

# EXECUTIVE POWER ESSENTIALISM AND FOREIGN AFFAIRS

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## INTRODUCTION

Conflict abroad almost always enhances executive power at home. This expectation has held true at least since the constitutions of antiquity.<sup>1</sup> It holds no less true for modern constitutions, including the Constitution of the United States.<sup>2</sup> Constitutional arguments for executive power likewise escalate with increased perceptions of foreign threat. It is therefore hardly surprising that broad assertions of presidential power have become commonplace after the events of September 11, 2001, and the ensuing war on international terrorism.

One perennial weapon in the executive arsenal is the so-called “Vesting Clause” of Article II of the Constitution. This clause, which provides that “The executive Power shall be vested in a President of the United States of America,”<sup>3</sup> stands in apparent contrast with the Article I Vesting Clause, which provides that “All legislative Powers *herein granted* shall be vested in a Congress of the United States . . . .”<sup>4</sup> This textual difference, usually bolstered with historical materials, has long undergirded the claim that the Article II Vesting Clause implicitly grants the President a broad array of residual powers not specified in the remainder of Article II. We will call this claim the “Vesting Clause Thesis.”

The Vesting Clause Thesis was famously advanced by Alexander Hamilton in his first *Pacificus* essay defending President Washington’s 1793 Neutrality Proclamation.<sup>5</sup> The Thesis has had a checkered career

1. See ARISTOTLE, *THE POLITICS* 346 (T. A. Sinclair trans., rev. ed. 1981) (“The tyrant is also very ready to make war; for this keeps his subjects occupied and in continued need of a leader.”); PLATO, *THE REPUBLIC*, in 2 *CAMBRIDGE LIBRARY OF LAW CLASSICS* 27, 291 (Henry Davis trans. 1901) (describing the incentives tyrants have to make war abroad to maintain power at home).

2. A number of constitutional Founders observed that leaders of other countries had often initiated war for personal reasons. See, e.g., *THE FEDERALIST* NO. 4, at 46 (John Jay) (Clinton Rossiter ed., 1961) (“[A]bsolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory . . . .”); JAMES MADISON, *LETTERS OF HELVIDIUS* NO. 4 (Sept. 14, 1793), reprinted in 15 *THE PAPERS OF JAMES MADISON* 108 (Thomas A. Mason et al. eds., 1985) [hereinafter *LETTERS OF HELVIDIUS*] (“War is in fact the true nurse of executive aggrandizement.”). See generally William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 *CORNELL L. REV.* 695 (1997).

3. U.S. CONST. art. II, § 1, cl. 1.

4. U.S. CONST. art. I, § 1, cl. 1 (emphasis added).

5. See ALEXANDER HAMILTON, *LETTERS OF PACIFICUS* NO. 1 (June 29, 1793), reprinted in 15 *THE PAPERS OF ALEXANDER HAMILTON* 33 (Harold C. Syrett & Jacob E. Cooke eds., 1969) [hereinafter *LETTERS OF PACIFICUS*]; see also *infra* Part IV.E.

in constitutional law and interpretation ever since. One ostensible high point came in *Myers v. United States*,<sup>6</sup> in which a majority of the Supreme Court relied on the Vesting Clause Thesis in holding that the President had an exclusive power of removing executive officers.<sup>7</sup> Even in *Myers*, however, the Court's reliance on the Vesting Clause Thesis was minimal, and the Court's analysis and holding have since been severely qualified.<sup>8</sup> An offsetting low point famously occurred in the steel seizure case, *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>9</sup> in which the Court rejected President Truman's broad claim of executive power, a claim that was based in part on the Article II Vesting Clause.<sup>10</sup> Although the majority in *Youngstown* did not specifically address the Vesting Clause Thesis, Justice Jackson addressed it in his influential concurrence and repudiated it.<sup>11</sup>

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6. 272 U.S. 52 (1926).

7. *See id.* at 118.

8. The Vesting Clause Thesis takes up only one paragraph of the Court's long opinion. Much of the opinion is focused instead on a 1789 debate in the House of Representatives over the President's removal power. *See id.* at 111-18, 119-39, 174-75. As we discuss below, those who supported a presidential removal power in that debate typically relied on the Appointments Clause (which gives the President the power to appoint various officials with the advice and consent of the Senate) or the Take Care Clause (which states that the President "shall take Care that the Laws be faithfully executed") rather than the Vesting Clause. *See infra* Part IV.C. Three Justices — Holmes, McReynolds, and Brandeis — dissented in *Myers*. Justice McReynolds's dissent argues, among other things, that the Vesting Clause Thesis is unsupported by Founding history. *See Myers*, 272 U.S. at 193, 228-37 (McReynolds, J., dissenting). In a subsequent decision, *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Court upheld a statute restricting the power of the President to remove a Commissioner of the Federal Trade Commission. The Court in *Humphrey's Executor* noted that the only point actually decided in *Myers* was that "the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress." *Id.* at 626. The Court also stated that it was disapproving of any statements in *Myers* that were "out of harmony with the views here set forth." *Id.* The decision in *Myers* was further qualified in *Morrison v. Olson*, 487 U.S. 654 (1988), in which the Court held that Congress could impose a "good cause" limitation on the President's power to remove an independent counsel. *See id.* at 686-87. In his lone dissent, Justice Scalia invoked the Vesting Clause Thesis. *See id.* at 705-06 (Scalia, J., dissenting). In response, the majority stated in a footnote that Justice Scalia's Vesting Clause argument for an absolute power of removal "depends upon an extrapolation from general constitutional language which we think is more than the text will bear." *Id.* at 690 n.29.

9. 343 U.S. 579 (1952).

10. *See id.* at 587-88. For a recent decision rejecting a broad claim of executive power, albeit one not expressly premised on the Vesting Clause Thesis, see *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

11. *See Youngstown*, 343 U.S. at 640-41 (Jackson, J., concurring); *see also id.* at 632 (Douglas, J., concurring) ("Article II which vests the 'executive Power' in the President defines that power with particularity."). The dissenters in *Youngstown* invoked the Article II Vesting Clause in passing, *see id.* at 681-82 (Vinson, C.J., dissenting), but ultimately rested their argument on a "practical construction" of the Take Care Clause. *See id.* at 702. Perhaps surprisingly, presidents have not always embraced the Vesting Clause Thesis. Compare THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 388-89 (1914) (embracing a version of the Thesis, which he called the "stewardship" theory of executive power), with WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 139-40, 144-45 (H. Jefferson Powell ed., 2002) (1916) (rejecting the stewardship theory and arguing that "the President

In recent years, the Vesting Clause Thesis has gained newfound popularity. White House officials were apparently prepared to deploy the argument in support of the Bush Administration's authority to use military force against Iraq had Congress not expressly granted such authority.<sup>12</sup> The Administration's reliance on the Vesting Clause Thesis is also evident in controversial memoranda concerning treatment of detainees that were prepared by the Department of Justice and the Department of Defense after September 11.<sup>13</sup> In terms of academic support, professors Saikrishna Prakash and Michael Ramsey recently defended the Vesting Clause Thesis at length in an important article in the *Yale Law Journal*.<sup>14</sup> Professor John Yoo has invoked the Thesis in a number of recent articles as support for a variety of alleged presidential foreign affairs powers.<sup>15</sup> The Thesis also has received recent support from Professor Phillip Trimble,<sup>16</sup> and the historical account that ostensibly supports it parallels an interpretation

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can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise").

12. See Mike Allen & Juliet Eilperin, *Bush Aides Say White House Needs No Hill Vote; Some See Such Support as Politically Helpful*, WASH. POST, Aug. 26, 2002, at A1. Congress subsequently passed a Joint Resolution authorizing the President to use force against Iraq. See Authorization for Use of Military Force Against Iraq Resolution of 2002, H.R.J. Res. 114, 107th Cong., 116 Stat. 1498.

13. See Draft Memorandum from John Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, to William J. Haynes II, General Counsel, Department of Defense, Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002) at 14-15 ("Article II makes clear that the President is vested with all of the federal executive power. . . . While Article II, § 1 of the Constitution grants the President an undefined executive power, Article I, § 1 of the Constitution limits Congress to '[a]ll legislative Powers herein granted' in the rest of Article I."), <http://msnbc.msn.com/id/5025040/site/newsweek/>; Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense (Jan. 22, 2002), at 11 (same), <http://washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf>; Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), at 37 ("[T]he structure of the Constitution demonstrates that any power traditionally understood as pertaining to the executive — which includes the conduct of warfare and the defense of the nation — unless expressly assigned in the Constitution to Congress, is vested in the President. Article II, Section 1 makes this clear by stating that the 'executive Power shall be vested in a President of the United States of America.' That sweeping grant vests in the President an unenumerated 'executive power' and contrasts with the specific enumeration of powers — those 'herein' — granted to Congress in Article I."), <http://news.findlaw.com/wp/docs/doj/bybee80102mem.pdf>; Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (April 4, 2003), at 23 (same), <http://www.washingtonpost.com/wp-srv/nation/documents/040403dod.pdf>.

14. See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001).

15. See *infra* notes 21-22.

16. See PHILLIP R. TRIMBLE, INTERNATIONAL LAW: UNITED STATES FOREIGN RELATIONS LAW 10-46 (2002).

advanced in a thoughtful recent book by Professor H. Jefferson Powell.<sup>17</sup>

The principal attraction of the Vesting Clause Thesis is that it provides a straightforward solution to what appears to be a paradox of American constitutionalism: the specific grants of power in Article II are few and limited, especially when compared with Congress's extensive list of powers in Article I, and yet the President has long been a significant — some argue, dominant — institutional actor in American government.<sup>18</sup> The President has been particularly dominant with respect to foreign affairs, and indeed is sometimes referred to as the “sole organ” for the United States in its international relations.<sup>19</sup> The Vesting Clause Thesis reconciles the text of the Constitution with the breadth of presidential power by stipulating that the Article II Vesting Clause grants the President all powers that are in their nature “executive,” subject only to the specific exceptions and qualifications set forth in the rest of the Constitution.

In addition to the constitutional text, advocates of the Vesting Clause Thesis rely heavily on history. Their historical claim is that constitutional theorists in Britain and Europe had worked out a common, comprehensive, and detailed conception of the natural division of governmental power well before American independence,

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17. See H. JEFFERSON POWELL, *THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION* (2002). In arguing that the Constitution implicitly vests the President with “authority for the formulation and implementation of foreign policy,” *id.* at 7, Professor Powell relies primarily on the functional goals of the Founders rather than on the Vesting Clause. See *id.* at 93-94. For additional academic reliance on the Vesting Clause Thesis, see, for example, GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* ch. 1 (2004); Michael Stokes Paulsen, *Youngstown Goes to War*, 19 *CONST. COMMENT.* 215, 237-38 (2002).

18. See, e.g., EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1984* (5th rev. ed. 1984) (chronicling the shift in power toward the Executive Branch since the Founding); FORREST McDONALD, *THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY* (1994) (same); ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973) (same).

19. See, e.g., *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (referring to the “very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations”). The genesis of the “sole organ” language is a speech made by John Marshall in 1800 while he was a member of the House of Representatives. President Adams had ordered the extradition to Great Britain of Thomas Nash, alias Jonathan Robbins, who was accused of murder while aboard a British ship. Although Adams acted pursuant to a treaty with Great Britain, he was criticized on the ground that the extradition request from Great Britain should have been processed by judicial action, not executive action. It was in this context that Marshall, defending Adams, proclaimed: “The president is the sole organ of the nation in its external relations, and its sole representative with foreign nations.” John Marshall, *Address Before the House of Representatives* (Mar. 7, 1800), in 10 *ANNALS OF CONG.* 596, 613 (Washington, Gales and Seaton 1851). Marshall went on to argue that the President “is charged to execute the laws,” that a treaty “is declared to be a law,” and that the President therefore has the power to fulfill U.S. responsibilities under an extradition treaty. 10 *id.* at 613-14. Marshall therefore was not making any claim about unspecified substantive powers.

and that the Constitution of the United States — with discrete textual exceptions — embodied this reigning separation of powers understanding. When the Founders referred in the Article II Vesting Clause to the “executive Power,” the argument runs, they referred to an understood bundle of powers and therefore had no need to enumerate specific executive powers in the remainder of Article II. Rather, such an enumeration became necessary only for those few instances in which the Founders were deviating from the prevailing understanding — for example, when they divided an executive power between the President and the Senate. Proponents of this account line up purported support from every relevant development leading to the Constitution’s ratification: seventeenth- and eighteenth-century political theory, the revolutionary and “critical” periods under the Articles of Confederation, the Federal Convention, and the state ratification debates. The most powerful evidence, however, allegedly comes from the statements and practices of government officials during the Washington Administration, which, it is claimed, confirm the consensus underlying Article II.

Armed thus with text and history, scholars have relied on the Vesting Clause Thesis to cash out a number of specific claims concerning presidential power. Some argue, for example, that the President has the power to terminate treaties because that power is executive in nature and is not expressly delegated to Congress or the Senate.<sup>20</sup> Others assert that the President has broad unenumerated war powers in situations not involving congressional declarations of war, since the war power, too, is in its nature executive.<sup>21</sup> And still others have invoked the Vesting Clause Thesis in support of a power of the President to conclude certain international agreements on his own authority, notwithstanding the requirement in Article II of the Constitution that the President obtain the advice and consent of two-thirds of the Senate in order to make treaties.<sup>22</sup> The potential breadth

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20. See, e.g., Prakash & Ramsey, *supra* note 14, at 324-27.

21. See, e.g., ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY 53-55 (1991); Eugene V. Rostow, “Once More unto the Breach”: *The War Powers Resolution Revisited*, 21 VAL. U. L. REV. 1, 14-15 (1986); John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1676-78 (2002).

22. See, e.g., Prakash & Ramsey, *supra* note 14, at 264; Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 207-16 (1998). Through a complex argument that involves characterizing treaty-making as executive in nature and treaty implementation as legislative in nature, Professor Yoo has invoked the Vesting Clause Thesis to argue that treaties generally should not be viewed as self-executing within the U.S. legal system. See John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1966-67 (1999); John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2224 (1999). Professor Yoo also has relied on the Vesting Clause Thesis as support for a broad presidential power to interpret treaties. See John C. Yoo, *Treaty Interpretation and the False Sirens of Delegation*, 90 CAL. L. REV. 1305, 1320-22

of the Vesting Clause Thesis is further illustrated by dicta in a recent Supreme Court decision, *American Insurance Association v. Garamendi*, in which the Court appeared to suggest that the President might have the power to preempt state laws simply by articulating the “foreign policy of the Executive Branch.”<sup>23</sup>

This Article challenges the Vesting Clause Thesis on both textual and historical grounds. As for text, the difference in wording between the Article I and Article II Vesting Clauses can be explained in other plausible ways and need not be read as distinguishing between a limited grant of legislative powers and a plenary grant of executive power. Familiar canons of construction, such as *expressio unius*, and other interpretive principles further cut against the Vesting Clause Thesis. That thesis, moreover, cannot explain some of Article II’s specific grants of foreign affairs authority, and it sits uneasily with the Constitution’s enumerated powers structure.

Given that the textual case for the Vesting Clause Thesis is at best uncertain, the persuasiveness of the thesis ultimately depends on history. Here there is a particular irony. Proponents of the Vesting Clause Thesis are often also advocates of a classically originalist approach to constitutional interpretation, pursuant to which the understanding of the Constitution’s framers and ratifiers controls constitutional meaning. Yet, as we will show, the historical sources that are most relevant to the Founding, such as the records of the Federal Convention, the *Federalist Papers*, and the state ratification debates, contain almost nothing that supports the Vesting Clause Thesis, and much that contradicts it.

Supporters of the Vesting Clause Thesis attempt to compensate for the lack of direct Founding support by focusing on political theory and practice both before and after the ratification of the Constitution. Their historical narrative thus has two central features. First, it is a story of continuity, whereby European political theory is carried forward, relatively unblemished, into American constitutional design and practice. Second, the narrative relies on what could be called “executive power essentialism” — the proposition that the Founders

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(2002); John C. Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851, 869 (2001) (book review).

23. See *Am. Ins. Ass’n v. Garamendi*, 123 S. Ct. 2374, 2386 (2003). In that case, the Court, in a 5-4 decision, held that a California statute was preempted by executive agreements because, in the Court’s view, the statute had created an obstacle to the achievement of the President’s foreign policy as articulated in the agreements. The Court referred in passing to the Article II Vesting Clause, stating that “the historical gloss on the ‘executive Power’ vested in Article II of the Constitution has recognized the President’s ‘vast share of responsibility for the conduct of our foreign relations.’” *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-611 (1952) (Frankfurter, J., concurring)). Professors Prakash and Ramsey, by contrast, disavow any claim of presidential lawmaking power in their defense of the Vesting Clause Thesis. See Prakash & Ramsey, *supra* note 14, at 235, 263, 340-46.

had in mind, and intended the Constitution to reflect, a conception of what is “naturally” or “essentially” within executive power.<sup>24</sup> We argue that this historical narrative is wrong on both counts. Among other things, the narrative fails to take account of complexity within eighteenth-century political theory, the experience of state constitutionalism before 1787, and the Founders’ self-conscious rejection of the British model of government. The narrative also understates the degree to which the constitutional Founders were functionalists, willing to deviate from pure political theory and essentialist categories in order to design an effective government.

Moreover, as usually presented, the post-constitutional practice of the Washington Administration provides only half the story. Washington and his cabinet, perhaps unsurprisingly, tended to stake out pro-executive positions with respect to the management of U.S. diplomacy. To the extent that there was a consensus concerning these positions, that consensus was based on functional considerations related to specific constitutional grants, not the Vesting Clause. When other, more substantive issues arose — such as the power to remove executive officials (including the Secretary of State) and the power to declare neutrality — the consensus broke down and there was substantial disagreement about the sources and scope of executive power. Moreover, with the partial exception of Alexander Hamilton, neither Washington nor his cabinet actually articulated the Vesting Clause Thesis, preferring instead to make more specific and modest textual claims.

This Article proceeds as follows. In Part II, we show why the constitutional text does not by itself establish the case for the Vesting Clause Thesis. In Part III, we consider the views of seventeenth- and eighteenth-century political theorists, the practices of the states during the Critical Period as they relate to the issue of executive power, and lessons from the Continental Congress. In Part IV, we discuss the constitutional Founding, with particular emphasis on the discussions and debates relating to the presidency. In Part V, we consider some of the most relevant practices and debates that occurred during the eight years of the Washington Administration.

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24. We are not implying that advocates of the Vesting Clause Thesis are making some sort of Platonic claim about the meaning of executive power, but rather simply that they are claiming that certain powers would have been understood by the Founders — for theoretical, historical, or other reasons — as naturally or essentially belonging to the executive. Cf. Prakash & Ramsey, *supra* note 14, at 253 n.91 (denying that executive power has an inherent meaning in the abstract and instead “mak[ing] a claim about the meaning of executive power at a particular time in history”).



## I. TEXTUAL UNCERTAINTY

It is important to understand at the outset why the textual arguments in support of the Vesting Clause Thesis are, at best, indeterminate. As noted above, the principal textual argument is the difference in wording between the Article I and Article II Vesting Clauses. The Article I clause provides that “[a]ll legislative powers *herein granted* shall be vested” in Congress, whereas the Article II clause provides that “[t]he executive Power shall be vested” in the President. This difference in wording, it is argued, suggests that Congress’s legislative powers were intended to be limited to the ones listed in the Constitution, whereas the President’s powers were to include all those encompassed by the phrase “executive Power,” without regard to whether those powers were listed in the Constitution.<sup>25</sup>

As an initial matter, even if this textual argument were correct, and the Article II Vesting Clause were read as a power-conferring provision, the argument would not tell us which powers the Clause encompasses. It is possible, for example, that the phrase “executive Power” confers simply a power to execute the laws. That would help explain, for example, why it is written in the singular rather than the plural. Indeed, to the extent that there are any Founding statements ascribing substantive content to the Article II Vesting Clause, they are all statements equating executive power with the power to execute the laws.<sup>26</sup> If this is what the Vesting Clause means, it could not serve as the source of the foreign relations powers claimed by proponents of the Vesting Clause Thesis. Thus, even on its own terms, the textual argument for the Vesting Clause Thesis is inconclusive and depends on history.

It is also worth noting that the textual argument assumes a level of precision on the part of the Founders that may be unrealistic. As Professor Christopher Eisgruber has noted, constitutional law scholars

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25. See, e.g., Prakash & Ramsey, *supra* note 14, at 256-57.

26. See *infra* Part III. In an article published after his above-referenced article with Professor Ramsey, Professor Prakash argues that, “[a]t bottom, the executive power is the power to execute the laws.” Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 704 (2003). As he notes, one of the definitions of “executive” in the Founding-era version of Samuel Johnson’s dictionary included “having the power to put in act the laws.” *Id.* at 716 (quoting 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 683 (Librairie du Liban ed., 1978) (1755)). Although that definition does not refer in any way to foreign affairs powers, Professor Prakash continues to adhere to the arguments he made with Professor Ramsey about presidential foreign affairs powers. See *id.* at 704 & n.5, 714. As with the Johnson quotation, however, much of the historical evidence that Professor Prakash cites in his more recent article suggests that any consensus about executive power extended *only* to a power to execute the laws, and this evidence thereby tends to undermine the broader claims he made with Professor Ramsey. For additional examples of this point, see *infra* notes 61, 146, 574, 662.

often fall prey to the aesthetic fallacy that “the constitutional text possesses hidden harmonies that will reveal themselves to assiduous students” and, relatedly, that “we should be extremely reluctant ever to conclude that it is redundant, clumsy, ambiguous, or incomplete.”<sup>27</sup> In fact, it could be the case, as Professor David Currie has observed, that the difference in the wording of the Article I and Article II Vesting Clauses “may well have been accidental.”<sup>28</sup> Whether accidental or not, however, there are other plausible explanations for this difference.

The Article II Vesting Clause states that the executive power shall be vested “in a President of the United States of America.” As discussed later in this Article, a significant issue during the drafting of the Constitution was whether to have a unitary or plural executive. The Article II Vesting Clause may simply make clear *where* the executive power is being vested — in a unitary President — not the scope of that power.<sup>29</sup> In other words, the Clause may have been worded to address an issue that was specific to Article II. Conversely, the “herein granted” language in the Article I Vesting Clause may serve to emphasize the limits of federalism on the national legislative power, a concern that would have been specific to Article I.<sup>30</sup> Another possibility has been suggested by Professor Michael Fromkin. As he notes, there was a Congress already in existence at the time of the framing of the Constitution, so the “herein granted” language in Article I might have been designed to make clear that, from now on, Congress would have only the powers being listed. By contrast, the

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27. CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* 113 (2001). *But see* Prakash & Ramsey, *supra* note 14, at 236 (“Our framework reveals that there are no gaps in the Constitution’s allocation of foreign affairs powers.”).

28. DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801*, at 177 (1997). As Currie notes, the “herein granted” language in Article I was added late in the Federal Convention by the Committee of Style, which was not supposed to make substantive changes (although it did so in some instances). *See id.*; 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 590 (Max Farrand ed., 1911). Of course, even if the drafters did not intend for the difference in wording to reflect a difference in meaning, the difference might be constitutionally significant if those involved in ratifying the Constitution would have perceived a difference in meaning. We address that historical question below in Part III.C.

29. *See, e.g.*, Edward S. Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 *COLUM. L. REV.* 53, 53 (1953) (“The records of the Constitutional Convention make it clear that the purposes of [the Article II Vesting Clause] were simply to settle the question whether the executive branch should be plural or single and to give the executive a title.”); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *COLUM. L. REV.* 1, 47-48 n.195 (1994) (“The [Article II] Vesting Clause does nothing more than show who . . . is to exercise the executive power, and not *what* that power is.”). As noted below, this interpretation appears to be consistent with the way in which the delegates at the Federal Convention used the word “vesting.” *See, e.g., infra* text accompanying notes 211-213.

30. *See* Henry P. Monaghan, *The Protective Power of the Presidency*, 93 *COLUM. L. REV.* 1, 22 (1993) (“This [language] seemed designed only to reflect the limits of federalism on national regulatory power, not to ratify or to recognize substantive executive power.”).

Founders might not have thought it necessary to use that language for the new executive and judicial branches.<sup>31</sup> As a matter of text, these alternative interpretations are at least as plausible as the Vesting Clause Thesis.

Not only are there other explanations for the difference in wording of the Vesting Clauses, there is also a significant textual problem with construing the Article II Vesting Clause as conveying unenumerated powers. Article II expressly grants the President the commander-in-chief power; the power to request written opinions from federal executive officers; the power to grant pardons; the power to make treaties; and the power to appoint a variety of officials.<sup>32</sup> Article II also directs (and thereby presumably empowers) the President to receive ambassadors, and to take care that the laws are faithfully executed.<sup>33</sup> Proponents of the Vesting Clause Thesis concede that many if not all of these specific grants and directives are encompassed within their construction of the phrase “executive Power” in the Article II Vesting Clause.<sup>34</sup> Under their construction, however, the specific grants would appear to be superfluous, in contravention of the general presumption against redundancy.<sup>35</sup> Furthermore, the Founders’ decision to list what they meant by “executive Power” would tend to suggest, pursuant to the *expressio unius* canon, that their list was complete, rather than merely illustrative.<sup>36</sup>

Proponents of the Vesting Clause Thesis attempt to address this textual problem by arguing that the delineation of some of the Article II powers, such as the treaty power and the appointments power, can be explained by the fact that the Constitution divides these powers with the Senate. It was necessary to list these powers despite the general grant of executive power in the Vesting Clause, the argument goes, in order to make clear that the President was not receiving

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31. See A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346, 1363 (1994).

32. U.S. CONST. art II, § 2.

33. U.S. CONST. art II, § 3.

34. See, e.g., Prakash & Ramsey, *supra* note 14, at 259-60.

35. See WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 833 (3d ed. 2001) (discussing presumption against redundancy); 2A NORMAN J. SINGER, *SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION* § 46:06 (6th ed. 2000) (same).

36. See ESKRIDGE ET AL., *supra* note 35, at 824-25 (discussing *expressio unius* canon); 2A SINGER, *supra* note 35, §§ 47:23-47:25 (same). Professor Prakash has himself emphasized the *expressio unius* canon in another coauthored article about executive power. See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 562-64 (1994). Although that article argues generally for applying the *expressio unius* canon to the Constitution, it does not take a firm position on whether the canon should be applied to the list of powers in Article II. See *id.* at 563-64 (stating that the canon “arguably may also apply to the list in Article II”).

exclusive control over these functions.<sup>37</sup> Although not a divided power, a similar argument is made with respect to the commander-in-chief power: the Constitution gives Congress a number of powers relating to war, so the Founders needed to make clear that the President still had the commander-in-chief power.<sup>38</sup>

This divided powers response is problematic, for several reasons. First, the powers listed in Article II are not written as if they were limits on divided powers. Article II does not state, for example, that “the executive power to make treaties is subject to the advice and consent of two-thirds of the Senate,” or that “the president’s war powers shall not extend to issuing declarations of war.” Second, proponents of the Vesting Clause Thesis also maintain that any executive powers not specifically delegated to other institutional actors should be *presumed* to rest with the President. As Prakash and Ramsey argue, “the Constitution has a simple default rule that we call the ‘residual principle’: Foreign affairs powers not assigned elsewhere belong to the President, by virtue of the President’s executive power; while foreign affairs powers specifically allocated elsewhere are not presidential powers, in spite of the President’s executive power.”<sup>39</sup> In light of that purported default rule, it is not clear why delineation was needed even of divided powers, since whatever was not given to the Senate or to Congress would presumptively remain with the President. Third, the divided powers response does not explain all of the Article II grants. Most notably, the power to require written opinions, the pardon power, and the ambassadorial receipt power all rest exclusively with the President, and yet they too are specifically delineated.<sup>40</sup> Proponents of the Vesting Clause Thesis do not have a convincing explanation for these specific grants.<sup>41</sup> Finally, as discussed

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37. See Prakash & Ramsey, *supra* note 14, at 253 n.91.

38. *Id.*

39. *Id.* at 254.

40. The President also was granted the undivided powers of recommending legislation to Congress, calling Congress into special session, and commissioning officers of the United States. See U.S. CONST. art. II, § 3. In addition, the President was granted, in Article I, the power to veto legislation. See U.S. CONST. art. I, § 7, cl. 2.

41. Prakash and Ramsey do not address either the power to require written opinions or the pardon power. As for the ambassadorial receipt power, they simply call it a “small redundancy.” Prakash & Ramsey, *supra* note 14, at 260. It is quite possible, of course, that the Constitution contains redundancies. But if one is willing to accept imperfections of constitutional drafting in this respect, the textual argument for the Vesting Clause Thesis — which assumes precise drafting with respect to the differences in the Article I and Article II Vesting Clauses — is also undermined. In his more recent article on executive power, Professor Prakash contends that the pardon power is listed in Article II in order to define its scope, i.e., to make clear that it is limited to federal offenses and that it does not apply to impeachments. See Prakash, *supra* note 26, at 715. But this shift from a divided powers explanation to a definitional explanation serves to undermine the claim made by Vesting Clause Thesis proponents that the phrase “executive Power” was shorthand for an *understood* bundle of powers. Moreover, if the Pardon Clause had been intended as a

below, even though there was only one branch of government under the Articles of Confederation — and thus no need to list powers in order to divide them — the foreign affairs powers of the government (including powers claimed by the Vesting Clause Thesis proponents to be “executive” in nature) were specified.<sup>42</sup>

The textual argument only becomes more complicated and uncertain when one looks at the *Article III* Vesting Clause. This clause provides that “[t]he Judicial Power of the United States, shall be vested” in the Supreme Court and whatever lower federal courts Congress creates. This clause appears to be similar to the Article II clause, in that it refers generally to a category of power instead of referring to powers “herein granted.” Nevertheless, it has long been settled that the specific categories of cases and controversies subsequently listed in Article III define the boundaries of the exercise of the federal judicial power.<sup>43</sup> In other words, the list of cases and controversies is treated as exhaustive, not merely illustrative. As Alexander Hamilton notes in *Federalist No. 80*, after he recites Article III’s list of cases and controversies, “This constitutes the entire mass of the judicial authority of the Union.”<sup>44</sup> If Articles II and III are to be treated the same, this may suggest that the powers referred to in Article II should be construed as exhaustive, not illustrative, of the President’s authority.

To be sure, the Article III list is preceded by the phrase, “The judicial Power shall extend to,” whereas the list of powers in Article II is not preceded by the phrase, “The executive Power shall extend to.” This difference might suggest that, despite the similarity of their Vesting Clauses, Articles II and III should be treated differently with respect to the issue of unspecified powers. But this response is not entirely satisfactory. If the Article II and Article III Vesting Clauses by their terms convey a package of unspecified powers, it is not clear why the language “shall extend to” in Article III is treated as exhaustive. That language, unlike the “herein granted” language in Article I, could easily be read to be illustrative, especially if it does not

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limitation on an inherent executive power, one would expect it to have been phrased differently, e.g., “The President’s pardon power shall not extend to offenses against a state, or to cases of impeachment.”

42. See *infra* Part II.C. In addition, essentially all of the foreign affairs powers listed in the Articles of Confederation are specifically assigned somewhere in the Constitution. The only slight exception is that there is no precise analogue in the Constitution to the congressional power under the Articles of Confederation of “determining on peace.” The Constitution does assign to Congress, and not the President, the power to “declare War.” Whether Congress’s power to declare war also gives it the exclusive power to determine whether the United States will remain neutral in a military conflict was a central issue in the 1793 debate over President Washington’s Neutrality Proclamation. See *infra* Part IV.E.

43. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

44. THE FEDERALIST, *supra* note 2, NO. 80 (Alexander Hamilton), at 479.

fully encompass the package of powers being granted in the Article III Vesting Clause. If it is the very enumeration of the cases and controversies that makes the Article III list exhaustive, that argument would obviously apply as well to the enumeration of executive powers in Article II.

Nevertheless, Professor Steven Calabresi and Kevin Rhodes have argued at length that the phrase “shall extend to” in Article III is not a grant of power but rather is simply a description of the situations in which a particular power can be exercised. The Article III Vesting Clause must be a grant of power, they contend, because it is the “only *explicit* constitutional source of the federal judiciary’s authority to act.”<sup>45</sup> Professor Froomkin has contested this argument, arguing that the judiciary’s power to act can be derived either from the structure of the Constitution or from Article III’s list of cases and controversies.<sup>46</sup> It is unnecessary to resolve this debate for present purposes because, even if Calabresi and Rhodes were correct, their argument would not provide support for the Vesting Clause Thesis. Under their analysis, the Article III Vesting Clause simply conveys a power to decide cases (with perhaps related powers to protect the process of decisionmaking),<sup>47</sup> without defining the circumstances under which that power may be exercised. Extending that argument to Article II at most suggests that the Article II Vesting Clause conveys something like a “power to execute the laws” (with perhaps a related power to control executive subordinates), and not that it conveys unspecified foreign relations powers, as maintained by the proponents of the Vesting Clause Thesis. Indeed, Calabresi and Rhodes themselves suggest skepticism about whether the Article II Vesting Clause conveys unspecified substantive powers.<sup>48</sup>

In addition to these textual difficulties, the Vesting Clause Thesis is at least in tension with the enumerated powers structure of the

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45. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155, 1176 (1992); see also *Kansas v. Colorado*, 206 U.S. 46, 81-82 (1907) (distinguishing between the Article I and Article III Vesting Clauses and stating that “the entire judicial power of the Nation” is granted by the Article III clause); Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377 (1994).

46. See Froomkin, *supra* note 31, at 1352-53.

47. The Supreme Court has stated that “[c]ourts invested with the judicial power of the United States have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities.” *Degen v. United States*, 517 U.S. 820, 823 (1996) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-46 (1991)); see also *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (reasoning that “a ‘judicial Power’ is one to render dispositive judgments” (quoting Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990))).

48. See Calabresi & Rhodes, *supra* note 45, at 1177 n.119. *But cf.* Prakash & Ramsey, *supra* note 14, at 257 & n.104 (citing the Calabresi & Rhodes article as support for their argument).

Constitution. The Constitution lists the powers of the three federal branches in great detail, and the Founders emphasized that they were creating a national government with limited and defined powers. James Madison stated in the *Federalist Papers*, for example, that the national government “is limited to certain enumerated objects,”<sup>49</sup> and that “[t]he powers delegated to the federal government are . . . few and defined.”<sup>50</sup> The proponents of the Constitution thought this proposition so evident that it precluded the need for a Bill of Rights.<sup>51</sup> Indeed, they argued that a Bill of Rights might be dangerous because it could be construed as implying governmental powers that had not in fact been granted.<sup>52</sup> And, when the Bill of Rights was subsequently adopted, it contained the Tenth Amendment, which reaffirms that the national government has only the powers that have been delegated to it.<sup>53</sup> The idea of an unspecified residuum of substantive powers in the President does not fit well with this structural feature of the Constitution.<sup>54</sup>

Our claim here is not that these textual and structural points clearly refute the Vesting Clause Thesis. Rather, our claim is simply that the legitimacy of the Vesting Clause Thesis cannot be determined simply by looking at what the Constitution says. The case for the Vesting Clause Thesis, therefore, must lie elsewhere. According to its proponents, the Vesting Clause Thesis is confirmed by history. The meaning of the Article II Vesting Clause may not be obvious to us, it is argued, but to the Founding generation it was simply shorthand for an acknowledged array of powers.<sup>55</sup> As we will show, not only does the relevant historical evidence fail to confirm the thesis, it actually provides a powerful case against it.

49. THE FEDERALIST, *supra* note 2, NO. 14 (James Madison), at 102.

50. THE FEDERALIST, *supra* note 2, NO. 45 (James Madison), at 292.

51. See generally JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 288-338 (1996).

52. See, e.g., THE FEDERALIST, *supra* note 2, NO. 84 (Alexander Hamilton), at 513 (making this argument); Charles C. Pinckney, Speech in South Carolina House of Representatives (Jan. 18, 1778), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 256 (same).

53. See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”). For a discussion of the tension between the Tenth Amendment and broad claims of executive war power, see D.A. Jeremy Telman, *A Truism That Isn’t True? The Tenth Amendment and Executive War Power*, 51 CATH. U. L. REV. 135 (2001).

54. For recent Supreme Court decisions emphasizing the enumerated powers structure of the Constitution, see, for example, *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997); *United States v. Lopez*, 514 U.S. 549, 552 (1995); and *New York v. United States*, 505 U.S. 144, 155 (1992). Even Chief Justice Marshall’s famous national power decision, *McCulloch v. Maryland*, emphasized this structural feature. See 17 U.S. (4 Wheat.) 316, 405 (1819) (“This [federal] government is acknowledged by all to be one of enumerated powers.”).

55. See, e.g., Prakash & Ramsey, *supra* note 14, at 253.

## II. THEORY AND HISTORY PRIOR TO THE FEDERAL CONVENTION

### A. *Seventeenth- and Eighteenth-Century Political Theory*

As noted, proponents of the Vesting Clause Thesis typically place significant weight on the views of seventeenth- and eighteenth-century political theorists, especially the writings of John Locke, William Blackstone, and Baron de Montesquieu. These writings, the proponents contend, show that foreign affairs powers were viewed by theorists as inherently executive in nature and thus as at least presumptively assigned to the executive branch of any government. The Founders would have been familiar with and likely influenced by these writings, the argument goes, and thus the writings shed light on what the Founders understood with respect to the Article II Vesting Clause.<sup>56</sup>

As we discuss later in this Article, the purported continuity between the views of the seventeenth- and eighteenth-century theorists concerning the proper scope of executive power and the understandings of the constitutional Founders is highly questionable. Among other things, when discussing executive power these theorists primarily used the British monarchy as their model, a model consciously rejected by the constitutional Founders when thinking about executive power. For now, we focus on what the theorists actually said. It turns out that, even on their own terms, the theorists provide no more than weak support for the idea that foreign relations powers are inherently executive in nature.

Locke, for example, far from claiming that foreign relations powers are inherently executive, actually distinguishes executive power from foreign relations power. In a chapter of the second book of his *Two Treatises of Government*, Locke describes three classes of power — “legislative,” “executive,” and “federative.”<sup>57</sup> Here he defines “executive” power as simply the power of “the *Execution* of the Laws that are made, and remain in force,” a power that he argues should be separated from the power to make laws.<sup>58</sup> Importantly, Locke distinguishes this executive power from the “federative” power, which he says encompasses “the Power of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth.”<sup>59</sup> He makes clear that these two classes

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56. See, e.g., *id.* at 265-72.

57. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 409-12 (Peter Laslett ed., rev. ed. 1960) (1690).

58. *Id.* at 410.

59. *Id.*



of power — executive and federative — are “really distinct in themselves.”<sup>60</sup>

Locke does observe that the executive and federative powers “are always almost united,” and he argues that if the two powers are separated it “would be apt sometime or other to cause disorder and ruin[.]”<sup>61</sup> But he bases his analysis here not on essentialist reasoning about the nature of executive power, but rather on functional differences between the legislative and executive branches. In particular, Locke contends that the federative power, unlike the regulation of domestic affairs, “is much less capable to be directed by antecedent, standing, positive Laws.”<sup>62</sup> In his view, the functional features of the executive branch — for example, its ability to make case-by-case judgments in response to changing circumstances — argue for assigning it the federative power.<sup>63</sup> Assigning it elsewhere, he contends, would be “almost impracticable.”<sup>64</sup> As Professor Rakove has noted, Locke is clearly basing his argument about assigning the federative power to the executive “on considerations of prudence, convenience, and efficiency, not right.”<sup>65</sup> Furthermore, Locke makes clear elsewhere in his treatise that the legislative power is supreme, even with respect to the federative power, a proposition at odds with the Vesting Clause Thesis.<sup>66</sup>

Blackstone provides even less support than Locke for the proposition that foreign relations powers are inherently executive in nature. Principally an expositor of English law rather than a political theorist, Blackstone analyzed the English Constitution primarily in terms of Whig “mixed government” theory as opposed to separation

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60. *Id.*; see also *id.* at 412 (stating that “the *Executive and Federative Power* of every Community be really distinct in themselves”).

61. *Id.* at 411-12; see also Prakash, *supra* note 26, at 745 (observing that Locke deemed powers other than law execution to be “executive” “only because they typically belong to the entity charged with law execution”).

62. LOCKE, *supra* note 57, at 411.

63. See *id.* at 412 (“[W]hat is to be done in reference to *Foreigners*, depending much upon their actions, and the variation of designs and interests, must be left in great part to the *Prudence* of those who have this Power committed to them, to be managed by the best of their Skill, for the advantage of the Commonwealth.”).

64. *Id.*

65. Jack N. Rakove, *Solving a Constitutional Puzzle: The Treatymaking Clause as a Case Study*, 1 *PERSP. AM. HIST.* 233, 261 (1984).

66. See, e.g., LOCKE, *supra* note 57, at 401 (referring to the legislative power as the “supream power of the Common-wealth”); *id.* at 415 (describing both the executive power and the federative power as “Ministerial and subordinate to the Legislative, which as has been shew’d in a Constituted Commonwealth, is the Supream”). Prakash and Ramsey are thus incorrect in suggesting that under Locke’s analysis the federative power is not subject to legislative constraint. See Prakash & Ramsey, *supra* note 14, at 267.

of powers.<sup>67</sup> Under the mixed government analysis, the English Constitution balanced governmental institutions associated with social orders rather than with basic governmental functions. Specifically, the King, Lords, and Commons respectively embodied monarchy, aristocracy, and democracy, and through mutual checks prevented the respective horrors of tyranny, oligarchy, and anarchy.<sup>68</sup> This is not to say that aspects of the English Constitution could not also be understood through a separation of powers framework.<sup>69</sup> It is to say, however, that the triad of King, Lords, and Commons did not obviously translate into the executive, judicial, and legislative categories. Accordingly, Blackstone's focus on mixed government as an initial matter means that references to the powers of the monarch or to specific prerogative powers cannot automatically be translated as executive power.

Although Blackstone on occasion refers generally to the Crown as exercising executive power,<sup>70</sup> he makes no effort to define the meaning of executive power, and still less to delineate the boundaries between executive and legislative authority in systematic or categorical terms. Moreover, although Blackstone contends that the prerogatives of the Crown include particular foreign relations powers, he justifies these assignments of power by a combination of functional arguments and arguments relating to the nature of the British monarchy. As an example of the latter, he contends that the King's prerogative includes the power to make treaties because under international law treaties are to be made by sovereign powers "and in England the sovereign power, *quoad hoc*, is vested in the person of the king."<sup>71</sup> Blackstone gives a similar sovereign power justification for the King's "prerogative of making war and peace."<sup>72</sup> As we discuss later, the constitutional Founders expressly rejected this sort of "royal prerogative" reasoning when thinking about the U.S. presidency. In any event, even Blackstone's royal prerogative arguments are specific to the structure of the British government and are not global claims about the inherent meaning of executive power.<sup>73</sup>

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67. See Stanley N. Katz, *Introduction to Book I*, in 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND viii-ix (facsimile of First Edition, Stanley Katz, ed., 1979) (1765).

68. See GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 18-21 (1969).

69. See Katz, *supra* note 67, at viii-ix.

70. See 1 COMMENTARIES ON THE LAWS OF ENGLAND, *supra* note 67, at 183.

71. 1 *id.* at 249.

72. 1 *id.*

73. Prakash and Ramsey quote some of Blackstone's references to the foreign relations prerogatives of the King as if they were definitions by Blackstone of "executive power," see

Montesquieu provides more support than Locke or Blackstone for the proposition that foreign relations powers are inherently executive, but even here the picture is complicated and uncertain. As a French theorist rather than an English empiricist, Montesquieu was certainly more inclined than Locke or Blackstone towards essentialist categories. But his essentialism primarily concerns the abstract classification of power rather than the proper institutional assignment of power. In addition, Montesquieu's dominant focus is on the separation of categories of power in order to preserve liberty, and he gives only passing attention to the relationship between executive power and foreign relations power.

In purporting to describe the English constitution, Montesquieu notes that in every government there are three classes of power: "the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law."<sup>74</sup> By the first power, says Montesquieu, "the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted."<sup>75</sup> By the second power, "he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions."<sup>76</sup> This category is thus similar to Locke's category of federative power. By the third power, the prince or magistrate "punishes criminals, or determines the disputes that arise between individuals."<sup>77</sup> Although initially labeling the third power as a type of executive power, Montesquieu quickly relabels it "the judiciary power," and he refers to the second power as "the executive power of the state."<sup>78</sup>

Montesquieu's taxonomy is confusing, in part because he initially refers to two categories of executive power. His subsequent relabeling of the third category as the judiciary power does not eliminate confusion because it seems to suggest that the second category fully covers executive power, in which case executive power would be *limited* to foreign relations powers and would not include the most obvious executive power of all — executing domestic laws.<sup>79</sup> But it is clear from Montesquieu's subsequent discussion (which focuses

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Prakash & Ramsey, *supra* note 14, at 269, but Blackstone does not himself use that phrase when referring to the prerogatives.

