflict among the states and sections over possible misuse (or non-use) of the commercial powers about to be bestowed on Congress. On the 31st of August there was a good deal of wrangling over a proposal that in a less tense situation might have been regarded as self-evidently just. The provision in question said merely that no law regulating commerce or tariffs should " 'oblige vessels bound to or from any State to enter clear or pay duties in another.' " The clause was finally adopted by a vote of eight states to two,[413] but the debate revealed a depth of suspicion and acrimony among the states that could only be mitigated by an unremitting attention to the balancing of one economic interest against another.

Throughout this period of debating and bargaining on the regu-

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408 *Id.* at 452-53 (Madison's notes).

409 *Id.* at 453 (Madison's notes).

410 *Id.* at 449-50, 451 (Madison's notes). Madison pointed out in a footnote the underlying significance of General Pinckney's seemingly bland remarks. *Id.* at 449 n.*.

411 *Id.* at 446, 447 (Journal), 453 (Madison's notes). On the crucial vote, South Carolina joined the six states north of Maryland in rejecting the two-thirds requirement. The other four southern states voted on the opposite side.

412 *Id.* at 443 (Madison's notes, August 28), 446 (Journal, August 29), 453-54 (Madison's notes).

413 *Id.* at 480-81 (Madison's notes). New Hampshire and South Carolina voted in the negative. According to McHenry, Massachusetts did also, making the vote eight to three. *Id.* at 482. Neither the Journal nor Madison's notes, however, record any vote by Massachusetts. *Id.* at 474 (Journal), 481 (Madison's notes).

lation of foreign and domestic commerce, the article relating to the Senate, with its crucial treaty-making clause, remained quietly in the hands of the Committee of Detail to which it had been referred on the 23rd of August. It was, of course, obvious that the two-thirds rule, which had been debated so vehemently in connection with navigation acts, would be equally relevant if applied to commercial treaties, which dealt with the same subject-matter, or even, by extension, to all treaties, since few were without some economic or regional impact. It is hardly surprising, therefore, that no attempt was made to reach a decision on the treaty clause until the outcome was known of the struggle over navigation acts and related matters. And when a committee report finally came, it recommended inserting into the treaty clause the two-thirds requirement that had just been scrapped in connection with navigation acts.

The Brearley Committee's Revision of the Treaty Clause

This particular compromise was not proposed by the Committee of Detail, for it had been superseded. On the 31st of August the Convention voted

> to refer such parts of the Constitution as have been postponed, and such parts of Reports as have not been acted on to a Committee of a Member from each State.[414]

David Brearley of New Jersey became chairman, and the eleven-man committee made three successive reports. The first, a relatively minor one, was presented the very next day, a Saturday, whereupon the Convention immediately adjourned so that the committee could deliberate.[415] Only a small amount of business was done by the Convention on the following Monday, and by Tuesday, the 4th of September, the Brearley committee was ready with one of the most significant reports of the entire Convention,[416] leaving only a few details to be cleared up in its final report on the following day.[417]

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414 *Id.* at 473 (Journal).

415 *See id.* at 483-85.

416 *See id.* at 486-92.

417 *Id.* at 508-09 (Madison's notes). Among the provisions proposed in the third report, two should be noted at this juncture:

> (1) To add to the clause "to declare war" the words "and grant letters of marque and reprisal"
>
> (2) To add to the clause "to raise and support armies" the words "but no appropriation of money to that use shall be for a longer term than two years . . . ."

Id. at 508.

The second report (that of Tuesday, the 4th of September) proposed the system of electing the President that was (with modifications) finally written into the Constitution, created the office of vice-president, and dealt with impeachment.[418] Hardly less significant, however, was the provision with which we are particularly concerned, that which dealt with treaty-making, with appointments, and with the roles of President and Senate therein. The wording was as follows:

> The President by and with the advice and Consent of the Senate, shall have power to make Treaties; and he shall nominate and by and with the advice and consent of the Senate shall appoint ambassadors, and other public Ministers, Judges of the Supreme Court, and all other Officers of the U[nited] S[tates], whose appointments are not otherwise herein provided for. But no Treaty shall be made without the consent of two thirds of the members present.[419]

For reasons that will shortly appear, one other recommendation of the committee, though seemingly unrelated, should be read in connection with the above. The President, said this new addition to the executive article,

> may require the opinion in writing of the principal Officer in each of the Executive Departments, upon any subject relating to the duties of their respective offices.[420]

The new committee on postponed parts was proposing three specific changes in the article on the Senate which the old Committee of Detail had drafted. In the first place, it was giving the President a definite role in treaty-making. In the second place, instead of authorizing certain appointments to be made by the Senate alone and others by the President alone, it was lumping all kinds of appointments together and subjecting them to a uniform procedure involving joint participation by President and Senate. In the third place, it was applying a two-thirds rule to treaty-making. Each of the three changes must be examined in the context of the other decisions the Convention was making, for the broad implications of what the committee was doing are not immediately self-evident. Its decision to apply the two-thirds rule is the easiest to comprehend, for there were obvious parallels to the economic and sectional bargaining just examined.

Far less apparent is the significance of the new arrangement proposed for the making of appointments. The ultimate effect was to alter

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418 *Id.* at 497-99 (Madison's notes).

419 *Id.* at 498-99.

420 *Id.* at 499.

fundamentally the relationship of the Senate to the executive branch, changing it from a body completely apart from and independent of the President into a council of appointment or executive council. And the terms "advice and consent," traditionally descriptive of the role of such a council, were carried over (though with a difference to be noted later) into the treaty-making clause, thereby defining the relationship between President and Senate in this matter as a conciliar relationship also.

The Question of a Separate Council of State

The idea that there should be an Executive Council or Council of State or Privy Council to advise the President was probably taken for granted by most delegates from the very beginning of the Convention. The Privy Council was a familiar historic feature of the British constitution, and royal government in the American colonies was exercised by a governor with whom a council was regularly associated.[421] More pertinent, so far as the Federal Convention of 1787 was concerned, was the fact that every one of the states that had adopted a written constitution since the beginning of 1776—and twelve of them had done so[422] —had provided a Council to advise the chief executive (usually styled the Governor).[423] Labels differed—Privy Council, Council of State, Ex-

421 *See* notes 53-55 *supra* and accompanying text.

422 The first of the former colonies to adopt a constitution of its own was New Hampshire on January 5, 1776. Between that time and the meeting of the Federal Convention in 1787, eleven of the thirteen adopted state constitutions, as did Vermont (whose admission to the Union was delayed until 1791 by jurisdictional claims of New York and New Hampshire). Of the twelve states (including Vermont) which did adopt constitutions, three had replaced their first versions with second ones prior to 1787. The fifteen constitutions thus adopted are here listed in chronological order, with references to the complete texts in the seven-volume THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA (F. Thorpe ed. 1909) [hereinafter cited as CONSTITUTIONS]: New Hampshire, January 5, 1776 (4 *id.* at 2451-53); South Carolina, March 26, 1776 (6 *id.* at 3241-48); Virginia, June 29, 1776 (7 *id.* at 3812-19); New Jersey, July 2, 1776 (5 *id.* at 2594-98); Delaware, September 10, 1776 (1 *id.* at 562-68); Pennsylvania, September 28, 1776 (5 *id.* at 3081-92); Maryland, November 11, 1776 (3 *id.* at 1686-1712); North Carolina, December 18, 1776 (5 *id.* at 2787-94); Georgia, February 5, 1777 (2 *id.* at 777-85); New York, April 20, 1777 (5 *id.* at 2623-38); Vermont, July 8, 1777 (6 *id.* at 3737-49); South Carolina (second constitution), March 19, 1778 (*id.* at 3248-57); Massachusetts, March 2, 1780 (3 *id.* at 1888-1911); New Hampshire (second constitution), June 2, 1784 (4 *id.* at 2453-70); Vermont (second constitution), July 4, 1786 (6 *id.* at 3749-61).

