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# William and Mary Law Review

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## THE FOUNDERS AND THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS

H. JEFFERSON POWELL\*

The conventional wisdom in recent scholarship is that the President exercises far greater power over foreign affairs than the Constitution authorizes. "The unmistakable trend toward executive domination of U.S. foreign affairs in the past sixty years represents a dramatic departure from the basic scheme of the Constitution. . . . The president is vested with only modest authority in this realm and is clearly only of secondary importance."<sup>1</sup> The Constitution was intended to give Congress the "preeminent role . . . in the formulation of foreign policy."<sup>2</sup> Proponents of this view (which I shall term the "congressional-primacy" interpretation of the Constitution) sometimes disagree on

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\* Professor of Law, Duke University. Many thanks to Neil Kinkopf and David Lange for their comments.

1. David Gray Adler, *Court, Constitution, and Foreign Affairs*, in *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY* 19, 19 (David G. Adler & Larry N. George eds., 1996).

2. *Introduction* to *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY*, *supra* note 1, at 1, 6; *see also* JOHN HART ELY, *ON CONSTITUTIONAL GROUND* 149 (1996) ("The Constitution gives the president no general right to make foreign policy. Quite the contrary[.] virtually every substantive constitutional power touching on foreign affairs is vested in Congress."); FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* 177 (1986) ("Articles I and II of the Constitution reveal the intent

details of how we are to construe the relationship between Congress and the President in the *execution* of foreign policy.<sup>3</sup> They are united, however, in their rejection of any interpretation of the Constitution that accords the President primary constitutional responsibility for the *formulation* of United States foreign policy.<sup>4</sup>

One requirement of adopting the congressional-primacy view is that one repudiate or distinguish away most of what the Supreme Court appears to have said on the subject, for the Court often has spoken approvingly of "the generally accepted view that foreign policy [is] the province and responsibility of the Executive."<sup>5</sup> This is, to be sure, a task that the proponents of congressional primacy have been willing to undertake, at times

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of the framers to give Congress the dominant hand in the establishment of basic policy regarding foreign relations."); Larry N. George, *Democratic Theory and the Conduct of American Foreign Policy*, in *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY*, *supra* note 1, at 57 ("Throughout this century, and particularly since World War II, presidents have usurped authority over foreign affairs in ways that directly violate both the letter and the intent of the Constitution."); Phillip R. Trimble, *The President's Foreign Affairs Power*, in *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 39, 40 (Louis Henkin et al. eds., 1990) ("[U]nder a detached and narrowly 'legal' analysis, Congress has virtually plenary authority over all aspects of foreign policy."). Variations on this theme are central to the arguments of most important recent book-length discussions of these and related topics. *See, e.g.*, JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993); LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* (1990); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* (2d ed. 1996); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990); WORMUTH & FIRMAGE, *supra*.

3. *See*, for example, the disagreement between Louis Fisher and Michael Glennon over the power to control the processes of diplomatic negotiation. Compare Louis Fisher, *Congressional Participation in the Treaty Process*, 137 U. PA. L. REV. 1511, 1512-19 (1989) (attacking the "myth" that the executive has a "monopoly" on the process of negotiating and drafting treaties), with Michael J. Glennon, *The Senate Role in Treaty Ratification*, 77 AM. J. INT'L L. 257, 279-80 (1983) (conceding the existence of constitutional limitations on senatorial interference with the negotiation of treaties).

4. I shall term an understanding of the Constitution that accords the President such authority the "executive-responsibility" view. As with its "congressional-primacy" opposite, a general executive-responsibility approach to the area is compatible with a variety of positions on specific issues.

5. *Department of the Navy v. Egan*, 484 U.S. 518, 529 (1988) (quoting *Haig v. Agee*, 453 U.S. 280, 293-94 (1981)).

with remarkable alacrity.<sup>6</sup> In turn, however, the sheer weight of inconvenient judicial comment to be dismissed<sup>7</sup> demands a proportionately greater emphasis on other sources of constitutional argument. It is no surprise, therefore, that proponents of congressional primacy assert that for most of the Republic's history, the primacy of Congress's authority over foreign affairs was recognized, not least by both political branches themselves. Whatever its roots, they typically assert, the idea that the President has a legitimate, lawful claim to primacy in foreign affairs—

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6. See, e.g., Adler, *supra* note 1, at 29 (stating that *Dames & Moore* was "a political decision by a political court" (quoting Arthur S. Miller, *Dames & Moore v. Regan: A Political Decision by a Political Court*, 29 UCLA L. REV. 1104, 1107 (1982))); Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright?*, 13 YALE J. INT'L L. 5, 13 (1988) (describing the opinion of the Court in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), as "a muddled law review article wedged with considerable difficulty between the pages of the United States Reports").

7. The most flamboyant and controversial of the Court's comments on the subject are to be found in *Curtiss-Wright*, which referred to "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress." *Curtiss-Wright*, 299 U.S. at 320. As the quotation from Professor Glennon in the preceding footnote suggests, many scholars deny that the Court's remarks in *Curtiss-Wright* are to be taken seriously. *Curtiss-Wright's* apparent endorsement of a broad, independent presidential role in the formulation of United States foreign policy, however, is echoed in a wide range of other opinions, many by highly respected jurists. See, e.g., *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 188 (1993) (Stevens, J., writing for an eight-justice majority) (citing *Curtiss-Wright* in referring to the "foreign and military affairs for which the President has unique responsibility"); *Webster v. Doe*, 486 U.S. 592, 605-06 (1988) (O'Connor, J., concurring in part and dissenting in part) (quoting *Curtiss-Wright's* description of the President's "delicate, plenary and exclusive power"); *Harlow v. Fitzgerald*, 457 U.S. 800, 812 n.19 (1982) (Powell, J., writing for an eight-justice majority) (referring to "such 'central' Presidential domains as foreign policy and national security, in which the President [has a] singularly vital mandate"); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972) (Rehnquist, J., plurality opinion) (noting that "this Court has recognized the primacy of the Executive in the conduct of foreign relations [and] emphasized the lead role of the Executive in foreign policy"); *New York Times Co. v. United States*, 403 U.S. 713, 729 (1971) (Stewart, J., joined by White, J., concurring) (explaining that "the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs"); *id.* at 756 (Harlan, J., dissenting) (stating that the President has "constitutional primacy in the field of foreign affairs"); *Ward v. Skinner*, 943 F.2d 157, 160 (1st Cir. 1991) (Breyer, C.J.) (arguing that "the Constitution makes the Executive Branch . . . primarily responsible" for the exercise of "the foreign affairs power").

including the formulation of foreign policy—is a twentieth-century innovation in fundamental opposition to our constitutional history, just as it is to constitutional text and original intent.<sup>8</sup> “None of [the early] presidents ever claimed that he possessed inherent constitutional powers as chief executive or commander-in-chief that lay beyond legislative control,”<sup>9</sup> and, a fortiori, neither Congress nor the courts ever entertained such a claim. If this point is correct—that is, if during the formative era of our constitutional history the words and actions of the three branches repudiated (implicitly or explicitly) any presidential claim to independent authority—congressional primacy has at least one solid basis of support.