74. 1 BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 151 (Thomas Nugent trans., Hafner Pub. Co. 1949) (1751).

75. 1 *id.*

76. 1 *id.*

77. 1 *id.*

78. 1 *id.*

79. See M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 95 (2d ed. 1998) (explaining Montesquieu's initial taxonomy).

primarily on the need for separating legislative, executive, and judicial power) that this was not his intent. Thus, for example, he refers to the “three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.”<sup>80</sup> Here Montesquieu equates executive power with executing the laws and makes no specific reference to foreign relations powers.<sup>81</sup>

In Montesquieu’s subsequent discussion, there are only isolated references to foreign relations powers, and they do not shed much additional light on the relationship between executive power and foreign relations power. In the section of the book containing Montesquieu’s taxonomy, there is only one subsequent reference to a foreign relations power. In asserting that the executive should manage the army, Montesquieu argues that this follows “from the very nature of the thing, its business consisting more in action than in deliberation.”<sup>82</sup> The word “nature” here might suggest essentialism, but the core of the argument appears ultimately to be functional, grounded in the executive’s (i.e., monarch’s) ability to act with speed. In a later section of the book, in discussing the executive power in ancient Rome, Montesquieu observes that the Roman Senate exercised most of the executive power, and he includes within his description of the Senate’s powers various foreign relations functions such as determining on peace and war, regulating the army, and receiving and sending ambassadors.<sup>83</sup> Obviously, Montesquieu is here assigning foreign relations powers to his executive category, but even in this context he is referring to specific powers rather than globally equating executive authority with foreign relations authority.

Given Montesquieu’s limited (and confusing) treatment of the linkage between executive power and foreign relations powers, it is at least an overstatement to suggest, as proponents of the Vesting Clause Thesis have suggested, that his treatise provides conclusive support for the proposition that foreign relations powers were conceived of in the middle to late 1700s as inherently executive.<sup>84</sup> In addition, proponents of the Vesting Clause Thesis have tended to ignore the functionalist

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80. 1 MONTESQUIEU, *supra* note 74, at 152.

81. As William Gwyn notes, Montesquieu “gets off to a faltering start” with his initial taxonomy, since the taxonomy he “actually went on to employ is of a rather different nature.” W.B. GWYN, *THE MEANING OF THE SEPARATION OF POWERS: AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGIN TO THE ADOPTION OF THE UNITED STATES CONSTITUTION* 101 (1965); *see also* Rakove, *supra* note 65, at 262 (“In attempting to define legislative, executive, and judicial power . . . Montesquieu betrayed some confusion.”).

82. 1 MONTESQUIEU, *supra* note 74, at 161.

83. 1 *id.* at 173.

84. *See, e.g.*, Prakash & Ramsey, *supra* note 14, at 268 (“The influential Charles Louis de Secondat, Baron de Montesquieu, confirmed that Locke’s federative power had become a branch of the executive power by the mid-eighteenth century.”).

strands of Montesquieu's reasoning. While more abstract than the arguments made by Locke and Blackstone, functionalist arguments nevertheless play an important role in Montesquieu's discussion of the proper assignment of governmental powers. As noted above, this was evident in his brief reference to regulation of the army. In addition, when arguing that the executive power should be exercised by a monarch, Montesquieu contends that "this branch of government, having need of despatch, is better administered by one than by many."<sup>85</sup> Montesquieu's functionalism is also evident in his arguments in favor of dividing powers that otherwise would fall exclusively into a particular category. Perhaps most famously, he argues for giving the executive a veto power over legislation in order to avoid the accretion of too much power in the legislature, even though this means mixing the executive and legislative categories.<sup>86</sup> As we will document below, the constitutional Founders were much more influenced by this sort of functionalist reasoning than by Montesquieu's abstract essentialism.

The writings of other, less-prominent domestic legal theorists are no more helpful to the Vesting Clause Thesis. Although the English legal theorist Thomas Rutherford might appear to expressly endorse the foreign-affairs/executive-power equation, his support for the Thesis is more apparent than real. As an initial matter, Rutherford divides all government power into two rather than three categories and then does so in a unique fashion. In his typology, all government power is either "legislative" — basically the power, by common understanding, to define rights, duties, and membership in the community<sup>87</sup> — or "executive" — society's "power to act with its joint or common force for defense and security."<sup>88</sup> Rutherford next divides the executive power into the "internal," "external," and "mixed." The internal, or "civil," executive power operates upon objects within a society.<sup>89</sup> It follows that the external power, which includes most notably "military power," applies to matters outside a society.<sup>90</sup> Rutherford's unique dualist scheme, which appeared after the more familiar tripartite theses of Locke and Montesquieu, may call into question the extent of his influence in America. More generally, the

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85. 1 MONTESQUIEU, *supra* note 74, at 156.

86. 1 *id.* at 159.

87. 2 THOMAS RUTHERFORTH, *INSTITUTES OF NATURAL LAW* 43-50 (Cambridge, J. Bentham 1756).

88. 2 *id.* at 50-61.

89. 2 *id.* at 50-54. Internal executive power, according to Rutherford, included the "Judicial power," which is "the internal or civil branch of executive power exerting itself under such checks and controls, as the legislative power has subjected it to, in order to prevent its deviating from the purposes, for which it was formed." 2 *id.* at 51.

90. 2 *id.* at 50-56. Rutherford gave as an example of "mixed" powers the appointment of magistrates. 2 *id.* at 59-60.

emergence of yet another take on governmental structure belies the notion that a settled consensus on separation of powers theory prevailed in the years leading up to the American Revolution.

As to foreign affairs, moreover, Rutherforth makes clear that the executive wields external authority out of practical considerations, not because foreign affairs powers are by their nature executive. As a descriptive matter, Rutherforth observes that “where the legislative and executive power are lodged in different hands,” especially when the membership of the legislature is large, “the usual practice is to allow some degree of discretionary power in respect of war and peace to him or them, who are entrusted with the right of putting the military force in motion.”<sup>91</sup> This is especially so, he continues, “where the legislative body cannot act with such readiness and expedition, as the occasions or opportunities of war require.”<sup>92</sup> Nonetheless, Rutherforth concludes, though such an arrangement “may be convenient, it is not necessary.”<sup>93</sup>

To the contrary, Rutherforth expressly asserts that most foreign affairs powers are in essence legislative and therefore subject to substantial legislative limitation. Rutherforth begins his account of external executive power with a conventional discussion of military defense.<sup>94</sup> To this he adds a list of non-military foreign affairs powers, including the authority to make peace, grant rights to foreigners, make alliances, make treaties, and adjust navigation rights. But are any of these powers fundamentally executive? Rutherforth answers no:

However, though these several powers are usually connected with external executive power by being lodged in the same hands, *they are not naturally essential parts of it*. These several powers are rather acts of the common understanding, than of the common force; *and therefore seem, in their own nature, to be parts rather of the legislative than the executive power.*<sup>95</sup>

Despite the practical wisdom of lodging foreign affairs powers in the executive, Rutherforth remains careful to assert their legislative character, at times in surprising ways. For example, the ostensible champion of executive foreign affairs authority argues that the legislative authorities can be within their rights to communicate with other countries on their own, to make war and peace, and to send deputies with a military “to control its operations even in war.”<sup>96</sup>

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91. 2 *id.* at 56.

92. 2 *id.*

93. 2 *id.* at 57.

94. 2 *id.* at 54-55.

95. 2 *id.* at 56 (emphasis added).

96. 2 *id.* at 57.

Like Montesquieu, Jean De Lolme was a French theorist who examined the English Constitution for lessons about structuring a government of ordered liberty, though like Rutherford, he was both subsequent and secondary to his more celebrated countryman. Also as with Montesquieu, De Lolme provides more support for the idea that foreign affairs are executive in nature than any of the Englishmen who lived under the framework he describes. Perhaps more importantly, De Lolme further echoes Montesquieu in considering the connection between the executive and foreign affairs in a manner that is at best cursory and at worst garbled. Appearing in English in 1775, De Lolme's uncritical acceptance of broad royal prerogative likely made this portion of his analysis less appealing to an American audience, however often he may have been quoted generally.

In the manner of Rutherford, De Lolme divides government power between the legislative and the executive, rather than add either the judicial or federative as a coordinate building block.<sup>97</sup> His main chapter examining executive power, however, quickly shifts to speaking in terms of the "prerogative of the King."<sup>98</sup> This move means that, in contrast to both Rutherford and Blackstone, De Lolme in effect simply equates executive authority, a component of separation of powers analysis, with the royal prerogative, in many ways a unique set of powers retained by the English monarchy. What then follows is a standard, though broadly interpreted, list of English prerogative powers, including the King's role as: the "source of all judicial power"; the "*fountain of honor*"; the "superintendent of Commerce"; the "Supreme head of the Church"; the "Generalissimo of all sea or land forces whatever"; and as a ruler who "CAN DO NO WRONG."<sup>99</sup> Tucked away in this enumeration comes De Lolme's most extensive consideration of the monarch's foreign affairs authorities:

He is, with regard to foreign Nations, the representative, and the depository, of all the power and collective majesty of the Nation: he sends and receives ambassadors; he contracts alliances; and has the prerogative of declaring war, and of making peace, on whatever conditions he thinks proper.<sup>100</sup>

Precisely because De Lolme follows the royal prerogative, a careful reading of this passage indicates that he does not simply equate foreign affairs powers with executive authority. Rather, like Blackstone, De Lolme references the monarch's functional role in discussing specific powers. As noted, however, Blackstone is careful to distinguish the pairings, so that the King's role as sovereign, for

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97. See J.L. DE LOLME, *THE CONSTITUTION OF ENGLAND* (4th ed. 1784) (1711).

98. *Id.* at 72.

99. *Id.* at 72-73.

100. *Id.* at 73.

example, accounts for the prerogative to make war, while his capacity as the nation's representative explains the prerogative to receive ambassadors.<sup>101</sup> De Lolme, by contrast, lumps them together, clouding the functional origins of his conclusions.

In any case, De Lolme's actual influence on the foreign affairs provisions of the Constitution remains unclear. Although he was among leading eighteenth-century thinkers whom Americans frequently cited,<sup>102</sup> we are unaware of any instance in which De Lolme was cited for the proposition that foreign affairs authority was executive, much less cited with approval. Given De Lolme's fulsome description of such prerogatives as head of the established church and doing no wrong, together with Americans' rejection of British royal authority, the lack of such citations is perhaps not surprising.

It is not only the theories about the British constitutional system that are unsupportive of the Vesting Clause Thesis. Actual British practice in the years leading up to the U.S. Constitution further undercuts the story of continuity and executive power essentialism posited by the Thesis. English historians generally agree that the eighteenth century witnessed the emergence of a governmental system not readily captured by either mixed government or separation of powers conceptions. With the Glorious Revolution of 1688, power fundamentally shifted from the Stuart monarchs to Parliament.<sup>103</sup> It was not, however, until the accession of George I, the German-born Elector of Hanover, that Parliament consolidated this shift into a stable form of supremacy that lasted most of the eighteenth century. Displaying far less concern for British policy than his Stuart predecessors, George I mainly concerned himself with the security of his principality on the Continent. Government initiative fell to the King's ministers, who by the early 1720s themselves deferred to the "prime minister," Robert Walpole.<sup>104</sup>

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101. See *supra* text accompanying notes 71-72.

102. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 27 (1967) [hereinafter BAILYN, *IDEOLOGICAL ORIGINS*]; Jack N. Rakove, *Fidelity Through History (or to It)*, 65 *FORDHAM L. REV.* 1587, 1598 (1997).

103. Older "Whig" interpretations emphasized the extent to which the Revolution itself produced this shift. See GEORGE TREVELYAN, *THE ENGLISH REVOLUTION, 1688-1689*, at 175 (1954). More recent views argue that while the Revolution clearly resulted in a transfer of real power to Parliament, many issues concerning the boundaries between royal and parliamentary power remained unresolved. See J.P. KENYON, *STUART ENGLAND* 262 (1978); J.G.A. Pocock, *Introduction in THREE BRITISH REVOLUTIONS: 1641, 1688, 1776*, at 13 (J.G.A. Pocock ed., 1980).

104. See BETTY KEMP, *SIR ROBERT WALPOLE* 45 (1976) ("In William III's reign, the initiative in policy lay with the King; in Anne's reign it lay with those who could command her favour; in the 1720s and 1730s, it lay with Walpole."). For a summary of the rise of Parliamentary supremacy during this era, see Martin Stephen Flaherty, Note, *The Empire Strikes Back: Annesley v. Sherlock and the Triumph of Imperial Parliamentary Supremacy*, 87 *COLUM. L. REV.* 593, 612-13, 620-21 (1987).



The system Walpole devised in essence vested control of the British government in ministers who could command stable majorities in Parliament, especially the House of Commons, while retaining the monarch's favor. Walpole and his ministry could control Parliament in part because both the Revolution and the new dynasty had settled many of the divisive issues that had plagued England in the previous century, but also in part because of the accepted practice of "corruption," whereby the ministry would grant lucrative government posts and titles to Members of Parliament in exchange for their loyalty. Since the appointment of such posts formally remained with the King — as did other prerogatives and forms of influence — Walpole also needed royal approval to keep these majorities in place. Walpole was able to obtain such approval because the monarch was generally disengaged and cared mainly that a stable Parliament vote to approve adequate funds. This mutually reinforcing circle sustained Walpole and his successors through the reigns of both George I and his son, George II.<sup>105</sup> Importantly, ministerial initiative extended to foreign policy, although here two acting secretaries of state — along with somewhat independent ambassadors and other diplomats — played a greater role than the "prime" minister.<sup>106</sup> Not until George III ascended to the throne in 1760 did a more assertive monarch put pressure on the system.<sup>107</sup> By that time, however, the monarchy had ceded too much power for too long to have any hope of dismantling the framework that remains in recognizable form to this day.

For present purposes, what matters here is that the ministerial approach that Walpole pioneered bears little relation to the royal executive touted by Vesting Clause advocates. In separation of powers terms, functional executive power, especially the authority to determine both domestic and foreign policy, lay less with the monarch than with a collection of legislators in Parliament who principally comprised the ministry. Real executive and legislative power, in other words, was concentrated in Parliament. Certain contemporaries, moreover, recognized this state of affairs and decried it, mainly in

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105. See BERNARD BAILYN, *THE ORIGINS OF AMERICAN POLITICS* 24-32 (1968) [hereinafter BAILYN, *ORIGINS OF AMERICAN POLITICS*]; BETTY KEMP, *KING AND COMMONS 1660-1832*, at 85-103, 113-30 (1957); KEMP, *supra* note 104, at 3-9, 72-80; J.H. PLUMB, *ENGLAND IN THE EIGHTEENTH CENTURY* 60-73 (1992) (1950). See also RAKOVE, *supra* note 51, at 209-11 (1996) (summarizing British practice). For a classic account of Walpole's life as "prime minister," see 2 J.H. PLUMB, *SIR ROBERT WALPOLE: THE KING'S MINISTER* (1960).

106. See JEREMY A. BLACK, *A SYSTEM OF AMBITION? BRITISH FOREIGN POLICY 1660-1783*, at 12-21, 32-79, 175-282 (2d ed. 2000) [hereinafter BLACK, *SYSTEM OF AMBITION?*]; JEREMY A. BLACK, *BRITISH FOREIGN POLICY IN THE AGE OF WALPOLE* 49-89 (1985).

107. See BLACK, *SYSTEM OF AMBITION?*, *supra* note 106, at 41-42, 234-54; KEMP, *supra* note 104, at 124; H.M. SCOTT, *BRITISH FOREIGN POLICY IN THE AGE OF THE AMERICAN REVOLUTION* 10-28 (1990).

mixed government terms. “Real” or “Old” Whigs, among others, blasted the “robinocracy” of Walpole as a perversion under which certain ministerial oligarchs employed corruption behind the monarch’s back to pervert the democracy in Parliament.<sup>108</sup> As many leading historians have pointed out, this literature was especially influential to Americans who came to resist and then rebel against Parliament’s encroachments on the colonies after 1764.<sup>109</sup> This resistance, however, was against the perceived corruption of the legislative process, not the shift away from the royal executive.<sup>110</sup> In sum, the reality of the ministerial system, as well as the principal critique of it, make it even more unlikely that the Founders would have settled upon a single, widely held conception of executive power, especially one illustrated by a common understanding of the British monarchy.

In addition to the writings of domestic legal theorists, the Founders were familiar with the writings of prominent international law publicists. These writings can be more briefly described because of their relative silence on the relevant issue. To the extent that European thinkers influenced the Founders, historians and legal scholars commonly reference Grotius, Vattel, Burlamaqui, and Puffendorf as comparable to Locke, Blackstone, and Montesquieu.<sup>111</sup> On the relationship between the executive and foreign affairs, however, these writers had little to say. Instead, they generally distinguished between domestic law and the law of nations, declared that they would do no more than note the many different ways nations arranged their legal orders, including who conducted foreign affairs, and that they would devote their attention to international law. Foreign affairs powers, under their analysis, were simply linked generically to the “sovereigns” or “rulers” — that is, to the particular

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108. See BAILYN, *IDEOLOGICAL ORIGINS*, *supra* note 102, at 47-54; BAILYN, *ORIGINS OF AMERICAN POLITICS*, *supra* note 105, at 32-52; WOOD, *supra* note 68, at 10-17. The still-standard general account of English opposition literature is CAROLINE ROBBINS, *THE EIGHTEENTH-CENTURY COMMONWEALTHMAN: STUDIES IN THE TRANSMISSION, DEVELOPMENT AND CIRCUMSTANCE OF ENGLISH LIBERAL THOUGHT FROM THE RESTORATION OF CHARLES II UNTIL THE WAR WITH THE THIRTEEN COLONIES* (1959).

109. See BAILYN, *IDEOLOGICAL ORIGINS*, *supra* note 102, at 52-58; BAILYN, *ORIGINS OF AMERICAN POLITICS*, *supra* note 105, at 34-47; WOOD, *supra* note 68, at 14-18.

110. See BAILYN, *IDEOLOGICAL ORIGINS*, *supra* note 102, at 45-52; BAILYN, *ORIGINS OF AMERICAN POLITICS*, *supra* note 105, at 94-143; WOOD, *supra* note 68, at 18-43.

111. See J. J. BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW* (Thomas Nugent trans., 2d ed. 1763) (1752); HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* (Francis Kelsey trans., 1925) (photo reprint 1964) (1646); SAMUEL PUFFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* (photo. reprint 1934) (1688); EMMERICH DE VATTEL, *LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS* (Charles G. Fenwick trans., 1916) (1758); see also BAILYN, *IDEOLOGICAL ORIGINS*, *supra* note 102, at 27 (“In pamphlet after pamphlet the American writers cited . . . Grotius, Puffendorf, Burlamaqui, and Vattel on the laws of nature and of nations, and on the principles of civil government.”).

governments of the individual nations.<sup>112</sup> With respect to the power to conduct war, for example, Vattel notes that:

[A]s the various rights constituting that power, which ultimately resides in the body of the Nation, can be separated or limited, according to the will of the Nation, *it is in the individual constitution of each State that we must look to find where is located the authority to make war in the name of the State.*<sup>113</sup>

By itself, this agnosticism about domestic constitutional arrangements simply means that these international law publicists offer no support for the executive foreign affairs power thesis. In a larger context, however, this silence may work to undermine the thesis. These writers centrally concerned themselves with how governments should interact with one another in international affairs. If there existed a consensus that the domestic executive by definition had to conduct foreign affairs, one would expect some mention of this assumption, especially given the eighteenth-century tendency to attribute decisiveness to the executive and deliberation to the legislature. This expectation, however, goes unfulfilled, which in turn calls into question the idea that an executive foreign affairs baseline in fact existed.

### B. *State Constitutional Experience*

In seeking guidance when drafting and debating the Constitution, the Founders looked most directly to the experience of the state governments during the revolutionary and “critical” periods.<sup>114</sup> As Professor Rakove has explained, “[t]he states had served, in effect, as the great political laboratory upon whose experiments the framers of 1787 drew to revise the theory of republican government.”<sup>115</sup> Thus, “[c]onscious as they were of the fate of other republics and confederacies, ancient and modern, the lessons of the past that [the

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112. See, e.g., VATTEL, *supra* note 111, at 69, 160, 235, 393. *But see* Prakash & Ramsey, *supra* note 14, at 269-71 (suggesting that the publicists assigned foreign affairs powers to the executive branch of governments).

113. VATTEL, *supra* note 111, at 235-36 (emphasis added) (citation omitted).

114. The term “critical period” was used by John Quincy Adams in a commencement address at Harvard College in 1787, in which he spoke of “this critical period” in which the nation was “groaning under the intolerable burden of accumulated evils.” ROBERT A. EAST, JOHN QUINCY ADAMS, THE CRITICAL YEARS, 1785-1794, at 85 (1962) (quoting Adams); see also WOOD, *supra* note 68, at 393 (discussing use of the term). The term has come to refer to the period in the 1780s between the revolutionary war and the ratification of the Constitution. See, e.g., JOHN FISKE, THE CRITICAL PERIOD OF AMERICAN HISTORY, 1783-89 (1898).

115. RAKOVE, *supra* note 51, at 31.

framers] weighed most heavily were drawn from their own experience.”<sup>116</sup>

Advocates of the Vesting Clause Thesis suggest that in designing the state constitutions Americans simply applied the wisdom of European jurists and thinkers without significant modification. Prakash and Ramsey, for example, while conceding the need for further research, “presume that the ordinary understanding of executive power established by Locke, Montesquieu, and Blackstone should be used to construe the analogous phrases in [the first] state constitutions” framed after independence.<sup>117</sup> As we have shown, executive-power essentialists have painted too simplistic a picture of the relevant eighteenth-century political, constitutional, and legal thought. But even were this portrait accurate, the essentialist account errs more dramatically in its presumption that America’s constitutional practitioners mechanically applied European political and legal theory.

As an initial matter, the essentialist story of continuity and consensus is historically counterintuitive. Historians, in contrast to lawyers, assume change over time.<sup>118</sup> This is especially true over extended periods characterized by upheaval, such as revolution and nation-building. A thoroughly-worked-out framework of executive power over foreign affairs that endured nearly unaltered for over a century, and survived periods of radical political change, may be possible, but it is hardly probable. More specifically, the essentialist thesis stands at odds with the prevailing professional narrative about the period, which stresses discontinuity and ferment. At the very least, there should be a presumption in favor of such a prevailing narrative. With sufficient historical evidence, such a presumption can of course be rebutted. For various reasons, however, legal scholars rarely have

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116. *Id.* at 21; see also WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 290 (expanded ed. 2001) (“The state constitutions’ profound influence on the drafting of the federal Constitution and the ratification debates was taken for granted by contemporaries.”); Donald S. Lutz, *The First American Constitutions*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 70 (Leonard W. Levy & Dennis J. Mahoney eds., 1987) (“By the summer of 1787, the framers of our national constitution, many of whom had helped write state constitutions, could draw upon a rich experience in the design of institutions and the practical effects of these institutions.”).

117. Prakash & Ramsey, *supra* note 14, at 278-79 n.209. Somewhat surprisingly for an exhaustive historical account, Prakash and Ramsey devote only one long footnote to the early state constitutions, even though these constitutions were the initial focus of constitutional thought in the United States, and even though they touched upon matters relating to foreign affairs, such as embargoes and control of the military.

118. See BERNARD BAILY, *ON THE TEACHING AND WRITING OF HISTORY* 50-51 (1994).

the time or resources to overturn the prevailing historical understanding.<sup>119</sup>

Unlike proponents of the Vesting Clause Thesis, the leading historians of the period have emphasized the dramatic discontinuity and conflict in American constitutional thinking, as the British Empire gave way to independent state frameworks joined under the Articles of Confederation, which in turn gave way to the Constitution of the United States. This story conventionally begins with the English “Whig” or “mixed” Constitution that the colonists paradoxically internalized and venerated even as they resisted Britain’s attempts to establish its imperial authority over them. Within a decade, resistance led to independence, which forced the King’s former subjects to experiment with radically different, “republican” constitutions on the state level, and the *sui generis* Articles of Confederation at the national level. Perceived democratic excess at home and weakness abroad led to a reform movement that reflected a fundamental reevaluation of several first principles. This rethinking led to what Gordon Wood has famously characterized as a new “American science of politics,”<sup>120</sup> the chief legacy of which was the Federal Constitution. With the shift from the English mixed Constitution, to the republican state constitutions, to the United States Constitution, there has rarely in constitutional history been such a degree of transformation or innovation in such a concentrated period.<sup>121</sup>

The most relevant break with received constitutional wisdom followed closely upon independence, as the mixed government

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119. One of us has developed these themes at length. See Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1745-55 (1996) [hereinafter Flaherty, *Most Dangerous Branch*]; Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 551-54 (1995) [hereinafter Flaherty, *History “Lite”*]. See also Martin S. Flaherty, *The Future and Past of U.S. Foreign Affairs Law*, 67 LAW & CONTEMP. PROBS. (forthcoming 2004) (discussing credible use of constitutional history with regard to recent foreign affairs scholarship).

120. WOOD, *supra* note 68, at 593.

121. This account has emerged in a series of now classic studies written after World War II. Any list of essentials would include, in rough order of the periods covered: J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (1975); Bailyn, *Ideological Origins*, *supra* note 102; Jack P. Greene, *Peripheries and Center: Constitutional Development in the Extended Politics of the British Empire and United States, 1607-1788* (1986); Edmund S. Morgan & Helen M. Morgan, *The Stamp Act Crisis: Prologue to Revolution* (1953); 1-4 John Phillip Reid, *Constitutional History of the American Revolution* (1986-93); Adams, *supra* note 116; Wood, *supra* note 68; Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (1985). Also useful is a recent and somewhat revisionist account by Marc Kruman, who argues, among other things, that the new “American science of politics” had emerged as early as the first state constitutions, rather than with the Federal Constitution. See Marc W. Kruman, *Between Authority and Liberty: State Constitution Making in Revolutionary America* (1997). For a historiographical overview, see Flaherty, *History “Lite”*, *supra* note 119, at 535-49.

conception gave way to an emphasis on republicanism. This shift reflected a belief that legislatures were the primary guardians of liberty, and it involved both an outright rejection of royal prerogative powers as a model for republican executives and a suspicion of chief magistrates more generally.<sup>122</sup> As Edward Corwin has explained, “The colonial period ended with the belief prevalent that ‘the executive magistracy’ was the natural enemy, the legislative assembly the natural friend of liberty, a sentiment strengthened by the contemporary spectacle of George III’s domination of Parliament.”<sup>123</sup>

This distrust of executive authority was evident in the writings of leading revolutionary thinkers. The executive, John Adams wrote in his influential essay *Thoughts on Government*, must be “stripped of most of those badges of domination called prerogatives.”<sup>124</sup> In a similar vein, Thomas Jefferson, in his 1783 “Draft of a Fundamental Constitution for the Commonwealth of Virginia,” emphasized that “[b]y Executive powers,”

we mean no reference to those powers exercised under our former government by the crown as of it’s prerogative; nor that these shall be the standard of what may or may not be deemed the rightful powers of the Governor. We give him those powers only which are necessary to carry into execution the laws, and which are not in their nature [either legislative or] Judiciary.<sup>125</sup>

Jefferson, moreover, expressly extended this thinking to foreign affairs. His draft constitution delegated the usual array of external powers — that is, “of declaring war and concluding peace, of contracting alliances, of issuing letters of marque and reprisal, of raising or introducing armed forces” — to the Continental Congress.<sup>126</sup> Where the Congress did not exercise these powers, they were to be exercised by the governor “under the regulation of such laws as the legislature may think it expedient to pass.”<sup>127</sup> The royal prerogative, it was clear, would no longer serve as the benchmark for executive power.

The state constitutions drafted in the wake of independence reflected this shift in thinking. By 1777, ten of the thirteen states, as well as Vermont, had adopted new constitutions. As Allan Nevins notes, this “was the first time in the world’s history that a large group

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122. See CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY, 1775-1796*, at 27 (1922).

123. CORWIN, *supra* note 18, at 5-6.

124. JOHN ADAMS, *THOUGHTS ON GOVERNMENT* (1776), *reprinted in* 4 *PAPERS OF JOHN ADAMS* 65, 89 (Robert J. Taylor ed., 1979).

125. Thomas Jefferson, *Draft of a Constitution for Virginia*, in 6 *THE PAPERS OF THOMAS JEFFERSON* 294, 298-99 (Julian P. Boyd ed., 1952).

126. 6 *id.* at 299.

127. 6 *id.*

of communities had begun the formation of their own governments under written constitutions.”<sup>128</sup> Thereafter the states’ constitutional creativity slowed, but did not cease. In a second, more prolonged spate of constitution-making, Massachusetts drafted its first state constitution, while South Carolina, New Hampshire, and Vermont each adopted a second or revised constitution. By the opening of the Federal Convention, fifteen state constitutions had been drafted.

In drafting the state constitutions, Americans rejected the English mixed government model, and instead embraced republican government as the leading alternative that classical theory had to offer. In purest form this would mean concentrating governmental authority in a single deliberative assembly that would remain accountable to the people, and so protect their liberty, by insuring that it would be as representative and responsive as practicable. At least two early constitutions, Pennsylvania and Vermont, came close to this ideal, and nearly all of the early republican frameworks would approach it in some degree.<sup>129</sup> Yet even at this early stage, other considerations directed Americans away from republicanism in its most simple form. In particular, one additional consequence of mixed government passing from the scene was that separation of powers analysis could come out of its shadow and provide what would become a complementary framework for allocating governmental authority. Four of the initial state constitutions contained express separation of powers clauses, with three following suit several years later. Typical was the language of Maryland’s 1776 constitution, which declared, “the legislative, executive and judicial powers of government, ought to be forever and distinct from each other.”<sup>130</sup>

The initial state commitment to separation of powers, however, was largely rhetorical. The reality of the first state constitutions was a

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128. ALLAN NEVINS, *THE AMERICAN STATES DURING AND AFTER THE REVOLUTION, 1775-1789*, at 117 (1924).

129. See WOOD, *supra* note 68, at 83-90, 163. The Pennsylvania and Vermont Constitutions were nearly identical. See PA. CONST. OF 1776, *reprinted in* 5 *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* 3081 (Francis Newton Thorpe ed., 1909) [hereinafter *STATE CONSTITUTIONS*]; VT. CONST. OF 1777, *reprinted in* 6 *STATE CONSTITUTIONS, supra*, at 3737.

130. See MD. CONST. OF 1776, art. VI, *reprinted in* 3 *STATE CONSTITUTIONS, supra* note 129, at 1686, 1687. In all, eight of the fifteen state constitutions during this period contained such clauses. The other states were North Carolina, N.C. CONST. OF 1776, art. IV, *reprinted in* 5 *STATE CONSTITUTIONS, supra* note 129, at 2787, 2787; Virginia, VA. CONST. OF 1776, § 5, *reprinted in* 7 *STATE CONSTITUTIONS, supra* note 129, at 3812, 3813; Georgia, GA. CONST. OF 1777, art. I, *reprinted in* 2 *STATE CONSTITUTIONS, supra* note 129, at 777, 778; and later Massachusetts, MASS. CONST. OF 1780, art. XXX, *in* 3 *STATE CONSTITUTIONS, supra* note 129, at 1888, 1893; New Hampshire, N.H. CONST. OF 1784, art. XXXVII, *reprinted in* 4 *STATE CONSTITUTIONS, supra* note 129, at 2453, 2457; and the second Vermont constitution, VT. CONST. OF 1786, ch. II, art. VI, *reprinted in* 6 *STATE CONSTITUTIONS, supra* note 129, at 3749, 3755.

concentration of extensive authority in the legislatures, in keeping with the republican ideal. Echoing a chorus of authorities, Willi Paul Adams has observed that after 1776 the state assemblies “became the most powerful political institutions in the states. . . . In the metaphorical language of the day, the legislature was ‘the soul, the source of life and movement’ in the body of the state.”<sup>131</sup> Thus, for example, many of the first state assemblies could appoint judges,<sup>132</sup> and had either express or implicit power to alter their constitutions.<sup>133</sup>

The corollary of supreme legislatures was subordinate executives. As an initial matter, the state constitutions were united in rejecting the royal model. Two states, Virginia and Maryland, expressly rejected prerogative powers as the template for their executives, declaring that the governor in exercising executive powers “shall not, under any pretence, exercise any power or prerogative by virtue of any law, statute, or custom of England or Great Britain.”<sup>134</sup> Even when left unstated, a similar repudiation was plain nearly everywhere else. Thus, for example, the Pennsylvania constitution created a plural rather than unitary executive, and New Hampshire’s 1776 constitution omitted an

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131. ADAMS, *supra* note 116, at 229 (quoting *The American Whig, No. III*, PROVIDENCE GAZETTE, April 3, 1779, at 1); *see also, e.g.*, Lutz, *supra* note 116, at 75 (“The executive was invariably quite weak [under the early state constitutions] and a creature of the legislature.”).

132. Four of the relevant state constitutions vested the appointment of the judges in the legislature. *See* N.J. CONST. OF 1776, art. XII, *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 129, at 2594, 2596; N.C. CONST. OF 1776, arts. XIII, XXXIII, *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 129, at 2787, 2791, 2793; S.C. CONST. OF 1776, arts. XIX, XX, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3241, 3246; VA. CONST. OF 1776, para. 35, *reprinted in* 7 STATE CONSTITUTIONS, *supra* note 129, at 3812, 3817. New York vested judicial appointments in a special council chosen by the assembly in which the governor had one vote. *See* N.Y. CONST. OF 1777, art. XXIII, *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 129, at 2623, 2633. In Georgia, intermediate appointments were vested in the governor, with appointments generally being left to whatever process the legislature would establish by law. *See* GA. CONST. OF 1777, art. XXI, *reprinted in* 2 STATE CONSTITUTIONS, *supra* note 129, at 777, 781.

133. Two constitutions expressly allowed the legislature to enact amendments. *See* DEL. CONST. OF 1776, art. 30, *reprinted in* 1 STATE CONSTITUTIONS, *supra* note 129, at 562, 568 (providing for constitutional amendment by legislative supermajorities); MD. CONST. OF 1776, art. LIX, *reprinted in* 3 STATE CONSTITUTIONS, *supra* note 129, at 1686, 1701 (requiring intervening election prior to legislative amendments going into effect). In other states, the constitution technically amounted to no more than a statute. *See* N.J. CONST. OF 1776, pmbl., *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 129, at 2594, 2595; S.C. CONST. OF 1778, pmbl., *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3248, 3248; S.C. CONST. OF 1776, pmbl., *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3241, 3243; VA. CONST. OF 1776, pmbl., *reprinted in* 7 STATE CONSTITUTIONS, *supra* note 129, at 3812, 3814. Among the defects of the Virginia Constitution, Jefferson famously included the fact “that the ordinary legislature may alter the constitution itself.” Thomas Jefferson, *Notes on the State of Virginia*, in 3 THE WRITINGS OF THOMAS JEFFERSON 85, 225 (Paul Leicester Ford ed., 1894).

134. *See* MD. CONST. OF 1776, art. XXXIII, *reprinted in* 3 STATE CONSTITUTIONS, *supra* note 129, at 1686, 1696; VA. CONST. OF 1776, para. 29, *reprinted in* 7 STATE CONSTITUTIONS, *supra* note 129, at 3812, 3816-17.



executive altogether.<sup>135</sup> Furthermore, aside from New York, each of the twelve constitutions that did provide for a single governor or chief executive further made provision for some sort of executive or privy council. In contrast to the English Privy Council, however, these bodies were selected by the legislature as an independent check, and were thus accorded the express power to advise, or (in several states) make decisions with, the chief executive.<sup>136</sup> Perhaps most striking, the new republican governors could not exercise a veto, and could not adjourn or prorogue the legislature as could their royal predecessors.<sup>137</sup>

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135. See PA. CONST. OF 1776, § 3, *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 129, at 3081, 3084; N.H. CONST. OF 1776, *reprinted in* 4 STATE CONSTITUTIONS, *supra* note 129, at 2451; *see also* NEVINS, *supra* note 128, at 166 (describing the “subordination of the executive branch to the legislature” in the state constitutions).

136. In Delaware, Maryland, and South Carolina, the councils in certain matters had the power of consent; in the other states the power of the councils was advisory. See DEL. CONST. OF 1776, arts. 8-9, *reprinted in* 1 STATE CONSTITUTIONS, *supra* note 129, at 562, 563-64; GA. CONST. OF 1777, arts. II, XIX-XXV, *reprinted in* 2 STATE CONSTITUTIONS, *supra* note 129, at 777, 778-81; MD. CONST. OF 1776, arts. XXVI, XXXIII-XXXIX, *reprinted in* 3 STATE CONSTITUTIONS, *supra* note 129, at 1686, 1695-97; MASS. CONST. OF 1780, pt. II, ch. II, § I, arts. III, IV, *reprinted in* 3 STATE CONSTITUTIONS, *supra* note 129, at 1888, 1900-01; *id.* at pt. II, ch. II, § 3, arts. I-IV, *reprinted in* 3 STATE CONSTITUTIONS, *supra* note 129, at 1888, 1904-05; N.H. CONST. OF 1784, *reprinted in* 4 STATE CONSTITUTIONS, *supra* note 129, at 2453, 2463-66; N.J. CONST. OF 1776, art. VIII, *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 129, at 2594, 2596; N.C. CONST. OF 1776, art. XIV, *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 129, at 2787, 2791; S.C. CONST. OF 1778, arts. V, VIII-IX, XXXI-XXXII, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3248, 3249, 3255; S.C. CONST. OF 1776, arts. V, XII-XIV, XXV, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3241, 3244, 3246-47; VA. CONST. OF 1776, para. 31, *reprinted in* 7 STATE CONSTITUTIONS, *supra* note 129, at 3812, 3817.

137. Under nine of the state constitutions adopted during this period, the governor had no power to prorogue, dissolve, or adjourn, and seven of the constitutions lacked any provision for a veto. The first South Carolina Constitution of 1776 provided for a veto but did not provide for a power to prorogue, dissolve, or adjourn; the New York constitution allowed the other powers, but lacked a genuine gubernatorial veto, instead creating a council of revision, of which the governor was a part, which could veto legislation subject to an override by two-thirds of each house of the legislature. See DEL. CONST. OF 1776, art. 10, *reprinted in* 1 STATE CONSTITUTIONS, *supra* note 129, at 562, 564; GA. CONST. OF 1777, art. XIX-XX, *reprinted in* 2 STATE CONSTITUTIONS, *supra* note 129, at 777, 781; MD. CONST. OF 1776, art. XXXIII, *reprinted in* 3 STATE CONSTITUTIONS, *supra* note 129, at 1686, 1697; N.Y. CONST. OF 1777, arts. III, XVIII, *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 129, at 2623, 2628-29, 2632-33; N.C. CONST. OF 1776, arts. XVIII-XX, *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 129, at 2787, 2791-92; S.C. CONST. OF 1778, arts. XVI-XVII, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3248, 3252-53; S.C. CONST. OF 1776, arts. VII-VIII, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3241, 3244; VA. CONST. OF 1776, para. 30, *reprinted in* 7 STATE CONSTITUTIONS, *supra* note 129, at 3812, 3817; VT. CONST. OF 1777, ch. 2, § XIV, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3737, 3744. The second Vermont Constitution provided for a provisional veto that put a bill over to the next session. See Vt. CONST. OF 1786, ch. 2, § XVI, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3749, 3757. Pennsylvania, which had a plural executive council with a nominal president instead of a true governor, likewise made no provision for the executive council to prorogue, dissolve, adjourn, or veto. See PA. CONST. OF 1776, § 20, *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 129, at 3081, 3087-88. See also BAILYN, *IDEOLOGICAL ORIGINS*, *supra* note 102, at 66-70 (contrasting the power of royal and republican governors); KRUMAN, *supra* note 121, at 123-26 (arguing that both the legacy of

The republican state executive also lost out with regard to government appointments, a process that the legislatures dominated. Indeed, no governor had the exclusive power to appoint either judges or certain officials that today would be termed executive, such as the secretary of state, the comptroller, and military officers. In a number of states the power to make such appointments was vested exclusively in the legislature.<sup>138</sup> Moreover, in most of the constitutions adopted in the first wave of state constitution-making, the election of the governor himself was assigned to the legislature rather than to the electorate.<sup>139</sup>

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prerogative power as well as “the framers’ sense of a functional separation of powers” contributed to a denial of the veto power to the new republican governors); WOOD, *supra* note 68, at 141 (“Even among those who desired a stronger magistrate than most, it seemed abominable that a single person should have a negative over the voice of the whole society.”).

138. Delaware illustrated several approaches at once in providing that the chief executive could appoint judges jointly with the Assembly, see DEL. CONST. OF 1776, art. 12, *reprinted in* 1 STATE CONSTITUTIONS, *supra* note 129, at 562, 564-65; and could appoint civil officers unless otherwise directed by the Assembly, see art. 16, 1 *id.* at 565; yet mandating that the Assembly itself appoint all military officers, see 1 *id.* Several states emphasized the council as a check, with Maryland subjecting the governor’s appointments to council approval, see MD. CONST. OF 1776, art. XLVIII, *reprinted in* 3 STATE CONSTITUTIONS, *supra* note 129, at 1686, 1699; and Vermont vesting the power in the chief executive and council jointly, see VT. CONST. OF 1777, ch. II, art. XVIII, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3737, 3745. Somewhat surprisingly, New York placed most appointments in a council of appointment, a body in which the governor had only one vote, and vested selection of the state treasurer in the Assembly. See N.Y. CONST. OF 1777, art. XXIII, *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 129, at 2623, 2633-34. A number of states went still further and vested either all, or at least significant, judicial, civil, and military appointments in the legislature. See, e.g., VA. CONST. OF 1776, para. 13, *reprinted in* 7 STATE CONSTITUTIONS, *supra* note 129, at 3812, 3817 (vesting appointment of Supreme Court, Chancery, and Admiralty judges, as well as the Attorney General, in the Assembly).

139. See DEL. CONST. OF 1776, art. 7, *reprinted in* 1 STATE CONSTITUTIONS, *supra* note 129, at 562, 563; GA. CONST. OF 1777, arts. II, XIII, *reprinted in* 2 STATE CONSTITUTIONS, *supra* note 129, at 777, 778-781; MD. CONST. OF 1776, art. XXV, *reprinted in* 3 STATE CONSTITUTIONS, *supra* note 129, at 1686, 1695; N.J. CONST. OF 1776, art. VII, *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 129, at 2594, 2596; N.C. CONST. OF 1776, art. XV, *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 129, at 2787, 2791; S.C. CONST. OF 1778, art. III, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3248, 3249; S.C. CONST. OF 1776, art. III, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3241, 3243; VA. CONST. OF 1776, para. 29, *reprinted in* 7 STATE CONSTITUTIONS, *supra* note 129, at 3812, 3817. The two exceptions were Vermont, which provided for public election of the governor to a one-year term, see VT. CONST. OF 1777, ch. II, § XVII, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3737, 3744; and New York, which provided for public election of the governor to a three-year term, see N.Y. CONST. OF 1777, art. XVII, *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 129, at 2623, 2632. As has widely been noted, the New York constitution was ahead of its time in terms of separation of powers and executive authority. In contrast to other constitutions adopted immediately after independence, New York provided for a substantially more powerful governor through such mechanisms as a qualified veto, the authority to convene and prorogue the assembly, and the authority to appoint judges. In its different realization of executive authority, New York anticipated the “second wave” of reform constitutions such as the Massachusetts and New Hampshire constitutions, as well as the Federal Constitution. For a discussion of the New York Constitution in the constitutional development of the period, see Flaherty, *Most Dangerous Branch*, *supra* note 119, at 1768-70.

