1974

Constitutional Allocation of the War Powers Between the President and Congress: 1787-88

W. Taylor Reveley III

William & Mary Law School

Repository Citation
https://scholarship.law.wm.edu/facpubs/240
Constitutional Allocation of the War Powers
Between the President and Congress: 1787-1788

W. Taylor Reveley, III*

I. The Framers and Ratifiers: Threshold Considerations ... 74
   A. Enigmatic Intentions .................................................. 74
      1. Fragmentary Record of Debate at the Constitutional
         Convention ................................................................. 74
      2. Confusion Inherent in the Process .............................. 75
      3. Deliberate Ambiguity .................................................. 76
      4. Gaps in Intent: Other Assumptions, Other Problems ....... 78
      5. Dangers of Extrapolation ........................................... 84
   B. Sources of Intent ...................................................... 85

II. The Framers and Ratifiers: The Context in Which They
    Met .................................................................................. 86
    A. British Practice and Political Theory .......................... 86
    B. American Practice ...................................................... 90

III. The Framers: Philadelphia 1787 .................................... 95
    A. War and Treaty-Making .............................................. 96
       1. Philadelphia, May through July ................................. 96
       2. Philadelphia, August .................................................. 101
       3. Philadelphia, September ............................................ 113
    B. Other Comment on the Allocation ................................. 121

IV. The Ratifiers ................................................................. 124
    A. War-Making ............................................................... 126
    B. Diplomacy, especially Treaty-Making ......................... 133
    C. Other Comment on the Allocation .................................. 138

V. Résumé ............................................................................. 143

For some time the international community has been keenly interested
in the foreign uses to which America puts its military. The nature of these
uses has traditionally been affected by the manner in which the Constitu­
tion divides the war powers between the President and Congress. This
allocation of war-peace authority, in turn, is the product of a number of
influences, among them the intentions of the Framers and Ratifiers for the
text which they drafted and approved. Their war-power debates, as we
shall see, have heavy international overtones.

*A.B., 1985, Princeton Univ.; LL.B, 1988, Univ. of Virginia; member of the Virginia Bar.
Much of this article stems from the author's work while an International Affairs Fellow of
the Council on Foreign Relations and a Fellow of the Woodrow Wilson International Center
for Scholars.
These debates have not been neglected, especially during America's recent involvement in Indochina. Why another plunge into the war-power understandings of 1787-88? In part, it is useful to approach them without the distraction unavoidable when the country is at war. More important, it is helpful to present in unusual detail the basic data on which conclusions about the Framers and Ratifiers' intentions rest. Armed with these data, it becomes possible for the reader to cast an informed and appropriately cold eye on pronouncements about what the Constitutional Fathers had in mind — including pronouncements below.

I. THE FRAMERS AND RATIFIERS: THRESHOLD CONSIDERATIONS

A. Enigmatic Intentions

We begin with the reality that our grasp of the Framers and Ratifiers' intentions is none too firm. Five factors contribute to uncertainty about what they meant regarding congressional-executive control over war and peace.

1. Fragmentary Record of Debate at the Constitutional Conventions

When executive and congressional prerogatives clashed in the Steel Seizure Case, Mr. Justice Jackson lamented the poverty of really useful and unambiguous authority applicable to concrete problems of executive power . . . . Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.\(^1\)

The situation is not that grim, but available records are impoverished. The Framers had an official secretary, William Jackson, but he restricted himself largely to recording motions and votes. Further, his notes were "carelessly kept," and though his "statement of questions is probably accurate in most cases, . . . the determination of those questions and in particular the votes upon them should be accepted somewhat tentatively."\(^2\) The Framers debated in secret, and Jackson's Journal remained undisclosed, first in the hands of George Washington and then in the Department of State, until it was published by order of Congress in 1819

---

2. 1 M. Farrand, Records of the Federal Convention of 1787, at xiii-xiv (1911) [hereinafter cited as Farrand].
following the deaths of most of the Convention delegates.\textsuperscript{3} At that point, of course, it was essentially beyond verification or correction.

In subsequent years, other accounts of the Framers’ Philadelphia proceedings were published, most important the notes of James Madison in 1840. But Madison as an old man had dubiously revised his account after the appearance of the Journal.\textsuperscript{4} His attempt to reconstruct events of more than thirty years before was necessarily clouded by the passage of time. Similarly, Charles Pinckney, attempting in 1819 to produce a copy of the plan that he had presented the Convention, could not remember which of several papers in his hands was the correct version.\textsuperscript{5}

Even when the available accounts of the Philadelphia proceedings are mustered, their overlapping discussion comes to very little for a convention that met steadily for almost four months. The standard compilation of the debates runs to less than 1300 pages.\textsuperscript{6} The verbatim transcript of a proceeding of similar length today could easily reach twenty times that volume. Records of most of the state ratifying conventions are even more modest than those of Philadelphia.\textsuperscript{7}

\section*{2. Confusion Inherent in the Process}

Though attendance varied, a total of fifty-five men participated in the four months of deliberations in Philadelphia, and many more took part in the state ratifying conventions.\textsuperscript{8} Divergent positions had to be compromised during the drafting of the Constitution, and compromise on one provision did not prevent efforts to reassert more extreme positions in later provisions. Thus, interpretation of specific language varied among delegates. Moreover, because the Philadelphia Convention met in secret and its participants said little about its deliberations during ratification, dele-

\begin{footnotesize}
3. See text at note 164 \textit{infra}.

4. Madison changed his notes in places to correspond with the questionable records of Jackson and Robert Yates. 1 \textsc{Farrand} xvi-xvii.

5. As Pinckney wrote John Quincy Adams, who was readying the Journal for publication, “at the distance of nearly thirty two Years it is impossible for me now to say which of the 4 or 5 draughts I have was the one but enclosed I send you the one I believe was it.” 3 \textsc{Farrand} 595 (Letter of Dec. 30, 1818).

6. The debates, redundantly described by different men, appear in the first two volumes of \textsc{Farrand}, covering respectively 606 and 667 pages.

7. See 2-4 J. Elliot, \textit{Debates in the Several State Conventions on the Adoption of the Federal Constitution} (1818) [hereinafter cited as Elliot]. These records, first compiled in 1830, range from a 663-page account of the Virginia debates to a 17-page fragment on the Connecticut proceedings.

8. Attendance at the Philadelphia Convention averaged forty delegates. 3 \textsc{Farrand} 586 n.2. Over 1,000 delegates attended the state ratifying conventions, Massachusetts’ convention being the largest with 364 Ratifiers and Delaware’s the smallest with only 30. See C. \textit{Warren}, \textit{The Making of the Constitution} 819-20 (1928).
\end{footnotesize}
gates to the state conventions were largely unaware of the previously expressed views of the Framers. Even those Framers who were also Ratifiers, and who chose to tell their colleagues of the Philadelphia debates, did not always recall them with precision. Under the circumstances, it is not likely that a majority, much less all, of those who voted in the federal and state conventions for the Constitution's war-power provisions held a finely drawn, common "intent" about their meaning.

3. Deliberate Ambiguity

Evidence of several sorts suggest that the Framers may have drafted the Constitution with a measure of deliberate ambiguity. First, any constitutional scheme hinged on separation of powers and on checks and balances necessarily allocates competing powers with vaguely defined frontiers among the various branches of government. Second, apparent on the face of the Constitution is a drafting technique that eschewed detail for terse statement and left much to be assumed for "[c]onstitution-makers, in that day at least, did not regard themselves as framers of detailed codes. To them the statement of the bare principle was sufficient . . . ." Third, the Constitutional Fathers were practical men, and their laconic drafting technique no doubt reflected awareness of the difficulty of laying down rules to govern situations whose dimensions were at best dimly grasped. The Framers and Ratifiers did seem clearly to appreciate the role of experience in shaping tenable rules. As Washington noted, "Time and habit are necessary to fix the true character of governments." James Madison in remarks in the Virginia ratifying convention was also quite explicit about the need for experience, stating:

the organization of the general government of the United States was, in all its parts, very difficult. There was a peculiar difficulty in that of the executive. Every thing incident to it must have participated in that difficulty. That mode which was judged most expedient was adopted till experience should point out one more eligible.  

9. See, e.g., 1 Farrand 86 (Dickinson); 4 Elliot 120-22 (Davie); 2 id. at 34-35 (Madison); The Federalist Nos. 37, 47-48 & 51 (J. Madison) (E.H. Scott ed. 1894). [subsequent citations to specific page numbers in The Federalist refer to this edition]; 5 Annals of Cong. 487 (1796) (Madison).


12. 3 Elliot 531. See also The Federalist Nos. 38, 43 & 47 (J. Madison); id. No. 81 (A. Hamilton). It may well be, however, that the Framers and Ratifiers expected experience to
While not among the Framers, Thomas Jefferson suggested in 1816:

Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It deserved well of its country. It was very little like the present, but without the experience of the present; and forty years of experience in government is worth a century of book-reading; and this they would say themselves, were they to rise from the dead . . . . Let us . . . avail ourselves of our reason and experience, to correct the crude essays of our first and unexperienced, although wise, virtuous, and well-meaning councils.13

Finally, deliberate ambiguity was very likely a means of producing agreement among fractious delegates. Gouverneur Morris, very influential in drafting the final version of the document, explained with regard to certain clauses that "it became necessary to select phrases which, expressing my own notions, would not alarm others . . . ."14 For men whose overriding objective was ratification of a Constitution promising a more viable union, the precise meaning to be given to ambiguous but generally acceptable language could await resolution in practice.

be taken into account by the formal amendment of the Constitution rather than by its informal adaptation through court decisions or a process of claim and concession between the President and Congress.
13. Letter to Samuel Kercheval, July 12, 1816, reprinted in M. McDOUGAL & ASSOCIATES, STUDIES IN WORLD PUBLIC ORDER 619 n.9 (1990) [hereinafter cited as McDOUGAL].
14. 1 ELLIOT 506-07 (Letter to Timothy Pickering, Dec. 22, 1814). Morris referred to the language of Article III; the rest of the Constitution he thought clear enough but not likely by itself to prevent legislative aggrandizement. He also told Pickering that the Constitutional Fathers' debates were of little moment in interpreting the document:

What can a history of the Constitution avail toward interpreting its provisions? This must be done by comparing the plain import of the words with the general tenor and object of the instrument.

. . . .

[A]fter all, what does it signify that men should have a written constitution, containing unequivocal provisions and limitations? The legislative lion will not be entangled in the meshes of a logical net. The legislature will always make the power which it wishes to exercise, unless it be so organized as to contain within itself the sufficient check . . . . The idea of binding legislators by oath is puerile. Having sworn to exercise the powers granted, accordingly to their true intent and meaning, they will, when they feel a desire to go farther, avoid the shame, if not the guilt, of perjury, by swearing the true intent and meaning to be, according to their comprehension, that which suits their purpose.

Id.
4. Gaps in Intent: Other Assumptions, Other Problems

The Framers' and Ratifiers' assumptions about the nature of American foreign relations and government, and their focus on problems of the late 1780's, simply precluded attention to many issues regarding the division of war-peace authority between the legislative and executive branches. In 1787 it took eighteen days to move from Boston to Georgia. Economic and governmental divisions further heightened the separation of the American people. The country was little more than "a loose confederation of states, rife with sectional secession movements." Its constitutional necessities were, first, an allocation of authority between the national government and the states that would create a viable union, and second, a division of national authority between the representatives of the large and small states that would ensure ratification of the new plan of government. Of great concern also were basic institutional questions about the sort of national executive to be carved out of existing congressional government, for example, whether the Executive would be one person or several, act with or without a council, have veto power, how the Executive would be chosen, for what term, and with what possibility of re-election. But these issues were rarely considered with an eye to the respective roles of the President and Congress in determining American policy. To a large extent, they were merely another manifestation of the state-national conflict, the federalists favoring a stronger Executive than the states-righters.

Foreign affairs as such were scarcely mentioned in either the Philadelphia or state debates, and the only aspects of external relations to receive real attention were war and treaty-making. As between them, the focus

15. McDougal, supra note 13, at 631. See also id. at 628 n.55; C. Warren, supra note 8, at 3-54. The evils of confederations were very much on the nationalists' minds. E.g., The Federalist No. 17 (A. Hamilton); id. Nos. 18-20 (A. Hamilton & J. Madison).
16. America's external relations did figure more prominently in The Federalist. Hamilton in Federalist No. 17, at 93, described the federal government's concerns as principally "commerce, finance, negotiation, and war," and Madison in No. 45, at 258, described federal powers as "few and defined" to be "exercised principally on external objects, as war, peace, negotiation, and foreign commerce" and to be "most extensive and important in times of war and danger." Accord, e.g., id. Nos. 23 & 34 (A. Hamilton); id. No. 42 (J. Madison). As these and others of The Federalist suggest, foreign affairs were stressed to sell the Constitution. Disunited, the states were less efficient in diplomatic and military affairs, and their inefficiency invited foreign aggression. Moreover, if wars and treaties were to be the main diet of the federal government, other public affairs would be left to state and local officials, and federal operations would usually be modest, since major military and diplomatic undertakings were rarely expected.
17. L. Henkin, Foreign Affairs and the Constitution 129, 372 n.1 (1972). It has been suggested that:

The overemphasis upon treaties was . . . natural, considering the time. In the nature of the case, the problem of a new nation is to negotiate treaties, either to gain recognition thereby, or to regularize its contact, commercial and political,
was on treaties, though the two merged whenever the Constitutional Fathers turned to the termination of hostilities.

Predominant attention could go to treaties, for peace was expected to be the customary state of the new nation. America would avoid aggressive war abroad, and in turn enjoy "an insulated situation" from the great powers of Europe. In Hamilton's words:

Europe is at a great distance from us. Her colonies in our vicinity will be likely to continue too much disproportioned in strength to be able to give us any dangerous annoyance. Extensive military establishments cannot, in this position, be necessary to our security. 18

Commercial relations were to characterize American links with the rest of the world. Contacts of other sorts, not much desired, would be discouraged by hobbling treaty-making. In this vein, Gouverneur Morris opined that "[i]n general he was not solicitous to multiply & facilitate Treaties," and James Madison believed that since Independence "it has been too easy . . . to make Treaties." 19 This isolationist mood was perhaps a reaction to the hardships of the Revolution. It clearly fed on fear of great power interference in the domestic politics of the fledgling state, especially through bribery of federal politicians. 20 The notion of peaceful retreat, in any event,
firmly gripped Americans in the late 1780's. John Adams went so far as to suggest that the foreign service might usefully be abandoned, or radically reduced from its already meager proportions.  

The Constitutional Fathers' pacific view of foreign relations chilled their consideration of the use of American force abroad. They simply foresaw no such use except for defensive naval action to protect the Atlantic coast and American commerce and, possibly, to intervene in the Caribbean struggles of Old World powers. Though they did not expect foreign attack, the Framers and Ratifiers remained aware of its possibility, especially from Britain or Spain, the two powers holding territory abutting the United States, or from their Indian allies. Purely domestic troubles with the Indians, acute state rivalries, and Shay's Rebellion in 1786, made real the

21. 8 WORKS OF JOHN ADAMS 37 (C.F. Adams ed. 1853). See also 2 FARRAND 285 (Gerry). J. William Fulbright has suggested:

Our institutional arrangements for foreign affairs were drafted in the late 18th century by men who assumed that these affairs would be few and insignificant. The Founding Fathers considered, for instance, that the Department of State would quite possibly wither away from disuse.

Fulbright, American Foreign Policy in the 20th Century Under an 18th-Century Constitution, 47 CORNELL L.Q. 1, 2 (1961).

22. Hamilton wrote in Federalist No. 24 at 135, that a navy was crucial "If we mean to be a commercial people or even to be secure on our Atlantic side." In Federalist No. 34, at 176, he asked more broadly for effective defense: "Admitting that we ought to try the novel and absurd experiment in politics, of tying up the hands of government from offensive war, founded upon reasons of state; yet, certainly, we ought not to disable it from guarding the community against the ambition or enmity of other nations." See also id. Nos. 11 & 34 (A. Hamilton); id. No. 41 (J. Madison); 2 FARRAND 450; 2 ELLIOT 143 (Thacher), 218 (Lansing).

Hamilton in Federalist No. 11, at 62, briefly trafficked with a more offensive use of naval power in local waters:

A farther resource for influencing the conduct of European nations toward us, in this respect [trade], would arise from the establishment of a Federal navy. There can be no doubt, that the continuance of the Union, under an efficient government, would put it in our power . . . to create a navy, which . . . would at least be of respectable weight, if thrown into the scale of either of two contending parties. This would be more peculiarly the case, in relation to operations in the West Indies . . . . By a steady adherence to the Union, we may hope, ere long, to become the arbiter of Europe in America; and to be able to incline the balance of European competitions in this part of the world, as our interest may dictate.

23. Other than as competitors for open areas of North America, Britain was feared for its forts in territory officially American, and Britain and Spain for their control of navigation on the St. Lawrence and Mississippi Rivers. See, e.g., The Federalist No. 15 (A. Hamilton). As suggested in note 16 supra, the specter of European attack was also raised to promote federal hegemony over foreign affairs. State authority in diplomatic and military affairs, it was said, led to violations of international law and just cause for foreign attack. The Federalist No. 3 (J. Jay); id. Nos. 80-81 (A. Hamilton). Also, state authority in diplomatic and military matters bred national disarray rather than the "union and a good national government" essential "to put and keep" the American people "in such a situation as, instead of inviting war will tend to repress and discourage it." Id. No. 4, at 25 (J. Jay). Accord, id.
potential for war at home without foreign involvement.\textsuperscript{24} It was no accident that the Constitution spoke of calling out the militia — viewed then as the mainstay of American armed force — “to execute the Laws of the Union, suppress Insurrections and repel Invasions.”

To ensure the anticipated peace and deter perceived threats to American security, the Constitutional Fathers saw the behavior of the States — not the respective powers of the President and Congress — as their major problem. Interstate conflicts and intrastate revolts disrupted internal tranquility, while American disunity and the provocative behavior of individual states invited foreign attack. Jefferson wrote Washington early in the Philadelphia Convention about the need “to make our states as one to all foreign concerns,”\textsuperscript{25} and Madison concluded that “[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations.”\textsuperscript{25.1}

Since colonial days the states had been loathe to subordinate their immediate individual interests to the common good. They were reluctant to bear their fair share of military burdens unless actually attacked, but prone themselves to incite Indians, European powers and their sister states. Separate diplomatic activity by them and their violation of national treaties were facts of life. Danger to the nation from state excesses in foreign affairs provided important impetus to the Constitutional Convention. Madison spoke in Philadelphia of “those violations of the law of nations & of Treaties which if not prevented must involve us in the calamities of foreign wars,” and said that “[t]he tendency of the States to these violations has been manifested in sundry instances.” He continued:

The files of Congs. contain complaints already, from almost every nation with which treaties have been formed. Hitherto indulgence has been shown us. This cannot be the permanent disposition of foreign nations. A rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring

\textsuperscript{24} See, e.g., 1 FARRAND 316-18 (Madison); 2 id. at 455, 463 (Martin); 2 ELLIOT 212 (Livingston); 3 id. at 180 (Lee [Va.]), 424-25 (Madison); THE FEDERALIST No. 3 (J. Jay); id. Nos. 6-8 & 21 (A. Hamilton).
\textsuperscript{25} C. WARREN, \textit{supra} note 8, at 451 (Letter of Aug. 14, 1787).
\textsuperscript{25.1} THE FEDERALIST No. 42, at 232.
them on the whole. The existing confederacy does (not) sufficiently provide against this evil.  

Significantly, the Constitutional Fathers found the supremacy of national treaties over state law far more troublesome than the manner in which the United States would itself make treaties. By the same token, they were vastly more concerned to define national war-peace authority, already great in theory under the Confederation, than to allocate war powers between the President and Congress. And they apparently felt it more essential to grant emergency military powers to the states than to the national executive, probably on the assumption that state militia would

26. 1 FARRAND at 316. See also 1 id. at 171 (Pinckney), 426 (Wilson), 513 (Morris); L. HENKIN, supra note 16, at 290-91 n.10, 295 n.8, 373 n.3; McDougal, supra note 14, at 466-620.

