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AN ESSAY IN SEPARATION OF POWERS: SOME EARLY VERSIONS AND PRACTICES

GERHARD CASPER*

I. INTRODUCTION

The separation of governmental powers along functional lines has been a core concept of American constitutional law ever since the Revolution. Barren assertions of its importance, however, do not capture the complexity of the matter when viewed from the vantage point of either theory or practice. This essay will be concerned with the question of what happened to separation of powers notions as the framers' generation and the government during Washington's presidency faced practical problems of governmental organization and the conduct of government. The relevant literature is voluminous and many of the issues are well known. The essay will not rediscuss the details of the constitutional distribution of powers or the system of checks and balances. Nor will it, with the exception of the debate about the removal power, consider controversies that are quite familiar. Instead, the emphasis will be on somewhat more obscure aspects of the problem that may illuminate some of the complexities inherent in the generality of the doctrine.

Following a review of the state of the separation of powers doctrine during the period of constitution-making, the essay will focus on some issues of interbranch communications and the establishment of the "great departments" of government. It will then examine in detail the manner in which the Washington administration and Congress handled the problem of the American hostages in Algiers, keeping in mind that the federal government was essentially created to conduct foreign, trade, and defense policies.

Although the relation between legislative and executive powers has, once again, become a matter of dispute, the point of this exer-

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cise is not to draw specific lessons from history even as to the detailed reconstruction of the legal side of the Algiers episode—however striking its parallels to contemporary events and difficulties. The essay is not an attempt to question modern constitutional law and its interpretations from a historical vantage point. Instead, it is an essay about the reactions of those individuals who reflected about separation of powers as they implemented the new Constitution. “[T]he essay,” Felix Frankfurter once said, “is tentative, reflective, suggestive, contradictory, and incomplete. It mirrors the perversities and complexities of life.”¹

The essay is not, however, without a point of view. It does suggest that the very centrality of the separation of powers doctrine in the last quarter of the eighteenth century quickly produced a sharpened sense of its uncertainty as the “first constitutional generation” encountered specific tasks of governmental organization and statecraft. Indeed, the doctrine itself mirrored the complexities of life and its symbolisms. It was “tentative, reflective, suggestive, contradictory, and incomplete.”² It did not provide a major premise for easy syllogisms concerning the organization of government. This essay will be concerned mostly with legislative and executive powers in the last quarter of the eighteenth century. The subject of the judiciary will be taken up in a later effort.

II. THE SEPARATION OF POWERS DOCTRINE DURING THE PERIOD OF CONSTITUTION-MAKING

“A society in which the guarantee of rights is not assured, nor the separation of powers provided for, has no constitution.”³ This stringent formulation is that of article 16 of the French Declaration of the Rights of Man of 1789. With respect to the separation of powers, it expressed what had become an almost sacred article of faith in the deliberations of the constitutional assemblies of the United States and France.⁴ The reference to separation of powers as a fundamental normative principle⁵ in bills of rights can also be

1. P. KURLAND, FELIX FRANKFURTER ON THE SUPREME COURT 203 (1970).

2. *Id.*

3. J. GODECHOT, LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789, at 35 (1970).

4. M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 184 (1967).

5. W. GWYN, THE MEANING OF THE SEPARATION OF POWERS 8 (1965).

found in American constitutions. Article VI of the Maryland Declaration of Rights of 1776 thus provided "[t]hat the legislative, executive and judicial powers of government, ought to be forever separate and distinct from each other."⁶ Similar formulations appear elsewhere, for instance in the 1776 Virginia Bill of Rights. In its Constitution, Virginia repeated its commitment to the separation of powers and elaborated: "The legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other: nor shall any person exercise the powers of more than one of them, at the same time"⁷

When these words were written, the separation of executive and judicial, legislative and executive powers had been the subject of ever increasing attention on both sides of the Atlantic for about 150 years. Nedham, Locke, Bolingbroke, Montesquieu, Blackstone, Rousseau, Siy  s, Adams, Jefferson, and Madison are only some of the names associated with this debate.⁸ Their respective contributions reflected rather diverse political, constitutional, and theoretical concerns. It is therefore hardly surprising that, by the last quarter of the eighteenth century, no single doctrine using the label of separation of powers had emerged that could command general assent.

Invocation of the phrase "separation of powers" in bills of rights, such as those of Maryland, Massachusetts, New Hampshire, North Carolina, Virginia, and France, however, suggests a common linkage between the concept of liberty and the notion of separation of powers.⁹ Although the meaning of liberty was not something on which agreement existed, the functional linkage was emphasized again and again. Montesquieu, perhaps the most frequently cited and the most confused and confusing of the writers on separation of powers, provided the classical formulation concerning the linkage:

6. 3 F. THORPE, *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* 1687 (1909).

7. 7 *Id.* at 3815.

8. For some of the sources see the excerpts in 1 *THE FOUNDERS' CONSTITUTION* 311-54 (P. Kurland & R. Lerner eds. 1987).

9. See W. GWYN, *supra* note 5, at 11-27.

When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be then no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.¹⁰

As put forward by Montesquieu, separation of powers is a functional concept; separation is a necessary, if not a sufficient, condition of liberty. Its absence promotes tyranny.

Unfortunately, many political writers, Montesquieu included, tended to amalgamate (and thus obscure) separation of powers notions with another possible condition of liberty, or at least of good government: the institution of "mixed" government, which was aimed primarily at balancing different classes or interests.¹¹ Since the days of Aristotle it had become customary to differentiate among forms of government, especially monarchy, aristocracy, and what we now refer to as democracy. In his history of Rome, Polybius, the Greek historian, hypothesized that Rome had avoided the cycle of change and deterioration occurring in states with a single form of government.¹² In contrast, Rome combined the three types of government to create a state of equilibrium through the principle of counteraction.¹³ Although Polybius' analysis of the Roman constitution was less than convincing, he established the notion of mixed government¹⁴ that eventually became commonplace, especially as applied to the British constitution and as advocated by Montesquieu and John Adams, among others. Adams thought that Polybius' views were "deservedly revered."¹⁵ After a detailed ac-

10. C. MONTESQUIEU, *THE SPIRIT OF LAWS* 202 (D. Carrithers ed. 1977) (T. Nugent trans. 1st ed. 1750).

11. Cf. W. GWYN, *supra* note 5, at 26.

12. See POLYBIUS, *THE RISE OF THE ROMAN EMPIRE* 317-18 (I. Scott-Kilvert trans. 1979).

13. *Id.*

14. See A. PASSERIN D'ENTRÈVES, *THE NOTION OF THE STATE* 115 (1967).

15. 1 J. ADAMS, *A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA* 169 (1787).

count of those views, however, Adams suggested that Polybius was wrong in judging that the invention of a more perfect system of government than the Roman one was impossible:

We may be convinced that the constitution of England, if its balance is seen to play, in practice, according to the principles of its theory—that is to say, if the people are fairly and fully represented, so as to have the power of *dividing or choosing, of drawing up hill or down*, instead of being disposed of by a few lords—is a system much more perfect. The constitutions of several of the United States, it is hoped, will prove themselves improvements both upon the Roman, the Spartan, and the English commonwealths.¹⁶

The debate about the desirability of mixed government thus concerned issues of immediate relevance to the American revolutionaries: the manifestations of British constitutional arrangements in the governmental structures of the former colonies and ways to improve them.

Although great differences in the institutional arrangements of government in the various colonies existed,¹⁷ to say that, by and large, the colonies had “mixed” government based on the British model with monarchic, aristocratic, and democratic elements manifested in their governors, councils, and legislatures is not an exaggeration. A London compendium from 1755 said of the colonial governments: “By the governor, representing the King, the colonies are monarchical; by a Council they are aristocratical; by a house of representatives, or delegates from the people, they are democratical. . . .”¹⁸

This summary of mixed government, more an “ideal type” than a complete description of the constitutional facts, did not mean that separation of powers notions were absent before 1776. Rather, they were intertwined with older notions reflecting the allocation of powers in the mixed colonial regimes.¹⁹ In these mixed regimes,

16. *Id.* at 176.

17. In fact, even the sources of governmental authority varied from one colony to another.

18. W.P. ADAMS, *THE FIRST AMERICAN CONSTITUTIONS* 257 (1980) (quoting 1 W. DOUGLASS, *A SUMMARY, HISTORICAL AND POLITICAL, OF THE BRITISH SETTLEMENTS IN NORTH AMERICA* 213-15 (1755)).

19. See M. VILE, *supra* note 4, at 128.

only the popular house of the legislature represented the people, the often predominating gubernatorial powers possessed legislative, executive, and judicial elements, and the functionally differentiated judiciary was kept less than completely separate. Although the colonists and the colonial legislatures were in fact highly autonomous from London, their constitutional conflicts concerned the separation and mixing of powers that differed sharply as to the local and distant sources of their respective authority.

The challenge faced after the Declaration of Independence was how to adapt the institutions of mixed government to the doctrine of popular sovereignty.²⁰ The issue was no longer the separation of differently based powers, but the separation of power (in the singular) flowing from one source: the people. If the separation of powers was a necessary condition of liberty, the task was to reconcile it to the notion of popular sovereignty, which was invoked explicitly and dramatically in the majority of the new state constitutions and was the foremost expression of that liberty.

A further problem was that the people in the former colonies were stratified: there were old inhabitants and newcomers, revolutionaries and loyalists, free men and indentured servants and slaves. Often, there was a "gentry" as distrustful of the "people" as the "people" were distrustful of the "gentry." The tensions resulting from these stratifications were bound up with the organizational tasks of the new states.

As one reviews the state constitutions adopted between 1776 and 1787 for the ways in which they implemented separation of powers notions, one is struck by the fact that the particulars display an exceedingly weak version of separation of powers. Most of the constitutions made a conceptual distinction, either explicitly or implicitly, between legislative, executive, and judicial functions, introduced more or less elaborate systems of interbranch ineligibilities, and gave some, although often a modest, measure of independence to the judiciary. The most distinct feature of the constitutions, however, was the dependence of the executive on the legislative branch on four counts. First, only New York, Massachusetts, and New Hampshire provided for the election of governors by voters. In the latter two states, the choice reverted to the legis-

20. W.P. ADAMS, *supra* note 18, at 259-62.

lature if no candidate received a majority of the votes. The other constitutions granted the legislature the power to elect the governor or president, typically on an annual basis. In Pennsylvania the legislature and the "supreme executive council," which was popularly elected, jointly chose the president. Second, only Massachusetts and New York recognized an overridable veto.²¹ In New York the veto power was lodged in a council of revision. Third, all states provided for some kind of executive or privy council, generally elected by the legislature.²² Fourth, states distributed the power of appointments in various ways, but legislative controls predominated.

Furthermore, although governors were authorized to exercise, subject to council participation, "the executive powers of government,"²³ this authorization occasionally was restricted by the clause that it had to be done according to the laws of the state.²⁴ Virginia even added the proviso that the governor "shall not, under any pretence, exercise any power or prerogative, by virtue of any law, statute or custom of England."²⁵

The 1776 state constitutional arrangements met with some immediate criticism on separation of powers grounds. In 1777, New York provided for more separation, and the 1778 draft constitution of Massachusetts was rejected, partially because it was viewed as insufficiently mindful of the separation of powers. The towns of Essex County, in the so-called Essex Result of 1778, submitted a detailed critique that not only deplored the lack of "proper" executive authority, but also disapproved of the intermingling of executive, legislative, and judicial powers.²⁶

The Essex Result complicated the debate over separation of powers considerably by invoking the notion of checks and balances. "A little attention to the subject will convince us, that these

21. The first South Carolina Constitution, which was short-lived, vested the "legislative power" in a president, an assembly, and a legislative council, and thus provided the president with an absolute veto.