Contrary to what essentialist theory might predict, none of the constitutions adopted during this period simply granted the “executive power,” or, having done so, proceeded to specify what inherently executive powers would be shared with the other branches — the strategy that essentialist scholars attribute to Article II of the federal Constitution. About half of the early state constitutions did preface their treatment of the executive branch with some general provision concerning executive power.<sup>140</sup> Such texts, however, were always followed by specific grants of powers, such as the power to pardon, the commander-in-chief power, and the power to appoint civil and military officials, that would have been superfluous if the general clause were expected to encompass the universe of executive authority that modern essentialists assume.<sup>141</sup> This pattern indicates that, to the extent these general executive power provisions conveyed anything,

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140. Four state constitutions expressly employed the term “vest,” though in Pennsylvania and Vermont, the latter of which produced two constitutions during the period under consideration, the term was applied to a plural executive. See N.Y. CONST. OF 1777, art. XVII, *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 129, at 2623, 2632 (“[T]he supreme executive power and authority of this State shall be vested in a governor.”); PA. CONST. OF 1776, § 3, *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 129, at 3081, 3084 (“The supreme executive power shall be vested in a president and council.”); VT. CONST. OF 1786, ch. 2, § 3, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3749, 3754 (“The supreme executive power shall be vested in a Governor (or, in his absence, a Lieutenant-Governor) and Council.”); VT. CONST. OF 1777, ch. 2, § 3, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3737, 3743 (“The supreme executive power shall be vested in a Governor and Council.”). Five other state constitutions arguably employed the equivalent of vesting language with such formulations as the governor, chief magistrate, or president “shall exercise” or “have” executive power, or “shall execute” the laws. See GA. CONST. OF 1777, art. XIX, *reprinted in* 2 STATE CONSTITUTIONS, *supra* note 129, at 777, 781 (“The governor shall, with the advice of the executive council, exercise the executive powers of government, according to the laws of this State and the constitution thereof . . . .”); N.J. CONST. OF 1776, art. VIII, *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 129, at 2594, 2596 (“[T]he Governor, or in his absence, the Vice-President of the Council, shall have the supreme executive power . . . .”); S.C. CONST. OF 1778, art. XI, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3248, 3250 (“[T]he executive authority be vested in the governor and commander-in-chief, in the manner herein mentioned.”); S.C. CONST. OF 1776, art. XXX, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3241, 3247 (“[T]he executive authority be vested in the president and commander-in-chief, limited and restrained as aforesaid.”); VA. CONST. OF 1776, para. 29, *reprinted in* 7 STATE CONSTITUTIONS, *supra* note 129, at 3812, 3816 (“A Governor, or chief magistrate . . . shall, with the advice of a Council of State, exercise the executive powers of government according to the laws of this Commonwealth.”).

141. See GA. CONST. OF 1777, arts. XIX, XX-XXII, *reprinted in* 2 STATE CONSTITUTIONS, *supra* note 129, at 777, 781; N.J. CONST. OF 1776, arts. VIII, XIX, *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 129, at 2594, 2596; N.Y. CONST. OF 1777, arts. VII-XIX, *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 129, at 2623, 2632-33; PA. CONST. OF 1776, § 20, *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 129, at 3081, 3087-88; S.C. CONST. OF 1778, arts. XVIII, XXIX-XXXIII, XXXV, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3248, 3254-55; S.C. CONST. OF 1776, arts. XXII-XXVI, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3241, 3246-67; VT. CONST. OF 1786 art. XI, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3749, 3756; VT. CONST. OF 1777, art. XVIII, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3737, 3745; VA. CONST. OF 1776, para. 29, *reprinted in* 7 STATE CONSTITUTIONS, *supra* note 129, at 3812, 3816-17.

they conveyed no more than a general power of implementing and enforcing the laws.

The other state constitutions dealt with executive authority in even more guarded fashion. Two constitutions, in Massachusetts and New Hampshire, simply set up a governor or equivalent, listed discrete powers, and refrained from any general language suggesting further grants of authority.<sup>142</sup> Several others set forth a detailed list of discrete executive powers, followed by a catch-all phrase declaring that the chief magistrate could also exercise “other” executive powers. These phrases, however, were always qualified with language that made clear that the exercise of executive authority had to be consistent with the constitution, the laws, or both.<sup>143</sup>

Notably, language mandating that executive power accord with the constitution or laws appeared even in some constitutions that prefaced their treatment of executive power with the more general provisions. Virginia, for example, required that executive powers had to be exercised “according to the laws of this Commonwealth.”<sup>144</sup> The second South Carolina constitution was particularly explicit in this regard, stating that “the executive authority be vested in the governor and commander-in-chief, *in manner herein mentioned.*”<sup>145</sup>

The prevailing state approach, therefore, may be summarized as follows. In no instance did a state constitution list executive powers simply for the purpose of specifying exceptions to some general grant of authority. Instead, the early state constitutions adopted an array of strategies with respect to executive power, which in and of itself should give pause to anyone who would make ready generalizations about what the Founding generation thought as a whole on the nature of executive power. Common to all approaches, however, was an emphasis on specific delegations of authority. General language was used to delegate only the power to implement the laws, and in any case was invariably followed with additional grants of ostensibly executive powers, and often was further limited with language

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142. See MASS. CONST. OF 1780, pt. II, ch. II, § I, *reprinted in* 3 STATE CONSTITUTIONS, *supra* note 129, at 1888, 1899-1903; N.H. CONST. OF 1784, pt. 2, *reprinted in* 4 STATE CONSTITUTIONS, *supra* note 129, at 2453, 2462-65.

143. See DEL. CONST. OF 1776, art. 7, *reprinted in* 1 STATE CONSTITUTIONS, *supra* note 129, at 562, 563 (subjecting the exercise of executive power to the constitution and laws); MD. CONST. OF 1776, art. XXXIII, *reprinted in* 3 STATE CONSTITUTIONS, *supra* note 129, at 1686, 1696 (subjecting the exercise of executive power to the laws); N.C. CONST. OF 1776, art. XIX, *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 129, at 2787, 2791-92 (subjecting executive power to constitution and laws).

144. VA. CONST. OF 1776, para. 29, *reprinted in* 7 STATE CONSTITUTIONS, *supra* note 129, at 3812, 3816.

145. S.C. CONST. OF 1778, art. XI, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3248, 3250 (emphasis added). See also S.C. CONST. OF 1776, art. XXX, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3241, 3247 (granting executive authority “limited and restrained as aforesaid”).

requiring the exercise of executive authority to accord with the state constitution, laws, or both. In short, nothing in the state constitutions indicates that American constitutionmakers sought to vest executive officials with broad powers that were not otherwise specified.<sup>146</sup>

This pattern — strong legislatures and limited and defined executive powers — extended to foreign affairs. Contrary to popular perception,<sup>147</sup> the first state constitutions necessarily addressed external powers, in part because they were drafted amidst the uncertainties of war and in part because the national government lacked an operative written framework until the Articles of Confederation were ratified in 1781.<sup>148</sup> Accordingly, all fifteen of the constitutions under consideration addressed the militia,<sup>149</sup> and ten specified additional

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146. In contrast to his article written with Professor Ramsey, Professor Prakash's subsequent study on executive power does examine the early state constitutions in some detail and comes to conclusions similar to our own concerning the dominance of the legislatures. As he puts it:

[M]ost states adopted constitutions that, although they paid lip service to the separation adage, nonetheless made their executive powers appendages of the legislature. With notable exceptions, executives were appointed by the legislature, faced term limits, could not appoint executive officers, and lacked the veto authority. To top it off, the few constitutional powers they did enjoy were often subject to legislative alteration.

Prakash, *supra* note 26, at 756-57. Professor Prakash goes on to argue, however, that the weak executives that characterized the state constitutions became a sort of anti-template that ignored the wisdom of Montesquieu, wisdom that was rediscovered by the time of the Federal Convention. *See id.* at 768-79. As noted above, *see supra* note 27, we do not necessarily disagree with Professor Prakash that the term "executive power" might have been understood by the Founders to refer generically to the authority to implement the laws. We disagree with Professor Prakash's suggestion, however, of a settled and specific understanding of executive power, and we particularly disagree with the claim by Professors Prakash and Ramsey that such a settled and specific understanding extended to foreign affairs.

147. *See, e.g.,* Prakash & Ramsey, *supra* note 14, at 278-79 n.209 ("For the most part, state constitutions said little specific about foreign affairs.").

148. *See* RICHARD B. MORRIS, *THE FORGING OF THE UNION, 1781-1789*, at 80-91 (1987).

149. *See* DEL. CONST. OF 1776, art. 7, *reprinted in* 1 STATE CONSTITUTIONS, *supra* note 129, at 562, 563; GA. CONST. OF 1777, art. XXXIII, *reprinted in* 2 STATE CONSTITUTIONS, *supra* note 129, at 777, 782; MD. CONST. OF 1776, art. XXXIII, *reprinted in* 3 STATE CONSTITUTIONS, *supra* note 129, at 1686, 1696; MASS. CONST. OF 1780, pt. II, ch. II, § I, art. VIII, *reprinted in* 3 STATE CONSTITUTIONS, *supra* note 129, at 1888, 1901; N.H. CONST. OF 1784, pt. 2, *reprinted in* 4 STATE CONSTITUTIONS, *supra* note 129, at 2453, 2463-64; N.H. CONST. OF 1776, *reprinted in* 4 STATE CONSTITUTIONS, *supra* note 129, at 2451, 2453; N.J. CONST. OF 1776, art. VIII, *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 129, at 2594, 2596; N.Y. CONST. OF 1777, art. XVIII, *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 129, at 2623, 2632-33; N.C. CONST. OF 1776, art. XVIII, *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 129, at 2787, 2791; PA. CONST. OF 1776, § 20, *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 129, at 3081, 3088-89; S.C. CONST. OF 1778, art. XXXIII, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3248, 3255; S.C. CONST. OF 1776, art. XXVI, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3241, 3247; VT. CONST. OF 1786, ch. 2, art. XI, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3749, 3756; VT. CONST. OF 1777, ch. 2, art. XVIII, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3737, 3745; VA. CONST. OF 1776, para. 33, *reprinted in* 7 STATE CONSTITUTIONS, *supra* note 129, at 3812, 3817.

powers concerning external relations such as the power to lay embargoes.<sup>150</sup> To the extent that the executives were granted foreign affairs powers, those powers were often shared with the advisory council or the legislature. Both the 1776 and 1778 South Carolina constitutions, for example, prohibited the governor from commencing war, concluding peace, or entering into treaties without the consent of the legislature.<sup>151</sup> Furthermore, although the state constitutions typically made the executive the commander in chief of the state's armed forces, a number of the constitutions required approval of the executive council, or even the legislature, to exercise the commander-in-chief power, even to the point of restricting the governor's ability to assume command in person.<sup>152</sup> In addition, the states typically either made the appointment of military officers subject to legislative approval, or mandated that the legislature alone make military appointments, or otherwise placed appointment outside the governor's control, as in election of officers by militia companies themselves.<sup>153</sup>

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150. See DEL. CONST. OF 1776, art. 9, *reprinted in* 1 STATE CONSTITUTIONS, *supra* note 129, at 562, 564; MD. CONST. OF 1776, art. XXXIII, *reprinted in* 3 STATE CONSTITUTIONS, *supra* note 129, at 1686, 1696; MASS. CONST. OF 1780, pt. II, ch. II, § I, art. X, *reprinted in* 3 STATE CONSTITUTIONS, *supra* note 129, at 1888, 1902; N.H. CONST. OF 1784, pt. 2, *reprinted in* 4 STATE CONSTITUTIONS, *supra* note 129, at 2453, 2463-64; N.C. CONST. OF 1776, art. XIX, *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 129, at 2787, 2791; PA. CONST. OF 1776, § 20, *reprinted in* 5 STATE CONSTITUTIONS, 3081, 3088-89; S.C. CONST. OF 1778, arts. XXXIII, XXXV, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3248, 3255; S.C. CONST. OF 1776, art. XXVI, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3241, 3247; VT. CONST. OF 1786, ch. 2, art. XI, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3749, 3756; VT. CONST. OF 1777, ch. 2, art. XVIII, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3737, 3745.

151. See S.C. CONST. OF 1778, art. XXXIII, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3248, 3255; S.C. CONST. OF 1776, art. XXVI, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3241, 3247.

152. See DEL. CONST. OF 1776, art. 9, *reprinted in* 1 STATE CONSTITUTIONS, *supra* note 129, at 562, 563; MD. CONST. OF 1776, art. XXXIII, *reprinted in* 3 STATE CONSTITUTIONS, *supra* note 129, at 1686, 1696; MASS. CONST. OF 1780, pt. II, ch. II, § I, art. VIII, *reprinted in* 3 STATE CONSTITUTIONS, *supra* note 129, at 1888, 1901; PA. CONST. OF 1776, § 20, *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 121, at 3081, 3088-89; S.C. CONST. OF 1776, art. XXVI, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3241, 3247; VT. CONST. OF 1786, ch. 2, art. XI, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3749, 3756; VT. CONST. OF 1777, ch. 2, art. XVIII, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 129, at 3737, 3745. Although the North Carolina and Virginia constitutions did not expressly subject aspects of the commander-in-chief power to the consent of the legislature or council, the North Carolina constitution provided that the governor could "embody," or call up, the militia only during the recess of the legislature, see N.C. CONST. OF 1776, art. XVIII, *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 129, at 2787, 2791, while the Virginia constitution stated that the governor would have the power to direct the militia "according to the laws of the country," VA. CONST. OF 1776, para. 34, *reprinted in* 7 STATE CONSTITUTIONS, *supra* note 129, at 3812, 3817.

153. Five state constitutions expressly lodged the appointment of either high-ranking or all military officers in the legislature. See DEL. CONST. OF 1776, art. 16, *reprinted in* 1 STATE CONSTITUTIONS, *supra* note 129, at 562, 565; MASS. CONST. OF 1780, pt. II, ch. II, art. X, *reprinted in* 3 STATE CONSTITUTIONS, *supra* note 129, at 1888, 1902; N.H. CONST. OF 1776

Significantly, these examples of ongoing supervision of the executive appeared in later constitutions that were adopted during the 1780s. Not long after independence, leading observers came to conclude that the nation's first experiments in framing government were flawed. Rethinking separation of powers would prove to be a prominent feature of constitutional reform. Fundamental among the insights that experience under the state constitutions suggested was the sobering possibility that the people could tyrannize themselves. Where classical theory indicated that republican government typically descended into anarchy, in effect too much liberty, state laws infringing rights of property, contract, and trial by jury appeared to demonstrate that concentrating power in the legislatures had instead resulted in the oxymoron that John Adams famously dubbed "democratic despotism."<sup>154</sup> Madison also referred to this phenomenon during the debates in the Federal Convention, when he noted that, "Experience has proved a tendency in our governments to throw all power into the Legislative vortex. The Executives of the States are in

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*reprinted in 4 STATE CONSTITUTIONS, supra note 129, at 2451, 2453; N.J. CONST. OF 1776, reprinted in 5 STATE CONSTITUTIONS, supra note 129, at 2594, 2596; N.C. CONST. OF 1776, art. XIV, reprinted in 5 STATE CONSTITUTIONS, supra note 129, at 2787, 2791. In addition, both South Carolina constitutions, as well as the Virginia constitution, while initially vesting military appointments elsewhere, indicated that the legislature could alter the procedures regarding the military and presumably accord the appointment power to itself. See S.C. CONST. OF 1778, art. XXXII, reprinted in 6 STATE CONSTITUTIONS, supra note 129, at 3248, 3255; S.C. CONST. OF 1776, art. XXV, reprinted in 6 STATE CONSTITUTIONS, supra note 129, at 3241, 3247; VA. CONST. OF 1776, paras. 33-34, reprinted in 7 STATE CONSTITUTIONS, supra note 129, at 3812, 3817. Seven constitutions placed the authority to appoint either all or high-ranking military officers in the governor, subject to the approval of the executive council. See MD. CONST. OF 1776, art. XLVII, reprinted in 3 STATE CONSTITUTIONS, supra note 129, at 1686, 1699; N.H. CONST. OF 1784, pt. II, reprinted in 4 STATE CONSTITUTIONS, supra note 129, at 2453, 2464-65; PA. CONST. OF 1776, § 20, reprinted in 5 STATE CONSTITUTIONS, supra note 129, at 3081, 3087; S.C. CONST. OF 1778, art. XXXIII, reprinted in 6 STATE CONSTITUTIONS, supra note 129, at 3248, 3255; S.C. CONST. OF 1776, art. XXV, reprinted in 6 STATE CONSTITUTIONS, supra note 129, at 3241, 3247; VT. CONST. OF 1786, ch. II, art. XI, reprinted in 6 STATE CONSTITUTIONS, supra note 129, at 3749, 3756; VT. CONST. OF 1777, ch. II, art. XVIII, reprinted in 6 STATE CONSTITUTIONS, supra note 129, at 3737, 3745. Four constitutions specified that the appointment of inferior officers would rest with their individual companies. See MASS. CONST. OF 1780, pt. II, ch. II, art. X, reprinted in 3 STATE CONSTITUTIONS, supra note 129, at 1888, 1902; N.H. CONST. OF 1784, pt. II, reprinted in 4 STATE CONSTITUTIONS, supra note 129, at 2453, 2464-65; N.H. CONST. OF 1776, reprinted in 4 STATE CONSTITUTIONS, supra note 129, at 2451, 2453; N.J. CONST. OF 1776, art. X, reprinted in 5 STATE CONSTITUTIONS, supra note 129, at 2594, 2596. The New York constitution vested appointments generally in the governor and a council constituted for that purpose. See N.Y. CONST. OF 1777, art. XXIII, reprinted in 5 STATE CONSTITUTIONS, supra note 129, at 2623, 2633. The Georgia constitution provided that the governor, with the advice of the council, would fill all intermediate appointments until the next general election, at least implying that the ultimate authority to determine appointment procedures rested with the legislature. See GA. CONST. OF 1777, art. XXI, reprinted in 2 STATE CONSTITUTIONS, supra note 129, at 777, 781. No state constitution expressly vested the appointment of military officers in the governor alone.*

154. See WOOD, *supra* note 68, at 404.

general little more than Cyphers; the legislatures omnipotent.”<sup>155</sup> This discovery that the people could tyrannize themselves, and the ensuing return to the constitutional drawing board, remain perhaps the central episodes in the narrative that constitutional historians have reconstructed over the past several generations.<sup>156</sup>

In response to these perceived abuses by the legislatures, some states moved to make the executive more independent of the legislature. The 1780 Massachusetts Constitution, for example, made the governor subject to popular election and gave him, along with an advice council, powers of appointment and a veto power over legislation subject to an override by two-thirds of each house of the legislature.<sup>157</sup> His specific, substantive powers, however, were still limited and defined. For example, the Massachusetts Constitution goes into great detail about what exactly the governor’s commander-in-chief power entails, stating, for example, that the governor would have the power “to take and surprise, by all ways and means whatsoever, all and every such person or persons, with their ships, arms, ammunition, and other goods, as shall, in a hostile manner, invade, or attempt the invading, conquering, or annoying this commonwealth.”<sup>158</sup> It also states that the governor’s specifically enumerated commander-in-chief powers had to be “exercised agreeably to the rules and regulations of the constitution, and the laws of the land, and not otherwise.”<sup>159</sup> So, even here, the legislature was given significant, and ultimately controlling, authority. The Massachusetts Constitution also gave the legislature power to make significant appointments, including appointment of various military officials.<sup>160</sup>

In sum, the state constitutions reflected a sharp break from the royal prerogative model of executive power, even with respect to foreign affairs. As the Critical Period progressed, some states moved to enhance the independence and authority of the executive branch,

155. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 35.

156. See EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 237-62 (1988); McDONALD, *supra* note 121, at 143-83; WOOD, *supra* note 68, at 391-467; Rakove, *supra* note 65, at 35-56.

157. See MASS. CONST. OF 1780, pt. II, ch. II, § I, arts. II-III, *reprinted in* 3 STATE CONSTITUTIONS, *supra* note 129, at 1888, 1900 (making governor subject to popular election); *id.* at pt. II, ch. I, § I, art. II, *reprinted in* 3 STATE CONSTITUTIONS, *supra* note 129, at 1888, 1893 (giving governor veto power); *id.* at pt. II, ch. II, § I, arts. IX-X, *reprinted in* 3 STATE CONSTITUTIONS, *supra* note 129, at 1888, 1902 (giving governor appointment power).

158. See *id.* at pt. II, ch. II, § I, art. VII, *reprinted in* 3 STATE CONSTITUTIONS, *supra* note 129, at 1888, 1901.

159. *Id.*

160. See *id.* at pt. II, ch. II, § I, art. X, *reprinted in* 3 STATE CONSTITUTIONS, *supra* note 129, at 1888, 1902; *id.* at pt. II, ch. II, § IV, art. I, *reprinted in* 3 STATE CONSTITUTIONS, *supra* note 129, at 1888, 1905.



but they did so in order to provide a check on the legislature, not because of some essentialist conception of executive power. Moreover, the actual allocation of executive power remained specific and functional rather than categorical and essentialist.

### C. *Lessons from the Continental Congress*

The experience at the national level during this period further contradicts the story of continuity posited by executive power essentialists. The Continental Congress, made up of delegates from the colonies, first met in September 1774 to discuss and seek redress of American grievances against the British. Fighting subsequently broke out between American and British forces at Lexington and Concord in April 1775, and a second Continental Congress met the next month. At that point, Congress began to manage American foreign affairs, including, most notably, the conduct of the revolutionary war.<sup>161</sup>

For its first seven years, Congress operated without a ratified constitutive document. To justify the separation of the thirteen states from England, Congress did of course issue the Declaration of Independence. The Declaration observed that, with their separation, the states had “full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and do all other Acts and Things which Independent States may of right do.”<sup>162</sup> The Declaration did not tie these foreign relations powers to any particular governmental structure, and it certainly did not suggest that these powers inherently had to be exercised by an executive branch. Nor, as explained above, did the state constitutions being developed at this point reflect an understanding that foreign affairs powers had to be assigned to the executive.

Congress agreed on the Articles of Confederation and Perpetual Union in 1777, but the Articles did not take effect until 1781, after they had been ratified by all the states. There is nothing in Congress’s experience, either before or after the adoption of the Articles, that suggests an understanding that foreign affairs powers had to be vested in an executive branch. As an initial matter, it is worth noting the obvious: the national government did not have an executive branch prior to the Constitution, and thus exercised its foreign affairs powers through Congress. Furthermore, under the Articles, the exercise of

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161. See generally EDMUND CODY BURNETT, *THE CONTINENTAL CONGRESS* (1941); JERRILYN GREENE MARSTON, *KING AND CONGRESS: THE TRANSFER OF POLITICAL LEGITIMACY, 1774-1776*, at 206-23 (1987); PETER S. ONUF, *THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES, 1775-1787* (1983); JENNINGS B. SANDERS, *EVOLUTION OF EXECUTIVE DEPARTMENTS OF THE CONTINENTAL CONGRESS, 1774-1789*, at 38-49 (1935).

162. The Declaration of Independence (U.S. 1776), reprinted in 1 *THE PAPERS OF THOMAS JEFFERSON* 429, 432 (Julian P. Boyd ed., 1950).

many important foreign affairs powers, including going to war, entering into treaties, and appointing military commanders, required the concurrence of at least nine of the thirteen states, and the appointment of state representatives in Congress was determined by the state legislatures.<sup>163</sup> Furthermore, during this period, a number of states engaged in their own foreign affairs activities, frequently through their legislatures.<sup>164</sup> These facts, by themselves, would seem to substantially undermine the claim that foreign affairs powers were viewed as inherently associated with an executive.

The Continental Congress did handle many foreign affairs issues through committees, and subsequently through departments. For example, in November 1775, Congress established a Committee of Correspondence to communicate with and seek support from sympathizers in Europe. This committee was eventually succeeded by a more general Committee for Foreign Affairs. These committees, however, reported back to the full Congress and were subject to Congress's direction and control.<sup>165</sup> In the early 1780s, Congress moved to establish departments, including a Department of Foreign Affairs, that would be headed by a single secretary. The heads of these departments, however, were appointed by and controlled by Congress. As John Jay noted when he was Secretary for Foreign Affairs, "I am to be governed by the Instructions, and it is my Duty faithfully to execute the Orders of Congress."<sup>166</sup> Moreover, the duties of the Secretary for Foreign Affairs were largely ministerial, and "all matters of great importance were referred to Congress."<sup>167</sup> Furthermore, the justifications Congress gave for creating the foreign affairs department were purely functional rather than essentialist. In particular, a congressional committee determined that "a fixed and permanent Office for the department of foreign affairs ought forthwith to be established as a remedy against the fluctuation, the delay and

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163. See ARTICLES OF CONFEDERATION OF 1781, art. V, para. 1; *id.* at art. IX, para. 6.

164. See, e.g., NEVINS, *supra* note 128, at 658-60; Claude H. Van Tyne, *Sovereignty in the American Revolution: An Historical Study*, 12 AM. HIST. REV. 529 (1907). We take no position here on whether the national government's foreign relations powers were originally derived from the states, a matter of significant historical debate. See GREENE, *supra* note 121, at 178-80 (discussing this debate).

165. See, e.g., SANDERS, *supra* note 161, at 40-41, 45-46.

166. Letter from John Jay to the President of Congress (Aug. 3, 1786), in 3 THE EMERGING NATION: A DOCUMENTARY HISTORY OF THE FOREIGN RELATIONS OF THE UNITED STATES UNDER THE ARTICLES OF CONFEDERATION, 1780-1789, at 247, 255 (Mary A. Giunta et al. eds., 1996).

167. SANDERS, *supra* note 161, at 114; see also 1 BRADFORD PERKINS, THE CAMBRIDGE HISTORY OF AMERICAN FOREIGN RELATIONS: THE CREATION OF A REPUBLICAN EMPIRE, 1776-1865, at 55 (1993) (noting that Congress kept the Department "on a very short leash"); ELMER PLISCHKE, U.S. DEPARTMENT OF STATE 11 (1999) (explaining that the Secretary for Foreign Affairs was "regarded as little more than a congressional clerk").

indecision to which the present mode of managing our foreign affairs must be exposed.”<sup>168</sup> There is no hint of executive power essentialism in this reasoning.

The list of powers in the Articles of Confederation is also revealing. Like the later Constitution, the Articles assigned specific foreign affairs powers to the national government, and expressly prohibited the states from engaging in specified foreign affairs activities. Thus, for example, the national government was assigned the powers of “determining on peace and war,” sending and receiving ambassadors, and entering into treaties.<sup>169</sup> The states were, correspondingly, prohibited from entering into treaties, sending and receiving ambassadors, and engaging in war, unless they obtained Congress’s consent.<sup>170</sup> The Articles never used the word “executive” to refer to foreign affairs powers, and they certainly did not use that word as a shorthand for an unspecified package of foreign affairs powers. Instead, they listed and defined the foreign affairs powers of the Continental Congress with great specificity. Prakash and Ramsey seek to explain away this feature of the Articles by suggesting that “the drafters of the Articles did not employ the most economical phrasing.”<sup>171</sup> The phrasing of the Articles, however, is perfectly economical with respect to the assignment of foreign affairs powers, once one rejects the Vesting Clause Thesis. Furthermore, it is important to note that essentially all of the foreign affairs powers referred to in the Articles are also referred to in the Constitution.<sup>172</sup> That the Constitution specifically carries forward the foreign affairs powers listed in the Articles of Confederation (and, in fact, adds to them), further undercuts the assertion that the Founders would have perceived some undefined package of foreign affairs powers that had to be encompassed by the Article II Vesting Clause.<sup>173</sup> In fact, James

168. Congressional Committee Report and Resolution (Jan. 10, 1781), in 1 *THE EMERGING NATION*, *supra* note 166, at 139, 140.

169. ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 1.

170. *Id.* at art. VI.

171. Prakash & Ramsey, *supra* note 14, at 275 n.191.

172. Unlike the Articles of Confederation, however, the Constitution does not specifically refer to a power of “determining on peace.” The lack of such a specific reference became an issue in the Neutrality Controversy of 1793, discussed below in Part IV.E.

173. Prakash and Ramsey could be read to suggest that the Continental Congress was granted unspecified executive powers by virtue of Article IX, paragraph 5, of the Articles of Confederation, which provided that Congress would have the power to “appoint such other committees and civil officers as may be necessary for managing the general affairs of the united states under their direction.” See Prakash & Ramsey, *supra* note 14, at 275 & n.191. This appointment power, however, did not by its terms suggest any additional substantive powers, and we know of no support during the Critical Period for construing it as granting such powers. Furthermore, the Articles of Confederation specifically reserved to the states “every Power, Jurisdiction, and right, which is not by this confederation expressly delegated to the United States,” thereby making clear that the Articles were not delegating unspecified

Madison made clear in the *Federalist Papers* that, other than adding the commerce power, the Constitution “does not enlarge” the foreign affairs powers listed in the Articles of Confederation, but rather simply “substitutes a more effectual mode of administering them.”<sup>174</sup>

Prakash and Ramsey note correctly, although vaguely, that the national government had difficulty managing foreign affairs under the Articles.<sup>175</sup> The *Federalist Papers* begin, in fact, by noting the “inefficacy of the subsisting federal government,”<sup>176</sup> and it is clear from subsequent essays that Publius had foreign affairs concerns prominently in mind. Similarly, early in the Federal Convention, Edmund Randolph began by listing the defects of the Confederation, many of which concerned the conduct of foreign affairs.<sup>177</sup> These defects, suggest Prakash and Ramsey, persuaded the Founders to incorporate the purported Locke/Blackstone/Montesquieu conception of executive power essentialism into the Constitution, through the Article II Vesting Clause.

The difficulties under the Articles, however, and the efforts by the constitutional Founders to respond to them, are at best unconnected to the Vesting Clause Thesis, and at worst substantially in tension with it. By the time of the Federal Convention, it was perceived that the Articles were deficient in at least three respects concerning the management of foreign affairs.<sup>178</sup> First, there was no clear indication in the Articles that treaties operated as supreme law of the land. This omission, combined with the lack of a national court system, meant that the national government had difficulty preventing states from violating treaty provisions, especially the peace treaty with Great

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powers. ARTICLES OF CONFEDERATION OF 1781, art. II (emphasis added); see also MERRILL JENSEN, THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, 1774-1781, at 130 (1940) (“[T]he final draft of the Articles of Confederation was a pact between thirteen sovereign states which agreed to delegate certain powers for specific purposes, while they retained all powers not expressly delegated by them to the central government.”).

174. THE FEDERALIST, *supra* note 2, NO. 45 (James Madison), at 293.

175. See Prakash & Ramsey, *supra* note 14, at 278.

176. THE FEDERALIST, *supra* note 2, NO. 1 (Alexander Hamilton), at 33.

177. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 19.

178. See Jack N. Rakove, *Making Foreign Policy — The View from 1787*, in FOREIGN POLICY AND THE CONSTITUTION 1, 2-4 (Robert A. Goldwin & Robert A. Licht eds., 1990); see also FREDERICK W. MARKS III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION (1973) (discussing inadequacies in the Articles of Confederation); PERKINS, *supra* note 167, at 17-53 (same); JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 342-52 (1979) (same). There were other deficiencies in the Articles that did not directly concern foreign affairs but that nevertheless implicated foreign affairs, such as the lack of a power to regulate directly on the people, see THE FEDERALIST, *supra* note 2, NO. 15 (Alexander Hamilton), at 108, and the lack of a taxing power, see *id.* NO. 30 (Alexander Hamilton), at 188-91.

Britain. In turn, Great Britain used the state violations as an excuse for continuing to occupy its northwestern forts in the United States. It was in this context that John Jay expressed the view that the states had, “*by express delegation of Power, formed and vested in Congress a perfect though limited Sovereignty for the general and National purposes specified in the [Articles of] Confederation.*”<sup>179</sup> This experience of state violation of treaty commitments obviously was on the minds of the constitutional Founders, and they addressed it directly by including a Supremacy Clause in the Constitution that refers to treaties, and also by providing for the creation of a national court system.<sup>180</sup> This federalism problem, however, has nothing to do with the Vesting Clause Thesis.

A second foreign affairs problem under the Articles was that the Continental Congress had not been given the power to regulate commerce, including foreign commerce. As a result, it lacked leverage in negotiating trade concessions from other countries, especially from Britain and France. Threats by the Continental Congress to restrict access to U.S. markets were ineffectual, since each state could set its own foreign trade policy, and at least some states would tend to deviate from the purported national policy. The constitutional Founders addressed this problem as well in the Constitution, by assigning to Congress the power to regulate commerce.<sup>181</sup> This experience — which showed the need to increase *Congress’s* foreign affairs powers — hardly shows that foreign affairs authority inherently was associated with an executive branch.

The third foreign affairs problem has at least some connection to the U.S. presidency, but it too is unsupportive of the Vesting Clause Thesis. The problem was that the United States had trouble negotiating with foreign nations through a legislative body rather than through an independent executive branch. John Jay’s efforts to negotiate with Spain over navigation rights on the lower Mississippi were the most prominent example of this problem. Jay’s efforts were repeatedly hampered by the fact that Congress, as a plural body representing different regional interests, had difficulty agreeing on the U.S. negotiating position, and by the fact that, when it could agree, it often micromanaged Jay’s efforts.<sup>182</sup> Thus, for example, Jay

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179. John Jay’s Report on State Laws Contrary to the Treaty of Peace (Oct. 13, 1786), in 3 THE EMERGING NATION, *supra* note 166, at 334 (emphasis added). Echoing Jay’s views, the President of Congress subsequently sent a letter to the state governors stating that “the Thirteen Independent Sovereign States have by express delegation of power formed and Vested in us a general, though limited Sovereignty, for the general and National purposes specified in the Confederation.” Letter from the President of Congress to the State Governors (April 13, 1787), in 3 THE EMERGING NATION, *supra* note 166, at 472, 473.

180. See THE FEDERALIST, *supra* note 2, NO. 3 (John Jay), at 43-45.

181. See *id.* NO. 11 (Alexander Hamilton); *id.* NO. 22 (Alexander Hamilton).

182. See SANDERS, *supra* note 161, at 124.

complained to Congress that he found “exceedingly embarrassing” its directive that, in negotiating with Spain, he was required to communicate in advance to Congress every proposition he would make to the Spanish representative, and also to report back to Congress on every proposition that the representative made to him during the negotiations.<sup>183</sup> Jay also wrote to Jefferson, complaining that he would “often experience unreasonable Delays and successive Obstacles in obtaining the Decision and Sentiments of Congress, even on points which require Dispatch.”<sup>184</sup> The situation was so problematic that Jay eventually suggested that Congress consider appointing a committee “with power to instruct and direct me on every point and Subject relative to the proposed treaty with Spain.”<sup>185</sup>

Once again, the constitutional Founders addressed this problem with specific text: they assigned the treaty power to an independent President who could negotiate more effectively than a legislative body. It was through such specific assignments of power, and through the structure of the presidency, that the Founders sought to achieve what Hamilton referred to in the *Federalist Papers* as “energy in the

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183. Letter from John Jay to the President of Congress (August 15, 1785), in 1 THE EMERGING NATION, *supra* note 166, at 744; *see also* Letter from John Jay to the President of Congress (Aug. 10, 1785), in 3 THE EMERGING NATION, *supra* note 166, at 257, 257-58 (stating that it was impossible for him instantly to execute Congress’s order that he convey to Congress “without Delay” any information he received concerning France’s views of U.S. rights of navigation on the Mississippi and Spain’s territorial claims on the east side of the Mississippi). In response to Jay’s complaint about having to report back to Congress on every proposition made or received during the negotiations, Congress changed his instructions to eliminate that requirement. *See* Congressional Resolution Changing John Jay’s Instructions for Negotiating a Treaty with Spain (Aug. 25, 1785), in 2 THE EMERGING NATION, *supra* note 166, at 768-69.

184. Letter from John Jay to Thomas Jefferson (Aug. 18, 1786), in 3 THE EMERGING NATION, *supra* note 166, at 266, 266-67; *see also* Letter from John Jay to Thomas Jefferson (Jan. 19, 1786), in 3 THE EMERGING NATION, *supra* note 166, at 69, 69-70 (complaining about Congress’s failure to pay sufficient attention to foreign affairs). Jay also noted in some of his correspondence that, in order for the government to operate effectively, the legislative, executive, and judicial functions of the government should be separated, albeit with checks on each other. As he explained in a letter to Washington, “Let Congress legislate — let others execute — let others judge.” Letter from John Jay to George Washington (Jan. 7, 1787), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 226, 227 (Henry P. Johnston ed., New York, Putnam 1891); *see also* Letter from John Jay to Thomas Jefferson (Aug. 18, 1786), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, *supra*, at 210, 210 (stating that the “three great departments of sovereignty should be forever separated, and so distributed as to serve as checks on each other”); Letter from John Jay to Thomas Jefferson (Dec. 14, 1786), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, *supra*, at 222, 223 (stating that “government should be divided into executive, legislative, and judicial departments”). This separation, Jay further explained, would not itself answer the question of which powers should be assigned to the government, “a question which deserves much thought.” 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, *supra*, at 227-28. Jay thus appeared to conceive of “executive power” as the power to execute the laws.

185. Letter from John Jay to the President of Congress (May 29, 1786), in 3 THE EMERGING NATION, *supra* note 166, at 190, 190.

executive.”<sup>186</sup> Even on the treaty-power issue, however, the Founders limited executive power by requiring the President to obtain the advice and consent of the Senate, the smaller of the two houses of the new national legislature.<sup>187</sup> The Founders’ decision that, for functional reasons, it would be better to have an independent executive rather than the legislature negotiate U.S. treaties hardly shows that they intended to delegate to the President a package of unspecified additional powers out of some notion of executive power essentialism.

There are statements during this period, as Prakash and Ramsey emphasize, referring to the foreign affairs department and other congressional departments as “executive.”<sup>188</sup> This label, however, appears to have been used simply to refer to the role of the departments in executing congressional policy. Robert Morris had complained, for example, that so long as Congress attempted “to execute as well as deliberate on their business it never will be done as it ought.”<sup>189</sup> And the Continental Congress made clear its intention that when it referred a matter to a department, the matter would be “carried into execution.”<sup>190</sup> There is no evidence that the label “executive” referred to an understood bundle of foreign affairs or other substantive powers. Indeed, as noted above, the key foreign relations powers granted by the Articles of Confederation were retained and exercised by Congress as a whole even after the establishment of the “executive” departments.<sup>191</sup>

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186. See THE FEDERALIST, *supra* note 2, NO. 70 (Alexander Hamilton), at 423.

187. As discussed below, the delegates at the Federal Convention initially contemplated that the Senate alone would have the treaty power, and only late in the Convention decided to divide the treaty power between the Senate and President. See *infra* Parts III.A., IV.A.

188. See Prakash & Ramsey, *supra* note 14, at 274-76; see also, e.g., Letter from Robert R. Livingston to Benjamin Franklin (Oct. 20, 1781), in 1 THE EMERGING NATION, *supra* note 166, at 257, 257 (referring to the “great Executive Departments”).

189. MARSTON, *supra* note 161, at 307.

190. 23 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 722 (Gaillard Hunt ed., 1914).

191. Prakash and Ramsey also rely on the 1778 pamphlet, *Essex Result*. Apparently written by Theophilus Parsons (a leading Massachusetts lawyer and subsequently chief justice of the Massachusetts Supreme Court), this pamphlet called for rejection of a draft Massachusetts constitution because, among other things, the executive was given insufficient power. See ESSEX RESULT (1778), reprinted in THEOPHILUS PARSONS, MEMOIR OF THEOPHILUS PARSONS 359 (1859); see also THACH, *supra* note 122, at 44-49 (discussing this pamphlet). The pamphlet thus proposed, for example, that the executive be given a veto power over legislation and full command over the state’s military forces, proposals that were subsequently included in the constitution adopted by Massachusetts in 1780. As discussed above, however, the 1780 constitution also defined the governor’s commander-in-chief powers in great detail, and stated that these powers had to be “exercised agreeably to the rules and regulations of the constitution, and the laws of the land, and not otherwise.” See *supra* text accompanying notes 157-160. In discussing executive power, *Essex Result* noted that this power “is sometimes divided into the external executive, and internal executive,” and that “[t]he former comprehends war, peace, the sending and receiving ambassadors, and whatever concerns the transactions of the state with any other independent state.” ESSEX

### III. THE CONSTITUTIONAL FOUNDING

#### A. *The Federal Convention*

Far from supporting the Vesting Clause Thesis, the records of the Federal Convention all but devastate it. The records show that as the delegates drafted and negotiated the constitutional text, they attempted to specify the powers being granted to the executive branch. Although there were occasional references to the concept of executive power in the abstract, the records make clear that there was no consensus on what was encompassed by that concept, with delegates disagreeing, for example, over whether powers relating to war, peace, and treaty-making were executive in nature. Furthermore, although one should always be cautious about making inferences from silence, it is telling that there is not a single reference to the Vesting Clause Thesis in all of the records of the Federal Convention. The oft-expressed opposition of many delegates to creating an executive that resembled the British monarch further weighs against the Thesis.

The story begins on May 29, 1787. On that date, Edmund Randolph presented the Virginia Plan, which consisted of fifteen resolutions. The seventh resolution called for the establishment of a national executive, to be chosen by the national legislature.<sup>192</sup> The resolution also stated that “besides a general authority to execute the National laws, [the national executive] ought to enjoy the Executive rights vested in Congress by the Confederation.”<sup>193</sup> If this resolution had been adopted by the Convention, it might support the Vesting Clause Thesis, because it suggests a conception of “executive power” as a defined category that can be distinguished from legislative powers, albeit one limited by reference to the Articles of Confederation. Even this is not entirely clear, though, since the Virginia Plan was proposing general ideas, not constitutional language. As a result, it would have been consistent with this plan to specify the foreign affairs powers of the Executive, just as the Articles of Confederation had specified the foreign affairs powers of the Continental Congress. In any event, this resolution was not adopted

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RESULT, *supra*, at 373. The U.S. confederation, explained the pamphlet, had “lopped off this branch of the executive, and placed it in Congress.” *Id.* Although these statements do appear to borrow from the taxonomy developed by some of the European theorists, it is notable that the pamphlet also recognizes that the “external executive power” can be divided from the “internal executive power” and can be exercised by a legislature, such as the Continental Congress. In this way the *Essex Result* echoes Locke properly understood, insofar as Locke distinguished between domestic executive power and foreign federative power, and acknowledged that these powers do not necessarily have to be vested in the same hands. See *supra* Part II.A.

192. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 21.

193. 1 *id.*



by the Convention. In fact, the conception of executive power reflected in this resolution was quickly rejected by the delegates, and all subsequent discussions of executive power by the delegates were in terms of specific grants of executive power rather than in terms of a collection of powers.

On June 1, the delegates began considering Randolph's seventh resolution. There was general agreement with the idea of establishing a national executive. There was significant concern, however, about vesting too much power in the executive, and about using the British model as a benchmark for executive power. Charles Pinckney stated that he "was for a vigorous Executive but was afraid the Executive powers of (the existing) Congress might extend to peace & war & which would render the Executive a Monarchy, of the worst kind, towit an elective one."<sup>194</sup> John Rutledge similarly stated that "he was for vesting the Executive power in a single person, tho' he was not for giving him the power of war and peace."<sup>195</sup> Roger Sherman stated even more strongly that "he considered the Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect."<sup>196</sup> And James Wilson emphasized the impropriety of using the British monarchy as a model for executive power:

He did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c. The only powers he conceived strictly Executive were those of executing the laws, and appointing officers, not (appertaining to and) appointed by the Legislature.<sup>197</sup>

Among other things, it is clear from these statements that the speakers did not equate the concept of executive power with an accepted bundle of foreign relations powers.

This concern about creating an executive that resembled the British monarch was part of the reason for some delegates' opposition to a singular, as opposed to a plural, executive. Randolph, for example, expressed the view that a singular executive would be the "fetus of Monarchy."<sup>198</sup> Supporters of a singular executive denied that it would be similar to the British monarchy. Thus, Wilson "repeated that he was not governed by the British Model which was inapplicable to the situation of this Country."<sup>199</sup>

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194. 1 *id.* at 64-65.

195. 1 *id.*

196. 1 *id.*

197. 1 *id.* at 65-66.

198. 1 *id.* at 66; *see also* 1 *id.* at 88 (statement by Randolph on June 2 that "the permanent temper of the people was adverse to the very semblance of Monarchy").

199. 1 *id.* at 66.

At this point in the debate, Madison suggested that the delegates “fix the extent of the Executive authority” because “as certain powers were in their nature Executive, . . . a definition of their extent would assist the judgment in determining how far they might be safely entrusted to a single officer.”<sup>200</sup> Madison agreed with Wilson that executive powers “do not include the Rights of war & peace &c.” and that “the powers should be *confined and defined*” because “if large we shall have the Evils of elective Monarchies.”<sup>201</sup> He therefore moved that the national executive be vested with *three powers* — “to carry into execution the national laws,” “to appoint to offices in cases not otherwise provided for,” and “to execute such powers, not legislative or judiciary in their nature, as may from time to time be delegated by the national legislature.”<sup>202</sup> The Committee of the Whole agreed to the motion but deleted the third listed power as “unnecessary, the object of them being included in the ‘power to carry into effect the national laws.’ ”<sup>203</sup>

Thus, in their first consideration of the issue, the delegates sharply rejected the purported Locke/Montesquieu/Blackstone assignment of powers. They disagreed, for example, that the powers over war and peace should be vested with the executive. As Professor Rakove has noted, “the remarks of June 1 demonstrate that the framers believed that questions of war and peace — that is, the most critical subjects of foreign policy — were appropriate subjects for legislative determination rather than an inherent prerogative of executive power.”<sup>204</sup> Moreover, instead of relying on the British model or even the Continental Congress as a categorical reference, the delegates moved to, in Madison’s words, “confine[] and define[]” the executive’s powers. All subsequent discussions in the Federal Convention are consistent with this theme: the delegates continued to define the executive’s powers, including his foreign affairs powers, and they never suggested that they were vesting him with unspecified residual powers. Moreover, to the extent that this discussion reveals any consensus about what is inherently part of executive power, it was simply that executive power entails the power to execute the laws.