Connecticut and Rhode Island made do with their colonial charters until 1818 and 1842 respectively. *See* 1 *id.* at 536-47; 6 *id.* at 3222-40.

423 Four of the twelve states that adopted written constitutions prior to 1787 used the title President—South Carolina (1776 constitution), Delaware, Pennsylvania, and New

ecutive Council, or simply Council[424]—but the functions were the same. Only New York varied the pattern by establishing two councils: one for appointments, and one for "revision" of the laws (*i.e.*, vetoing them).[425] In every instance the Council was made as independent of the Governor as possible. Members of the Council were elected by popular vote in three states,[426] by the legislature in eight,[427] and by a combination of both methods in the remaining one.[428] Three of the states required many executive acts to be performed by the Governor and Council acting as an organized executive body.[429] Six of the others

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Hampshire (1784 constitution). In its second constitution (1778), South Carolina shifted to Governor, the title used from the outset by eight other states. New Hampshire made no provision for a chief executive until its second constitution.

424 Four states used the term Privy Council—South Carolina (both constitutions), Virginia, New Jersey, and Delaware. Two used the term Council of State—Virginia and North Carolina (Virginia, as the foregoing shows, used the terms interchangeably). Three states used the term Executive Council—Pennsylvania, Georgia, and Vermont (both constitutions). New York had two specialized councils—a Council of Revision and a Council of Appointment. The other three states spoke of a Council to the Governor or simply a Council—Maryland, Massachusetts, and New Hampshire (1784 constitution). To avoid confusion, one must note that the upper house of the legislature in four states was called a Legislature Council or simply a Council—New Hampshire and South Carolina (1776 constitutions), New Jersey, and Delaware.

Two states followed the pattern of colonial government by establishing a Council that was both the upper house of the legislature and the executive council to the governor. In New Jersey, any three or more of the Legislative Council could constitute a Privy Council. 5 CONSTITUTIONS 2596 (Article 8). In Georgia, the Executive Council, without the Governor, sat almost as an upper chamber when the House of Assembly was in session. *See* 2 *id.* at 779, 781, 782 (Articles 8, 22, 27, 28). Finally, two states provided for a Council of Censors, distinctly different from all other types of councils—Pennsylvania and Vermont (both constitutions).

425 *See* note 424 *supra*.

426 New Jersey, Pennsylvania, and Vermont (both constitutions).

427 South Carolina (both constitutions), Virginia, Delaware, Maryland, North Carolina, Georgia, New York (the Council of Appointment), and New Hampshire (1784 constitution).

428 Massachusetts provided for popular election of forty persons who were to be councillors and senators. 3 CONSTITUTIONS 1895 (Part 2, chapter 1, section 2, article 1). Nine of these would then be elected by joint ballot of the two houses to serve on the Council, and the remainder would constitute the Senate. *Id.* at 1904 (Part 2, chapter 2, section 3, article 2).

429 Pennsylvania, Georgia, and Vermont (both constitutions).

The functioning of the executive council as a regular organ of government, with the chief executive as a participating member, is graphically described in the Pennsylvania constitution:

> The president . . . with the council, five of whom shall be a quorum, shall have power to appoint and commissionate [*sic*] judges . . . and shall supply every vacancy in any office. . . . They are to correspond with other states, and transact business with the officers of government, civil and military; and to prepare such business as may appear to them necessary to lay before the general assembly. . . . And shall have power to grant pardons . . . to take care that the laws be faith-

applied the traditional phrase "advice and consent" to the situations where power was to be exercised concurrently by Governor and Council.[430] Two states made use only of the word "advice," but used it with the almost inescapable implication that the approval of the Council was what was required.[431] Only a single state left the Council completely without mandatory authority, its constitution speaking vaguely of a right "to consult."[432] To be sure, in every state the Governor was required to act "by and with the advice and consent of the Council" only on matters of certain specified kinds, such as making appointments, calling out the militia, invoking martial law, imposing embargoes, etc.[433] On other matters, where the constitution did not require

fully executed . . . and they may draw upon the treasury for such sums as shall be appropriated by the house: They may also lay embargoes . . . in the recess of the house only: They . . . shall have power to call together the general assembly when necessary, before the day to which they shall stand adjourned. The president shall be commander in chief of the forces of the state, but shall not command in person, except advised thereto by the council, and then only so long as they shall approve thereof. The president and council shall have a secretary, and keep fair books of their proceedings, wherein any counsellor may enter his dissent, with his reasons in support of it.

5 CONSTITUTIONS 3087-88 (Section 20). See 6 *id.* at 3745, 3756 for substantially identical provisions in the Vermont constitutions of 1777 and 1786 (Chapter 2, section 18, and Chapter 2, section 11, respectively).

430 South Carolina (both constitutions), Delaware, Maryland, New York (Council of Appointment), Massachusetts, and New Hampshire (1784 constitution).

431 Virginia and North Carolina. Save for the omission of the word "consent," several of the following clauses are virtually identical with those in notes 429 *supra* and 433 *infra*. The Governor, according to the Virginia constitution,

shall, with the advice of a Council of State, exercise the executive powers of government, according to the laws of this Commonwealth; and shall not, under any pretence, exercise any power or prerogative, by virtue of any law, statute or custom of England.

7 CONSTITUTIONS 3816-17.

The Governor may embody the militia, with the advice of the Privy Council; and when embodied, shall alone have the direction of the militia, under the laws of the country.

Id. at 3817.

The Sheriffs and Coroners shall be nominated by the respective Courts, approved by the Governor, with the advice of the Privy Council, and commissioned by the Governor.

Id. at 3818. In the last clause, in particular, it is difficult to see how the phrase "with the advice of" can mean anything except "with the consent of." According to the North Carolina constitution, the Governor "shall have power, by and with the advice of the Council of State, to embody the militia for the public safety." 5 *id.* at 2791 (Article 18). "He also, may by and with the advice of the Council of State, lay embargoes . . . in the recess of the General Assembly." *Id.* (Article 19).

432 The relevant portion of the New Jersey constitution provided that

the Governor, or, in his absence, the Vice-President of the Council, shall have the supreme executive power . . . and . . . any three or more of the Council shall, at all times, be a privy-council, to consult them . . . .