The congressional-primacy interpretation of the Constitution is, I think, an error. On balance, and despite many difficulties of interpretation and application, the Constitution is best read—as in fact it generally has been read by the courts and the executive—to accord the President exactly what congressional-primacy proponents deny: “inherent constitutional powers,” some of which are “beyond legislative control,” to formulate and pursue foreign policy. This Article, however, does not attempt to make this broader argument.<sup>10</sup> Instead, it examines the assumption of the advocates of congressional primacy that the constitutional thought and practice of the Founding era are devoid of support

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8. See Louis Henkin, *Constitutionalism, Democracy and Foreign Affairs*, 67 IND. L.J. 879, 880-84 (1992) (noting the growth of presidential power in foreign affairs and resulting changes in constitutional theory).

9. KOH, *supra* note 2, at 80. With his customary care in the presentation of his argument, Professor Koh acknowledges the existence of a gap between his view of the Constitution's intended meaning—that “the Constitution's drafters assigned Congress the dominant role in foreign affairs”—and early executive practice to the contrary, explaining that “the president's functional superiority in responding to external events enabled him to seize the preeminent role in the foreign policy process, while Congress accepted a reactive, consultative role.” *Id.* Although this presidential “seizure” of an enhanced role in the actual conduct of foreign policy was “a substantial de facto amendment of the National Security Constitution,” Koh believes that the general principle that the Constitution does not vest the President with a broad, independent power to make foreign policy was unquestioned. *Id.* at 79-80.

10. I attempt to outline the general shape of a responsible executive-responsibility interpretation in a companion piece to this Article. See H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 1701 (1999).

for the executive-responsibility view. I attempt to show that this assumption is clearly mistaken. In fact, the argument that the President possesses significant independent constitutional authority over foreign affairs is no invention of twentieth-century executive branch apologists,<sup>11</sup> but can be found in carefully considered statements of principle articulated by distinguished Founding-era constitutionalists in the exercise of their duties as officials or officers of the United States government. Put another way, presidential responsibility for the formulation and conduct of foreign policy was a plausible interpretation of the Constitution in the formative period of our constitutional history.

This fact, as I hope to demonstrate it to be, will not resolve our debates over the proper interpretation of the Constitution in the Republic's third century, but its implications are considerable. If executive responsibility in foreign affairs is an understanding of the Constitution with solid roots in the earliest stages of the "constitutional tradition that lends meaning to the text,"<sup>12</sup> the widespread scholarly assumption that such an understanding is *obviously* an improper reading of the Constitution is untenable. From the perspective of Founding-era constitutionalism, those who argue today for congressional primacy in foreign affairs are partisans for a hotly contested position rather than faithful proponents of an uncontroversial original meaning. For their part, the defenders of presidential authority are entitled to invoke weighty Founding-era authority in support of their fundamental premises.

The Founding-era materials this Article examines are also suggestive of the manner in which we should discuss the distribution of authority over foreign affairs. Although the materials are brief by our standards and at times cryptic in their precise implications, read as a whole they reveal a coherent pattern of understanding about *how* to interpret the Constitution on these

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11. Or even of eighteenth-century political controversialists. Cf. KOH, *supra* note 2, at 79-80 (explaining that in "a heated exchange of letters" with James Madison in 1793, Alexander Hamilton "recited for the first time a broad argument" for executive authority over foreign affairs, but "once declared, Hamilton's vision was immediately challenged and not embodied into customary law").

12. *Printz v. United States*, 117 S. Ct. 2365, 2376 (1997).

issues, not simply in terms of conclusions, but also in terms of what types of arguments count. As is often the case, the Founders' own constitutional thought is significant not just as authority, but as example. In the area of foreign affairs, in which the interpretations we give the Constitution can implicate the survival of the Republic itself, the need for a common understanding of how to construe the Republic's fundamental law is of special importance.

This Article considers six early documents or sets of statements: a 1790 legal opinion written by Secretary of State Thomas Jefferson and almost certainly approved by President Washington; the executive branch's dealings in 1793 with the problems raised by French privateers; the discussions in the cabinet over the Senate's request in 1794 for diplomatic documents; the debate in the House of Representatives over a similar House request in 1796; Congressman John Marshall's famous speech in 1800 defending a decision by President John Adams; and an 1816 report of the Senate Foreign Relations Committee.<sup>13</sup> None of the texts this Article examines dealt at length or in a theoretical fashion with the Constitution's structuring of authority over foreign affairs: they were the product of busy officials attempting to carry out their duties under the Constitution. We must there-

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13. I have omitted one obvious candidate for examination: the 1793 controversy over President Washington's proclamation of neutrality, which raged both within Washington's cabinet and in the public sphere, and provoked a pseudonymous duel in the papers between Alexander Hamilton ("Pacificus") and James Madison ("Helvidius"). I have done so because the major documents—the Hamilton and Madison essays—present unusually difficult questions of interpretation, and it is unclear what weight to give them as expressions of their authors' constitutional views. Madison, at any rate, expressed contemporaneous dissatisfaction with the "Helvidius" papers. See Letter from James Madison to Thomas Jefferson (July 30, 1793), in 15 THE PAPERS OF JAMES MADISON 48 (Thomas A. Mason et al. eds., 1985). Years later he sharply criticized himself for the contents and tone of the exchange with Hamilton: "I ought not perhaps to acknowledge my having written this polemic tract, without acknowledging at the same time my consciousness & regret, that it breathes a spirit which was of no advantage either to the subject, or to the Author." James Madison, *Detached Memoranda*, in Elizabeth Fleet ed., *Madison's "Detached Memoranda"*, 3 WM. & MARY Q. (3d series) 534, 567 (1946) [hereinafter Madison, *Detached Memoranda*]; see also *id.* at 567-68 (referring to Hamilton's "Pacificus" essays as "a publication breathing not only the intemperance of party, but giving as was believed a perverted view of Presidt Washington's proclamation of neutrality, and calculated to put a dangerous gloss on the Constitution of the U.S.").

fore spend some time reconstructing the context of their words, and the assumptions underlying their decisions. What emerges from such a close reading, I believe, is a coherent pattern of thought that accorded the President central responsibility for the foreign policy of the United States.

# I.

Most agree that President Washington exercised considerable initiative in the conduct of United States foreign policy.<sup>14</sup> In his study of Washington's constitutional thought and practice, for example, Professor Glenn A. Phelps stresses the first president's general deference to congressional prerogative, but "when we examine Washington's words and deeds with regard to foreign and military affairs, we find a very different picture. Here, Washington willingly accepted a much more activist notion of presidential power. . . . [In] foreign policy and military affairs . . . [Washington] envision[ed] a leadership role for the president."<sup>15</sup> The conventional wisdom in recent constitutional scholarship denies to Washington's actions anything more than modest constitutional significance: At most, Washington successfully exploited the President's functional advantages in foreign and military matters in order to assume a "leadership role" that in no way implied presidential independence of Congress's policymaking authority should Congress choose to exert that authority.<sup>16</sup> In particular, the argument goes, the Washington administration did not lay claim to broad, unenumerated foreign policy authority not tied to specific Article II powers, and it did not entertain the idea that any substantial area of presidential policymaking was constitutionally independent of congressional control.<sup>17</sup> These claims about the constitutional reasoning behind

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14. See JAMES THOMAS FLEXNER, *GEORGE WASHINGTON AND THE NEW NATION* (1783-1793), at 215 (1969) ("Washington did not hesitate to assert his primacy in diplomatic affairs."); see also ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS* 129 (1976) (summarizing "Washington's decision to assume control of government operations and policy-making over a range of activities").

15. GLENN A. PHELPS, *GEORGE WASHINGTON AND AMERICAN CONSTITUTIONALISM* 153 (1993).

16. See, e.g., KOH, *supra* note 2, at 78-80.

17. See *id.* at 78 (stating that "little claim was heard in those years that the



the actions of President Washington and his advisors are, I think, demonstrably mistaken.