22. The New York institutional arrangements were more complex.

23. 7 F. THORPE, *supra* note 6, at 3816.

24. *See id.* ("according to the laws of this Commonwealth").

25. *Id.* at 3816-17. For a discussion of these and related restrictions and practices, see C. THACH, JR., *THE CREATION OF THE PRESIDENCY 1775-1789*, at 29-34 (1969).

26. *THE POPULAR SOURCES OF POLITICAL AUTHORITY* 324-25 (O. Handlin & M. Handlin eds. 1966).

three powers ought to be in different hands, and independent of one another, and so ballanced, and each having that check upon the other, that their independence shall be preserved."²⁷ The insight that checks and balances were needed to maintain the independence of each of the three branches revived the concept of balanced government without quite capturing the complexity of the matter. The problem had primarily become that of separation of power flowing from a single source, rather than the balancing of various factions in the organization of the government. In its newly added Bill of Rights, the 1780 Constitution of Massachusetts addressed the principle explicitly in language that also can be found in the earlier state constitutions: "All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them."²⁸

In the end, the 1780 Constitution was not dramatically different from the 1778 draft as to the manner in which it distributed powers, although the later document did provide for the (overridable) gubernatorial veto. Its main balancing feature could be found in the 1778 draft: the annual election of the governor directly by the voters (provided a candidate received a majority of votes). The separate gubernatorial election was, of course, in accord with John Adams's strong belief in an executive "distinct and independent of the legislative."²⁹

The Bill of Rights of the 1784 New Hampshire Constitution expressed clearly that the doctrine of separation of powers, or for that matter the notion of checks and balances, could not supply neat formulas from which proper governmental organizational arrangements would follow automatically. Article XXXVII of the New Hampshire Bill of Rights displayed a deeper appreciation of the problem than the more barren assertions in all the other state constitutions:

In the government of this state, the three essential powers thereof, to wit, the legislative, executive and judicial, ought to be

27. *Id.* at 337.

28. 3 F. THORPE, *supra* note 6, at 1890.

29. 3 J. ADAMS, *supra* note 15, at 419.

kept as separate from and independent of each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.³⁰

This provision, which is still in force, obviously views the separation of powers as essential to free government. However, it also reflects the concept of separate and independent powers as limited by the very notion of free government and by the necessity of maintaining "the whole fabric of the constitution."³¹ In short, New Hampshire emphasizes separation, coordination, and cooperation. Its dialectical view of the matter concisely summarizes the difficulties that awaited the federal constitutional convention as it faced the separation of powers "doctrine."

The Articles of Confederation had established a congress of state delegates as the central law-making and governing institution. Although its President, committees, and civil officers³² partook of an executive quality, and although after 1780 it established a court of appeals for cases of capture,³³ the Confederation can hardly be seen as possessing the characteristics of a tripartite government. On the other hand, one should not overlook the fact that some institutional separation of administrative tasks had evolved, dictated, as it were, by the nature of things, and the need to free the Congress from concerning itself with too much administrative detail.³⁴

Although the absence of separation of powers was not generally viewed as the main weakness of the Confederation, Hamilton criticized the Articles as early as July 1783 for "confounding legislative and executive powers in a single body" and for lacking a federal judicature "having cognizance of all matters of general concern."³⁵ In a draft resolution calling for a convention to amend the Articles, Hamilton wrote that the Confederation's structure was "contrary

30. 4 F. THORPE, *supra* note 6, at 2457.

31. *Id.*

32. The "civil officers" were the Postmaster General after 1775, and the Secretary of Foreign Affairs, the Secretary of War, and the Superintendent of Finance after 1781. In 1784, however, the latter was to be replaced by a Board of Treasury.

33. H. BOURGUIGNON, *THE FIRST FEDERAL COURT* 101-34 (1977).

34. See C. THACH, JR., *supra* note 25, at 73.

35. 3 *THE PAPERS OF ALEXANDER HAMILTON* 420-21 (H. Syrett ed. 1966).

to the most approved and well founded maxims of free government which require that the legislative executive and judicial authorities should be deposited in distinct and separate hands."³⁶ Hamilton had intended to submit the resolution to the Continental Congress, but abandoned the project for want of support.³⁷

When Randolph opened the substantive deliberations of the 1787 Convention with his enumeration of the defects of the Confederation, he apparently made no reference to separation of powers.³⁸ The Virginia Plan, submitted the same day, however, implied separation of powers and called for a quadripartite governmental structure: a bicameral legislature, a national executive, a national judiciary (to serve during good behavior), and a council of revision to be composed of the executive and members of the judiciary. The first house of the legislature was to elect the second from a pool of candidates to be nominated by the states, and the legislature was to elect the executive and judiciary. The executive was to enjoy "the Executive rights vested in Congress by the Confederation," but what these rights were was not adumbrated.³⁹

Other plans for a constitution all presupposed a three-branch structure of government.⁴⁰ A resolution "that a national government ought to be established consisting of a supreme legislative, judiciary, and executive" was adopted overwhelmingly in the Committee of the Whole on May 30, the day following submission of the Virginia Plan.⁴¹ In a way, this event was the beginning and the end of the consideration of separation of powers *as such* in the Convention. To be sure, in the subsequent discussions of the structure and powers of the legislative, executive, and judicial branches as well as in the repeated debates concerning a council of revision, the delegates raised many points about the independence of the respective branches, the dangers of encroachments, and the need for checks and balances. What was strikingly absent, however, was anything that might be viewed as a coherent and generally shared view of separation of powers.

36. *Id.* at 421.

37. *Id.* at 420 n.1.

38. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 18 (M. Farrand ed. 1937).

39. *Id.* at 20-21.

40. See 3 *id.* at 595-630.

41. 1 *id.* at 30-31.

The constitutional text itself, although implying the notion of distinct branches, did not invoke the separation of powers as a principle. Some of the state ratifying conventions attempted to remedy this omission in their original proposals for bills of rights to be added to the Constitution. Madison also sought a remedy. In 1788, in the *Federalist* papers, Madison had considered it necessary to defend the Constitution against the charge that it paid no regard to the separation of powers. His core argument in *The Federalist* No. 47 was the "impossibility and inexpediency of avoiding any mixture"⁴² as demonstrated by the state constitutions and as supported by the "oracle who is always consulted and cited on this subject . . . the celebrated Montesquieu."⁴³ Montesquieu, according to Madison, did not mean to suggest that the three departments "ought to have no *partial agency* in, or no *control* over, the acts of each other."⁴⁴

Madison's 1789 proposal for a new article VII to precede the existing one (which was to be renumbered) was ingenious in the manner in which it formulated a separation of powers doctrine that took account of the constitutional scheme of checks and balances:

The powers delegated by this constitution, are appropriated to the departments to which they are respectively distributed: so that the legislative department shall never exercise the powers vested in the executive or judicial; nor the executive exercise the powers vested in the legislative or judicial; nor the judicial exercise the powers vested in the legislative or executive departments.⁴⁵

The separation of powers provision of Roger Sherman's draft bill of rights, also dating from the summer of 1789, captured even more clearly the point made by Madison's proposed article VII:

The legislative, executive and judiciary powers vested by the Constitution in the respective branches of the Government of the United States shall be exercised according to the distribution therein made, so that neither of said branches shall assume

42. THE FEDERALIST No. 47, at 339 (J. Madison) (B. Wright ed. 1961).

43. *Id.* at 337.

44. *Id.* at 338.

45. 12 THE PAPERS OF JAMES MADISON 202 (C. Hobson & R. Rutland eds. 1979).

or exercise any of the powers peculiar to either of the other branches.⁴⁶

The House adopted Madison's amendment (with a minor change) despite objections that it was unnecessary and "subversive of the Constitution."⁴⁷ Madison supposed "the people would be gratified with the amendment, as it was admitted that the powers ought to be separate and distinct; it might also tend to an explanation of some doubts that might arise respecting the construction of the Constitution."⁴⁸ This was an intriguing suggestion: the amendment would provide a principle of interpretation for the Constitution—in *dubio, pro* separation of powers. In fact, Madison had taken this position earlier that year when discussing the removal power.⁴⁹ Alas, the Senate rejected the amendment for reasons we shall never know.⁵⁰ One can only surmise that the Senate was not eager to adopt separation of powers as an independent doctrine or even as a mere principle of construction for the many and subtle "mixing" decisions of the framers, some of which benefitted the Senate.

With regard to these "mixing" decisions, on such crucial touchstones as the mode of selecting the President and the assignment of the appointments power, the Convention delegates could not agree on constitutional solutions until the very end of the deliberations. Only the presidential veto (with the two-thirds override) stood more or less firm from the very beginning of the Convention,⁵¹ although for most of its duration it was thought to be vested in a President who would be elected by the legislature.⁵² Proposals for an absolute veto were defeated twice, albeit a three-fourths override was agreed upon on August 15,⁵³ until reconsideration of the matter on September 12.⁵⁴

46. 46 LIBRARY OF CONGRESS INFORMATION BULLETIN 350-52 (1987).

47. 1 ANNALS OF CONG. 760-61 (J. Gales ed. 1789).

48. *Id.* at 760.

49. See 12 THE PAPERS OF JAMES MADISON, *supra* note 45, at 172-74.

50. 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1150 (1971).

51. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 38, at 106.

52. *Id.* at 81.

53. 2 *id.* at 301.

54. *Id.* at 586-87.

As to the mode of selecting the President, election by the legislature was more or less supported firmly, until, at the end of August, the issue became clearly linked to that of state power and influence. The electoral college compromise worked out by the Committee on Remaining Matters "almost satisfied almost everybody."⁵⁵ However, in the context and in light of what went on before, one should be reluctant to view the compromise as a ringing endorsement of a John Adams-type position on the executive.

The Virginia plan had been silent about the appointments power with the exception of legislative election of judges. Early on, however, the appointment of judges was given to the Senate.⁵⁶ The matter was discussed repeatedly, although, again, the division of the power into one of presidential nomination and Senate advice and consent came only as part of the compromises made by the Committee on Remaining Matters. The delegates overwhelmingly agreed to this division of the appointments power on September 7, after James Wilson had objected in vain to "blending a branch of the Legislature with the Executive."⁵⁷ Likewise, a joint ballot of both houses was to appoint the Treasurer,⁵⁸ and only on September 14 was this provision struck in the interest of conformity.⁵⁹

One additional aspect of mixing deserves notice. In defense of his interpretation of the common defence and general welfare clause as a separate and substantive grant of power to the Congress, William Crosskey has argued that some of the congressional powers that appear in section 8 of article I were included there not to secure them as against the states but to prevent their passing to the President as executive prerogatives.⁶⁰ Fortunately, one need not agree with Crosskey's larger point to conclude that his argument has merit and has implications for the separation of powers doctrine. Commercial powers, the naturalization power, and the power to establish courts, subdue rebellions, make war, raise ar-

55. F. McDONALD, *NOVUS ORDO SECLORUM* 250 (1985).

56. 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, *supra* note 38, at 233.

57. 2 *id.* at 538-41.

58. *Id.* at 314-15.

59. *Id.* at 614.