27. The state-federal struggle for control of American armed forces dominated the controversy over control of military power during the drafting and ratifying conventions. E.g., Donahoe & Smelser, The Congressional Power to Raise Armies: The Constitutional and Ratifying Conventions, 33 REV. OF POL. 202 (1971).

28. Articles of Confederation III and VI through IX dealt with diplomatic and military affairs. Much of their detail concerned raising, organizing, and supporting the military, leaving significant authority in the states. War and treaty-making, however, were largely preserves of the central government:

Article 6. No state, without the consent of . . . Congress . . . , shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty, with any king, prince, or state; . . .

. . . .

No state shall engage in any war without the consent of Congress . . . unless such state be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay till . . . Congress . . . can be consulted; nor shall any state grant commissions to any ships or vessels of war, nor letters of marque and reprisal, except it be after a declaration of war by . . . Congress . . . and then only against the . . . state . . . against which war has been so declared, and under such regulations as shall be established by . . . Congress . . . unless such state be infested by pirates, in which case, vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue or until . . . Congress . . . shall determine otherwise.

. . . .

Article 9. The United States in Congress assembled shall have the sole and exclusive right and power of determining on war, except in the cases mentioned in the sixth article — of sending and receiving ambassadors — entering into treaties and alliances; . . . of granting letters of marque and reprisal in times of peace . . .

. . . .

The United States in Congress assembled shall also have the sole and exclusive right and power of . . . making rules for the government and regulation of the [national] land and naval forces, and directing their operations.

1 ELLIOT at 79-82. Those favoring ratification of the Constitution argued that these powers were illusory, since the national government remained dependent on the states for the means of their execution. See THE FEDERALIST Nos. 22 & 25 (A. Hamilton); id. No. 38 (J. Madison).
bear the first brunt of repelling sudden attack. Thus, while the Executive's emergency prerogative is mentioned only briefly in a confusing fragment of the Philadelphia debates, the states' appears explicitly in the Constitution.29

True, impetus to Philadelphia also stemmed from concern that the national government was inefficiently discharging its foreign and military responsibilities. But the Framers and Ratifiers sought to end this inefficiency, in part, by loosening the hold of individual states on congressional action and by restructuring Congress to make it a more viable executive force.30 Their other remedies were only slightly more effective in dividing authority between the President and the legislators. To relieve the clumsy handling of foreign affairs, the Constitutional Fathers finally opted for close collaboration between the Executive and Senate, an arrangement that seemed realistic given the anticipated governments of national unity and the belief that the Senate would be institutionally capable of handling diplomatic business.

As regards military affairs, there was no dissatisfaction with congressional capacity to make policy, except in cases of sudden attack, and for sudden attack the explicit constitutional remedy was emergency action by the states. Military inefficiency, rather, was seen in the efforts of Congress to implement its policy through operational command of American forces. Here consensus existed that an Executive was needed to serve as first general and admiral of the nation's army and navy.

The demons arising out of that command for the Framers and Ratifiers were not ours. Their abiding fear was that the Executive would use the military for tyrannical purposes at home, possibly to make himself a hereditary prince, not that he would use it for ill-advised foreign adventures. Thus, controversy centered on whether it was safe to allow executive command in the field, whether standing armies might be used by the President for domestic subversion, and whether he should be allowed to pardon traitors, since their crimes could stem from efforts to help him usurp power. Plenary congressional authority over raising, supporting and organizing the military, coupled with little reliance on a standing army and navy, was widely thought to be an adequate bar to presidential usurpation — as it would have seemed sufficient protection against his unauthorized intervention abroad, had that seemed credible in 1787-88. For some of the

30. As Madison argued:

The proper remedy for this [lack of national officials responsible for American policy] must be an additional body in the legislative department, which having sufficient permanency to provide for such objects as require a continued attention and train of measures, may be justly and effectually answerable for the attainment of those objects.

THE FEDERALIST No. 63, at 346-47.
Constitutional Fathers, quaintly, there were no executive demons in military matters, only congressional: the legislators were said to hold both the purse and the sword, and thus to be feared as incipient military despots. For these Framers and Ratifiers, of course, remedy lay in state control of American armed forces — that is, heavy federal reliance on state militia, state officers, and state military appropriations.

5. **Dangers of Extrapolation**

It is hazardous to seek to fill gaps in the Framers' and Ratifiers' intent by extrapolation from their debates on the war powers. They acted on the basis of many factual assumptions that no longer hold, and they often seem obsessed with ephemeral economic and security concerns. What the Constitutional Fathers would have thought given later twentieth century realities often cannot be safely predicted from what they said given circumstances of the late 1780's. What, for instance, if they had realized that peace and noninvolvement with the rest of the world would not be America's customary state? That the hazards, pace and complexity of international affairs would radically increase, along with the country's capacity and need to work its will abroad? That declarations of war and treaties would hardly prove to be the guts of American war and peace? That from the outset the Senate could not keep step with the President in governing our foreign relations, and the militia could not replace standing armies? That the regular military would grow gargantuan, little restrained by the congressional capacity to raise and support, and that the loyalty of naturalized citizens, the navigation of the Mississippi, and other compelling issues of the late eighteenth century would quickly fade?

There are, of course, aspects of the 1787 understandings not rooted in the passing assumptions and problems of those years. But any attempt to extrapolate from the Framers' and Ratifiers' expressed intentions to cover gaps in their war-power debates must have its adequacy measured by reference to questions such as those above, and it must convincingly rebut the possibility that the extrapolation is too speculative to be meaningful.

In short, fragmentary evidence of the debates, the limited extent to which there is ever common purpose in any process as lengthy, contentious, and complex as the drafting and ratifying of the Constitution, the chance that the text includes deliberately ambiguous language to be shaped by experience, the presence of gaps in intent caused by assumptions and problems peculiar to the late 1780's, and the dangers of extending what was said then about the war powers, in response to concrete problems of that era, to unforeseen issues in unforeseen times — all these demand

---

31. See, e.g., 2 *Farrand* 268-72, 359-63, 499-503.
restrained judgments of what the Framers and Ratifiers really had in mind.

B. Sources of Intent

The relevant provisions of the Constitution are an authoritative — but extremely vague — guide to the Constitutional Fathers' war-power intentions. These provisions are considered here only as they figure in the 1787-88 debates. Primary attention goes to the debates, with a look at three other sorts of evidence as well. First is the historical and intellectual context in which the Framers and Ratifiers lived. Context suggests, for instance, the evils against which the Constitution is meant to guard and definitions for its generalities. The Framers and Ratifiers, well read in history and political theory, seemed eager to take contextual considerations into account in molding their new country. 32

Second is contemporaneous construction: the interpretation given constitutional language, once it has gone into effect, by men who participated in its framing and ratification and by their contemporaries. During heated debate in 1831 over the President's constitutional prerogative to appoint special diplomatic agents, Senator Livingston made classic recourse to contemporaneous construction, arguing that the interpretation which he favored

was made in the earliest years of the Federal Government, by the man who presided in the convention which made that Constitution, acting with the advice and assistance of the leading members of that body, all fresh from its discussion; men who had taken prominent parts in every question that arose . . . .

By these men, with this perfect and recent knowledge of the Constitution, acting under the solemn obligation to preserve it inviolate and without any possible motive to make them forget their duty, was this first precedent set; without a single doubt on the mind that it was correct; without protest, without even remark. 33

But contemporaneous construction must be gingerly handled. There is no reason to believe that the Framers and Ratifiers became more clear as to

---

32. E.g., The Federalist Nos. 38, 52 & 63 (J. Madison). But Madison also noted that although Americans "paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience." Id. No. 14, at 79. See also The Federalist Papers xix-xx, 292 n.25 (R. Fairfield ed. 1966) [hereinafter cited as The Federalist Papers]; Lofgren, supra note 10, at 689-90.

their intentions after their conventions than during them.

Third are publications issued during the ratification process, construing the Constitution in attempts either to encourage or deter its acceptance. Far and away the most significant of these efforts was The Federalist. It will be extensively considered here, but with several grains of salt. Its essays lack the authoritative status of debates in either the Philadelphia or state conventions. They were simply promotional literature, devoted to rebutting the "gorgons, hydras, and chimeras dire," seen in the Constitution by its foes. And, The Federalist almost surely did not have the same impact on the constitutional understanding of the Ratifiers as it has had on the views of subsequent generations. As McLaughlin wrote in 1935:

"[T]hese essays were probably of service in winning support of the Constitution; but the extent of that service we naturally cannot measure. For much immediate practical effect they were perhaps too learned, too free from passion . . . . The Federalist probably had more effect after the new government went into operation than in the days of uncertainty when the fate of the union seemed to hang in the balance . . . ."

Against this background, we turn to a more specific examination of the Framers' and Ratifiers' intentions. We will move from context to the Philadelphia Convention, and then to the ratification process, considering there the state debates, promotional publications, and a bit of contemporary construction.

II. THE FRAMERS AND RATIFIERS: THE CONTEXT IN WHICH THEY MET

To the extent that the Framers and Ratifiers did consider how to allocate the war powers between the legislative and executive branches, they were clearly influenced by the context in which the constitutional conventions met. A sketch of that context usefully touches on British practice, contemporary political theory, and earlier American government, both national and state.

A. British Practice and Political Theory

The Framers and Ratifiers looked for their historical lessons to Greece

34. The Federalist No. 29, at 158 (A. Hamilton).
35. A. McLaughlin, A Constitutional History of the United States 208-09 (1935). Fairfield states that "[s]ince some of the most controversial points in the Constitution were not discussed until most of the state conventions had been held, the probability is that The Federalist was not too influential." The Federalist Papers, supra note 32, at 280-81 n.20. But he also notes that the extent of their influence has been controversial and cites representative opinion. Id. at ix-xi.
and Rome, France, Holland, the Holy Roman Empire and others, but above all to England. Hamilton, speaking of "the exclusion of military establishments in time of peace," noted that "as a national sentiment, it must be traced to those habits of thinking which we derive from the nation from whom the inhabitants of these States have in general sprung."

The Crown controlled British foreign and military affairs with little parliamentary check until the seventeenth century. Then wielding the power of the purse, the legislators moved radically to reduce royal prerogative over these areas. During the course of a century of Stuart absolutism, civil war, Commonwealth, Restoration and Glorious Revolution, Parliament confirmed its authority over levying taxes, including those for military ends; established its right to condition military appropriations, for instance, by voting funds for use only in disbanding the army; and acquired control over raising and maintaining standing armies in time of peace. The legislators also enlarged their say in foreign affairs, especially treaty-making. Following the Restoration, the Crown's authority as commander-in-chief began to unravel, though it was buttressed ironically by public distaste for the military policy of John Churchill, the Duke of Marlborough. He shaped British use of force in the early 1700's when the War of the Spanish Succession coincided with flaccid Queen Anne, using his strength in the field and Parliament to pursue campaigns distasteful to most of his countrymen. Finally, the emerging authority of the cabinet and its responsibility to Parliament grew steadily during the 1700's until by the time of the Constitutional Conventions there remained little purely royal prerogative over British foreign and military affairs. Significantly, the legislators controlled British policy through statutory requests that the Crown act "by and with the advice and consent" of Parliament.

36. *The Federalist* No. 26, at 141. Reference to British practice was frequent during the Philadelphia and state conventions, and in *The Federalist*. See, e.g., 1 FARRAND 65-66 (Wilson & Randolph), 97 (Sherman), 289 (Hamilton), 391 (Butler), 398-404 (Pinecney); 2 id. at 104 (Morris), 274 (Mason); 3 ELLOR 16-17 (Nicholas [Va.]), 393 (Madison); *The Federalist* Nos. 26, 70 & 84 (A. Hamilton) (references to the British Constitution and laws); id. Nos. 37, 45 & 56 (J. Madison).


38. Colonial legislatures in America used "advice and consent" similarly. See H. Wriston, *supra* note 17, at 63-71.
The Framers and Ratifiers did not dwell on the emerging executive-in-Parliament, though there was some awareness of its existence. To the extent that the rise of the cabinet was perceived, it very likely was viewed as an abuse of the separation of legislative and executive powers, a principle dear to the Constitutional Fathers and to the political theorists whom they favored. Primary attention went to seventeenth-century lessons and thus to executive despotism and its legislative remedies. The potential tyranny of standing armies during peace was stressed, and the burdens of ill-advised royal wars noted. The king was frequently portrayed as having great foreign and military authority, an exemplar of what the American Executive was not to be.

39. For example, Gouverneur Morris addressed the Philadelphia Convention on removal of the real British executive by party intrigue:

Some leader of party will always covet his seat, will perplex his administration, will cabal with the Legislature, till he succeeds in supplanting him. This was the way in which the King of England was got out, he meant the real King, the Minister.

2 FARRAND 104. James Wilson argued: “The people of Amer. did not oppose the British King but the Parliament — the opposition was not agst. an Unity but a corrupt multitude . . . .” 1 Id. at 71. See also W. BINKLEY, THE MAN IN THE WHITE HOUSE, HIS POWERS & DUTIES 290-91 (1959) (colonies were loyal to the King but disapproved of “ministerial policies”).

40. The necessity for separation was a frequent theme during the federal and state conventions, e.g., 2 FARRAND 537 (Mason), 538-39 (Wilson); 4 ELLIOT 56 (Lenoir [N.C.]); with Montesquieu seen as its greatest prophet, e.g., 2 FARRAND 34 (Madison); THE FEDERALIST No. 47 (J. Madison); The Federalist Papers, supra note 32, at 297-98 n.60. Later, Madison stated in Congress that “if there is a principle in our constitution . . . more sacred than another, it is that which separates the legislative, executive, and judicial powers.” 1 ANNALS OF CONG. 604 (1789). The Constitutional Fathers stressed on other occasions, however, the overlapping nature of legislative, executive and judicial powers — a necessary concomitant of checks and balances.


42. E.g., 2 FARRAND 616-17 (Mason & Madison). John Jay warned that:

absolute monarchs will often make war when their nations are to get nothing by it; but for purposes and objects merely personal, such as thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. These, and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctioned by justice or the voice and interests of his people.

THE FEDERALIST No. 4, at 24.

43. See 2 FARRAND 393 (Johnson); 3 id. at 302 (Letter from Pierce Butler to Weedon Butler, May 5, 1788); 4 ELLIOT at 107-08 (Iredell), 269 (Pringle [S.C.]), 277-79 (Pinckney). See also The Federalist Nos. 67 & 68 (A. Hamilton). However, these protestations of regal might were somewhat inconsistent with the Constitutional Fathers’ belief that Parliament had greatly curbed the King’s power. No doubt there was an element of gamesmanship involved in aggrandizing the King. Those in favor of the Constitution could then show how pallid and
In their concern to contain executive power with legislative, the Framers and Ratifiers may well have been influenced by Whig theorists, as well as by their concept of British constitutional history.\textsuperscript{44} They were also aware of the distinction drawn by theorists, principally John Locke, between purely executive prerogative, on the one hand, and federative authority on the other, the former concerning law enforcement and the latter the conduct of external affairs, including war and peace. They knew too, of the theorists' emphasis on the institutional advantages of the executive in handling foreign and military matters.\textsuperscript{45}

Another important European influence on the Constitutional Fathers concerned the character of war: whether it might be entered without a formal declaration, at what levels of force it might arise, and the role of marque and reprisal in its prosecution. Theorists known to educated Americans in the 1780's, especially Grotius, Pufendorf, Vattel, and Burlamaqui, differed over whether a declaration was necessary to initiate unjust war, but agreed that none was needed to enter defensive hostilities. They examined in detail undeclared or "imperfect" war, noting that it was generally limited in scope, designed to redress grievances and prosecuted through restricted government action or private war-making under letters of marque and reprisal. They agreed further that it could easily lead to outright or "perfect" war.\textsuperscript{46}

Public naval reprisals, in fact, had gone before British wars with the Dutch in 1652 and 1664, the Spanish in 1739 and the French in 1756. And
undeclared war was the norm in eighteenth-century European practice, a
reality brought home to Americans when Britain’s Seven Years War with
France began on this continent. Thus, the Framers and Ratifiers knew
that war might be limited or general, that marque and reprisal were a
means of waging limited hostilities, and that even major conflict generally
began without prior declaration.

B. American Practice

As Edward Corwin has noted, America ceased to be a colony “with the
belief prevalent that ‘the executive magistracy’ was the natural enemy, the
legislative assembly the natural friend of liberty . . . .”48 “Fear of a return
of Executive authority like that exercised by the Royal Governors or by the
King,” according to Charles Warren, “had been ever present in the states
from the beginning of the Revolution.”49 Much of the American antipathy
for executive authority no doubt stemmed from the fact that the colonial
assemblies were locally chosen and the royal governors appointed by Lon­
don.50 A measure of it, however, resulted from the colonists’ distaste for
British use of troops to enforce unpopular policies, especially economic.
That use came to be attributed to the Crown, and reinforced the aversion
to peace-time armies born of seventeenth-century experience in Britain
itself. The Declaration of Independence captured prevailing distrust of
armed executives:

The history of the present King of Great Britain is a history of
repeated injuries and usurpations, all having in direct object the
establishment of an absolute Tyranny over these States . . . .

He has kept among us, in times of peace, Standing Armies
without the consent of our legislature.

He has affected to render the Military independent of and su-
perior to the Civil Power.

These themes recurred frequently in the years leading to the Constitu­
tional Conventions, along with strong preference for militia rather than
standing armies as America’s peace-time military determ.mnt.51

47. See McDougal, supra note 13, at 715 n.135; Lofgren, supra note 10, at 693. Cf. The
Federalist No. 25 (A. Hamilton) (“the ceremony of a formal denunciation of war has of late
fallen in disuse”).

48. E. Corwin, supra note 45, at 5-6. However, as noted in note 39 supra, aversion to the
Executive was mixed with some awareness that America’s difficulties with Britain had Parlia-
mentary origins as well.

49. C. Warren, supra note 8, at 173.

50. 1 The Works of James Wilson 292-93 (R. McCloskey ed. 1967). See Berger, War-
Making by the President, 121 U. Pa. L. Rev. 29, 32 (1972).

51. Before the Declaration of Independence, the first Continental Congress attacked the
The Continental Congresses responded to fear of executives by having none formally. Though the presiding officer of Congress was termed "The President," he mainly chaired debate. The legislators, acting through their unicameral assembly and various committees and boards established by it, sought to execute national affairs. They did find it necessary to appoint a commander-in-chief for the American revolutionary forces, and chose George Washington on June 19, 1775, instructing him, however, "punctually to observe and follow such orders and directions, from time to time, as you shall receive from this or a future Congress . . . or a committee of Congress, for that purpose appointed." The legislators then appointed various bodies to oversee the war effort, and were prone early in the conflict to instruct Washington in the minutiae of its conduct.

The Articles of Confederation came into effect on March 1, 1781, still without any national administrator, except as the executive existed in Congress and its agents. Executive departments responsible to Congress did begin to appear in 1781, including Foreign Affairs and War, but the Confederation had no need to allocate war powers between executive and legislative branches. The Articles simply gave Congress "the sole and exclusive right and power of determining on peace and war" and of "making rules for government and regulation of the . . . land and naval forces, and for directing their operations." Congress also largely controlled letters of marque and reprisal, though the states could issue them under certain limited circumstances. Ambiguity about the meaning of the word "declare" in the war-power context, in fact, began then, since the Articles.

stationing of British Armies in America during peace and voted that "the keeping a standing army in these colonies, in times of peace, without the consent of the legislature of that colony in which such army is kept, is against the law." 2 JOURNALS OF THE CONTINENTAL CONGRESS 96 (1906). The Virginia Constitution of 1776 included among the fundamental rights of man:

That a well-regulated militia composed of the body of the people, trained to arms,

is the proper, natural and safe defense of a free State; that standing armies in

time of peace should be avoided as dangerous to liberty; and that in all cases the

military should be under strict subordination to, and governed by, the civil power.