In his first annual address to Congress, Washington identified the provision of adequate financing to carry out diplomacy as a matter demanding congressional attention, and did so in a manner strongly implying a constitutional division of responsibility between the legislature and the executive. Congress, Washington said, had the tasks of defining the "compensations to be made" to American diplomats and of appropriating "a competent fund designated for defraying the expenses incident to the conduct of foreign affairs."<sup>18</sup> The purpose of Congress's actions, on the other hand, was to provide the necessary foundation for the President's conduct of those affairs: "The interests of the United States require, that our intercourse with other nations should be facilitated by such provisions as will enable me to fulfil my duty in that respect, in the manner, which circumstances may render most conducive to the public good . . . ."<sup>19</sup> It is difficult to read this public address to mean anything other than that it is the President's duty—not Congress's—to determine "the manner . . . most conducive to the public good" of conducting "our intercourse with other nations."<sup>20</sup> At the least, therefore, Washington was asserting authority over the processes of diplomacy.

Within a few days, the House of Representatives appointed a committee to prepare legislation on the subject,<sup>21</sup> and subsequent events showed that the implications of Washington's words had not escaped notice. On January 19, 1790, the House debated the scope of the committee's task and, in the course of doing so, members expressed differing views on the respective constitutional roles of the President, House, and Senate.<sup>22</sup> Every-

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president operated in foreign affairs by dint of an *inherent* unenumerated constitutional authority").

18. George Washington, Address to the United States Senate and House of Representatives (Jan. 8, 1790), in 4 THE PAPERS OF GEORGE WASHINGTON 543-44 (Dorothy Twohig et al. eds., 1996).

19. *Id.*

20. *Id.*

21. See 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: MARCH 4, 1789—MARCH 3, 1791, at 698 (Charlene Bangs Bickford & Helen E. Veit eds., 1986) [hereinafter 4 DOCUMENTARY HISTORY].

22. See 12 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE

one agreed that it was within the House's power to determine whether to appropriate funds, although only Roger Sherman is reported to have disagreed with William Smith's assertion that the House's power was the purely negative one of withholding public funding: "The question then is not whether any [diplomatic officers] should be appointed, because it does not lay with the house to determine; to be sure, if they were of opinion that all intercourse with foreign nations should be cut off, they might decline to make provision for them . . . ." <sup>23</sup> Unsurprisingly, the uniform assumption was that regular diplomats would be appointed with the advice and consent of the Senate, although that proposition was entirely consistent with the view expressed by Smith that the dispatch and maintenance of diplomatic officials was "a business clearly within the executive branch." <sup>24</sup> Two days later, the committee reported a bill setting the salaries for various grades of diplomats and authorizing the President "to draw out of the Treasury of the United States, a sum not exceeding 40,000 dollars, for the support of such persons as he may find necessary and proper to employ in the intercourse between the United States and foreign nations." <sup>25</sup>

On January 26 and 27, the bill was the subject of heated debate. Sherman, Michael Stone, and Richard Bland Lee argued vigorously—and on constitutional grounds—to amend the bill to require the President to obtain the Senate's advice and consent in determining what grade of diplomatic officer to employ in a

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UNITED STATES OF AMERICA: 4 MARCH 1789—3 MARCH 1791, at 34-39 (Helen E. Veit et al. eds., 1994) [hereinafter 12 DOCUMENTARY HISTORY].

23. *Id.* at 36. Sherman "[w]as inclined to think that the legislature ought to determine how many ministers should be employed abroad, nor did he think it would be any abridgment of the executive power so to do." *Id.* at 37. As the magnificent work of the *Documentary History* shows, it is dangerous to rely on the exact wording reported in the various original (and conflicting) sources, and my quotations from and paraphrases of the debates represent an effort not to adopt dubious readings.

24. *Id.* at 36 (remarks of William Smith). Smith went on to ascribe to the President and Senate together the power to determine which grade of diplomat to employ in any given instance, and to the President alone the authority to recall diplomats or maintain them at his own expense in the event the legislature terminated funding. *See id.*

25. 4 DOCUMENTARY HISTORY, *supra* note 21, at 699 n.2 (summarizing a Jan. 27, 1790 article in the GAZETTE OF THE UNITED STATES).

given post.<sup>26</sup> "If you give an influence to the president superior to the senate, in any thing relating to the intercourse between the United States and foreign nations, you deviate from the principles of the constitution."<sup>27</sup> A series of representatives replied that the Constitution's principles dictated the opposite conclusion:

[I]t would be wrong to blend the senate with the president, in the exercise of an authority not jointly vested in them by the constitution; and in any business whatever of an executive nature, they had no right to do it any more than they had a right to associate a committee of this house with him.<sup>28</sup>

The amendments finally were defeated (by an unrecorded vote), but Sherman successfully moved to table the bill itself on January 28, arguing that \$40,000 was excessive and that "the house had no measure . . . whereby they could ascertain the sums necessary to be appropriated" prior to the arrival of the new Secretary of State, Thomas Jefferson.<sup>29</sup>

Washington had watched the debates in the House with great anxiety, both out of fear that Congress ultimately would vote for too small a sum and because he objected to legislative interference with the proper design of the diplomatic service, which he assumed to be an executive function. He repeatedly discussed the issues with Jefferson after the latter's belated arrival in New York on March 21,<sup>30</sup> and instructed the Secretary of State to inform the House committee that the diplomatic corps would

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26. See 12 DOCUMENTARY HISTORY, *supra* note 22, at 75-82.

27. *Id.* at 76 (remarks of Michael Stone). Lee's constitutional views seem to have been less definite than Stone's. The *Congressional Register* quoted him as saying that he made his first motion to amend "in order to obtain the sense of the house" on "whether the constitution did not bind them to adopt this idea." *Id.* at 75. Moreover, the *New-York Daily Gazette* reported that he observed of his second motion that "he was not particularly anxious" about whether it carried. *Id.* at 74.

28. *Id.* at 81 (remarks of Egbert Benson).

29. *Id.* at 97. After Jefferson's arrival, the bill was sent back to committee because "[i]t ha[d] been delayed until his arrival." *Id.* at 853 (remarks of John Laurance).

30. See 6 THE DIARIES OF GEORGE WASHINGTON 51-52 (Donald Jackson & Dorothy Twohig eds., 1979) (Mar. 23, 1790) [hereinafter WASHINGTON DIARIES]; *id.* at 54 (Mar. 26, 1790); *id.* at 62 (Apr. 16, 1790); *id.* at 69 (Apr. 28, 1790).

be as economical as feasible.<sup>31</sup> But in addition to careful, indirect politicking with members of both the House and the Senate, Washington sought clarification of the constitutional questions from Jefferson, Chief Justice John Jay, and James Madison, still at this time Washington's closest associate in the House.<sup>32</sup> All three agreed, both on the legal issues and on the inadvisability of permitting informal legislative involvement in an executive function.<sup>33</sup> Washington's diary entry for April 27, the day the House resumed debating the bill, summarized the advice he received:

Had some conversation with Mr. Madison on the propriety of consulting the Senate on the places to which it would be necessary to send persons in the Diplomatic line, and Consuls; and with respect to the grade of the first. His opinion coincides with Mr. Jays and Mr. Jeffersons—to wit—that they have no Constitutional right to interfere with either, & that it might be impolitic to draw it into a precedent[;] their powers extending no farther than to an approbation or disapprobation of the person nominated by the President all the rest being Executive and vested in the President by the Constitution.<sup>34</sup>

There is no evidence that Jay provided Washington with written advice, but Jefferson's formal opinion survives and explains in greater detail the reasoning that, at least as Washington understood it, he shared with Jay and Madison on the proper interpretation of the Constitution. Jefferson's basic premise was that the constitutional separation of powers "lodg[es] each [branch] with a distinct magistracy" and that consequently the Senate's advice and consent powers are narrow and quite specific exceptions to otherwise plenary presidential authority over executive matters.<sup>35</sup>

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31. *See id.* at 54.