60. See 3 W. CROSSKEY & W. JEFFREY, JR., *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 19 (1980).

mies, or call out the militia were prerogatives that the delegates to the Convention did not hesitate to turn into legislative powers.⁶¹

The Convention debates, taken as a whole, hardly suggest a strong consensus that the "[s]tate experience . . . contributed, nothing more strongly, to discredit the whole idea of the sovereign legislature, to bring home the real meaning of limited government and coordinate powers."⁶² Forrest McDonald, in his recent book on the origins of the Constitution,⁶³ has concluded from the decisions of the Convention that the "doctrine of the separation of powers had clearly been abandoned in the framing of the Constitution."⁶⁴ This judgment presupposes that a doctrine existed that could be abandoned. Given the state of the discussion of the framers in the last quarter of the eighteenth century and the constitutions enacted after 1776, a "pure" doctrine of separation of powers can be no more than a political science or legal construct.⁶⁵

No consensus existed as to the precise institutional arrangements that would satisfy the requirements of the doctrine.⁶⁶ The only matter on which agreement existed was what it meant *not* to have separation of powers: it meant tyranny. This insight is not to be belittled. Madison and Sherman were right when, in their 1789 proposals, they claimed that the particular distribution of powers found in the Constitution could be legitimately seen as *a* version of an uncertain doctrine.⁶⁷

III. COMMUNICATIONS BETWEEN THE EXECUTIVE AND LEGISLATIVE BRANCHES AFTER FORMATION OF THE FEDERAL GOVERNMENT

On April 30, 1789, President Washington took the oath of office and delivered his inaugural address before the Congress. If Senator Maclay is to be trusted, the president was exceedingly ill at ease,⁶⁸ but so was everybody else. Deciding the proper forms of address,

61. F. McDONALD, *supra* note 55, at 262-63.

62. C. THACH, JR., *supra* note 25, at 52.

63. F. McDONALD, *supra* note 55.

64. *Id.* at 258.

65. See M. VILE, *supra* note 4, at 13 (the "pure doctrine" of separation of powers is an "ideal type" that has been rarely put into practice).

66. W. GWYN, *supra* note 5, at 128.

67. See 1 ANNALS OF CONG., *supra* note 47, at 492-501.

68. E. MACLAY, THE JOURNAL OF WILLIAM MACLAY 9 (2d ed. 1927).

whether titles were appropriate, what ceremonies the new government should conduct, and how the separate branches, and—within Congress—the two houses, should interact was not easy. Symbolism became important.

During the Senate debate that followed, the Vice President referred to Washington's address as "his most gracious speech."⁶⁹ This brought Senator Maclay, a kind of republican prig, to his feet:

Mr. President, we have lately had a hard struggle for our liberty against kingly authority. The minds of men are still heated: everything related to that species of government is odious to the people. The words prefixed to the President's speech are the same that are usually placed before the speech of his Britannic Majesty. I know they will give offense. I consider them as improper. I therefore move that they be struck out⁷⁰

And struck out they were, eventually, against the protestations of John Adams who wanted "dignified and respectable government."⁷¹ Dignified government also lost out when the House and Senate refused to grant the President a title such as "His Highness the President of the United States of America and Protector of the Rights of the Same."⁷²

The importance of symbolism to the interaction between the branches was clear to many. Washington requested advice on these matters and wrote to Madison: "As the first of every thing, *in our situation* will serve to establish a Precedent, it is devoutly wished on my part, that these precedents may be fixed on true principles."⁷³

From the vantage point of separation of powers, physical interaction was an issue of surprising significance. How should messages be handled, what communications should be oral, which should be written, what was the proper mode for discussing oral communications? Some of these matters had been viewed as of such consequence for the separation of powers, that state constitutions had

69. *Id.* (emphasis omitted).

70. *Id.* at 9-10. Maclay objected to the manner in which the Chancellor of the State of New York introduced the President. The Chancellor proclaimed, " 'Long live George Washington, President of the United States!' " 1 ANNALS OF CONG., *supra* note 47, at 26-27.

71. E. MACLAY, *supra* note 68, at 10.

72. *Id.* at 25.

73. 12 THE PAPERS OF JAMES MADISON, *supra* note 45, at 132.

regulated certain aspects of official intercourse. Article XXXII of the Georgia Constitution of 1777, for instance, had provided that all transactions between the legislative and executive bodies be communicated by message.⁷⁴ The underlying fear was that the Executive might otherwise exercise undue influence on the deliberations of the legislature. As so often was the case, the reaction was against the British model of parliamentary government and what was perceived as ministerial predominance and corruption under that system.⁷⁵

Four examples from the early days of the federal government are representative and illustrate some of the problems. The first involved the Senate in its "executive" role concerning appointments. Should advice and consent be given *viva voce* or by ballot? In June of 1789, the Senate decided to proceed by ballot in order to prevent "bargaining for" or "purchase of" votes.⁷⁶ The issue was reopened, however, after the Senate had, for the first time, rejected a presidential nomination in early August. Washington reacted with a message—one that was for him somewhat acerbic—in which he suggested that the Senators might have asked him for more information concerning the candidate. The President then met with a Senate committee which proposed that he should communicate nominations orally, a step that might produce a *viva voce* vote. Washington insisted that it was up to the President to decide in what place and manner he should consult the Senate "as his council." Although he did not rule out personal appearance, he was firm about whose choice it was. The Senate yielded on presidential discretion and also changed its mind in favor of *viva voce* vote. Apparently, the President never made a nomination in person.⁷⁷

Similar questions arose with respect to the Senate's role concerning treaties, the second example of the problems of physical interaction. On the very day on which the previous issue was resolved, Washington sent a message to the Senators informing them that he would meet them in their chamber the following day "to advise with them on the terms of the treaty to be negotiated with

74. 2 F. THORPE, *supra* note 6, at 782.

75. See G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 144 (1969).

76. E. MACLAY, *supra* note 68, at 76-79.

77. See the account in 1 G. HAYNES, *THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE* 52-58 (1938).

the Southern Indians.”⁷⁸ The famous episode is well known and need not be recounted.⁷⁹ As it turned out, Washington’s attempt to interact personally with the Senators encountered two overwhelming difficulties. First, Washington’s personal and official status made open and frank discussion not impossible, but very difficult. Second, even though Washington had brought the Secretary of War, General Henry Knox, along to answer questions about details, the treaty problems were simply too complex to be dealt with orally and without preparation. The Senate postponed the matter for the weekend and disposed of it on Monday, again with the President present.⁸⁰ The experiment was not repeated, however. Its failure, nevertheless, did not mean that in the future the President was contemptuous of the Senate’s role in treaty making. Indeed, he continued to seek advice, not just approval, but he did so in writing.⁸¹

The third example, one of the more telling debates concerning modes of interaction, occurred at the end of June, in the House of Representatives. The House had before it the bill for establishing the Treasury Department, which made it the duty of the Secretary to “digest and report plans for the improvement and management of the revenue, and the support of the public credit.”⁸² No similar clause was contained in the legislation establishing the Foreign Affairs and War Departments. Its presence here reflected the special constitutional role of the House with respect to bills for raising revenue:

It is the proper business of this House to originate revenue laws; but as we want information to act upon, we must procure it where it is to be had, consequently we must get it out of this officer, and the best way of doing so, must be by making it his duty to bring it forward.⁸³

78. 1 ANNALS OF CONG., *supra* note 47, at 65.

79. See 1 G. HAYNES, *supra* note 77, at 62-68.

80. See E. MACLAY, *supra* note 68, at 125-30.

81. See 1 G. HAYNES, *supra* note 77, at 68.

82. 1 ANNALS OF CONG., *supra* note 47, at 592.

83. *Id.* at 607 (statement of Rep. Sherman).

This view of the matter was also that of the most likely appointee to the office, Alexander Hamilton, who wanted direct dealings with Congress and some independence from the President.⁸⁴

The clause about "reporting plans" met with strong objections. John Page of Virginia saw it as a "dangerous innovation upon the Constitutional privilege" of the House of Representatives.⁸⁵ He worried that members would be inclined to defer to others who had thoroughly studied a case, thus creating undue influence. "Nor would the mischief stop here; it would establish a precedent which might be extended, until we admitted all the ministers of the Government on the floor, to explain and support the plans they have digested and reported: thus laying a foundation for an aristocracy or a detestable monarchy."⁸⁶ Tucker of South Carolina used separation of powers language: "If we authorize him to prepare and report plans, it will create an interference of the Executive with the Legislative powers"⁸⁷ He referred the House to the mode of interaction specified by the Constitution in section 3 of article II—it was for the President to provide information and make recommendations.⁸⁸ Other Congressmen warned against "the doctrine of having prime and great ministers of State."⁸⁹ In the end, the House defeated the motion to strike out the clause and adopted it, but only after substituting the verb "prepare" for "report."⁹⁰

The fourth significant example concerning modes of interaction occurred in 1792 when a host of substantive and symbolic issues arose. That year, the House wanted to investigate the destruction of the United States Army under the command of General St. Clair at the hand of Indians in the Ohio country in 1791. The first proposal before the legislators was to request that the President institute an inquiry. This approach raised separation of powers objections. Although the reasons were more adumbrated than clearly stated, apparently the members believed that telling the President how to carry the laws into execution was an encroachment on exec-

84. F. McDONALD, *ALEXANDER HAMILTON: A BIOGRAPHY* 128 (1979).

85. 1 *ANNALS OF CONG.*, *supra* note 47, at 592 (statement of Rep. Page).

86. *Id.* at 592-93.

87. *Id.* at 593 (statement of Rep. Tucker).

88. *Id.*

89. *Id.* at 601 (statement of Rep. Gerry).

90. *Id.* at 607.

utive power.⁹¹ The motion was overwhelmingly defeated and, instead, a motion based on the powers of the House respecting the expenditures of public money was adopted. This adopted motion required the appointment of a House committee of inquiry that would "be empowered to call for such persons, papers, and records, as may be necessary to assist their inquiries."⁹² In order not to encroach on executive power, then, the House proceeded to authorize the first parliamentary investigation of the executive branch.

The resolution was adopted on March 27, 1792. The Committee then proceeded to ask Secretary Knox for papers. Knox referred the matter to the President, who called together his cabinet. According to Jefferson, they were unanimous as to the power of the House to investigate. They also believed that requests for executive papers had to be made directly to the President, and that although the President should cooperate, he should refuse to deliver papers "the disclosure of which would injure the public."⁹³ The House accepted both restrictions when, on April 4, it passed a resolution "[t]hat the President of the United States be requested to cause the proper officers to lay before the House such papers of a public nature, in the Executive Department, as may be necessary to the investigation of the causes of the failure of the late expedition under Major General St. Clair."⁹⁴ This resolution treated the executive branch as a unitary "department" and recognized the potential need of the United States not to make everything public.⁹⁵

After the Committee report and public examination of such witnesses as Major General St. Clair and Secretary Knox, a resolution was introduced to notify the Secretaries of Treasury and War that the House would consider the report "to the end that they may attend the House, and furnish such information as may be conducive to the due investigation of the matters stated in the said report."⁹⁶ Fisher Ames of Massachusetts supported the motion, noting the reputational interests involved. The motion "was due to

91. See 3 ANNALS OF CONG. 490-94 (1792).

92. *Id.* at 493.

93. THE COMPLETE ANAS OF THOMAS JEFFERSON 71 (F. Sawvel ed. 1903).

94. 3 ANNALS OF CONG., *supra* note 91, at 536.

95. No papers, or rather copies of papers, were withheld in this case, however.

96. 3 ANNALS OF CONG., *supra* note 91, at 679.

justice, to truth, and to the national honor, to take effectual measures to investigate the business."⁹⁷ Ames saw the inquiry as preparatory to an impeachment. The fact that it was not an impeachment was used by opponents who argued that the House had no right to cite the Secretaries while also urging "the impropriety of any of the Heads of Departments coming forward, and attempting in any way to influence the deliberations of the Legislature."⁹⁸ The latter reason seems to have been the weightier one.

Disputes concerning modes of interaction necessarily acquired partisan overtones as Congress began to develop parties. Arguments such as the ones just quoted reflected not only constitutional positions, but also political interests. Congressmen sympathetic to the Secretaries apparently favored their appearance before the House. Nevertheless, the House rejected the motion for a variety of stated reasons, among them the impracticality of an investigation by the House as such figured prominently.