Quoted in C. Rossiter, SEEDTIME OF THE REPUBLIC 400 (1953). See also Donahoe & Smelser, supra note 27.

52. See E. Burnett, THE CONTINENTAL CONGRESS 34 (1941); J. Guggenheimer, The Development of the Executive Department, 1775-1789, in ESSAYS IN THE CONSTITUTIONAL HISTORY OF THE UNITED STATES IN THE FORMATIVE PERIOD 1775-1789, at 116-85 (J. Jameson ed. 1889); H. Wriston, supra note 17, at 3-26.


54. Guggenheimer, supra note 52, at 146, 153-85.

55. ART. OF CONFED. art. IX, reprinted in note 28 supra.
spoke both of Congress' "determining on war" and of state marque and reprisal after a congressional "declaration of war." It appears that determine and declare were used interchangeably.

State constitutions after 1776 proved only slightly less extreme in their rejection of executive authority. Independent state executives were created but with narrow powers, and sometimes with the requirement that they govern in tandem with a council — a post-revolutionary adaptation of one means of hamstringing colonial governors. Executive councils had long been in America, often associated with the upper house of the legislature. Care was taken that the executives not "under any pretence, exercise any power or prerogative, by virtue of any law, statute or custom of England." In Madison's words, "[t]he Executives of the States are in general little more than Cyphers; the legislators omnipotent."

Almost every state did make its governor commander-in-chief of the local militia, but pursuant to legislative direction. The pertinent provision of the Massachusetts Constitution in 1780 — which Hamilton in Federalist No. 69 termed possibly more expansive in empowering the executive than the equivalent clause in the federal constitution — named the governor "commander-in-chief of the army and navy" with power to "repel, resist, expel" invaders of Massachusetts, and "with all these and other powers incident to the offices of captain-general and commander-in-chief, and admiral, to be exercised agreeable to the rules and regulations of the constitution and the laws of the land and not otherwise."

Out of this national and state experience, there seems to have emerged little if any dissatisfaction with legislative control over decisions to go to war and make peace. Even in colonial times, the legislators had dominated these determinations, one way or another. They wholly controlled them

---

56. Compare Art. of Confed. art. IX with Art. of Confed. art. VI, supra note 28.
57. Delaware in its post-independence constitution, even conditioned executive command of the militia on the concurrence of a council:

The President, with the advice and consent of the privy council, may embody the militia, and act as captain-general and commander-in-chief of them, and the other military force of this State, under the laws of the same.
1 F. Thorpe, The Federal and State Constitutions 564 (1909). See also The Federalist No. 70 (A. Hamilton); A. Nevins, The American States During and After the Revolution, 1775-1789, at 117-205 (1924); H. Wriston, supra note 17, at 65-68.
59. 2 Farrand 35. Accord, The Federalist No. 48 (J. Madison).
61. Colonial legislators found their control over appropriations particularly useful in this regard. See W. Binkley, supra note 39, at 3-4; E. May, supra note 37, at 9-10; R. Russell, supra note 53, at 2-11, 22.
thereafter. Nor had fear of executive usurpation lessened dramatically by 1787-88, particularly should a standing army during peace be at executive disposal. But there had by that time developed growing awareness that legislatures could be tyrannical too, and that Congress to date had lacked the capacity to execute policy efficiently, especially foreign and military policy. There was related awareness that the legislatures had not been at their best during crises.

Disenchantment with legislative good faith had been sparked by the excesses of state assemblies. Madison suggested that the dangers of legislative tyranny had escaped the "founders of our republics," so that

they seem never for a moment to have turned their eyes from the danger to liberty from the overgrown and all-grasping prerogative of an hereditary magistrate . . . . They seem never to have recollected the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations. Thus, a national executive was thought necessary by many to check and balance Congress.

Disenchantment with legislative capacity to conduct military and foreign affairs had begun early during the Revolutionary War. Congress conceded a measure of institutional weakness in orders to General Washington issued just the day after he had been told to obey the legislature in all things. The second-round orders acknowledged that "whereas all particulars cannot be foreseen, nor positive instructions for such emergencies so before hand given but that many things must be left to your prudent and discreet management." As the conflict progressed and congressional efforts to conduct it proved disastrous, the legislators left more and more to Washington, especially during times of great emergency. Consensus formed that, though Congress might decide on war and peace, a separate executive was needed to provide unified command.

The legislators were not notably more successful in their discharge of the nonmilitary aspects of foreign affairs. Innumerable ad hoc committees were appointed to handle various diplomatic and treaty initiatives. Back-

63. The Federalist No. 48, at 274 (J. Madison).
64. 2 Journals of the Continental Congress 101 (1905).
65. Randolph, in the Virginia ratifying convention, closed a catalogue of the evils of the dissolution of the Union by recalling . . . what passed in the year 1781. Such was the situation of our affairs then, that the power of dictator was given to the commander-in-chief, to save us from destruction.
3 Elliot 79. See C. Berdaahl, War Powers of the Executive in the United States 18 (1921); cf. 2 Elliot 359-60.
biting among committee members, lapses of essential confidentiality, and frequent failure to delegate adequate operational authority to agents were endemic. A part of the difficulty lay in the stranglehold of individual states on congressional action and in the absence of any element within Congress composed of a few legislators with lengthy tenure and ensured continuity. Under the Confederation, voting in Congress continued to be by states irrespective of population, with congressional delegates elected annually by the state legislatures, and a nine vote majority required to approve major diplomatic or military action. The yearly assemblies functioned as had their predecessors, "essentially . . . as councils of ambassadorial delegates from a group of federated states."

By 1787, it was apparent to most interested Americans that the national legislature as then constituted could not execute diplomatic or military policy. Congress restructured could reasonably be expected to become a more potent executive force. But there also was strong, though by no means universal, sentiment that effective implementation of American policy would also require a national administrator, independent to one degree or another from Congress.

Even so, the major impetus toward an executive was not foreign affairs, but belief that purely domestic tranquility called for something more than congressional government. Enforcing national law and quelling insurgents seemed the more compelling needs. In Hamilton's words:

Energy in the Executive, is a leading character in the definition of good government. It is essential . . . to the steady administra-


67. Each state retained the power to replace any of its delegates or to recall its entire delegation at any time. The delegates' salaries were fixed and paid by the states, and no delegate could serve more than three terms in any six-year period. Moreover, each state's delegates voted as a unit rather than individually. ART. OF CONFED. art. V.

Congress could appoint a "committee of the states," composed of one delegate from each state, to conduct national affairs during congressional recesses. Even in this committee, the consent of nine states was required in order to approve military or diplomatic actions. Also, Congress could annually appoint one delegate to be "president" but no delegate could serve more than once in any three-year period. Id. art. IX.

68. McDougal, supra note 13, at 620. In Max Farrand's words, the country was run by "a congress of states." M. FARRAND, THE FRAMING OF THE CONSTITUTION 3-4 (1913). Hamilton had savage words for Confederation practice:

Congress, from the non-attendance of a few States, have been frequently in the situation of a Polish diet, where a single VOTE has been sufficient to put a stop to all their movements. A sixtieth part of the Union, which is about the proportion of Delaware and Rhode Island, has several times been able to oppose an entire bar to its operations.

The Federalist No. 22, at 121.
tion of the laws, to the protection of property against those irregular and high-handed combinations, which sometimes interrupt the ordinary course of justice, to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.69

III. THE FRAMERS: PHILADELPHIA 1787

The Framers of the Constitution deliberated for four months, from May 14 to September 17, 1787. Fifty-five men representing all of the states but Rhode Island attended at one point or another, though attendance averaged forty or less. Of the twelve states represented, all did not vote on every motion, including some crucial to the evolution of war and treaty powers. The delegates acted in secret session as a Committee of the Whole, debating and voting on provisions section-by-section, each state having one vote and the majority ruling within both states’ delegations and the Convention itself. Most of the actual drafting was done by smaller groups of influential delegates, for example, the five-man Committee on Detail70 which in late July produced the first version of the Constitution actually written at the Convention. As noted before, the process was not conducive to a finely drawn, common “intent.”

Discussion of the Framers’ debates concerning the division of war-peace authority between the President and Congress will be in two sections: first, a day-by-day account focusing on the powers to which the delegates gave most attention, war and treaty-making, and second, a summary statement of other pertinent debate. Why the day-by-day account? Because the Framers’ action on war and treaty issues was not neat and compartmentalized, but episodic with heavy intermingling of distinct questions. Thus, their intentions are best approximated by tracking their steps in coming to the Constitution’s language on war and treaty-making.

Little progress on these matters was made from May through July. The Convention was then obsessed with dividing authority between the states

---

69. The Federalist No. 70, at 384. It has been suggested that:
In the late 1780’s . . . the trend toward weaker executives was reversed. The reversal, however, resulted from domestic considerations — stronger and more independent leadership seemed necessary to ensure liberty and stability within the country — and it had little or no connection with external problems of war-making.

70. The Committee on Detail was composed of Oliver Ellsworth (Conn.), Nathaniel Gorham (Mass.), Edmund Randolph (Va.), John Rutledge (S.C.), and James Wilson (Pa.). F. RodeLL, FIFTY-FIVE MEN 121 (1936).
and national government and, within Congress, between the large and small states. And the Framers were beset with decisions about the basics of the national executive, among them whether it should be a legislative creature. With rare exception, the Philadelphia delegates seem to have assumed through July that legislators, as in Confederation days, would control all foreign concerns.

After the emergence of the Senate as a body acceptable to the small states and endowed with a size, tenure, and continuity thought conducive to diplomatic power, strong August tides developed to commit American foreign affairs, epitomized by treaty-making, to the senators alone. As the month wore on, however, many of the Framers began to fear an overweening Senate and to cast about for checks on its authority, as well as for checks on the power of Congress as a whole. Their remedy, adopted in a burst of early September activity, was a stronger Executive, one associated with the Senate in foreign negotiations and agreements. Thus, the President became part of the treaty-making process only ten days before the end of the Convention, over three and a half months after it began its work.

A. War and Treaty-Making

1. Philadelphia, May through July

On May 29, 1787, the first substantive proposals were laid before the Convention. William Randolph presented the Virginia Plan. It made no specific reference to foreign or military affairs, and ducked legislative versus executive issues. It is likely that the Virginians saw few if any such issues. The national executive that they proposed was essentially a legislative agent, and almost certainly they expected policy-making to remain a congressional preserve, as had been the case since Independence.

The Virginia Plan was elliptical. Its sixth resolution proposed simply that "the National Legislature ought to be empowered to enjoy the Legislative Rights vested in Congress by the Confederation, and moreover . . . to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof"; and its seventh resolution suggested a national executive of unspecified number, to be elected by the legislature, who "beside a general authority to execute the National Laws . . . ought to enjoy the Executive Rights vested in Congress by the Confederation."71 As debate three days later made clear, these "Executive Rights" were not thought to cover war and treaty-making.72

71. 1 FARRAND 21. See also 3 id. at 593-94.
72. See text at notes 75 & 76 infra.
Following Randolph’s speech, Charles Pinckney of South Carolina presented his own, more detailed constitutional scheme. What he actually said is uncertain. The account that Pinckney produced in 1819 for publication differs in certain respects from views that he himself expressed during and immediately after the Convention, and it resembles results later reached by the delegates only after much effort. Nonetheless, the Pinckney Plan as recalled in 1819 vested in Congress power to raise, support and organize the military; in the Senate, authority over war, treaties and diplomatic appointments; and in the President the executive power and military command. Articles seven and eight of the plan provided that “[t]he Senate shall have the sole & exclusive power to declare War & to make treaties & to appoint Ambassadors & other Ministers to Foreign nations,” and that “[t]he Executive Power . . . shall be vested in a President,” who “shall be Commander in chief of the army & navy of the United States & of the Militia of the several states.” Pinckney did not explain “The Executive Power,” but it could have had little foreign-affairs content, given the authority that he assigned the Senate. His proposals were referred to the Committee of the Whole, but never debated. The Virginia Plan became the first focus of Convention discussion.

On June 1, the Framers took up the seventh, or executive, resolution of the Virginia proposals. During argument whether the Executive should be one or several persons, discussion turned to which branch ought to govern war and peace. Even those favoring a strong executive opted for legislative control:

Mr. Pinkney was for a vigorous Executive but was afraid the Executive powers of [the existing] Congress might extend to peace & war & which would render the Executive a Monarchy, of the worst kind, to wit an elective one.

... Mr. Rutledge . . . was for vesting the Executive power in a single person, tho’ he was not for giving him the power of war and peace. A single man would feel the greatest responsibility, and administer the public affairs best.

73. See text at note 5 supra. As “reconstructed” by Max Farrand, Pinckney’s May 29 proposals dealt very little with executive-legislative relations, centering rather on federal-state problems. It appears that Pinckney gave war and treaty-making to the legislature, because he called for “The Assent of Two-Thirds of both Houses where the present Confederation had made the assent of Nine States necessary.” He named the President “Commander in chief of the Land Forces of the U.S. and Admiral of their Navy,” authorized him “to inspect the Department of foreign Affairs—War—Treasury,” to “suspend Officers, civil and military” and “to advise with the Heads of the different Departments as his Council.” The legislatures, however, was to “institute offices and appoint officers for the Departments of For. Affairs, War, Treasury and Admiralty,” and to control raising, supporting and organizing the military. 3 FARRAND 604-09.

74. 1 FARRAND 23; 3 id. at 599-600.
Mr. Wilson preferred a single magistrate, as giving most energy
dispatch and responsibility to the office. He did not consider the
Prerogatives of the British Monarch as a proper guide in defining
the Executive powers. Some of these prerogatives were of a Legis­
lative nature. Among others that of war & peace &c. The only
powers he conceived strictly Executive were those of executing
the laws, and appointing officers . . . .

According to the convention notes of Rufus King, Madison joined Wilson:

Mad: agrees wth. Wilson in his definition of executive powers
— executive powers ex vi termini, do not include the Rights of
war & peace & c. but the powers shd. be confined and defined —
if large we shall have the evils of elective Monarchies — probably
the best plan will be a single Executive of long duration wth.
a Council, with liberty to depart from their opinion at his
peril—

Others, such as Roger Sherman, did not confront war-power problems, as
they viewed "the Executive magistracy as nothing more than an institu­
tion for carrying the will of the Legislature into effect, that the person or
persons ought to be appointed by and accountable to the Legislature only,
which was the depositary of the supreme will of the Society." Agreement that war and peace policy were for the legislature, however,
did not mean that the Convention felt that the legislators should direct a
conflict, once authorized. The need for a single executive as commander­
in-chief was stressed by Pierce Butler on June 2 and Elbridge Gerry two
days later. Butler said that

his opinion on this point had been formed under the opportunity
he had had of seeing the manner in which a plurality of military
heads distracted Holland when threatened with invasion by the
imperial troops. One man was for directing the force to the de­
fence of this part, another to that part of the Country, just as he
happened to be swayed by prejudice or interest.

As for Gerry, he

was at a loss to discover the policy of three members for the
Executive. It wd. be extremely inconvenient in many instances,

75. 1 FARRAND 64-66. See also id. at 73-74. Randolph "strenuously opposed a unity in the
Executive magistracy. He regarded it as the foetus of monarchy . . . . He could not see why
the great requisites for the Executive department, vigor, despatch & responsibility could not
be found in three men, as well as in one man." Id. at 66.
76. 1 FARRAND 70. Madison's own account focused on the need to define the nature of
executive power before settling on a single or plural Executive. Id. at 66-67.
77. 1 FARRAND 65.
78. 1 FARRAND 88-89.
particularly in military matters, whether relating to the militia, an army, or a navy. It would be a general with three heads.\textsuperscript{79}

On June 15, William Patterson presented the New Jersey Plan, the small state reaction to the Virginia proposals. As was true with the Virginia Plan, no mention was made of foreign or military policy, though it seems clear that legislative control was assumed, in light of Confederation practice favored by the small states and in the light of the June 1 calls, just described, for legislative control of war and peace. New Jersey's second proposition left to the legislature "the powers vested in the U. States in Congress, by the present existing articles of Confederation.\textsuperscript{80}" Patterson also proposed a multiple executive, who would be commander-in-chief but might not take field command of American armies:

\begin{quote}
[T]he Executives besides their general authority to execute the federal acts ought to appoint all federal officers not otherwise provided for, \& to direct all military operations; provided that none of the persons [composing the federal Executive] shall on any occasion take command of any troops, so as personally conduct any enterprise as General, or in other capacity.\textsuperscript{81}
\end{quote}

Three days after Patterson spoke, Alexander Hamilton on June 18 advanced a starkly different view of the Executive. His "Governoir" would have had extensive sway over foreign and military affairs through his "sole appointment of the heads . . . of the departments of Finance, War and Foreign Affairs," and he would have made treaties "with the advice and approbation of the Senate." But even Hamilton did not propose that the "Governoir" control the commitment of American forces to combat. Rather the Senate was to have that power, and the Executive only the authority to wage the conflict. The fourth and sixth provisos in his plan stated that:

\begin{quote}
IV. The supreme Executive authority . . . to be vested in a Governoir to be elected to serve during good behaviour . . . . The . . . functions of the Executive to be as follows: . . . to have the direction of war when authorized or begun; to have with the advice and approbation of the Senate the power of making all treaties; to have the sole appointment of the heads . . . of the departments of Finance War and Foreign Affairs . . . .

VI. The Senate to have the sole power of declaring war, the power of advising and approving all Treaties, the power of ap-
\end{quote}

\textsuperscript{79} 1 FARRAND 97.
\textsuperscript{80} 1 FARRAND 243.
\textsuperscript{81} 1 FARRAND 244. Although several versions of the New Jersey Plan exist, with significant differences among them, none of the variations bear on the war powers. See 3 id. at 611-16.
proving or rejecting all appointments of officers except the heads
. . . of Finance War and foreign affairs.\textsuperscript{82}

Note the apparent interchangeability with which Hamilton used the terms
"declare" and "authorized or begun." He said the Senate was to "declare"
war and the Executive to direct it once "authorized or begun."

Hamilton and his Governor were ignored. There was no dissent on June
26 when James Wilson, himself an advocate of potent executive authority,
said that the Senate — not the Executive — "will probably be the depository
of the powers" regarding "foreign nations." Wilson was arguing the
need for continuity in external relations to support a nine-year term for
senators, with triennial rotation of one-third their number:

Every nation may be regarded in two relations: 1) to its own
citizens, 2) to foreign nations. It is therefore not only liable to
anarchy and tyranny within but has wars to avoid and treaties
to obtain from abroad. The Senate will probably be the depository
of the powers concerning the latter objects. It ought, there-
fore, to be made respectable in the eyes of foreign nations.\textsuperscript{83}

More than two months after the Convention first met, the Framers found
time to pass a resolution dealing with the scope of legislative authority. It
was akin to the Virginia proposal of May 29:

[T]he national Legislature ought to possess the legislative rights
vested in Congress by the confederation; and moreover to legis-
late in all cases from the general interests of the Union, and also
in those cases in which the States are separately incompetent, or
in which the harmony of the United States may be interrupted
by the exercise of individual legislation.\textsuperscript{84}

On July 26, the Convention adopted a resolution on the Executive, provid-
ing niggardly that one "be instituted to consist of a single person to be
chosen by the national Legislature . . . with power to carry into execution

\textsuperscript{82} 1 FARRAND 292. Robert Yates' account of Hamilton's proposal stated that:
The executive to have the power of negativing all laws — to make war or peace,
with the advice of the senate — to make treaties with their advice, but to have
the sole direction of all military operations, and to send ambassadors and appoint
all military officers, and to pardon all offenders, treason excepted, unless by
advice of the Senate.

\textit{Id.} at 300. It appears, however, that Yates erroneously included the Executive with the Senate
in war-making decisions. The proposal that Hamilton submitted to Madison near the end of
the Convention, like Madison's notes of Hamilton's June 18 speech, left these decisions to
the Senate. See 3 \textit{id.} at 622, 624-25.

\textsuperscript{83} 1 FARRAND 426.

\textsuperscript{84} 2 FARRAND 14, 21. \textit{See also} 2 \textit{id.} at 131-32.
the national Laws [and] to appoint to Offices in cases not otherwise provided for.”