32. *See id.* at 68.

33. *See id.*

34. *Id.*

35. Thomas Jefferson, Opinion of Thomas Jefferson (Apr. 24, 1790) [hereinafter Jefferson Opinion], in 5 PAPERS OF GEORGE WASHINGTON, *supra* note 18, at 343.

The transaction of business with foreign nations is Executive altogether. it belongs then to the head of that department, *except* as to such portions of it as are specially submitted to the Senate. *Exceptions* are to be construed strictly. the Constitution itself indeed has taken care to circumscribe this one [the advice and consent power over appointments] within very strict limits . . . .<sup>36</sup>

The Senate's only "right," Jefferson explained, was "to say that 'A. or B. is unfit to be appointed,'" and it had no constitutional authority to insist that "'the grade fixed on is not the fit one to employ,' or 'our connections with the country of his destination are not such as to call for any mission.'"<sup>37</sup>

Jefferson's reasoning was, in part, formal and textual in nature. In his view, foreign affairs are "executive" by definition; therefore, his general principle that the Constitution lodges legislative, executive, and judicial powers in separate governmental entities dictated a presumption that all authority over foreign affairs is vested in the President.<sup>38</sup> The corollary—that textually mandated exceptions to the rule of executive exclusivity are "to be construed strictly"—presumably follows both because it is necessary to give real force to his general rule of executive exclusivity,<sup>39</sup> and on the basis of *expressio unius est exclusio alterius*. Jefferson further supported a narrow interpretation of the Senate's role by a close examination of the appointments process laid out in Article II of the Constitution.<sup>40</sup>

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36. *Id.*

37. *Id.*

38. *See id.*

39. In 1791, Jefferson made a similar argument in support of giving Congress's enumerated powers a narrow construction in order to preserve what he saw as the basic federalism principle that legislative authority remains vested in the states. *See* Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank (Feb. 15, 1791), in JEFFERSON POWELL, *LANGUAGES OF POWER: A SOURCEBOOK OF EARLY AMERICAN CONSTITUTIONAL HISTORY* 42 (1991) ("To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition.").

40. Jefferson pointed out that the text of the Constitution expressly gives the President alone the powers to nominate and commission officers, and grants the Senate a partial agency only in the appointment proper, "that act of the will which con-

Jefferson's argument was not entirely textual in nature, however; indeed, undergirding his textual reasoning were assumptions about the manner in which American foreign policy would be made that he believed were implicit in the Constitution:

[T]he Senate is not supposed by the Constitution to be acquainted with the concerns of the Executive department. it was not intended that these should be communicated to them; nor can they therefore be qualified to judge of the necessity which calls for a mission to any particular place, or of the particular grade, more or less marked, which special and secret circumstances may call for. all this is left to the President.<sup>41</sup>

A Senate—a fortiori, Congress as a whole—that neither knows nor can expect to be informed by the executive of “the concerns” of foreign affairs is no preeminent or even coordinate partner in the formulation of foreign policy.

Jefferson's belief in the exclusivity of the conduct of foreign relations constitutionally vested in the President is clear in the final paragraph of his opinion, in which he considers the objection that the Senate can in fact exercise control over the destination or grade of diplomatic officers simply by refusing to confirm individuals with posts or ranks of which the Senate disapproves.<sup>42</sup> Jefferson's response is a very early example of the sort of constitutional argument most often met in the consideration of arguably unconstitutional conditions: Congress, or in this case the Senate, cannot use an otherwise legitimate power to coerce the President in the exercise of his independent constitutional authority. Decisions about the rank and destination are exclusively presidential, and therefore it “would be a breach of trust, an abuse of the power confided to the Senate,” for that body to attempt to impose its views on those matters on the President.<sup>43</sup>

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stitutes or makes the Agent.” Jefferson Opinion, *supra* note 35, at 343. The Senate was excluded from all but a part of the process of selecting the particular individual; therefore, Jefferson thought it followed that it was necessarily excluded as well from the “previous & more remote” functions of determining where “the public service calls for” a diplomatic mission and what level mission should be employed. *Id.*

41. *Id.* at 343-44.

42. *See id.* at 344.

43. *Id.*

Jefferson's opinion, and Washington's diary entry about his conversation with Madison, are the last surviving discussions of the constitutional issues relating to foreign affairs raised by Washington's January 1790 annual message. When the House returned to the bill in late April, the only reported debate concerned the overall expense of the bill,<sup>44</sup> and the act Washington eventually signed on July 1 was a political victory for the President: it contained no reference to any role for the Senate in structuring the diplomatic service, and appropriated a sum within the range the President had thought necessary.<sup>45</sup> As with most matters resolved by the political branches, the constitutional import of what happened is not free of ambiguity. The House's rejection of the argument that the Senate must take part in determining the grade of diplomatic officers proves at most that a majority was not persuaded that the Constitution *required* such an arrangement, not that the Constitution forbids it. Washington's January address implied the existence of an indeterminate area of executive responsibility for foreign affairs, and was entirely congruent with the much more explicit reasoning his constitutional advisors provided him in April; while it seems very unlikely that Washington disagreed with that advice, he was not compelled to act on it and we do not know how widely known its contents may have been.

Ambiguity is not, on the other hand, the same thing as indecipherability. The events surrounding the genesis of the Foreign Intercourse Act of 1790 clearly show that four of the most important Founding-era constitutionalists—Jefferson, Jay, Madison, and Washington—believed that the Constitution entrusted significant foreign affairs authority exclusively to the President. Decisions about where the United States is to post

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44. See 13 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: 4 MARCH 1789—3 MARCH 1791, at 1217 (Helen E. Veit et al. eds., 1994).

45. As enacted, the Foreign Intercourse Act authorized the expenditure of \$40,000 annually, the figure in the original legislation. See Foreign Intercourse Act, 1 Stat. 128-29 (1790). In March, Washington and Jefferson had agreed that the latter should inform the House committee that \$36,000 was the bare minimum necessary and that as much as \$49,000 or \$50,000 might be necessary. See 6 WASHINGTON DIARIES, *supra* note 30, at 54 (Mar. 26, 1790).

diplomats and (particularly in the eighteenth century) with what ranks are in themselves substantive decisions about the conduct of United States foreign policy, and self-evidently have an impact on the other policy choices readily available to the nation. At least one of them (Jefferson) explicitly defined the general authority to conduct foreign affairs as exclusively executive save only when the Senate has an express constitutional negative,<sup>46</sup> and it seems most likely that the others agreed. Jefferson's assumptions about the Senate's lack of privity to diplomatic information further support the conclusion that he located the power to formulate as well as the power to conduct foreign policy in the President. The fact that Washington and his advisors did not need to abandon their views or engage in constitutional confrontation with the legislature provides no sound basis for rejecting the significance of their reasoning. Nor is there any good reason to think that they reached their conclusions out of mere expediency: one of Washington's greatest concerns—a concern well known to his advisors—was to reach the right constitutional judgments in order to set correct precedents for the future.<sup>47</sup>

## II.

There can be no doubt that Edmond Charles Genet's contributions to the history of United States foreign relations were considerable, if almost entirely unintended. Genet, the French minister to the United States from the spring of 1793 until his recall the following winter, singlehandedly brought Franco-American relations almost to the breaking point while utterly failing in his assigned mission of overcoming American reluctance to enter into a closer alliance with the new French Republic.<sup>48</sup> Any French diplomat, to be sure, would have faced considerable difficulties. Even before Genet arrived in Philadelphia to present his

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46. See Jefferson Opinion, *supra* note 35, at 343-44.