The vote led Secretary Knox to write to the Speaker asking for permission to appear before the House. Samuel Hodgden, who had been Quartermaster General during the poor provisioning of St. Clair's army, wrote a similar request. When the House discussed these requests, Madison suggested recommitment of the report to the select committee, which could then hear Knox and Hodgden. The House agreed to this, although Ames had argued strongly to provide an opportunity for vindication: "Shall they be sent to a Committee-room, and make their defence . . . in the hearing of perhaps ten or a dozen persons only?"⁹⁹

The account of Madison's opposition to the motion to invite Secretaries Hamilton and Knox to appear before the House in the *Gazette of the U.S.* stated:

Mr. Madison objected to the motion on constitutional grounds, and as being contrary to the practice of the house. He had not, he said, thoroughly resolved the business in his own mind, and therefore was not prepared to state fully the effects which would result from the adoption of the resolution; but he would hazard thus much, that it would form an innovation in

97. *Id.* at 680-81 (statement of Rep. Ames).

98. *Id.* at 683 (statement of Rep. Venable).

99. *Id.* at 686 (statement of Rep. Ames).

the mode of conducting the business of this house, and introduce a precedent which would lead to perplexing and embarrassing consequences; as it involved a conclusion in respect to the principles of the government, which, at an earlier day, would have been revolted from. He was decidedly in favour of written information.¹⁰⁰

Although this summary is more suggestive than clear, it shows at least that Madison viewed the personal appearance of cabinet members as involving the very "principles of the government" as they had emerged.¹⁰¹ What had emerged, as illustrated by the St. Clair episode, in particular, was a mode of interaction to some extent at arms length, although personal interaction was considered appropriate at the committee level. What also had emerged was the President's control of the executive branch and therefore of the information to be provided the legislature. In the cabinet meeting about the St. Clair investigation, only Hamilton had invoked, not implausibly, a more direct relation with the House.¹⁰²

The issues of what information Congress was entitled to, and what conditions could be placed on its circulation, were more complex. Abraham Sofaer correctly stated that, during the Washington presidency, a widely shared view existed that the President had some discretion in declining to furnish information, and that the President was extremely careful in exercising that discretion.¹⁰³

The President also claimed the right to communicate with the Congress on a confidential basis. Although this exercise presented few difficulties with the early Senate, which until 1794 met behind closed doors, the House ordinarily met in public and its debates were widely reported in newspapers. Nevertheless, the House occasionally went into closed session to receive confidential communications from the President. During the Second Congress this procedure was formalized into a standing rule providing that "whenever confidential communications are received from the President of the United States" the House was to be cleared dur-

100. 14 THE PAPERS OF JAMES MADISON, *supra* note 45, at 406.

101. *Id.*

102. THE COMPLETE ANAS OF THOMAS JEFFERSON, *supra* note 93, at 71.

103. See A. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 79-93 (1976).

ing the reading and all debates.¹⁰⁴ This House rule, in effect, granted the President control of an important aspect of the manner in which the House conducted its business. During the consideration of American relations with the Barbary Powers, the matter was reopened and it was argued that the rule violated the public's right to know: "[S]ecrecy in a Republican Government wounds the majesty of the sovereign people."¹⁰⁵ The reply was "that because this Government is Republican, it will not be pretended that it can have no secrets."¹⁰⁶ Indeed, the journal secrecy clause in article I, section 5 of the Constitution supports the latter proposition. The Constitution did not commit the country to the free circulation of information at any price. Nevertheless, the problem was not secrecy as such, but the Executive's control over House deliberations. On December 30, 1793, the House amended its rule to provide for two phases: closed door reading of confidential communications from the President and closed door debate "unless otherwise directed by the House."¹⁰⁷

What is striking as one reviews these early instances of interaction between the Congress and the executive branch is the care with which arguments were phrased and how both branches appreciated the precedent-setting nature of contemplated action. Indeed, precedents for the modes and conditions of communication were set, which—for better or for worse—essentially endure to the present day. The separation of powers doctrine hardly compelled these precedents. Yet, the episodes under discussion display an inclination to maintain some distance between the legislative and executive branches in accord with the distinct responsibilities in a complex system of representative government. At the turn from the eighteenth to the nineteenth century this symbolic distancing was expanded by the physical distance between the two branches in the new capital city.¹⁰⁸ One must, however, be on guard against overrating the importance of this distancing for the government's substantive decision making. As we shall see, the realities of the

104. 3 ANNALS OF CONG., *supra* note 91, at 414.

105. 4 ANNALS OF CONG. 150 (1794).

106. *Id.*

107. *Id.* at 151. See D. HOFFMAN, GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS 100-04 (1981).

108. See J. YOUNG, THE WASHINGTON COMMUNITY 1800-1828, at 6 (1966).

constitutional coordination of the governmental institutions in cases such as financial planning and foreign policy quickly overcame more barren notions of separation.

IV. ESTABLISHMENT OF THE DEPARTMENTS OF GOVERNMENT

William Maclay had this to say about the bills establishing the executive departments:

[I do not] see the necessity of having made this business a subject of legislation. The point of view in which it has presented itself to me was that the President should signify to the Senate his desire of appointing a Minister of Foreign Affairs, and nominate the man. And so of the other necessary departments. If the Senate agreed to the necessity of the office and the men, they would concur; if not, they would negative, etc. The House would get the business before them when salaries came to be appointed, and could thus give their opinion by providing for the officers or not.¹⁰⁹

Maclay's approach adapted to American constitutional conditions the manner in which the great offices of state had emerged in England—from the King's privy council. The officers came before the offices.¹¹⁰ In the House of Representatives, on the other hand, that the principles of organization for the executive offices should be settled by legislation was taken for granted. The tenure of the officers that would head the departments thus established was the great separation of powers issue that overshadowed all other issues in the spring of 1789. Its resolution has become known as "the decision of 1789."

The constitutional arrangements in the states had little relevance to the debate. The manner in which the state constitutions had dealt with appointments, terms of office, and removal did not suggest a consensus of any kind. Important officers were frequently elected by the legislature for one year or for more extended terms. Councils shared gubernatorial appointment powers that were subject to various legislative controls, including displacement. The constitutions only occasionally included the phrase "service during

109. E. MACLAY, *supra* note 68, at 101.

110. See F. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 387-99 (1926).

pleasure." On the whole, the state rules were so diverse as to defy any synthesis.¹¹¹ No clear-cut state precedents were available to the members of the House of Representatives as they faced the task of interpreting the provisions of the United States Constitution with respect to the tenure of executive officers.

On May 19, after Boudinot had introduced the subject, Madison moved that Congress establish departments of Foreign Affairs, Treasury, and War. The departments were to be led by secretaries, who were to be "appointed by the President, by and with the advice and consent of the Senate; and to be removable by the President."¹¹² The motion immediately focused attention on the location of the removal power. In the subsequent debate, two major issues emerged: (1) the substantive issue, and (2) the question whether Congress, especially the House of Representatives, should declare its views on the correct interpretation of the Constitution.¹¹³

Louis Fisher has rightly emphasized the wide-ranging nature of the debate, the complexity of the issues, and the shifting tide of opinion "that advanced and receded each day as the deliberation continued."¹¹⁴ Nevertheless, the following major positions can be identified on the question of the location of the removal power:

1. Removal was possible only by means of impeachment.
2. The removal power belonged to the President because the Constitution did not provide otherwise and because the Senate was not expressly associated with it.
3. The removal power belonged to the President because it was an inherently executive power. The Senate was a legislative body with only a qualified check over the executive power.
4. The removal power belonged to the President because the President, under the Constitution, is answerable for the conduct of his officers.

111. See Blumoff, *Separation of Powers and the Origins of the Appointment Clause*, 37 SYRACUSE L. REV. 1037, 1051-57 (1987).

112. 1 ANNALS OF CONG., *supra* note 47, at 370-71.

113. See *id.* at 372-82.

114. L. FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 60-61 (1985).

5. The removal power was shared by the President and Senate because of its similarity to the appointment power, which was also shared.¹¹⁵
6. Congress could delegate the removal power to the President because of its power over offices and the terms of office.¹¹⁶
7. Congress had discretion in the matter on account of its powers under the necessary and proper clause.

The debate was replete with references to separation of powers. The views of James Madison and Stone of Maryland respectively characterize two extremes. First, Madison's opinion:

Perhaps there was no argument urged with more success, or more plausibly grounded, against the constitution, under which we are now deliberating, than that founded on the mingling of the executive and legislative branches of the government in one body. It has been objected, that the senate have too much of the executive power even, by having a controul over the president in the appointment to office. Now, shall we extend this connection between the legislative and executive departments, which will strengthen the objection, and diminish the responsibility we have in the head of the executive? I cannot but believe, if gentlemen weigh well these considerations, they will think it safe and expedient to adopt the clause.¹¹⁷

Issues of constitutional power aside, Madison's position was clearly based on separation of powers notions. Stone considered such arguments as too late:

A separation of the powers of Government, between the Legislative, Executive, and Judicial branches, is considered as the proper ground for our opinion, and a principle which we must admit. Are we to get it brought into the Constitution? For I apprehend there is no such principle as a separation of those powers brought into the Constitution at present, but to the degree which an examination will appear to exist. Is there any express declaration, that it is a principle of the Constitution to keep the

115. This is the position taken by Hamilton. See *THE FEDERALIST* No. 77, at 484-89 (A. Hamilton) (B. Wright ed. 1961).

116. This suggestion was one of the various ones put forth by Madison.

117. 12 *THE PAPERS OF JAMES MADISON*, *supra* note 45, at 174.

Legislative and Executive powers distinct? No. Has the Constitution in practice kept them separate? No. Whence is this idea drawn? That it is a principle in this Constitution, that the powers of Government should be kept separate? No sure ground is afforded for it in the Constitution itself. It is found in the celebrated writers on government; and, in general, I conceive the principle to be a good one. But if no such principle is declared in the Constitution, and that instrument has adopted exceptions, I think we ought to follow those exceptions, step by step, in every case to which they bear relation.¹¹⁸

In addition to the question of the significance of the separation of powers doctrine for the Constitution and the removal power, some members of the House doubted whether Congress should make any declaration as to the allocation of constitutional powers. Smith of South Carolina, who opposed presidential removal, thought the issue should be left to the judiciary: "It will be time enough to determine the question when the President shall remove an officer in this way."¹¹⁹ Gerry, who believed in the similarity of the removal and appointments powers, wanted the clause "to be removable by the President" stricken, partially because he believed that the legislature should have no power to construe the meaning of the Constitution.¹²⁰ He did assume that the judiciary had the power of exposition.¹²¹ As far as the Congress was concerned, it could act only by amendment pursuant to article V.¹²²

In response to this proposition, Benson pointed out the impossibility of avoiding all construction of the Constitution. At the same time, he notified the House that he would move for new language, in order to destroy all appearance that Congress was conferring the power of removal on the President. Such a conferral "would be admitting the House to be possessed of an authority which would destroy those checks and balances which are cautiously introduced into the Constitution, to prevent an amalgamation of the legislative and executive powers."¹²³

118. 1 ANNALS OF CONG., *supra* note 47, at 564-65 (statement of Rep. Stone).

119. *Id.* at 459 (statement of Rep. Smith).

120. *Id.* at 573 (statement of Rep. Gerry).

121. *Id.* at 573-76.

122. *Id.* at 503.

123. *Id.* at 505 (statement of Rep. Benson).