After the June 1 deliberations, there were a number of discussions concerning the manner of electing the executive, whether the executive should be plural or singular, whether the executive should have a veto power over legislation, and the executive’s term of

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200. 1 *id.* at 66-67. John Dickinson similarly stated that “the powers of the Executive ought to be defined before we say in whom the power shall vest.” 1 *id.* at 74.

201. 1 *id.* at 70 (emphasis added).

202. 1 *id.* at 63.

203. 1 *id.* at 67.

204. Rakove, *supra* note 65, at 239.

office.<sup>205</sup> These discussions were complicated and contentious. As George Mason noted at one point, “In every Stage of the Question relative to the Executive, the difficulty of the subject and the diversity of the opinions concerning it have appeared.”<sup>206</sup> In these discussions, however, there was repeated agreement that the only powers being granted to the executive were those of executing the laws, making certain appointments, and (after additional discussion) vetoing legislation.<sup>207</sup> This agreement is also reflected in the Report of the Committee of the Whole on June 13, which delineates these, and only these, executive powers.<sup>208</sup> There were also repeated, uncontested statements in these discussions that the U.S. executive should not resemble a monarchy.

The alternative constitutional plans presented to the delegates were fully consistent with this approach. On June 15, William Paterson presented the New Jersey Plan. Under this plan, the executive would be elected by Congress, would be plural rather than singular, and would have “general authority to execute the federal acts” as well as the power “to appoint all federal officers not otherwise provided for, & to direct all military operations.”<sup>209</sup> Like Madison’s amendment of the Virginia Plan, the New Jersey Plan spelled out the powers that would be vested in the executive. As for other foreign affairs powers, the Plan stated that Congress would have the powers specified in the Articles of Confederation, as well as a number of additional powers, such as the power to regulate international trade.<sup>210</sup> Under this plan,

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205. In discussing the Federal Convention, Prakash and Ramsey move immediately from Madison’s motion on June 1 to the considerations of the Committee of Detail, in late July, noting that “[a]fter this modification of the Virginia Plan, there was no sustained consideration of foreign affairs until the Committee of Detail.” Prakash & Ramsey, *supra* note 14, at 283. In doing so, Prakash and Ramsey fail to give sufficient attention to a number of relevant discussions and proposals that occurred during this period.

206. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 118. In a letter to Thomas Jefferson in October 1787, James Madison recounted that “[o]n the question whether [the executive] should consist of a single person, or a plurality of coordinate members, on the mode of appointment, on the duration in office, on the degree of power, on the re-eligibility, tedious and reiterated discussions took place.” Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 131, 132.

207. See, e.g., 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 101; 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 32-33, 116. *But cf.* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 113 (comment by George Mason on June 4 that “[w]e have not yet been able to define the powers of the Executive”).

208. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 236.

209. 1 *id.* at 244. Given the Plan’s reference to directing military operations, Prakash and Ramsey are incorrect in describing the executive under this Plan as “bereft of foreign affairs authority.” Prakash & Ramsey, *supra* note 14, at 281 n.214.

210. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 243.

therefore, the executive's foreign affairs powers were to be very limited and defined, and most foreign affairs powers were to be granted to Congress.

The obviously limited nature of executive power under the modified Virginia plan and the New Jersey plan helps shed light on what the delegates understood when they referred to the "vesting" of executive power. On June 4, there were repeated references to "vesting the executive powers in a single person,"<sup>211</sup> even though the proposal before the convention at this point was for an executive that would have only the powers of executing the laws and making appointments.<sup>212</sup> On June 16, in contrasting the Committee of the Whole's modified Virginia Plan with the New Jersey Plan, James Wilson noted that the Committee's plan "vested the Executive powers in a single Magistrate" whereas "[t]he plan of N. Jersey, vested them in a plurality."<sup>213</sup> In other words, constitutional plans that clearly did not incorporate the Vesting Clause Thesis were nevertheless viewed as "vesting the executive powers." Vesting, under this conception, simply meant assigning the specified powers, not granting unspecified residual powers. To put it differently, a general vesting clause described *where* powers were being vested, not what those powers were.

On June 18, Alexander Hamilton presented his own constitutional plan. Already displaying a pro-executive inclination for which he would later become famous, Hamilton proposed:

The supreme Executive authority of the United States to be vested in a Governour to be elected to serve during good behaviour — the election to be made by Electors chosen by the people in the Election Districts aforesaid — The authorities & functions of the Executive to be as follows: to have a negative on all laws about to be passed, and the execution of all laws passed, to have the direction of war when authorized or begun; to have with the advice and approbation of the Senate the power of making all treaties; to have the sole appointment of the heads or chief officers or the departments of Finance, War and Foreign Affairs; to have the nomination of all officers (Ambassadors to foreign Nations included) subject to the approbation or rejection of the Senate; to have the power of pardoning all offences except Treason; which he shall not pardon without the approbation of the Senate.<sup>214</sup>

Hamilton's plan obviously proposed a broader package of executive power than what was reflected in either the modified Virginia Plan or the New Jersey Plan. But even under Hamilton's more expansive proposal, the powers of the executive, including

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211. See, e.g., 1 *id.* at 101, 106-07, 110.

212. See *supra* text accompanying notes 202-203.

213. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 254.

214. 1 *id.* at 292.

powers relating to foreign affairs, were spelled out in detail. Hamilton does not appear to have been relying on some undefined residuum of executive power. Prakash and Ramsey assert the contrary, claiming (without explanation) that the beginning of the first sentence quoted above — “The supreme Executive authority of the United States to be vested in a Governour to be elected during good behaviour” — was implicitly a grant of “residual foreign affairs authorities not vested elsewhere.”<sup>215</sup> But this is pure assertion, and it is contradicted by the language that immediately precedes Hamilton’s list of executive powers — “The authorities & functions of the Executive *to be as follows.*” It is also undermined by the fact that Hamilton used similar language with respect to the vesting of legislative power,<sup>216</sup> yet Prakash and Ramsey do not contend that he was proposing to grant unspecified residual powers to Congress. Finally, their claim is undermined by Hamilton’s assignment to the *Senate*, rather than to the Governor, of “the sole power of declaring war” and “the power of advising and approving all Treaties,”<sup>217</sup> significant foreign relations powers that Prakash and Ramsey claim are executive in nature.

Still another constitutional proposal was the Pinckney Plan, proposed by Charles Pinckney of South Carolina and evidently considered by the Committee of Detail. This plan provides that “the executive Authority of the U.S. shall be vested” in the President, and it then lists a variety of presidential duties and powers, including duties and powers relating to foreign affairs.<sup>218</sup> Prakash and Ramsey assert that the vesting clause in the Pinckney Plan implied that the executive would have residual foreign affairs powers.<sup>219</sup> Again, this begs the question, since the meaning of such a vesting clause is precisely what is at issue. Moreover, as Prakash and Ramsey acknowledge, Pinckney’s comments in response to the Virginia Plan (described above), in which he opposed assigning the foreign affairs powers exercised by the Continental Congress to the executive, suggest that he did not believe that the executive should have residual foreign affairs powers. Prakash and Ramsey simply note that Pinckney’s comments “contradicted his own plan.”<sup>220</sup> There is no

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215. Prakash & Ramsey, *supra* note 14, at 280.

216. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 291 (“The Supreme Legislative power of the United States of America to be vested . . .”).

217. 1 *id.* at 292.

218. See 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 606.

219. See Prakash & Ramsey, *supra* note 14, at 281 n.215. Pinckney’s plan stated that, “In the Presid[ent] ‘the executive Authority of the U.S. shall be vested.’ ” 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 606.

220. Prakash & Ramsey, *supra* note 14, at 281 n.215.

contradiction, however, if the vesting clause is not read as granting residual powers.<sup>221</sup>

The Committee of Detail was appointed on July 23.<sup>222</sup> The Committee's drafts show that it attempted to enumerate the executive's powers, including ultimately some foreign affairs powers, just as the various plans had attempted to do.<sup>223</sup> As Prakash and Ramsey concede, "At this stage, the executive lacked the residual executive power."<sup>224</sup> Prakash and Ramsey assert, however, that the Committee's final report, presented on August 6, included such a residual power. In other words, they claim that the Committee of Detail substantially modified the nature of the executive's power in a way inconsistent with all of the Convention's discussions up to that point. The only evidence they provide for this assertion is that the portion of the report addressing executive power begins with the clause, "The Executive Power of the United States shall be vested in a single person."<sup>225</sup> The language of this clause, however, can easily be read just as addressing the issue of whether the executive power that is specified will be vested in a "single person" or a plural body, an issue discussed at length in earlier stages of the Convention. And this is exactly how Madison's record of the Convention describes the clause when it was voted on by the Committee of the Whole on August 24.<sup>226</sup>

Furthermore, the Committee of Detail's report spells out in great detail the executive's powers and duties, including those relating to foreign affairs, and it expressly gives other foreign affairs powers to the Senate or to Congress.<sup>227</sup> Indeed, *all* of the foreign affairs powers

221. As discussed below, Pinckney also stated at the Pennsylvania ratifying convention that the Senate and President "form together a body in whom can be best and most safely vested the diplomatic power of the United States." See *infra* text accompanying note 411. In an 1818 letter to John Quincy Adams, Pinckney recalled that his constitutional plan was "substantially adopted . . . except as to the Senate & giving more power to the Executive than I intended." Letter from Charles Pickney to John Quincy Adams (Dec. 30, 1818), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 427, 427. With respect to the enhancement of executive power, Pinckney gives the example of the decision late in the Convention to divide the treaty power between the Senate and President rather than assign it exclusively to the Senate. 3 *id.*

222. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 95.

223. See, e.g., 2 *id.* at 132, 145, 171; SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 189 (James H. Hutson ed., 1987).

224. Prakash & Ramsey, *supra* note 14, at 283.

225. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 185.

226. See 2 *id.* at 401 ("On the question for vesting the power in a *single person* — It was agreed to nem: con: So also on the *Stile* and *title*."). The "stile" and "title" were addressed in the next sentence of this portion of the Committee's report: "His stile shall be 'The President of the United States of America;' and his title shall be, 'His Excellency.'" 2 *id.* at 185.

227. For additional discussion of this point, see Arthur Bestor, *Respective Roles of the Senate and President in the Making and Abrogation of Treaties — The Original Intent of the Framers of the Constitution Historically Examined*, 55 WASH. L. REV. 1, 87 (1979):

The [Vesting Clause] could not possibly have had [residual power] meaning in the report of

that had been discussed in the Convention are mentioned expressly somewhere in the Committee's report, making it even less likely that the Committee intended the executive Vesting Clause to convey additional foreign affairs powers.<sup>228</sup> Finally, the Committee used similar vesting language for the legislative and judicial branches, suggesting, as Abraham Sofaer has noted, "that the committee . . . had no specific pro-executive plan in mind."<sup>229</sup>

It is also worth noting that Committee of Detail's report envisioned that the *Senate* would have the dominant power over U.S. foreign relations. Accordingly, it assigned to the Senate the sole power of making treaties, as well as the power of appointing ambassadors.<sup>230</sup> In commenting on the report, Pinckney noted that "the Senate is to have the power of making treaties & *managing our foreign affairs* . . ."<sup>231</sup> In the closing weeks of the Convention, some of the Senate's foreign affairs power was shifted to the President. But, again, the story is one of assignment of particular powers to particular institutional actors, not one of an essentialist conception of executive power or of granting unspecified powers. More specifically, the debates strongly suggest that power was being shifted to the President not because of some sort of executive power essentialism, but rather because of mistrust of the Senate.<sup>232</sup>

Consider, for example, the power to make treaties. When the Committee of the Whole addressed the proposal to assign the treaty power to the Senate, Madison "observed that the Senate represented

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the Committee of Detail, for the essential powers in the realm of diplomacy were specifically bestowed elsewhere — that is to say, on the Senate exclusively. In their use of general terms like 'Executive Power,' the framers obviously intended that the meaning should be arrived at by observing the particular powers actually enumerated in the relevant article of the Constitution.

*Id.* See also Rakove, *supra* note 65, at 264 ("Given the evidence that a doctrine of inherent executive power over war and peace was not influential at the outset of the Convention — as the proceedings of June 1 conclusively prove — it hardly seems likely that it would have become more attractive as the debates wore on.")

228. Prakash and Ramsey's discussion of this point — the linchpin of their argument about the Federal Convention — is entirely conclusory. They assert that the Committee of Detail's use of the Vesting Clause was a reintroduction of the idea of residual executive power, and they remark that "no one sought to strike the language or complained." Prakash & Ramsey, *supra* note 14, at 286. It would be important — and, indeed, surprising — that no one would comment on the reintroduction of an idea that had generated substantial opposition at the beginning of the Convention. Of course, the most likely reason why no one commented on it is that Prakash and Ramsey's assertion about the Vesting Clause is incorrect.

229. ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS* 30 (1976).

230. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 183.

231. 2 *id.* at 235 (emphasis added).

232. For a detailed explanation of this point, see RAKOVE, *supra* note 51, at 263-67.

the States alone, and for this as well as other obvious reasons it was proper that the President should be an agent in Treaties.”<sup>233</sup> Gouverneur Morris also expressed concern about giving the Senate the treaty power, and he proposed an amendment whereby treaties would not be binding on the United States until ratified by federal legislation.<sup>234</sup> Madison and others disagreed with that amendment, however, on the grounds that it would be too inconvenient and would put the United States at a disadvantage in international negotiations, and the amendment was defeated.<sup>235</sup> This debate was resumed on September 7, with James Wilson moving to amend the treaty clause to require the consent of the House of Representatives.<sup>236</sup> Sherman responded that “the power could be safely trusted to the Senate” and that “the necessity of secrecy in the case of treaties forbade a reference of them to the whole Legislature.”<sup>237</sup> Wilson’s motion was defeated. Madison subsequently moved, unsuccessfully, to allow two-thirds of the Senate to make peace treaties without the President’s consent.<sup>238</sup> What is noteworthy about these discussions is that at no point was there a claim that the treaty power inherently belonged to the executive. The only issues were whether, for functional reasons, the power should be divided between the Senate and some other institutional body, and, if so, which institutional body would be best.

The Convention finally turned to the executive branch part of the Committee of Detail’s report on August 24. The discussion here is, once again, revealing for what it does not show. Delegates quibbled with the specific grants of authority and responsibility and thus, for example, modified the language of the appointments provision and the provision giving the President command of the state militia.<sup>239</sup> They also added in certain presidential powers and responsibilities, such as the responsibility for receiving ambassadors.<sup>240</sup> But there was no discussion of whether the list of powers and responsibilities matched some preconception of what should be executive, and there was no suggestion that the Vesting Clause was granting unspecified powers. Indeed, if the delegates had been assuming the Vesting Clause Thesis, much of their quibbling about specific executive powers would have been beside the point.

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233. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 392.

234. 2 *id.*

235. 2 *id.* at 392-94.

236. *See* 2 *id.* at 538.

237. 2 *id.*

238. *See* 2 *id.* at 540-41.

239. *See* 2 *id.* at 405-06, 422.

240. 2 *id.* at 419.



The Convention's brief discussion of Congress's power relating to war is not to the contrary. The Committee of Detail had proposed to give Congress the power "[t]o make war."<sup>241</sup> Pinckney objected to that proposal, arguing that the House of Representatives would be "too numerous for such deliberations," and that the power should rest with the Senate alone because it would be "more acquainted with foreign affairs."<sup>242</sup> Pierce Butler, by contrast, thought that the Senate would have the same institutional problems as the full Congress, and he proposed that the power to make war be given to the President.<sup>243</sup> A number of delegates expressed concern, however, about giving the President the power to commence war. Madison moved to amend the Committee of Detail's proposal to give Congress the power to "*declare*" rather than "*make*" war, which he said would "leav[e] to the Executive the power to repel sudden attacks."<sup>244</sup> Roger Sherman did not think this amendment necessary, since he believed that the President would already have the power to repel attacks.<sup>245</sup> The delegates apparently agreed, initially voting against the motion. Rufus King, however, noted that the word "make" could be understood to include conducting the war, "which was an Executive function," and at that point the delegates voted in favor of the motion.

There are obviously statements in this discussion suggesting that certain war-related powers belong to the executive — namely the power to repel attacks and the power to conduct the operations of war. The basis for this assumption is not entirely clear, but it easily could have been based on the President's assigned power as Commander in Chief.<sup>246</sup> What *is* clear is that, when considering where

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241. *See* 2 *id.* at 182.

242. 2 *id.* at 318.

243. 2 *id.*

244. 2 *id.*

245. 2 *id.*

246. The New Jersey Plan, for example, specifically referred to a presidential power to "direct all military operations." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 244; *see also* THE FEDERALIST, *supra* note 2, NO. 69 (Alexander Hamilton), at 418 (stating that the President, as Commander in Chief, has "the supreme command and direction of the military and naval forces"). And the Hamilton Plan gave the President the power of "direction of the war when authorized *or begun*." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 292 (emphasis added). The phrase "or begun" in Hamilton's Plan presumably included situations in which a war was initiated against the United States and it acted to repel the attack. *See* JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 142 n.22 (1993); *see also* Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002) (explaining that the Founders understood that war could be "declared" by an attack on the United States and that this would trigger the President's commander-in-chief powers). *But see* Prakash & Ramsey, *supra* note 14, at 285 (arguing that the reference in the Convention debate to a power to repel attacks proves that the delegates assumed that the President would have residual foreign affairs powers).

to assign the foreign relations power of declaring war, the delegates agreed not to vest it with the President, and no one claimed that this violated some sort of essentialist conception of executive power.

### B. *The Federalist Papers*

The *Federalist Papers* likewise repudiate the Vesting Clause Thesis. As in the Federal Convention debates, the discussions of executive power in the *Federalist Papers* are premised on the assumption that the President is being granted only the powers specified in Article II. This assumption is evident, for example, in the comparisons between the proposed U.S. executive and the British monarch. In *Federalist No. 48*, Madison acknowledges that, “[i]n a government where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, the executive department is very justly regarded as the source of danger.”<sup>247</sup> But he contrasts that situation from “a representative republic where the executive magistracy is carefully limited, both in the extent and the duration of its power.”<sup>248</sup>

Similarly, in *Federalist No. 67*, Hamilton acknowledges the “aversion of the people to monarchy,” and he proceeds to go through the President’s enumerated Article II powers to show that they are much less extensive than those of the British monarch.<sup>249</sup> Nowhere in this essay does he suggest that the Vesting Clause is an independent source of power. Moreover, the structure of his discussion — going through the enumerated powers in Article II to show that they are sufficiently limited — would make little sense if there were also an unspecified residuum of “executive Power.” Hamilton repeats this approach in *Federalist No. 69*, again going through the President’s enumerated powers, and arguing that the limitation of the President to these powers means that “there is no pretense for the parallel which has been attempted between him and the king of Great Britain.”<sup>250</sup>

The *Federalist Papers* also repeatedly suggest that Congress’s powers will be much greater than those of the President. In doing so, the *Papers* point to the limited list of powers in Article II, Section 2. These statements, like those contrasting the President with the British monarch, would make little sense if there were an unspecified residuum of presidential power. For example, in *Federalist No. 48*,

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247. THE FEDERALIST, *supra* note 2, NO. 48 (James Madison), at 309.

248. *Id.*

249. *Id.* NO. 67 (Alexander Hamilton), at 407.

250. *Id.* NO. 69 (Alexander Hamilton), at 422; *see also id.* NO. 73 (Alexander Hamilton), at 442 (considering the powers “which are proposed to be vested in the President of the United States”).

Madison states that Congress's powers are "more extensive, and less susceptible of precise limits" than those of the President, and he describes the executive power as "being restrained within a narrower compass and being more simple in its nature."<sup>251</sup>

Another inconsistency between the *Federalist Papers* and the Vesting Clause Thesis is that the *Papers* generally employ functional arguments for the assignment of powers, not essentialist labels like "legislative" or "executive." In *Federalist No. 64*, for example, Jay argues that, even though the treaty power could be viewed as legislative in nature, it nevertheless made sense to vest it in the President and Senate. He suggests that one should not place too much emphasis on formal labels: "[W]hatever name be given to the power of making treaties, or however obligatory they may be when made, certain it is that the people may, with much propriety, commit the power to a distinct body from the legislature, the executive, or the judicial."<sup>252</sup> When the *Federalist Papers* invoke essentialist labels, they tend to eschew the traditional categories used by Locke, Blackstone, and Montesquieu. In *Federalist No. 75*, for example, Hamilton acknowledges that treatise writers had classified the treaty power as properly belonging to the executive, but he calls this "an arbitrary disposition" and rejects it.<sup>253</sup>

The *Federalist Papers* also emphasize a more general background point that, as noted in Part I, is in tension with the Vesting Clause Thesis. Specially, they emphasize that the Constitution is establishing a government of limited and *defined* powers. Most famously, Madison states in *Federalist No. 45* that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined."<sup>254</sup> An unspecified residuum of executive power does not sit comfortably with this general structural feature of the Constitution.

Another background point made in the *Federalist Papers* is that there is nothing inherently problematic, from a separation of powers standpoint, with mixing powers among branches of government. Madison makes this point most clearly in *Federalist No. 47*, where he responds to the Anti-Federalist charge that "the Constitution is [in] supposed violation of the political maxim that the legislative, executive, and judiciary departments ought to be separate and distinct."<sup>255</sup> Turning to Montesquieu (upon whom the Anti-Federalists frequently relied), Madison explains that the relevant political maxim

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251. *Id.* NO. 48 (James Madison), at 310; *see also id.* NO. 51 (James Madison), at 322 ("In a republican government, the legislative authority necessarily predominates.").

252. *Id.* NO. 64 (John Jay), at 394.

253. *Id.* NO. 75 (Alexander Hamilton), at 450.

254. *Id.* NO. 45 (James Madison), at 292.

255. *Id.* NO. 47 (James Madison), at 301.

is instead that “the accumulation of all powers . . . in the same hands . . . may justly be pronounced the very definition of tyranny,”<sup>256</sup> and that the Constitution’s mixing of powers does not violate this maxim. Even under the British Constitution — “to Montesquieu what Homer has been to the didactic writers on epic poetry” — Madison notes that there was a mixing of powers.<sup>257</sup> Madison also looks in detail at the state constitutions in the Critical Period and finds that “there is not a single instance in which the several departments of power have been kept absolutely separate and distinct.”<sup>258</sup>

The only *Federalist Paper* that offers even superficial support to the Vesting Clause Thesis is *Federalist No. 72*. There, Hamilton notes that the “administration of government . . . falls peculiarly within the province of the executive department.”<sup>259</sup> Hamilton makes this observation in order to justify giving the President the power to nominate appointments. He does not appear to be arguing that “administration” is a separate, unspecified executive power; rather, he seems to think that it is part of the President’s role in executing the laws and carrying out his specified powers. In any event, the foreign affairs administrative functions he mentions — negotiating with foreign governments, the arrangement of the armed forces, and the direction of war — can all be justified from the specific grants of power, such as the treaty power and the commander-in-chief power.<sup>260</sup>

### C. State Ratification Debates

With the state ratification debates — the final component of the usual originalist trinity — the Vesting Clause Thesis continues down the path from historical claim to present-day wishful thinking. At least for originalists, the constitutional understanding reflected in the state conventions merits particular weight. As Chief Justice Marshall famously asserted in one of his own, if infrequent, originalist forays, the Constitution “was a mere proposal,” which “the people were at perfect liberty to accept or reject.”<sup>261</sup> It followed that “[f]rom these [ratifying] Conventions the constitution derives its whole authority.”<sup>262</sup> Similarly, James Madison noted, many years after the Constitution’s

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256. *Id.*

257. *Id.* at 301-02.

258. *Id.* at 304. The state constitutions are discussed above in Part II.B.

259. *Id.* NO. 72 (Alexander Hamilton), at 435.

260. *See also id.* NO. 84 (Alexander Hamilton), at 519 (noting that the “management of foreign negotiations will naturally devolve” on the President, subject to the consent of the Senate).

261. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403-04 (1819).

262. *Id.* at 403.

ratification, that it was in the “respective State Conventions, where [the Constitution] received all the authority which it possesses.”<sup>263</sup>

It is puzzling, therefore, that proponents of the Vesting Clause Thesis have devoted relatively little attention to the state ratification debates. Prakash and Ramsey’s ostensibly originalist account, for example, devotes only a few short pages to the subject.<sup>264</sup> A possible reason for this omission is that the state ratification debates offer little evidence for executive power essentialism with regard to foreign affairs and no instances that articulate the Vesting Clause Thesis. Such silence is particularly striking in light of the sheer volume of the state debates.<sup>265</sup> Instead of assuming the Vesting Clause Thesis, the state ratification debates, like the Federal Convention debates and the *Federalist Papers*, proceed on the assumption that the President is being granted only the powers specified in Article II. To support this claim, we consider in detail the six most significant convention debates — Virginia, Pennsylvania, Massachusetts, New York, North Carolina, and South Carolina.

*Virginia.* Virginia produced arguably the most significant ratification debates for several reasons. First, Virginia was the most important state in terms of size and leadership. Even though the requisite eight states had ratified the Constitution when the Virginia ratifying convention met, few thought the ratification process could succeed without the Old Dominion.<sup>266</sup> Second, Virginia unquestionably produced the most comprehensive debates in terms of quality and quantity. The Virginia ratification materials account for over 1700 pages in the authoritative *Documentary History of the Ratification of the Constitution*, and more than 600 of those pages reflect the con-

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263. Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 228, 228 (1865); see also 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 374 (recording Madison’s statement in the House of Representatives on April 6, 1796: “If we were to look, therefore, for the meaning of the instrument beyond the face of the instrument, we must look for it, not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution.”).

264. See Prakash & Ramsey, *supra* note 14, at 287-95.

265. The *Documentary History of the Ratification of the Constitution* is approaching twenty volumes. That said, it should be noted that the quality of the documentary record varies wildly, and that the accounts of many of the convention debates are plagued by partisanship and poor recording. See James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEXAS L. REV. 1 (1986). The unevenness of the record should caution those who seek to discern constitutional meaning from the debates without more. Poor parliamentary reporting, however, does not explain the relative absence of a position central to issues concerning which a wide array of other positions were documented.

266. Lance Banning, *Virginia: Sectionalism and the General Good*, in RATIFYING THE CONSTITUTION 261, 262 (Michael Allen Gillespie & Michael Lienesch eds., 1989).

vention debates.<sup>267</sup> The caliber of debate, moreover, was exceptionally high, featuring James Madison, Edmund Randolph, George Mason, John Marshall, Patrick Henry, James Monroe, among other notables. Perhaps most important of all, for present purposes, the Virginia convention addressed foreign affairs issues in greater detail than any other state, in part out of its paternalistic concern for the fate of Kentucky and what was then the Southwest, especially with regard to the treaty power and U.S. navigation rights on the Mississippi.<sup>268</sup> For these reasons, foreign affairs scholars have typically, and rightly, focused upon the discussions that Virginia produced. The telling exception proving this rule is the work of Vesting Clause Thesis proponents, where the Virginia debates are conspicuous by their absence.<sup>269</sup>

The Virginia convention from the outset dispelled any notion that conceptions of government that may have been celebrated in Europe carried over without alteration to America. The convention opened with the Anti-Federalists, led by Patrick Henry, seeking to portray the Constitution as the reincarnation of the British imperial government that Virginians had rejected in 1776. Prominent in this strategy were attempts to equate the President with the British monarch. “[T]here is to be,” Henry declaimed, “a great and mighty President, with very extensive powers; the powers of a King.”<sup>270</sup> Henry pressed the analogy by invoking the old Whig fear concerning the misuse of troops ostensibly mustered to protect the nation from foreign enemies: “Away with your President, we shall have a King: The army will salute him Monarch; your militia will leave you and assist in making him King, and fight against you: And what have you to oppose this force?”<sup>271</sup> Federalists, such as Edmund Randolph and John Marshall, dismissed both the Anti-Federalists’ horrors as well as the royal comparison.<sup>272</sup> Even before the convention, “An Impartial Citizen” contrasted the U.S. and British Constitutions, citing the President’s merely contingent veto and commenting that “[t]he President in many

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267. The Virginia debates take up volumes eight through ten of *The Documentary History of the Ratification of the Constitution*. See 8-10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (John P. Kaminski & Gaspare J. Saladino eds., 1988-90).

268. For an overview of the ratification struggle in Virginia, see Banning, *supra* note 266, at 261-99.

269. See, e.g., Prakash & Ramsey, *supra* note 14, at 291-92 & n.261; *id.* at 293 & nn.271-72.

270. 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 267, at 961. Note that even here, Henry does not speak in terms of executive or royal power as a unitary abstraction, but instead refers to “powers” in the plural.

271. 9 *id.* at 964.

272. See, e.g., 9 *id.* at 1019, 1125.

important cases, must have the concurrence of the Senate, wherein his sole decision might be dangerous.”<sup>273</sup>

In debating the war power, the comparison between King and President merged into a discussion of the Constitution’s assignment of foreign affairs authority. Here the debate reflected a general pattern whereby the participants concentrated on the allocation of specific powers and the likely consequences of the allocation, rather than on essentialist claims about what was truly “executive” or “legislative.” Specifically, Anti-Federalists objected to the combination in Congress of the power to declare war with the authority to finance it, while Federalists responded that the republic could only be safe with the power to declare war vested in the legislative branch. As Henry put it, “I find fault with the paper before you, because the same power that declares war, has the power to carry it on.”<sup>274</sup> To him, this combination was even worse than in Britain, since there “[t]he King declares war: The House of Commons gives the means of carrying it on. This is a strong check on the King.”<sup>275</sup> Yet, “[h]ow is it here? The Congress can both declare war and carry it on; and levy your money, as long as you have a shilling to pay.”<sup>276</sup> Note that Henry, not one to leave any argument unspoken, does not object that affording Congress the power to declare war violates a general understanding that such a power is “executive.” Rather, he attacks the combination of powers in light of the results it will produce.

Federalists defended the war power in the same functionalist terms. Randolph countered Henry, arguing that America compared favorably to England because it imposed more of a popular check on the exercise of the war power: “In England the King declares war. In America, Congress must be consulted. — In England, Parliament gives money. In America, Congress does it. There are consequently more powers in the hands of the people, and greater checks upon the Executive here, than in England.”<sup>277</sup> Marshall echoed Randolph in the same functionalist terms, asking, “Are the people of England more secure, if the Commons have no voice in declaring war, or are we less secure, by having the Senate joined with the President?”<sup>278</sup> By contrast, no Federalist asserted that the declare war power was legislative in nature, or that the Constitution’s allocation of the declare war power to Congress was an exception to a general rule.

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273. 8 *id.* at 295.

274. 9 *id.* at 1069.

275. 9 *id.*

276. 9 *id.*

277. 9 *id.* at 1098.

278. 9 *id.* at 1125. Unless he was referring to the treaty power, Marshall should have referred to the full Congress rather than the Senate, since the full Congress was given the power under the proposed Constitution to declare war.

The single most sustained foreign affairs debate in Virginia concerned the treaty-making power, and that discussion produced almost no essentialist rhetoric. This relative silence is striking given the important role accorded the Senate in this purported executive function. Instead of essentialism, the overwhelming majority of the debate centered on whether the requirement that two-thirds of the senators present give their advice and consent to a treaty would be a sufficient check against regions bent on using the treaty authority to undermine the interests of other regions, in particular, the South's interest in maintaining free navigation of the Mississippi. When the President does make an appearance, the issue is not whether the executive should or should not be the exclusive repository of this important foreign affairs power, but whether the characteristics of the office would make it an additional check against a regional sell-out.

Especially noteworthy is the Anti-Federalist failure to make the obvious objection that Senate approval, let alone by a supermajority, is an infringement of executive foreign affairs authority. Instead, Anti-Federalists objected to the allocation of treaty-making authority on the ground that it would not protect regional interests. In this context, William Grayson argued that “[t]he consent of the President (is) considered as a trivial check.”<sup>279</sup> James Monroe concurred on the ground that the President likely would not prevent a betrayal of Southern interests since he probably would be elected by, and beholden to, the Northeast.<sup>280</sup> The Anti-Federalists further argued that the Senate would not provide a sufficient safeguard. This critique dominated the convention's two main discussions of treaties,<sup>281</sup> and it was rigorously explored in a table that George Mason provided predicting likely Senate voting patterns.<sup>282</sup>

Federalists defended the treaty-making power primarily on the ground that it would protect the interests of Virginia and the region to which Virginians were likely to emigrate. At least one delegate, Francis Corbin, addressed the possibility of vesting the power in the President alone, and rejected it on solely functional grounds. Even then, he did not make the point to justify a departure from an abstract baseline, although he did note that it made U.S. practice diverge from most governments elsewhere:

It would be dangerous to give this power to the President alone — as the concession of such a power to one individual, is repugnant to Republican principles. — It is therefore given to the President and the Senate (who

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279. 10 *id.* at 1383.

280. 10 *id.* at 1371-73.

281. The Convention took up treaty-making from June 12-14, and again on June 18 and 19. See 10 *id.* at 1184-1297, 1371-1410.

282. 10 *id.* at 1375.



represent the states in their individual capacities) conjointly. — In this it differs from every Government we know. — It steers with admirable dexterity between the two extremes — neither leaving it to the Executive, as in most other Governments, nor to the Legislature, which would too much retard such negotiations.<sup>283</sup>

Virginia's emphasis on specific powers and likely results also prevailed in considering Article II itself. If any topic should have prompted discussion of what "executive" authority entailed as a general, residual, or baseline matter, Article II would have been it. But even though the debate was extensive, there was neither a considered analysis of the Vesting Clause nor any assertion that the text reflected a grant of unspecified powers. Instead, the delegates repeatedly moved to consider the implications of the particular powers specified in Article II. Even before the convention formally took up Article II, James Monroe set the tone when he sought to demonstrate that the President would be too powerful, but he did so with reference only to specific textual grants rather than residual powers.<sup>284</sup> Other speakers followed Monroe by also decrying the President's power, again only with reference to particular grants. Mason, for example, "animadverting on the magnitude of the powers of the President, was alarmed at the additional power of commanding the army in person."<sup>285</sup> While he admitted that the President should have the power to "give orders, and have a general superintendency" over the army, he feared that the commander-in-chief grant — not some general ideal of executive power — further entailed command in the field and that this could be abused. Likewise, Mason objected to the pardon power on the ground that it might easily be abused and clear the way for a monarchy.<sup>286</sup>

In theory, the Federalists could have defended against such objections on the ground that personal command or the pardon power were essentially executive in nature. They did not. Madison, for instance, contended that it would be improper to vest the pardon power in the House or Senate, "because numerous bodies were actuated more or less by passion, and might in a moment of vengeance forget humanity."<sup>287</sup> Looking back, he also turned not to Montesquieu but to the experience of Massachusetts, where the legislature's exercise of the pardon power had resulted in inconsistent decisions.<sup>288</sup> More generally, Edmund Randolph answered the Anti-Federalist

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283. 10 *id.* at 1391-92.

284. See 9 *id.* at 1115 (referring to the specific powers listed in Article II).

285. 10 *id.* at 1378.

286. 10 *id.* at 1378-79.

287. 10 *id.* at 1379-80.

288. 10 *id.* at 1380.

attacks on the presidency by emphasizing the limited and divided nature of the powers conferred on the President in Article II:

What are his powers? To see the laws executed. Every Executive in America has that power. He is also to command the army — This power also is enjoyed by the Executives of the different States. He can handle no part of the public money except what is given him by law. . . . I cannot conceive how his powers can be called formidable. Both Houses are a check upon him. He can do no important act without the concurrence of the Senate.<sup>289</sup>

By contrast, the essentialist arguments that the Virginia convention did produce were few and fleeting, especially with respect to foreign affairs. As noted, no one asserted that foreign affairs authority was as a class “executive,” and no one claimed that the Article II Vesting Clause accorded the President general foreign affairs authority. In a handful of instances some Virginians did employ essentialist rhetoric when analyzing specific foreign affairs powers. Outside the Convention, “Cassius” defended the Constitution by arguing that, “though the power of making treaties [has] been, always, considered a part of the executive,” the Senate provides an important check.<sup>290</sup> “A Native of Virginia” likewise commented that the powers vested in Article II, sections 2 and 3, including the Commander in Chief Clause, “belong from the nature of them, to the Executive branch of government; and could be placed in no other hands with propriety.”<sup>291</sup> Mason in passing referred to the President as “[t]his very executive officer,” en route to suggesting that he might receive pensions from European potentates.<sup>292</sup> If there are other examples, they are difficult to find and all but eclipsed by the focus on powers and functions already recounted.

Only a few essentialist comments crop up even when the frame is expanded to encompass executive power in general. Arthur Lee, for example, complained to John Adams that the Constitution vested “legislative, executive & judicial Powers in the Senate.”<sup>293</sup> “Republicus” from Kentucky appeared to make a Vesting Clause argument when stating that “supreme continental executive power” is granted to the President, but then went on to discuss only those powers that are specified.<sup>294</sup> Mason at the convention asserted that the President and Senate were united as “man and wife,” and that “[t]he

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289. 9 *id.* at 1098.

290. 9 *id.* at 645.

291. 9 *id.* at 681.

292. 10 *id.* at 1365.

293. 8 *id.* at 34. Joseph Jones made the same general point in a letter to Madison. See 8 *id.* at 129.

294. 8 *id.* at 448.

Executive and Legislative powers thus connected, will destroy all balances.”<sup>295</sup> Given the voluminous records, the paucity of essentialist language, let alone sustained argument, is striking.

A number of express denials of executive power essentialism, moreover, offset the rhetoric to the contrary. Two of these came from the prominent Federalist Edmund Pendleton. Writing to Madison, Pendleton declared that “[t]he President is indeed to be a great man, but it is only in shew to represent the Federal dignity & Power, having no latent Prerogatives, nor any Powers but such as are defined and given him by law.”<sup>296</sup> To Richard Henry Lee he also wrote that the President’s “powers are defined, & not left to latent Prerogatives — they none of them appear too large,” with the possible exceptions of pardoning treason before conviction and giving force to treaties.<sup>297</sup> A more complex and intriguing denial of essentialism came from Randolph in a rejoinder to Madison’s claim that the Necessary and Proper Clause would simply permit Congress to enact necessarily implied powers. Stating that Madison’s narrow construction would make the clause “superfluous,” he continued:

Let us take an example of a single department: For instance that of the President, who has certain things annexed to his office. Does it not reasonably follow, that he must have some incidental powers? The principle of incidental powers extends to all parts of the system. If you then say, that the President has incidental powers, you reduce [the Necessary and Proper Clause] to tautology.<sup>298</sup>

Randolph’s discussion itself would have been superfluous if there had been a general understanding that the Article II Vesting Clause accorded all executive authority unless otherwise specified. Of course, it might be argued that Randolph was referring to incidental powers that the President might have that were not executive in nature, whatever these might be. The more natural reading, however, is simply that Randolph looked to Article II’s specific grants of power as the starting point, and then assumed that the President, like all parts of the government, would possess additional implied powers for the system to be workable even absent the Necessary and Proper Clause.

Randolph at one point went further, suggesting that Congress should be the primary repository of foreign affairs authority. He began by noting that, under the Articles of Confederation, Congress “had nominally powers, powers on paper, which it could not use.”<sup>299</sup> He recounted, for example, that “[t]he power of making peace and war is

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295. 10 *id.* at 1376.

296. 8 *id.* at 47.

297. 10 *id.* at 1627.

298. 10 *id.* at 1348.

299. 9 *id.* at 985.

expressly delegated to Congress; yet the power of granting passports, though within that of making peace and war, was considered by Virginia as belonging to herself.”<sup>300</sup> To strengthen the national government’s foreign affairs powers, Randolph explained, *Congress’s* powers had to be enhanced: “Without adequate powers vested in Congress,” he argued, “America cannot be respectable in the eyes of other nations. Congress, Sir, ought to be fully vested with the power to support the Union — protect the interest of the United States,” including the authority to “defend them from external invasions and insults.”<sup>301</sup> If such an approach would have amounted to a revolution in settled understandings equating foreign affairs power with the executive, Randolph, no more than other Virginians, seems to have discerned it.

*Pennsylvania.* Virginia’s unparalleled foreign affairs discussion earns it pride of place, but the Constitution’s first significant test and resulting debates occurred in Pennsylvania. Unlike Delaware, the first convention to ratify, Pennsylvania boasted a substantial and vigorous Anti-Federalist opposition that ensured thorough consideration. With the exception of James Wilson, Pennsylvania’s delegates did not rival Virginia’s in terms of sophistication or depth of knowledge, but the leaders included able spokesmen, including Thomas McKean among the Constitution’s defenders, and William Findley and John Smilie among the adversaries.<sup>302</sup> The fact that the Constitution had been framed in Pennsylvania gave the state’s role in the ratification process particular symbolic importance.

Unfortunately, poor and even politicized recording undermines the usefulness of the resulting exchanges. With the significant exception of speeches by McKean and Wilson, the account of proceedings within the Convention are terse and only partially enhanced by outside articles and commentaries. Moreover, the scope of the President’s proposed powers under the Constitution was not a significant component of the debate in Pennsylvania. The debate focused instead on the lack of a bill of rights and on the scope of Congress’s and the Senate’s proposed powers.

Despite these limitations, the Pennsylvania debates serve to further undermine the Vesting Clause Thesis. In particular, when the President’s powers were discussed in Pennsylvania, both the Federalists and the Anti-Federalists appeared to assume that the President was being granted only the powers specified in Article II.

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300. 9 *id.*

301. 9 *id.* at 985-86.

302. See RAKOVE, *supra* note 51, at 116-18; George J. Graham, Jr., *Pennsylvania: Representation and the Meaning of Republicanism*, in RATIFYING THE CONSTITUTION, *supra* note 268, at 52, 52-69.

Moreover, in defending against the charge that the Constitution impermissibly mixed categories of power, the supporters of the Constitution commonly resorted to functionalist rather than essentialist explanations, further confirming that they were not thinking of the Constitution's assignment of powers in the manner that is assumed by the Vesting Clause Thesis.

In a widely circulated defense of the proposed Constitution, published soon after the end of the Federal Convention, Tench Coxe anticipated that there would be objections to the scope of the President's powers. In his first "American Citizen" essay, he carefully contrasted the proposed President with the British monarch, arguing that the President would be much less powerful.<sup>303</sup> For example, he noted that the President "will have no authority to make a treaty without *two-thirds of the Senate*, nor can he appoint ambassadors or other great officers *without their approbation*."<sup>304</sup> Coxe concluded by stating that, "[f]rom such a servant with powers so limited and transitory, there can be no danger."<sup>305</sup> This description, with its focus on limited and defined powers, at least implicitly suggests that the President was not being granted some general residuum of executive power.

The sort of objection anticipated by Coxe was not in fact pressed vigorously by opponents of the Constitution in Pennsylvania. Outside of the convention, Anti-Federalists such as "Philadelphensis" and "An Officer of the Late Continental Army" did charge that the President would have too much power and would be an "elective king." In explaining this charge, the Anti-Federalists referred only to powers specified in the Constitution, such as the commander-in-chief power, pardon power, and veto power.<sup>306</sup> In response, a Federalist essay denied this charge, noting, among other things, that "the new Constitution provides that [the President] shall act 'by and with the advice and consent of the senate' (Article 2, Section 2), and can in no instance act alone, except in the cause of humanity by granting reprieves or pardons."<sup>307</sup> This response, too, seems to envision the President receiving only the powers specified in Article II, a number of which are shared with the Senate.

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303. See Tench Coxe, *An American Citizen I*, INDEP. GAZETTEER, Sept. 26, 1787, reprinted in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 138, 140-41 (Merrill Jensen ed., 1976).

304. 2 *id.* at 141.

305. 2 *id.* at 142.

306. See, e.g., 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 303, at 210, 212; 3 THE COMPLETE ANTI-FEDERALIST 136, 137 (Herbert J. Storing ed., 1981).

307. *Plain Truth: Reply to An Officer of the Late Continental Army*, INDEP. GAZETTEER, Nov. 10, 1787, reprinted in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 303, at 216, 221.

From then on in the Pennsylvania debates, the Anti-Federalist objections concerning the President's powers, although sometimes framed in essentialist terms, were primarily that the President would be too weak, not that he would resemble a monarch. During the Pennsylvania convention, John Smilie contended that the Senate had "an alarming share of the executive" power.<sup>308</sup> Similarly, he stated: "The balance of power is in the Senate. Their share in the executive department will corrupt the legislature, and detracts from the proper power of the President, and will make the President merely a tool to the Senate."<sup>309</sup> And William Findley objected that "[o]nly a part of the executive power is vested in the President. The most influential part is in the Senate, and he only acts as *primus inter pares* of the Senate; only he has the sole right of nomination."<sup>310</sup> As James Wilson subsequently observed in describing the Anti-Federalist position in Pennsylvania, "[t]he objection against the powers of the President is not that they are too many or too great, but to state it in the gentleman's own language [referring to John Smilie's comments], they are so trifling that the President is no more than the *tool* of the Senate."<sup>311</sup>

In responding to this criticism, defenders of the Constitution did not suggest that the President would have powers not specified in Article II, and they — unlike the critics — did not typically resort to essentialist labels. Rather, they defended the Constitution's assignment of powers in functional terms. In defending the Senate's role in the treaty process, for example, Thomas McKean stated: "Is it an objection that the President is bound to consult the Senate? This is contending for his monarchy. But he clearly is responsible to the people."<sup>312</sup> Similarly, James Wilson argued that, even though treaties "are to have the force of laws," it was proper to assign the treaty power to the Senate and President rather than to Congress because "sometimes secrecy may be necessary [during negotiations]" and because Congress would not be able to be in session during a "long series of negotiation."<sup>313</sup> Wilson also famously defended the assignment of the declare war power to Congress on the ground that more numerous bodies would be slower to go to war than individuals.<sup>314</sup>

The Federalists, in other words, acknowledged the President's limited powers and defended the limitations on functional grounds.