47. "As the first of every thing, *in our situation* will serve to establish a Precedent, it is devoutly wished on my part, that these precedents may be fixed on true principles." Letter from George Washington to James Madison (May 5, 1789), in 30 THE WRITINGS OF GEORGE WASHINGTON 310-11 (John C. Fitzpatrick ed., 1939).

48. See STANLEY ELKINS & ERIC MCKITTRICK, THE AGE OF FEDERALISM 330-73 (1993).



credentials to the President, Washington had issued a proclamation of neutrality ordering or suggesting—the legal status of the proclamation was disputed—that American citizens avoid participation in the war France had declared against Great Britain and Holland.<sup>49</sup> The proclamation directly contradicted the foreign policy the French government wished the United States to pursue, and Genet believed (correctly) that there was a deep strain of sympathy for the embattled French Republic in American public opinion.<sup>50</sup> However, his intemperate efforts to secure the Washington administration's acquiescence or, failing that, to appeal over the President's head to Congress or public opinion eventually provoked even France's sympathizers in the executive branch and Congress beyond endurance.<sup>51</sup>

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49. News of the French declaration of war on Great Britain and Holland reached the United States shortly before Genet's arrival on April 8, 1793. Washington issued the proclamation on April 22; Genet arrived in Philadelphia on May 16. See DUMAS MALONE, *JEFFERSON AND THE ORDEAL OF LIBERTY* at xxi-xxiii (1962). The interpretation, constitutional legitimacy, and legal effect of the proclamation became the source of heated debate, both public and private, including the anonymous *Pacificus/Helvidius* exchange between Hamilton and Madison. See Madison, *Detached Memoranda*, *supra* note 13, at 567-68.

50. See ELKINS & MCKITRICK, *supra* note 48, at 330-36.

51. Secretary of State Jefferson, a leader of the emerging "Republican" faction in United States politics, was like most Republicans a strong Francophile, and he did his best both to like Genet personally and to guide him in making the French case in the most effective way. Indeed, Jefferson's early conversations with Genet at best walked a thin line between Jefferson's loyalty to the administration he served and his desire to maintain close ties between the United States and France. See *id.* at 344-45. By early July, however, Jefferson had concluded that Genet's appointment was "calamitous."

Hothheaded, all imagination, no judgment, passionate, disrespectful & even indecent towards the P[resident] in his written as well as verbal communications, talking of appeals from him to Congress, from them to the people, urging the most unreasonable & groundless propositions, & in the most dictatorial style &c. &c. &c. If ever it should be necessary to lay his communications before Congress or the public, they will excite universal indignation.

Letter from Thomas Jefferson to James Madison (July 7, 1793), in 15 PAPERS OF JAMES MADISON, *supra* note 13, at 43. Jefferson's great congressional ally, James Madison, concluded that Genet's "conduct has been that of a madman. He is abandoned even by his votaries in Philada. Hutcheson [Republican partisan James Hutcheson] declares that he has ruined the Republican interest in that place." Letter from James Madison to James Monroe (Sept. 15, 1793), in 15 PAPERS OF JAMES MADISON, *supra* note 13, at 110-11.

The most important aspect of Genet's behavior for present purposes involved the contentious question of French privateering. Genet's instructions made the encouragement of privateering by ships outfitted and crews recruited in American ports one of his objectives, and before leaving Charleston, his port of arrival in the United States, for Philadelphia he commissioned and ordered four privateers to sea, news of which occasioned protests by the British minister, George Hammond.<sup>52</sup> On the President's behalf, Secretary of State Jefferson responded that the United States agreed with Britain that the French actions were contrary to the rights and duties of a neutral power and that "[t]he practice of commissioning, equipping, and manning Vessels, in our ports to cruise on any of the belligerent parties, is equally and entirely disapproved, and the government will take effectual measures to prevent a repetition of it."<sup>53</sup> A week later, the administration took steps to ensure that "effectual measures" would prevent further French abuse of American neutrality: the cabinet and President approved, and Secretary of War Knox sent letters to the states' governors directing the governors in their capacity as the commanders-in-chief of their respective states' militias to prevent hostilities "committed between the belligerent parties within the protection of your state[s]" and to stop the outfitting of privateers.<sup>54</sup>

The precise implications that Washington meant Knox's letters to communicate are uncertain. Jefferson later denied that they sanctioned military action, while Knox and Secretary of the Treasury Hamilton maintained that the letters were "[a]ddressed to [the governors] in their military capacity, expressly to be executed by the agency of the Militia," and that

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52. See ELKINS & MCKITRICK, *supra* note 48, at 333-35; 14 THE PAPERS OF ALEXANDER HAMILTON 451-54 (Harold C. Syrett ed., 1969) (editorial note).

53. Letter from Thomas Jefferson to George Hammond (May 15, 1793), in 14 PAPERS OF ALEXANDER HAMILTON, *supra* note 52, at 453-54.

54. Letters from Henry Knox to the Governors (May 23 & 24, 1793), in VI CALENDAR OF VIRGINIA STATE PAPERS AND OTHER MANUSCRIPTS 377, 379 (photo-reprint 1968) (Sherwin McRae ed., 1886); see also GEORGE WASHINGTON, THE JOURNAL OF THE PROCEEDINGS OF THE PRESIDENT: 1793-1797, at 147 (Dorothy Twohig ed., 1981) (noting approval, on May 23, 1793, of Knox's drafts for letters "[o]ne to guard agt. prizes being taken within the jurisdiction of the U.S. and the other to guard agt. fitting out privateers").

their instructions "included necessarily the use of military coercion, when that should be found requisite to the end to be accomplished."<sup>55</sup> Whichever interpretation better reflects Washington's original expectations,<sup>56</sup> Knox's letters necessarily rest on an impressive unity of opinion among Washington, Jefferson, and Hamilton that the President could utilize his authority as commander-in-chief, at least to some extent, to execute his views of the obligations of the United States under the law of nations, without the need for express statutory or treaty-based authority to do so.

Furthermore, on the first occasion that arose to act on Knox's letters, Washington and his cabinet (including Jefferson) assumed that effective enforcement of the administration's position on privateering might involve the use of force beyond that involved in a simple criminal arrest. When Governor George Clinton of New York informed Washington on June 9 that he seized a French prize, the *Catharine*, "which was arming, equipping & manning by French & other citizens to cruize against some of the belligerent powers," the cabinet unanimously concluded that Clinton should be asked "to deliver over to the civil power [i.e., the courts] the said vessel & her appurtenances, to

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55. Reasons for the Opinion of the Secretary of the Treasury and the Secretary at War Respecting the Brigantine *Little Sarah* (July 8, 1793), in 15 PAPERS OF ALEXANDER HAMILTON, *supra* note 52, at 77 [hereinafter Reasons Respecting the *Little Sarah*]. Jefferson implicitly but unmistakably rejected this interpretation of Knox's letters in his Dissenting Opinion on the *Little Sarah*, in 26 THE PAPERS OF THOMAS JEFFERSON 449-52 (John Catanzariti et al. eds., 1995).