With these skimpy guides and the background of prior debate, the small Committee on Detail was left to work out the allocation of war and treaty powers, as part of their larger mandate to draft a proposed constitution. The Convention as a whole recessed on July 26 pending the Committee's report two weeks later. The fact that the Committee was able to move with ease to an allocation suggests the existence of general, if largely unspoken, consensus about the appropriate division: policy-making to the legislators and policy-implementation to the Executive.

2. Philadelphia, August

On August 6, John Rutledge reported for the Committee on Detail. A two-house legislature was proposed, with the treaty-making authority taken from the whole and given to the more elite of the new houses. One article stated that “The Senate . . . shall have power to make treaties, and to appoint Ambassadors . . . .” And the Committee report gave to the legislature the power “to make war,” among other military grants. Proposed Article VII provided:

Sect. 1. The Legislature of the United States shall have the power . . .
To make rules concerning captures on land and water;
To declare the law and punishment of piracies and felonies committed on the high seas, . . . and of offences against the law of nations;
To subdue a rebellion in any State, on the application of its legislature;
To make war;
To raise armies;
To build and equip fleets;
To call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions . . . .

The Committee also proposed a single Executive who “shall be commander in chief of the Army and Navy of the United States, and of the Militia of the Several States.”

The Convention began consideration of the constitution as proposed,
moving clause-by-clause. On August 11, a proviso for publication of legislative debates was reached, with some suggestion that the Senate might act in a non-legislative capacity requiring greater secrecy than ordinary, and that questions of war and peace should be considered in camera. Advocates of complete public disclosure, however, prevailed for the moment:

Mr. (Madison) & Mr. Rutledge moved “that each House shall keep a journal of its proceeding, & (shall) publish the same from time to time; except such (part) of the proceedings of the Senate, when acting not in its Legislative capacity as may (be judged by) that House (to) require secrecy.”

Mr. Mercer. This implies that other powers than legislative will be given to the Senate which he hoped would not be given.89

The motion then failed, with Virginia alone in favor. At which point Messrs. Gerry and Sherman moved “to insert after the words ‘publish them’ the following ‘except such as relate to treaties & military operations.’ Their object was to give each House a discretion in such cases.” Their motion was also unsuccessful.90

Two days later, on August 13, foreign affairs surfaced again amid debate over the sole authority of the House of Representatives to initiate revenue measures. James Wilson joined those opposing any such prerogative for the House. “War, Commerce & Revenue were the great objects of the Genl. Government,” he said. “All of them are connected with money. Restriction in favor of the H. of Represets. would exclude the Senate from originating any important bills whatever —” 91 Edmund Randolph, however, felt strongly that money — “the means of war” — as well as actual decisions to fight, should be dominated by the House:

When the people behold in the Senate, the countenance of an aristocracy; and in the president, the form at least of a little monarch, will not their alarms be sufficiently raised without taking from their immediate representatives, a right which has been so long appropriated to them. — The Executive will have more

89. 2 FARRAND 259.
90. 2 FARRAND 260. The Framers ultimately provided in Article I of the Constitution that “Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such parts as may in their Judgment require Secrecy.” U.S. Const. art. I, § 5.
Concern over congressional secrecy, however, remained at high pitch, and three states — New York, Rhode Island, and Virginia — ratified the Constitution with a request that it be amended to permit only the withholding of sensitive diplomatic and military information. Had the first North Carolina convention agreed to the Constitution, it very likely would have sought the same amendment. See 1 ELLIOT 330 (N.Y.), 336 (R.I.); 3 id. at 659-60 (Va.); 4 id. at 245 (N.C.). See generally note 175 infra and accompanying text.
91. 2 FARRAND 275.
influence over the Senate, than over the H. of Reps — Allow the Senate to originate in this case, & that influence will be sure to mix itself in their deliberations and plans. The Declaration of War he conceived ought not to be in the Senate composed of 26 men only, but rather in the other House. In the other House ought to be placed the origination of the means of war . . . . The Senate will be more likely to be corrupt than the H. of Reps and should therefore have less to do with money matters. 92

On August 15, there was a flurry over the treaty power, again during controversy over the Representatives’ fiscal prerogatives. George Mason was “extremely earnest” to prevent initiation of money bills by the Senate, “who he said could already sell the whole Country by means of Treaties.” He suggested that “[i]f Spain should possess herself of Georgia therefore the Senate might by treaty dismember the Union.” 93 Responding to Mason, John Francis Mercer of Maryland suddenly broke with prevailing opinion to oppose treaty-making by the Senate rather than the Executive, though with the debilitating proviso that treaties required congressional ratification before becoming law. Mercer felt “that the Senate ought not to have the power of treaties. This power belonged to the Executive department; adding that Treaties would not be final so as to alter the laws of the land, till ratified by legislative authority,” citing British precedent. 94 But his comment prompted no other expressions of support for executive treaty-making.

On August 17 the Convention reached its most celebrated war-power moment: the substitution of “declare” for “make” in what became the congressional declaration-of-war clause. The recorded debate in its various versions, however, is anticlimactic. It covers only a few pages, with conflict between the accounts of Jackson and Madison. While confusing and potentially unreliable on the crucial issue of executive authority, Madison’s notes provide the only substantial coverage of the Framers’ thoughts.

Charles Pinckney began the debate with an objection to placing war-commencement authority in Congress as a whole, on the ground that the House of Representatives was institutionally incapable of handling it well. He preferred the Senate alone, noting that the States are equally represented there and that the Senators, as was still the case at that stage of the Convention, had sole authority over the making of peace treaties:

Mr. Pinckney opposed the vesting this power in the Legislature.

92. 2 FARRAND 278-79. Randolph said that he opposed Senate involvement as much to help win ratification of the Constitution, as to ensure sound government: “His principal object was to prevent popular objections against the plan, and to secure its adoption.” Id. at 279.
93. 2 FARRAND 297-98.
94. 2 FARRAND 297.
Its proceedings were too slow. It wd. meet but once a year. The Hs. of Reps would be too numerous for such deliberations. The Senate would be the best depositary, being more acquainted with foreign affairs, and most capable of proper resolutions. If the States are equally represented in the Senate, so as to give no advantage to large States, the power will notwithstanding be safe, as the small have their all at stake in such cases as well as the large States. It would be singular for one — authority to make war, and another peace.95

Pierce Butler then pushed argument as to institutional advantages one step further, proposing that war commencement be left to the judgment of the most rapid, expert and national of all, the President:

The Objections agst the Legislature [noted by Pinckney] lie in a great degree agst the Senate. He was for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it.96

Butler's suggestion is the only recorded proposal by either a Framer or Ratifier that the Executive control war-making. Butler never formally so moved. Further, as we shall see, he claimed no credit for the proposal when describing it to the South Carolina ratification convention, and by September 7 he had harsh words for executive good faith. Several Philadelphia delegates expressly attacked his proposal, as noted below.

After Butler spoke, Madison, seconded by Gerry, made his famed "sudden attack" motion. It did not refer to executive authority to repel imminent, as well as ongoing attack, even though authority over both was given to the states by explicit language in the August 6 draft constitution. The motion, nonetheless, did seem to intend greater emergency authority for the President than had been proposed for him to that point:

Mr. M(adison) and Mr. Gerry moved to insert "declare," striking out "make" war; leaving to the Executive the power to repel sudden attacks.97

95. 2 FARRAND 318. Compare Pinckney's memory in 1818 of his Convention position on senatorial war-making:

It may be necessary to remark that very soon after the Convention met I changed & avowed candidly the change of my opinion . . . in giving the exclusive Power to the Senate to declare War thinking it safer . . . to vest [war-making] in Congress.

3 Id. at 427-28 (letter to John Quincy Adams, Dec. 30, 1818).

96. 2 FARRAND 318. Butler's commitment of war to the Executive seems to have been a passing fancy. Compare his comments, 2 id. at 541 and 4 ELLIOT 263.

97. 2 FARRAND 318.
What happened thereafter none can say with confidence. Both the Jackson and Madison accounts agree that the substitution of “declare” for “make” ultimately passed eight states to one; but Jackson recorded the motion as having been initially defeated five to four, while Madison reported that it first passed seven to two, and then became eight to one when Oliver Ellsworth of Connecticut “gave up his objection,” thus shifting his state’s vote from no to yes. In Madison’s version, Messrs. Sherman, Gerry, Ellsworth, and Mason all spoke before the first vote was taken. Their remarks as recorded did little to lessen the confusion.

Sherman seemed to think that the President already had authority to repel sudden attacks under the Committee of Detail language, and that adoption of the motion might unduly narrow congressional authority:

Mr. Sharman thought it stood very well. The Executive shd. be able to repel and not to commence war. “Make” better than “declare” the latter narrowing the power too much.

Gerry, apparently ignoring Sherman’s attack on the motion that he had just seconded, turned to attack Butler for having suggested that the President be empowered to make war:

Mr. Gerry never expected to hear in a republic a motion to empower the Executive alone to declare war.

Ellsworth then gained the floor for reasons best known to him. Perhaps he wished to rebut Pinckney’s view that the Senate should control war because it controlled peace:

Mr. Elseworth, there is a material difference between the cases of making war, and making peace. It shd. be more easy to get out of war, than into it. War also is a simple and overt declaration. peace attended with intricate & secret negociations.

98. Compare 2 Farrand (Jackson) with 2 id. at 319 (Madison). The only other notes extant on the make-to-declare debate, those of James McHenry, add little. They tersely state:

Debated the difference between a power to declare war, and to make war — amended by substituting declare — adjourned without a question on the clause.

2 Id. at 320. According to Jackson, however, there was a vote on the clause, and the Convention did not again consider the declaration of war language.

99. 2 Farrand 318.

100. 2 Farrand 318. Though Gerry referred to an executive war-making “motion,” neither Jackson, Madison or McHenry cited one. Conceivably the motion was made, and the first vote mentioned by Jackson was devoted to its defeat. Such, however, is sheer speculation. Given the Framers’ fear of executive power, it borders on the inconceivable that an executive war-making motion could have failed only five states to four — the vote recorded by Jackson for the first motion — or that Madison could have failed to notice both the making of so explosive a motion and its rejection by only a razor’s edge.

101. 2 Farrand 319.
What exactly Ellsworth thought of the sudden-attack motion, on which he is recorded by Madison as having first voted no and then yes, is lost to time.

Then came George Mason with warnings against executive or senatorial war-making and his famed plea for "clogging" war and facilitating peace. The tenor of Mason's remarks would seem to place him with Sherman in opposition to the sudden-attack motion but for reasons also lost to time he must have believed that changing "make-to-declare" would lessen the likelihood of American involvement in hostilities:

Mr. Mason was agst giving the power of war to the Executive, because not (safely) to be trusted with it; or to the Senate, because not so constructed as to entitled to it. He was for clogging rather than facilitating war; but for facilitating peace. He preferred "declare" to "make". 102

At this juncture, Madison records a favorable vote on the motion. It may or may not have been favorable. He then indicates that Rufus King pointed out "that 'make' war might be understood to 'conduct' it which was an Executive function." 103 According to Madison, this argument led Ellsworth to drop his objection to "declare," altering Connecticut's vote and producing an 8-to-1 approval. If that was what happened, it seems that a majority of the Framers voted for "declare" to give the President authority to respond to sudden attacks, only Ellsworth going along to ensure that congressional authority would not be thought to extend to conducting war. If, however, Jackson correctly noted a defeat for the sudden-attack motion on its first try, and if King's argument was the decisive factor in the changed vote, then a majority of the Framers may well have preferred "declare" to avoid suggesting that Congress controls the conduct as well as the authorization of conflict.

The inconclusive records of the Philadelphia debate on changing "make" to "declare" are not sharpened by available accounts of the ratification debates. The one remark made during the state debates that was at least tangentially relevant to the Framers' war-power intent came from none other than Pierce Butler, the man who had favored presidential control. On January 16, 1788, he "endeavor[ed] to recollect" for his fellow delegates to the South Carolina convention "those reasons by which [the

102. 2 FARRAND 319. Perhaps Mason believed that heightened national capacity to repel sudden attack, via executive emergency authority, would deter foreign aggressors. Judging by his distaste for executive military power, it is reasonable to assume that Mason did not understand make-to-declare as granting sweeping presidential prerogative. See, e.g., 3 ELLIOT 496-98.

103. 2 FARRAND 319. Madison's notes state only that "[o]nly the remark by Mr. King that 'make' war might be understood to 'conduct' it which was an Executive function, Mr. Ellsworth gave up his objection (and the vote of Cont was changed to — ay.)" Id. (textual note).
Framers] were guided.” But his explanation was only casually related to the debate as recorded by Madison and wholly ignored the sudden-attack motion. Butler recalled:

It was first proposed to vest the sole power of making peace or war in the Senate; but this was objected to as inimical to the genius of a republic, by destroying the necessary balance they were anxious to preserve. Some gentlemen were inclined to give this power to the President; but it was objected to, as throwing into his hands the influence of a monarch, having an opportunity of involving his country in a war whenever he wished to promote her destruction. The House of Representatives was then named; but an insurmountable objection was made to this proposition—which was, that negotiations always required the greatest secrecy, which could not be expected in a large body.¹⁰⁴

Thus, despite its immense significance to post-1789 practice, the Framers’ make-to-declare debate scarcely concerned the Constitutional Fathers. Perspective on this debate’s limited utility for judgment about the Framers’ war-peace intentions also stems from the fact that four of the thirteen states took no part in it. Massachusetts, New Jersey, New York and Rhode Island had no “intent” at all on the substitution of “declare” for “make.”¹⁰⁵

¹⁰⁴. 4 Elliot 263. See also note 96 supra. Note that Butler spoke of the “power of making peace or war,” despite the make-to-declare substitution. Ezra Stiles marked his diary for December 21, 1789 in the same vein:

Mr. Baldwin was one of the Continental Convention at Philada last Summer. He gave me an Acc of the whole Progress in Convention. It appeared that they were pretty unanimous in the following Ideas, viz. . . . 10. They vested Congress . . . with the Army, Navy & making War & Peace.

3 Farrand 168-69.

It is significant, further, that Butler’s remarks did not occur during debate on the executive-legislative allocation of war powers, or even during consideration of congressional authority to declare war. He was responding, instead, to fear that the Senate would be overweeningly powerful, because its members could not be impeached. Judge Pendleton had just “read a paragraph in the Constitution, which says ‘the Senate shall have the sole power of impeachment,’” and said:

In the British government, and all governments where power is given to make treaties of peace, or declare war, there had been found necessity to annex responsibility. In England, particularly, ministers that advised illegal measures were liable to impeachment, for advising the King. Now, if justice called for punishment of treachery in the Senate, on account of giving bad advice, before what tribunal could they be arraigned? Not surely before their house; that was absurd to suppose. Nor could the President be impeached for making treaties, he acting only under the advice of Senate, without power of negativing.

4 Elliot 263.

¹⁰⁵. Madison recorded: “On the motion to insert declare — in place of Make, (it was agreed
Action on war and peace continued on August 17, immediately after the substitution debate. Pinckney’s effort to strike the whole declare-war clause failed, with no record of argument. Concern heard on August 15 about possible senatorial venality in peace-making was renewed by Gerry, when Butler tried to put the power over war and peace in the same hands, those of Congress as a whole:

Mr. Butler moved to give the Legislature power of peace, as they were to have that of war.

Mr. Gerry 2ds. him. 8 Senators may possibly exercise the power if vested in that body, and 14 if all should be present; and may consequently give up part of the U. States. The Senate are more liable to be corrupted by an Enemy than the whole Legislature.\textsuperscript{108}

The motion for adding “and peace” after “war,” however, failed ten states to none, Massachusetts having returned to vote.\textsuperscript{107}

On August 18 marque and reprisal were mentioned in passing for the first time, among a list of additional legislative powers for consideration by the Convention. Madison’s notes suggest that Pinckney prepared the list, but also state that Gerry “remarked that . . . something (ought to be) inserted concerning letters of marque, which he thought not included in the power of war.”\textsuperscript{108} Marque and reprisal were within congressional authority under the Articles of Confederation; the Framers doubtless felt it natural that similar authority be given Congress under the Constitution. Gerry’s concern, perhaps, was rooted in the fact that the Articles permitted Congress to authorize marque and reprisal “in times of peace,” as well as war.\textsuperscript{109} It suggests a desire to make absolutely clear congressional control

---

\textsuperscript{106.} 2 FARRAND 319.

\textsuperscript{107.} 2 FARRAND 319.

\textsuperscript{108.} 1 FARRAND 326. See also id. at 322.

\textsuperscript{109.} Although the Articles did not explicitly state that Congress might grant letter of marque and reprisal during war, the grant to Congress of broad authority over hostilities, and the proviso for state marque and reprisal during war, under congressional supervision, indicate the existence of the power. See Art. of Confed. arts. VI & IX, supra note 28, Madison similarly understood congressional power over marque under the Articles of Confederation:

The prohibition of letters of marque is another part of the old system, but is somewhat extended in the new. According to the former, letters of marque could be granted by the States after a declaration of war; according to the latter, these licenses must be obtained as well during war as previous to its declaration, from the government of the United States. This alteration is fully justified by the advantage of uniformity in all points which relate to foreign powers; and of immediate responsibility to the nation in all those for whose conduct the nation itself is to be responsible.

\textsuperscript{The Federalist} No. 44, at 247.
over minor as well as major uses of American armed force.

Two days later, on August 20, Gouverneur Morris struck a blow for executive prerogative reminiscent of Hamilton’s effort on June 18.110 Morris urged a presidential “Council of State,” consisting of the Chief Justice and the Secretaries of Domestic Affairs, Commerce and Finance, Foreign Affairs, War and the Marine. The secretaries were to “be appointed by the President and hold office during pleasure,” though subject to impeachment. The duties of the Secretary of Foreign Affairs implied executive control of American diplomacy. Significantly, the President would not have had to follow the advice given him by the Council. Charles Pinckney, departing his heavy senatorial bias, found merit in the proposal:

Mr. Govr. Morris 2ded. by Mr. Pinckney submitted the following propositions which were in like manner referred to the Committee on Detail.

“To assist the President in conducting the Public affairs there shall be a Council of State composed of the following officers —

4. The Secretary of foreign affairs who shall also be appointed by the President during pleasure. It shall be his duty to correspond with all foreign Ministers, prepare plans of Treaties, & consider such as may be transmitted from abroad; and generally to attend to the interests of the U- S- in their connections with foreign powers.

5. The Secretary of War who shall also be appointed by the President during pleasure. It shall be his duty to superintend every thing relating to the war-Department, such as the raising and equipping of troops, the care of military Stores —public fortifications, arsenals & the like — also in time of war to prepare & recommend plans of offence and Defence.

The President may from time to time submit any matter to the discussion of the Council of State, and he may require the written opinions of any one or more of the members: But he shall in all cases exercise his own judgment, and either Conform to such opinions or not as he may think proper; and every officer above-mentioned shall be responsible for his opinion of the affairs relating to his particular Department.”111

110. See text following note 81 supra.
111. 2 Farrand 342-44. Morris had earlier commented that:

There must be certain great officers of State; a minister of finance, of war, of foreign affairs &c. These he presumes will exercise their functions in
Morris' plan was submitted to the Committee on Detail, where it was shredded. His aspirations for the President, like those of Hamilton before him, were not shared by their colleagues. The Committee in its August 22 report denied constitutional status to the various secretaries, leaving their existence subject to legislation; it said nothing about their duties, again leaving their definition to statute and practice; and it took control over the appointment of these officers from the President:

The Committee report that in their opinion the following additions should be made to the report now before the Convention vizt

The President . . . shall have a Privy-Council which shall consist of the President of the Senate, the Speaker of the House . . ., the Chief-Justice . . . and the principal Officer in the respective departments of foreign affairs, domestic affairs, War, Marine, and Finance, as such departments of office shall from time to time be established — whose duty it shall be to advise him in matters respecting the execution of his Office, which he shall think proper to lay before them: But their advice shall not conclude him, nor affect his responsibility for the measures which he shall adopt.112

Whether the President should have a council, and the extent of its power over him, remained burning issues for the rest of the Convention. The tenor of debate, however, was one of checking presidential prerogative, not enhancing it, through a council. Ultimately, of course, the Framers opted for no privy advisers other than the Senate and for an innocuous proviso that the Executive “may require the Opinion in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.”113

111 subordination to the Executive, and will be amenable by impeachment to the public Justice. Without these ministers the Executive can do nothing of consequence.