On June 19, a motion to strike out the words "to be removable by the President" was defeated 20 to 34.¹²⁴ On June 22, Benson introduced his amendment to the House, which ingeniously was based on indirection. Specifically, it gave the chief clerk of the department the custody of all records "whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy."¹²⁵ The motion was carried 30 to 18.¹²⁶ After its adoption, in accord with his previously announced plan, Benson moved to strike out the clause "to be removable by the President."¹²⁷ The motion was carried 31 to 19.¹²⁸ The "decision of 1789" was later sealed in an evenly split Senate, with the Vice President casting the decisive vote.¹²⁹

Short of a roll-call analysis of the shifting alliances, which would be hampered by the fact that by no means all members of the House participated in the debates and that we have no reliable account of Senate proceedings, knowing how decisive the decision was and its exact meaning is difficult.¹³⁰ In any event, this is not a very interesting pursuit, because the real significance of the debate lies in the multitude of views expressed about the significance and meaning of separation of powers. In some way, most speakers, including Madison, as is evidenced in the quoted passage,¹³¹ recognized that distillation of a constitutional separation of powers doctrine that was supported by the constitutional text was difficult. This awareness led Madison and Benson to argue that "amalgamation" had been carried far enough and that doubtful cases should be resolved in favor of more separation and a more effective and responsible executive branch. Yet, the contrary arguments were hardly frivolous as they expressed a preference for construing the Constitution rather than relying on "celebrated writers on govern-

124. *Id.* at 576.

125. *Id.* at 578.

126. *Id.* at 580.

127. *Id.*

128. *Id.* at 585.

129. For the various Senate votes, see L. FISHER, *supra* note 114, at 65.

130. For a detailed analysis, see C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 205-10 (1969).

131. See *supra* text accompanying note 117.

ment."¹³² Furthermore, how responsibility and efficacy could best be achieved in different contexts was by no means clear.

Madison himself provides a striking illustration of this last point. Only one week after the vote on the Benson motion, Madison rose in the House during the debate on the bill establishing the Treasury Department. The bill provided for a Comptroller, whose duties included deciding, on appeal, without further review by the Secretary, all claims concerning the settlement of accounts. The bill made no special provisions concerning the tenure of the Comptroller.¹³³ Madison, in analyzing the "properties" of the office, found them to be "not purely of an executive nature."¹³⁴

It seems to me that they partake of a judiciary quality as well as executive, perhaps the latter obtains in the greatest degree. The principal duty seems to be deciding upon the lawfulness and justice of the claims and accounts subsisting between the United States and the particular citizens; this partakes strongly of the judicial character, and there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of the government . . .

Whatever, Mr. Chairman, may be my opinion with respect to the tenure by which an executive officer may hold his office according to the meaning of the constitution, I am very well satisfied, that a modification by the legislature may take place in such as partake of the judicial qualities, and that the legislative power is sufficient to establish this office on such a footing, as to answer the purposes for which it is prescribed.¹³⁵

Madison proposed tenure for a term of years, although, somewhat surprisingly after his opening words, he would still allow the President to remove the Comptroller. The officer was to be reappointable. The point of the scheme was to establish the Comptroller's dependence on the President, through the removal power, on the Senate, through reconfirmation, and on the House, through impeachment and the power over his salary.¹³⁶

132. 1 ANNALS OF CONG., *supra* note 47, at 565 (statement of Rep. Stone).

133. 12 THE PAPERS OF JAMES MADISON, *supra* note 45, at 265.

134. *Id.*

135. *Id.* at 265-66.

136. *Id.* at 266.

Madison's intervention revealed the complexity of any classification scheme. Later in the debate, he conceded that the office was neither executive nor judicial, but "distinct from both."¹³⁷ Madison's intervention also showed that the views he had adumbrated at the beginning of the removal debate concerning congressional power over offices¹³⁸ were a function of the different organizational tasks confronted by the legislature.

Madison's rather unclear measure for protecting the Comptroller against "interference in the settling and adjusting" of legal claims against the United States was seen by other members as, in Benson's words, "setting afloat the question which had already been carried"—service in the executive branch during pleasure.¹³⁹ In short, some feared that Madison had stirred up a hornet's nest and, the next day, he withdrew the proposition.¹⁴⁰

The real decisions of 1789 are those embodied in the statutes establishing the "great departments" of government. These statutes are of considerable interest beyond the fact that they recognized a presidential removal power. Three departments—Foreign Affairs, War, and Treasury—were established that were the direct successors to those of the Continental Congress. The departments of Foreign Affairs and War were denominated "executive" departments, and thus were placed squarely within the executive branch. Although areas of responsibility were spelled out, the secretaries were subjected explicitly to presidential directions: the principal officer "shall conduct the business of the . . . department in such manner as the President of the United States shall from time to time order or instruct."¹⁴¹ The initial organization of the departments was skeletal, with only a chief clerk named expressly.

137. *Id.* at 267.

138. *Id.* at 172-74.

139. 1 ANNALS OF CONG., *supra* note 47, at 612-14.

140. *Id.* at 615.

141. An Act for establishing an Executive Department, to be denominated the Department of Foreign Affairs, 1 Stat. 28-29 (1789); An Act to establish an Executive Department, to be denominated the Department of War, 1 Stat. 49-50 (1789). The Department of Foreign Affairs was subsequently given additional responsibilities and in effect, once it was renamed the Department of State, became the "Home Department" that the parsimonious First Congress rejected. On the far-reaching responsibilities of the State Department (which, in the absence of a Justice Department, included administration of the court system), see L. WHITE, *THE FEDERALISTS* 128-44 (1978).

Matters were completely different as to the Department of Treasury. The Treasury was not referred to as an "executive" department, even though the Secretary of the Treasury was grouped with other "executive officers" in the act setting salaries¹⁴² and the Secretary was removable by the President. The legislation was silent on the subject of presidential direction, yet did not vest the appointment of inferior officers in the Secretary. An elaborate set of such officers and their responsibilities was spelled out in detail. The officers included an assistant secretary, a comptroller, an auditor, a treasurer, and a register, who were subjected to a detailed system of controls. For instance, disbursement could be made only by the Treasurer, upon warrants signed by the Secretary, countersigned by the Comptroller, and recorded by the Register.¹⁴³

The duties of the Secretary, as defined by the legislation, were extensive and involved direct relations with the Congress:

Sec. 2. *And be it further enacted*, That it shall be the duty of the Secretary of the Treasury to digest and prepare plans for the improvement and management of the revenue, and for the support of public credit; to prepare and report estimates of public revenue, and the public expenditures; to superintend the collection of the revenue; to decide on the forms of keeping and stating accounts and making returns, and to grant under the limitations herein established, or to be hereafter provided, all warrants for monies to be issued from the Treasury, in pursuance of appropriations by law; to execute such services relative to the sale of the lands belonging to the United States, as may be by law required of him; (a) to make report, and give information to either branch of the legislature, in person or in writing (as he may be required), respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office; and generally to perform all such services relative to the finances, as he shall be directed to perform.¹⁴⁴

142. An Act for establishing the Salaries of the Executive Officers of Government, with their Assistants and Clerks, 1 Stat. 67 (1789).

143. An Act to establish the Treasury Department. *Id.* at 65-67. See generally L. WHITE, *supra* note 141, at 116-27 (describing Treasury operations).

144. 1 Stat. 65-66 (1789).

As Forrest McDonald put it, "Hamilton could scarcely have asked for more."¹⁴⁵ Although we shall never know the exact influence that Hamilton had on the shape of the legislation, the direct link that the act created between the Secretary and the Congress had ample state precedent. Even in New York, a state in which the constitution was more generous than any other toward the executive branch, the treasurer was "appointed by act of the legislature, to originate with the assembly."¹⁴⁶ One should also recall that until September 14, 1787, the draft of the federal Constitution provided for the election of the Treasurer.¹⁴⁷

In the Congress, the Secretary of Treasury was seen as an indispensable, direct arm of the House in regard to its responsibilities for revenues and appropriations. The House had appointed a Committee of Ways and Means as early as July 24, 1789.¹⁴⁸ As soon as Hamilton was confirmed, the House turned the Committee's task over to him and discharged the Committee.¹⁴⁹ The House did not establish a standing Committee on Ways and Means until 1795.¹⁵⁰

Whatever the constitutional significance of the different treatment accorded the Treasury Department, its *symbolic* significance for the separation of powers seems considerable. Only the departments of State and War were completely "executive" in nature. As to the Treasury, although Congress did not exclude the President from giving orders and instructions to its Secretary, it claimed that authority for itself and did not even mention the President in this respect. This fact made presidential control of the Secretary more tenuous, as Hamilton had been quick to point out when the cabinet discussed the proper response to the St. Clair inquiry.¹⁵¹ Congress certainly did not demand part of the power to execute the laws, but it varied the instruments for executing its own powers and those of the executive branch, in accordance with the subject matter to be regulated and its own sense of the legislature's responsibilities with respect to that subject matter. Put differently,

145. F. McDONALD, *supra* note 84, at 133.

146. 5 F. THORPE, *supra* note 6, at 2633 (1777 N.Y. CONST. art. XXII).

147. *See supra* text accompanying note 59.

148. 1 ANNALS OF CONG., *supra* note 47, at 670-71.

149. *Id.* at 894-95.

150. N. CUNNINGHAM, *THE PROCESS OF GOVERNMENT UNDER JEFFERSON* 216 (1978).

151. *See supra* text accompanying note 102.

Congress stressed coordination rather than separation as it seemed constitutionally appropriate.

V. THE CONDUCT OF FOREIGN RELATIONS: THE WASHINGTON ADMINISTRATION, CONGRESS, AND THE ALGIERS PROBLEM

On the 25th of July, 1785, the schooner *Maria*, captain Stevens, belonging to a Mr. Foster, of Boston, was taken off Cape St. Vincents, by an Algerine corsair; and, five days afterwards, the ship *Dauphin*, captain O'Brien, belonging to Messieurs Irvins of Philadelphia, was taken by another Algerine, about fifty leagues westward of Lisbon. These vessels, with their cargoes and crew, twenty-one persons in number, were carried into Algiers.¹⁵²

With these words, Secretary of State Thomas Jefferson described an event that posed one of the most intractable foreign policy problems the new country encountered, one which would occupy the Washington administration throughout its eight years. The Algiers episode illustrates vividly the foreign policy issues that arise under a system characterized by a three-way (executive, Senate, House) allocation of decision-making authority. In evaluating its significance, one must keep in mind that one of the framers' central purposes in establishing the federal government was the effective and controlled conduct of foreign and defense policy.

Algiers, Tunis, and Tripoli were autonomous regencies of the Ottoman empire, governed by a local and regularly replenished military establishment of Turks and financed by tributes from country tribes, agricultural trade, and piracy. For the purposes of piracy, fleets of cruisers were maintained under Turkish sea captains. The piracy policy was one of declaring "war" on countries big and small, taking ships and seamen captive, putting the "slaves" to work, and then selling "peace." A fourth participant in these activities was Morocco, an independent state under a Sultan. These four powers, the "Barbary Powers," exercised considerable control over Mediterranean and Atlantic shipping.¹⁵³ Because England

152. 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 100 (W. Lowrie & M. Clarke eds. 1832).

153. For two detailed accounts of the Algiers episode, see R. IRWIN, *THE DIPLOMATIC RELATIONS OF THE UNITED STATES WITH THE BARBARY POWERS 1776-1816* (1931) and H.G. BARNBY, *THE PRISONERS OF ALGIERS* (1966).

withdrew her Mediterranean passes for American ships shortly after the outbreak of the War of Independence, the "American Revolution transferred from London to Philadelphia the problem of protecting American commerce."¹⁵⁴

In 1784 the Continental Congress resolved to secure treaties with Morocco, Algiers, Tunis, and Tripoli. Indeed, a fifty-year treaty was concluded with Morocco in 1787.¹⁵⁵ However, negotiations with the other Barbary Powers collapsed and the capture of the *Maria* and *Dauphin* exacerbated the problem.