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308. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 303, at 466.

309. 2 *id.* at 508.

310. 2 *id.* at 512.

311. 2 *id.* at 566.

312. 2 *id.* at 544.

313. 2 *id.* at 562.

314. See 2 *id.* at 583.

There are a couple of statements by Wilson that are slight, but only slight, exceptions to this pattern. In denying that the President would be the tool of the Senate, Wilson observed that he could “see that [the President] may do a great many things independent of the Senate; and with respect to the executive powers of government in which the Senate participate, they can do nothing without him.”<sup>315</sup> The “great many things” referred to by Wilson presumably would have included the President’s powers as Commander in Chief, his role in receiving ambassadors, and his Take Care Clause responsibilities in executing federal law; Wilson need not be read here as referring to unspecified powers. Wilson further stated that the President “holds the helm, and the vessel can proceed in neither one direction nor another, without his concurrence.”<sup>316</sup> The reference to the President’s “concurrence” presumably was a reference to the President’s veto power and the requirement of his agreement to treaties, not a reference to some residuum of unilateral presidential powers.

Although Prakash and Ramsey do not consider the Pennsylvania debates in detail, they do quote comments by John Smilie and others complaining about the Senate’s role in the treaty process, an activity that the complainants described as “executive” in nature.<sup>317</sup> Statements like these, argue Prakash and Ramsey, show that the participants in the Pennsylvania debates had a conception of executive power, something that Prakash and Ramsey assert “[i]n a roundabout way . . . confirms the conventional view that the President enjoyed a residual executive power over foreign affairs.”<sup>318</sup>

That some of the participants in these debates referred to executive power in the abstract does not in fact show — in either a straightforward or roundabout way — that they believed that the Constitution was granting the President a residuum of unspecified foreign affairs powers. There is no evidence, for example, that the participants who made these statements believed that there were executive powers, let alone foreign affairs powers, that had not already been specified in the Constitution. Nor do these abstract references, by critics of the Constitution, demonstrate that there was a consensus about what was properly encompassed within the category of executive power. Moreover, as noted above, these references were in the context of complaints that the Constitution’s grants of power to the President were too limited, and that the President would be the tool of the Senate. Neither the complainants nor the defenders of the proposed Constitution suggested that the President would have

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315. 2 *id.* at 566.

316. 2 *id.*

317. See Prakash & Ramsey, *supra* note 14, at 291.

318. *Id.* at 290.

powers unspecified in Article II, even though such residual power might have alleviated the concerns about the weakness of the President.

*Massachusetts.* Although comprising an extensive set of materials, the Massachusetts ratification debates, like the Pennsylvania debates, were of relatively low quality, especially when compared with those of Virginia.<sup>319</sup> Many of the state's most able leaders were effectively missing in action: John Adams was in Europe; Samuel Adams had to cope with the death of his son shortly after the start of the convention; and John Hancock was in poor health and straddled the fence until the eleventh hour.<sup>320</sup> In addition, prominent in the debates were Anti-Federalists from the West who did not compare to the Southern gentry with respect to learned political analysis.<sup>321</sup> Relatedly, the specter of Shays's Rebellion still hung over the state, and led to a preoccupation with internal affairs.<sup>322</sup> Finally, the debates in Massachusetts, both within and outside the state convention, focused primarily on the scope of Congress's, rather than the President's, powers.<sup>323</sup>

The debates over presidential power that did take place in Massachusetts all concerned the powers listed in Article II. Thus, for example, "Vox Populi," in arguing that the proposed Constitution would deprive Massachusetts of its sovereignty (and thereby conflict with the oath that Massachusetts's state officials were required to take), referred to the President's treaty, appointment, pardon, and commander-in-chief powers — all powers listed in Article II.<sup>324</sup> Similarly, the objections that were raised with respect to presidential power in the brief discussion of Article II during the convention concerned the treaty and pardon powers.<sup>325</sup> Here and elsewhere, the participants in the Massachusetts debates appeared to assume that the

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319. The Massachusetts debates take up volumes four through seven of *The Documentary History of the Ratification of the Constitution*. See 4-7 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (John P. Kaminski & Gaspare J. Saladino eds., 1997-2001).

320. See RAKOVE, *supra* note 51, at 119-20; Michael A. Gillespie, *Massachusetts: Creating Consensus*, in RATIFYING THE CONSTITUTION, *supra* note 268, at 138, 138-67.

321. See 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 319, at 1108-09; RAKOVE, *supra* note 51, at 119.

322. See 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 319, at xxxviii-xl.

323. The Massachusetts convention spent over two weeks debating Article I, but only three days discussing Articles II and III. See 6 *id.* at 1110-11, 1116.

324. See Vox Populi, *To the PEOPLE of MASSACHUSETTS*, MASS. GAZETTE, Nov. 23, 1787, reprinted in 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 319, at 309, 311.

325. See 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 319, at 1362.



President was being granted only the powers listed in Article II. “Cornelius,” for example, after reviewing the specific grants of power in Articles I, II, and III, stated that the President is “vested with the powers prescribed in the Constitution.”<sup>326</sup>

Moreover, the defenders of the Constitution in Massachusetts emphasized the limited nature of the grants of power in Article II, again suggesting that the President was receiving only the powers listed. “Cassius,” for example, contended that “no more than necessary powers are vested in the executive of the United States by the new constitution,” and that, in Article II, Section 3, “[v]ery little more power is granted to the [P]resident of the United States . . . than what is vested in the governours of the different states.”<sup>327</sup> Similarly, Governor James Bowdoin stated during the convention debates that “[t]he executive powers of the President[] are very similar to those of the several States, except in those points, which relate more particularly to the union; and respect ambassadours, publick ministers, and consuls.”<sup>328</sup> In what may be the only reference to the Article II Vesting Clause in the Massachusetts debates, Cassius observed as follows: “Section one, of article second, provides, that the executive power shall be vested in a President of the United States. The necessity of such a provision must appear reasonable to any one; any further remarks, therefore, on this head, will be needless.”<sup>329</sup> Here, Cassius almost certainly was treating the Vesting Clause as identifying the *recipient* of the Article II powers, not as conveying a package of unspecified powers.<sup>330</sup>

Although Massachusetts did feature some essentialist rhetoric, such statements were few, in passing, and served more as labels than as justifications for the allocation of given powers. For example, Elbridge Gerry, who had served as a delegate to the Federal Convention and had declined to sign the Constitution, objected that in the Constitution “the executive is blended with & will have an undue

326. 4 *id.* at 416; *see also* 6 *id.* at 1436 (documenting a statement by William Cushing, in an undelivered speech, that “the powers of ye president & Senate are Specified”).

327. Cassius, *To the Inhabitants of this State*, MASS. GAZETTE, Dec. 21, 1787, *reprinted in* 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 319, at 500, 500-01.

328. 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 319, at 1392.

329. Cassius, *To the Inhabitants of this State*, MASS. GAZETTE, Dec. 18, 1787, *reprinted in* 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 319, at 479, 482.

330. *See also* 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 319, at 1363 (recording the statement by Nathaniel Gorham that Article II, Section 1 “fixes the mode of appointment”).

influence on the legislature.”<sup>331</sup> Similarly, John DeWitt observed that, “The Legislative is divided between the People, who are the Democratic[,] and the Senate, who are the Aristocratical part, and the Executive between the same Senate and the President who represents the Monarchical branch.”<sup>332</sup> A further essentialist comment came from Bowdoin, who defended the Senate by noting that it resembled the upper house in most states in “having not only legislative, but executive powers.”<sup>333</sup> Given that the upper houses of the states did not have treaty-making authority, Bowdoin appears to have meant simply that the Senate, as he immediately went on to explain, would act as “an advising body” to the President.<sup>334</sup>

One of the few, if only, statements equating the executive with any aspect of foreign affairs came from Daniel Taylor, who remarked that, “When the [S]enate act as legislators they are countroulable at all times by the [House of R]epresentatives; and in their executive capacity, in making treaties and conducting negotiations, the consent of two thirds is necessary.”<sup>335</sup> Importantly, the reference here is to a foreign affairs power specifically listed in the Constitution (treaty-making), and there is no suggestion of unspecified foreign affairs powers. Moreover, there is no suggestion here or anywhere else in the Massachusetts debates that foreign affairs powers inherently had to be assigned to the executive branch. In fact, a few commentators pointed to the other extreme to argue that foreign affairs authority most naturally belonged to the legislative branch. According to “Agrippa,” for example, “the intercourse between us and foreign nations, properly forms the department of Congress,” including not just the authority to regulate trade, but also “the right of war and peace.”<sup>336</sup> These stray statements no more establish legislative foreign affairs essentialism than their counterparts prove the executive variety. That, however, is exactly our point.

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331. 4 *id.* at 98. In response to this objection, the other two Massachusetts delegates to the Federal Convention, Rufus King and Nathaniel Gorham, argued that “[t]he same objection might be made [against] the constitution of this State . . . but as experience has not proved that our Executive has an undue influence over the Legislature — we cannot think the objection well founded.” 4 *id.* at 188.

332. John De Witt, *To the Free Citizens of the Commonwealth of Massachusetts*, AM. HERALD, Nov. 5, 1787, reprinted in 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 319, at 194, 196.

333. 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 319, at 1391.

334. 6 *id.*

335. 6 *id.* at 1326.

336. Agrippa, *To the Massachusetts Convention*, MASS. GAZETTE, Jan. 15, 1788, reprinted in 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 319, at 720, 724.

*New York.* Although New York held its convention debates relatively late and was the eleventh state to ratify the Constitution, its debates were important for several reasons. New York City had been serving as the national capital, and the state was geographically central to the new nation. The state also had growing commercial importance, and was the source of the *Federalist Papers*. Its debates also featured prominent figures such as Alexander Hamilton and John Jay.

Outside of the convention, Anti-Federalists such as “Cato” pressed the usual charge that the President would be an “elective king,” and they cited to the express grants of authority in the Constitution, not to any unspecified residuum, in support of this charge.<sup>337</sup> There was, however, little discussion of the presidency in the convention debates. By the time the convention had turned to Article II, the delegates became aware that the Constitution had received its ninth ratification (by New Hampshire) and therefore was approved. The scope and nature of the subsequent discussions were likely affected by this news.<sup>338</sup>

Much of the initial debates focused on the process provisions of Article I, such as the provisions relating to the apportionment of representatives and the frequency of congressional elections. There was also debate over whether the Senate would be too powerful. Gilbert Livingston complained, for example, that “too much is put in their hands” and that there was “little or no check” on the Senate.<sup>339</sup> In addition, there was some debate over Congress’s Necessary and Proper power,<sup>340</sup> and there was substantial discussion of Congress’s power to tax.<sup>341</sup> But, as the records themselves state, there was “little or no debate” about Article II of the Constitution.<sup>342</sup>

Not surprisingly, therefore, the statements in the New York debates relating to foreign affairs primarily concerned the Senate. These statements suggest an understanding that the Senate would have substantial foreign relations power, perhaps equal to or greater than the President’s foreign relations power. For example, Robert Livingston, in defending the Constitution’s assignment of a long term of office for senators, observed that the Senate is “to form treaties

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337. See Cato, *To the Citizens of the State of New York*, N.Y. J., Nov. 8, 1787, reprinted in 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 195, 197-98 (John P. Kaminski et al. eds., 2003).

338. See Cecil L. Eubanks, *New York: Federalism and the Political Economy of Union*, in RATIFYING THE CONSTITUTION, *supra* note 268, at 300, 300-40.

339. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 279 (Jonathan Elliot ed., 1836) [hereinafter THE DEBATES IN THE SEVERAL STATE CONVENTIONS]; see also 2 *id.* at 278 (statement by Gilbert Livingston that the Senate was “a dangerous body”).

340. 2 *id.* at 314-17.

341. See, e.g., 2 *id.* at 320-22.

342. 2 *id.* at 379.

with foreign nations,” and that this “requires a comprehensive knowledge of foreign politics, and an extensive acquaintance with characters, whom, in this capacity, they have to negotiate with.”<sup>343</sup> Similarly, Alexander Hamilton, in arguing against a proposal that would give state legislatures the power to recall senators and limit the ability of senators to be reelected, stated that the Senate, “together with the [P]resident, are to manage all our concerns with foreign nations.”<sup>344</sup> Robert Livingston went on to state, even more broadly, that the Senate is “to transact all foreign business.”<sup>345</sup>

These statements about the Senate are difficult to reconcile with the Vesting Clause Thesis, which hypothesizes that the President will manage foreign affairs by virtue of having the “executive Power.” Prakash and Ramsey’s only answer to these statements is to assert that the speakers were mistaken.<sup>346</sup> It is noteworthy, however, that these statements went uncontested in the recorded debates. By contrast, when John Lansing suggested that the Senate also had the power to declare war,<sup>347</sup> Robert Livingston quickly corrected him, noting that “the power could not be exercised except by the whole legislature.”<sup>348</sup>

When the New York convention proceeded to have its limited discussion of Article II, Melancton Smith and Gilbert Livingston made several unsuccessful motions to amend the Constitution to limit the power of the presidency. Smith moved to change the President’s term to a single term of seven years.<sup>349</sup> Livingston moved that the President “should never command the army, militia, or navy of the United States, in person, without the consent of the Congress; and that he should not have the power to grant pardons for treason, without the consent of the [C]ongress.”<sup>350</sup> And Smith moved to have the convention express the view that Congress could appoint a council of advice to assist the President.<sup>351</sup> Given their concerns about the

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343. 2 *id.* at 281.

344. 2 *id.* at 294.

345. 2 *id.* at 308.

346. See Prakash & Ramsey, *supra* note 14, at 289 & nn.253-54.

347. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 339, at 285.

348. 2 *id.* Other comments in the debates appear to confirm the understanding that Congress would have power over war. For example, in arguing that there would be a sufficient number of representatives in Congress, John Jay noted that the critics of the apportionment provisions did not think a larger number of representatives was necessary for “the important powers of war and peace,” even though these powers “reach[] objects the most dear to the people; and every man is concerned in them.” 2 *id.* at 274. And both Hamilton and Jay argued that the new Congress would be less susceptible to corruption than the Continental Congress in making decisions concerning war and peace. See 2 *id.* at 254, 275.

349. 2 *id.* at 380.

350. 2 *id.*

351. 2 *id.* at 381.

presidency, it seems likely that Smith and Livingston would have complained about unspecified presidential powers, if they had believed that such powers were encompassed by the Article II Vesting Clause. But neither they nor anyone else in the New York ratifying convention mentioned that possibility.

*North Carolina.* The views expressed in the initial North Carolina convention might be entitled to less weight due to the fact that the convention voted against the Constitution. Nevertheless, the statements made during the debates shed further light on how the supporters and opponents of the Constitution understood Article II. Almost all of the relevant comments in the North Carolina debates suggest that the President's powers were specified in Article II. In addition, the proponents of the Constitution typically relied on functional rather than essentialist arguments to explain the Constitution's assignment of powers. Although there are a few statements in the debates that suggest essentialist thinking with respect to the assignment of the treaty power, these statements are specific to that power and, in any event, were contested and contradictory.<sup>352</sup>

As elsewhere, the convention discussed the Constitution section by section. Early in the debate, in discussing the first section of Article I, William Lenoir objected to giving the President the treaty power because, in his view, that power is legislative in nature and the Constitution says in Article I that the legislative power is being vested in Congress.<sup>353</sup> Richard Spaight, Archibald Maclaine, and James Iredell denied that the power was legislative. In this regard, Maclaine argued that, unlike legislation, treaties act upon states rather than individuals, such that the President acts "in his executive capacity" when making treaties.<sup>354</sup> Iredell explained, somewhat differently, that there is nothing inherently objectionable about the President making law, since every exercise of power operates as the law of the land, and he gave the example of a pardon.<sup>355</sup> Lenoir remained unpersuaded by these responses.

Prakash and Ramsey rely heavily on this exchange,<sup>356</sup> but it is not clear that it helps them. First, Lenoir was relying on the statement in the Constitution that the legislative power was being assigned to

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352. For a general discussion of the unusual course of ratification in North Carolina, see Michael Lienesch, *North Carolina: Preserving Rights*, in *RATIFYING THE CONSTITUTION*, *supra* note 268, at 343, 343-67.

353. See 4 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS*, *supra* note 339, at 56.

354. See 4 *id.*

355. 4 *id.* at 57.

356. See Prakash & Ramsey, *supra* note 14, at 292 n.262, 294-95.

Congress, not on some pre-constitutional baseline.<sup>357</sup> Second, to the extent that the exchange shows essentialist thinking about what is legislative and what is executive, it does so only with respect to a power specifically listed in Article II, not some unspecified power or foreign affairs powers more generally. No one in this exchange said, for example, that foreign affairs powers must be vested with the executive. Third, even for the specified power that was discussed, the exchange demonstrates that there was substantial debate and uncertainty concerning the proper categorization.

When the North Carolina convention reached Article II, and the first section of that Article was read, there apparently was silence. William Davie, a supporter of the Constitution, expressed “astonishment at the precipitancy with which we go through this business.”<sup>358</sup> He thought it “highly improper to pass over in silence any part of the [C]onstitution which has been loudly objected to.”<sup>359</sup> Although the first section of Article II met his “entire approbation,” he knew that some people objected to having a separate Executive Branch and to the election provisions in this section. Importantly, Davie made no mention of any objection concerning the assignment of substantive power, suggesting that neither he nor the opponents of the Constitution viewed the Clause as conferring substantive power.

When the convention proceeded to discuss the second section of Article II, Iredell noted that “[i]t conveys very important powers, and ought not to be passed by.”<sup>360</sup> This was the first time in the debate that any portion of Article II was referred to as conveying substantive power. Furthermore, Iredell’s statement suggests that this section was not viewed as merely illustrative of a more general grant of power in the Vesting Clause. Iredell confirmed this understanding, observing: “I believe that most of the governors of the different states have powers similar to those of the [P]resident.”<sup>361</sup>

Iredell then proceeded to defend the commander-in-chief power. He noted that “[i]n almost every country, the executive has the command of the military forces.”<sup>362</sup> He then argued that this is a proper assignment, based on functional reasons, such as the need for secrecy and dispatch. He further argued that the President’s power is

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357. Lenoir’s reading of the Article I Vesting Clause also contradicts Prakash and Ramsey’s textual argument about the distinction between the Article I and Article II vesting clauses. Lenoir appeared to read Article I’s clause as signifying that all legislative power had to be vested in Congress, a construction at odds with the “herein granted” language as construed by proponents of the Vesting Clause Thesis. *See supra* Part I.

358. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 339, at 119.

359. 4 *id.*

360. 4 *id.* at 123.

361. 4 *id.*

362. 4 *id.*

properly guarded by Congress's power to declare war.<sup>363</sup> Again, there is no hint of executive power essentialism.

Essentialism did creep in, however, in the convention's discussion of the treaty power. Samuel Spencer, an opponent of the Constitution, objected to giving the Senate a role in the treaty process, because "by this clause they possess the chief of the executive power."<sup>364</sup> Spencer thus obviously thought that the treaty power was something that should properly be vested with the Executive Branch, and his statement could be read as reflecting essentialist thinking with respect to this point.<sup>365</sup> In response, Davie agreed that the treaty power "has, in all countries and governments been placed in the executive departments."<sup>366</sup> This assignment, explained Davie, had been based on functional considerations: the need for "secrecy, design, and dispatch, which are always necessary in negotiations between nations," and the danger of "violence, animosity, and heat of parties, which too often infect numerous bodies."<sup>367</sup> Davie further explained that the Constitution included the Senate in the treaty process as a compromise to take account of the interests of the small states.<sup>368</sup> In addition, Davie contended that Montesquieu had been misconstrued as arguing against any blending of powers; in fact, explained Davie, Montesquieu did not advocate "[a]n absolute and complete separation."<sup>369</sup> Iredell further defended the inclusion of state interests, through the Senate, in the treaty process.<sup>370</sup>

At most, this exchange shows that the *treaty power* was considered by the speakers to be a traditionally executive power, and that there was some debate over whether this was justified by essentialist reasoning or functional considerations. Interestingly, an earlier exchange in the convention (between Lenoir and others, recounted above) was based on the opposite claim that the treaty power was legislative rather than executive, showing the uncertain nature of these categories. In any event, Spencer's essentialist objection, like North Carolina's initial decision not to ratify the Constitution, did not prevail. Rather, the Constitution deviated from strict categorization even with respect to what Spencer referred to as the "chief" of the executive power, which would seem to undercut the claim that the

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363. 4 *id.* at 124.

364. 4 *id.* at 131.

365. See Prakash & Ramsey, *supra* note 14, at 291 n.257.

366. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 339, at 134.

367. 4 *id.*

368. 4 *id.* at 135.

369. 4 *id.*

370. 4 *id.* at 139.

Vesting Clause incorporated some sort of well-understood package of executive power.<sup>371</sup>

In the convention's discussion of the impeachment check on the President, Iredell stated that the President "is to regulate all intercourse with foreign powers, and it is his duty to impart to the [S]enate every material intelligence he receives."<sup>372</sup> Prakash and Ramsey rely on this statement as implying a dominant role for the President in foreign relations.<sup>373</sup> On its face, however, this statement appears merely to be referring to the President's expected role as a medium for communications with other nations. Moreover, Iredell made no effort to tie his statement to the Vesting Clause, and it could just as well have been based on implications from the President's specified powers (such as the treaty power and the powers to appoint and receive ambassadors). This narrower construction would be consistent with a more general statement Iredell made later in the convention, that "[t]he powers of the government are particularly enumerated and defined: they can claim no others but such as are so enumerated."<sup>374</sup>

Near the end of the convention, there were some general speeches for and against the Constitution. In describing some of the objections to the Constitution, Lenoir complained about various presidential powers, including the pardon power, the appointment power, and the veto power.<sup>375</sup> He made no mention of unspecified presidential powers, although one would have expected Lenoir and other constitutional opponents to have objected to that idea if they thought it was encompassed within the Vesting Clause. Again, the silence is striking.

*South Carolina.* The debates in South Carolina similarly reflected the view that the President would have only the powers specified in Article II.<sup>376</sup> For example, Charles Pinckney, in commenting on the proposed executive branch, noted that "[t]hough many objections had been made to this part of the system, he was always at a loss to

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371. It is not clear that Spencer's objection prevailed even at the North Carolina convention. None of North Carolina's proposed amendments, even the ones relating to the treaty power, addressed his objection concerning the Senate's role in the treaty process. See 4 *id.* at 240-43.

372. 4 *id.* at 140.

373. See Prakash & Ramsey, *supra* note 14, at 288. Prakash and Ramsey also rely on an earlier hypothetical by Iredell about the President sending a spy overseas as suggesting executive control over foreign affairs. See 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 339, at 128; Prakash & Ramsey, *supra* note 14, at 288.

374. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 339, at 219.

375. 4 *id.* at 205-06.

376. For background on ratification in South Carolina, see Robert M. Weir, *South Carolina: Slavery and the Structure of the Union*, in RATIFYING THE CONSTITUTION, *supra* note 268, at 201, 201-34.



account for them.”<sup>377</sup> He explained that there was “nothing dangerous in its powers,” something “easily discerned *from reviewing them*.”<sup>378</sup> Pinckney then proceeded to discuss only powers enumerated in Article II. Given the Constitution’s assignments of power, Pinckney explained, the only danger would come from a *combination* of the President and Senate acting together. These comments suggest that the Executive Branch was being granted only the powers enumerated in Article II.

The other Pinckney — Charles Cotesworth Pinckney — explained that some people had argued for vesting the treaty power with Congress. But the need for secrecy and dispatch, he explained, weighed against vesting it there.<sup>379</sup> He also argued that, even though it may have been proper for the British king to have the treaty power, there were potential dangers with vesting the treaty power solely with the President.<sup>380</sup> His discussion of the proper placement of the treaty power is entirely functional rather than essentialist, and, like other participants in state ratification debates, Pinckney rejected the British model of executive power. At one point, Pinckney stated more generally that, for functional reasons, foreign relations authority is properly shared between the Senate and President.<sup>381</sup>

Critics of the Constitution in South Carolina also rejected the British model. Rawlins Lowndes, for example, repeatedly asserted in the debates that the President’s powers would be too great — resembling a monarchy.<sup>382</sup> To the extent this objection was explained, or answered, the reference always was to powers enumerated in the Constitution, such as the treaty power.<sup>383</sup>

*Conclusion.* The state ratification debates confirm the lack of Founding-era support for the Vesting Clause Thesis. In the thousands of pages recording these debates, the argument that the Vesting

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377. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 339, at 253.

378. 4 *id.* (emphasis added).

379. 4 *id.* at 258.

380. 4 *id.* at 258-59.

381. 4 *id.* at 273. Prakash and Ramsey simply assert that Pinckney was mistaken on this point. See Prakash & Ramsey, *supra* note 14, at 289 n.253.

382. See 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 339, at 260, 278, 298.

383. In responding to Lowndes’s concern about vesting the treaty power with the President, John Pringle argued: “The making of treaties is justly a part of their prerogative — it properly belongs to the executive part of government, because [treaties] must be conducted with dispatch and secrecy; not to be expected in larger assemblies.” 4 *id.* at 263. Prakash and Ramsey rely on the first part of this statement as confirming an understanding that the treaty power was executive in nature, see Prakash & Ramsey, *supra* note 14, at 293, but they ignore the fact that Pringle’s explanation is entirely functional rather than essentialist. It is telling that Prakash and Ramsey stop their quotation of Pringle right before the word “because” and simply summarize the functional language.

Clause grants the President a general foreign affairs power simply does not appear. Rather, the arguments for and against executive authority consistently focus on the specific powers listed in Article II. Moreover, many statements in these debates expressly or impliedly assume that these specific powers are the only ones being granted to the President. Furthermore, the Constitution's supporters repeatedly made clear that, in establishing the Executive, the Constitution had rejected the model offered by the British monarch. Instead of relying on essentialist categories, the supporters, and to a significant extent the Constitution's opponents as well, emphasized the functional reasons for granting, withholding, or dividing discrete powers among the President, Senate, and Congress. Other than as rhetorical embellishment, essentialist assertions did little or no work in any of these debates.

#### IV. THE WASHINGTON ADMINISTRATION

##### A. *The Senate's Role in Treaty-making*

We begin our discussion of the Washington Administration somewhat out of chronological order. The foreign affairs law development that we discuss here — a change in the Senate's role in the treaty process — was not the earliest foreign affairs law development, but it was one of the most significant. It also provides a vivid illustration of discontinuity, since it is likely that the change in the Senate's role was inconsistent with the Founders' original understanding of the Constitution. Furthermore, it offers a cautionary lesson against too easily drawing inferences about the understanding of the Founders from postratification practices.

In a nutshell, the Founders appeared to assume that the Senate's power of "advice and consent" in the treaty process entailed not only a veto power but also some sort of role in the formulation and negotiation of treaties. Although the Washington Administration initially shared this understanding, the Administration soon deviated from it, often formulating and negotiating treaties without Senate input and simply presenting the treaties to the Senate for an affirmative or negative vote. This deviation from original understanding became common practice and remains the practice today.<sup>384</sup>

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384. For detailed descriptions of this development, see Bestor, *supra* note 227, and Rakove, *supra* note 65. See also LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION ch. 2 (1988) (discussing the original understanding on this issue). Prakash and Ramsey's otherwise quite detailed account of the Washington Administration makes no mention of this development. They do correctly observe in a footnote, however, that "some envisioned that the Senate would be heavily involved with foreign negotiations." Prakash & Ramsey, *supra* note 14, at 290 n.255.

### 1. *Understanding of the Founders*

The text of the Article II Treaty Clause, in referring to both “advice” and “consent,” appears to contemplate more than just a veto role for the Senate, since such a role presumably would be encompassed by the word “consent.” Research concerning the historic meaning of the phrase “advice and consent” provides further support for this construction. As Howard Sklamberg has noted, the phrase had been used in English statutes to signify Parliament’s dominant role vis-à-vis the King in the legislative process.<sup>385</sup> It also had been used in state constitutions to signify a formal advice role for the state legislatures, typically in situations in which the legislatures dominated the executive.<sup>386</sup> Thus, as Sklamberg explains:

[A]t the time of the Constitutional Convention, the term “advice and consent” denoted a Parliament that exercised nearly plenary lawmaking power and state councils that played a substantial role in the exercise of executive power. This historical context suggests that the Constitution assigns the Senate some active function in treatymaking and does not limit it to the role of a ratifier.<sup>387</sup>

The records of the Federal Convention support this conclusion. Until late in the Convention, the proposed Constitution would have given the *entire* treaty power to the Senate. Thus, for example, the draft of the Constitution issued by the Committee of Detail on August 6 provided that “The Senate of the United States shall have power to make treaties” and made no mention of treaties in its list of the President’s powers.<sup>388</sup> The Committee of Detail’s draft also would have given the Senate the sole power of appointing ambassadors and judges.<sup>389</sup> Although Hamilton had proposed in his plan on June 18 that the “Governor” was “to have with the advice and approbation of the Senate the power of making all treaties,”<sup>390</sup> his plan was not discussed. Furthermore, even his plan would have given the Senate “the power of advising and approving all Treaties,” thus extending the Senate’s role beyond mere approval.<sup>391</sup>

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385. See Howard R. Sklamberg, *The Meaning of “Advice and Consent”: The Senate’s Constitutional Role in Treatymaking*, 18 MICH. J. INT’L L. 445, 448 (1997).

386. *Id.* at 449; see also *supra* Part II.C.

387. Sklamberg, *supra* note 385, at 450.

388. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 183, 185.

389. See 2 *id.* at 183. As noted above in Part III.A, the Committee of Detail’s draft assigned these powers to the Senate even though the draft also stated that the “Executive Power of the United States shall be vested” in the President. See 2 *id.* at 185. Thus, the Committee of Detail apparently did not understand the Vesting Clause as encompassing the powers of making treaties, appointing ambassadors, or appointing judges.

390. 1 *id.* at 292.

391. 1 *id.*

When the proposed Treaty Clause was considered in late August, concerns were expressed about giving the treaty power exclusively to the Senate. By this point, it had been agreed at the Convention (in what has been called the “Great Compromise”) that the states would have equal representation in the Senate. Madison thus “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.”<sup>392</sup> Other delegates expressed the view that there should be a check against abuses of the treaty power. Gouverneur Morris proposed an amendment whereby treaties would not be binding on the United States until ratified by Congress.<sup>393</sup> James Wilson expressed concern that, “without the amendment, the Senate alone can make a Treaty, requiring all the Rice of S. Carolina to be sent to some one particular port.”<sup>394</sup> Along somewhat similar lines, George Mason, in commenting in an earlier discussion about senatorial powers, had observed that the Senate “could already sell the whole Country by means of Treaties.”<sup>395</sup> Madison concluded the discussion by “hint[ing] for consideration, whether a distinction might not be made between different sorts of Treaties — Allowing the President & Senate to make Treaties eventual and of Alliance for limited terms — and requiring the concurrence of the whole Legislature in other Treaties.”<sup>396</sup>

In light of these objections, the Treaty Clause, along with certain other provisions, was eventually sent to what has come to be called the Committee of Postponed Parts. There is no record of the Committee’s deliberations. But in its report on September 4, the Committee proposed that the President “by and with the advice and Consent of the Senate, shall have power to make Treaties.”<sup>397</sup> It also proposed that the President “by and with the advice and consent of the Senate”

392. 2 *id.* at 392. As Arthur Bestor notes, in suggesting that the President should be an “agent” of the Senate, Madison may have had in mind the agency relationship that existed for treaties between the Continental Congress and the Secretary for Foreign Affairs, pursuant to which Congress exercised ultimate control over the treaty process. *See* Bestor, *supra* note 227, at 109.

393. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 392.

394. 2 *id.* at 393.

395. 2 *id.* at 297. At this point, John Mercer expressed the view that “the Senate ought not to have the power of treaties” because “[t]his power belonged to the Executive department.” 2 *id.* As others have noted, it is unlikely that Mercer’s views were representative of the views of the other delegates. *See* Bestor, *supra* note 227, at 103-06; Rakove, *supra* note 65, at 240 n.12. Moreover, Mercer also believed that treaties “would not be final so as to alter the laws of the land, till ratified by legislative authority,” a proposition expressly rejected by the Convention. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 297; *see also supra* text accompanying notes 234-238.

396. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 394.

397. 2 *id.* at 498.

would have the power of appointing ambassadors and judges.<sup>398</sup> Obviously, there had been a shift at this point towards sharing some of the Senate's powers with the executive.<sup>399</sup>

The modified Treaty Clause was considered on September 7. As noted, James Wilson at this point moved to include the House of Representatives in the treaty process, observing that “[a]s treaties . . . are to have the operation of laws, they ought to have the sanction of laws also.”<sup>400</sup> Sherman responded that the “necessity of secrecy in the case of treaties forbade a reference of them to the whole Legislature.”<sup>401</sup> Wilson's motion was subsequently defeated, and the first portion of the Treaty Clause (mentioning the role of the President and Senate) was approved.<sup>402</sup> As Rakove has explained, it is difficult to understand the concerns of secrecy expressed in this discussion unless the Senate was envisioned as having a role beyond merely approving or disapproving finished treaties.<sup>403</sup> Furthermore, as Arthur Bestor has argued, there probably would have been more concerns raised about assigning the treaty power to the President if it were believed that the Senate's role were limited in this way.<sup>404</sup>

The *Federalist Papers* that discuss the treaty power similarly suggest that the Senate's role would be broader than voting on finished treaties. In *Federalist No. 64*, Jay emphasized the need for secrecy and dispatch in the negotiation of treaties, and noted that “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.”<sup>405</sup> Jay went on to explain that the “preparatory and auxiliary measures” in treaty negotiations often require the most secrecy and that “should any

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398. 2 *id.*

399. As Rakove explains, this shift appears to have been driven by concerns about the Senate rather than an essentialist view about the powers of the executive. See Rakove, *supra* note 65, at 249.

400. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 538.

401. 2 *id.*

402. 2 *id.*

403. See Rakove, *supra* note 65, at 246-47.

404. See Bestor, *supra* note 227, at 93. After approval of the first part of the treaty clause, there was discussion of the two-thirds senatorial consent requirement. Wilson and King objected to this requirement because, as Wilson stated, it “puts it in the power of a minority to controul the will of a majority.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 540. Madison moved successfully at this point to exempt treaties of peace from the two-thirds requirement. 2 *id.* at 540-41. He also proposed, unsuccessfully, to allow two-thirds of the Senate to make peace treaties without the concurrence of the President. 2 *id.* The exception to the two-thirds requirement for peace treaties was subsequently stricken after additional discussion. 2 *id.* at 547-49. Nothing in these discussions suggests that the Senate's role would be limited to approving or disapproving finished treaties.

405. THE FEDERALIST, *supra* note 2, NO. 64 (John Jay), at 393.

circumstance occur which requires the advice and consent of the Senate, he may at any time convene them.”<sup>406</sup> These statements appear to assume that the President will be consulting with the Senate when negotiating treaties and not simply presenting the Senate with finished treaties that have already been negotiated.

In *Federalist No. 75*, Hamilton argued that the treaty-making power was neither wholly executive nor wholly legislative in nature and thus should be shared between the legislative and executive branches:

The qualities elsewhere detailed as 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.<sup>407</sup>

In arguing against giving the treaty power to the Senate alone, he emphasized “the benefits of the constitutional agency of the President in the conduct of foreign negotiations” and the “additional security which would result from the co-operation of the executive.”<sup>408</sup> In arguing against inclusion of the House of Representatives in the treaty process, Hamilton noted, among other things, the need for secrecy and dispatch and refers to problems associated with “obtain[ing the House’s] sanction in the *progressive stages* of a treaty.”<sup>409</sup> Hamilton’s statements seem to envision that the President will consult with the Senate in negotiating treaties. These statements can also be read to suggest that the President would act as the Senate’s agent in the treaty process, something that Madison had suggested at the Federal Convention.

The evidence from the state ratification conventions is less clear but on the whole is consistent with the foregoing discussion. There are statements in some of the conventions suggesting that the President would have a dominant role in the treaty process. There are also statements, however, suggesting that the Senate’s role would not be limited to mere approval or disapproval of finished treaties. In the South Carolina convention, for example, although Charles Cotesworth Pinckney refers at one point to the Senate’s role in the treaty process as a “power of agreeing or disagreeing to the terms proposed,”<sup>410</sup> he later explains that it is better to have the Senate rather than the House involved in the treaty process because it is functionally better suited for *negotiation*:

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406. *Id.*

407. *Id.* NO. 75 (Alexander Hamilton), at 451.

408. *Id.* at 451-52.

409. *Id.* at 453 (emphasis added).

410. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 339, at 259.

Can secrecy be expected in sixty-five members [of the House of Representatives]? The idea is absurd. Besides, their sessions will probably last only two or three months in the year, therefore, on that account, they would be a very unfit body for negotiation; whereas the [S]enate, from the smallness of its numbers, from the equality of power which each state has in it, from the length of time for which its members are elected, from the long sessions they may have, without any great inconveniency to themselves or constituents, joined with the president, who is the federal head of the United States, form together a body in whom can be best and most safely vested the diplomatic power of the union.<sup>411</sup>

James Wilson made similar statements at the Pennsylvania convention. While remarking that “[t]he Senate can make no treaties” and referring to Senators as “only auxiliaries to the President,”<sup>412</sup> Wilson observed that “the Senate and President possess the power of making [treaties]” and defended the exclusion of the House of Representatives from the treaty process on the ground that “sometimes secrecy may be necessary, and therefore it becomes an argument against committing the knowledge of these transactions to too many persons.”<sup>413</sup> Similarly, as we noted above in Part III.C, Robert Livingston stated in the New York ratifying convention that the Senate is “to form treaties with foreign nations,” and that this “requires a comprehensive knowledge of foreign politics, and an extensive acquaintance with characters, whom, in this capacity, they have to negotiate with.”<sup>414</sup>

In sum, although the precise role envisioned for the Senate in the treaty process is not entirely clear, the Founders appear to have understood that the Senate would have an advice role that went beyond a mere affirmative or negative vote.

## 2. *Practices of the Washington Administration*

Initially, both the Washington Administration and the Senate shared the understanding, discussed above, that the Senate would have a substantial advice role in the treaty process. The first treaties received by the Senate for its consideration — two Indian treaties and a consular convention with France — had been negotiated before the Senate began operating and thus did not squarely present the issue of

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411. 4 *id.* at 272-73.

412. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 303, at 480, 491.

413. 2 *id.* at 562. Wilson also noted that the Senate and the President “are checks upon each other and are so balanced, as to produce security to the people.” 2 *id.* at 563; *see also supra* text accompanying note 313 (describing a statement by Wilson expressing a preference for the Senate over the House in the treaty process because it is more suited to a “long series of negotiation”).

414. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 339, at 281.

the Senate's role in the negotiation process.<sup>415</sup> Nevertheless, in approving the consular convention, the Senate "explicitly gave advice as well as consent, imparting not only its own imprimatur but also an unequivocal suggestion as to how the President should exercise his authority to perform the distinct act of final ratification."<sup>416</sup>

On August 6, 1789, the Senate appointed a committee to confer with the President "on the mode of communication proper to be pursued between him and the Senate, in the formation of Treaties, and making appointments to Offices."<sup>417</sup> Two days later, Washington conveyed his sentiments to the committee, stating that, "[i]n all matters respecting Treaties," oral communications "seem indispensably necessary."<sup>418</sup> In a subsequent meeting with the committee, Washington expressed the view that the Senate acts as the President's council when considering treaties and that therefore the President should determine the time, place, and manner of the consultation.<sup>419</sup> He noted, for example, that "in Treaties of a complicated nature, it may happen that [the President] will send his propositions in writing and consult the Senate in person after time shall have been allowed for consideration."<sup>420</sup> He therefore suggested that:

[T]he Senate should accommodate their rules to the uncertainty of the particular mode and place that may be preferred; providing for the reception of either oral [or] written propositions, and for giving their consent and advice in either the *presence* or *absence* of the President, leaving him free to use the mode and place that may be found most eligible and accordant with other business which may be before him at the time.<sup>421</sup>

In late August, the Senate considered the committee's report of its discussions with the President.<sup>422</sup> After considering the report, the Senate passed a resolution governing the procedures to be followed when meeting with the President.<sup>423</sup> At this point, Washington delivered a message to the Senate announcing his intent of meeting

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415. See CURRIE, *supra* note 28, at 21-23.

416. *Id.* at 22.

417. 2 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, at 24 (Linda Grant De Pauw et al. eds., 1974).

418. Letter from George Washington to the Senate (Aug. 8, 1789), in 30 THE WRITINGS OF GEORGE WASHINGTON 373, 373 (John C. Fitzpatrick ed., 1939).

419. Letter from George Washington to the Senate (Aug. 10, 1789), in 30 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 418, at 377, 377-78.

420. 30 *id.* at 378.

421. 30 *id.* at 378-79.

422. 2 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 417, at 29 n.54.

423. 2 *id.* at 29.



with them “to advise with them on the terms of the Treaty to be negotiated with the Southern Indians.”<sup>424</sup> Washington and his Secretary of War, Henry Knox, came to the Senate chamber the following day and presented the Senate with a report and a list of seven questions (concerning instructions to be given to the commissioners appointed to negotiate the treaty).<sup>425</sup>

Senator Maclay notes in his diary that it was difficult to hear the presentation of the President’s report (which was delivered by Vice-President Adams), due to carriages driving past the Senate chamber.<sup>426</sup> At the request of Senator Robert Morris, the report was read a second time. Adams then immediately asked for the Senate’s advice and consent on the questions. After a pause, Maclay rose and stated that “[t]he business is new to the Senate, it is of importance, it is our duty to inform ourselves as well as possible on the Subject.”<sup>427</sup> As a result, he asked for a “reading of the Treaties and other documents alluded to in the paper now before Us.”<sup>428</sup> According to Maclay’s diary, Washington at this point “wore an aspect of Stern displeasure.”<sup>429</sup> Various documents were then read and discussed. The Senate ultimately decided to postpone a decision on all but one of the questions until the following Monday. Senator Morris also proposed that the papers communicated by the President be given to a five-person committee that would report back to the full Senate. Senator Butler objected, noting that the Senate was “acting as a Council” and that “no Councils ever committed anything.”<sup>430</sup>

Washington apparently was unhappy with the proposal to commit the matter to a committee. According to Maclay, Washington “started up in a Violent fret,” stating that “[t]his defeats every purpose of my coming here.”<sup>431</sup> Although Maclay reports that Washington subsequently calmed down and indicated that he did not object to reconvening on Monday, Maclay also states that Washington left the Senate-chamber “with a discontented Air.”<sup>432</sup> In his memoirs, John Quincy Adams reports that he had heard that “when Washington left

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424. 2 *id.* at 30.

425. 2 *id.* at 31-34; Letter from George Washington to the Senate (Aug. 22, 1789), in 30 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 418, at 385, 385-390.

426. William Maclay, Diary entry (Aug. 22, 1789), in 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, at 128, 128 (Kenneth R. Bowling & Helen E. Veit eds., 1988).

427. 9 *id.*

428. 9 *id.* at 128-29.

429. 9 *id.* at 129.

430. 9 *id.* at 130.

431. 9 *id.*

432. 9 *id.*

the Senate chamber he said he would be damned if he ever went there again.<sup>433</sup> Maclay's otherwise colorful diary does not report such a statement, however, and it may have been apocryphal.<sup>434</sup> The Senate met again with the President on Monday, at which point, according to Maclay, the President was "placid and Serene and manifested a Spirit of Accomodation."<sup>435</sup> After discussion, the Senate proceeded to answer the President's questions.<sup>436</sup> The instructions that Washington subsequently gave to the treaty commissioners conformed to the Senate's answers.<sup>437</sup>

These early events suggest that both the Senate and the President understood that the Senate would consult with the President and give the President advice before treaties were finalized. As Professor Currie notes, both the Senate and President in the encounter over the Southern Indians treaty "plainly interpreted the power to advise and consent to include not merely approval of the finished product but also discussion in advance of the course of action to be pursued."<sup>438</sup> Other early examples confirm this understanding.<sup>439</sup>

The Washington Administration, however, consciously moved away from this understanding. Washington's two meetings with the Senate concerning the Southern Indians treaty were the first and last times he consulted with the Senate in person.<sup>440</sup> To be sure, even after this episode Washington frequently sought the Senate's advice on treaties through written communications.<sup>441</sup> But he did not do so consistently. In connection with four Indian treaties, for example, Washington did not consult with the Senate before the treaties were negotiated.<sup>442</sup> With respect to one of these treaties in 1793,

433. 6 MEMOIRS OF JOHN QUINCY ADAMS 427 (Charles Francis Adams ed., 1875).