56. According to Jefferson, Washington later remarked in conversation that he had assumed the governors would be able to stop efforts to outfit privateers at an early stage and with a minimum use of force. See Thomas Jefferson, Notes of a Cabinet Meeting, in 26 PAPERS OF THOMAS JEFFERSON, *supra* note 55, at 508. However, Jefferson's account of Washington's views is not without its own interpretive difficulties. See Thomas Jefferson, Notes on Neutrality Questions, in 26 PAPERS OF THOMAS JEFFERSON, *supra* note 55, at 499 (speculating that Washington would not himself have ordered the use of military force but "would [have been] glad [if] we [the cabinet secretaries] had ordered it"). In any event, even if Washington hoped or expected that the governors could accomplish his wishes without bloodshed, Knox and Hamilton correctly pointed out that his authority to issue instructions to them, and their ability to carry out the instructions, were premised on his and their respective roles as commanding officers of the militia. See Reasons for the Opinion of the Secretary of the Treasury and the Secretary at War, in 15 PAPERS OF ALEXANDER HAMILTON, *supra* note 52, at 77-78.

be dealt with according to law.”<sup>57</sup> The cabinet further decided that Richard Harison, the U.S. Attorney for New York, should “have such proceedings at law instituted” against the *Catharine* and “all the persons citizens or aliens participating in the armament or object thereof as he shall think will be most effectual for . . . preventing the sd vessel & appurtenances from being applied to the destined purpose.”<sup>58</sup> The cabinet went on, however, to advise Washington to instruct Harison that “if he shall be of opinion that no judiciary process will be sufficient to prevent such application of the vessel to the hostile purpose intended,” he was to request Clinton “to detain her by force till the further advice of the General government can be taken.”<sup>59</sup> Clinton complied, turning the *Catharine* over to the U.S. marshal and assuring the president that if the French offered resistance to “any civil process . . . a sufficient number of militia [were] ready to enforce the laws of the US.”<sup>60</sup>

At the same time that the executive branch was attempting to carry out its pledge to take “effectual measures” to stop the equipment of French privateers in United States ports, it tried to persuade Genet to eliminate the need for confrontation.<sup>61</sup> Jefferson repeatedly informed Genet of the administration’s views on “the *right* of every nation to prohibit acts of sovereignty from being exercised by any other within its limits, and the *duty* of a neutral nation to prohibit such as would injure one of

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57. Cabinet Meeting, Opinion Respecting the Measures to be Taken Relative to a Sloop Fitted Out as a Privateer (June 12, 1793), in 14 PAPERS OF ALEXANDER HAMILTON, *supra* note 52, at 534-35 [hereinafter Cabinet Meeting Opinion].

58. *Id.* Washington noted his decision to act on the cabinet’s advice in his official journal. See WASHINGTON, *supra* note 54, at 169 (June 12, 1793).

59. Cabinet Meeting Opinion, *supra* note 57, at 535.

60. WASHINGTON, *supra* note 54, at 182 (June 18, 1793) (summarizing a June 15, 1793 letter from a subordinate state officer to Secretary Knox). Clinton cautioned the federal executive that his power to employ the militia to enforce the President’s instructions was limited by state law to cases where “the Civil authority should be found inadequate,” *id.*, which did not of course contradict those instructions.

Harison filed a prize suit against the vessel, but the district court ultimately dismissed the action for lack of jurisdiction. See WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 83-84 & n.31 (1995).

61. See MALONE, *supra* note 49, at 102-03.

the warring powers";<sup>62</sup> in Washington's view, both the right and the duty were squarely applicable to French efforts to use American ports as de facto bases for the equipment and support of privateers.<sup>63</sup> Jefferson therefore requested that the French refrain from further actions to the contrary.<sup>64</sup> Genet's response was an increasingly vehement rejection of the lawfulness and political legitimacy of the administration's position, culminating in a letter of June 22 so intemperate that Jefferson never troubled to respond to it.<sup>65</sup> The issue reached the point of crisis with the episode of the *Little Sarah*.<sup>66</sup>

Originally a British merchant ship, the *Little Sarah* was captured by a French warship in May 1794 and sailed by a prize crew into Philadelphia harbor, where she remained for two months.<sup>67</sup> In early July, while President Washington was vacationing at Mount Vernon, the members of his cabinet learned that the *Little Sarah* had been extensively refitted and appeared to be ready to set sail as the privateer *Petite Democrate* under the French flag.<sup>68</sup> With Washington absent, Governor Thomas Mifflin of Pennsylvania requested the cabinet's advice about

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62. ELKINS & MCKITRICK, *supra* note 48, at 345 (quoting Thomas Jefferson).

63. *See id.*

64. *See* MALONE, *supra* note 49, at 102-03.

65. *See* ELKINS & MCKITRICK, *supra* note 48, at 345-49. Elkins and McKittrick remark that "[s]o far as ordinary diplomacy was concerned, this was a burning of bridges," but also note Jefferson's continued efforts to maintain good personal relations with Genet. *Id.* at 349. Jefferson's private correspondence at the time shows that the motive behind Jefferson's apparent inconsistency in behavior was a desire to limit the damage Genet was doing to Franco-American relations, and to dissuade Genet of "the dangerous opinion . . . that the people of the US. will disavow the acts of their government, and that he has an appeal from the Executive to Congress, and from both to the people." Letter from Thomas Jefferson to James Monroe (June 28, 1793), in 26 PAPERS OF THOMAS JEFFERSON, *supra* note 55, at 392-93. Subsequent events would show that Jefferson's judgment of Genet's reasonability was quite mistaken, as he himself came to see. *See* Letter from Thomas Jefferson to James Madison (July 7, 1793), in 15 PAPERS OF JAMES MADISON, *supra* note 13, at 43.

66. I have found James Flexner's documentation of the various accounts of the events surrounding the *Little Sarah* to be the clearest and most useful. *See* JAMES THOMAS FLEXNER, *GEORGE WASHINGTON: ANGUISH AND FAREWELL (1793-1799)*, at 56-61 (1972).

67. *See* ELKINS & MCKITRICK, *supra* note 48, at 350.

68. *See id.*

what action, if any, to take: if her crew chose to sail, the *Little Sarah* could be stopped only by the use of military force.<sup>69</sup>

The consequences of either course of action were grave. The British could easily view permitting the *Little Sarah* to depart as a willful refusal to take "effectual measures" to preserve American neutrality, but firing on the vessel would be, in effect (and perhaps legally), an act of war.<sup>70</sup> On July 8, Secretaries Jefferson, Hamilton, and Knox met with Governor Mifflin, but the federal officers were unable to agree on the proper course of action.<sup>71</sup> Hamilton and Knox were "of opinion" that "military coercion [should] be employed to arrest and prevent [the *Little Sarah's*] progress" if she attempted to sail "before the pleasure of the President shall be known concerning her."<sup>72</sup> Jefferson disagreed for a variety of reasons, as he later explained to Washington. He was motivated in part out of concerns of prudence and policy: he did not think that Genet would further provoke the United States by ordering the vessel to sail before Washington's return, and he believed that the use of force against the French would be inconsistent with the administration's unwillingness to use force to resist the Royal Navy's impressment of American seamen.<sup>73</sup> Jefferson, however, also raised a question of authority that is of great interest for present purposes:

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69. See *id.* at 350-51.