5 CONSTITUTIONS 2596 (Article 8).

433 The following excerpts are illustrative of this point.

that the advice and consent of the Council be obtained, the Governor was free to consult it if he chose, but he was not obliged to follow its recommendations.[434] Nevertheless, neither the giving nor the receiving of advice was a casual, off-hand affair. Ten of the states required the advice and the proceedings of the Council to be set down in writing, usually with the yeas and nays recorded, and often certified by the signatures of the members present. Moreover, seven of the states—a majority—provided specifically that these records of the Council's "advice and proceedings" were to be laid before the legislature if the latter called for them.[435] When an oath of secrecy was prescribed, it bound

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> [T]he president and commander-in-chief, with the advice and consent of the privy council, may appoint . . . all other necessary officers, except such as are by law directed to be otherwise chosen.

6 CONSTITUTIONS 3247 (South Carolina constitution of 1776, Article 25). "All judicial officers . . . shall be nominated and appointed by the governor, by and with the advice and consent of the council." 3 *id.* at 1902 (Massachusetts constitution, Part 2, chapter 2, section 1, article 9). "[T]he Governor, by and with the advice and consent of the Council, may embody the militia; and, when embodied, shall alone have the direction thereof." *Id.* at 1696 (Maryland constitution, Article 33). The New Hampshire constitution of 1784 stated that

> the president hereby is entrusted with all other powers incident to the office of captain-general and commander in chief, and admiral . . . provided that the president shall not . . . grant commissions for exercising the law-martial in any case, without the advice and consent of the council.

4 *id.* at 2464. Finally, the second South Carolina constitution declared that

> the governor and commander-in-chief . . . by and with the advice and consent of the privy council, may lay embargoes . . . for any time not exceeding thirty days, in the recess of the general assembly.

6 *id.* at 3255 (Article 35).

434 The South Carolina constitution of 1776 provides a good example.

> The privy council (of which four to be a quorum) to advise the president and commander-in-chief when required, but he shall not be bound to consult them, unless in cases after mentioned.

6 CONSTITUTIONS 3244 (Article 5). Among the "cases after mentioned" were the filling of vacancies and the appointment of minor "necessary officers;" in these "the advice and consent of the privy council" was required. *Id.* at 3246-47 (Articles 24 & 25).

435 The archetypal provision was that of the Virginia constitution. The legislature was to choose a "Privy Council, or Council of State, consisting of eight members," and they were to choose a President from among their own number.

> Four members shall be sufficient to act, and their advice and proceedings shall be entered on record, and signed by the members present, (to any part whereof, any member may enter his dissent) to be laid before the General Assembly, when called for by them.

7 CONSTITUTIONS 3817. Six other states made similar provisions—Delaware, Maryland, North Carolina, South Carolina (1778 constitution), Massachusetts, and New Hampshire (1784 constitution). See note 429 *supra* for the provision of the Pennsylvania constitution that required a record to be kept but which said nothing about making it available to the legislature. Two other states—Georgia and Vermont (both constitutions)—followed Pennsylvania in this.

the councillor to reveal nothing "until leave given by the council, or when called upon by the house of assembly."[436]

During the early part of the Federal Convention of 1787 little attention was given to the question of incorporating in the constitutional system of the Union the kind of Executive Council or Council of State that had been universally established within state governments. Most of the plans that were presented and discussed made some provision for a council, but details were various and vague. In frank imitation of the New York arrangement, the Virginia Plan of the 29th of May called for a Council of Revision, but not for the equivalent of the New York Council of Appointment.[437] Charles Pinckney's plan, presented the same day, proposed that the President should "have a Right to advise with the Heads of the different Departments as his Council." The same officers would constitute a Council of Revision also.[438] Since they would be appointed not by the President but by Congress, this Council would theoretically be as independent as those in the states. The New Jersey Plan of the 15th of June proposed a plural executive, which would be in itself a council.[439] Prior to the appointment of the Committee of Detail at the end of July, however, nothing had been decided relative to a council, and the discussion had been rather desultory.[440]

When, however, no provision for a council appeared anywhere in the draft constitution reported by the Committee of Detail on the 6th of August, the omission soon gave rise to debate. On the 18th of August, Oliver Ellsworth of Connecticut "observed that a Council had not yet been provided for the President," and he proposed one that would include members from each of the three branches; the President of the Senate, the Chief Justice, and the heads of the principal executive departments. This council "should advise but not conclude the President."[441] Each of the three speakers who followed took a different view.

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436 *E.g.*, 2 CONSTITUTIONS 782 (Georgia constitution, Article 30).

437 *See* 1 RECORDS 21 (Virginia Plan, resolution 8).

438 2 RECORDS 135 (Committee of Detail) (outline of the Pinckney Plan found among James Wilson's papers). These two clauses were incorporated into Professor Jameson's reconstruction of the Pinckney Plan, referred to in note 185 *supra*. *See* 3 RECORDS 606 (Appendix D). *See also id.* at 110-11 (excerpts from *Observations on the Plan of Government Submitted to the Federal Convention*, a pamphlet published by Pinckney following the Convention). *See* note 185 *supra*.

439 1 RECORDS 244 (Madison's notes).

440 *See, e.g., id.* at 66-67, 70-71, 74 (Madison's, King's & Pierce's notes, June 1), 97-98, 110-11 (Madison's & Mason's notes, June 4); 4 *id.* at 15-17.

441 2 RECORDS 328-29 (Madison's notes). Four days earlier, John Francis Mercer of Maryland had spoken of the need for a council, which he thought should be composed of "members of both Houses." *Id.* at 285 (Madison's notes).

Charles Pinckney, who was on record as favoring a council differently constituted,[442] wished the President to be at liberty "to call for advice or not as he might chuse," and he warned: "Give him an able Council and it will thwart him; a weak one and he will shelter himself under their sanction."[443] Elbridge Gerry of Massachusetts, assuming that the council would act as a council of revision in vetoing acts of Congress, announced that he "was ag[ain]st letting the heads of the departments . . . have anything to do in business connected with legislation," and he objected also to the participation of the chief justice.[444] John Dickinson of Delaware "urged that the great appointments should be made by the Legislature," in which case the officers concerned "might properly be consulted by the Executive," but they would hardly be the independent advisers that Dickinson had in mind if the appointments were "made by the Executive himself."[445] Faced with such divergent views, the Convention "by general Consent" allowed the subject to lie over.[446]

On the next business day, Monday, the 20th of August, Gouverneur Morris, seconded by Pinckney, submitted an elaborate proposal on the subject, which was referred, without debate, to the old Committee of Detail. Its purpose, according to its opening words, was to establish a "Council of State" which would "assist the President in conducting the Public affairs."[447] Madison, in his original Notes, characterized the document more accurately as "a sett [*sic*] of resolutions or-

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442 The Pinckney Plan proposed a council made up exclusively of the President and heads of executive departments. *Id.* at 135 (Committee of Detail); 3 *id.* at 606 (Appendix D). The proposal of Gouverneur Morris, which Pinckney would second, added the chief justice, but no members of the legislative branch. *See* 2 *id.* at 342-43 (Madison's notes, August 20). This proposal was not actually introduced until the 20th, but Pinckney had announced on the 18th that it was in the offing. *See id.* at 329 (Madison's notes). Pinckney was originally "opposed to an introduction of the Judges into the business." 1 *id.* at 139 (Madison's notes, June 6).