434. See EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1984*, at 488 n.116 (5th rev. ed. 1984). *But see* RALSTON HAYDEN, *THE SENATE AND TREATIES, 1789-1817*, at 23 (1920) (stating that it is "very likely" that Washington did make this statement).

435. Maclay, *supra* note 426, at 131-32.

436. *Id.* at 131-32; 2 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1797, *supra* note 417, at 34-36.

437. See George Washington, Instructions to the Commissioners for treating with the Southern Indians, in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS 65, 65-68 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales & Seaton 1832).

438. CURRIE, *supra* note 28, at 24.

439. See *id.* at 24-25.

440. See HAYDEN, *supra* note 434, at 22; CONG. RESEARCH SERV., LIBRARY OF CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 33 (rev. ed. 2001).

441. See SAMUEL B. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 68-70 (2d ed. 1916).

442. See HAYDEN, *supra* note 434, at 37.

Washington asked his cabinet whether he should consult with the Senate, and, for secrecy reasons, they advised him not to do so.<sup>443</sup>

Perhaps most famously, the Washington Administration did not consult with the Senate before starting to negotiate the Jay Treaty with Great Britain in 1794. The Administration informed the Senate in April 1794 that there would be negotiations when it sought Senate approval of Jay's appointment, but it did not submit Jay's treaty instructions to the Senate.<sup>444</sup> There was a motion in the Senate to request that the Administration "inform Senate of the whole business with which the proposed Envoy is to be charged," but the motion was defeated.<sup>445</sup> More than a year later, in June 1795, Washington submitted the completed treaty to the Senate for its approval.<sup>446</sup> The treaty generated substantial controversy in the United States, even after the Senate approved it and Washington signed it.<sup>447</sup> After much debate, the House of Representatives demanded that Washington turn over to it copies of Jay's negotiating instructions and other materials relating to the treaty,<sup>448</sup> but Washington declined to do so.

By the end of the Washington Administration, it was clear that, despite the original understanding, the Senate had ceased to have a substantial advice role in the treaty process.<sup>449</sup> Since then, presidents have consulted with the Senate prior to treaty negotiations only in isolated instances.<sup>450</sup> The shift away from original understanding may

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443. See Letter from George Washington to the Secretary of State, the Secretary of Treasury, and the Attorney General (Feb. 17, 1793), in 32 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 418, at 348, 348-49; HAYDEN, *supra* note 434, at 37-38.

444. See Letter from George Washington to the Senate (Apr. 16, 1794), in 33 THE WRITINGS OF GEORGE WASHINGTON 332, 332-33 (John C. Fitzpatrick ed., 1940); HAYDEN, *supra* note 434, at 70-71.

445. See Journal entry (Apr. 17, 1794), in 1 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE 151, 151 (1828). There may, however, have been informal discussions between the Administration and Senate leaders concerning Jay's instructions. See HAYDEN, *supra* note 434, at 73.

446. See Journal entry (June 8, 1795), in 1 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE, *supra* note 445, at 178, 178.

447. See CURRIE, *supra* note 28, at 209-17; STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800, at 415-49 (1993). In approving the Jay Treaty (by a bare two-thirds majority), the Senate conditioned its consent on suspension of the twelfth article of the treaty limiting trade between the United States and the British West Indies, a condition accepted by Washington and Great Britain. This was the first time that the Senate attached a reservation to its consent to a treaty, something that is today common practice. See Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 404-07 (2000); see also SOFAER, *supra* note 229, at 96 ("[President Washington] consciously accepted the Senate's power to approve treaties conditionally, and thereby in effect to advance 'advice' in the form of proposed amendments.").

448. See 5 ANNALS OF CONG. 759-60 (1796).

449. See HAYDEN, *supra* note 434, at 104-05.

450. See CRANDALL, *supra* note 441, at 70-72.

well have been functionally sensible and, perhaps for this reason, the Senate did not actively resist it. This development provides a useful reminder, however, that one should not lightly assume that post-ratification practices and statements implemented some sort of Founding consensus. It also provides a vivid illustration of how, in the early years of this nation, important separation of powers issues were worked out at the operational level in the light of practical experience rather than by reference to essentialist categories.

### B. *Washington's Control of Diplomacy*

Upon assuming office, the Washington Administration necessarily embarked upon a wide range of activities relating to foreign affairs. Many of the powers the first President exercised appear straightforward and uncontroversial. Chief among these were Washington's de facto oversight of the holdover Department of Foreign Affairs, his direct authority over the newly established State Department, and his primary role in determining funding levels and establishing regulations with regard to the diplomatic corps.

Executive power essentialists claim that only the Vesting Clause Thesis can account for Washington's actions.<sup>451</sup> In fact, text and history offer more specific explanations. As a matter of text, reasonable constructions of specific foreign affairs clauses, such as those authorizing the President to appoint and receive ambassadors, make treaties, and require opinions from the heads of executive departments, support accepted assertions of presidential authority more plausibly than treating the Article II Vesting Clause as a general source of foreign affairs authority. The history of the period, moreover, indicates that contemporaries both inside and outside of the Administration followed this more modest interpretive strategy. Where specific grants reasonably supported those presidential actions that bore upon foreign affairs, officials and commentators tended either to accept the Executive's assertions, rely on specific text, make functional arguments to augment the particular textual claims, or pursue these approaches together. As we shall show in subsequent sections, where specific text did not point to a fairly clear answer, as with regard to the removal of the Secretary of State or the power to proclaim neutrality, substantial controversy ensued. Yet even here, as we will further show, participants in the debates continued to emphasize specific text and functional consequences, making essentialist arguments comparatively rarely, and — until Hamilton's

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451. See Prakash & Ramsey, *supra* note 14, at 298-311.

*Pacificus* essays and then only in part — relying on the Article II Vesting Clause almost not at all.<sup>452</sup>

### 1. *Oversight of the Old Department of Foreign Affairs*

George Washington took office facing a transitional situation that no President has had to face since. By the time he was sworn in on April 30, 1789, much of the rest of the government, including much of the Executive Branch, had yet to be established. These unsatisfactory circumstances extended to foreign affairs, one area in which an institutional vacuum could not long be tolerated. A new Department of Foreign Affairs was not formally established until late July, with subsequent legislation altering the name to Department of State in September.<sup>453</sup> Compounding the situation, the first Secretary of State, Thomas Jefferson, was not confirmed by the Senate until September 26, and since he was in France at the time, did not actually assume control of the Department until March 1790. Similar to what he did in other areas, Washington meanwhile chose to make do with the old Department of Foreign Affairs established under the Articles of Confederation and the holdover Secretary of Foreign Affairs, John Jay. Accordingly, the President directed Jay to communicate papers regarding a pending consular treaty to the Senate, to send an emissary to Canada, and otherwise to serve as though he were an interim Secretary of State.

According to executive power essentialists, both Washington's attitude toward Jay and Jay's ready compliance are "inexplicable"<sup>454</sup> absent the Vesting Clause Thesis. Whereas the Confederation Congress had earlier created a foreign secretary answerable to it, the very same official immediately came under the supervision of a Chief Executive, where none had existed before, established by the new Constitution. As Prakash and Ramsey make the point, the behavior of these leading Founders could be considered ordinary "only if one admits that the Constitution created a new executive principal,"<sup>455</sup> with the background assumption that "management of foreign affairs was an executive function constitutionally conveyed to the President as part of the executive power."<sup>456</sup>

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452. See *infra* Parts IV.C, IV.D, and IV.E.

453. See 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, at 90 & n.56 (Linda Grant DePauw et al. eds., 1972); 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, at 693 (Linda Grant DePauw ed., 1982); 6 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, at 1753 (Charlene Bangs Bickford & Helen E. Veit eds., 1986).

454. Prakash & Ramsey, *supra* note 14, at 300.

455. *Id.*

456. *Id.* at 298.

As an initial matter, the transition between the Articles of Confederation and the U.S. Constitution was a unique event, and it is far from clear that the actions taken in this context reflected more general conceptions of the proper operations of government. More importantly, even if these actions illustrated general Founding understandings, they prove almost nothing. That the President was viewed as having supervisory authority over officers such as the Secretary of State hardly shows that he had been granted a residuum of unspecified powers in the Vesting Clause. Specific textual grants of power, such as the Appointments Clause, the Treaty Clause, the Opinions Clause, and the Take Care Clause, plausibly gave the President a lead role in directing such officers. Not surprisingly, therefore, there is no reference to the Article II Vesting Clause in any of the historical materials relating to Washington's oversight of the old departments, including the Department of Foreign Affairs.

Even on the narrow point relating to Washington's supervisory authority, the historical materials relating to the transition are more ambiguous than suggested by Vesting Clause Thesis advocates. In the first place, the President and "holdovers" such as Jay dealt with one another not as a matter of constitutional command, but instead consciously cooperated in an informal way to serve the interests of the nation during the transition. As Washington explained in the first letter he wrote to Jay seeking information regarding the nation's foreign affairs:

Sir: Although in the present unsettled state of the Executive Departments, under the government of the Union, I do not conceive it expedient to call upon you for information officially; yet I have supposed that some informal communications from the Office of foreign Affairs might neither be improper nor unprofitable.<sup>457</sup>

When Washington again addressed the subject in more than a passing fashion, he sounded a similar note of caution. Pressing Gouverneur Morris to act as an envoy to Britain, Washington explained the informal, ad hoc nature of his request: "It appears to me most expedient," he wrote, "to have these Inquiries made informally, by a private Agent; and understanding that you will soon be in London, I desire you in that Capacity, and on the Authority and Credit of this Letter, to converse with his Britannic Majesty's Ministers on these Points."<sup>458</sup> The President added that, "This Communication ought regularly to be made to you by the Secretary of State, but that office

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457. Letter from George Washington to John Jay (June 8, 1789), in 30 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 418, at 343, 343. While Prakash and Ramsey cite this letter, and otherwise parse it, they omit this key passage. See Prakash & Ramsey, *supra* note 14, at 299 & n.281.

458. Letter from George Washington to Gouverneur Morris (Oct. 13, 1789), in 30 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 418, at 439, 440.

not being at present filled, my Desire of avoiding Delays induces me to make it under my own Hand.”<sup>459</sup>

Jay’s understanding of the situation was similar to Washington’s. In an illuminating letter to an acting U.S. agent in Morocco, the holdover foreign secretary delivered what Prakash and Ramsey rightly note was a “constitutional lesson.”<sup>460</sup> Jay made clear that, since his last communication, “a great Revolution and change in their Government” had occurred during which “the attention of the United States to their foreign affairs necessarily become interrupted.”<sup>461</sup> Nor, Jay continued, had the transition been fully completed. Noting that Jefferson had not yet assumed his duties as the new Secretary of State, Jay explained that Washington has “directed” him to update the envoy in the meantime.<sup>462</sup> Jay then pointed out that holdover envoys, like the holdover secretary, might not have a formal status under the new regime until Congress could act, but should continue to serve for the best interests of the nation in any case. “In these arrangements,” he wrote, “proper attention will be paid to the powers of the American Agents; but as this cannot be done until the ensuing

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459. 30 *id.* Washington and Jay in passing each once employed the compulsory term “order,” and further employed the more ambiguous term, “direct.” Writing to the Senate, Washington stated that Jay “has my orders” to provide papers relevant to negotiations resulting in certain alterations to the Consular Convention between the United States and France. See Letter from George Washington to the Senate (June 11, 1789), in 30 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 418, at 346, 346. Later, in a letter to Secretary of War Henry Knox, the President also mentioned that he had “seen fit to direct” Jay, as “acting Secretary of foreign Affairs,” to send a special envoy to Britain to secure U.S. surveyors to enter Canada. See Letter from George Washington to Henry Knox (Sept. 5, 1789), in 30 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 418, at 394, 394. Washington’s reference to “orders” reflects either a passing slip into the language of command or, more likely, his desire to ensure ratification of the pending proposals by demonstrating his desire to provide the Senate further information relevant to the process. By contrast, to read the reference as indicating both that Washington believed that he had a constitutional power to command Jay, and that this power was a function of executive foreign affairs authority, not only places upon it a weight it cannot bear, but further opens Washington to a charge of inconsistency or hypocrisy in light of his initial explanation to Jay.

Much the same can be said of Jay’s language, which appears in a letter that resulted from the issue Washington mentioned to Knox. Writing to Lord Dorchester of Britain, Jay stated both that he had been “directed” by Washington and was acting “in pursuance of the orders of the President.” Letter from John Jay to Lord Dorchester (Sept. 4, 1789), in 3 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 602, 602 n.1 (Dorothy Twohig ed., 1989). Given Washington’s initial approach, Jay’s use of compulsory language is best understood as reflecting an understandable desire not to highlight the “unsettled” nature of the President’s authority over holdover officials in writing to a British official.

460. Prakash & Ramsey, *supra* note 14, at 299.

461. Letter from John Jay to Giuseppe Chiappe (Dec. 1, 1789), in 28 George Washington Papers at the Library of Congress, 1741-1799: Series 2 Letterbooks 92, <http://memory.loc.gov/cgi-bin/ampage?collId=mgw2&fileName=gwpage028.db&recNum=0,images> 112-16 (last modified Feb. 16, 1999).

462. *Id.*

Sessions of the two Houses of Congress, I am persuaded that their zeal and attachment will, in the meantime remain unabated.”<sup>463</sup>

Jay’s letter also expressed his conception of the new President’s constitutional authority. He began by telling the envoy that the first thing to notice about the new Constitution is that the President “is vested with powers and prerogatives of far greater magnitude and importance than any that were confided to the former Presidents of Congress . . . to whom the great Executive Powers were not committed; for they were all held . . . by . . . the Congress itself.”<sup>464</sup> In further explaining that the envoy’s letters, which would otherwise have gone to the President of the Confederation Congress, should be delivered to the new President, Jay stated that the President “possesses Powers and Prerogatives in many respects similar to those which are enjoyed by the King of England.”<sup>465</sup> Jay, in other words, emphasized the strength that the new office would play in foreign affairs, indicated that it was analogous “in many respects,” but not identical, to the British monarchy, and throughout referred to executive powers in the plural, rather than asserting a unified executive foreign affairs authority, much less indicating that such an authority came from the Vesting Clause.

Not only was the relationship between Washington and Jay consciously informal and ad hoc, it is noteworthy that the express, public orders that Jay received came not from the President but from the Senate. About the same time that Washington unofficially sought information from Jay, the Senate “ORDERED that Mr. Jay furnish the Senate with an accurate translation of the Consular Conventions” between the United States and France.<sup>466</sup> Washington, once more avoiding unambiguous language of command, responded to this order by stating that “Mr. Jay has my directions to lay before you [the relevant papers] at such time as you may think proper to assign.”<sup>467</sup> To this the Senate responded that Jay is again “ORDERED,” this time to “lay before the Senate . . . the Papers referred to in the President’s Message.”<sup>468</sup> An executive power essentialist might respond that this exchange reflects the exception from executive foreign affairs power that the new Constitution carved out in according the Senate a role in treaty ratification, or that Washington in any case interposed himself to convert the Senate’s order to Jay into his own. Neither explanation,

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463. *Id.*

464. *Id.*

465. *Id.*

466. 2 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 417, at 8.

467. 2 *id.*

468. 2 *id.*



however, would fully account for the discrepancy between Washington's careful refusal to treat the "acting Secretary" as an official subordinate and the Senate's readiness to issue express commands to the same official directly.

In any event, even if it were clear that Washington believed that he had constitutional authority over the holdover officials, specific constitutional text interpreted in the light of pressing functional needs would provide a more reasonable account for Washington's (and the Senate's) oversight of the nation's lame-duck foreign affairs apparatus than would positing a vast and unspecified executive foreign affairs authority. Washington's request for information from Jay had obvious grounding in the Opinions Clause.<sup>469</sup> Both his, and the Senate's, "order" to provide papers relevant to a pending convention likewise had a plausible basis in the Treaty Clause.<sup>470</sup> Even Washington's directions to Jay for sending an envoy, to say nothing of his own resort to Morris, gesture toward presidential power to appoint "Ambassadors, other public Ministers, and Consuls" set out in the Appointments Clause,<sup>471</sup> the lack of Senate confirmation notwithstanding. In other words justifications grounded in specific foreign affairs grants are at least plausible, making it unnecessary to project all foreign affairs authority onto the cryptic Vesting Clause, even assuming that all parties at the time believed that the new Constitution gave the President authority over holdover officers and departments.<sup>472</sup>

## 2. *Creation of the State Department*

Specific constitutional text also accounts for the uncontroversial aspects of the statute establishing what came to be named the

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469. "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.

470. "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 . . ." U.S. CONST. art. II, § 2, cl. 2.

471. "[H]e 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." U.S. CONST. art. II, § 2, cl. 2.

472. By contrast, Prakash and Ramsey argue, for example, that the Opinions Clause was "hardly sufficient authority" to authorize Washington's efforts to be updated on foreign affairs, because "he did not merely seek opinions; he also sought the documents he would need to review in order to make decisions." Prakash & Ramsey, *supra* note 14, at 291 n.289. Instead, they contend, the President's purported "executive prerogatives over foreign affairs," as granted through the Article II Vesting Clause, supplies the requisite authority. It is not clear, however, why the Opinions Clause should be read in the narrowest possible way, and the Vesting Clause read in the most expansive fashion.

Department of State.<sup>473</sup> To address the problems that the transition so obviously created, James Madison on May 19 introduced a resolution calling for the creation of three “executive” departments — foreign affairs, war, and treasury. Anticipating Jay’s concerns, Congress turned first to the proposed department of foreign affairs. The House passed the bill on June 24, with the Senate following suit on July 18. The bill’s passage is remembered almost exclusively for the epic debate it ignited over whether Senate approval would be necessary for removing the new Secretary of Foreign Affairs, and by analogy, the other department heads — an issue that we address separately below in Section C. The Foreign Affairs Act did not otherwise generate significant controversy.

Executive power essentialists take those parts of the Act that produced general agreement as confirmation of their thesis. First, they note that the statute expressly created an “executive” department that, along with its Secretary, was wholly subordinate to the will of the President. Second, they point out that Congress assigned no foreign affairs duties directly to the Secretary, but instead empowered the President to make such assignments. More generally, they contend that the organic statute made no attempt to convey foreign affairs authority to the President but instead “presumed a wide executive sphere in foreign relations” that was, moreover, “preexisting.”<sup>474</sup>

As before, these claims either lack historical support, are better explained by the Constitution’s text and the experience that preceded it, or both. While, for example, the statute did not place either the department or the secretary under any express obligations to Congress, it directly assigned duties to department subordinates rather than leave such assignments entirely with the President.<sup>475</sup> More

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473. By contrast, where text failed to address an issue, or did so in a manner that invited opposing interpretations as in the case of removal, the statute would ignite substantial controversy. *See infra* Part IV.C.

474. Prakash & Ramsey, *supra* note 14, at 301.

475. Specifically, the Act created a “chief Clerk” subordinate to the Secretary and provided that whenever the office of Secretary stood vacant, the clerk “shall during such Vacancy, have the charge and custody of all Records, Books, and Papers appertaining to the said department.” Foreign Affairs Act of 1789, ch. 4, § 2, 1 Stat. 28, 29, *reprinted in* 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 453, at 689, 689.

This provision notwithstanding, it remains true that the Act generally did not directly assign duties to the department or its personnel, but instead left such assignment to presidential discretion. The same point also applies to the organic statute creating the War Department. *See* War Department Act of 1789, ch. 7, 1 Stat. 49, *reprinted in* 6 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 453, at 2028. By contrast, Prakash and Ramsey point to the “stark” differences in the statute creating the Treasury Department, which both made the Secretary of the Treasury and subordinate personnel accountable to Congress and did so directly rather than through the President. *See* Prakash & Ramsey, *supra* note 14, at 301-02 n.291. These differences, they assert, “speak[] volumes,” for they “suggest[] that Congress was aware that the President enjoyed a foreign affairs sphere (albeit limited) that no statute could infringe or limit.” *Id.*

importantly, a careful reading of the Act reveals that the deference Congress gave to the President tracks, at points verbatim, Article II's specific grants rather than some broad and undefined conception of "executive Power." As an initial matter, at no point does the Act expressly or implicitly refer to general executive authority as the basis of its allocations or power. Rather, every version, including the one enacted, set forth the duties that the President would assign to the Secretary in almost minute detail:

the Secretary for the department of foreign Affairs, who shall perform and execute such duties as shall from time to time be enjoined on, or intrusted to him by the President of the United States, agreeable to the Constitution, relative to correspondences, commissions, or instructions to, or with public Ministers or Consuls from the United States, or to negotiations with public Ministers from foreign States or princes, or to Memorials or other applications from foreign public Ministers, or other foreigners, or to such other Matters respecting foreign Affairs, as the President of the United States shall . . . from time to time Order or instruct.<sup>476</sup>

This list of specific areas of responsibility would have been surplusage if Congress had assumed that all it was doing was creating a subordinate officer subject to the President's general foreign affairs authority. Moreover, these areas of responsibility all echo Article II's discrete grants to the President. The duty to handle the correspondence, commissions, and instructions to U.S. "public Ministers or Consuls" finds a provenance in both the President's power "to appoint Ambassadors, other public Ministers and Consuls,"<sup>477</sup> as well as the duty to "Commission all the Officers of the United States."<sup>478</sup> Likewise, the same duty as applied to "negotiations" with foreign nations fairly clearly alludes to the President's authority "to make Treaties."<sup>479</sup> The reference to other applications from foreign public ministers, finally, echoes presidential authority to "receive

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What these differences instead suggest is the hybrid nature of the Treasury Department that followed from the Constitution's assignment of relevant specific powers. Just as Article II accords the President specific powers, including several bearing on foreign affairs, Article I grants Congress specific powers over public lands and finance. These are precisely the powers that the Treasury statute tracks in placing the department under certain obligations to Congress. *See* Treasury Act of 1789, ch. 12, 1 Stat. 65, *reprinted in* 6 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 452, at 1975. In sum, the difference between the statutes creating the Foreign Affairs and War Departments on the one hand, and the Treasury Department on the other, are better understood as resulting from discrete textual commitments rather than an essentialist understanding of legislative or executive authority.

476. Foreign Affairs Act of 1789, ch. 4, § 1, 1 Stat. 28, 29, *reprinted in* 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 453, at 689, 689 (emphasis added).

477. U.S. CONST. art. II, § 2, cl. 2.

478. U.S. CONST. art. II, § 3.

479. U.S. CONST. art. II, § 2, cl. 2.

Ambassadors and other public Ministers.”<sup>480</sup> Further supporting each set of obligations is the President’s authority to “require the Opinion, in Writing, of the principal officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices.”<sup>481</sup> To be sure, the list of duties ends with a general reference to “such other Matters respecting foreign Affairs” that the President may order. Even aside from the descriptive limitation “such” other matters, this passage appears to be a classic candidate for the maxim *ejusdem generis* — that is, to be read as a catch-all provision limited by the class that proceeds it — rather than as a back-door allusion to a general foreign affairs authority not set out anywhere else.

We are not attempting here to make conclusive arguments detailing the Act’s constitutional basis, or to address all counterarguments that could have been made either then or now. Our aim instead is to show that the general agreement that existed with respect to the Act did not depend on an acceptance of the Vesting Clause Thesis. Rather, both the statute and the agreement it generated can be understood as a function of discrete statutory allocations tracking specific constitutional grants. This view takes the available texts more seriously and, as we have shown, is consistent with the general emphasis on particular foreign affairs functions evident throughout the period. Put another way, there was simply no extraordinary gap that only an expansive reading of the Vesting Clause could fill.

### 3. *Management of the Diplomatic Corps*

The textual approach that best accounts for the transitional period under the old Foreign Affairs Department, as well as the creation of its successor, also explains the day-to-day workings of the new State Department once it was up and running. As we will explain, a number of President Washington’s more ambitious foreign policy forays, such as the Neutrality Proclamation, generated substantial constitutional controversy.<sup>482</sup> By contrast, Washington’s day-to-day handling of the diplomatic corps produced no more dispute than either of the matters just related. The President’s generally acknowledged oversight of foreign affairs had several components. First, Washington for the most part treated his new Secretary of State, Thomas Jefferson, as his subordinate. Second, Washington instructed U.S. diplomats abroad through Jefferson, and, on rare occasions, directly. Third, the

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480. U.S. CONST. art. II, § 3.

481. U.S. CONST. art. II, § 2, cl. 1.

482. *See infra* Part IV.E.

President had diplomats both transferred and removed. Finally, Washington in effect created diplomatic posts, albeit through the mechanism of appointment with the advice and consent of the Senate. In none of these instances is textual or historical support so wanting that only the Vesting Clause Thesis can account for them.

According to essentialists, each category of Washington's actions is unfathomable absent an expansive conception of executive foreign affairs authority. Professors Prakash and Ramsey in particular assert that "the Chief Executive directed the nation's foreign affairs subject to the Constitution's exceptions to his executive power."<sup>483</sup> Otherwise, they suggest, Jefferson as Secretary of State would plausibly have had a "sphere of foreign relations authority that the President simply could not breach,"<sup>484</sup> a novel assertion that no one then or since appears to have made.

Once more, this interpretation overreads what occurred and overlooks more precise explanations. Consider, first, Washington's supervision of Jefferson. From the outset, the President asserted his authority over the Department,<sup>485</sup> and the Secretary of State accepted

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483. Prakash & Ramsey, *supra* note 14, at 307.

484. *Id.*

485. In a long letter hoping to entice Jefferson from Paris to become the first Secretary of State, Washington wrote that he had decided "to nominate you for the Department of State, which, under its present organization, involves many of the most interesting objects of Executive Authority." Letter from George Washington to Thomas Jefferson (Oct. 13, 1789), in 30 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 418, at 446, 446. Still seeking Jefferson's assent, Washington followed up, noting that, "The necessary arrangements with regard to our intercourse with Foreign Nations have never yet been taken up on a great scale by the Government: because the Department . . . has never been properly organized, so as to bring the business well and systematically before the Executive." Letter from George Washington to Thomas Jefferson (Jan. 21, 1790), in 30 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 418, at 509, 511. These passing statements are hardly endorsements of either the Vesting Clause Thesis or executive foreign affairs essentialism. Fairly read, they show no more than that Washington viewed the State Department and those foreign affairs matters with which it deals as under the purview of the Executive Branch.

Conversely, Washington's initial letter to Jefferson suggested that the Secretary of State would have a certain degree of independence. At one point the President stated that more or less out of practical necessity he had placed state papers pertaining to foreign affairs in the custody of Roger Alden, "Assistant Secretary to the late [Confederation] Congress," indicating nonetheless that this arrangement should be seen as provisional, "[u]nwilling as I am to interfere in the direction of your choice of Assistants." Letter from George Washington to Thomas Jefferson (Oct. 13, 1798), *supra*, at 447. We do not argue that Washington here was indicating anything more than prudential concerns, as opposed to a belief that his authority over the State Department was in any way limited. To assert otherwise would be to overread this passage in the same way that Prakash and Ramsey overread Washington's other statements. Rather, our point is simply that Washington's correspondence confirms only that he believed that he had authority over the State Department, a point that we do not dispute, rather than that this authority came from an essentialist conception of executive authority in foreign affairs, or from the Article II Vesting Clause.

it,<sup>486</sup> both in often flowery fashion. But why some version of executive power essentialism must be invoked to account for such authority remains a mystery. As noted, the Act establishing the Department sets forth the requisite basis for Washington's actions in the first instance by making the Secretary subject to presidential command in some detail. Reliance on the statute — which neither Jefferson nor Washington would have had any incentive to question — pushes back the issue to the basis for the Act's assignment of authority. As we have discussed, the Act's specific and modest language suggests that its basis was understood to be the Constitution's discrete grants, functionally applied, rather than an unstated consensus viewing foreign affairs as an inherently executive matter.<sup>487</sup>

The same analysis applies to the President's handling of the diplomatic corps. As the Foreign Affairs Act assumed, Washington left most diplomatic correspondence to Jefferson, though in isolated instances he did correspond with diplomats directly.<sup>488</sup> But even had the President corresponded directly with every U.S. diplomat all the time, exactly how this would prove the case for executive power essentialism would continue to be elusive. In this case the Foreign Affairs Act expressly specified the President's authority to entrust the Secretary of State with duties "relative to correspondences, commissions, or instructions . . . with public Ministers or Consuls from the United States."<sup>489</sup> It would be an odd interpretation holding that the Act, in placing the Secretary under these potential duties,

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486. See Letter from Thomas Jefferson to George Washington (Dec. 15, 1789), in 16 THE PAPERS OF THOMAS JEFFERSON 34, 34 (Julian P. Boyd ed., 1961); Letter from Thomas Jefferson to George Washington (Feb. 14, 1790), in 16 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 184, 184.

487. See *supra* text accompanying notes 475-481.

488. One of the rare occasions on which Washington did so involved extraordinary circumstances. In June 1792, Gouverneur Morris assumed his duties as ambassador to France. As would happen with much else in American politics, the ongoing French Revolution made the appointment controversial, alienating especially those who believed Morris was hostile to the new regime. In this context, Washington enclosed a private letter to Morris along with the official letter from the Secretary of State signifying his nomination and appointment. The letter informed Morris that his posting had generated opposition, as well as the grounds for it. See Letter from George Washington to Gouverneur Morris (Jan. 28, 1792), in 31 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 418, at 468, 468-70. Washington had previously vetted the letter with Jefferson, see Letter from George Washington to Thomas Jefferson (Jan. 28, 1792), in 31 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 418, at 467, 467, whose support for the Revolution had already become evident. In light of the extraordinarily sensitive issues that the French Revolution would likely present for American foreign policy, Washington evidently took the unusual step of writing to Morris directly to ensure his evenhandedness, while including Jefferson in the process to ensure that all the key American players were on the same page. For a discussion of the relevant background, see ELKINS & MCKITRICK, *supra* note 447, at 314-22.

489. Foreign Affairs Act of 1789, ch. 4, § 1, 1 Stat. 28, 28-29, reprinted in 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 453, at 689, 689.

somehow precluded the President from undertaking them directly.<sup>490</sup> This again leaves the matter of the constitutional basis for presidential correspondence with diplomats. As we have argued, specific text such as the Opinions Clause and the Appointments Clause offers a more promising basis, both in requiring a less expansive reading of text than is required by the Vesting Clause Thesis, and in better comporting with the contemporary preference for discrete textual arguments.<sup>491</sup>

Washington's disposition of diplomats is merely a variant on the same themes. The President on occasion would transfer envoys from one post to another. Significant here, however, is that this was ordinarily done with Senate approval, apparently on the theory that a transfer represented a new appointment that accordingly required advice and consent.<sup>492</sup> Conversely, Washington did unilaterally remove diplomats, including two U.S. ambassadors to revolutionary France.<sup>493</sup> This power, however, would logically appear to be a corollary of the President's superior authority to remove the Secretary of State himself, something expressly contemplated by the Foreign Affairs Act.<sup>494</sup> In contrast to the fairly mundane powers dealt with so far, Congress's decision to allow the President to remove the Secretary of State without the advice and consent of the Senate triggered enormous controversy due in part to the practical stakes involved and in part because specific text did not reasonably settle the issue.<sup>495</sup>

Finally, Washington's ostensible creation of diplomatic posts provides the essentialist interpretation with even less support than the practices already discussed. Since Congress itself did not establish

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490. We take no position on whether the Foreign Affairs Act conferred the foreign affairs duties it specified, or merely recognized presidential authority with regard to these matters. Either way, our argument remains that specific constitutional text, rather than executive power essentialism, offers a more modest and satisfactory foundation for the President's authority than the Vesting Clause Thesis.

491. See also *infra* Part IV.C (discussing specific textual arguments made during the debate on removal of executive officers).

492. See PLISCHKE, *supra* note 167, at 48 tbl. 2.2. Prakash and Ramsey concede that this was the usual practice without exploring its significance. See Prakash & Ramsey, *supra* note 14, at 309. They might argue, of course, that this was simply an example where specific text transferred foreign affairs authority away from the President, with the specific text being the assignment to the Senate of an advice and consent power over appointments. That said, a thoroughgoing essentialist might argue that precisely since a transfer is not an appointment, the matter should be left to the President alone. It is noteworthy, therefore, that this was not the practice that Washington and the Senate worked out. Placed in the larger context of the period, moreover, the practice is best accounted for by the Founding generation's inclination for relying on discrete text and functional practicality, as we have noted throughout.

493. The volatile nature of relations with France prompted Washington to remove two ambassadors; he first removed Gouverneur Morris, and later James Monroe. See PLISCHKE, *supra* note 167, at 64 n.25; ELKINS & MCKITRICK, *supra* note 447, at 503-04.

494. Foreign Affairs Act of 1789, ch. 4, 1 Stat. 28, reprinted in 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789-1791, *supra* note 453, at 689, 689.

495. See *infra* Part IV.C.

specific foreign postings, the President did have a principal role in “creating” such positions by nominating specific individuals for particular assignments. This principal role, however, was not exclusive for the simple reason that the nomination of diplomats required Senate approval, a requirement that was followed in practice.<sup>496</sup> An essentialist might respond that this arrangement merely confirms the thesis that the Executive controlled foreign affairs absent constitutional text excepting certain foreign affairs powers to the other branches. Yet given that the Appointments Clause addresses the matter directly, the de facto creation of diplomatic posts through presidential nomination and Senate confirmation is no less consistent with our view that the Founding generation looked, insofar as it could, to discrete text.<sup>497</sup>

#### 4. *The Diplomatic Salaries Dispute*

With the issue of how to pay for U.S. diplomats abroad, the general though largely unstated agreement evident thus far begins to break down. Funding of the diplomatic corps did not produce the level of controversy associated with the removal debate a year earlier or the debate over the Neutrality Proclamation several years later. Nevertheless, the issue of diplomatic salaries did produce a lively and significant debate. In resolving this debate, the Founding generation relied first and foremost on specific constitutional text and functional practicalities. In this regard, this debate serves as a useful preview of our consideration below of the larger and more famous controversies.

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496. On this point, Prakash and Ramsey bring things almost full circle by arguing that Washington also “felt free to dispatch unilaterally emissaries to foreign nations without the advice (and certainly without the consent) of the Senate.” Prakash & Ramsey, *supra* note 14, at 309. For this proposition they cite the President’s earlier designation of Gouverneur Morris as a private envoy to Britain in 1789. *See id.* As discussed above, Washington expressly viewed this mission as an interim measure adopted out of practical necessity, given that the nation still lacked a Secretary of State, a situation itself due to the as yet incomplete transition from the old regime under the Articles of Confederation to the new one under the Constitution. *See supra* text accompanying note 459.

497. The establishment of diplomatic posts through presidential appointment and senatorial nomination raises the related issue of whether and to what extent this can be done without enabling legislation creating the post itself. As a matter of text, the Appointments Clause has conventionally been understood to require that officers of the United States “shall be established by law,” whether “Ambassadors, other public Ministers and Consuls, [] judges of the supreme Court,” or “all other officers of the United States, whose Appointments are not herein otherwise provided for.” U.S. CONST. art. II, § 2, cl. 2; *see also* Prakash & Ramsey, *supra* note 14, at 309 n.336 (stating that they are “not sure whether the Constitution permits the President to appoint to a diplomatic post in the absence of a statute first creating that diplomatic post” in the light of the interpretation of the Appointments Clause in the domestic context). As we will show in the next subsection, moreover, the statute establishing a fund for diplomats was widely understood as delegating to the President the authority to commission persons to serve in foreign postings as well as what to pay them within certain specified salary grades. *See infra* Part IV.B.4. In this way, the Act arguably furnished a statutory basis for the positions.



In his first annual address to Congress, on January 8, 1790, President Washington asked Congress to appropriate “a competent fund designated for defraying the expenses incident to the conduct of our foreign affairs.”<sup>498</sup> Washington also noted in his address that the “compensations to be made to the persons who may be employed, should according to the nature of their appointments, be defined by law.”<sup>499</sup> These remarks appear to envision a significant role for Congress in funding the diplomatic corps and thus, if anything, seem to weigh against executive power essentialism.

On January 15, 1790, the House resolved that several select committees be created to generate responses to Washington’s address. Among these was a committee regarding “provision for persons employed in the intercourse between foreign nations and the United States.”<sup>500</sup> Several days later, on January 19, Theodore Sedgwick of Massachusetts reported that the committee “had some doubts on their mind respecting the extent” of the provision they were to propose.<sup>501</sup> In particular, the committee was unsure whether it should make “a general provision for every grade of foreign ministers, or whether, in the contrary, they are not tied down to provide for those only who are now in existence.”<sup>502</sup>

John Page of Virginia then moved to discharge the committee so that the issue could be determined in a committee of the whole.<sup>503</sup> Page’s motion prompted a brief, initial debate over whether the House should fix diplomatic salaries by law or leave the matter to the discretion of the President. There was also some discussion at this point over who had the authority to determine the number of foreign ministers and where they would be sent.

William Smith of South Carolina argued that it was the business of the President and Senate, not the House, to appoint foreign ministers, and that the decision whether to send them to particular places “was a business clearly within the executive branch.”<sup>504</sup> Roger Sherman of Connecticut “[w]as inclined to think that the legislature ought to determine how many ministers should be employed abroad” and he “did [not] think it would be any abridgment of the executive power to

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498. President George Washington, First Annual Address to Congress (Jan. 8, 1790), in 30 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 418, at 491, 492.

499. 30 *id.*

500. 12 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, at 23 (Helen E. Veit et al. eds., 1994).

501. 12 *id.* at 34.

502. 12 *id.*

503. 12 *id.* at 35.

504. 12 *id.* at 36.

do so.”<sup>505</sup> Alexander White of Virginia argued that “the most inconvenient consequences might result” if congressional approval were needed prior to sending foreign ministers, since “[t]he exigencies that required such an appointment, might be over before the legislature had convened for the purpose of authorising him to make it.”<sup>506</sup>

Moving to the issue of who should set the diplomatic salaries, James Jackson of Georgia made two arguments in support of congressional authority. First, he suggested that Congress was better suited than the President to take account of geographic differences when setting diplomatic salaries.<sup>507</sup> Second, he argued that it would be embarrassing to the President if he were the one to make salary distinctions among postings.<sup>508</sup> This salary issue would become the focal point of a more lengthy debate about a week later. At this point, the House simply instructed the committee that, in providing for compensation for U.S. diplomats, it should provide for “a compensation for persons who may hereafter be employed in such intercourse.”<sup>509</sup> It is noteworthy, though, that these initial discussions were focused entirely on functional arguments, and that there was no mention of either executive power essentialism or the Article II Vesting Clause.

On January 26, the House resolved itself into a committee of the whole “on the bill to provide for the means of intercourse between the United States and foreign nations.”<sup>510</sup> This bill authorized a sum not exceeding \$40,000 to be drawn from the Treasury at the President’s discretion, and it also set maximum salaries for the various diplomatic grades.<sup>511</sup>

Almost immediately, Richard Bland Lee of Virginia moved to amend the bill by inserting the words “by and with the consent of the senate” after the word “president.” Lee relied on an analogy to the treaty power, arguing that, “as the constitution had vested in the president, with the advice and consent of the senate, the power of appointing ambassadors and other public ministers, he thought they ought to be equally interested in proportioning the salaries.”<sup>512</sup> As *The*

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505. 12 *id.* at 37.

506. 12 *id.*

507. 12 *id.*

508. 12 *id.* at 37-38.

509. 12 *id.* at 38.

510. 12 *id.* at 75.

511. See 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 453, at 67.

512. 12 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 500, at 75.

*Daily Advertiser* put it, “[a] considerable debate now ensued.”<sup>513</sup> Nowhere in this debate was there any mention of the Article II Vesting Clause. Nor did executive power essentialism play any significant role in the debate. Instead, in rejecting Lee’s motion, the prevailing view appears to have been that *Congress* had the authority to set the diplomatic salaries, but that it was functionally desirable to delegate some of that authority to the President.

Several House members supported Lee’s motion to require Senate consent, and these House members obviously did not rely on executive power essentialism. Rather, they relied on a combination of specific textual grants and functional arguments. For example, Michael Jennifer Stone of Maryland argued that it was proper to give the Senate a consent power over diplomatic salaries because “the constitution has vested [the Senate] with equal authority in every transaction relative to this business.”<sup>514</sup> He subsequently elaborated on this point, noting that the Senate’s advice and consent was required for treaties and arguing that the House would be departing from this principle if it “[increased] the agency of the president.”<sup>515</sup> Stone also complained that allowing the President to determine the salaries would give him undue influence over the appointments process.<sup>516</sup> Roger Sherman of Connecticut invoked both the Treaty Clause and the Appointments Clause, arguing:

The establishment of every treaty requires the voice of the senate, as does the appointment of every officer for conducting the business; these two objects are expressly provided for in the constitution, and they lead me to believe, that the two bodies ought to act jointly in every transaction which respects the business of negotiation with foreign powers.<sup>517</sup>

As for the opponents of the motion, almost all of them objected to Lee’s motion on purely functional grounds. Smith of South Carolina, for example, acknowledged that the Constitution was “silent” on the issue, but argued that a requirement of Senate consent would “diminish the responsibility of the executive officer” and might “open

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513. 12 *id.* at 69.

514. 12 *id.* at 76.

515. 12 *id.* at 78.

516. 12 *id.*

517. 12 *id.* at 79. In attempting to discount these pro-Senate statements, Prakash and Ramsey assert that “a much larger number [of House members] . . . regarded the ‘intercourse with foreign nations [as] a trust specially committed to the President.’” Prakash & Ramsey, *supra* note 14, at 303-04. Here they quote from a summary of the debate in the *Gazette of the United States*, which merely states that this proposition “was contended” during the debate and does not indicate how much support it received. See 12 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 500, at 72. The much more detailed account of the debate in the *Congressional Register* reveals little express support for this proposition. See 12 *id.* at 75-82.

a door for cabal.”<sup>518</sup> Benjamin Huntington of Connecticut further noted that “it might happen that the money might be wanting during the recess of the senate, and it would hardly be expedient to call them together for the purpose of making a draft upon the treasury for a small sum of money” and that “it was also judged prudent to leave it at the discretion of the executive officer to apportion the salaries.”<sup>519</sup> And James Madison observed that apportionment of salaries “could be better performed by the president alone than connected with a large body.”<sup>520</sup>

In conjunction with these functional arguments, some House members emphasized that the proposed bill would sufficiently cabin presidential power. In response to Stone, for example, Sedgwick argued that the ceilings imposed by the bill on the salaries for the various diplomatic grades, along with the Senate’s role in the appointments process, would ensure that the President would not have “an improper influence.”<sup>521</sup> John Laurance of New York made the same point, while also noting that the power of setting the diplomatic salaries was a *congressional* power and thus one that it could delegate to the President.<sup>522</sup>

Other House members echoed Laurance’s view that Congress had the ultimate authority to establish the diplomatic salaries. James Jackson, for example, argued that the power to set salaries should not be delegated to the President even with the Senate’s consent, because “[t]he appropriation of public money belongs in a peculiar manner to this house, and I am for retaining the power in our own hands.”<sup>523</sup> Similarly, Thomas Scott of Pennsylvania argued that “disposing of, or giving away sums of public money, is a legislative, not an executive act; and cannot be performed in any other way than with all the formalities of legislative authority.”<sup>524</sup> These comments, if anything, suggest legislative essentialism rather than executive essentialism, although the speakers also appear to have had in mind the requirement in Article I, Section 9 that “[n]o money shall be drawn from the treasury, but in consequence of appropriations made by law.”<sup>525</sup>

Importantly, this claim by several House members that Congress had the power to set the diplomatic salaries was not met with denial.

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518. 12 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 500, at 75.

519. 12 *id.* at 76.

520. 12 *id.* at 81.

521. 12 *id.* at 77.

522. 12 *id.* at 78.

523. 12 *id.* at 88.

524. 12 *id.* at 89.