The Continental Congress commissioned John Adams, Benjamin Franklin, and Thomas Jefferson to negotiate with the Barbary Powers. When these men sent an agent to Algiers, its ruler, the Dey, demanded a \$60,000 ransom. This sum amounted to more than \$2,800 a head, considerably above the \$200 that the Commissioners had offered or the \$550 that Jefferson was willing to pay in September of 1788, when he employed the services of a French religious order to recover the hostages. In March of 1790, Jefferson took up his new position of Secretary of State. The House of Representatives referred to the Secretary a petition for relief concerning the American captives in Algiers.¹⁵⁶ At this point it becomes interesting to explore the manner in which the executive branch and Congress interacted to find a solution.

On December 30, 1790, the President sent both houses of Congress a report on the prisoners of Algiers which the House had requested. The Secretary of State had prepared the report for the President. On the same date, Jefferson also sent the House a report on Mediterranean trade. The Secretary of State had prepared the latter report at the request of the House following the President's annual speech to his "Fellow Citizens of the Senate and House of Representatives" on December 8.¹⁵⁷ During that address, the President called the Congressmen's attention to the "distressful" state of the Mediterranean trade.¹⁵⁸

Washington's cover letter accompanying the first report said: "I lay before you a report of the Secretary of State on the subject of

154. R. IRWIN, *supra* note 153, at 20.

155. *Id.* at 28-33.

156. See 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 152, at 101.

157. 2 ANNALS OF CONG. 1728 (1790).

158. *Id.* at 1730.

the citizens of the United States in captivity at Algiers, *that you may provide on their behalf, what to you shall seem most expedient.*"¹⁵⁹ Jefferson's report consisted of a detailed account of diplomatic activities since the days of the Continental Congress, as well as of the "market" in Algerine captives—the per capita ransom paid by various European states.¹⁶⁰ Jefferson stated somewhat laconically that from "these facts and opinions, some conjecture may be formed of the terms on which the liberty of our citizens may be obtained."¹⁶¹ He also pointed to the alternative of meeting force with force, suggesting the capture of Algerine mariners, or better still, Turks, for purposes of exchange. Jefferson concluded by emphasizing the connection of the subject matter at hand with "the liberation of our commerce in the Mediterranean."¹⁶² The report was accompanied by extracts from diplomatic and other correspondence¹⁶³ which had received some "judicious editing" by Jefferson.¹⁶⁴

In response to a House request, Jefferson sent the report on Mediterranean trade directly to the House after the President had approved it. In his report, Jefferson provided information about the importance of the Mediterranean ports for the United States agricultural exports before the war. He stressed that navigation had not been resumed at all since the peace and discussed alternatives for coping with the situation, including the option "to obtain peace by purchasing it."¹⁶⁵ Jefferson relayed the opinion of a European source, "whose name is not free to be mentioned here,"¹⁶⁶ that the United States could not buy peace with Algiers for less than a million dollars.¹⁶⁷

159. 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 152, at 100 (emphasis added).

160. Prices ranged from \$1,200 to \$2,920 a man. *See id.* at 101.

161. *Id.*

162. *Id.*

163. See list in 18 THE PAPERS OF THOMAS JEFFERSON 435-36 (J. Boyd ed. 1971) (editorial note).

164. *Id.* at 404 (editorial note).

165. 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 152, at 104.

166. *Id.* at 105.

167. In the end, the opinion turned out to be exceedingly accurate.

Finally, Jefferson discussed “repel[ling] force by force” as an alternative.¹⁶⁸ He provided estimates of the strength of the Algerine naval force, suggested that the United States needed a naval force equal to it, and put forward the idea of an alliance with other countries. He pointed to the fact that Portugal, by keeping a naval watch before the Straits of Gibraltar, had contained the Algerines within the Mediterranean. “Should Portugal effect a peace with them, as has been apprehended for some time, the Atlantic will immediately become the principal scene of their piracies.”¹⁶⁹ Jefferson concluded:

Upon the whole, it rests with Congress to decide between war, tribute, and ransom, as the means of re-establishing our Mediterranean commerce. If war, they will consider how far our own resources shall be called forth, and how far they will enable the Executive to engage, in the forms of the constitution, the co-operation of other Powers. If tribute or ransom, it will rest with them to limit and provide the amount; and with the Executive, observing the same constitutional forms, to make arrangements for employing it to the best advantage.¹⁷⁰

The report was so structured that Jefferson, while treating the alternatives fairly, made it clear where he stood (and, indeed had stood all along): giving in to ransom demands would only encourage further extortion. The report was again accompanied by a range of diplomatic and other correspondence.¹⁷¹

Jefferson submitted the report with a request to the Speaker of the House that it be treated as a secret document, because it was not in the interest of the United States that countries at peace with Algiers learn about American plans for concerted action. The galleries were indeed cleared and the House forwarded the report to the Senate on a confidential basis.¹⁷²

When the Senate received Jefferson's report on January 3, Maclay thought it breathed resentment and abounded “with martial

168. 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 152, at 105.

169. *Id.*

170. *Id.*

171. 18 THE PAPERS OF THOMAS JEFFERSON, *supra* note 163, at 429-30 (editorial note).

172. *Id.* at 410 (editorial note), 436-37.

estimates in a naval way."¹⁷³ Three days later, a Senate committee found that a naval force was necessary "and that it will be proper to resort to the same as soon as the state of the public finances will admit."¹⁷⁴ The committee was headed by Jefferson's friend Langdon and included Senators who were sympathetic to Hamiltonian trade policy.¹⁷⁵

On February 1, 1791, the Senate adopted a resolution that

the Senate advise and consent that the President of the United States take such measures as he may think necessary for the redemption of the citizens of the United States now in captivity at Algiers, provided the expense shall not exceed forty thousand dollars; and, also, that measures be taken to confirm the treaty now existing between the United States and the Emperor of Morocco.¹⁷⁶

The last item referred to the fact that the Sultan had died and a customary payment was due his successor. The President responded to the Senate in a message dated February 22 in which he said he would act "in conformity with your resolution of advice" as soon as the necessary moneys were appropriated and ready.¹⁷⁷ By a special appropriations act of March 3, 1791, Congress appropriated \$20,000 for the Moroccan treaty.¹⁷⁸ No further steps were taken concerning a naval force or the Algiers prisoners, however.¹⁷⁹

This first set of interactions between the executive branch and Congress was marked by a straightforward, detailed, and, on the whole, complete executive branch account to the Congress of the state of affairs.¹⁸⁰ It illustrated the President's inclination to wait for congressional judgment as well as Jefferson's inclination to make recommendations. No doubt was entertained about the ultimate authority of the Congress. Furthermore, both branches dis-

173. E. MACLAY, *supra* note 68, at 353.

174. 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 152, at 108.

175. 18 THE PAPERS OF THOMAS JEFFERSON, *supra* note 163, at 410 (editorial note).

176. 2 ANNALS OF CONG., *supra* note 157, at 1735.

177. 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 152, at 128.

178. An Act making an appropriation for the purpose therein mentioned, 1 Stat. 214 (1791).

179. For a detailed account, see 18 THE PAPERS OF THOMAS JEFFERSON, *supra* note 163, at 410-13 (editorial note).

180. D. HOFFMAN, *supra* note 107, at 68, 79.

played a consensus that, at times, the interests of the country demanded secrecy. Perhaps the most important aspect is that, at the outset, the executive branch, because any solution depended on appropriations, recognized the need to deal with Congress as a whole. This last matter became controversial in the spring of 1792.

The previous December, Jefferson had forwarded new information to the Senate that suggested that accession of a new Dey in Algiers provided a favorable moment for making a permanent arrangement with the regency. Also, Captain O'Brien urged, after six years of captivity, that something be done "to finally extricate your fourteen unfortunate subjects from their present state of bondage and adversity."¹⁸¹ Of the twenty-one original captives, some had died and one had been privately ransomed. A Senate committee recommended a treaty.¹⁸²

On March 11, 1792, in preparation for a meeting between the President and Senators the next day, Washington and Jefferson discussed whether the President could proceed with treaty negotiations only with Senate authorization. These are Jefferson's notes on his consultation with the President:

My opinions run on the following heads:

We must go to Algiers with cash in our hands. Where shall we get it? By loan? By converting money now in the treasury?

Probably a loan might be obtained on the President's authority; but as this could not be repaid without a subsequent act of legislature, the Representatives might refuse it. So if money in the treasury be converted, they may refuse to sanction it.

The subsequent approbation of the Senate being necessary to validate a treaty, they expect to be consulted beforehand, if the case admits.

So the subsequent act of the Representatives being necessary where money is given, why should not they expect to be consulted in like manner, when the case admits. A treaty is a law of the land. But prudence will point out this difference to be attended to in making them; viz. where a treaty contains such articles only as will go into execution of themselves, or be carried into execution by the judges, they may be safely made; but

181. 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 152, at 130.

182. *Id.* at 133.

where there are articles which require a law to be passed afterwards by the legislature, great caution is requisite.

For example; the consular convention with France required a very small legislative regulation. This convention was unanimously ratified by the Senate. Yet the same identical men threw by the law to enforce it at the last session, and the Representatives at this session have placed it among the laws which they may take up or not, at their own convenience, as if that was a higher motive than the public faith.

Therefore, against hazarding this transaction without the sanction of both Houses.

The President concurred. The Senate express the motive for this proposition, to be a fear that the Representatives would not keep the secret. He has no opinion of the secrecy of the Senate.¹⁸³

Apparently Washington met with strong resistance from the Senators, as is evidenced by Jefferson's notes from April 9:

The President had wished to redeem our captives at Algiers, and to make peace with them on paying an annual tribute. The Senate were willing to approve this, but unwilling to have the lower House applied to previously to furnish the money; they wished the President to take the money from the treasury, or open a loan for it. They thought that to consult the Representatives on one occasion, would give them a handle always to claim it, and would let them into a participation of the power of making treaties, which the constitution had given exclusively to the President and Senate. They said too, that if the particular sum was voted by the Representatives, it would not be a secret. The President had no confidence in the secrecy of the Senate, and did not choose to take money from the treasury or to borrow. But he agreed he would enter into provisional treaties with the Algerines, not to be binding on us till ratified here. I prepared questions for consultation with the Senate, and added, that the Senate were to be apprized that on the return of the provisional treaty, and after they should advise the ratification, he would not have the seal put to it till the two Houses should vote the money. He asked me if the treaty stipulating a sum and ratified by him, with the advice of the Senate, would not be good under

183. THE COMPLETE ANAS OF THOMAS JEFFERSON, *supra* note 93, at 63-64.

the constitution, and obligatory on the Representatives to furnish the money? I answered it certainly would, and that it would be the duty of the Representatives to raise the money; but that they might decline to do what was their duty, and I thought it might be incautious to commit himself by a ratification with a foreign nation, where he might be left in the lurch in the execution: it was possible too, to conceive a treaty, which it would not be their duty to provide for. He said that he did not like throwing too much into democratic hands, that if they would not do what the constitution called on them to do, the government would be at an end, and must *then assume another form*. He stopped here; and I kept silence to see whether he would say anything more in the same line, or add any qualifying expression to soften what he had said, but he did neither.¹⁸⁴

Washington had obviously come to the conclusion that a negotiated redemption of the American prisoners was the only realistic option. Washington and Jefferson also believed that realism, if not constitutional necessity, made it highly desirable to have the House approve of the negotiations beforehand. Washington was not about to borrow the necessary money on his own authority. The Senate insisted on having a special role and brought the need for secrecy into play, although the President was not impressed by the Senate's allegedly superior capacity to keep secrets. Following behind-the-scenes discussions, all of these considerations were brought into finely tuned balance, when on a single day, May 8, 1792, the President formally asked the Senate whether it would approve both ransom and a treaty and if so, at what price. The Senate advised the President that a peace treaty with Algiers not to exceed \$40,000, plus subsequent annual tribute not to exceed \$25,000, plus ransom not to exceed \$40,000 would be approved.¹⁸⁵ Finally, the Congress made a special appropriation of \$50,000 "to defray any expense which might be incurred in relation to the intercourse between the United States and foreign nations."¹⁸⁶ The purpose of this last appropriation was understood to be Algiers but this was not publicly stated to protect the negotiations.