443 2 RECORDS 329 (Madison's notes). Pinckney was following the example of his own state's constitution, which only required consultation in certain named situations. *See* note 434 *supra*.

444 2 RECORDS 329 (Madison's notes). Gerry had made the same objection to the inclusion of the judiciary on a council of revision as early as June 4. "It was," he then said, "quite foreign from the nature of ye. office to make them judges of the policy of public measures." 1 *id.* at 97-98 (Madison's notes). Others invoked the doctrine of separation of powers to the same effect. *See id.* at 110 (Pierce's notes, June 4) (speech of John Dickinson), 139-40 (Madison's notes, June 6) (speech of Mason). Madison, however, defended the idea of "annexing the wisdom and weight of the Judiciary to the Executive" in a council of revision. *Id.* at 138-39 (Madison's notes, June 6); *see id.* at 110 (Pierce's notes, June 4).

445 2 RECORDS 329 (Madison's notes).

446 *Id.*

447 *See id.* at 342-44 (Madison's notes).

ganizing the Executive department."[448] What the propositions really did was spell out in considerable detail the administrative duties of six principal executive officers—five heads of departments and a Secretary of State[449]—as well as certain advisory functions to be performed by the chief justice, who would preside over the council in the President's absence.[450] The traditional function of a Privy Council—to express an independent judgment on great issues of policy—was little more than an appendage to the administrative responsibilities of the several members. The President, it is true, might "submit any matter to the discussion of the Council of State" and he could "require the written opinions of any one or more of the members," but he was free to "[c]onform to such opinions or not as he may think proper."[451] These "opinions" were apparently conceived of as expert recommendations concerning matters within the purview of the particular official's administrative responsibility, for the proposal ended with a warning, backed up by the threat of impeachment, that "every officer . . . shall be responsible for his opinion *on the affairs relating to his particular Department.*"[452] One traditional function of a council of state—to give advice, and often consent also, on appointments to office—was nowhere mentioned.

Adding a Council of State so conceived would not alter in any appreciable way the machinery already contained in the draft constitution proposed by the Committee of Detail. In particular it would not shift the responsibility for appointments, which the draft constitution allocated exclusively to the Senate where ambassadorships and Supreme Court judgeships were concerned and exclusively to the President where executive offices were to be filled.[453] Because the proposal would add only a few administrative details to the original draft constitution,

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448 *Id.* at 340-41 n.4. This was the entry Madison made at the time. Eventually he replaced it with a full transcript of Morris' proposition, copied from the subsequently-printed Journal. *Id.*

449 This officer was to be "Secretary to the Council of State, and also public Secretary to the President," with the duty of preparing "all public despatches from the President which he shall countersign." *Id.* at 343 (Madison's notes). There was also to be a Secretary of Foreign Affairs. The merging of the two functions by the First Congress when it created the executive departments in 1789, and the decision to use the word "State" rather than "Foreign Affairs" in the name of the Department and in the title of its chief officer, accounts for the present-day American connotation of these terms.

450 *Id.* at 342 (Madison's notes).

451 *Id.* at 343-44 (Madison's notes).

452 *Id.* at 344 (Madison's notes) (emphasis added).

453 *Id.* at 183, 185 (Article 9, section 1; Article 10, section 2).

the Committee of Detail showed no hesitation in reporting out an abbreviated version of the Morris/Pinckney resolutions two days after they were introduced and referred. The new text underlined the point that since any advice given to the President did not bind him, it would not "affect his responsibility for the measures which he shall adopt."[454]

This recommendation from the Committee of Detail reached the floor of the Convention on the 22nd of August, toward the end of a day spent in debating the two-pronged issue of navigation acts and slave importations.[455] On the next day, the 23rd, the Convention took up the article on the Senate, which assigned to that body not only the power to make treaties but also the power to appoint ambassadors and Supreme Court judges. The day's debate on treaty-making has already been examined.[456] Before it took place there was a brief discussion of the appointing power. Gouverneur Morris "argued ag[ain]st the appointment of officers by the Senate," on the ground that the body was "too numerous for the purpose" and would therefore be "subject to cabal" and "devoid of responsibility." Whether he was suggesting a Privy Council as a substitute for the Senate cannot be determined, for the existing record of the speech contains no allusion to his previous proposal for a council, even though it had been favorably reported the day before. After an expression of agreement by Wilson, the Convention turned to other matters.[457]

On the 24th of August, after the article on the Senate had been sent back to committee,[458] another discussion of the appointment procedure took place, this time *apropos* of the clause giving the President exclusive power to "appoint officers in all cases not otherwise provided for by this Constitution."[459] Fear of executive power was expressed, and changes were voted to prevent the President from using the appointing power to create new offices.[460] Randolph, distrustful of both the legislative and the executive branches where appointments were concerned, suggested that various appointments to federal offices

454 *Id.* at 367 (Journal, August 22). The committee version used the term "Privy-Council."

455 *Id.* at 375 (Madison's notes). The report was made just after the Convention had appointed the committee to seek a compromise on the question of navigation acts and the slave trade.

456 See notes 390-400 *supra* and accompanying text.

457 *See* 2 RECORDS 389 (Madison's notes, August 23).

458 See note 400 *supra* and accompanying text.

459 2 RECORDS 185 (Article 10, section 2).

460 *See id.* at 405-06 (Madison's notes). This sentiment was expressed again later in the Convention. *See id.* at 544-45 (Journal, September 8), 550, 553 (Madison's notes), 621 (Journal, September 8), 628 (Madison's notes).

might be referred "to some State Authority."[461] Strangely enough no one seems to have brought up on this occasion the idea that a council might give advice and consent on appointments.

By this time the proposed compromise on navigation acts and the importation of slaves was before the Convention,[462] and debate thereon pushed aside further consideration both of the appointing power and of the proposal for a Privy Council. That the latter proposition was still alive was shown by an incidental remark of Madison's on the 27th of August. Impeachment was under discussion, and Madison suggested that should a vacancy in the presidency be created, the executive powers might be exercised "by the persons composing the Council to the President."[463]

By the end of August no decision had been reached on the proposal for a Privy Council, and there had been no satisfactory resolution of conflicting views on the matter of appointments. These, then, were two of the "postponed" parts of the constitutional system which the Brearley committee was created to deal with.[464] Together with the question of presidential participation in treaty-making and the possible application of a two-thirds rule in the approval of treaties, they made up a group of four interrelated issues that could be set off against one another and a balance reached.

The one bit of evidence we have concerning the proceedings within the Brearley committee reveals that the idea of creating a new Privy Council was considered and rejected.[465] On the other hand, as its report proves, the committee was impressed by the contention that appointments should not be made with finality either by a cabal-prone body like the Senate or by a President acting alone. The answer of the Brearley committee was to convert the Senate itself into a council of appointment, placing in the hands of the President the exclusive power to nominate all officers (including ambassadors and Supreme

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461 *Id.* at 405 (Madison's notes). This was put in the form of a motion and eventually voted down. *See id.* at 406, 407 & n.17 (Madison's & McHenry's notes, August 24), 418-19 & n.15 (Madison's notes, August 25).