525. U.S. CONST. art. I, § 9, cl. 6.

Instead, opponents of Lee's motion simply responded that it was functionally desirable for Congress to delegate some of this authority to the President. Elias Boudinot of New Jersey, for example, argued that "we are so circumstanced as not to be able to ascertain the proper sum required by every diplomatique officer who may be sent to the various courts of Europe, and other quarters of the globe."<sup>526</sup> Sedgwick similarly acknowledged that Congress could fix the salaries, but he "feared that the house had not sufficient information for that purpose."<sup>527</sup>

Only one House member, Egbert Benson of New York, espoused an executive essentialist position. In objecting to Lee's motion, Benson stated that:

[I]t would be wrong to blend the senate with the president, in the exercise of an authority not jointly vested in them by the constitution; and in any business whatever of an executive nature, they had no right to do it any more than they had the right to associate a committee of this house with him.<sup>528</sup>

This comment, although emphasized by Prakash and Ramsey,<sup>529</sup> was sandwiched between the lines of argument described above and appears to have generated no discussion. Benson's comment is also substantially outweighed by the numerous statements claiming, or acknowledging, that Congress had the constitutional power to set the diplomatic salaries. Finally, Congress's eventual enactment of the appropriations bill was itself a repudiation of executive power essentialism, since the bill placed precise limits on the salaries for each of the diplomatic grades.<sup>530</sup>

The above debate did not entirely resolve the controversy over diplomatic appointments. On January 28, 1790, Sherman successfully moved to table the appropriations bill, arguing that the sum of \$40,000 was "too much for the purposes specified in the bill, and that the house had no measure at present whereby they could ascertain the sums necessary to be appropriated."<sup>531</sup> The House did not return to the bill until late April.

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526. 12 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 500, at 89.

527. 12 *id.* at 90.

528. 12 *id.* at 81.

529. See Prakash & Ramsey, *supra* note 14, at 304.

530. See An Act Providing the Means of Intercourse Between the United States and Foreign Nations, 1 Stat. 128 (1790); see also CURRIE, *supra* note 28, at 46 ("In prescribing ceilings for remuneration for various types of officers, Congress rejected the thesis that the Constitution reserved the matter to the President with or without consent of the Senate . . .").

531. 12 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789-1791, *supra* note 500, at 97.

In the meantime, Washington asked Jefferson (who had just returned from France to assume his duties as the new Secretary of State) to prepare an opinion addressing whether the Senate, in exercising its advice and consent power over appointments, could “negative” the proposed grade of U.S. diplomats. In response to this request, Jefferson prepared a written opinion concluding that the Senate did not have the authority to negative the grade.<sup>532</sup> Jefferson’s opinion contains some pro-executive language, and Prakash and Ramsey not surprisingly rely on it.<sup>533</sup>

Jefferson’s opinion begins with the following general claim about the separation of powers structure of the Constitution:

The Constitution has divided the powers of government into three branches, Legislative, Executive, and Judiciary, lodging each with a distinct magistracy. The Legislative it has given completely to the Senate and House of [R]epresentatives: It has declared that the “Executive powers shall be vested in the President,” submitting special articles of it to a negative by the Senate; and it has vested the Judiciary power in the courts of justice, with certain exceptions also in favor of the Senate.<sup>534</sup>

This passage obviously refers to powers in somewhat essentialist terms, albeit by reference to constitutional text rather than preconstitutional theory. Unlike proponents of the Vesting Clause Thesis, however, Jefferson appears to be assuming here that there is no difference in the effect of the three vesting clauses in the Constitution, with the Article I Vesting Clause, for example, purportedly giving the legislative power “completely to the Senate and House of Representatives.” Furthermore, Jefferson’s reference here to “the Executive powers” in the plural rather than to the singular form used in the Article II Vesting Clause, may suggest that he is referring to the powers specifically listed in Article II rather than some residuary category.<sup>535</sup>

Jefferson then proceeds to equate at least one aspect of foreign affairs with executive power, stating: “The transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, *except* as to such portions of it as are specifically submitted to the Senate. *Exceptions* are to be construed strictly.”<sup>536</sup> In

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532. See Thomas Jefferson, Opinion of the Powers of the Senate Respecting Diplomatic Appointments (Apr. 24, 1790), in 16 THE PAPERS OF THOMAS JEFFERSON, *supra* note 486, at 378, 378-80 [hereinafter Jefferson Opinion].

533. See, e.g., Prakash & Ramsey, *supra* note 14, at 305-07.

534. Jefferson Opinion, *supra* note 532, at 378-79.

535. Prakash and Ramsey claim that, in using a plural reference, Jefferson “erroneously quoted the Vesting Clause,” see Prakash & Ramsey, *supra* note 14, at 306, and then in a later discussion they substitute a singular reference in brackets in place of Jefferson’s actual language, see *id.* at 311.

536. Jefferson Opinion, *supra* note 532, at 379.

context, Jefferson's reference to the "transaction of business with foreign nations" is almost certainly a reference to negotiations and other diplomatic interactions between the United States and other nations, and not to substantive foreign affairs powers. Although Jefferson does not explain the reasoning behind his claim that such interactions are to be managed by the Executive Branch, the remainder of his opinion suggests that he was relying, at least in part, on the President's designated role in nominating, appointing, and commissioning diplomatic officers.<sup>537</sup> Thus, Jefferson observes that the Constitution "gives the *nomination* of the foreign Agent to the President, the *appointment* to him and the Senate jointly, and the *commissioning* to the President," and he reasons that the Senate's advice and consent power "does not comprehend the neighboring acts of *nomination* or *commission*, (and the constitution says it shall not, by giving them exclusively to the President) still less can it pretend to comprehend those previous and more remote of *destination* and *grade*."<sup>538</sup> In other words, Jefferson reasons that the determination of the destination and grade of the diplomats is related to the President's assigned powers over nomination and appointment, not the Senate's advice and consent power.

In sum, although essentialist and pro-executive in its orientation, Jefferson's opinion did not claim that all foreign affairs powers were inherently vested in the Executive Branch. Moreover, despite making an arguable reference to the Article II Vesting Clause at the beginning of his opinion, Jefferson did not ultimately claim that the determination of the destination and grade of diplomats was a residual power encompassed by the Vesting Clause. Rather, in concluding that the Senate did not have the power to regulate those determinations, Jefferson relied on the specific language of the Appointments and Commissions Clauses.<sup>539</sup>

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537. Article II, Section 2 of the Constitution provides in relevant part that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls." U.S. CONST. art. II, § 2. Article II, Section 3 provides in relevant part that the President "shall commission all the officers of the United States." U.S. CONST. art. II, § 3. Of course, Jefferson also could have relied on the President's role in making treaties as further support for his control over diplomacy; regardless of the originally intended role for the Senate in the treaty process, see *supra* Part IV.A, the Treaty Clause easily can be read to give the President at least a lead role in negotiating and concluding treaties.

538. Jefferson Opinion, *supra* note 532, at 379.

539. Washington apparently also sought out the views of John Jay and James Madison concerning the Senate's authority to control the destination and grade of U.S. diplomats. There is no direct record of what Jay and Madison told the President. In his diary, however, Washington reported that Madison's view

coincides with Mr. Jays and Mr. Jeffersons — to wit — that [the Senate has] no Constitutional right to interfere with either, & that it might be impolitic to draw it into a precedent their powers extending no farther than to an approbation or disapprobation of the person nominated by the President all the rest being Executive and vested in the President

### C. *The Removal Debate*

Congress's establishment of the executive departments in 1789 occasioned a sustained and important debate in the House of Representatives over the President's power to remove executive officers.<sup>540</sup> This debate is relevant to foreign affairs authority, both because it concerned the scope of executive power in general, and because it specifically concerned executive power to remove the Secretary of State. On May 19, 1789, Madison proposed that Congress establish three executive departments — a department of foreign affairs, a department of the treasury, and a department of war.<sup>541</sup> He also proposed that the heads of these departments be “removable by the [P]resident.”<sup>542</sup> There was substantial debate over the removal provision, after which a vote was taken and a “considerable majority” in the House (sitting as a Committee of the Whole) favored retaining the provision.<sup>543</sup> The House revisited the issue on June 16, in considering the proposed bill for the Department of Foreign Affairs. At this point, Alexander White of Virginia moved to strike the presidential removal provision, and a week-long debate ensued over this issue.<sup>544</sup> The House subsequently voted thirty-four to twenty not to strike the provision. A few days later, however, the provision was deleted in a complicated vote described below.

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by the Constitution.

George Washington, Diary entry (Apr. 27, 1790), in 6 THE DIARIES OF GEORGE WASHINGTON 68, 68 (Donald Jackson & Dorothy Twohig eds., 1979). Although cryptic, this diary entry appears to suggest that Madison and Jay, like Jefferson, thought that the Constitution (perhaps through the terms of the Appointments Clause) granted the President general control over U.S. diplomats, subject only to the Senate's ability to disapprove of particular nominees. There is no suggestion here that Madison or Jay thought that the Article II Vesting Clause gave the President residual foreign affairs powers. Nor did Madison make such a suggestion in the House debates over diplomatic funding described above.

540. For detailed accounts of this debate, see 1 CORWIN ON THE CONSTITUTION 317-71 (Richard Loss ed., 1981); JAMES HART, THE AMERICAN PRESIDENCY IN ACTION 1789, at 155-89 (1948); and THACH, *supra* note 122, at 140-65. See also CURRIE, *supra* note 28, at 36-41. This debate is also discussed in the majority and dissenting opinions in *Myers v. United States*, 272 U.S. 52 (1926). Prakash and Ramsey make only passing reference to the debate. See Prakash & Ramsey, *supra* note 14, at 302.

541. See 10 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, at 725 (Charlene Bangs Bickford et al. eds., 1992).

542. 10 *id.*

543. 10 *id.* at 740.

544. When White made the motion, William Smith of South Carolina noted that he himself had planned to make such a motion, and that he “believed that many gentlemen [on May 19] neglected to oppose the principle in the bill, under an idea that a further discussion would take place, and had reserved themselves accordingly.” 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, at 842-43 (Charlene Bangs Bickford et al. eds., 1992).



Both in the May 19 debate and in the debate in mid-June, a substantial number of House members argued that the heads of departments could constitutionally be removed only in the same way that they were appointed — that is, with the advice and consent of the Senate. Theodorick Bland of Virginia argued, for example, that “[t]he constitution declares, that the president and the senate shall appoint, and it naturally follows, that the power which appoints shall remove also.”<sup>545</sup> Similarly, Alexander White of Virginia stated that “[t]he constitution had given the power of appointment to the senate, and most certainly it gave them the power to dismiss.”<sup>546</sup> William Smith of South Carolina went further, arguing that the only constitutional basis for removing heads of departments was through the impeachment process.<sup>547</sup>

In response to these arguments, some of the supporters of the removal provision — including eventually Madison — did invoke the Article II Vesting Clause. In the May 19 debate, John Vining of Delaware argued that “there was a strong presumption that [the President] was invested with [the removal power]; because, it was declared, that all executive power should be vested in him, except in cases where it is otherwise qualified.”<sup>548</sup> And George Clymer of Pennsylvania stated that “the power of removal was an executive power, and as such belonged to the president alone, by the express words of the constitution, ‘the executive power shall be vested in a president of the United States of America.’”<sup>549</sup> At this point in the debate, Madison, in contrast, relied primarily on functional arguments. He noted, for example, that a requirement of senatorial advice and consent for removal “would be found very inconvenient in practice” and would “tend[] to lessen [the] responsibility” of the President over his subordinates.<sup>550</sup>

When the debate resumed in June, Madison added his voice to those invoking the Vesting Clause. On June 16, he noted that the Constitution states that the executive power shall be vested in the President and that, although it contains an exception for senatorial

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545. 10 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 541, at 737.

546. 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 544, at 848.

547. 10 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 541, at 727. At times, however, Smith seemed to accept that presidential removal with the advice and consent of the Senate might be sufficient. *See, e.g.*, 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 544, at 861.

548. 10 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 541, at 728.

549. 10 *id.* at 738.

550. 10 *id.* at 735.

involvement in appointments, he did not think Congress had the right to “extend this exception.”<sup>551</sup> And, on June 17, Madison referred to the Vesting Clause and argued that the requirement of senatorial advice and consent for appointments was “an exception to this general principle; and exceptions to general rules are ever taken strictly.”<sup>552</sup> Fisher Ames of Massachusetts also invoked the Vesting Clause in the June debate, noting that the Constitution declares “that the executive power shall be vested in the president” and that “[u]nder these terms all the powers properly belonging to the executive department of the government are given, and such only taken away as are expressly excepted.”<sup>553</sup>

Despite these invocations of the Vesting Clause, it is impossible to find in the removal debates any consensus in favor — or even majority support for — the Vesting Clause Thesis. This is so for a number of reasons. First, more than a dozen House members spoke on behalf of the removal provision in the May and June debates, and most of them did not invoke the Clause. Instead, they relied on specific textual grants, such as the Appointments Clause and the Take Care Clause, and on functional arguments. Indeed, Madison himself often relied on these alternative arguments, even after having invoked the Vesting Clause. Immediately after invoking the Vesting Clause on June 17, for example, Madison noted that “there is still another part of the constitution, which in my judgment, clearly favors the construction I give. The President is required, sir, to take care that the laws be faithfully executed.”<sup>554</sup>

Second, at least some of the proponents of the removal provision appear to have believed that the Constitution did not even address the power of removal, let alone assign this power to the President. These proponents supported the removal provision not because it followed from the Article II Vesting Clause, but rather because they thought it was a functionally desirable legislative measure. John Laurance of New York, for example, thought that the “constitution was silent with respect to the time the secretary of foreign affairs shall remain in office” and that the “only question” was “could the legislature safely trust the president with this power.”<sup>555</sup> Similarly, Egbert Benson of

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551. 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 544, at 868.

552. 11 *id.* at 896; *see also* 11 *id.* at 922 (invoking the Vesting Clause).

553. 11 *id.* at 979; *see also* 11 *id.* at 960 (Theodore Sedgwick of Massachusetts making arguable reference to the Vesting Clause).

554. 11 *id.* at 896.

555. 10 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 541, at 733; *see also* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 544, at 908-09 (John Laurance stating that the Constitution “is silent” on the issue of removal and that Congress can address this constitutional omission); 11 *id.* at

New York argued that “there was a power in the legislature of supplying the omission in the constitution.”<sup>556</sup> And Fisher Ames, despite having invoked the Vesting Clause, expressed the view that the power of removal “not being distributed by the constitution, it will come before the legislature, and, like every other omitted case, must be supplied by law.”<sup>557</sup>

At times, Madison also suggested this view. He acknowledged that “[p]erhaps this is an omitted case” in the Constitution,<sup>558</sup> and he argued that “there was no impropriety in the legislature settling this question.”<sup>559</sup> In a letter to Edmund Randolph, he noted that, “The Constitution has omitted to declare expressly by what authority removals from office are to be made. Out of this silence four constructive doctrines have arisen . . . .”<sup>560</sup> Moreover, Madison confessed that his view regarding a presidential power of removal “does not perfectly correspond with the ideas I entertained of [the Constitution] from the first glance.”<sup>561</sup> These statements suggest that Madison was not necessarily claiming that the constitutional Founders had resolved the removal issue in favor of the President.<sup>562</sup> Indeed, Smith pointed

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911 (Laurance referring to “declaring a legislative opinion in cases where the constitution is silent”).

556. 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 544, at 902.

557. 11 *id.* at 882; *see also* 11 *id.* at 886 (Thomas Hartley of Pennsylvania arguing that if the Constitution was “silent” on the issue of removal, Congress had the power under the Necessary and Proper Clause to address it); 11 *id.* at 873 (Elias Boudinot of New Jersey referring to the removal provision as “a legislative construction of the constitution necessary to be settled for the direction of your officers”); 11 *id.* at 939 (Vining suggesting that Congress has the power to give the President the power of removal by virtue of the Necessary and Proper Clause); 11 *id.* at 963 (Richard Lee of Virginia making a suggestion to the same effect); 11 *id.* at 983 (Sedgwick stating that “the legislature were at liberty to determine that an officer should be removable by the president, or whom they pleased”).

558. 11 *id.* at 927.

559. 11 *id.* at 845.

560. Letter from James Madison to Edmund Pendleton (June 21, 1789), in 12 THE PAPERS OF JAMES MADISON 251, 252 (Charles F. Hobson et al. eds., 1979). Madison also described Congress’s decision on this matter as a “legislative construction” of the Constitution, *see* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 544, at 987, and expressed the view that Congress’s resolution of this issue would become “the permanent exposition of the constitution.” 11 *id.* at 921. As Professor Caleb Nelson explains, Madison believed that the meaning of uncertain provisions of the Constitution could be “liquidated” or “fixed” by the post-Founding practices and interpretations of the federal branches. *See* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 525-29 (2003).

561. 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 544, at 867; *see also* 11 *id.* at 846; 11 *id.* at 896; 10 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 541, at 735 (stating that “[t]he constitution at the first view, may seem to favor” the requirement of senatorial advice and consent for removal).

562. At least this is true during much of the debate. At the end of the debate, in arguing for Benson’s motion (described below), Madison claimed: “Gentlemen have all along

out during the debate that *Federalist No. 77* had stated that senatorial advice and consent would be required for removal, and neither Madison nor anyone else disagreed.<sup>563</sup> This idea — that Congress was addressing something not resolved at the Founding — helps explain the frequent reliance by Madison and other proponents of the removal provision on functional rather than textual arguments. As Smith accurately observed, many supporters of the removal provision “have gone mostly on the point of expediency.”<sup>564</sup>

Third, a number of the opponents of the removal provision directly contested the Vesting Clause Thesis. Alexander White, for example, argued that, although the executive power is vested in the President, “the executive powers so vested, are those enumerated in the constitution.”<sup>565</sup> Similarly, Smith argued that the Vesting Clause argument “proves too much, and therefore proves nothing; because it implies that powers which are expressly given by the constitution would have been in the president without the express grant.”<sup>566</sup> And James Jackson of Georgia argued that even if it could be proved that the power of removal was executive in nature, “it does not follow that it vests in the president alone because [the President] alone does not possess all executive powers.”<sup>567</sup>

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proceeded on the idea that the constitution vests the power in the president; and what arguments were brought forward respecting the convenience or inconvenience of such a disposition of the power, were intended only to throw light upon what was meant by the compilers of the constitution.” 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 544, at 1029.

563. 11 *id.* at 861. *Federalist No. 77*, written by Hamilton, states that the consent of the Senate “would be necessary to displace as well as to appoint.” THE FEDERALIST, *supra* note 2, NO. 77 (Alexander Hamilton), at 459.

564. 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 544, at 985; *see also* 11 *id.* at 849 (Smith noting that the supporters of the removal provision were “inconsistent with themselves,” with some arguing that the Constitution gave the President the power of removal and others arguing that Congress should give the President this power). Not surprisingly, Smith and other opponents of the removal provision denied that Congress had the power to fill in a constitutional omission in this way. *See, e.g.*, 11 *id.* at 850 (Elbridge Gerry of Massachusetts stating that he “feared that the House were about making a breach in the constitution, by treating the subject as a meer question of expediency”); 11 *id.* at 943 (Smith stating that “[s]ome gentlemen have supposed that the constitution has made no provision for the removal of officers; and they have called it an omitted case, and a defect. They ask, if we may not supply that defect. I answer, No.”); 11 *id.* at 901 (recording a statement by Gerry that “[a]n attempt to supply such a case might appear an attempt at an amendment to the constitution”). They also argued that the removal provision was unnecessary if the Constitution in fact already gave the President the power of removal. *See, e.g.*, 11 *id.* at 986 (documenting remarks made by Smith).

565. 11 *id.* at 872; *see also* 11 *id.* at 952-53 (White contesting the Vesting Clause Thesis).

566. 11 *id.* at 936-37; *see also* 11 *id.* at 843 (Smith stating that “[i]f one reads the [Constitution] with attention, one would see that the powers of the different departments of the government were defined expressly”).

567. 11 *id.* at 912; *see also* 11 *id.* at 1013-14 (Michael Stone of Maryland contesting the Vesting Clause argument). White and Gerry also pointed out that a number of state constitutions had not given the governors the powers of appointment and removal, which

Fourth, the House members who invoked the Vesting Clause did so in a limited way. None of them suggested that the Article II Vesting Clause gave the President a package of unenumerated foreign affairs powers, even though the mid-June debate occurred in the context of discussing the proposed Department of Foreign Affairs.<sup>568</sup> In fact, one of the opponents of the removal provision — Samuel Livermore of New Hampshire — stated that he did not think anyone would claim that the President had the implied power to terminate treaties,<sup>569</sup> and no one did. Instead of seeing the Vesting Clause as conveying a package of foreign affairs powers, the House members who invoked the Clause may have simply believed that the Clause gave the President a general power to execute the laws, and that removal of subordinate executive officers was included within such a power. Fisher Ames, for example, closely tied his views regarding the vesting of executive power to the President's responsibility for executing the laws, stating:

The constitution places all executive power in the hands of the president, and could he personally execute all the laws, there would be no occasion for establishing auxiliaries; but the circumscribed powers of human nature in one man, demands the aid of others. . . . [H]e must therefore have assistants: But in order that he may be responsible to his country, he must have a choice in selecting his assistants, a control over them, with power to remove them when he finds the qualifications which induced their appointment cease to exist.<sup>570</sup>

This strong functional argument does not depend on the acceptance of unenumerated foreign affairs powers.

Madison also appears to have been invoking the Vesting Clause in this limited, "execution of the laws," way. Unlike the typical formulation of the Vesting Clause Thesis, Madison made no distinction in his statements between the three Vesting Clauses, instead referring to the legislative, executive, and judicial Vesting Clauses as if they had similar effect. He stated, for example, that "the legislative powers shall be vested in two houses, and the executive in a

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shows, they argued, that these powers were not viewed as inherently executive in nature. See 11 *id.* at 877-878, 930.

568. As Professor Powell notes, there was a reference to foreign affairs by Vining, see POWELL, *supra* note 17, at 39, but the reference is vague and does not claim that the Vesting Clause grants foreign affairs powers to the President. See 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 544, at 870 (stating that the President "executes the duties of foreign affairs"). Although Thomas Hartley of Pennsylvania did not refer to the Vesting Clause, he did state at one point that, "The business of the secretary of foreign affairs is of an executive nature, and must consequently be attached to the executive department." 11 *id.* at 905.

569. See 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 544, at 884.

570. 11 *id.* at 880.

President.”<sup>571</sup> In addition, Madison made no reference to an executive power over foreign affairs, and the only textual exception Madison mentioned with respect to the Constitution’s vesting of executive power in the President is the requirement of senatorial advice and consent for appointments.<sup>572</sup> Thus, to the extent that Madison viewed the Article II Vesting Clause as a grant of power, the power he appears to have had in mind was something like a power to execute the laws — not a package of substantive foreign affairs powers. This reading of his statements is consistent with the *Helvidius* essays he wrote several years later regarding the constitutionality of the 1793 Neutrality Proclamation (discussed below in Section E). In those essays, he distinguished the Proclamation from the President’s power of removal, arguing that “the powers of war and treaties” implicated by the Proclamation cannot be classified “within a grant of executive power.”<sup>573</sup> Madison argued:

[No analogy] can be traced between a power in the supreme officer responsible for the faithful execution of the laws, to displace a subaltern officer employed in the execution of the laws; and a power to make treaties, and to declare war, such as these have been found to be in their nature, their operation, and their consequences.<sup>574</sup>

Finally, the ultimate vote on the removal provision was too complicated and uncertain to show even a consensus in favor of an Article II power of removal, let alone a consensus in favor of the Vesting Clause Thesis. On June 19, the question was called, and the vote was thirty-four to twenty to retain the removal provision.<sup>575</sup> Three days later, however, Benson, who had voted for the removal provision, made two motions — first, to add a provision in the bill stating that the duties of the Secretary for Foreign Affairs would be assumed by his assistant “when ever [the secretary] shall be removed from office by the president of the United States”;<sup>576</sup> and second, to delete the removal provision that had occasioned so much debate. Benson explained that the removal provision might look too much like a grant of power from Congress, whereas his new proposed language “would evade that point, and establish a legislative construction of the con-

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571. See 11 *id.* at 896.

572. 11 *id.*

573. JAMES MADISON, LETTERS OF HELVIDIUS NO. 1 (Aug. 24, 1793), reprinted in 15 THE PAPERS OF JAMES MADISON, *supra* note 2, at 72.

574. 15 *id.*; see also Prakash, *supra* note 26, at 794-97 (noting consistency between Madison’s position in the removal debate and his position as Helvidius).

575. 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 544, at 1024.

576. 11 *id.* at 1028.

stitution.”<sup>577</sup> In two separate votes, Benson’s motions were approved. As Professor Currie explains, however, different House members voted for the two motions, making it impossible to infer majority support for an Article II power of removal:

The members first voted thirty to eighteen to add Benson’s “whenever” language. All those who voted in favor of presidential removal voted aye, whether they thought that Article II settled the question or left the matter to Congress. The House then voted thirty-one to nineteen to drop the phrase “to be removable by the President.” The numbers were virtually identical, but it was a different majority. For on this question the proponents of Article II power prevailed only because they were joined by a substantial number of members who had opposed presidential removal altogether.<sup>578</sup>

A fortiori, one cannot infer majority support from this vote for the Vesting Clause Thesis, even in the limited form it was presented during the debates.<sup>579</sup>

Although the bill for the Department of Foreign Affairs was then sent to the Senate, there is unfortunately no official record of the Senate discussions. It is clear from Senator Maclay’s diary that there was a debate in the Senate over the “whenever” clause that had been added pursuant to Benson’s motion, and that Maclay and certain other Senators spoke out against it.<sup>580</sup> We also know from the Senate Journal that the clause narrowly survived defeat, when there was a ten to nine vote on July 18 to retain it, with Vice-President Adams casting the tie-breaking vote.<sup>581</sup> Although it appears from Maclay’s diary and from Adams’s (very sketchy) notes that there was disagreement over the implications of the Vesting Clause — between Oliver Ellsworth and

577. 11 *id.* In support of Benson’s motions, Vining expressed the view that the substitution made it “more likely [that they would] obtain the acquiescence of the senate.” 11 *id.* at 1035-36.

578. CURRIE, *supra* note 28, at 40-41; *see also* *Myers v. United States*, 272 U.S. 52, 284-85 (1926) (Brandeis, J., dissenting) (noting this uncertainty in the votes); Calabresi & Prakash, *supra* note 36, at 645 (describing the “sea of conflicting congressional views”).

579. *See also* 1 CORWIN ON THE CONSTITUTION, *supra* note 540, at 332 (noting that “a mere fraction of a fraction, a minority of a minority, of the House, can be shown to have attributed the removal power to the President on the grounds of executive prerogative”).

580. *See* 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 426, at 109-16.

581. *See* 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 453, at 86. An earlier vote apparently had been taken on July 16, and it was 11-10, with the Vice-President breaking a tie. *See* 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 426, at 115. “Two days later (July 18) those who were against the bill asked for the yeas and nays in the same form as originally voted, with the casting vote of the Vice President. Butler had been for striking out, but was now absent. So Ellsworth withdrew to preserve the tie.” HART, *supra* note 540, at 188.

William Johnson, for example<sup>582</sup> — it is impossible to reconstruct the precise nature of the Senate's discussion from the materials we have. As a result, the same ambiguities that exist with respect to the House vote exist with respect to the Senate vote. As Professor Currie notes, "[I]t was the considered judgment of a majority in both Houses of Congress that the President could remove the Secretary of Foreign Affairs, but there was no consensus as to whether he got that authority from Congress or the Constitution itself."<sup>583</sup>

In sum, what we find in the first major debate in Congress over executive power is uncertainty and disagreement, not consensus. The idea that the Article II Vesting Clause conveys unenumerated power, far from being an understood feature of the recently ratified Constitution, was instead simply one of many contested arguments in the debate, and not the dominant one. If any approach could fairly be said to claim preeminence in this debate, it was the focus on functional consequences that had been so evident earlier in the Founding debates. Moreover, even those who invoked the Vesting Clause did so in the limited context of a presidential power to execute the laws and made no claim that the Vesting Clause conveys unenumerated foreign affairs powers.

#### D. *Reception and Recall of Genet*

Proponents of the Vesting Clause Thesis invoke the Washington Administration's handling in 1793 of the controversial ambassador from revolutionary France, Edmond Genet, as support for the Thesis. On their view, only a general foreign affairs power understood as executive can explain the Administration's dealings with this reckless emissary.<sup>584</sup> In fact, the Administration's actions with respect to Genet can all reasonably be tied to the President's enumerated powers to receive ambassadors and to execute the laws. Moreover, although the handling of Genet generated significant debates within the Administration and in the country, it is noteworthy that the Article II Vesting Clause was never invoked during these debates.

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582. See William Maclay, Diary entry (July 18, 1789), in 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 426, at 117-18; 3 THE WORKS OF JOHN ADAMS 409, 412 (1851).

583. CURRIE, *supra* note 28, at 41; see also JAMES THOMAS FLEXNER, GEORGE WASHINGTON AND THE NEW NATION, 1783-1789, at 215 (1969) ("Since the matter was so closely contested even with the prestigious Washington in the executive chair, it is hard to doubt that if anyone else had been elected President, the vote would have gone the other way.").

584. See Prakash & Ramsey, *supra* note 14, at 312-17.



### 1. *Chronology of Key Events and Statements*

We begin this section with a detailed account of the key events and statements in this period, and we then assess the implications of these events and statements for the debate over the Vesting Clause Thesis. The Genet episode concerned, in part, two treaties between the United States and France concluded during the Revolutionary War. Among other things, these treaties required the United States to help protect French possessions in the Americas (such as the French West Indies), allowed French warships and privateers to bring prizes into U.S. ports, and disallowed the use by France's enemies of U.S. ports for outfitting privateers and selling prizes.<sup>585</sup> In 1789, the same year that the United States began operating under its new Constitution, a violent revolution was initiated in France. The monarchy was subsequently abolished in September 1792, and King Louis XVI was executed in January 1793. The French government was controlled by a National Convention, dominated until the spring of 1793 by the Girondins, and thereafter by the Jacobins. In conjunction with its abolition of the monarchy, France began declaring war on various countries. In April 1792, it declared war on Austria and soon found itself also at war with Prussia (which had earlier formed an alliance with Austria). In early 1793, France declared war on Great Britain and Holland, and then against Spain. The French-U.S. treaties raised the prospect that the United States might be drawn into the European war on the side of the French.

In November 1792, the National Convention appointed Genet to serve as the new French Minister to the United States. Genet set sail for the United States in late February 1793 and arrived in Charleston, South Carolina, on April 8, 1793, where he was greeted by enthusiastic crowds. Soon thereafter, before he had even been officially received by the U.S. government, he began commissioning and arming privateers, manned largely by American sailors, to prey on British ships. He also began establishing French prize courts on U.S. soil to oversee the condemnation and sale of captured prize vessels, planning raids into Spanish-controlled Florida, and plotting the "liberation" of Louisiana and Canada.

President Washington wanted to keep the United States out of the European war. As he explained in a letter to Gouverneur Morris, the U.S. Minister to France, "unwise should we be in the extreme to involve ourselves in the contests of European Nations, where our weight could be but small; tho' the loss to ourselves would be

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585. See 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 3-44 (Hunter Miller ed., 1931).

certain.”<sup>586</sup> Upon hearing of France’s declaration of war on Great Britain and Holland, Washington cut short his stay at Mount Vernon and returned to Philadelphia (then the national capital) to discuss the matter with his cabinet.<sup>587</sup>

On April 18, Washington gave his four cabinet officers (Alexander Hamilton, Thomas Jefferson, Edmund Randolph, and Henry Knox) a list of thirteen questions he wanted to discuss with them the following day.<sup>588</sup> The questions included whether to issue a neutrality proclamation, whether to receive the new French minister, whether to renounce the 1778 treaties, and whether to call Congress into special session.<sup>589</sup> That same day, Genet left Charleston by land en route to Philadelphia. Genet made frequent stops, such that the trip took almost a month.

In the meantime, Washington met with the cabinet on April 19. At that meeting, it was agreed unanimously that Congress should not be called into special session, that a neutrality proclamation should be issued, and that the minister from the Republic of France should be received.<sup>590</sup> In letters to Madison and Monroe, Jefferson stated that he had initially opposed the issuance of the proclamation because he believed that, given the Constitution’s assignment of the power to declare war to Congress, the Executive Branch did not have the power

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586. Letter from George Washington to Gouverneur Morris (Mar. 25, 1793), in 32 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 418, at 402, 402.

587. *See* Letter from George Washington to Henry Lee (May 6, 1793), in 32 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 418, at 448, 448-49; Letter from George Washington to Alexander Hamilton (Apr. 12, 1793), in 14 THE PAPERS OF ALEXANDER HAMILTON 314, 314-15 (Harold C. Syrett et al. eds., 1969).

588. *See* Questions Submitted to the Cabinet by the President (Apr. 18, 1793), in 32 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 418, at 419, 419-21.

589. Jefferson, apparently for good reason, believed that the thirteen questions had been formulated by Hamilton. *See* 25 THE PAPERS OF THOMAS JEFFERSON 569 n. (John Catanzariti ed., 1992); Thomas Jefferson, Notes on Washington’s Questions on Neutrality and the Alliance with France (May 6, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 665, 665-66; *see also* 3 DUMAS MALONE, JEFFERSON AND HIS TIME: JEFFERSON AND THE ORDEAL OF LIBERTY 68 (1962) (stating that the questions “almost certainly” were drafted by Hamilton). It is clear that Hamilton had already been discussing similar questions with John Jay. *See* 14 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 587, at 297-300 (reprinting two letters from Hamilton to Jay, both dated April 9, 1793). Indeed, at Hamilton’s request, Jay had drafted a sample neutrality proclamation prior to the April 18 meeting. *See* Letter and Enclosure from John Jay to Alexander Hamilton (Apr. 11, 1793), in 14 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 587, at 307; CHARLES MARION THOMAS, AMERICAN NEUTRALITY IN 1793: A STUDY IN CABINET GOVERNMENT 43-45 (1931).

590. *See* Cabinet Opinion (Apr. 19, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 589, at 570; Notes on Washington’s Questions (May 6, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 589, at 665-66; Notes on Cabinet Meeting (Apr. 19, 1793), in 14 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 587, at 328.

to declare neutrality.<sup>591</sup> In response to this concern, Jefferson said that it was agreed in the cabinet meeting that the word “neutrality” would not be used in the proclamation.<sup>592</sup>

There was debate in the meeting, however, over whether to receive the French minister with or without qualifications.<sup>593</sup> If he were received without qualifications, it might signify that the United States accepted the continuing effect of the 1778 treaties between the United States and France, notwithstanding the change in France’s government. A receipt with qualifications, by contrast, might allow the United States the option of suspending or renouncing the treaties. Hamilton and Knox thought the minister should be received with qualifications, whereas Jefferson and Randolph thought he should be received without qualifications. Washington asked his cabinet members to prepare written opinions on this issue. There is no indication that the constitutional powers of the Executive Branch were discussed at the April 19 meeting.

While the cabinet officials were preparing their written opinions, Randolph drafted the Neutrality Proclamation, which was issued on April 22, 1793. Copies of it were sent to the foreign ministers from France, Great Britain, and Holland.<sup>594</sup> The Executive Branch’s power to issue this Proclamation became the subject of the *Pacificus-Helvidius* debate between Hamilton and Madison, discussed below in Section D.

Jefferson submitted his written opinion to the President on April 28.<sup>595</sup> He argued that, under the law of nations, the 1778 treaties between the United States and France were still in effect, notwithstanding the intervening change in the French government. As he explained:

[T]he treaties between the US. and France, were not treaties between the US. and Louis Capet, but between the two nations of America and France, and the nations remaining in existence, tho’ both of them have

591. See Letter from Thomas Jefferson to James Madison (June 23, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON 346 (John Catanzariti ed., 1995); Letter from Thomas Jefferson to James Madison (June 29, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 403; Letter from Thomas Jefferson to James Monroe (July 14, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 501.

592. See CHARLES S. HYNEMAN, THE FIRST AMERICAN NEUTRALITY: A STUDY OF THE AMERICAN UNDERSTANDING OF NEUTRAL OBLIGATIONS DURING THE YEARS 1792 TO 1815, at 12-13 (1934); THOMAS, *supra* note 589, at 46.

593. Even before the meeting, Washington had decided to receive Genet. See 3 MALONE, *supra* note 589, at 69; 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 589, at 469-70.

594. See Letter from Thomas Jefferson to Jean Baptiste Ternant, George Hammond, and F.P. Van Berckel (Apr. 23, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 589, at 583, 583-84.

595. See Letter and Enclosed Opinion from Thomas Jefferson to George Washington (Apr. 28, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 589, at 607, 607-18.

since changed their forms of government, the treaties are not annulled by these changes.<sup>596</sup>

Jefferson also argued that compliance with the treaties would not unduly threaten U.S. neutrality. In addition, he argued that the reception of Genet was, in any event, a separate matter from the continuing effect of the treaties: "There is not a word, in either of them, about sending ministers. This has been done between us under the common usage of nations, and can have no effect either to continue or annul the treaties."<sup>597</sup> There is no discussion in Jefferson's opinion of constitutional issues. Rather, the focus is on international law, with references to the leading international law commentators of the time, such as Vattel, Grotius, and Puffendorf — each of whom, it will be recalled, had little or nothing to say concerning how nations constituted those parts of their governments responsible for conducting foreign affairs.<sup>598</sup>

Hamilton and Knox submitted their opinion on May 2.<sup>599</sup> They argued that, in light of the substantial changes in the French government, the United States had a right to suspend the 1778 treaties and consider whether the changes in the government warranted a renunciation of the treaties.<sup>600</sup> Like Jefferson's opinion, the Hamilton/Knox opinion contains an extensive discussion of the law of nations, with references to Vattel, Grotius, and Puffendorf. Hamilton apparently gave Washington another opinion on May 2 concerning whether, under international law, the war in which France was engaged was offensive or defensive.<sup>601</sup> There is no discussion of executive power in either opinion.

Randolph submitted his own opinion on May 6. In this opinion (which is quoted at length in the footnotes to the Hamilton/Knox opinion in the Hamilton papers), Randolph agreed with Jefferson that Genet should be received without qualifications.<sup>602</sup> Once again, there was no discussion of executive power.

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596. 25 *id.* at 609.

597. 25 *id.* at 612.

598. See *supra* Part II.A.

599. See Letter and Enclosed Answer from Alexander Hamilton and Henry Knox to George Washington (May 2, 1793), in 14 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 587, at 367, 367-96.

600. 14 *id.* at 372.

601. See Letter from Alexander Hamilton to George Washington (May 2, 1793), in 14 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 587, at 398, 398-408.

602. See Letter and Enclosed Answer from Alexander Hamilton and Henry Knox to George Washington, *supra* note 599, at 368 n.4, 374 n.12, 375 n.13, 388 n.22, 396 n.26.

Washington agreed with Jefferson and Randolph and decided, on May 6, to receive Genet without qualifications.<sup>603</sup> Genet arrived in Philadelphia on May 16, and Washington met with him on May 18. Initially, Jefferson was very supportive of Genet, telling Madison that “he offers every thing, and asks nothing.”<sup>604</sup>

Despite the Neutrality Proclamation, Genet continued with his privateering and other activities. This prompted vigorous complaints from the British Minister to the United States, George Hammond, starting in May with complaints about the capture of the British ship *Grange* in U.S. waters.<sup>605</sup>

Genet’s activities were the subject of numerous cabinet meetings, and the Administration repeatedly, through Jefferson, asked Genet to cease his activities, to no avail.<sup>606</sup> At times, Genet suggested that if the Administration continued to thwart his activities, he would appeal to Congress and the American people. Not surprisingly, Washington became increasingly frustrated with Genet. For example, Washington wrote a letter to Jefferson on July 11, 1793, asking, “Is the Minister of the French Republic to set the Acts of this Government at defiance, *with impunity?* and then threaten the Executive with an appeal to the People?”<sup>607</sup> Jefferson, despite his initial support for Genet, became

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603. Prakash and Ramsey claim that, even though Washington did not attempt to suspend or terminate the French treaties, the discussion of that possibility by his cabinet shows that they understood that the President had the unilateral constitutional power to terminate U.S. treaties. See Prakash & Ramsey, *supra* note 14, at 324-27. However, there was never any discussion by the cabinet (let alone by the Senate or Congress), of either the President’s constitutional authority with respect to this issue, or how a suspension or termination would be accomplished. As a result, the evidence here is much too thin to support any claim of constitutional consensus, especially one tied to the Article II Vesting Clause, which was never even mentioned. Furthermore, as Prakash and Ramsey appear to acknowledge, President John Adams, in the “quasi-war” with France in the late 1790s, acted as if he did not have the unilateral power to terminate treaties with France. See Prakash & Ramsey, *supra* note 14, at 326 n.409.

604. Letter from Thomas Jefferson to James Madison (May 19, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 591, at 61, 62.

605. See Memorial from George Hammond to Thomas Jefferson (May 2, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 589, at 637, 637-38; Letter from Thomas Jefferson to George Hammond (May 15, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 591, at 38, 38-40; see also Edmund Randolph’s Opinion on the *Grange* (May 14, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 591, at 31, 31-35 (concluding that the *Grange* “has been seized on neutral ground” and thus restitution should be made to the British).

606. Jefferson’s initial letters were addressed to the outgoing French minister, Jean Baptiste Ternant. See, e.g., Letter from Thomas Jefferson to Jean Baptiste Ternant (May 3, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 589, at 649; Letter from Thomas Jefferson to Jean Baptiste Ternant (May 6, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 589, at 676; Letter from Thomas Jefferson to Jean Baptiste Ternant (May 15, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 591, at 42.

607. Letter from George Washington to Thomas Jefferson (July 11, 1793), in 33 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 444, at 4, 4.

disenchanted with him. For example, in a letter to Madison dated July 7, 1793, he stated:

Never, in my opinion, was so calamitous an appointment made, as that of the present minister of F[rance] here. Hotheaded, all imagination, no judgment, passionate, disrespectful and even indecent towards the P[resident] in his written as well as verbal communications, talking of appeals from him to Congress, from them to the people, urging the most unreasonable and groundless propositions, and in the most dictatorial style . . . .<sup>608</sup>

The Genet episode reached a boiling point in July, when word reached the cabinet that Genet's ship, the *Embuscade*, had captured a British merchant ship, *Little Sarah*, and had fitted her out in the port of Philadelphia as a privateer, under the new name *Petite Democrate*. Governor Thomas Mifflin of Pennsylvania reported that the ship now had fourteen guns and appeared ready to sail. Despite the Neutrality Proclamation, and despite requests by both Mifflin and Jefferson that the *Petite Democrate* stay in port, Genet allowed the ship to sail. He informed Jefferson that, "When treaties speak, the agents of nations have but to obey."<sup>609</sup>

As a result of these events, the cabinet began considering in July whether and how to have Genet recalled.<sup>610</sup> In early August, it was decided that a letter would be sent to Gouverneur Morris detailing Genet's conduct and asking Morris to lay this information before the French government and ask for Genet's recall.<sup>611</sup> Jefferson drafted the

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608. Letter from Thomas Jefferson to James Madison (July 7, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 591, at 443, 444. For a lively account of Jefferson's initial support for Genet and eventual disenchantment with him, see CONOR CRUISE O'BRIEN, *THE LONG AFFAIR: THOMAS JEFFERSON AND THE FRENCH REVOLUTION, 1785-1800*, at 152-90 (1996).

609. Letter from Edmond Genet to Thomas Jefferson (July 9, 1793), in 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 163, 163 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales & Seaton 1833).

610. See Notes of Cabinet Meeting on Edmond Charles Genet (July 23, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 591, at 553; Notes of Cabinet Meeting on Edmond Charles Genet (Aug. 2, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 591, at 601.

611. See Notes of Cabinet Meeting on Edmond Charles Genet (Aug. 1, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 591, at 598; see also Letter from Thomas Jefferson to James Madison (Aug. 3, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 591, at 606 (stating that "[w]e have decided unanimously to require the recall of Genet"). The cabinet also considered again whether to call Congress into early session. Jefferson was the only cabinet member who favored doing so, and Washington decided not to take this action. See Rules on Neutrality (Aug. 3, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 591, at 608 (covering rules developed in a meeting on the same day); Opinion on Convening Congress (Aug. 4, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 591, at 615 (suggesting that Congress be called). Washington eventually did agree with Jefferson that Congress should be called into special session, but he allowed himself to be voted down by Hamilton, Knox, and Randolph. See JAMES THOMAS FLEXNER, *GEORGE WASHINGTON: ANGUISH AND FAREWELL, 1793-1799*, at 85 (1972).

proposed letter to Morris, and, after revisions by the cabinet, the letter was sent on August 23.<sup>612</sup> Morris delivered the recall request to the French government on October 8, and they made a decision to recall him three days later, on October 11. News of this decision did not reach Philadelphia, however, until January 1794.<sup>613</sup>

Also in July, the Administration sent twenty-nine questions to the Justices of the Supreme Court concerning, among other things, the meaning of the 1778 treaties with France.<sup>614</sup> Jefferson's letter to the Justices explained that the war in Europe had generated questions "of considerable difficulty, and of greater importance to the peace of the US," and that "their decision is so little analagous to the ordinary functions of the Executive, as to occasion much embarrassment and difficulty to them."<sup>615</sup> Washington's cabinet also agreed to inform the British and French ministers that "the Executive of the US., desirous of having done what shall be strictly conformeable to the treaties of the US. and the laws respecting the said cases has determined to refer the questions arising therein to persons learned in the laws."<sup>616</sup> A letter to this effect was sent to Genet and Hammond.<sup>617</sup> The Supreme Court subsequently declined to answer the questions, on the ground that the Court was not empowered to issue advisory opinions.<sup>618</sup> As a result, the cabinet formulated its own rules of neutrality, addressing, among other things, the arming and equipping of foreign vessels in U.S. ports.<sup>619</sup>

As Genet became increasingly frustrated with the Administration's neutrality policy, he began to raise the issue of executive power in his

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612. See Cabinet Opinions on Edmond Charles Genet (Aug. 23, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 591, at 745; 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 591, at 747-50 (covering the letter to Gouverneur Morris and some cabinet notes).