Id. at 53-54.
112. 2 Farrand 366-67.
113. U.S. Const. art. II, § 2. Discussion of an executive council recurred periodically, often with a foreign affairs cast and even more frequently with an aura of executive restraint. As George Mason said when it became clear that there would be no advisers other than the Senate: “[I]n rejecting a Council to the President we were about to try an experiment on which the most despotic Governments had never ventured— The Grand Signor himself had his Divan.” 2 Farrand 541. See, e.g., 1 id. at 21 (Resolution 8 of the Virginia Plan), 74 (Randolph), 97 (Sherman & Gerry); 2 id. at 328-29, 342-44 (Morris and Pinckney's proposed “Council of State”), 542 (Franklin); 3 id. at 606 (Article III of the Pinckney Plan). James Iredell also made a lengthy council comment before the North Carolina convention. 4 Elliot 108-10.

It appears, however, that the Framers viewed the Senate in certain of its functions as a potent executive council. E.g., 2 Farrand 538-39. On the other hand, in Luther Martin's view
On August 23 the clause giving exclusive treaty power to the Senate came up for discussion. Reaction to the heady authority proposed for the senators set in. Madison wished to involve the President as "an agent" — not the agent — in treaty-making, principally because the Senate represented only state interests:

Mr. (Madison) observed that the Senate represented the States alone, and that for this as well as other obvious reasons it was proper that the President should be an agent in Treaties.\textsuperscript{111}

Gouverneur Morris was not certain that "he should agree to refer the making of Treaties to the Senate at all," but his remedy was to involve the House of Representatives by requiring that "no Treaty shall be binding on the U.S. which is not ratified by law."\textsuperscript{115} His motion to this end failed, eight states opposed, Pennsylvania in favor and North Carolina divided.

Arguments on Morris' motion strikingly evidenced what was on the Framers' minds. Madison felt that convenience demanded exclusion of the House from precisely those agreements with direct bearing on the use of force. He "suggested the inconvenience of requiring a legal ratification of treaties of alliance for the purposes of war &c &c,"\textsuperscript{114} and later "hinted for consideration, whether a distinction might not be made between different sorts of Treaties — Allowing the President & Senate to make Treaties eventual and of Alliance for limited terms — and requiring the concurrence of the whole Legislature in other Treaties."\textsuperscript{117}

Nathaniel Gorham and Benjamin Franklin expected the Senate to control negotiations and worried about practical problems if the House were to be able to derail the senators' plans:

Mr. Ghorum. Many other disadvantages must be experienced if treaties of peace and all negotiations are to be previously rati­fied - and if not previously, the Ministers would be at a loss how to proceed . . . . American Ministers must go abroad not in­structed by the same Authority which is to ratify their proceed­ings.

. . . .

Docr. Johnson thought there was something of solecism in saying that the acts of a Minister with plenipotentiary powers from one Body should depend for ratification on another Body . . . .\textsuperscript{118}

\footnote{the Senate would provide a spineless set of advisers to the President: "The impeachment can rarely come from the Second branch, who are his Council and will be under his influence." 3 \textit{Id.} at 158 (Address before Md. House of Rep., Nov. 29, 1787).}

\textsuperscript{111} 2 \textit{Farrand} 392.

\textsuperscript{115} 2 \textit{Farrand} 392.

\textsuperscript{116} 2 \textit{Farrand} 392.

\textsuperscript{117} 2 \textit{Farrand} 394.

\textsuperscript{118} 2 \textit{Farrand} 392-93.
Presumably when presidential involvement in treaty-making was later approved unanimously by the Convention, neither Gorham nor Johnson thought a "solecism" was created, because the Senate and President were expected to act jointly during negotiation and approval of agreements. Morris defended his motion on a number of ephemeral grounds, and was answered by the equally transient reasoning of Gorham:

Mr. Govr. Morris. As to treaties of alliance, they will oblige foreign powers to send their Ministers here, the very thing we should wish for. Such treaties could not be otherwise made, if his amendment shd. succeed. In general he was not solicitous to multiply & facilitate Treaties. He wished none to be made with G. Britain, till she should be at war. Then a good bargain might be made with her. So with other foreign powers. The more difficulty in making treaties, the more value will be set on them.

Mr. Ghorum in answer to Mr. Govr. Morris, said that negotiations on the spot were not be desired by us, especially if the whole Legislature is to have any thing to do with Treaties. It will be generally influenced by two or three men, who will be corrupted by the Ambassadors here. In such a Government as ours, it is necessary to guard against the Government itself being seduced.119

Finally, James Wilson suggested that the Morris amendment simply reflected British practice: "In the most important Treaties, the King . . . being obliged to resort to Parliament for the execution of them, is under the same fetters as the amendment . . . will impose on the Senate."120 And John Dickinson, voicing the state-federal concern that ever underlay treaty debate, said that he "concurred in the amendment, as most safe and proper, tho' he was sensible it was unfavorable to the little States; wch would otherwise have an equal share in making Treaties."121 Amid this gaggle of views, the Framers decided to postpone action on treaties, except to reject Morris' motion for House ratification of Senate-made agreements.

Before returning to the treaty power, the Convention on August 27 disposed of the commander-in-chief clause with phenomenal rapidity, in light of its fundamental importance in later years. Recall that the Committee on Detail had proposed that the President's command run equally over "the Army and Navy of the United States, and of the Militia of the Several States."122 The only recorded debate centered on this equality of command,

119. 2 FARRAND 392-93.
120. 2 FARRAND 393.
121. 2 FARRAND 393.
122. See text at note 88 supra.
with its suggestion of an undue federal hand on state troops: "Mr. Sher­
man moved to amend the clause giving the Executive the command of the
Militia, so as to read 'and of the Militia of the several States, when called
into the actual service of the U- S-.'" The motion and clause so altered
passed six states to two, with Massachusetts, New Jersey, New York and
North Carolina not voting, and Rhode Island absent as always. There may also have been brief debate over whether the President
should be permitted to command in the field. One of the Framers, Luther
Martin, reported to the Maryland legislature on November 29, 1787, that:

Objections were made to that part of this article by which the
President is appointed Commander-in-Chief . . . ; and it was
wished to be so far restrained, that he should not command in
person; but this could not be obtained.

As we have seen, too, the New Jersey Plan introduced on June 15 would
have forbidden an Executive on horseback.

Thus, it seems that the only commander-in-chief concerns of the Con­
vention were undue federal authority over the militia and the possibility
that executive field command might lead to tyranny. It is reasonable to
assume that the commander-in-chief clause was noncontroversial because
the Framers intended it to convey tightly circumscribed authority: that of
first general and admiral of American forces, with power only to wage war
authorized by Congress.

3. Philadelphia, September

On September 4, thirteen days before the end of the Convention, there
came the first hard proposal that the President join the Senate in making
treaties. David Brearley, speaking for the eleven-member Committee on
Unfinished Business, proposed that

    The President by and with the advice and Consent of the Sen­
ate, shall have power to make Treaties; . . . . But no Treaty
shall be made without the consent of two thirds of the members
present.

123. 2 FARRAND 426.
124. 2 FARRAND 426-27.
125. 3 FARRAND 217-18.
126. See text at note 81 supra.
127. The Committee on Unfinished Business was composed of one representative from each
state attending the Convention: Nicholas Gilman (N.H.), Rufus King (Mass.), Roger Sher­
man (Conn.), David Brearley (N.J.), Gouverneur Morris (Pa.), John Dickinson (Del.), Daniel
Carrol (Md.), James Madison (Va.), Hugh Williamson (N.C.), Pierce Butler (S.C.), and
Abraham Baldwin (Ga.). See 2 FARRAND 473.
128. 2 FARRAND 498-99.
There was no further discussion of treaty-making on the fourth.

On the following day, September 5, the Framers without debate unanimously accepted a further suggestion from the Committee on Unfinished Business "[T]o add to the clause "to declare war" the words "and grant letters of marque and reprisal."" This proved to be the last occasion on which the Convention allocated control between Congress and the President over the use of armed force.

All that remained were questions concerning treaty-making, which themselves bore heavily on war and peace. A number of issues were in contention: whether the House of Representatives should be joined with the Senate in making treaties, whether the President should be joined, by what majority the Senate was to act, and whether peace treaties should be treated like other pacts as regards the size of the Senate majority needed for approval, and the possibility that the Senate might override presidential objections. In short, to what degree was senatorial prerogative over foreign affairs to be tempered?

The Framers turned first to House participation when they reached treaty-making on September 7. The August 23 effort to have the Representatives included was renewed, and again decisively rejected, with scant debate. In Sherman's words, "the only question that could be made was whether the power could be safely trusted to the Senate. He thought it could; and the necessity of secrecy in the case of treaties forbade a reference of them to the whole Legislature." The language leaving treaties to the Senate and President was then approved unanimously, without further debate.

Belated but hard consensus had formed that the Executive should be joined in treaty-making with the Senate to guard the national interest. During later controversy over the size of the Senate majority required to approve treaties, Rufus King reminded his colleagues "that as the Executive was here joined in the business, there was a check which did not exist in [the Confederation] Congress where the concurrence of 2/3 was required," and Gorham echoed that "[T]here is a difference in the case, as the President's consent will also be necessary in the new Govt." As Madison explained in 1831: "After the compromise which allowed an equality of votes in the Senate, that consideration, with the smaller num-

129. 2 FARRAND 505.
130. See text following note 114 supra.
131. 2 FARRAND 538.
132. 2 FARRAND 538.
133. 2 FARRAND 540.
134. 2 FARRAND 549.
ber and longer tenure of its members, will account for abridgment of its powers by associating the Executive in the exercise of them."

Also influential, no doubt, was recognition that executive speed and secrecy could be useful during negotiations, and belief that no independent prerogative was being given the President, only association with the Senate. The Framers' prior debate leaves little doubt that they thought the Senate institutionally capable of handling the country's diplomatic business. And against the background of British and colonial use of "advice and consent," those words surely were intended to grant the Senate at least as plenary a role in treaty-making as the President.

The rest of the treaty debate on September 7 went largely to the disposition of peace agreements. Madison first moved that two-thirds approval by the Senate be required for all pacts "'except treaties of peace' allowing these to be made with less difficulty than other treaties." His proposal to ease the way to peace was unanimously approved, without discussion.

Madison then sought to cut back the presidential role in peace-making. He proposed that the Senate by two-thirds vote be allowed to make peace over the Executive's objection, lest he find war so conducive to personal power that he block its end:

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

Pierce Butler seconded the motion, in contrast to his August 17 suggestion.

135. 3 FARRAND 503. In Pinckney's letter of December 30, 1818, to John Quincy Adams on the Philadelphia proceedings, he described association of the President with the Senate as a rash, twelfth-hour act:

[The great power given to the President was never intended to have been given to him while the Convention continued in that patient & cool deliberative situation in which they had been for nearly the whole of the proceeding five months of their session, nor was it until within the last week or ten days that almost the whole of the Executive Department was altered — I can assure you as a fact that for more than Four months & a half out of Five The power of exclusively making treaties, appointing public Ministers & Judges of the supreme Court was given to the Senate after numerous delegates & considerations of the subject both in Committee of the whole & in the house . . .

Id. at 427. In an 1831 letter, James Madison took strong issue with Pinckney's memory, and explained presidential involvement in treaties and appointments as noted in the text. See id. at 502-03.

136. See note 38 supra and accompanying text.

137. 2 FARRAND 540.

138. 2 FARRAND 540.
that the President be allowed to commence war on his own authority, adding "he will not make war but when the Nation will support it." Messrs. Gorham and Morris demurred, arguing that the President could not carry on war opposed by the legislature, since it controlled the tools of conflict, and that the Executive, in any event, was himself the defender of the national interest:

Mr. Ghorum thought the precaution unnecessary as the means of carrying on the war would not be in the hands of the President, but of the Legislature.

Mr. Govr. Morris thought the power of the President in this case harmless; and no peace ought to be made without the concurrence of the President, who was the general Guardian of the National interests.

Butler supported his second. He was strenuous for the motion, as a necessary security against ambitious & corrupt Presidents. He mentioned the later perfidious policy of the Statholder in Holland; and the artifices of the Duke of Marlbro' to prolong the war of which he had the management.

Elbridge Gerry and Hugh Williamson then concluded the debate, apparently harking back to Madison's first motion regarding a majority—rather than two-thirds—Senate approval of peace. These Framers saw a greater threat in ending wars on disadvantageous terms, than in extending them for lack of a two-thirds vote for peace:

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

Mr. Williamson thought Treaties of Peace should be guarded at least by requiring the same concurrence as in other Treaties.

139. See text at note 96 supra.
140. 2 FARRAND 540.
141. 2 FARRAND 540-41.
142. 2 FARRAND 541.
143. 2 FARRAND 541. Another harbinger of hard times for the peace-treaty exception came immediately before adjournment on September 7:

Mr. Williamson & Mr. Spaight moved "that no Treaty of Peace affecting Territorial rights shd be made without the concurrence of two-thirds of the (members of the Senate present.)"
The Convention voted 8-to-3 against any empowering of the Senate to make peace treaties without presidential approval. But the Framers immediately thereafter approved by the same margin the two-thirds requirement for Senate approval of all treaties "amended by the exception as to Treaties of peace." 114

The following morning, September 8, the decisions of the prior day came unhinged. "A reconsideration of the whole [treaty] clause was agreed to." 115 King had earlier that morning moved to strike the peace treaty exemption for the two-thirds requirement, while Wilson, to the contrary, had proposed eliminating the necessity for an extraordinary majority for any treaty. The debate centered on the peace problem. Like Gerry the previous day, other Framers showed the influence of passing economic and security problems, as well as the influence of more enduring considerations, principally the rights of the majority as against those of the minority. Wilson argued:

If the majority cannot be trusted, it was proof, as observed by Mr. Ghorum, that we were not fit for one Society.

Mr. Govr. Morris was agst. striking out the "exception of Treaties of peace" If two thirds of the Senate would be required for peace, the Legislature will be unwilling to make war for that reason, on account of the Fisheries or the Mississippi, the two great objects of the Union. Besides, if a Majority of the Senate be for peace, and are not allowed to make it, they will be apt to effect their purpose in the more disagreeable mode, of negating the supplies for the war.

Mr. Williamson remarked that Treaties are to be made in the branch of the Govt. where there may be a majority of the States without a majority of the people, Eight men may be a majority of a quorum, & should not have the power to decide the conditions of peace. There would be no danger, that the exposed States, as S. Carolina and Georgia, would urge an improper war for the Western Territory.

Mr. Wilson If two thirds are necessary to make peace, the minority may perpetuate war, against the sense of the majority.

Mr. Gerry enlarged on the danger of putting the essential rights of the Union in the hands of so small a number as a majority of

---

114. 2 FARRAND 541.
115. 2 FARRAND 548.
the Senate, representing perhaps, not one fifth of the people. The Senate will be corrupted by foreign influence.

Mr. Sherman was agst leaving the rights, established by a Treaty of Peace, to the Senate, & moved to annex a "proviso that no such right shd be ceded without the sanction of the Legislature."

Mr. Govr. Morris seconded the ideas of Mr. Sherman

Mr. Madison observed that it had been too easy in the present Congress to make Treaties altho' nine States were required for the purpose.146

The Convention then reversed its decision of the prior day, and voted eight states to three to strike out "except Treaties of peace."147 There ensued a series of votes, with little debate, on the two-thirds requirement itself, with some effort to make it more stringent by requiring two-thirds of all members of the Senate, not just of those present. At one juncture Roger Sherman's less stringent motion to require "a Majority of the whole number (of the Senate)" failed only six states to five.148 Ultimately, however, the treaty clause prevailed against the opposition of Georgia, New Jersey and Pennsylvania.

The debates provide only fleeting indications of why the Framers finally decided to exclude the House from the treaty process and to require Senate approval by two-thirds vote of the members present. Drawing on the Philadelphia and ratification records, there seem to have been three principal reasons for eliminating the House. First, an intent to maximize small state power by excluding the element of Congress that reflected population. William R. Davie, a Framer, told the North Carolina ratifying convention:

[T]he extreme jealousy of the little states, and between the commercial states and non-importing states, . . . made it indispensable to give the senators, as representatives of states, the power of making, or rather ratifying, treaties. Although it mili-

---

146. 2 FARRAND 548.
147. 2 FARRAND 548-49.
148. 2 FARRAND 549. Sherman’s purpose may have been to bar treaty-making by less than an absolute majority of the Senate’s membership, since two-thirds of the senators present at any time could fall short of that mark. His purpose may also have been to reduce the majority required, as a practical matter, for most treaties. Regarding the narrow demise of Sherman’s motion, it has been suggested that:

The change of one state delegation, probably of one man in a divided delegation, would have given us this provision instead of the two-thirds vote, and we should have revered that arrangement as an expression of the Convention’s great wisdom instead of looking up to its inspired action in fixing the higher majority.

tates against every idea of just proportion that the little state of Rhode Island should have the same suffrage as Virginia . . . yet the small states would not consent to confederate without an equal voice in the formation of treaties. Without that equality, they apprehended that their interest would be neglected or sacrificed in negotiations.\(^\text{149}\)

Second, there apparently was serious question in many Framers' minds whether the House, as opposed to the Senate, had the institutional capacity to deal with foreign affairs. The House was thought too large and infrequently in session for the requisite speed and secrecy, too short-term and fluctuating in its membership for the development of the necessary expertise, and too prone to factions to reflect the national interest. Charles Cotesworth Pinckney, a Framer, attacked during the South Carolina convention any notion that "the diplomatic power of the Union" might be safely vested in the representatives:

Can secrecy be expected in sixty-five members? The idea is absurd. Besides, their sessions will probably last only two or three months in the year; therefore, on that account, they would be a very unfit body for negotiation whereas the Senate, from the smallness of its numbers, from the equality of power which each state has in it, from the length of time for which its members are elected, from the long sessions they may have without any great inconvenience to themselves or constituents, joined with the president, who is the federal head of the United States, form together a body in whom can be best and most safely vested the diplomatic power of the Union.\(^\text{150}\)

---

149. 4 ELLIOT 120. See, e.g., 2 FARRAND 393 (Dickinson); 3 id. at 371 (Washington), 502-03 (Madison); 4 ELLIOT 27 (Speight).

150. 4 ELLIOT 280-81. Pinckney had spoken in the same vein earlier. Id. at 263-65. See, e.g., 1 FARRAND 426 (Wilson); 2 id. at 318 (Pinckney), 538 (Sherman); 2 ELLIOT 305-07 (Hamilton), 506-07 (Wilson); 3 id. at 509 (Corbin); 4 id. at 283 (Butler); The FEDERALIST Nos. 62 & 63 (J. Madison); id. No. 64 (J. Jay). Hamilton minced no words in excluding the House from "a share in the formation of treaties":

The fluctuating and . . . multitudinous composition of that body forbid us to expect in it those qualities which are essential to the proper execution of such a trust. Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character; decision, secrecy, and despatch, are incompatible with the genius of a body so variable and so numerous . . . . The greater frequency of the calls upon the House of Representatives and the greater length of time which it would often be necessary to keep them together when convened, to obtain their sanction in the progressive stages of a treaty, would be a source of so great inconvenience and expense as alone ought to condemn the project.