70. On the hard choices the *Little Sarah* presented the cabinet, see *id.* at 351 and MALONE, *supra* note 49, at 116. The possibility of almost immediate war was not an abstraction; as Jefferson pointed out, a large French armada was expected "[a]t this moment" in the Delaware. Thomas Jefferson, Dissenting Opinion on the *Little Sarah*, in 26 PAPERS OF THOMAS JEFFERSON, *supra* note 55, at 450.

71. See ELKINS & MCKITRICK, *supra* note 48, at 351.

72. Cabinet Meeting, Opinion on the Case of the *Little Sarah* (July 8, 1793), in 15 PAPERS OF ALEXANDER HAMILTON, *supra* note 52, at 71. In a subsequent memorandum, Jefferson described Hamilton and Knox's position even more emphatically: "They proposed our ordering a battery to be erected on Mud Island immediately, guns to be mounted, to fire at the vessel, and even to sink her if she should attempt to pass." Thomas Jefferson, Memorandum of a Conversation with Edmund Charles Genet (July 10, 1793), in 26 PAPERS OF THOMAS JEFFERSON, *supra* note 55, at 467.

73. See Thomas Jefferson, Dissenting Opinion on the *Little Sarah*, in 26 PAPERS OF THOMAS JEFFERSON, *supra* note 55, at 449-52.

[T]he actual commencement of hostilities against a nation, for such this act may be, is an act of too serious consequence to our countrymen to be brought on their heads by subordinate officers, not chosen by them nor clothed with their confidence; and too presumptuous on the part of those officers, when the chief magistrate, into whose hands the citizens have committed their safety, is within eight and forty hours of his arrival here, and may have an opportunity of judging for himself and them, whether [the French violation of the administration's orders] is sufficient cause of war between Americans and Frenchmen.<sup>74</sup>

Jefferson, in other words, thought it inappropriate for the cabinet to order the use of "military coercion," but agreed with Hamilton and Knox that the President, as the constitutional officer vested with the authority to ensure the security of the Republic, could legitimately order "the actual commencement" of activities that might easily lead to war.<sup>75</sup>

The dissension in the federal cabinet led Governor Mifflin to hesitate, and when Washington returned to Philadelphia on July 11, he learned that no attempt had been made to prevent the *Little Sarah* from dropping down the Delaware River below Mud Island and so forestalling any effort to prevent her departure save through the even riskier expedient of a boarding party.<sup>76</sup> Furious at the French actions, Washington ordered a cabinet meeting for the next morning, at which it was decided to express to Genet the expectation that the *Little Sarah* would "not depart till the further order of the President."<sup>77</sup> Genet again defied Washington and ordered the privateer to sail, which she did a

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74. *Id.* at 450.

75. Hamilton and Knox apparently accepted Jefferson's contention that the decision to commit an act of war properly belonged to the President rather than to subordinate officers, but maintained that Washington's letter to the governors authorized and indeed required Governor Mifflin to take military action under the circumstances. See *Reasons Respecting the Little Sarah*, *supra* note 55, at 77-78 (arguing that a governor who failed to take such action "would fail in his duty not to employ . . . the means recommended, *without further sanction*").

76. See FLEXNER, *supra* note 66, at 58.

77. Cabinet Meeting, Opinion on Vessels Arming and Arriving in United States Ports (July 12, 1793), in 15 PAPERS OF ALEXANDER HAMILTON, *supra* note 52, at 87.

few days later.<sup>78</sup> As with many of Genet's actions, this decision was short-sighted: while the French minister congratulated himself on bearding "Old Man Washington," the President and his cabinet unanimously decided to demand Genet's recall, a demand the French Republic honored, and to adopt express rules about what activities the belligerent powers were, and were not, permitted to undertake within the jurisdiction of the United States.<sup>79</sup> In early August, Secretary Knox circulated a letter to the governors informing them of the executive's new and "more decisive" rules<sup>80</sup> and requesting that each "in your capacity as Commander in Chief of your Militia, would in the earliest stage possible, suppress all practices throughout the state . . . which shall be a violation of these regulations, or the neutrality of the United States."<sup>81</sup> In particular, privateers that evaded the President's ban on their equipment in American ports were to be denied the subsequent use of those ports, by force if necessary.<sup>82</sup>

As they did in relation to the Foreign Intercourse Act of 1790, Washington and his closest advisors dealt with the *Little Sarah* and related episodes on the basis of assumptions about the

78. See WASHINGTON, *supra* note 54, at 167-68 (July 11, 1793); Cabinet Meeting, Opinion on Vessels Arming and Arriving in United States Ports (July 12, 1793), in 15 PAPERS OF ALEXANDER HAMILTON, *supra* note 52, at 87. As the *Petite Democrate*, the *Little Sarah* "became one of the most effective of French raiders." FLEXNER, *supra* note 66, at 60.

79. See FLEXNER, *supra* note 66, at 60; Cabinet Meetings, Proposals Concerning the Conduct of the French Minister (Aug. 1-23, 1793), in 15 PAPERS OF ALEXANDER HAMILTON, *supra* note 52, at 157; Cabinet Meeting, Opinion on the Fitting Out of Privateers in the Ports of the United States (Aug. 3, 1793), in 15 PAPERS OF ALEXANDER HAMILTON, *supra* note 52, at 169-70.

80. See WASHINGTON, *supra* note 54, at 221 n.2.

81. Letter from Henry Knox to Thomas Mifflin (Aug. 7, 1793), *quoted in* 15 PAPERS OF ALEXANDER HAMILTON, *supra* note 52, at 171 n.3. Washington's official journal shows that the letter was a circular written to all of the governors. See WASHINGTON, *supra* note 54, at 221 (Aug. 16, 1793).

82. Knox asked that the governors order any such vessel "to depart immediately" upon learning of her arrival, and "in case of her refusal [to] take effectual measures to oblige her to depart." Letter from Henry Knox to Thomas Mifflin (Aug. 7, 1793), *quoted in* WASHINGTON, *supra* note 54, at 221 n.2. Knox's expression of Washington's pacific wish "that force . . . not be resorted to until every proper effort has been previously made, to procure the early departure without it," confirmed, of course, his intention that force be used if necessary. *Id.*



President's authority over foreign affairs that were largely implicit but can be teased out with some degree of confidence. The most obvious constitutional rationale for the constitutional views necessarily underlying the administration's handling of Genet was that which Jefferson articulated in 1790: except where the Constitution expressly provides otherwise, the conduct of foreign affairs is exclusively executive.<sup>83</sup> This view, however, need not be attributed in its broadest form to Washington and his advisors in 1793 to see that their words and deeds necessarily involved the belief that the Constitution directly vests the President with a variety of powers relating to foreign policy. The administration vigorously insisted on the President's exclusive power to serve as the medium of diplomatic communication,<sup>84</sup> and the executive branch went further in acting on a view of the President's powers that encompassed the formulation of foreign policy goals as well as their implementation. No treaty provision or act of Congress provided any legislative sanction for the seizure of foreign-flag vessels or the use of "military coercion," and the interpretation of American obligations under the law of nations and the 1778 treaty with France that the administration was seeking to implement was purely executive. Neither Washington nor any member of his cabinet showed any hesitation about the President's authority to enforce, by military means if necessary, his views of appropriate United States foreign policy in light of the war between France and Britain.