462 The compromise committee had presented its report at the beginning of the day on August 24, prior to the debate on appointments. Debate on the compromise began the next day. See text accompanying notes 401-04 *supra*.

463 2 RECORDS 427 (Madison's notes).

464 *See* text accompanying note 414 *supra*.

465 Gouverneur Morris, a member of the committee, said in debate on September 7:

> The question of a Council was considered in the Committee, where it was judged that the Presid[en]t by persuading his Council—to concur in his wrong measures, would acquire their protection for them . . . .

2 RECORDS 542 (Madison's notes).

Court judges, whose appointments had previously been vested in the Senate alone), and requiring approval by the Senate of all such nominations (including purely executive officials, with whose appointments the Senate had previously had nothing to do).[466]

"Advice and Consent" as the Formula for Treaties and Appointments

Having in this manner brought the executive and legislative branches into partnership in the matter of appointments, the committee employed a similar approach in settling the question of presidential participation in treaty-making. Madison's suggestion—the only one that had been made on the subject—was that "the President should be an agent in Treaties."[467] Now in a narrow sense the President would necessarily be an agent in the matter, simply by virtue of his constitutional responsibility for executing the laws (among which treaties are included). But if Madison was thinking, as seems probable, of the relationship between the old Congress and its Secretary for Foreign Affairs, John Jay, then to be an "agent" meant giving as well as receiving advice and thus participating in the process by which a consensus was reached on the policies to be carried out. It was certainly the larger and not the narrower concept that the Brearley committee had in mind. And it chose to describe this joint responsibility in the traditional language of "advice and consent," thus employing a formula that had headed every English statute for more than a century, that had summed up the demand of British reformers for parliamentary deliberation on treaties, that had defined the relationship between royal governor and provincial council in the American colonies, and that was being used to describe a similar relationship in many of the new American state constitutions.

Though the phrase "advice and consent" was used in both the treaty and the appointments clauses, there was a significant difference. It involved the authority to *initiate* the process. Generally speaking, every governmental measure is *consummated* by an executive act. It is the President's signature (and in England the royal assent) which finally makes a legislative enactment a law. From the point of view of international law it is the President who, in the end, makes a treaty binding by authorizing the exchange of ratifications. And a person is actually appointed to a constitutional office when the President

466 *See* text accompanying note 419 *supra.*

467 See text accompanying note 390 *supra.*

executes the commission. Only with respect to appointments, however, does the American Constitution vest in the President the exclusive authority to take the initial step, and it does this in explicit terms. The President alone can make a nomination. There is no comparable language in the treaty clause.[468] Only after the Convention was over did any member of it suggest that the Senate was precluded from considering the terms of possible international agreements until the President should have laid before it a completed treaty.[469] A quite different assumption underlay several of the speeches made in the Convention when the treaty clause was under discussion. In particular, there was serious discussion of a proposal that the Senate be authorized to carry through to completion the negotiation of any treaty of peace even though the President himself might oppose it. This debate deserves to be quoted verbatim and in full from Madison's notes.

Under discussion was the Brearley committee's proposal to insert in the treaty clause the following proviso: "But no treaty shall be made without the consent of two thirds of the members present." Wilson immediately objected to putting it "in the power of a minority to controul the will of a majority," and King concurred in the objection. Madison then suggested a middle ground, thereby inaugurating the following colloquy:

> Mr. Madison moved to insert after the word "treaty" the words "except treaties of peace" allowing these to be made with less difficulty than other treaties—It was agreed to nem[ine] con[tradicente].
>
> Mr. Madison then moved to authorize a concurrence of two thirds of the Senate to make treaties of peace, without the concurrence of the President.—The President he said would necessarily derive so much power and importance from a state of war that he might be tempted, if authorized, to impede a treaty of peace. Mr. Butler 2ded. the motion.
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> Mr. Gorham thought the precaution unnecessary as the means of carrying on the war would not be in the hands of the President, but of the Legislature.

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468 The two clauses should be laid side-by-side:

> [The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . .

U.S. CONST. art. II, § 2, cl. 2.

469 In the Pennsylvania ratification convention on December 4, 1787, James Wilson asserted: "The Senate can make no treaties: they can approve of none, unless the President of the United States lays it before them." And in a later speech the same day he remarked, *apropos* of the Senate: "With regard to their power in forming treaties, they can make none; they are only auxiliaries to the President." 2 DEBATES, *supra* note 318, at 466, 477. *But see* note 474 *infra* for Wilson's subsequent remarks to the same body.

> Mr. Go[u]v[erneu]r Morris thought the power of the President in this case harmless; and that no peace ought to be made without the concurrence of the President, who was the general Guardian of the National interests.
>
> Mr. Butler was strenuous for the motion, as a necessary security against ambitious & corrupt Presidents. He mentioned the late perfidious policy of the Statholder in Holland; and the artifices of the Duke of Marlbro' to prolong the war of which he had the management.[470]

At this point the focus of attention shifted from the role of President (who was not thereafter mentioned) to the importance of a two-thirds rule even in treaties of peace. Elbridge Gerry of Massachusetts argued that "[i]n Treaties of peace the dearest interests will be at stake, as the fisheries, territory &c." In such treaties, moreover, it is "the extremities of the Continent" whose interests are most in danger "of being sacrificed." Therefore, he insisted, peace treaties should require "a greater rather than less proportion of votes." Hugh Williamson of North Carolina agreed, to the extent of insisting that "Treaties of peace should be guarded at least by requiring the same concurrence as in other Treaties." After Williamson's speech a vote was taken on Madison's motion and it was defeated by a vote of eight states to three, with Madison's own state of Virginia recorded in the negative.[471]

The remarkable thing was not the defeat of the proposal but the fact that Madison and the delegates who agreed with him took it for granted that the Senate would possess (even under the new phrasing of the treaty clause) both the authority and the means to direct diplomatic negotiations over the opposition of the President. Even the opponents of Madison's proposal did not question or challenge this assumption, but instead based their opposition on two clearly specified grounds of a quite different character—namely, that the two-thirds rule should not be relaxed under any circumstances, and that the concurrence of the President should be required in every case, because he was "the general Guardian of the National interests."[472] To speak of the President's "concurrence" (as Gouverneur Morris in fact did), instead of the concurrence of the Senate, was to affirm the policy-mak-

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470 2 RECORDS 540-41 (September 7).

471 *Id.* at 541 (Madison's notes). Later the same day Williamson (seconded by his fellow North Carolinian, Richard Dobbs Spaight) moved that a two-thirds vote be required for any "Treaty of Peace affecting Territorial rights." Rufus King of Massachusetts, mindful of his section's interest in the fisheries, insisted that it would be "necessary to look out for securities for some other rights," and moved to extend the provision to cover " 'all present rights of the U[nited] States.' " *Id.* at 543 (Madison's notes).