THE FEDERALIST No. 76, at 412.
Third, the representatives were too closely tied to the public — to the full play of democracy — for many of the Framers, especially as regards foreign affairs. Recall James Wilson’s concern on June 26 to make senators “respectable in the eyes of foreign nations” by nine-year terms and triennial rotation.\footnote{151} James Madison in Federalist No. 62 was more explicit: “The necessity of a senate is . . . indicated by the propensity of all single and numerous assemblies to yield to sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions.” He added that “a body which is to correct this infirmity ought itself to be free from it and consequently ought to be less numerous. It ought, more-over, to possess great firmness and consequently ought to hold its authority by a tenure of considerable duration.”\footnote{152}

Reasons for the two-thirds requirement are more obscure. Confederation practice very likely had an influence, as did the desire to have fewer treaties, and thus fewer entanglements with the rest of the world, than had been the case to 1787. Perhaps the dominant motive, however, was protection of state and regional interests. There appears to have been genuine fear of peace treaties approved by only a majority of the Senate — it could “be corrupted by foreign influence” to give away American territory, fishing rights, navigation of the Mississippi, and more.\footnote{153}

\begin{footnotes}
151. See text at note 83 supra. Madison in the same debate opposed having the states pay the salaries of their respective senators, lest it make them creatures of the states:
   One great end of the [Senate] was, that being a firm, wise, and impartial body, it might (not) only give stability to the Genl. Govt. in its operations on individuals, but hold an even balance among different States.

1 FARRAND 427-28. Hamilton had previously vented his contempt for the political wisdom of the general public, especially regarding foreign affairs. His solutions were a permanent executive and “one body of the legislature . . . constituted during good behaviour or life.” Id. at 299-300.

In less extreme tones, James Iredell argued to the North Carolina convention the need for a Senate sheltered from the full play of public opinion:
As the representatives of the people may probably be more popular, and it may be sometimes necessary for the Senate to prevent factious measures taking place, which may be highly injurious to the real interests of the public, the Senate should not be at the mercy of every popular clamor . . . . These observations apply even to acts of legislation concerning domestic policy; they apply much more forcibly to the case of foreign negotiations, which will form one part of the business of the Senate . . . .

4 ELLIOT 40-41. He went on to elaborate on the need for lengthy senatorial tenure:
The business of a senator . . . . must employ a great deal of time; since a general knowledge of the affairs of all the states, and of the relative situation of foreign nations, would be indispensable.

Id.

152. The Federalist No. 62, at 342. See also id. 10, 39 & 49 (J. Madison); id. Nos. 68, 71 & 73 (A. Hamilton); The Federalist Papers, supra note 32, at 289-90 nn.12 & 17.

153. 2 FARRAND 548. See generally note 173 infra.
\end{footnotes}
Then, too, by early September, the Framers were simply tired and ready for resolution, one way or another, of the treaty power. They had been meeting six days a week for almost four months, and had problems outstanding beyond the allocation of control over international agreements. It is probable that a part of their intent on September 8 was simply to lay treaty issues to rest, no matter how. This they did. There was no further discussion of war-peace issues before the Framers concluded their labors nine days later.

B. Other Comment on the Allocation

Beyond discussion of war and treaty-making, little was said by the Framers that bore directly on the division of war-peace authority between the President and Congress. Without debate, Congress was given control in Article I over a range of nonmilitary action with war and peace consequences. During federal-state debate there was specific recognition that power over trade and tariffs vitally affects foreign relations, James McHenry explicitly equating embargoes with war.154 Similarly, it was recognized that the treatment of aliens — especially immigrants and foreign economic interests — bears on external relations.155 But in both instances, the issue was not whether Congress or the President should control policy, but whether Congress or the states should.

By the same token, debate over raising, organizing, and supporting the military ran to federal-state problems. Very likely because of expectation that Congress would control war-peace policy, the Committee on Style near the end of the Convention placed in Article I the provisions denying the states foreign and military powers, as well as the proviso for suspending habeas corpus during military emergency.156

Convention review of clauses dealing with the Executive was similarly truncated so far as the allocation of war powers is concerned. The terse treatment of the commander-in-chief clause was typical. There was brief debate about joint executive-senatorial control over appointments, with Wilson and Pinckney expressing reservations about Senate involvement.

154. "Mr. McHenry conceived that [embargo] power to be included in the power of war." 2 FARRAND 362. The debate on export duties had an international tenor, id. at 359-63; and the subsequent debate on commercial regulation had an even heavier international tone, highlighted by Pinckney's proposal that no legislation affecting American foreign trade be adopted except by two-thirds vote of both houses of Congress. Id. at 448-53.

155. See, e.g., 2 FARRAND 268-72; 3 id. at 100 (Letter of Sherman and Ellsworth to the Governor of Connecticut, Sept. 26, 1787).

156. The provisions on state war powers were moved from their prior place with other language on the states, and the proviso on habeas corpus from among language on the judiciary. Compare 2 FARRAND 576 (habeas corpus) & 577 (state war powers) with id. at 598-97.
Wilson opted for executive appointments with guidance from a “Council . . . provided its advice not be made obligatory on the President,” and Pinckney, significantly, “was against joining the Senate in these appointments, except in the instances of Ambassadors who he thought ought not to be appointed by the President.”

Nothing was said about the purpose for the Article II, Section 1 language that “The executive Power shall be vested in a President of the United States of America.” There is no record of debate explaining why “herein granted” does not modify the executive power, as it does the Article I, Section 1 grant to Congress of legislative power. Early in the Convention, however, it was thought crucial to enumerate executive powers to “assist the judgment in determining how far they might be safely entrusted to a single officer.” Throughout the Philadelphia proceedings, fear was expressed over the potential for executive usurpation, with steady desire to avoid steps that might permit the potential to become real. The Senate, further, was pictured by some as having equal or greater authority than the restrained Executive.

Counter to this evidence that the Framers intended no undefined reservoir of presidential authority is the fact that they did finally create an independent Executive — a development by no means certain during most of the Convention. The presidency was made separate from Congress, to be held by one man with a non-legislative source of election, and a fixed term subject only to impeachment; the Executive was to be eligible for re-election, and to have his own enumerated powers; and the President would not be saddled with a council to oversee his actions.

157. 2 FARRAND 538-39.
158. For a discussion of the perceived parameters of other grants of executive powers, see text following note 236 infra.
159. 1 FARRAND 66-67. William Pierce recorded in his notes a similar statement by another Framer: “Mr. Dickinson was of opinion that the powers of the Executive ought to be defined before we say in whom the power shall vest.” Id. at 74.
160. E.g., 1 FARRAND 66 (Wilson), 74 (Randolph), 83 (Franklin), 86-87 (Dickinson), 101-03 (Mason & Franklin), 119 (Rutledge), 152 (Gerry); 2 id. at 35-36, 101 (Williamson); 3 id. at 169 (Diary of Ezra Stiles, Dec. 21, 1787). Collusion between the President and the Senate was also feared. E.g., 2 id. at 278-79 (Randolph), 512 (Williamson), 554 (Hamilton). Bagehot caught the Framers' mood regarding executive, if not congressional, authority when he reported:

[They] shrank from placing sovereign powers anywhere. They feared it would generate tyranny; George III had been a tyrant to them, and come what might, they would not make a George III.

161. E.g., 2 FARRAND 513 (Randolph), 522-23 (Wilson). During the ratification process, this notion was particularly prevalent. See text following note 198 infra.
162. See generally E. CORWIN, supra note 45, at 3-16; C. ROSSITER, 1787: THE GRAND CONVENTION 221-22 (1966) [hereinafter cited as GRAND CONVENTION]; C. ROSSITER, THE AMERICAN PRESIDENCY 74-81, 87 (2d ed. 1980).
Similarly, it was generally assumed that George Washington would be the first Executive, and confidence in him may have fostered intent that the President have wide powers. A year after the Convention, Pierce Butler wrote a relative in England that the powers of the President are full great, and greater that I was disposed to make them. Nor, Entre Nous, do I believe that they would have been so great had not many of the members cast their eyes toward General Washington as President; and shaped their Ideas of the Power to be given to a President, by their opinions of his virtue.163

The weight of the evidence at Philadelphia does suggest that a majority of the Framers by September wished an Executive who would be more than an agent of Congress. But it is difficult to conclude from that intention that the Framers, without saying so, also meant to clothe the President with an indeterminate reservoir of foreign and military authority via the executive-power clause, in light of their caution concerning executive power and their expressed desire to limit it.

On September 17 the Framers came at last to the end of their labors. They committed the Journal of their debates to George Washington, "subject to the order of Congress, if ever formed under the Constitution." It was not published immediately lest "a bad use . . . be made" of the deliberations "by those who would wish to prevent the adoption of the Constitution."164 Thirty-nine men signed the document, and stated their "opinion"

163. 3 FARRAND 302 (Letter to Weedon Butler, May 5, 1788). Butler in that letter, however, also went to lengths to describe the "material difference" between the powers of the British King and the American President, picturing the latter as far the weaker. He detailed the President's authority in a manner that suggested "full great" powers only as against the possibility that the Executive might have been a minion of Congress. Id. at 301-02. Cf. 1 ANNALS OF CONG. 482 (1789) (remark of Thomas Hartley in Congress that presidential "powers, taken together, are not very numerous").

Clinton Rossiter has cited as evidence of Washingtonian reassurance that "when Dr. Franklin predicted on June 4 that 'the first man put at the helm will be a good one,' every delegate knew perfectly well who that good man would be." GRAND CONVENTION, supra note 162, at 221. Omitted by Rossiter, however, was the balance — and less cheery point — of Franklin's remark. Franklin said in whole, after a dismal account of the take-over of Holland by the House of Orange:

The first man, put at the helm will be a good one. No body knows what sort may come afterwards. The Executive will always be increasing here, as elsewhere, till it ends in a monarchy.

164. While there was some sentiment for destroying the records, they were preserved to permit contradiction of any future "false suggestions." See 2 FARRAND 648 (King & Wilson). Opinions varied however, as to when such a use would be proper. For example, after Washington used the Journal in 1796 to support his interpretation of the Framers' intent during a controversy with the House of Representatives over its treaty-making role, see 3 id. at 371, Madison complained to Jefferson:
that Congress should begin government under it upon ratification by nine states.\textsuperscript{165}

The Framers then dissolved the Convention, and went to the states.

IV. \textbf{THE RATIFIERS}

Delaware's ratifying convention met first, in December 1787, and Rhode Island's last, in 1790 after the Constitution had already gone into effect.\textsuperscript{166} All in all, well over a thousand Ratifiers gathered in the thirteen state conventions, most of which ended in a matter of days or weeks.\textsuperscript{167} The Ratifiers' intentions for the Constitution are as important as those of its Framers. Madison, in fact, suggested in 1786 that the views of the Ratifiers are the more crucial: "If we were to look . . . for the meaning . . . beyond the face of the instrument, we must look for it, not in the General Convention which proposed, but in the State Conventions which accepted and ratified it."\textsuperscript{168}

Like the Framers, the Ratifiers gave little attention to the division of war-peace authority between the President and Congress. The State conventions prodigiously proposed changes in the Constitution to meet their concerns about government under it. Amendments were seriously considered in nine states, and formally advanced by seven.\textsuperscript{169} No more than twenty percent of the changes sought, however, dealt with the war powers,\textsuperscript{170} and those that did made clear the Ratifiers' preoccupation with domestic tyranny rather than foreign affairs, and their expectation that Congress — not the President — would control national policy. The only

\begin{footnotesize}
\begin{itemize}
\item According to my memory \& that of others, the Journal of the Convention was, by a vote deposited with the P., to be kept sacred until called for by some competent authority. How can this be reconciled with the use he has made of it?
\end{itemize}
\end{footnotesize}
aspects of executive war powers to attract any amendments whatsoever were the President's authority to command in the field and to pardon traitors.\textsuperscript{171}

The Ratifiers, on the other hand, were concerned with congressional authority on many fronts. For instance, there were amendments to raise the majority by which Congress may declare war\textsuperscript{172} and the Senate may approve commercial treaties;\textsuperscript{172} to require a three-fourths vote of both the Senate and House for treaties adversely affecting American territory, fishing or river navigation;\textsuperscript{172} to force each house to publish its journals at least annually "except such parts thereof, relating to treaties, alliances, or military operations, as, in their judgment, require secrecy";\textsuperscript{175} to hedge congressional capacity to suspend habeas corpus during military emergency;\textsuperscript{177} and above all to limit the legislators' control over organizing, raising, and supporting standing armies and state militia.\textsuperscript{177}

We know today significantly more about the Framers' debates at Philadelphia than most of the Ratifiers did. The Framers met in camera, and the official Journal of their discussions was not made public for twenty

\textsuperscript{171} Only three proposed amendments dealt with the President's war powers. New York moved to require: "[T]he President or person exercising his powers for the time being, shall not command any army in the field in person, without the previous desire of the Congress." 1 Elliot 330. An unsuccessful effort was made at the Maryland convention to propose a constitutional amendment forbidding the President to "command the army in person, without the consent of Congress." 2 id. at 553. The New York convention also proposed an amendment which would have made executive clemency in cases of treason conditional upon congressional approval. 1 id. at 330.

\textsuperscript{172} 1 Elliot 330 (N.Y.); id. at 336 (R.I.). After ratification, Thomas Jefferson believed that a two-thirds majority was needed. 7 The Papers of Thomas Jefferson 220, 222, 243-44 (J. Boyd ed. 1958). Among the would-be amendments of the abortive North Carolina convention was one that Congress "not introduce foreign troops" into America without a two-thirds vote of both houses. 4 Elliot 247.

\textsuperscript{173} 3 Elliot 690 (Va.); 4 id. at 245 (N.C.). North Carolina also wished no treaties to be in conflict with the Constitution or with any federal statute not first repealed by Congress. 4 id. at 246. Among the rejected Maryland amendments was a prohibition against treaties contrary to state constitutions or bills of rights. 2 id. at 553.

\textsuperscript{174} 3 Elliot 690 (Va.); 4 id. at 245 (N.C.).

\textsuperscript{175} 1 Elliot 336 (R.I.); 3 id. at 659-60 (Va.); 4 id. at 245 (N.C.). Such a requirement had bound the Confederation Congresses. See 1 id. at 83 (Art. of Confed. art. IX). New York went even further, insisting "that both houses of Congress shall always keep their doors open during their sessions, unless business may, in their opinion, require secrecy." Id. at 330.

\textsuperscript{176} New York proposed: "That the privilege of the habeas corpus shall not, by any law, be suspended for a longer term than six months, or until twenty days after the meeting of the Congress next following the act for such suspension." 1 Elliot 330.

\textsuperscript{177} The great majority of the pertinent amendments went to limit congressional capacity to raise standing armies and to control the militia; to ensure civil rule and guarantee citizens' rights to bear arms and have no troops quartered in their homes during peace. The dominant theme of these revisions was the need to protect state and individual interests against overweening federal authority, most manifest to the Ratifiers in Congress. See, e.g., 1 Elliot 326 (N.H.), 328 (N.Y.), 336 (R.I.); 2 id. at 552-53 (Md.); 3 id. at 660 (Va.).
years more. Accounts that certain Framers did offer during the state conventions were skimpy and often scrambled. Accordingly, the Ratifiers' intentions concerning the war-power provisions that they approved were influenced far less by the Framers' debates than by the Constitution's words, by newspaper and pamphlet interpretations of them, and by the body of experience and assumptions shared by leading Americans of the era.

Of the newspaper and pamphlet comment, *The Federalist* most reflected the Philadelphia consensus, but it is questionable whether these essays shaped the Ratifiers' views nearly as much as they have those of later Americans. Nonetheless, because of the subsequent importance of *The Federalist*, its conclusions receive full play here.

A. War-Making

"Are the people of England more secure," asked John Marshall rhetorically of the Virginia Convention, "if the Commons have no voice in declaring war? [O]r are we less secure by having the Senate joined with the President?" Marshall's exclusion of the House from war-commencement decisions was no doubt a momentary lapse, but it does suggest the imprecision accompanying the Ratifiers' deliberations. Marshall notwithstanding, it seems that the Ratifiers generally equated Congress' power to declare war under the Constitution with its power to determine on war under the Articles of Confederation. Robert R. Livingston put it most directly in the New York Convention: "But, say the gentlemen, our present [Confederation] Congress have not the same powers [as those proposed for Congress under the Constitution]. I answer, They have the very same . . . [including] the power of making war . . . ." The declare-war clause, in any event, posed no problems for even those state delegates most allergic to the new Constitution. The first North Carolina
convention, while finding the document too defective for ratification, allowed the clause giving Congress the power to "declare War [and] grant Letters of Marque and Reprisal" to be "read without any observation."\textsuperscript{181}

The modest attention given this clause appears to have stemmed from the unanimous expectation that it left the President no independent war-making authority. James Wilson's comments in Pennsylvania say much, both in their implicit equation of declaring and commencing war and in their explicit foreclosure of unilateral executive action:

This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large: this declaration must be made with the concurrence of the House of Representatives: from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into a war.\textsuperscript{182}

In North Carolina, James Iredell stated that "The President has not the power of declaring war by his own authority. . . . Those powers are vested in other hands."\textsuperscript{183} As we have already seen, Pierce Butler explained to the South Carolina convention that war-making by the President on his own authority "was objected to [by the Framers], as throwing into his hands the influence of a monarch, having an opportunity of involving his country in a war . . . . "\textsuperscript{184} Charles Pinckney also told the South Carolina delegates that "the President's powers did not permit him to declare war."\textsuperscript{185}

In similar vein, Hamilton declared in \textit{Federalist No. 69} that the power "of the British king extends to the \textit{declaring} of war . . . which, by the Constitution under consideration, would appertain to the Legislature."\textsuperscript{186} And George Clinton's bitterly antifederalist \textit{Letters of Cato} found no independent war-making authority for the Executive. Rather, in his effort to equate the President with the King, Clinton resorted to a more realistic view than Hamilton of the royal prerogative:

\begin{itemize}
\item \textsuperscript{181.} 4 \textit{Elliott} 94.
\item \textsuperscript{182.} 2 \textit{Elliott} 528.
\item \textsuperscript{183.} 4 \textit{Elliott} 107. Iredell continued:
\begin{itemize}
\item The power of declaring war is expressly given to Congress, that is, to the two branches of the legislature — the Senate, composed of representatives of the state legislatures, the House of Representatives, deputed by people at large. They have also expressly delegated to them the powers of raising and supporting armies, and of providing and maintaining a navy.
\end{itemize}
\textit{Id.} at 107-08.
\item \textsuperscript{184.} 4 \textit{Elliott} 283. See note 104 supra and accompanying text.
\item \textsuperscript{185.} 4 \textit{Elliott} 287. See also 2 id. at 195 (Ellsworth); 3 id. at 201 (Randolph).
\item \textsuperscript{186.} \textit{The Federalist No. 69}, at 379. See generally text at note 191 infra.
\end{itemize}
[T]hough it may be asserted that the king of Great Britain has the express power of making peace or war, yet he never thinks it prudent to do so without the advice of his Parliament, from whom he is to derive his support, and therefore these powers, in both president and king, are substantially the same . . . .

The Framers' change of "make" to "declare" was not mentioned during the ratification process, much less relied on by those opposed to the Constitution as evidence that the President might make war on his own authority.

By the same token, the Ratifiers understood the commander-in-chief clause very narrowly. It was more discussed and opposed in the state conventions than had been the case in Philadelphia. Robert Miller in North Carolina was particularly fearful that the President had been given undue military authority and "considered it as a defect in the Constitution, that it was not expressly provided that Congress should have the direction of the motions of the army." James Iredell, also in North Carolina, stated the more general view that conduct of hostilities is appropriately an executive function. He stressed the advantages of a single commander. But Iredell went on to equate presidential authority as commander-in-chief with that of the state governors:

I believe most of the governors of the different states have powers similar to those of the President. In almost every country, the executive has the command of the military forces. From the nature of the thing, the command of armies ought to be delegated to one person only. The secrecy, dispatch, and decision, which are necessary in military operations, can only be expected from one person. The President, therefore, is to command the military forces of the United States, and this power I think a proper one; at the same time it will be found to be sufficiently guarded.