613. See HARRY AMMON, THE GENET MISSION 155-56 (1973); ELKINS & MCKITRICK, *supra* note 447, at 369.

614. See Questions Proposed to be Submitted to the Judges of the Supreme Court (July 18, 1793), in 33 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 444, at 15, 15-19.

615. Letter from Thomas Jefferson to the Justices of the Supreme Court (July 18, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 591, at 520, 520.

616. Cabinet Opinion on Consulting the Supreme Court (July 12, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 591, at 484, 484.

617. See Letter from Thomas Jefferson to Edmond Charles Genet and George Hammond (July 12, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 591, at 487.

618. See Letter from Chief Justice Jay and Associate Justices to George Washington (Aug. 8, 1793), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, *supra* note 184, at 488, 488-89. See generally STEWART JAY, MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES (1997).

619. See Rules on Neutrality, *supra* note 611, at 608-09. The rules adopted by the cabinet were largely embodied, in the spring of the following year, in the Neutrality Act of 1794.

correspondence and discussions with Jefferson.<sup>620</sup> For example, in a letter dated June 8, Genet objected that “every obstruction by the Government of the United States, to the arming of French vessels, must be an attempt on the rights of man, upon which repose the independence and laws of the United States” and was contrary to “the intention of the people of America.”<sup>621</sup> Similarly, Jefferson in a memorandum describes a conversation he had with Genet in July about the respective powers of Congress and the President.<sup>622</sup> In response to a suggestion by Genet that U.S. policy towards France should be decided by Congress rather than by the President:

[Jefferson] explained our constitution to him, as having divided the functions of government among three different authorities, the Executive, Legislative, and Judiciary, each of which were supreme in all questions belonging to their department and independent of the others: that all the questions which had arisen between him and us belonged to the Executive department, and if Congress were sitting could not be carried to them, nor would they take notice of them.<sup>623</sup>

Jefferson further explained that Congress was “sovereign in making laws only, the Executive was sovereign in executing them, and the Judiciary in construing them where they related to their department.”<sup>624</sup> When Genet asserted that Congress should at least decide the proper interpretation of the 1778 treaties, Jefferson “told him No, there were very few cases indeed arising out of treaties which they could take notice of; that the President is to see that treaties are observed” and that “the constitution had made the President the last appeal.”<sup>625</sup>

Genet continued along these lines in a vitriolic letter dated June 22, complaining that the Washington Administration had acted without waiting for Congress, and asserting that the Administration’s actions were contrary to the will of the American people.<sup>626</sup> Jefferson

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620. Genet also was frustrated by the Administration’s decision not to accede to his request to pay off the entire U.S. debt to France. *See, e.g.*, Letter from Thomas Jefferson to Edmond Genet (June 11, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 591, at 252, 252.

621. Letter from Edmond Charles Genet to Thomas Jefferson (June 8, 1793), in 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 609, at 151, 151.

622. *See* Memorandum of a Conversation with Edmund Charles Genet (July 10, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 591, at 463, 463-67.

623. 26 *id.* at 465.

624. 26 *id.*

625. 26 *id.*

626. *See* Letter from Edmond Charles Genet to Thomas Jefferson (June 22, 1793), in 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 609, at 155, 155-56. Hamilton later referred to Genet’s June 22 letter as “the most offensive paper, perhaps, that ever was offered by a foreign Minister to a friendly power, with which he resided.” Reasons for the Opinion of the Secretary of the Treasury and the Secretary at War Respecting the



drafted a response, which he showed to Washington but never sent to Genet:

When you shall have had time to become better acquainted with the constitution of the US. you will become sensible that this question can only arise between him and the legislature: that the Executive is the sole organ of our communications with foreign governments; that the Agents of those governments are not authorized to judge what cases are to be decided by this or that department; but to consider the declarations of the President conclusive as to them, and sufficient evidence that the proper department has pronounced on the case.<sup>627</sup>

Genet apparently did not accept Jefferson's views about executive power. In mid-September, for example, upon receiving a copy of the letter that had been sent to Morris, Genet sent Jefferson an angry letter asserting, among other things, that "the Executive power is the only one which has been confided to the President of the United States" and that the President does not have "the power to bend existing treaties to circumstances, and to change their sense."<sup>628</sup> In December, Genet asked the Administration to present to Congress a translation of his instructions and other papers. Jefferson replied that "the communications, which are to pass between the Executive and Legislative branches, cannot be a subject for your interference, and that the President must be left to judge for himself what matters his duty or the public good may require him to propose to the deliberations of Congress."<sup>629</sup>

One specific issue that came up concerning executive power was the proper organ of government for approving and revoking the commissions of foreign consuls. In a letter on October 2, Jefferson informed Genet that, "by our constitution all foreign agents are to be addressed to the President of the US. no other branch of the government being charged with the foreign communications."<sup>630</sup> Genet responded on November 14 that the French government "will adopt

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Brigandine *Little Sarah* (July 8, 1793), in 15 *THE PAPERS OF ALEXANDER HAMILTON*, *supra* note 5, at 74, 75.

627. Unsent letter from Thomas Jefferson to Edmond Genet (July 16, 1793), in 26 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 591, at 510, 513; *see also* Unsent letter from Thomas Jefferson to Edmond Genet (Nov. 1793), in 27 *THE PAPERS OF THOMAS JEFFERSON* 378, 378-79 (John Catanzariti ed., 1997) (explaining that the Constitution assigns the power of corresponding with foreign nations to the executive, not to the states).

628. Letter from Edmond Genet to Thomas Jefferson (Sept. 18, 1793), in 1 *AMERICAN STATE PAPERS: FOREIGN RELATIONS*, *supra* note 609, at 172, 172.

629. Letter from Thomas Jefferson to Edmond Genet (Dec. 31, 1793), in 27 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 627, at 649, 649. As Harry Ammon explains, neither the National Convention nor Genet fully understood the role of the President in the U.S. constitutional system. *See* AMMON, *supra* note 613, at 25-26, 129.

630. Letter from Thomas Jefferson to Edmond Genet (Oct. 2, 1793), in 27 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 627, at 175, 176.

the alterations of which this matter appears susceptible, agreeably to the text, spirit, and basis, of your constitution” and that, in his view, the Constitution appeared to give the President only the ministerial duty “to verify purely and simply the powers of foreign agents accredited to their masters.”<sup>631</sup> Jefferson responded in a letter dated November 22 that he was “not authorized to enter into any discussions with you on the meaning of our constitution in any part of it, or to prove to you that it has ascribed to him alone the admission or interdiction of foreign agents. I inform you of the fact by authority from the President.”<sup>632</sup> Genet then sent Jefferson a letter on December 3 questioning the requirement that consular commissions be addressed to the President and arguing that the U.S. government did not have a right to revoke consular commissions.<sup>633</sup> This letter was considered by the cabinet on December 7, where it was agreed that consular commissions could be addressed “either to the US. or to the President of the US. but that one of these should be insisted on.”<sup>634</sup> Jefferson subsequently wrote Genet arguing that governments have the right to determine whether to accept particular consular officials and whether to permit them to continue exercising consular functions.<sup>635</sup> Jefferson also stated:

By what member of the government the right of giving or withdrawing permission, is to be exercised here, is a question on which no foreign Agent can be permitted to make himself the Umpire. It is sufficient for him, under our government that he is informed of it by the Executive.<sup>636</sup>

On at least a couple of occasions, Jefferson pointed out that the President *lacked* power over a particular matter. Thus, in a letter dated June 1, 1793, Jefferson informed Genet that Gideon Henfield, who was charged with violating U.S. neutrality, “appears to be in the custody of the civil magistrate, over whose proceedings the Executive has no controul.”<sup>637</sup> Similarly, in a letter dated June 17, 1793, Jefferson explained that the President could not interfere with judicial decisions exercising jurisdiction over certain vessels and cargoes taken by a

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631. Letter from Edmond Genet to Thomas Jefferson (Nov. 14, 1793), in 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 609, at 184, 184.

632. Letter from Thomas Jefferson to Edmond Genet (Nov. 22, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, *supra* note 627, at 414, 414.

633. Letter from Edmond Genet to Thomas Jefferson (Dec. 3, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, *supra* note 627, at 479, 479-80.

634. Cabinet Opinion on Edmond Charles Genet and James King (Dec. 7, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, *supra* note 627, at 489, 489.

635. Letter from Thomas Jefferson to Edmond Genet (Dec. 9, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, *supra* note 627, at 500, 500-01.

636. 27 *id.* at 500 (footnotes omitted).

637. Letter from Thomas Jefferson to Edmond Genet (June 1, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 591, at 160, 160.

French vessel as prizes. Jefferson stated that “[t]he functions of the Executive are not competent to the decision of Questions of property between Individuals.”<sup>638</sup> And, in responding to complaints by Genet of threats to French consuls and other concerns, Jefferson informed him that most of his complaints, “being beyond the powers of the Executive, they can only manifest their dispositions by acting on those which are within their powers.”<sup>639</sup>

In November 1793, while awaiting word back from France concerning Genet’s recall, the Administration considered dismissing Genet on its own authority.<sup>640</sup> This proposal was opposed by Jefferson and was never implemented. Nor was there any discussion of the source of the President’s authority, if any, to dismiss a foreign ambassador.

On December 5, 1793, Washington presented Congress with a report concerning Genet’s conduct, attaching much of the correspondence and other papers relating to what had occurred since Genet’s arrival.<sup>641</sup> At the outset of the report, Washington stated:

As the present situation of the several nations of Europe, and especially of those with which the United States have important relations, cannot but render the state of things between them and us matter of interesting inquiry to the Legislature, and may indeed give rise to deliberations to which they alone are competent, I have thought it my duty to communicate to them certain correspondences which have taken place.<sup>642</sup>

Genet continued to engage in problematic conduct to the very end. For example, on December 8, he wrote to Randolph demanding that Chief Justice Jay and Senator Rufus King be prosecuted for libel, based on their published allegation that he had threatened to appeal to the people of the United States to override the actions of the President.<sup>643</sup> In mid-January 1794, news of Genet’s recall by France

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638. Letter from Thomas Jefferson to Edmond Genet (June 17, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 591, at 301, 301.

639. Letter from Thomas Jefferson to Edmond Genet (Nov. 30, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, *supra* note 627, at 458, 458 (footnotes omitted); *see also* Letter from Thomas Jefferson to Edmond Genet (Sept. 9, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, *supra* note 627, at 67, 68 (“The Courts of Justice exercise the sovereignty of this country in judiciary matters, are supreme in these, and liable neither to controul nor opposition from any other branch of the Government.”).

640. *See* Notes of Cabinet Meetings on Edmond Charles Genet and the President’s Address to Congress (Nov. 18, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, *supra* note 627, at 399, 399-401.

641. *See* 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 609, at 141-243.

642. 1 *id.* at 141.

643. *See* Letter from Thomas Jefferson to Edmund Randolph enclosing letter from Edmond Genet (Dec. 18, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, *supra* note 627, at 587, 587. For a description of the circumstances surrounding the allegation made against

reached Philadelphia. On January 20, Washington informed Congress that Genet's conduct had "been unequivocally disapproved" by the French government and that the French Government had given "the strongest assurances . . . that [Genet's] recall should be expedited without delay."<sup>644</sup> Genet's successor, Jean Fauchet, arrived in the United States on February 20. Genet did not wish to return to France (where he might have been executed by the now-Jacobin controlled government), and Washington decided to grant him political asylum in the United States. In a truly American conclusion, Genet settled down as a gentleman farmer in New York and married Governor Clinton's daughter.

## 2. *Assessment*

While there is nothing in the Genet episode that contradicts the Vesting Clause Thesis, there is also nothing there that provides significant support for it. First, the assumptions and assertions concerning executive power during this episode were all made by Executive Branch officials, at a time when Congress was out of session and the Administration was understandably trying to prevent Genet's conduct from drawing the United States into war. There is no reason to believe that these officials were objectively trying to apply Founding intent. Second, although the scope of executive power came up in the discussions between Genet and Jefferson, there was almost no internal discussion by Washington's cabinet of this topic, so it is difficult to draw inferences from this episode about the constitutional theory underlying the Administration's actions. Third, the Administration's effort to obtain answers from the Supreme Court on the treaty questions, and its presentation of the Genet materials to Congress once Congress was in session, undermine the strong executive control story presented by Prakash and Ramsey.<sup>645</sup> Fourth, notwithstanding Jefferson's broad statements about the executive in his discussions with Genet, there is no documented reference in any of the correspondence or cabinet meetings relating to the Genet episode that refers to the Vesting Clause. Finally, and perhaps most importantly, all of the Executive Branch actions during this episode could reasonably have been based on specific constitutional provisions rather than on the Vesting Clause. Thus, the assumption that the Executive Branch could decide whether and how to receive Genet,

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Genet that he would attempt to appeal to the American people, see JOANNE B. FREEMAN, *AFFAIRS OF HONOR 93-97* (2001).

644. Letter from George Washington to Congress (Jan. 21, 1794), in 33 *THE WRITINGS OF GEORGE WASHINGTON*, *supra* note 444, at 245, 245-46.

645. See also FLEXNER, *supra* note 611, at 26 ("Washington would undoubtedly have consulted the Senate in the [neutrality] crisis had Congress been in session.").

and then could decide to ask for his recall, could reasonably have been based on the President's power to "receive ambassadors and other public ministers."<sup>646</sup> And the Administration's belief that it had the power in the absence of a judicial decision to interpret the 1778 treaties could reasonably have been based on the President's power to "take care that the laws be faithfully executed."<sup>647</sup>

Prakash and Ramsey argue, however, that the Ambassador Receipt Clause cannot explain the Washington Administration's practice of issuing and revoking "exequaters" to consuls, that is, the formal permission to set up consular functions. Consuls are mentioned in the Ambassador Appointment Clause and in the Article III jurisdictional provisions, but not in the Ambassador Receipt Clause.<sup>648</sup> At best, this appears to be a minor point. If one accepts the proposition that the Ambassador Receipt Clause includes a power to determine which foreign diplomats to receive (which is at least plausible), then the exequatur practice was at most a modest extension of that power to a class of diplomats not specifically included within the Clause. In other words, Prakash and Ramsey have at most identified a minor example of where the Administration's practice may have strained the constitutional text, not any confirmation or acceptance of the Vesting Clause Thesis.

In any event, it is possible that the Founders intended the Ambassador Receipt Clause to encompass consuls but inadvertently left out an express reference to those officials. This conclusion is supported by *Federalist No. 42*. There, Madison explains that, although the Articles of Confederation gave the national government "the sole and exclusive right and power of . . . sending and receiving ambassadors," the Constitution improves upon the Articles by adding

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646. U.S. CONST. art. II, § 3. Courts have long construed the Ambassador Receipt Clause as giving the President the power to determine whether to accredit foreign diplomats. *See, e.g., United States v. Ortega*, 27 F. Cas. 359, 361 (C.C.E.D. Pa. 1825) (No. 15,971) ("The constitution of the United States having vested in the president the power to receive ambassadors and other public ministers, has necessarily bestowed upon that branch of the government, not only the right, but the exclusive right, to judge of the credentials of the ministers so received . . ."). Courts also have relied on the Ambassador Receipt Clause as support for a presidential power to determine whether the United States should recognize particular foreign governments. *See, e.g., Matimak Trading Co. v. Khalily*, 118 F.3d 76, 79 (2d Cir. 1997) ("Because the Constitution empowers only the President to 'receive Ambassadors and other public Ministers,' the courts have deferred to the executive branch when determining what entities shall be considered foreign states." (quoting *Iran Handicraft & Carpet Exp. Ctr. v. Marjan Int'l Corp.*, 655 F. Supp. 1275, 1277 (S.D.N.Y. 1987), *aff'd*, 868 F.2d 1267 (2d Cir. 1988))). Although not noted by Prakash and Ramsey, in *Federalist No. 69*, Hamilton suggested a narrow reading of the Ambassador Receipt Clause, stating that the President's power to receive ambassadors "is more a matter of dignity than of authority" and would be "a circumstance which will be without consequence in the administration of the government." THE FEDERALIST, *supra* note 2, NO. 69 (Alexander Hamilton), at 420.

647. U.S. CONST. art. II, § 3.

648. *See Prakash & Ramsey, supra* note 14, at 316.

“a power of appointing and receiving ‘other public ministers and consuls.’”<sup>649</sup> Thus, Madison seemed to believe that the Ambassador Receipt Clause, unlike the equivalent clause in the Articles of Confederation, encompassed consuls. He went on to explain that:

The term ambassador, if taken strictly, as seems to be required by the second of the Articles of Confederation, comprehends the highest grade only of public ministers, and excludes the grades which the United States will be most likely to prefer, where foreign embassies may be necessary. And under no latitude of construction will the term comprehend consuls.<sup>650</sup>

Importantly, Madison also noted that, despite this textual problem, “it has been found expedient, and has been the practice of Congress, to employ the inferior grades of public ministers and to send and receive consuls.”<sup>651</sup> Thus, the Washington Administration’s practice, even if not encompassed by the Ambassador Receipt Clause, was a less dramatic extension of this Clause than what had already occurred under the Articles of Confederation, likewise on grounds of expediency.

On the other hand, although Prakash and Ramsey do not examine the Founding history on this point, a close reading of the Federal Convention proceedings suggests that the omission of consuls from the Ambassador Receipt Clause might have been intentional. The Committee of Detail’s draft of the Constitution assigned the power to appoint ambassadors to the Senate and the power to receive ambassadors to the President.<sup>652</sup> Neither of these clauses mentioned other public ministers or consuls, although those diplomats were mentioned in the federal court jurisdiction provision.<sup>653</sup> On August 23, 1787, the Ambassador Appointment Clause was modified to include a reference to “other public Ministers.”<sup>654</sup> On August 25, the same change was made to the Ambassador Receipt Clause.<sup>655</sup> On September 7, the Ambassador Appointment Clause was further modified to include a reference to consuls.<sup>656</sup> Somewhere along the way, a similar

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649. THE FEDERALIST, *supra* note 2, NO. 42 (James Madison), at 264.

650. *Id.* at 264-65. Article 2 of the Articles of Confederation provided: “Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.” ARTICLES OF CONFEDERATION OF 1781, art. II.

651. THE FEDERALIST, *supra* note 2, NO. 42 (James Madison), at 265.

652. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 183, 185.

653. *See* 2 *id.* at 186.

654. *See* 2 *id.* at 394.

655. *See* 2 *id.* at 411, 419.

656. *See* 2 *id.* at 533, 539.

modification must have been made to the Ambassador Receipt Clause, because both clauses contained a reference to consuls in the draft sent to the Committee of Style.<sup>657</sup> The draft reported out of the Committee, however, did not contain a reference to consuls in the Ambassador Receipt Clause, although consuls were still referenced in the Ambassador Appointment Clause (and in the federal court jurisdiction provision).<sup>658</sup>

The Committee of Style's deletion of the reference to consuls in the Ambassador Receipt Clause, but not in the Ambassador Appointments Clause, makes it harder to argue that the lack of a reference to consuls in that Clause was accidental. That said, it is not clear why the deletion was made. The disparity between the two clauses could still have been inadvertent, especially since the Committee of Style was not charged with making substantive changes. Alternatively, the Framers may have wanted to give the President the power to appoint all U.S. representatives abroad, but may not have wanted to burden him with the duty of receiving low-level foreign diplomats. Of course, if that was the reason for the deletion, the Framers would not necessarily have wanted to deny to the President the power over exequaturs, so Washington's practice still might have been consistent with the overall Founding intent. The key point, however, is that the Administration's practice concerning consuls was at most a minor deviation from the constitutional text, and one that was never linked to the Vesting Clause.

### E. *The Pacificus-Helvidius Debate*

In contrast to the Genet affair, the Neutrality Proclamation did famously produce what in many ways was the first sustained articulation of the Vesting Clause Thesis, from no less than the pen of Alexander Hamilton. In late June 1793, Hamilton began publishing newspaper essays, under the pseudonym "Pacificus," to defend the Proclamation against Republican criticisms. He ultimately wrote seven *Pacificus* essays, but only the first one focuses on the constitutionality of the Proclamation.<sup>659</sup> In late August and early September, James Madison published five essays, under the pseudonym "Helvidius," responding to Hamilton's constitutional arguments.

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657. See 2 *id.* at 574-575.

658. See 2 *id.* at 599-600.

659. The other essays address the validity of the Proclamation under international law and the Proclamation's policy implications. See LETTERS OF PACIFICUS, *supra* note 5, No. 2 (July 3, 1793), at 55-63; LETTERS OF PACIFICUS, *supra* note 5, No. 3 (July 6, 1793), at 65-69; LETTERS OF PACIFICUS, *supra* note 5, No. 4 (July 10, 1793), at 82-86; LETTERS OF PACIFICUS, *supra* note 5, No. 5 (July 13-17, 1793), at 90-95; LETTERS OF PACIFICUS, *supra* note 5, No. 6 (July 17, 1793), at 100-06; LETTERS OF PACIFICUS, *supra* note 5, No. 7 (July 27, 1793), at 130-35.

Proponents of the Vesting Clause Thesis sometimes describe Hamilton's constitutional defense of the Proclamation as if it rested entirely on the Vesting Clause Thesis.<sup>660</sup> Prakash and Ramsey emphasize, for example, that "the leading contemporaneous defense of Washington's Proclamation, that of Hamilton as *Pacificus*, directly identified Article II, Section 1 as its constitutional basis."<sup>661</sup> Indeed, Prakash and Ramsey go so far as to suggest that the Vesting Clause Thesis was the only possible constitutional argument that could have been made in support of the Proclamation and that "the only alternative explanation is that Washington simply seized powers not granted to him by the Constitution."<sup>662</sup> In fact, although Hamilton does invoke the Vesting Clause Thesis, he begins and ends his constitutional analysis by relying on specific textual grants of power rather than on the Vesting Clause. Furthermore, Hamilton expressly notes that resort to the Vesting Clause may not have been necessary in order for the Proclamation to be constitutionally valid.

Hamilton begins his analysis by noting that "[i]t will not be disputed that the management of the affairs of this country with foreign nations is confided to the Government of the [United States]."<sup>663</sup> He then goes on to argue that, within the national government, the Executive Branch is the "organ of intercourse between the [United States] and foreign Nations."<sup>664</sup> As support for this claim, he notes that it is the Executive Branch, not the Legislative or Judicial Branch, that is charged under the Constitution with making treaties and executing the laws.<sup>665</sup> Hamilton thus begins his constitutional analysis by referring to two enumerated powers in Article II.

At this point in his essay, Hamilton advocates a version of the Vesting Clause Thesis. He contends that the Vesting Clause is a comprehensive grant of executive power to the President and that this grant is not limited by Article II's specific grants of power, except to the extent that those grants are themselves specifically limited. As support for this claim, he notes the difference in wording between the Article I Vesting Clause and the Article II Vesting Clause. According to Hamilton, the specific grants of power in Article II merely "specify and regulate the principal articles implied in the definition of Executive Power; leaving the rest to flow from the general grant of that power, interpreted in conformity to other parts [of] the

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660. See Prakash & Ramsey, *supra* note 14, at 329-30.

661. *Id.* at 330.

662. *Id.* at 331. *But cf.* Prakash, *supra* note 26, at 793-94 (noting Hamilton's reliance on the Take Care Clause as an alternative argument).

663. LETTERS OF PACIFICUS, *supra* note 5, NO. 1 (June 29, 1793), at 33, 36.

664. *Id.* at 38.

665. *Id.* at 37-38.



constitution and to the principles of free government.”<sup>666</sup> Since issuing the Neutrality Proclamation was an “Executive Act,” says Hamilton, it fell within the powers granted in the Vesting Clause.

Immediately after making this Vesting Clause argument, however, Hamilton returns to the specific textual grants of power. He acknowledges that Congress has the power to declare war, and that this power may include the power to determine whether the United States “is under obligations to m[ake] war or not.”<sup>667</sup> But he contends that, in the absence of a declaration of war by Congress, the Executive Branch has a concurrent power to make this determination. As support for this claim, Hamilton relies on the Take Care Clause. His explanation is worth quoting at length:

If the Legislature have a right to make war on the one hand — it is on the other the duty of the Executive to preserve Peace till war is declared; and in fulfilling that duty, it must necessarily possess a right of judging what is the nature of the obligations which the treaties of the Country impose on the Government; and when in pursuance of this right it has concluded that there is nothing in them inconsistent with a *state* of neutrality, it becomes both its province and its duty to enforce the laws incident to that state of the Nation. The Executive is charged with the execution of all laws, the laws of Nations and well as the Municipal law, which recognizes and adopts those laws. It is consequently bound, by faithfully executing the laws of neutrality, when that is the state of the Nation, to avoid giving a cause of war to foreign Powers.<sup>668</sup>

Thus, according to Hamilton, Washington had the power to issue the Neutrality Proclamation by virtue of his Article II responsibility to execute “the Laws,” which, Hamilton argued, included U.S. treaty commitments and the customary international laws of neutrality.<sup>669</sup> Hamilton goes on to argue that this power is confirmed by the Ambassadorial Receipt Clause, which, Hamilton contends, necessarily entails the power of interpreting U.S. treaty commitments.<sup>670</sup> Importantly, Hamilton concludes his essay by suggesting that the Take Care Clause may by itself be enough to support the Neutrality Proclamation: “That clause of the constitution which makes it his duty to ‘take care that the laws be faithfully executed’ might alone have been relied upon, and this simple process of argument pursued.”<sup>671</sup>

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666. *Id.* at 39 (alteration in original).

667. *Id.* at 40 (alteration in original).

668. *Id.*

669. *See also id.* at 41. We take no position here on whether Hamilton correctly interpreted the word “Laws” in Article II. For evidence suggesting that the word “Laws” may have been intended to encompass treaties, but not the law of nations, see Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587, 602 n.65 (2002).

670. LETTERS OF PACIFICUS, *supra* note 5, NO. 1 (June 29, 1793), at 41-42.

671. *Id.* at 43; *see also* CURRIE, *supra* note 28, at 178 (noting Hamilton’s reliance on the Take Care Clause).

A close reading of the *Pacificus* essay shows, therefore, that the Vesting Clause Thesis was less central to Hamilton's analysis than proponents of the Thesis typically acknowledge. Moreover, Hamilton was defending only the limited argument that the President had the power to declare the default position of the United States under international law in the absence of congressional or judicial action.<sup>672</sup> Hamilton was not defending any of the presidential powers sometimes linked by modern commentators to the Vesting Clause, such as treaty termination, offensive war powers, or sole executive agreements. Although the Washington Administration controversially sought to prosecute individuals who violated U.S. neutrality, Hamilton's essay does not defend the constitutionality of that practice (which, among other things, might have violated Congress's power to define and punish offenses against the law of nations),<sup>673</sup> let alone link the practice to the Vesting Clause. And it is doubtful that others in the Administration thought that the Neutrality Proclamation itself (as opposed to the common law, treaties, or the law of nations) could serve as the basis for the prosecutions.<sup>674</sup>

In any event, it is difficult to see how the *Pacificus* essay can serve as evidence of the original understanding of the Article II Vesting Clause. The essay was an advocacy piece, written four years after the Constitution took effect, by a particularly pro-executive member of the Founding generation. The *Pacificus* essay was sharply contested by James Madison as well as by Thomas Jefferson, who urged Madison to write the *Helvidius* essays. In addition, Hamilton's reliance on the Vesting Clause Thesis in *Pacificus* contradicted his own statements about executive power made during the Founding.<sup>675</sup> If one is

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672. As reported in Jefferson's diary, President Washington himself viewed the Proclamation in these narrow terms: "The [President] declared he never had an idea that he could bind Congress against declaring war, or that anything contained in his [proclamation] could look beyond the first day of [Congress's] meeting . . ." Notes of Cabinet Meetings on Edmond Charles Genet and the President's Address to Congress (Nov. 18, 1793), *supra* note 640, at 400. In a speech to Congress on December 3, 1793, Washington explained that, in light of the war in Europe, he had issued the Proclamation "to admonish our Citizens of the consequences of a contraband trade, and of hostile Acts to any of the parties; and to obtain by a declaration of the existing legal state of things, an easier admission of our right to the immunities, belonging to our situation." President George Washington, Fifth Annual Address to Congress (Dec. 3, 1793), in 33 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 444, at 163, 164. In describing the specific acts he had taken to give effect to U.S. neutrality, he further noted that "[i]t rests with the wisdom of Congress to correct, improve or enforce this plan of procedure." 33 *id.*

673. See CURRIE, *supra* note 28, at 178-79.

674. See Prakash & Ramsey, *supra* note 14, at 343-45 (documenting this point). At President Washington's request, Congress enacted a neutrality statute in 1794 that provided a statutory basis for prosecuting violations of the law of nations concerning neutrality. See An Act in Addition to the Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 381 (1794).

675. The constitutional plan that Hamilton presented at the Federal Convention would have limited the President to certain enumerated powers. See *supra* Part III.A. In the

attempting to discern the Constitution's original meaning, surely Hamilton's Founding statements should be given more weight than what he later said in *Pacificus*.

Seeking to assign broader historical significance to the *Pacificus* essay, proponents of the Vesting Clause Thesis typically suggest that Hamilton "won" the debate with Madison. Prakash and Ramsey state, for example, that Madison's arguments were "incoherent" and that "Helvidius was no match for *Pacificus*."<sup>676</sup> The implication apparently is that Hamilton's arguments were so overpowering that they must have reflected Founding intent.

As others have noted, there are certainly weaknesses in Madison's *Helvidius* essays.<sup>677</sup> Logically, however, the fact that Madison's response may have been less than convincing does not show that Hamilton's views were correct, since Madison may have simply failed to make the best arguments. This would not be surprising, given that he wrote the *Helvidius* essays quite reluctantly, while he was preoccupied with other business, and he apparently was dissatisfied with his performance.<sup>678</sup> Moreover, even if Hamilton was right about

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*Federalist Papers*, Hamilton repeatedly implied that the President would have only the powers recited in Article II. See *supra* Part III.B. And in the New York ratifying convention, Hamilton stated that the Constitution entrusted the management of foreign relations to the Senate and President together. See *supra* Part III.C. See also Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 18 (1972-73) ("The magic of Hamilton's name must not obscure the fact that he had executed a *volte-face* [in *Pacificus*], repudiating assurances he had made both in *The Federalist* and in the New York Ratification Convention to procure adoption of the Constitution.").

676. Prakash & Ramsey, *supra* note 14, at 336, 339.

677. See, e.g., EDWARD S. CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* 28 (1917); ELKINS & MCKITRICK, *supra* note 447, at 362; SCHLESINGER, *supra* note 18, at 20; SOFAER, *supra* note 229, at 114-15. *But cf.* LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC* 527 n.18 (1995) (stating that *Helvidius* "decimates the logic of Hamilton's argument that the executive possesses something like a concurrent right with the legislature to determine whether treaty obligations compel war or peace"); LEVY, *supra* note 384, at 52 ("Madison demolished [Hamilton's] argument by showing that the Constitution had rejected the British theory of executive prerogative and by quoting *The Federalist* against Hamilton.").

678. Madison wrote the *Helvidius* essays after being urged to do so by Jefferson. In a June 30 postscript to a June 29 letter, Jefferson complained that "heresies" in the first *Pacificus* essay might "pass unnoticed and unanswered." Letter from Thomas Jefferson to James Madison (June 29, 1793), in 26 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 591, at 401, 404. On July 7, Jefferson wrote to Madison, "Nobody answers [Hamilton], and his doctrine will therefore be taken for confessed. For god's sake, my dear Sir, take up your pen, select the most striking heresies, and cut him to peices in the face of the public." Letter from Thomas Jefferson to James Madison, *supra* note 608, at 444. For a number of reasons, Madison was reluctant to take on this task. He agreed with Jefferson that Hamilton's argument "ought certainly to be taken notice of by some one who can do it justice." Letter from James Madison to Thomas Jefferson (July 18, 1793), in 15 *THE PAPERS OF JAMES MADISON*, *supra* note 2, at 44, 44. But he felt that he did not have either the necessary factual information or the requisite legal materials, and he hoped to find out "that some one else has undertaken it." *Id.* Madison also was in a difficult political situation, given the need by this time to distance the Republicans from Genet and the importance of not challenging Washington directly. On the latter point, he expressed concern to Jefferson that he did not

the constitutionality of the Neutrality Proclamation, it may have been because of his specific textual arguments rather than his Vesting Clause argument. Finally, and perhaps most importantly, an examination of Madison's argument shows that its weaknesses are similar to weaknesses shared by the Vesting Clause Thesis itself.

Madison's argument has two principal components. First, he contends that the powers of declaring war and making treaties are inherently "legislative" in nature and thus "can never fall within a proper definition of executive powers."<sup>679</sup> The exercise of executive power, rather, "must pre-suppose the existence of the laws to be executed."<sup>680</sup> Hamilton's suggestion to the contrary, Madison contends, is improperly borrowed from the example of British monarchy.<sup>681</sup> Consequently, Madison argues that the Constitution's grant of the war declaration power and the treaty power should not, as Hamilton argues, be construed strictly to preserve the maximum scope for presidential power. Here, Madison argues that the Constitution did not adopt the purported Locke/Montesquieu conception of executive power, noting: "Both of [these writers] too are evidently warped by a regard to the particular government of England, to which one of them owed allegiance; and the other professed an admiration bordering on idolatry."<sup>682</sup> Once it is concluded that the war power and the treaty power are legislative in nature, argues Madison, it becomes clear that the Constitution could not have assigned them to the President, since:

[T]he constitution cannot be supposed to have placed either any power legislative in its nature, entirely among executive powers, or any power executive in its nature, entirely among legislative powers, without charging the constitution, with that kind of intermixture and

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know "how far the [President] considers himself as actually committed with respect to some doctrines." Letter from James Madison to Thomas Jefferson (July 22, 1793), in 15 THE PAPERS OF JAMES MADISON, *supra* note 2, at 46, 46-47. Nevertheless, Madison "forced [himself] into the task of a reply," a task that he described as "the most grating one I ever experienced." Letter from James Madison to Thomas Jefferson (July 30, 1793), in 15 THE PAPERS OF JAMES MADISON, *supra* note 2, at 48, 48. Years later, Madison expressed dissatisfaction with his essays, describing them as a "polemic tract." James Madison, Detached Memoranda, in Elizabeth Fleet ed., *Madison's "Detached Memoranda,"* 3 WM. & MARY Q. (3d Series) 534, 567 (1946). He continued to be critical of the *Pacificus* essays, however, noting that they represented "a perverted view of [President] Washington's proclamation of neutrality, and [were] calculated to put a dangerous gloss on the Constitution of the U.S." *Id.* at 567-68.

679. LETTERS OF HELVIDIUS, *supra* note 573, NO. 1 (Aug. 24, 1793), at 66, 69. Given the expressions of legislative foreign affairs essentialism that appeared during the state ratification debates, see *supra* Part III.C, this tack was neither new nor unique to Madison.

680. LETTERS OF HELVIDIUS, *supra* note 573, NO. 1 (Aug. 24, 1793), at 66, 69.

681. *Id.* at 72.

682. *Id.* at 68.

consolidation of different powers, which would violate a fundamental principle in the organization of free governments.<sup>683</sup>

Second, Madison contends that the Constitution does not allow for the concurrent exercise of powers that are purely legislative or purely executive. He notes that Hamilton acknowledged that Congress's power of declaring war, even when strictly construed, includes the power of judging whether the United States is under an obligation to make war. This acknowledgment, Madison argues, means that the President cannot also have such a power, since concurrent powers are "contrary to one of the first and best maxims of a well organized government, and ought never to be founded in a forced construction, much less in opposition to a fair one."<sup>684</sup> As for Hamilton's argument that the executive has the power under specific textual grants, such as the Take Care Clause, to act in the absence of a congressional declaration of war, Madison contends that:

Whenever then a question occurs whether war shall be declared, or whether public stipulations require it, the question necessarily belongs to the department to which these functions belong — And no other department can be *in the execution of its proper functions*, if it should undertake to decide such a question.<sup>685</sup>

Madison also denies that the President's power to execute the laws gives him any discretion in interpreting and applying those laws, stating that "[t]he executive has no other discretion than to convene and give information to the legislature on occasions that may demand it; and whilst this discretion is duly exercised the trust of the executive is satisfied, and that department is not responsible for the consequences."<sup>686</sup>

There are a number of weaknesses in Madison's analysis. These weaknesses, however, do not confirm the persuasiveness of the Vesting Clause Thesis. Indeed, these weaknesses are similar to weaknesses in the Vesting Clause Thesis itself. First, Madison, atypically for him, relies on essentialist reasoning instead of functional arguments. Madison talks as if there are pure categories of executive and legislative power, and he simply disagrees with Hamilton about what those categories should look like. Madison's argument is also unpersuasive in rejecting the possibility of concurrent powers. In doing so, Madison (again, atypically for him) espouses a formal, categorical approach to the separation of powers. Yet, like the Vesting Clause Thesis, Madison's approach appears to be at odds with the mixing of powers so evident in the Constitution, a feature defended by

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683. *Id.* at 70.

684. LETTERS OF HELVIDIUS, *supra* note 573, NO. 2 (Aug. 31, 1793), at 80, 83.

685. *Id.* at 82.

686. *Id.* at 86.

Madison himself in *Federalist No. 47*.<sup>687</sup> Madison's approach also has the problem of being unworkable in practice, since it ignores the interpretive role necessarily entailed in executing the laws. Finally, his approach is functionally problematic, since it might mean that the national government would be unable to respond to many foreign relations problems when Congress was out of session. As Hamilton himself appeared to recognize, however, the specific textual grants may be sufficient to address these functional concerns, without any need for the Vesting Clause Thesis.<sup>688</sup>

In sum, the *Pacificus-Helvidius* debate neither provides Founding support for the Vesting Clause Thesis, nor demonstrates its inherent persuasiveness. Instead, the debate serves to highlight the fact that there were disagreements in the 1790s over the nature and scope of executive power. It also tends to confirm the possibility (as Hamilton himself acknowledged with respect to the Neutrality Proclamation) that the specific textual grants of power in Article II may give the Executive Branch sufficient authority over foreign affairs without the need for the Vesting Clause Thesis. To the extent that one can read anything into the lack of persuasiveness in the *Helvidius* essays, it is simply that essentialist reasoning about categories of power does not advance the constitutional analysis. The constitutional Founders (including Hamilton, at least before the *Pacificus* essays) were aware of this problem, which is why they spelled out the President's powers in Article II.<sup>689</sup>

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687. See *supra* text accompanying notes 256-259.

688. Although Madison's response to *Pacificus* suffered from some of the same analytical problems as the Vesting Clause Thesis, it is not accurate to suggest that Madison's response implicitly accepted the Thesis. See Prakash & Ramsey, *supra* note 14, at 335-37; William R. Casto, *Pacificus and Helvidius Reconsidered*, 28 N. KY. L. REV. 612, 631-32 (2001). Madison appeared to conceive of the category of "executive power" as simply a power to execute the laws, not as a package of independent substantive powers, and he construed the President's enumerated foreign affairs powers narrowly vis-à-vis Congress — an approach directly at odds with the Vesting Clause Thesis. It is possible, however, that Madison shied away from a direct assault on the Vesting Clause Thesis because of earlier statements he had made in connection with the 1789 removal debate. See *supra* Part IV.C.

689. Early post-Founding treatises also appear to confirm that the Article II Vesting Clause was not understood as conveying substantive powers. See, e.g., 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 281 (1836) (stating, after a discussion of the Vesting Clause, that "[h]aving thus considered the manner in which the president is constituted, it only remains for us to review the powers with which he is invested," and then referring only to powers specified in the Constitution); WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 135-49 (1825) (equating executive power with the power to execute the laws, and then discussing only powers specified in the Constitution); THOMAS SERGEANT, CONSTITUTIONAL LAW 356 (1822) (discussing Article II Vesting Clause and not mentioning any substantive powers); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 340 (1833) ("Having thus considered the manner, in which the executive department is organized, the next inquiry is, as to the powers, with which it is entrusted. These, and the corresponding duties, are enumerated in the second and third sections of the second article of the constitution."); ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE

## CONCLUSION

Elegant theories can often obscure shaky foundations, especially in constitutional law. Among the most venerable constitutional theories is the Vesting Clause Thesis, which is also among the most newly popular. This Thesis posits that the Founders, in vesting the “executive Power” in the President, delegated an unspecified but well-understood bundle of foreign-affairs powers, so well understood that the label served as mere shorthand for what everyone knew to be the essential attributes of an executive department. The Thesis further holds that, by virtue of this delegation, the President properly wields all foreign affairs authority not expressly granted to the other branches.

The Vesting Clause Thesis has a number of attractions. It offers a straightforward textual solution to a number of vexing questions about foreign affairs authority. It also helps reconcile the spare list of powers in Article II with the reality of vast presidential authority in foreign relations. And it hearkens back to a purported age when the boundaries separating the executive, legislative, and judicial were clear and precise. For many, of course, the Thesis has the added attraction of justifying a broad view of unilateral presidential power in foreign affairs. This aspect of the Thesis has helped attract adherents going back at least to Alexander Hamilton. It is perhaps no coincidence that this presidentialist orientation currently attracts advocates in an era in which the nation’s security faces threats that create pressure for sure and swift response.

History, especially constitutional history, may at times be elegant as well, but it is rarely so simple. As a description of what the Founding generation intended, understood, or meant, both the Vesting Clause Thesis and the broad view of executive power essentialism on which it rests are untenable. European political theory offers support for these views that is at best vague and overstated. A closer examination reveals that the leading theorists wrestled with specifics, disagreed among themselves, and in some cases reached what to modern expectations are surprising conclusions. The practices of the Washington Administration likewise offer some support, if not so much for the Vesting Clause Thesis expressly, at least for the idea of broad presidential power in foreign affairs. Yet it was precisely when such practices ventured beyond a plausible basis in specific text

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CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 329-50 (1803) (stating that “[t]he powers, or more properly, the duties, of the president of the United States, are various and extensive; though happily abridged of many others, which are considered as inseparable from the executive authority in monarchies: of these last, we have had frequent occasion to notice such as are transferred by the constitution to the congress of the United States; and of those which are assigned to the president,” and then analyzing only Article II’s specific grants of power).

that they ran into substantial opposition. Most of all, neither the Vesting Clause Thesis nor executive power essentialism find any significant support — and indeed, barely any plausible mention — in the materials on which originalists typically rely — that is, materials from the Founding and from the experiences of the national and state governments in the years leading to the Founding. To the contrary, these materials make clear what the Constitution's text suggests: the Founders settled upon a specific, and in certain regards unprecedented, set of executive powers by listing them in Article II. To the extent that the phrase "executive Power" conveyed any widely understood independent meaning, it encompassed simply a power to execute the laws.

Neither the Vesting Clause Thesis, nor executive power essentialism, provide the only arguments that can be made for broad presidential power in foreign relations. It is arguable, for example, that the President's delegated powers should be construed liberally to account for the changing and unanticipated responsibilities of his office. It is also arguable that the President has acquired constitutional powers not specified in Article II by virtue of the longstanding practices and interactions of the political branches. Indeed, it may be difficult to justify some features of modern foreign relations law, such as congressional-executive agreements and certain presidential authorizations of military force, on any other basis.<sup>690</sup> We do not, therefore, take a position here on the scope of the President's modern foreign affairs authority. Our goal, rather, is to put to rest one especially sweeping claim that typically appeals to history, but in fact lacks any substantial historical basis. In this way we hope to have cleared the path for a more nuanced and constitutionally defensible approach to the topic of presidential power, whether the approach rests on text, structure, custom, political theory, or indeed, history.

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690. Prakash and Ramsey simply beg the question of how the Constitution should be interpreted when they assert that reliance on post-constitutional practice or other nontextual materials involves "giv[ing] up on the Constitution." Prakash & Ramsey, *supra* note 14, at 233. The Supreme Court has often relied on longstanding practice when interpreting the Constitution. Indeed, such reliance has long been thought to be the most defensible part of the Court's famous foreign affairs law decision, *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936). See, e.g., THOMAS M. FRANCK, *POLITICAL QUESTIONS / JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* 14-15 (1992); Sarah H. Cleveland, *The Plenary Power Background of Curtiss-Wright*, 70 U. COLO. L. REV. 1127, 1133-34 (1999); Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1, 8-9 (1973-74).