472 *See id.* at 541 (speeches of Hugh Williamson and Gouverneur Morris, respectively).

ing role of the latter body and to suggest that the President's power would be akin to that exercised by him when approving or vetoing a piece of domestic legislation. In the Convention debates of the 7th and 8th of September, in fact, the President's role in treaty-making was twice described as constituting a check on the Senate. On the first occasion the word "check" was actually used. In opposing the two-thirds rule, Rufus King remarked that

> as the Executive was here joined in the business, there was a check which did not exist in Congress [*i.e.*, in the old Congress under the Confederation] where The concurrence of 2/3 was required.[473]

When an even more stringent two-thirds rule was urged on the basis of "the example in the present Cong[res]s," Gorham used the same argument (though not the word "check") in reply: "There is a difference in the case, as the President's consent will also be necessary in the new Gov[ernmen]t."[474]

Whether the conduct of foreign relations would be in reality a joint responsibility depended, in the last analysis, on whether or not the instructions to diplomatic representatives would be issued with the concurrence of both the Senate and the President. And the correlative question was whether ambassadors were to be official representatives of the Senate and President conjointly, or simply executive agents. Prior to the Brearley committee's proposal of the 4th of September 1787 there had never been the slightest doubt that ambassadors were to be appointed by and responsible to whatever body the treaty-making power might be vested in. Under the Confederation the old Congress had always appointed the envoys and debated and voted their instructions. In the plan that Alexander Hamilton presented to the Convention on the 18th of June, he proposed (precisely as the Brearley committee would later do) that the chief executive should "have with the advice and approbation of the Senate the power of making all treaties." Though the chief executive would appoint on

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473 *Id.* at 540.

474 *Id.* at 549 (Madison's notes, September 8). In the Pennsylvania ratification convention, James Wilson also spoke in terms of "concurrence," and described the President's power as a "check":

> We are told that the share which the Senate have in making treaties is exceptionable; but here they are also under a check, by a constituent part of the government, and nearly the immediate representative of the people—I mean the President of the United States. They can make no treaty without his concurrence.

2 DEBATES, *supra* note 318, at 505 (speech of December 11, 1787). Wilson continued:

> Neither the President nor the Senate, solely, can complete a treaty; they are checks upon each other, and are so balanced as to produce security to the people.

Id. at 507. *See also* note 469 *supra*.

his sole authority the heads of the executive departments, including that of Foreign Affairs, he was empowered only to nominate ambassadors, who were to be subject to the Senate's power of approval or rejection—a clear indication that they were not to be agents of the executive alone.[475] The report of the Committee of Detail, presented on the 6th of August, made the same sharp and unmistakable differentiation between ambassadors and executive officers. The Senate alone was empowered, in a single unbroken sentence, "to make treaties, and to appoint Ambassadors," whereas the President was authorized to appoint, without the concurrence of the Senate or any other body, not only his associates and subordinates in the executive branch but also other officers "in all cases not otherwise provided for by this Constitution."[476]

The Brearley committee, however, obscured this long-time distinction by providing a single uniform procedure for all appointments —ambassadors, judges, and officers "not otherwise . . . provided for." All alike were to be nominated by the President, submitted to the Senate for its advice and consent, and finally appointed by the President.[477] The status and responsibility of the different classes of officers were not necessarily altered by this homogenization of appointment procedures. The same three classes of officers were specifically named in the new clause as in the old. Supreme Court judges did not become executive agents because they were now to be nominated by the President, and executive officers did not cease to be such because the Senate was now admitted to a role in their appointment. There is no evidence of an intention on the part either of the Brearley committee or of the Convention to break down the established distinction between ambassadors and executive officers, and to convert the former into agents of the President, responsible to him alone. What little evidence there is runs the other way. George Mason, urging once more the creation of a Privy Council to advise the President, reiterated "his dislike of any reference whatever of the power to make appointments to either branch of the Legislature," and he said he was equally "averse to vest so dangerous a power in the President alone." If there were a Privy Council to deal with appointments, Mason continued, then "the concurrence of the Senate [would] be required only in the appointment of Ambassadors, and in making treaties, which are more of a legislative

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475 *See* text accompanying notes 226-28 *supra*.

476 2 RECORDS 183, 185 (Article 9, section 1, and Article 10, section 2, of the draft constitution).

477 *Id.* at 498-99 (Madison's notes, September 4).

nature."[478] Charles Pinckney likewise objected to involving the Senate in the appointing process, "except in the instances of Ambassadors who he thought ought not to be appointed by the President."[479] No one argued to opposite effect.

In the course of the last few pages remarks concerning the role of the President in foreign affairs have been quoted from the debates of the 7th and 8th of September 1787 on treaty-making, on appointments, and on a possible Privy Council. Seven speakers were involved —Madison, Gorham, Gouverneur Morris, Butler, King, Mason, and Charles Pinckney[480]—and the extant reports of their eight speeches on the matter have been quoted in full. Though seventeen different speakers made a total of 53 speeches on this group of topics during the two days mentioned,[481] these seven speakers were the only ones who discussed the relationship that would or should exist between the Senate and the President in the conduct of foreign relations.

The overwhelming majority of the speeches on the revised clauses relating to treaty-making and appointments were devoted, as one might expect, to the economic and sectional aspects that had all along been uppermost in most delegates' minds. Thus the treaty debate began with a motion to give the House of Representatives an equal share with the Senate in the making of treaties, on the ground that as treaties were "to have the operation of laws, they ought to have the sanction of laws also." After this was voted down, by ten states to one,[482] the two-thirds rule became the issue, occupying parts of two days' sessions. Wilson objected that a two-thirds rule "puts it in the power of a minority to controul the will of a majority,"[483] and, in particular, that "[i]f two thirds are necessary to make peace, the minority may perpetuate war, against the sense of the majority."[484] His motion to strike out the two-thirds requirement was, however, defeated by a vote of nine states to one, with one divided.[485] Then began a series of attempts to tighten the restriction—by requiring two-thirds of all members rather than two-thirds of those present, by requiring a majority of the whole number, by defining a quorum, by

478 *Id.* at 537 (Madison's notes, September 7).

479 *Id.* at 539 (Madison's notes, September 7).

480 *See* text accompanying notes 470, 473, 474, 478 & 479 *supra.* Two speeches by Gorham were involved.

481 *See* 2 RECORDS 538-43, 547-50, 553 (Madison's notes).

482 *Id.* at 538.

483 *Id.* at 540 (September 7).

484 *Id.* at 548 (September 8).

485 *Id.* at 549.

requiring previous notice.[486] All these motions were defeated, and finally the Convention voted, eight states to three, to adopt the two-thirds rule exactly as recommended by the Brearley committee.[487]

So far as appointments were concerned, debate focussed on the committee's refusal to set up a Privy Council that would, in substitution for the Senate, advise the President on appointments and on other matters—presumably domestic rather than foreign, though the point was not made clear. George Mason declared that "in rejecting a Council to the President we were about to try an experiment on which the most despotic Governments had never ventured"—even "[t]he Grand Signor himself had his Divan."[488] His motion to instruct the committee to bring in a clause establishing an Executive Council or Council of State was supported by an array including Benjamin Franklin, Madison, Wilson, and Dickinson, but it went down to defeat by a vote of eight states to three.[489] This meant, in effect, that the Senate was to serve as the council of appointment and also as a council of state where foreign affairs were concerned, but that in the handling of domestic matters there would be no independent privy council to advise the President. Instead he would be authorized to

> require the opinion in writing of the principal Officer in each of the Executive Departments, upon any subject relating to the duties of their respective offices.[490]

On the 8th of September 1787 the Convention adopted the clause relating to treaties and appointments in the form proposed by the Brearley committee.[491] In the nine days that remained, the clause underwent no change in substance, only a slight change in word order, but a change that was to be of some significance in its placement among the other clauses, sections, and articles of the finished Constitution. In the draft constitution that the Committee of Detail had presented on the 6th of August, an entire article had been devoted to the functions and powers of the Senate, an article that followed those devoted to the legislature as a whole and preceded the one devoted to the executive. Its two longest sections, borrowed from the Articles

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486 *Id.* at 544 (Journal, September 8), 549-50 (Madison's notes).