Hamilton in Federalist Nos. 69, 70, 72, 74 and 75 similarly construed the clause. In No. 74 he stressed the overwhelming merit of unified command during war — a reality recognized by the state constitutions:

The propriety of this provision is so evident, and . . . so consonant to the precedents of the State Constitutions in general, that little need be said to explain or enforce it. Even those of them

188. 4 Elliot 114. No other participant in the ratification debates went to Miller's lengths in ignoring the lesson of the Revolution concerning the need for unified command.
189. 4 Elliot 107. See also 3 id. at 497 (Nicholas [Va.]). George Mason disagreed "because the governor did not possess such extensive powers as the President, and had no influence over the navy." Id. at 497.
which have, in other respects coupled the Chief Magistrate with a council, have for the most part concentrated the military authority in him alone. Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war, implies the direction of common strength; and the power of directing and employing the common strength forms an usual and essential part in the definition of Executive authority. 190

In No. 69, however, Hamilton ignored the advantages of single command to hammer at the restrictive nature of the presidential military prerogative, as compared to that of the British king and even state governors. He began by reciting limits on the Executive’s command of the militia and went from there:

First. The President will have only the occasional command of such part of the militia of the nation as by Legislative provision may be called into the actual service of the Union. The King . . . and the Governor of New York, have at all times the entire command of all the militia within their several jurisdictions. In this article, therefore, the power of the President would be inferior to that of either the monarch or the governor. Second. The President is to be Commander-in-chief of the army and navy of the United States. In this respect his authority . . . would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy; while that of the British king extends to the declaring of war, and to the raising and regulating of fleets and armies; all which, by the Constitution under consideration, would appertain to the Legislature . . . . [I]t may well be a question, whether [the constitutions] of New Hampshire and Massachusetts . . . do not, in this instance, confer larger powers upon their respective

190. Hamilton in Federalist No. 70, at 385, stated:
That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and despatch will generally characterize the proceedings of one man, in a much more eminent degree than the proceedings of any great number . . . .

He had just noted: “Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks.” Id. at 384. He continued: “In the conduct of war . . . the energy of the Executive is the bulwark of national security . . . .” Id. at 388. In No. 72, at 396, Hamilton described as executive functions “the arrangement of the army and navy, the direction of the operations of war,” and in No. 75, at 410, he wrote that “the execution of the laws, and the employment of the common strength, either for this purpose, or for the common defence, seem to comprise all the functions of the Executive magistrate.” Cf. The Federalist No. 64 (J. Jay).
Governors than could be claimed by a President of the United States.\footnote{191. \textit{The Federalist} No. 69, 379.}

Evidence is compelling that the Ratifiers, like the Framers, understood the President as commander-in-chief to be simply "first general and admiral" — a man whose "energy" could save the country during military crisis, but who had authority neither to commit America to war, nor to govern any but the strategic and tactical aspects of its conflicts, once begun.\footnote{192. Hamilton in \textit{Federalist} Nos. 70 & 72 stressed the necessity for executive "energy" during national emergencies. See note 190 supra. But he wrote to rebut arguments that the President should have been plural, saddled with a council, or limited to a fixed number of terms. He wrote in No. 70, at 386, that the "ingredients which constitute energy in the Executive are, unity; duration; an adequate provision for its support; competent powers." Nothing in his discussion of "competent powers" suggested that the President would ever have dictatorial authority, even during crises. See notes 244-46 infra and accompanying text. \textit{Cf.} 2 \textsc{Elliott} 359-60; 3 id. at 79 (Randolph), 160 (Henry).}

Some Ratifiers did, however, question the commander-in-chief clause. They feared the base it might provide for unconstitutional seizure of power. "[T]he President, in the field, at the head of his army," warned Patrick Henry in Virginia, "can prescribe the terms on which he shall reign master . . . ."\footnote{193. \textsc{James Monroe} feared that the Executive could use the army to escape punishment for his crimes, thus encouraging foreign governments to bribe him to the country's ruin.\footnote{194. \textsc{George Mason}, also in the} \textsc{James Monroe} feared that the Executive could use the army to escape punishment for his crimes, thus encouraging foreign governments to bribe him to the country’s ruin.\footnote{194. \textsc{George Mason}, also in the} \textsc{James Monroe} feared that the Executive could use the army to escape punishment for his crimes, thus encouraging foreign governments to bribe him to the country’s ruin.\footnote{194. \textsc{George Mason}, also in the} James Monroe feared that the Executive could use the army to escape punishment for his crimes, thus encouraging foreign governments to bribe him to the country’s ruin.\footnote{194. \textsc{George Mason}, also in the} George Mason, also in the} James Monroe feared that the Executive could use the army to escape punishment for his crimes, thus encouraging foreign governments to bribe him to the country’s ruin. George Mason, also in the
Virginia Convention, would have had the President command, but not in person without the consent of Congress:

[He] admitted the propriety of his being commander-in-chief, so far as to give orders and have a general superintendency, but he thought it would be dangerous to let him command in person, without any restraint, as he might make a bad use of it. He was, then, clearly of opinion that the consent of a majority of both houses of Congress should be required before he could take command in person. 195

Reluctance to have Presidents in the field was linked with fear of standing armies during peace. The failure of the Constitution to prohibit a national military establishment except during war was a frequent antifederalist objection. It was answered by assurances that the militia would provide the back-bone of peacetime defense;196 or by assurances that Congress controlled raising and supporting the army, thus precluding executive misfeasance.197 As Hamilton argued in Federalist No. 26, the Constitu-

195. 3 Elliot 496. See note 171 supra. Mason’s concern that the President’s military power dangerously exceeded state governors’ was just mentioned, note 189 supra. His angst over armed Executives, though, may have been surpassed by his fear of militant Congresses controlling both declarations and tools of war: “How is this compared to the British constitution?” he asked. “Though the king may declare war, the Parliament has the means of carrying it on. It is not so here. Congress can do both. Were it not for that check in the British government, the monarch would be a despot.” Id. at 379.

196. For example, Randolph suggested during the Virginia convention:

With respect to a standing army, I believe there was not a member in the federal Convention, who did not feel indignation at such an institution. What remedy then, could be provided? Leave the country defenceless? In order to provide for our defence, and exclude the dangers of a standing army, the general defence is left to those who are the objects of defence. It is left to the militia, who will suffer if they become instruments of tyranny.

3 Elliot 401. For somewhat less hopeful views of the militia, see, e.g., id. at 177-78 (Lee), 378 (Mason); The Federalist No. 25 (A. Hamilton).

197. In the North Carolina convention, Spaight said:

True that the command of the army and navy was given to the President; but . . . Congress, who had the power of raising armies, could certainly prevent any abuse of that authority in the President—that they alone had the means of supporting armies, and that the President was impeachable if he in any manner abused his trust.

4 Elliot 114. See generally 2 id. at 348-49 (Hamilton); 3 id. at 393-94 (Madison); 4 id. at 258 (Pinckney); The Federalist No. 24 (A. Hamilton); id. No. 41 (J. Madison).

George Mason was not impressed:

Although Congress are to raise the army, . . . no security arises from that; for, in time of war, they must and ought to raise an army, which will be numerous, or otherwise, according to the war, and then the President is to command without any control.

3 Elliot at 497-98.
tion's two-year limit on military appropriations would ensure legislative oversight, because Congress

will be obliged . . . once at least in every two years, to deliberate upon the propriety of keeping a military force on foot; to come to a new resolution on the point . . . . They are not at liberty to vest in the Executive department, permanent funds for the support of an army; if they were even incautious enough to be willing to repose in it so improper a confidence. 198

The Ratifiers' stingy concept of the Executive as commander-in-chief was also reflected in concern that Congress, not the President, was the potential military despot. All agreed that Congress controlled the military purse, and there were some who believed that the legislators dominated the sword as well, thus putting the country's armies into congressional hands without check. 199

In 1790-91 James Wilson — who had been a leading Framer, Ratifier, and proponent of executive power — gave a series of law lectures in which he termed the war powers legislative:

The power of declaring war, and the other powers naturally connected with it, are vested in Congress. To provide and maintain a navy — to make rules for its government — to grant letters of marque and reprisal — to make rules concerning captures — to raise and support armies — to establish rules for their regulation — to provide for organizing . . . the militia, and for calling them forth in the service of the Union — all these are powers naturally connected with the power of declaring war. All these powers, therefore, are vested in Congress. 200

198. The Federalist No. 26, at 143.
199. During the Philadelphia Convention, George Mason had warned:
The purse and sword must not be in the same hands, if this is true, and the Legislature are able to raise revenues and make & direct a war, I shall agree to a restraining power of the Legislature either in the Executive or a council of Revision —

1 Farrand 144. Mason's concern on this score was not met by the Constitution, see note 195 supra and accompanying text; and he argued during the Virginia convention that Congress held both the purse and the sword. 3 Elliot 378-81. Others shared his fear. 2 Id. at 376-77 (Smith [N.Y.]), 552; 3 Id. at 172 (Henry). Cf. The Federalist No. 24 (A. Hamilton).

Recall that the bulk of the constitutional amendments proposed in the war-peace area sought to lessen congressional control over the military. See note 177 supra and accompanying text. Federalist rebuttal to the purse and sword specter was mixed, some arguing that their union was acceptable in legislative hands and to be dreaded only in executive, e.g., 2 Elliot 195 (Ellsworth); others that Congress would act wisely and with restraint, e.g., id. at 536-37 (McKean [Pa.]); and a few that the sword was not in congressional hands, e.g., id. at 348-49 (Hamilton).

The President, Wilson continued, has simply "to take care that the laws be faithfully executed; he is commander in chief of the army and navy . . . [and] he has authority to lead the army."\textsuperscript{201}

Thomas Jefferson, who found the Constitution defective on other scores, was not perturbed by its allocation of war powers between the President and Congress. In his celebrated "dog of war" letter to James Madison in 1789, he wrote that "[w]e have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay."\textsuperscript{202}

B. *Diplomacy, especially Treaty-Making*

The Ratifiers clearly did not mean for the President to make treaties on his own authority. William Davie, a Framer, complained to the North Carolina convention:

> On the principle of the propriety of vesting this power in the Executive department, it would seem that the whole power of making treaties ought to be left to the President, who, being elected by the people of the United States at large, will have their general interest at heart. But that jealousy of executive power which had shown itself so strongly in all American governments, would not admit this improvement.\textsuperscript{203}

Francis Corbin in Virginia was more enthusiastic about the lack of executive control over treaty-making: "It would be dangerous to give this power to the President alone, as the concession of such power to one individual is repugnant to republican principles. It is, therefore, given to the President and the Senate (who represent the states in their individual capacities) conjointly."\textsuperscript{204} And among many others who sounded the theme, James Wilson said in Pennsylvania that "[n]either the President nor the Senate, solely can complete a treaty; they are checks upon each other . . . ."\textsuperscript{205}

While there was isolated contrary comment,\textsuperscript{206} it was generally intended that the senators participate with the President in all aspects of treaty-
making; further, that they jointly oversee American foreign affairs as a whole, with some expectation that the Senate was to be the dominant partner. In Massachusetts, Ames felt that "[i]t need not be said that [the senators] are principally to direct the affairs of wars and treaties."

King defended a six-year term for senators because "[i]f for a shorter period, how can they be acquainted with the rights and interests of nations, so as to form advantageous treaties?" And Bowdoin described the Senate as "having not only legislative, but executive powers; being a legislating, and, at the same time, an advising body to the executive."

In the New York convention, G. Livingston found the Senate "a dangerous body," citing its powers as "council to the President, and in the forming of treaties," and terming it "a council of appointment, by whom ambassadors and other officers of state were to be appointed." Robert Livingston was more sanguine about the virtue of the Senate, but equally free in his understanding of its diplomatic authority: "They are to form treaties with foreign nations. This requires a comprehensive knowledge of foreign politics, and an extensive acquaintance with characters, whom . . . they have to negotiate with, together with such an intimate conception of our best interests, relative to foreign powers, as can only be derived from much experience in this business." He later stated that the "Senate was to transact all foreign business . . . ." Hamilton, too, said that the senators, "together with the President, are to manage all our concerns with foreign nations; they must understand all their interests, and their political systems."

James Wilson in Pennsylvania went to lengths to defend the President against the charge that he "is no more than the tool of the Senate." And McKean, finding the senators "joined with the President in concluding

they can approve of none, unless the President . . . lays it before them." Still engaged in the same effort, he "beg[ged] leave to repeat, that this Senate can do nothing without the concurrence of some other branch of government . . . . With regard to their power in forming treaties, they can make none; they are only auxiliaries to the President." Charles Cotesworth Pinckney, in turn, told the South Carolina Ratifiers that "At last it was agreed to give the President a power of proposing treaties, as he was the ostensible head of the Union, and to vest the Senate (where each state had an equal voice) with the power of agreeing or disagreeing to the terms proposed." But, a few sentences later he reported that the Framers had vested in the "President and Senate joined . . . the diplomatic authority of the Union."
"treaties," stated that "it therefore behooves them to be conversant with the politics of the nations of the world, and the dispositions of the sovereigns and their ministers . . . ."\(^{215}\)

In Virginia, Randolph could not "conceive" how the President's "powers can be called formidable . . . . He can do no important act without the concurrence of the Senate."\(^{216}\) "Consider the connection of the Senate with the executive," declared Monroe. "Has it not an authority over all the acts of the executive? What are the acts which the President can do without them?"\(^{217}\) And Patrick Henry, though chary of Presidents on horseback,\(^{218}\) lacked similar fear of them at the treaty table: "The honorable gentleman told you that there were two bodies, or branches, which must concur to make a treaty. Sir, the President, as distinguished from the Senate, is nothing. They will combine, and be as one."\(^{219}\)

Iredell speaking in North Carolina pointed to the institutional advantages of the Senate, as against the weaknesses of the House, in public affairs, and stated that "they apply much more forcibly to the case of foreign negotiations, which will form one part of the business of the Senate."\(^{220}\) He later said that the President "is to regulate all intercourse with foreign powers, and it is his duty to impart to the Senate every material intelligence he receives." "If it should appear," Iredell continued, "that he has not given them full information, but has concealed important intelligence which he ought to have communicated, and by that means induced them to enter into measures injurious to their country, and which they would not have consented to had the true state of things been disclosed to them," impeachment lies.\(^{221}\) Spencer, also a delegate to the North Carolina convention, felt that by dint of the Senators' capacity to impeach the President, they "possess the chief of the executive power; they are, in effect, to form treaties . . . and they have obviously, in effect, the appointment of all the officers of the United States," on the assumption that they could reject the President's nominations until he bent to their will.\(^{222}\)

Finally, in South Carolina, Charles Pinckney argued to similar effect that the President "cannot appoint to an office without the Senate concur[ring]; nor can he enter into treaties, or, in short, take a single step in his government, without their advice."\(^{223}\)

\(^{215}\) 2 Elliot 533.
\(^{216}\) 3 Elliot 201.
\(^{217}\) 3 Elliot 221.
\(^{218}\) See text at note 193 supra.
\(^{219}\) 3 Elliot 353.
\(^{220}\) 4 Elliot 41.
\(^{221}\) 4 Elliot 127. See also note 151 supra.
\(^{222}\) 4 Elliot 116.
\(^{223}\) 4 Elliot 258. See also note 104 supra (remarks of Judge Pendleton [S.C.]).
Jay and Hamilton in *The Federalist* took a broader view of the President's role in foreign affairs, but with no suggestion that he might ignore the Senate in their conduct. Madison talked only of the Senators. In No. 62, Madison justified their age and period-of-citizenship requirements on the grounds that Senators must have "greater extent of information and stability of character," because they will be "participating immediately in transactions with foreign nations." Madison began No. 63 with a "fifth desideratum illustrating the utility of a Senate":

Without a select and stable member of the Government, the esteem of foreign Powers will not only be forfeited by an unenlightened and variable policy . . . but the national councils will not possess that sensibility to the opinion of the world, which is perhaps not less necessary in order to merit, than it is to obtain, its respect and confidence.  

Jay in *Federalist No. 64* focused on treaty-making, indicating that the Senators' long and staggered terms enabled them "to become perfectly acquainted with our national concerns, and to form and introduce a system for the management of them." He then turned to institutional advantages peculiar to the President: "Secrecy and despatch." Executive unity facilitates gathering "intelligence" from those "who would rely on the secrecy of the President, but who would not confide in that of the Senate," and it permits him better than the Senators to respond to changing "tides" in "the affairs of men." Jay, however, limited to "preparatory and auxiliary measures" the action which the President might take solely on his own authority, justified by a need for speed or secrecy, and he said that "should any circumstance occur, which requires the advice and consent of the Senate, he may at any time convene them."  

Hamilton touched the allocation of diplomatic authority between the President and Senate in several papers. He made explicit in *Federalist No. 75* their joint control over treaties. Treaty-making, he said, "will be found to partake more of the Legislative than of the Executive characters, though it does not seem strictly to fall within the definition of either . . . . The power . . . seems, therefore, to form a distinct department, and to belong, properly, neither to the Legislative nor to the Executive." Thus, he con-  

225. Id. No. 63, at 345.  
226. Id. No. 64, at 354.  
227. Id. at 355.  
228. Id. No. 75, at 410. Hamilton continued:  
  The qualities elsewhere detailed, as indispensable in the management of foreign negotiations, point out the Executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead
cluded that "the union of the Executive with the Senate, in the article of treaties, is no infringement" of the separation of powers.\textsuperscript{229}

Hamilton apparently expected the President to handle the mechanics of American communications with other nations. In Federalist No. 72, he termed the "actual conduct of foreign negotiations" an executive function,\textsuperscript{230} and he argued in No. 75:

To have intrusted the power of making treaties to the Senate alone, would have been to relinquish the benefits of the constitutional agency of the President in the conduct of foreign negotiations. It is true that the Senate would, in that case, have the option of employing him in this capacity; but they would also have the option of letting it alone; and pique or cabal might induce the latter rather than the former. Besides this, the ministerial servant of the Senate could not be expected to enjoy the confidence and respect of foreign Powers in the same extent with the constitutional representatives of the nation; and, of course, would not be able to act with an equal degree of weight or efficacy.\textsuperscript{231}

But the President's "constitutional agency . . . . in the conduct of foreign affairs" was to be senatorially guided. In Federalist No. 84, Hamilton stated that "the management of foreign negotiations will naturally devolve" upon the Executive, "according to general principles concerted with the Senate, and subject to their final concurrence."\textsuperscript{232} While discussing treaty-making in No. 66, he said that "[s]o far as might concern the misbehavior of the Executive in perverting the instructions, or contravening the views of the Senate, we need not be apprehensive of a want of a disposition in that body to punish the abuse of their confidence, or to vindicate their own authority."\textsuperscript{233} He spoke in No. 75 of legislative "sanction in the progressive states of a treaty,"\textsuperscript{234} and in No. 77 indicated that it might often be necessary to "call" the Senate "together with a view to" treaties "when it would be unnecessary and improper to convene the House of Representatives."\textsuperscript{235}

Thus, presidential prerogative over American diplomacy was not Hamil-

\textsuperscript{229} Id. at 410-11.
\textsuperscript{230} Id. No. 72, at 396.
\textsuperscript{231} Id. No. 75, at 411.
\textsuperscript{232} Id. No. 84, at 475.
\textsuperscript{233} Id. No. 66, at 368.
\textsuperscript{234} Id. No. 75, at 412.
\textsuperscript{235} Id. No. 77, at 423.
ton's position, except perhaps as to the *channels* of foreign communication. Jay, more than Hamilton, was ambiguous even as to executive prerogative over channels. And Madison's comments in no way barred the Senate from involvement in any aspect of American diplomacy that it wished to enter.

C. Other Comment on the Allocation

The range of congressional authority over action with indirect impact on American war and peace received some attention in *The Federalist*, but, as was true in Philadelphia, in a federal-state context. Madison and Hamilton argued foreign affairs to justify congressional power to tax and borrow, control foreign trade, define and punish piracy and other offenses against the law of nations, regulate the coining and value of domestic and foreign money, punish counterfeiters, fix weights and measures, and establish a uniform rule of naturalization.