184. *Id.* at 72-73.

185. 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 152, at 136.

186. *Id.* at 290; An Act making certain appropriations therein mentioned, 1 Stat. 284-85 (1792).

Fearing interference from foreign countries, especially England, which was widely thought to be hostile to American interests and competition, the next steps were taken behind veils of extreme secrecy. George Washington, Thomas Jefferson, and Thomas Pinckney, the new American minister to London, were the only ones to know of the President's appointments of Admiral John Paul Jones, then in London, as commissioner for negotiations with Algiers, and of Thomas Barclay, the United States consul at Morocco, as his substitute should Jones not be available. Detailed instructions were issued for the negotiations.¹⁸⁷

When Pinckney arrived in London, he learned of Jones's death. Barclay received the papers and prepared for his departure for Algiers, but became ill and died in Lisbon in January 1793. At the end of March, Washington appointed the American minister to Portugal, David Humphreys, as Commissioner. At this point the strategic situation deteriorated considerably. At the beginning of October 1793, in Gibraltar, Humphreys learned that the much dreaded truce between Algiers and Portugal had been concluded and that Algerine corsairs were on their way to the Atlantic. The negotiations had been carried out by William Logie, the British consul in Algiers, on behalf of Portugal, although not necessarily with Portugal's informed consent. Edward Church, the United States consul in Lisbon, concluded that England was responsible:

The conduct of the British in this business leaves no room to doubt or mistake their object, which was evidently aimed at us As a further confirmation, it is worthy of remark, that the same British agent obtained a truce at the same time between the States of Holland and the Dey, for six months, whereby we and the Hanse Towns are now left the only prey to those barbarians.¹⁸⁸

On December 16, the President presented to both Houses of Congress a report from the Secretary of State that contained much of the diplomatic correspondence. Washington requested secrecy:

While it is proper our citizens should know that subjects which so much concern their interests and their feelings, have

187. See 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 152, at 288-300.

188. *Id.* at 296.

duly engaged the attention of their Legislature and Executive, it would still be improper that some particulars of this communication should be made known. The confidential conversation stated in one of the last letters sent herewith is one of these. Both justice and policy require that the source of that information should remain secret. So a knowledge of the sums meant to have been given for peace and ransom might have a disadvantageous influence on future proceedings for the same objects.¹⁸⁹

In connection with the House debates on the President's message, secrecy became controversial and the House amended its standing order in favor of House discretion.¹⁹⁰ The issue had acquired partisan overtones, with Republicans arguing for the amendment. This was also the time of heated controversy over the Neutrality Proclamation, the alliance with France, and relations with Great Britain. Nevertheless, after adoption of the amendment, the House defeated a motion to go into public session on Algiers by a one-vote margin.¹⁹¹ Indeed, on January 2, 1794, the House adopted secret resolutions authorizing additional money for the negotiations and calling for a naval force, "adequate to the protection of the commerce of the United States against the Algerine corsairs."¹⁹² The House lifted the injunction of secrecy concerning these resolutions on January 7, and requested a committee to edit the President's communication in accord with his suggestions. That task was accomplished by February 6.¹⁹³

While Congress was considering possible responses to the changed circumstances, the administration received new information that made matters even worse. The President forwarded this information, on a confidential basis, on March 3, 1794.¹⁹⁴ During October and November, Algiers had taken eleven American vessels and 105 American seamen captive in the Atlantic¹⁹⁵ and the Dey had firmly refused any negotiations with the United States. Congress was bombarded with petitions not only from the hostages,

189. *Id.* at 288.

190. *See supra* text accompanying notes 104-07.

191. *See* the account in D. HOFFMAN, *supra* note 107, at 100-04.

192. 4 ANNALS OF CONG., *supra* note 105, at 154.

193. D. HOFFMAN, *supra* note 107, at 102.

194. *See* 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 152, at 413-23.

195. R. IRWIN, *supra* note 153, at 60.

but also from merchants calling for adequate naval protection.¹⁹⁶ Insurance rates on American shipping increased from ten to thirty percent.¹⁹⁷

In a letter to Humphreys, Pierre Eric Skjöldebrand, brother of the Swedish Consul in Algiers and an informal American agent, held out some hope that, if the Dey could be talked to in a "favorable" moment, matters might be settled.¹⁹⁸ Apparently, on this basis, it was decided that Congress should make further efforts for a negotiated peace providing realistic amounts of ransom and naval armament.

Since 1790, Congress had made \$40,000 available annually for "intercourse between the United States and foreign nations," and had given the President discretion not to account specifically for such expenditures that he thought it inadvisable to make public.¹⁹⁹ The latter procedure was regularized in 1793 by a formal system of certificates that were deemed to be a "sufficient voucher."²⁰⁰ On March 20, 1794, Congress appropriated one million dollars in addition to all previous appropriations "to defray any expenses which may be incurred, in relation to the intercourse between the United States and foreign nations."²⁰¹ The legislation included authority to borrow the amount needed and called for an account of the expenditures "as soon as may be."²⁰² That it was almost half as much as regular 1794 appropriations for the support of the government and the military establishment gives a sense of the magnitude of this appropriation for a vaguely stated purpose.²⁰³

196. See, e.g., 4 ANNALS OF CONG., *supra* note 105, at 481.

197. R. IRWIN, *supra* note 153, at 60.

198. 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 152, at 415.

199. An Act providing the means of intercourse between the United States and foreign nations, 1 Stat. 128-29 (1790).

200. An Act to continue in force for a limited time, and to amend the act intituled "An Act providing the means of intercourse between the United States and foreign nations," 1 Stat. 299-300 (1793).

201. An Act making further provision for the expenses attending the intercourse of the United States with foreign nations; and further to continue in force the act intituled, "An act providing the means of intercourse between the United States and foreign nations," 1 Stat. 345 (1794).

202. *Id.*

203. See An Act making Appropriations for the support of Government, for the year one thousand seven hundred and ninety four, 1 Stat. 342-45 (1794); An Act making appropria-

A naval bill called for additional moneys. Almost three months after he had left the office of Secretary of State, Jefferson, in a limited way, got what he had requested three years earlier, and what he would use during his own Presidency—a naval force to deal with the Barbary Powers. The proposal was, on the whole, not very popular in the House. Madison opposed it, arguing that it would be cheaper to purchase peace.²⁰⁴ If the British were behind Algiers, as was widely assumed although not proven, then such a fleet would increase the danger of war with England.²⁰⁵ Madison thus attempted to undercut the Federalists, who favored the naval bill, by linking the Algiers issue to the greater dispute over relations with England and France.²⁰⁶ The House nevertheless approved the bill by an eleven-vote majority. The act of March 27, 1794 authorized six ships, but also provided that the program should be dropped if “a peace shall take place between the United States and the Regency of Algiers.”²⁰⁷ Congress assigned priority to the negotiations.

The President took immediate steps to implement the legislation.²⁰⁸ When a peace treaty with Algiers was eventually concluded, Congress reduced the ship-building program to three frigates that were launched in 1797.²⁰⁹ The entire expense for building, arming, and keeping the ships in commission for the years 1794 to 1798 was about \$2.5 million.²¹⁰ Irwin has argued that the great expense was, however, dwarfed by the savings in insurance premiums following the launching of the frigates.²¹¹

After considerable further difficulties, Humphreys' agent for these negotiations, Joseph Donaldson, agreed to a treaty at the end of 1795. Humphreys approved the treaty, “reserving the same, nevertheless, for the final ratification of the President of the United States of America, by and with the advice and consent of the Sen-

tions for the support of the Military establishment of the United States, for the year one thousand seven hundred and ninety four, 1 Stat. 346-47 (1794).

204. 15 THE PAPERS OF JAMES MADISON, *supra* note 45, at 147 (editorial note).

205. *Id.* at 249.

206. *See id.* at 147 (editorial note).

207. An Act to provide a Naval Armament, 1 Stat. 350-51 (1794).

208. R. IRWIN, *supra* note 153, at 66.

209. These frigates were the *United States*, the *Constitution*, and the *Constellation*.

210. R. IRWIN, *supra* note 153, at 79.

211. *Id.*

ate.”²¹² The terms had used up more money than Congress had appropriated and included maritime and military stores; in short, it was “cash and arms for hostages.”²¹³

The President submitted the treaty to the Senate on February 15, 1796 with much of the diplomatic correspondence.²¹⁴ It was promptly ratified. When the efforts to secure the necessary gold and silver in the war-torn European markets caused delays, the Dey announced that he would declare war on the United States—the threat added a 36-gun frigate for “the Dey’s daughter” to the previous expenses.²¹⁵ On May 30, 1796, Congress appropriated an additional \$260,000 for treaties with the Barbary Powers.²¹⁶ The surviving American hostages were released in June of 1796, some after eleven years of captivity.

The episode came to its end on February 22, 1797, when the House voted for still more appropriations, this time in the amount of approximately \$350,000,²¹⁷ for a total of Algiers expenditures in excess of one and a half million dollars. In opening the session of Congress, Washington had said:

After many delays and disappointments, arising out of the European war, the final arrangements for the fulfilling of the engagements made to the Dey and Regency of Algiers, will, in all present appearance, be crowned with success, but under great, though inevitable disadvantages in the pecuniary transactions, occasioned by that war, which will render a further provision necessary.²¹⁸

The House resolved first to call for an accounting.²¹⁹ The President responded within a week, submitting to both Houses, “in confidence,” detailed reports from the Secretaries of State and Treas-

212. 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 152, at 532.

213. For the colorful details, see H.G. BARNBY, *supra* note 153, at 191-98.

214. 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 152, at 529-32.

215. R. IRWIN, *supra* note 153, at 74.

216. An Act making further provision for the expenses attending the intercourse of the United States with foreign nations; and to continue in force the act, intituled “An act providing the means of intercourse between the United States and foreign nations,” 1 Stat. 487-88 (1796).

217. 6 ANNALS OF CONG. 2245-46 (1797).

218. *Id.* at 1764.

219. *Id.* at 1763-67.

sury. On February 21, 1797, the House, after a secret debate on the appropriations, voted overwhelmingly that the injunction of secrecy imposed on the report be lifted and "that all future debates and proceedings thereon be had with open doors."²²⁰ However, it exempted from publication an important letter detailing the matters of the additional frigate and payments made to various Algerine officials and an Algerine banker who had served as a go-between and financial broker.²²¹

The United States's first encounter with hostage-taking had ended. The plight of the captives, merchant pressure, lack of a navy, geographical distance, and the European wars had forced the United States to behave in the same manner in which many, more important, European powers had behaved for a long time. When Jefferson, as President, faced the problem anew after the Bashaw of Tripoli declared war in 1801, he sent the navy.²²² He justified his action as a training exercise, invoking an act of Congress passed during the last session of the Adams administration providing for a "Naval Peace Establishment."²²³ Sending the navy helped to some extent. The Bashaw, following the grounding of the frigate *Philadelphia*, captured more than 300 American seamen for whom the United States, as the result of a peace treaty in 1805, paid only \$60,000 in ransom. That amount was much less than the three million dollars originally demanded by the Bashaw or the amount that was previously paid to Algiers.

Relations with Algiers began to sour once again in 1812. New hostages were taken. On February 23, 1815, Madison asked Congress for a declaration of war.²²⁴ Congress responded on March 3, not with a formal declaration of war, but with legislation authorizing the President to employ "such of the armed vessels of the United States as may be judged requisite."²²⁵ This time it was the United States's turn to dictate a peace treaty to the Dey on "un-

220. *Id.* at 2235.