487 *Id.* at 550.

488 *Id.* at 541 (September 7).

489 *See id.* at 542.

490 *Id.* at 499 (Madison's notes, September 4) (Brearley committee report). After the defeat of the motion for an Executive Council, this clause was adopted with one state dissenting. *Id.* at 542-43.

491 *Id.* at 550. The Journal, rapidly deteriorating in completeness and accuracy during these closing days of the Convention, failed to record this vote.

of Confederation, imposed on the Senate the task of handling boundary and other jurisdictional disputes between states, and controversies over lands claimed under grants from different states.[492] On the 24th of August the settlement of all such disputes was transferred to the judiciary,[493] thus reducing the original senatorial article to a single section of 22 words—the one giving power to make treaties and appoint ambassadors. When the Brearley committee gave the clause a new beginning—"The President by and with the advice and Consent of the Senate, shall have power . . ."—it also transferred the provision to the article dealing with the executive, making it the fourth section thereof.[494] The final change was made by a Committee of Style and Arrangement, which was appointed on Saturday, the 8th of September, and which reported on Wednesday, the 12th, completing in a weekend and two extra days a comprehensive redaction of the much-amended draft constitution. Thanks to the skill of Gouverneur Morris, to whom most of the literary labor is attributed, the finished Constitution assumed the symmetrical and logical form familiar today, consisting of three long articles, each devoted to one of the great branches of government, followed by four shorter ones dealing with matters less easily classifiable.[495] In this process, whether intentionally or not, the provision respecting treaties and appointments ceased to be even an independent section and was reduced to the status of a clause, sandwiched between clauses relating to powers of a completely executive sort, exercised by the President on his sole authority. So com-

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492 *Id.* at 183-85 (Article 9, sections 2 & 3). The corresponding part of the Articles of Confederation is set out in 19 JCC 217-19 (Article 9).

493 *See* 2 RECORDS 400-01 (Madison's notes).

494 *Id.* at 498 (Madison's notes, September 4). Oddly enough, the committee did retain a separate article for the Senate, placing in it a section on the trial of impeachments, but nothing else. *Id.* at 497 (Madison's notes, September 4). This was the format in which these articles were referred to the Committee of Style and Arrangement. *See id.* at 572, 574 (Article 9; Article 10, section 4).

495 The five-man committee "to revise the style of and arrange the articles agreed to by the House" was elected on September 8. The Convention passed a few more motions before officially turning matters over to the committee two days later, but it then did no more business till the report was ready on the 12th. *See id.* at 547 (Journal, September 8), 553, 554 (Madison's & McHenry's notes), 564 (Madison's notes, September 10), 581 (Journal & Madison's notes, September 11), 582 (Journal, September 12), 585 (Madison's notes). Madison, who was a member of the committee, along with chairman William Samuel Johnson of Connecticut, Hamilton, and King, noted that "[t]he *finish* given to the style and arrangement of the Constitution fairly belongs to the pen of Mr. [Gouverneur] Morris." 3 *id.* at 499 (letter from Madison to Jared Sparks, April 8, 1831). *See id.* at 170 (Ezra Stiles' diary), 420 (letter from Morris to Timothy Pickering, December 22, 1814), 497-98 (letter from Sparks to Madison, March 30, 1831).

plete was the integration into the presidential article that the clause now begins with a pronoun:

> He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for.[496]

At the last moment, on the 15th of September, two additions were voted,[497] so that the completed Constitution (dressed up with the capitals that the calligrapher affected) reads as follows:

> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[498]

XIV. THE FOREIGN-AFFAIRS PROVISIONS OF THE CONSTITUTION INTERPRETED

This clause, and the clause in a subsequent section which says that the President "shall receive Ambassadors and other public Ministers,"[499] provide the foundation—the only foundation in the text of the Constitution—upon which has been erected the present-day con-

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496 2 RECORDS 599 (Article 2, section 2, paragraph 2, of the Constitution reported by the Committee of Style).

497 *Id.* at 627-28 (Madison's notes). The provision that offices to be filled should first be established by law was one that had previously been twice moved and twice rejected. *Id.* at 544-45 (Journal, September 8), 550, 553 (Madison's notes).

498 U.S. CONST. art II, § 2, cl. 2. The engrossed copy of the Constitution, now on permanent display in the National Archives, is ordinarily taken to be the official text. A facsimile is published in U.S. NATIONAL ARCHIVES, CHARTERS OF FREEDOM 5-9 (1952). An interesting case has been made for regarding the first printed text as the official one, for it was the text submitted to and ratified by the state conventions. Capital letters are used in it with far greater restraint. *See* THE CONSTITUTION OF THE UNITED STATES OF AMERICA, APPROVED BY THE CONTINENTAL CONGRESS, TRANSMITTED TO STATE LEGISLATURES FOR RATIFICATION AND RATIFIED BY CONVENTIONS OF THE ORIGINAL THIRTEEN STATES, LITERAL PRINT, S. Doc. No. 126, 83d Cong., 2d Sess. 16-34 (D. Myers ed. 1954).

499 U.S. CONST. art. III, § 3.

tention not only that the President possesses plenary authority over the conduct of American foreign relations, and not only that this authority is so great as to exclude the Senate from any participation in, or even right of inquiry about, the instructing of diplomatic envoys, but also that the framers of the Constitution intended the system to operate in this way.

A Twentieth-Century Doctrine of Presidential Dominance

Early in the twentieth century this theory of the framers' intent was given full and elaborate exposition in a speech of Senator John Coit Spooner, Republican, of Wisconsin, reputed "one of the best constitutional lawyers of his time."[500] The occasion was a Senate debate on the 23rd of January 1906, precipitated by Theodore Roosevelt's decision to involve the United States in the Algeciras conference on Morocco, and his agreement to administer the customs houses and manage the debt payments of Santo Domingo, in accord with what has been called the Roosevelt Corollary of the Monroe Doctrine—the latter action having been taken despite the refusal of the Senate to ratify the treaty authorizing it.[501] At the time Spooner addressed the Senate, a resolution had been introduced asking to see the instructions given the delegates to Algeciras in order (as Spooner paraphrased it)

> that the Senate might, sitting in judgment upon the executive conduct of our foreign relations, determine whether they were being conducted in accordance with the traditions of our country . . . .[502]

At the same time there was demand for full discussion of President Theodore Roosevelt's action in Santo Domingo on the ground that it represented

> a new policy on the part of the United States, affecting our relations not only with Santo Domingo, but with all the Caribbean States, Central American and South American Republics.[503]

Senator Spooner not only opposed the moves themselves but also

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500 C. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 245 (9 UNIVERSITY OF ILLINOIS STUDIES IN THE SOCIAL SCIENCES, Nos. 1 & 2 (1920)).