When the Ratifiers thought of executive versus legislative control over foreign affairs in terms other than war and treaty-making, they turned to diplomatic appointments, thus furthering the association in their minds of the President and Senate in foreign matters. In a 1789 congressional speech, Framer and Ratifier Roger Sherman spoke of appointments and treaties when he constitutionally linked the Executive and Senators "in every transaction which respects the business of negotiation with foreign powers":

The establishment of every treaty requires the voice of the Senate, as does the appointment of every officer conducting the business. These two objects are expressly provided for in the Constitution, and they lead me to believe that the two bodies ought to act jointly in every transaction which respects the business of negotiation with foreign powers . . . . There is something more required than responsibility in conducting treaties. The Constitution contemplates the united wisdom of the President and Senate, in order to make treaties . . . . The more wisdom there is employed, the greater security there is that the public business will be well done.

There was no hint during the ratification process that the President's constitutional authority to receive foreign diplomats conveyed any substantive power over foreign affairs. Hamilton in *Federalist No. 69* had little to say about the matter, other than that it spared Congress inconvenience:

---

236. On foreign trade, see, *e.g.*, *The Federalist Nos. 11 & 22* (A. Hamilton), *id.* No. 42 (J. Madison); on federal revenue, *e.g.*, *id.* No. 31 (A. Hamilton), *id.* No. 41 (J. Madison); on coining and valuing money, *id.* Nos. 42 & 44 (J. Madison); on the other powers noted in the text, *id.* No. 42 (J. Madison).

237. 1 *Annals of Cong.* 1122-23 (1790).
The President is also to be authorized to receive ambassadors, and other public ministers. This, though it has been a rich theme of declamation, is more a matter of dignity than of authority. It is a circumstance which will be without consequence in the administration of the Government; and it was far more convenient that it should be arranged in this manner, than that there should be a necessity of convening the Legislature, or one of its branches, upon every arrival of a foreign minister; though it were merely to take the place of a departed predecessor.\textsuperscript{238}

Madison in No. 42 did not mention the President, while commenting on the reception of diplomats.\textsuperscript{239}

The Executive's duty to take care that the laws be faithfully executed was thought significant. But it was not considered authority for him to enforce anything except congressional acts and treaties, or to use military force\textsuperscript{240} to implement law without explicit legislative authorization.

\textsuperscript{238} During the ratification process some feared the appointment power as a source of overweening executive authority, e.g., 1\textsuperscript{st} Elliott 379 (Martin: "the person who nominates will always in reality appoint"); while others took the opposite tack and found it a font of dangerous senatorial prerogative, e.g., 4 id. at 116 (Spencer: the Senators "had a negative upon" the Executive's nominations, "till he has exhausted the number of those he wishes to be appointed," and is "obliged, finally, to acquiesce in the appointment of those whom the Senate shall nominate, or else no appointment will take place.") Still others, often to support argument that the Senate would not be unduly powerful, described the joint control over appointments in more equal terms, e.g., 2 id. at 323, 476-77. Finally, there was some favorable comment on the President's power to make interim appointments during senatorial recess, e.g., 2 id. at 513-14; 4 id. at 135 (Macclaine). Hamilton commented on the appointment power in The Federalist Nos. 65-67, 69 and 77. Though a man imbued with Executive-first notions, he favored in No. 77, at 419, Senate consent to the removal of officials appointed with its blessing.

\textsuperscript{239} Madison wrote:

The second class of powers, lodged in the General Government, consists of those which regulate the intercourse with foreign nations, to wit, to make treaties; to send and receive ambassadors, other public ministers, and consuls; to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; to regulate foreign commerce . . . .

This class of powers forms an obvious and essential branch of the Federal administration. If we are to be one nation in any respect, it clearly ought to be in respect to other nations.

The powers to make treaties, and to send and receive ambassadors, speak their own propriety. Both of them are comprised in the Articles of Confederation; with this difference only, that the former is disembarrassed by the plan of the Convention of an exception, under which treaties might be substantially frustrated by regulations of the States; and that a power of appointing and receiving "other public ministers and consuls," is expressly and very properly added to the former provision concerning ambassadors.

The Federalist No. 42, at 231-32.

\textsuperscript{240} E.g., 2 Elliott 512-13 (Wilson).
The President’s pardon power received more attention. It was seen by some as a key to executive usurpation. Luther Martin of Maryland dreaded authority to pardon even more than military command:

The power given to these persons (the President and Vice-President) over the Army, and Navy, is in truth formidable, but the power of Pardon is still more dangerous, as in all acts of Treason, the very offence on which the prosecution would possibly arise, would most likely be in favour of the President’s own power.241

[Martin elaborated] — no treason was so likely to take place as that in which the President himself might be engaged — the attempt to assume to himself powers not given by the Constitution, and establish himself in regal authority; in which attempt a provision is made for him to secure from punishment the creatures of his ambition . . . 242

New York wished to pull the sting from pardon by amending the Constitution to condition executive clemency in treason cases on congressional approval.243 Hamilton in Federalist No. 74, however, explained that the power was properly executive, in order to quell domestic revolt:

[I]n seasons of insurrection or rebellion there are often critical moments when a well-timed offer of pardon to the insurgents . . . may restore the tranquility of the commonwealth, and which, if suffered to pass unimproved, it may never be possible afterward to recall. The dilatory process of convening the legislature, or one of its branches, for the purpose of obtaining its sanction to the measure would frequently be the occasion for letting slip the golden opportunity.244

To at least one Ratifier, the limited executive authority to summon Congress in the event of emergency and to dismiss it, should the two houses be unable to agree on a date for adjournment, smacked of incipient monarchy.245 But none suggested that this authority might be used by Presi-

241. 3 FARRAND 158.
242. 1 ELLIOT 378-79. Accord, e.g., 3 id. at 497 (Mason).
243. See note 171 supra.
244. The Federalist No. 74, at 409. During the Philadelphia Convention, however, Hamilton had been willing to have the President pardon traitors only with “approbation of the Senate.” 1 FARRAND 282. See also 4 ELLIOT 112-13 (suggestion by Iredell that pardon power might be beneficial during hostilities).
245. 4 ELLIOT 310-11 (Lowndes). But Maclaine pointed out in the North Carolina convention that “Congress must meet at least once in every year,” id. at 135; and Hamilton denigrated executive authority to summon and adjourn in The Federalist No. 77, at 422-23.
dents to block congressional action on war-peace issues. Similarly, none suggested that the provision for suspension of habeas corpus during military emergency posed an executive threat. Rather, the general assumption was that only Congress could suspend habeas corpus.214

Great emphasis fell on the national government's being one of enumerated powers, wielding only authority specifically given it by the Constitution.24 In none of the President's enumerated powers did the Ratifiers find wide-ranging authority.214 For them: "In republican government the legislative authority necessarily predominates."216

Nor did the Ratifiers think that the President received an undefined, nonenumerated reservoir of power in the executive clause.25 Instead, his

246. See, e.g., note 176 supra.
247. See, e.g., 2 Elliott 496 (Wilson), 533 (McKean [Pa.]); 4 id. at 179 (Iredell). As Madison wrote in The Federalist No. 14, at 77, national “jurisdiction is limited to certain enumerated objects,” and he noted in No. 45, at 258: “The powers delegated by the proposed Constitution to the federal government are few and defined.” See also id. No. 41 (J. Madison); Berger, The Presidential Monopoly of Foreign Relations, 71 Mich. L. Rev. 1, 20-22, 27, 32-33 (1972).
248. See The Federalist Nos. 69 & 73-77 (A. Hamilton); cf. id. No. 42 (J. Madison). Quite to the contrary, concern ran to expansive readings by Congress of its enumerated grants. See, e.g., id. Nos. 33 (A. Hamilton) & 44 (J. Madison) (necessary and proper clause); id. No. 41 (J. Madison) (congressional power to tax to “provide for the common Defence and general welfare of the United States”).
249. See The Federalist No. 48 (J. Madison).
250. In The Federalist No. 77 Hamilton reached what he termed “the only remaining powers of the Executive.” Neither they nor those previously covered involved the executive-power clause. It went unmentioned.

Madison, however, while defending congressional power to tax, asked:

For what purpose could the enumeration of particular powers be inserted if these and all others were meant to be included in the preceding general power? Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars.

Id. No. 41, at 230. Applying Madison's remarks to the President, the “preceding general power” is the executive-power clause, and the recital of explanatory and qualifying particulars occurs in the grants to the President that appear principally in article II, sections 2 and 3 of the Constitution.

Finally, it was always legislative authority — never executive — that Hamilton and Madison described as plastic and aggressive. See The Federalist Nos. 48-51 (J. Madison) & 71, 73 (A. Hamilton). As Madison wrote in The Federalist No. 48, at 274-75:

[In a representative republic, where the Executive magistracy is carefully limited, both in the extent and duration of its power; and where the Legislative power is exercised by an assembly, which is inspired by a supposed influence over the people, with an intrepid confidence in its own strength; . . . it is against the enterprising ambition of this department, that the people ought to indulge all their jealousy, and exhaust all their precautions.

The Legislative department, derives a superiority in our Governments, from other circumstances. Its constitutional powers being at once more extensive and less susceptible of precise limits, it can, with the greater facility, mask under
authority was compared with the limited powers of the state governors. James Bowdoin said in Massachusetts:

The legislative powers of the President are precisely those of the governors of this state and those of New York — rather negative than positive powers, given with a view to secure the independence of the executive, and to preserve a uniformity in the laws which are committed to him to execute. The executive powers of the President are very similar to those of the several states, except in those points which relate more particularly to the Union, and respect ambassadors, public ministers, and consuls. 211

And, as we have seen, the President's authority was often linked with the Senate's, not always in a manner suggesting executive parity with the Senators. 232

Even those at the state conventions opposed to the Constitution — because, in Patrick Henry's words, "[y]our President may easily become a king" 233 — did not find monarchy lurking in the executive-power clause. George Clinton as Cato sought to describe the President in the most regal terms possible, but cited only enumerated grants of authority to that end: military command, pardon, and appointments. The Executive, said Clinton,

is the generalissimo of the nation, and of course has the command and control of the army, navy and militia; he is the general conservator of the peace of the union — he may pardon all offences, except in cases of impeachment, and [is] the principal fountain of all offices and employments. Will not the exercises of these complicated and indirect measures, the encroachments which it makes on the co-ordinate departments . . . . On the other side, the Executive power being restrained within a narrower compass and being more simple in nature; and the Judiciary, being described by landmarks, still less uncertain, projects of usurpation by either of these departments would immediately betray and defeat themselves.

Recall Gouverneur Morris' assertion in 1814 that the "legislative" not the executive "lion will not be entangled in the meshes of a logical net," referring to the Constitution's "unequivocal provisions and limitations." Note 14 supra. Twenty-seven years earlier, during the Philadelphia Convention, Morris had warned that "The Legislature will continually seek to aggrandize and perpetuate themselves; and will seize those critical moments produced by war, invasion, or convulsion for that purpose." 2 FARRAND 52. Significantly for Hamilton, the Executive's veto power existed above all else to provide him with a shield against congressional usurpation. THE FEDERALIST No. 73.

251. 2 ELLIOT 128.
252. See, e.g., text at notes 216-19 supra.
253. 3 ELLIOT 58. See also 1 id. at 377-80 (Martin); 4 id. at 496-97 (Webster).
powers therefore tend either to establishment of a vile and arbitrary aristocracy or monarchy?254

Certainly the friends of the Constitution did not speak of reservoirs of nonenumerated authority in the executive-power clause. A measure of the federalists' restrained accounts of presidential authority may be discounted as ratification strategy. Doubtless, some of them privately intended much more for the Executive. But what the Ratifiers actually said during the ratification process provides the most authoritative guide to their understanding of the document. And that evidence shows a stringent reading of the President's enumerated grants of authority and no intent to give him nonenumerated powers.

V. RESUMÉ

What conclusions can be drawn from our overview of context, the Philadelphia debates and ratification process, and from a taste of contemporary construction?

American war-peace interests in 1787-88 were those of a small, divided people fearful of federal tyranny, domestic rebellion, and foreign invasion. The Framers and Ratifiers were more concerned with safeguards against military usurpation at home than with military preparedness during peace. Greatly more than we, they valued state authority over national, legislative power over executive. They preferred peace and political isolation to a world made safe for America. The institutional confidences of 1787-88 reflected these values and needs — a small, elite branch of Congress was planned as a plenary participant with the President in what little American diplomacy was expected. State militia were to be the backbone of national defense; Congress the arbiter of military policy, by governing the existence of American armed forces and their commitment to conflict. The states and President would serve as interim defenders against sudden attack, pending opportunity for congressional decision — the Executive as first general and admiral should the legislators choose to fight.

The Framers and Ratifiers did intend a more effective national executive, influenced by their understanding of European practice and political theory, by prior legislative excesses in America and by the dismal executive record of Revolutionary and Confederation Congresses. They wanted presidential aid in conducting negotiations, gathering intelligence and in framing recommendations essential to policy-making. They hoped to obtain an executive check on foolish or venal legislators, and they sought presidential execution of national policy. But with rare exception, the Framers and Ratifiers did not mean to surrender legislative control over

254. Cato IV in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 262-63 (P. Ford ed. 1892).
setting American policy and providing tools for its implementation. Thus, they rejected executive hegemony over foreign and military affairs, as seen in European practice and political theory. Their model, rather, was Parliament’s seventeenth century steps to curb the British king, and throughout their debates ran a persistent fear of executive despotism.

So far as the use of force was concerned, the Constitutional Fathers focused on raising, organizing, and supporting the armed forces and on combat. Raising, organizing, and supporting were primarily grist for state-federal conflict, but they also helped to rebut fears of executive usurpation. Concern that the President might turn the military to illegal ends was answered by assurance that Congress alone controlled its life’s blood.

By the same token, the debates are full of assertions that the legislators control decisions to commit the United States to battle. It appears that the Constitutional Fathers meant for the country to be able to use armed force without a declaration of war, but not without prior authorization by majority vote of the House and Senate, unless America were attacked during legislative recess. It appears also that they meant for the country to be able to use armed force on a limited, highly selective basis, as well as for unrestricted, general hostilities.

The word “declare” was loosely employed by the Framers in ways equating it with “begin” or “authorize.” The Constitutional Fathers, further, were aware that most eighteenth century conflicts had not been formally declared, and that political theorists distinguished between general and limited conflict — between “perfect” and “imperfect” war — with marque and reprisal a means of waging the latter. Defensive or retaliatory uses of force, the only sorts expected for America by the men of 1787-88, tended in that era to be limited, undeclared engagements. Thus, the Framers and Ratifiers’ allocation of authority to Congress to declare war and grant letters of marque and reprisal almost certainly carried control over all involvement of American forces in combat, except in response to sudden attack.

As regards the latter, the Framers apparently expected the states to bear the major burden of defense, until Congress could act. The Constitution authorizes the states to “engage in War” without prior congressional authorization if they are attacked or in “such imminent Danger as will not admit of delay.” To “engage in War” while only in imminent danger suggests power to take steps preparatory to combat, such as deployment, and to launch preemptive strikes to forestall or blunt impending assault.

The only equivalent authority for the President must be scavanged out of a brief, confused Philadelphia debate — less than two pages in Madison’s notes — which ended with the substitution of “declare” for “make” war. As we saw in detail, the discussion meandered and the nature of crucial votes remains obscure. Changing “make” to “declare” could not
have signaled much gain in executive prerogative in the minds of the Constitutional Fathers, however George Mason with his presidential phobia voted for the substitution, and the change later went through the ratification controversies unmentioned by the most rabid foes of the Executive. The possibility exists that the substitution was simply meant to prevent Congress from asserting control over the conduct, as well as the authorization, of conflict. Even if, as seems more probable, the change was intended to authorize emergency military action by the President, no mention was made of his defense against imminent attack. Most happily viewed for presidential prerogative, then, the Framers meant make-to-declare to permit executive response to ongoing physical attack on American territory — conceivably, also, preemptive strikes by the President against impending attack — until Congress could decide what further steps should be taken.

The commander-in-chief clause, in turn, received short shrift from the Constitutional Fathers. It was viewed as a modest grant of authority. Hamilton's "first general and admiral" interpretation reflected the consensus. During hostilities, the President would set strategy and tactics, and his authority would inevitably grow during military crisis. But he would not initiate American involvement in hostilities except by signing authorizing legislation; and he would not make peace except as a participant with the Senate in the treaty process.

Those who fought the commander-in-chief clause did so for fear the President would turn the army to treason and usurp authority not legally his. The Federalists replied with the need for single command during war, a lesson of the Revolution, and with the danger of placing it in an ambitious general rather than a civil officer with a fixed four-year tenure. They said that only the rare President would personally command the troops, and that there would be no armies, navies or militia for him to lead unless Congress so provided.

Against this background, it is probable that had the Framers and Ratifiers dealt explicitly with uses of the military other than for combat, they would have assigned control over deploying and stationing troops abroad, arming merchant men, convoying and so on to the legislative process, except when these uses were incident to the conduct of an authorized conflict. Several factors suggest this: the extensive military powers specifically given Congress, the definition of state war powers in the legislative article, the provision there for suspension of habeas corpus during invasion or rebellion, and the Ratifiers' understanding that suspension of habeas would be at legislative, not executive, instance. Finally, it seems clear that the declare-war and commander-in-chief clauses passed with little debate because they left Congress with authority over how the American military would be used. Other than the President's participation in legislating mili-
tary policy, his only role was to execute it.

The Framers and Ratifiers talked very little about control over the range of non-military action having war and peace consequences. They simply gave Congress authority over the bulk of such action when it was treated specifically in the Constitution. Debates concerned with state-federal authority indicated an awareness that congressional decisions about foreign commerce, in particular, would bear squarely on the country's foreign relations.

Had the Framers and Ratifiers moved to fill the constitutional gaps peppering non-military action — for example, concerning recognition and neutrality — they very likely would have given control either to the legislative process or to the President and Senate together. Congress received specific authority over those matters which the Framers thought would be important to American war and peace, except for the pardon power, treaty-making and diplomatic appointments. The Senate held sole responsibility over treaties and ambassadors until the last two weeks of the Philadelphia Convention, when the President was quickly associated in their control. Strong evidence exists that the Constitutional Fathers expected the Senate, no less than the President, to govern those aspects of American foreign relations not committed to Congress as a whole. Thus, the Executive's capacity to receive foreign diplomats was ignored during the Philadelphia debates and dismissed as insignificant during the ratification process, and there was no suggestion that "the executive power" of Article I, Section 1, conveyed authority over anything, other than enumerated prerogatives.

Finally, Philadelphia debate on international agreements — viewed as the core stuff of foreign relations — spent little time on senatorial-executive relations, and all of that on an effort to limit the President's say in peace treaties. During discussion of treaties, the Framers and Ratifiers confidently assumed that the Senate, though not the House, would be able to participate in transacting the country's diplomatic business. They expected it to do so. True, with foreign communications as with treaties, the President's unique advantages of speed and secrecy were recognized, even as against the Senate. But only Hamilton implied that for these reasons the President alone controlled even the channels of American exchange with other nations.

There was a war-peace consensus in 1787-88, one very chary of executive power. It has just been summarized. But that consensus rested in no small measure on transient assumptions about American external relations and on faulty confidence in the Senate and militia. Further, that consensus was reached without much thought while the Constitutional Fathers attended to more pressing problems. Thought began in depth only after ratification, when international and institutional realities pressed home on the new government.
The real enigma of the Framers and Ratifiers' intentions, accordingly, is what they would have said had they seriously focused on the allocation of war-peace authority between the President and Congress, and done so with a less ephemeral set of perceptions. The United States did not enter an era of peace amid non-involvement with the rest of the world. The Senate proved inadequate from the outset as a presidential consort in foreign affairs. The militia was early rejected as a compleat alternative to standing armies and navies. Further, the President's institutional advantages — his unity, continuity, and command over federal personnel — proved compelling during the recurrent international crises of the late 1700's and early 1800's. The early Executives moved into areas left vague by the Constitution, indeed into areas that the Framers and Ratifiers seem clearly to have intended for the President and Senate together. Significantly, the first generation under the Constitution — including many of its Framers and Ratifiers — did not find these developments unsettling. They were prone to interpret the document's text in light of experience, without much concern for the specifics of 1787-88 debates.