221. *Id.* at 2235-45.

222. See 5 D. MALONE, *JEFFERSON AND HIS TIME* 37-49 (1974).

223. A. SOFAER, *supra* note 103, at 210.

224. 28 ANNALS OF CONG. 269 (1815) (Message of Pres. Madison).

225. *Id.* at 1943.

precedented" terms.²²⁶ When the Dey reneged on that treaty, President Madison, in his annual message on December 3, 1816, advised Congress that he would use naval force, if necessary.²²⁷ The United States compelled the Dey, on December 23, to sign yet another treaty.²²⁸ However, given that the European powers had also become unwilling to put up with Barbary piracy, the treaty had become more or less irrelevant. In fact, it was forgotten in the State Department and not submitted by President Monroe for Senate ratification until December, 1821.²²⁹ In 1830, Algiers became part of the French colonial empire.

To say that the Algiers episode is less well known than other foreign policy issues of the Washington administration would be an understatement. Because it did not generate the same partisan passions as the Neutrality Proclamation or the Jay Treaty, the episode has been largely ignored. The difficulties that it posed, however, were great and intractable. Precisely because it was relatively free of partisanship, it framed the questions concerning the distribution of powers in a more detached manner. In any event, Washington's actions surrounding his unilateral proclamation of "neutrality" (after France had declared war against England in 1793), and the Jay Treaty with England, concluded in 1795, displayed, by and large, the same constitutional circumspection that characterized his administration's conduct with respect to the Barbary Powers.²³⁰

The Constitution does not speak in such abstractions as *the* foreign affairs power or *the* war power. Nor, as the Washington administration addressed the Algiers problem, were these two powers thought of as meaningful. When Jefferson told Congress in 1790 that it had to decide "between war, tribute, and ransom,"²³¹ he said about the latter two that Congress had the duty to limit and provide the amount, and the Executive had the duty "to make ar-

226. 4 AMERICAN STATE PAPERS: FOREIGN RELATIONS 4 (W. Lowrie & W. Franklin eds. 1834); R. IRWIN, *supra* note 153, at 176-86.

227. 30 ANNALS OF CONG. 13 (1816) (Pres. Madison's Annual Message).

228. R. IRWIN, *supra* note 153, at 186.

229. 5 AMERICAN STATE PAPERS: FOREIGN RELATIONS 133-34 (A. Dickens & J. Allen eds. 1858).

230. See A. SOFAER, *supra* note 103, at 103-16 (the Neutrality Proclamation), 85-93.

231. 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 152, at 105.

rangements for employing it to the best advantage."²³² In context, this meant that negotiations and treaty drafts were the task of the executive department, but that Congress shared responsibility and control through its power of the purse, and the Senate, through its treaty power.

As to Algiers, Washington sought advice²³³ and advice was rendered by the Senate, which set limits on the amount of ransom it would accept as the result of negotiations.²³⁴ Although one may safely assume that informal discussions lay behind formal messages and resolutions, the administration did not proceed with negotiations without formal authority contained in Senate resolutions or congressional appropriations.²³⁵ The instructions the administration unilaterally chose to give the commissioners were carefully framed in accordance with the stipulated monetary limitations.²³⁶ To the extent that they were exceeded, it was due to the necessities faced by the negotiators. If Congress remained in the dark, so did the executive due to the unsatisfactory communications system of the period. However, the Senate's treaty functions were formally preserved by the appropriate treaty stipulations.²³⁷

The Washington administration did not always follow as strict a course of consultations as it did during the Algiers business.²³⁸ It was quite conscious of the fact that occasionally the secrecy of diplomatic overtures was the condition of success. On the other hand, the extent to which, in general, the administration disclosed details of foreign negotiations to the Congress and to the public at large was remarkable and, indeed, worried some political observers.²³⁹ Frequently, Washington informed Congress by literally taking it into "his confidence." This mode of interaction was subject to two limitations. On the one hand, the executive branch claimed the right to withhold information if even its limited publication would

232. *Id.*

233. See *supra* text accompanying notes 159, 186.

234. See *supra* text accompanying notes 176-77, 186.

235. See *supra* text accompanying notes 178-79, 202.

236. See instructions to Jones, 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 152, at 290-92; instructions to Humphreys, *id.* at 528-29.

237. See *supra* text following note 211.

238. See A. SOFAER, *supra* note 103, at 96.

239. See 3 D. MALONE, *supra* note 222, at 152 (regarding Jefferson's disclosures as Secretary of State).

be against public interest.²⁴⁰ On the other hand, the House eventually claimed the right to lift injunctions of secrecy.²⁴¹ Whether the practices of the government with respect to secrecy ran counter to the spirit of the framers' plan²⁴² and the demands of popular sovereignty is a difficult question. Washington displayed awareness of these demands,²⁴³ but was also troubled by "throwing too much into democratic hands."²⁴⁴ On the whole, however, the administration seemed to be determined to achieve the highest possible degree of coordination for American policy toward Algiers, and not only kept Congress informed, but actually consulted it beforehand.

With regard to the respective powers of the Senate and the House, the administration's approach in the Algiers matter was arguably at some variance with the President's position in the Jay Treaty controversy. Discussing Algiers with his Secretary of State, Washington had raised the question of whether the House was under a constitutional obligation to furnish moneys stipulated in a ratified treaty. Jefferson responded that the House "certainly" had such an obligation, but then equivocated by conceiving of hypothetical treaties "which it would not be their duty to provide for."²⁴⁵

In the summer of 1795, following the Senate's approval, with some modification, of the Jay Treaty, Washington asked the House to provide \$90,000 to pay for arbitral commissions established by the treaty. This action led to an intense dispute about the House's power to demand the instructions and other documents relating to the treaty. The very partisan debate had a somewhat "academic" character because the Senate had received all the papers and the House members apparently could inspect them at the Senate.²⁴⁶ The House overwhelmingly adopted a resolution calling for the pa-

240. See *supra* text accompanying notes 93, 164.

241. See *supra* text accompanying notes 107, 190-91, 221.

242. D. HOFFMAN, *supra* note 107, at 76.

243. See *supra* text accompanying note 189.

244. THE COMPLETE ANAS OF THOMAS JEFFERSON, *supra* note 93, at 73; see *supra* text accompanying note 184.

245. THE COMPLETE ANAS OF THOMAS JEFFERSON, *supra* note 93, at 73; see *supra* text accompanying note 184.

246. 5 ANNALS OF CONG. 625, 629 (1796).

pers, excepting only those "as any existing negotiation may render improper to be disclosed."²⁴⁷

Washington refused, invoking the needs of foreign negotiations and the constitutional separation of powers that gave the House no role in the treaty-making process: "[It] is essential to the due administration of the Government, that the boundaries fixed by the Constitution between the different departments should be preserved."²⁴⁸ Earlier in his message, Washington indicated that the situation would be different if the House contemplated impeachment. He also stressed that he had "no disposition to withhold any information which the duty of my station will permit, or the public good shall require, to be disclosed."²⁴⁹ This latter language could, of course, cover the full disclosures made in connection with the Algiers negotiations.

Jefferson, then at Monticello, seems to have remained at the sidelines of this dispute, although he did tell Madison about the position he had taken favoring inclusion of both branches of the legislature in the Algiers arrangements.²⁵⁰ Dumas Malone, Jefferson's biographer, however, has found no evidence suggesting that Jefferson had anything to do with Virginia's proposed constitutional amendment that aimed at formalizing participation of the House in the treaty process when the subject matter of a treaty concerned congressional powers.²⁵¹

Although the strong views that Washington expressed on this occasion had already been foreshadowed vaguely in his exchange with Jefferson at the beginning of the Algiers episode,²⁵² his conduct in the course of that drawn-out business is well summarized by his own characterization of his overall attitude in the message rejecting the House request for the Jay Treaty papers:

[I]t has been, as it will continue to be, while I have the honor to preside in the Government, my constant endeavor to harmonize with the other branches thereof, so far as the trust delegated to

247. *Id.* at 759.

248. *Id.* at 761-62.

249. *Id.* at 760-61. For an account of the controversy, see A. SOFAER, *supra* note 103, at 85-93.

250. 3 D. MALONE, *supra* note 222, at 258.

251. *Id.* at 252.

252. *See supra* text accompanying note 184.

me by the people of the United States, and my sense of the obligation it imposes, to "preserve, protect, and defend the Constitution," will permit.²⁵³

VI. CONCLUSION

This essay has proceeded from the very general to the very specific in an effort to understand what happened to separation of powers notions as the Washington administration faced practical problems of governmental organization and of the conduct of government. These problems were all the more challenging because the Constitution spoke about major formative issues only a little more clearly than the separation of powers doctrine or the notion of checks and balances.

The shaping of governmental structures began in earnest in 1789 and, of course, has not concluded to this date. Precedents were set by the President and Congress in response to complex problems as they occurred, and were influenced by earnest considerations of principles and practical considerations of statecraft, but also, to be sure, by political considerations.²⁵⁴ The process was helped initially by the relative absence of partisanship. It was also helped by the circumspection of Washington, who has found few matches among later Presidents in the deliberateness with which he worried about what was right for the government as a whole, without concentrating unduly on the powers of the Presidency.

Such matters as the structure and accountability of executive departments were handled with discretion and common sense. The fact that Congress in general, and the House of Representatives in particular, had the ultimate word on financial matters led to coordination, even in the area of foreign policy, at least where this seemed most necessary. The House, on the other hand, although not recognizing an "executive privilege" as such, was sensitive to the needs of confidentiality in the conduct of foreign policy. The investigatory powers of the House were taken seriously by the executive branch. The "advisory" functions of the Senate as to ap-

253. 5 ANNALS OF CONG., *supra* note 246, at 760.

254. For a similar assessment of relations between the judiciary and Congress, see Marcus & Van Tassel, *Judges and Legislators in the New Federal System, 1789-1800*, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 31 (R. Katzmann ed. 1988).

pointments and treaties posed an intricate problem that Washington tried to solve as well as he could—although without much success, given the awkwardness inherent in the involvement of a legislative chamber and the exigencies of foreign negotiations. Although the special responsibility of the President for the maintenance of foreign relations was understood, neither the President nor the Congress assumed that the Executive had what John Locke, in his version of separation of powers, called the “federative” power, which pertained to foreign relations and was, by him, classified as an executive power.²⁵⁵

Madison stated, in *The Federalist No. 45*, that the change brought about by the new Constitution was much less the addition of new powers to the union than the invigoration of its original powers: “The proposed change does not enlarge these powers; it only substitutes a more effectual mode of administering them.”²⁵⁶ To some extent this statement may have been no more than an argument to help make the new Constitution more acceptable. One should remember, on the other hand, that Madison was disappointed by the outcome of the Constitutional Convention and thought that the changes made were too modest.²⁵⁷ In any event, what is more striking about the issues under review here is how much the concern of all participants was “an effectual mode of administering” the powers of the federal government. The main reference point for this concern was the constitutional framework rather than procrustean theories. Separation of powers notions played a supportive role, but the views expressed were not doctrinaire; in part because there was no clear doctrine. In general, little single-mindedness existed. What the New Hampshire Constitution, in its separation of powers provision, had referred to as “the chain of connection that binds the whole fabric of the constitution,”²⁵⁸ was perceived, if, at times, only dimly and without the “amity” that New Hampshire had postulated.

255. J. LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT* 89-90.

256. *THE FEDERALIST* No. 45, at 329 (J. Madison) (B. Wright ed. 1961).

257. 10 *THE PAPERS OF JAMES MADISON*, *supra* note 45, at 205.

258. 4 F. THORPE, *supra* note 6, at 2457 (1784 N.H. CONST. art. XXXVII).