501 For brief accounts, see S. BEMIS, A DIPLOMATIC HISTORY OF THE UNITED STATES 525-29, 581-86 (rev. ed. 1942).

502 40 CONG. REC. 1418 (1906) (resolution introduced by Senator Augustus O. Bacon of Georgia, as summarized by Spooner at the beginning of his speech).

503 *Id.* (remarks of Senator Francis G. Newlands of Nevada, preceding Spooner's speech).

denied that the Senate had any authority, constitutionally speaking, to meddle with diplomatic questions until a completed treaty should be presented for its approval. Excerpts from his interpretation of constitutional law follow:

> The Senate has nothing whatever to do with the *negotiation* of treaties or the conduct of our foreign intercourse and relations save the exercise of the one constitutional function of advice and consent which the Constitution requires as a precedent condition to the making of a treaty. . . .
>
> From the foundation of the Government it has been conceded in practice and in theory that the Constitution vests the power of negotiation and the various phases—and they are multifarious—of the conduct of our foreign relations exclusively in the President. And . . . he does not exercise that constitutional power, nor can he be made to do it, under the tutelage or guardianship of the Senate or of the House or of the Senate and House combined.[504]

Asked what interpretation he placed on the word "advice," and whether it is possible to give advice after a thing has been done, Spooner answered:

> The words "advice and consent of the Senate" are . . . well translated by the word "ratification" popularly used in this connection. The President negotiates the treaty, to begin with. He may employ such agencies as he chooses . . . . He may issue to the agent chosen by him—and neither Congress nor the Senate has any concern as to whom he chooses—such instructions as seem to him wise. . . . The Senate has no right to demand that he shall unfold to the world or to it, even in executive session, his instructions or the prospect or progress of the negotiation. . . . [U]nder the Constitution the absolute power of negotiation is in the President and the means of negotiation subject wholly to his will and his judgment.
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> . . . .
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> I do not deny the power of the Senate either in legislative session or in executive session . . . to pass a resolution expressive of its opinion as to matters of foreign policy. But if it is passed by the Senate, or by the House or by both Houses it is beyond any possible question purely advisory, and not in the slightest degree binding in law or conscience upon the President. . . .
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> . . . [S]o far as the conduct of our foreign relations is concerned, excluding only the Senate's participation in the making of treaties, the President has the absolute and uncontrolled and uncontrollable authority. Under the confederation there was felt to be great weakness in a system that made the Congress the organ of communication with foreign governments; but when the Constitu-

504 *Id.* (speech of Senator Spooner).

> tion was formed, it being almost everywhere else in the world a purely executive function, it was lodged with the President.[505]

The question here is not whether the precedents that had accumulated by 1906 justified this statement of constitutional law. The question is whether it represents the original intent of the men who drew up the Constitution. This is an historical question and historical questions are settled by contemporary evidence. The hard fact is that nothing in the records of the Convention or in the explanations that delegates offered in the months that followed corresponds in any degree with the assertions of Senator Spooner.

John Jay's understanding of the treaty provision of the Constitution has already been examined.[506] Even greater authority attaches to the exposition by Alexander Hamilton of the intended meaning of the foreign-policy provisions of the document, for he was a member of the Convention as Jay was not. In its proceedings, moreover, he was a consistent advocate of a powerful chief executive and was therefore unlikely to minimize the latter's authority. A few years later, indeed, at the time of Washington's Neutrality Proclamation of 1793, Hamilton would formulate, in controversy with Madison, a full-fledged theory of inherent presidential prerogative in foreign affairs.[507] But in 1788, when he contributed to *The Federalist* papers, he undertook to expound, not his own sometimes divergent ideas, but the true intent, as he understood it, of the actual document that was before the states for ratification.

The Interpretation of Hamilton in The Federalist, 1788

In the 75th number of *The Federalist,* first published on the 26th of March 1788, Hamilton examined all aspects of the treaty clause. At the outset he took notice of an objection to its "intermixture of powers," that is, to "the union of the Executive with the Senate, in the article of treaties." Far from condemning it, Hamilton found "a peculiar propriety in that union." He rejected as "arbitrary" the doctrine which placed treaty-making "in the class of executive authorities," and insisted instead that if carefully considered the treaty power would be discovered "to partake more of the legislative than of the executive character, though it does not seem strictly to fall

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505 *Id.*

506 See text accompanying notes 328-30 *supra.*

507 See note 259 *supra.*

within the definition of either." It should properly "form a distinct department."[508] Hamilton continued:

> The qualities . . . indispensable in the management of foreign negotiations, point out the Executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.[509]

Hamilton warned against confiding the treaty power to either the President alone or the Senate alone, but the tocsin rang loudest in his discussion of the first possibility. "[I]t would be utterly unsafe and improper," he wrote,

> to intrust that power to an elective magistrate of four years' duration. . . . The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.[510]

To Hamilton the conclusion was so clear as to amount to a demonstration:

> [T]he joint possession of the power in question, by the President and Senate, would afford a greater prospect of security, than the separate possession of it by either of them.[511]

Similar phrases occur in Hamilton's other discussions of the treaty power. "[T]he Senate," he had written in the 66th number of *The Federalist* earlier the same month, "is to have concurrent authority with the Executive in the formation of treaties." The relationship was also described as "the junction of the Senate with the Executive," and their "union with the Executive in the power of making treaties."[512] Hamilton used capitals to emphasize his point:

> The security essentially intended by the Constitution against corruption and treachery in the formation of treaties, is to be sought for in the numbers and characters of those who are to make them. The JOINT AGENCY of the Chief Magistrate of the Union, and of two thirds of the members of a body selected by the collec-

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508 THE FEDERALIST No. 75, at 465-67 (A. Hamilton).

509 *Id.* at 467.

510 *Id.* at 467-68.

511 *Id.* at 468.

512 *Id.* No. 66, at 414, 417 (A. Hamilton).

> tive wisdom of the legislatures of the several States, is designed to be the pledge for the fidelity of the national councils in this particular.[513]

That the advice of the Senate was to be active advice, not passive consent, was underlined when Hamilton went on to say that the Federal Convention in providing a procedure for impeachment

> might with propriety have meditated the punishment of the Executive, for a deviation from the instructions of the Senate, or a want of integrity in the conduct of the negotiations committed to him . . . .[514]

CONCLUSION

The phrase "advice and consent" meant to the framers of the American Constitution what it had meant for a century or more in both English and American constitutional usage. Its two crucial words meant two things not one. By "advice" was meant legislative deliberation on policy before executive action was initiated. By "consent" was meant approval of the result after negotiations (with their inevitable compromises) had been carried to completion. In the political lexicon of the youthful republic, "advice and consent" signified the "concurrent authority" of the Senate and the President—their "joint possession" of the power—to decide the great and delicate questions of foreign policy.

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513 *Id.* at 417.

514 *Id.*