The Washington administration's boldness in the formulation as well as the pursuit of foreign policy cannot have rested on a limited presidential power to maintain the status quo until Congress's will could be ascertained. The cabinet, for example,

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83. See Jefferson Opinion, *supra* note 35, at 343.

84. See Letter from Thomas Jefferson to Edmond Charles Genet (Nov. 22, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON 414 (John Catanzariti et al. eds., 1997) (stating that the President is "the only channel of communication between this country and foreign nations" and so under the order of things established by our constitution "it is from him alone that foreign nations or their agents are to learn what is or has been the will of the nation"). Jefferson's wording echoed that of Hamilton and Knox in their explanation of their views in the case of the *Little Sarah*. See Reasons Respecting the *Little Sarah*, *supra* note 55, at 76 ("[As a] diplomatic character . . . [Genet] has nothing to do but with the constitutional organ of the Government for foreign intercourse.").

unanimously advised Washington that there was no need to call a special session of Congress in April 1793 and did not revisit the issue.<sup>85</sup> Nor can the assumption of presidential authority to implement foreign policy through military force, up to and including acts of war, be ascribed to a narrow power to defend the United States against attack, for the use of force against the French was likely to be considered an attack by the United States. Instead, Washington and his advisors clearly believed that the President's authority with respect to foreign affairs carried with it some power to take military action without congressional sanction in order to achieve the executive's goals. The President's constitutional authority over foreign affairs empowered him in some circumstances to take actions that Congress clearly could authorize through its power to declare war, but which Congress had not so authorized, and in so doing implement policies that the President alone had adopted.

### III.

On three occasions during his presidency, Washington was presented with troublesome legislative requests for documents within the executive's possession. The primary historical importance of the first of these events—a March 1792 request from the House of Representatives for documents concerning the Wabash Nation's defeat of the Army—lies in the development of the notion of executive privilege; the second and third incidents are more important for present purposes.<sup>86</sup> On January 24, 1794, the Senate passed a resolution requesting the President to provide it with all correspondence between Gouverneur Morris, the controversial United States Minister to France, and both the French authorities and the Secretary of State.<sup>87</sup> Unlike the House in 1792, the Senate did not limit its request to papers “of

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85. See Thomas Jefferson, *The Anas*, in 1-3 THE WRITINGS OF THOMAS JEFFERSON 263, 350 (Andrew A. Lipscomb ed., 1904) (discussing cabinet meeting on Apr. 18, 1793).

86. For a factual account of these incidents, see SOFAER, *supra* note 14, at 79-93. Phelps provides a clear and thoughtful discussion of the significance of the episodes. See PHELPS, *supra* note 15, at 172-78.

87. See SOFAER, *supra* note 14, at 83.

a public nature."<sup>88</sup> Washington requested the advice of his three cabinet secretaries who, on January 28, unanimously advised him that he need not comply with the resolution, at least with respect to documents he deemed it unwise to reveal.<sup>89</sup> Secretary of War Henry Knox flatly advised against providing any of the correspondence to the Senate, a position with which Secretary of the Treasury Alexander Hamilton agreed as a general matter, although Hamilton believed that "the principle is safe, by excepting such parts as the President may choose to withhold."<sup>90</sup> Unfortunately, neither Knox nor Hamilton explained whether "the principle" at issue had to do with general executive confidentiality, the diplomatic nature of the documents, or both. The newly appointed Secretary of State, Edmund Randolph, advised compliance with the Senate's request but only with respect to "correspondence, proper from its nature, to be communicated."<sup>91</sup> At Washington's request, Randolph also met with Madison and Justice James Wilson, and reported that they too believed that the President was entitled to withhold whatever documents he thought it improper to disclose.<sup>92</sup>

Shortly thereafter, Washington asked the new Attorney General, William Bradford, for his views. Before the end of the month, Bradford replied:

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88. *Id.* at 82 (quoting the 1792 House resolution).

89. *See id.* at 83.

90. Cabinet Meeting, Opinion on Communicating to the Senate the Dispatches of Gouverneur Morris (Jan. 28, 1794), in 15 PAPERS OF ALEXANDER HAMILTON, *supra* note 52, at 667.

91. *Id.* Randolph later suggested, somewhat cryptically, that a complete refusal to comply would be appropriate if the Senate resolution were viewed as "executive" in nature. *See* Letter from Edmund Randolph to George Washington (n.d.), *quoted in* SOFAER, *supra* note 14, at 84 n.\*.

92. According to Randolph, Madison stated that "[t]here must be many things which the President cannot communicate with propriety," while Wilson advised that "what they [the Senate] ought not to have, ought not to be sent." SOFAER, *supra* note 14, at 84 n.\* (quoting *Washington Papers*, series 4, reel 105). In a later conversation, according to Randolph, Madison remarked that "the discretion of the President was always to be the guide" in determining what diplomatic documents or information could be disclosed. Letter from Edmund Randolph to George Washington (Feb. 24 [sic], 1794), in 33 THE WRITINGS OF GEORGE WASHINGTON 282 n.8 (John C. Fitzpatrick ed., 1940).

He is of opinion that it is the duty of the Executive to withhold such parts of the said correspondence as in the judgment of the Executive shall be deemed unsafe and improper to be disclosed. He also conceives that the *general* terms of the resolve do not exclude, in the construction of it, those just exceptions which the rights of the executive and the nature of foreign correspondences require. Every call of this nature, where the correspondence is secret and no specific object pointed at, must be presumed to proceed upon the idea that the papers requested are proper to be communicated[,] & it could scarcely be supposed, even if the words were stronger[,] that the Senate intended to include any Letters[,] the disclosure of which might endanger national honour or individual safety.<sup>93</sup>

Bradford therefore concurred in the conclusion reached by Knox, Hamilton, Randolph, Madison, and Wilson: Washington should "communicate to the Senate such parts of the said Correspondence as upon examination he shall deem safe & proper to disclose: withholding all such, as any circumstances may render improper to be communicated."<sup>94</sup>

The immediate basis for Bradford's advice was his interpretation of the Senate resolution, but his interpretation rested squarely on what we would now identify as a constitutionally-based rule of construction. The Senate's language was "*general*" in the sense that it did not specifically demand that the President surrender documents against his own judgment. Bradford reasoned that the resolution could be read as consistent with "those just exceptions which the rights of the executive and the nature of foreign correspondences require."<sup>95</sup> Bradford's reference to "the rights of the executive" was in itself ambiguous: the terminology of executive "rights" indicates that the argument concerned the President's constitutional role but could have referred to a general concept of executive confidentiality.<sup>96</sup> Bradford's

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93. Walter Dellinger & H. Jefferson Powell, *The Attorney General's First Separation of Powers Opinion*, 13 CONST. COMMENTARY 309, 316 (1996) (providing the only modern edition of Attorney General Bradford's 1794 opinion).

94. *Id.*

95. *Id.*

96. Cf. Thomas Jefferson, Opinion on the Constitutionality of the Bill for Es-

immediate association of the executive's constitutional "rights" with the secret "nature of foreign correspondences" indicates, however, that his opinion rested on an understanding of the Constitution's distribution of powers similar to that informing Jefferson's 1790 opinion on the National Bank. Bradford's argument assumed that the Senate would not be privy to diplomatic secrets; indeed, he asserted that the Senate would not expect access to such secrets where the President believed that their disclosure "might endanger national honour or individual safety." Both the assumption and the assertion make sense only if Bradford, like Jefferson, thought that the actual conduct of foreign policy was the President's business. Bradford's reference to "the rights of the executive," and his belief that the Senate could not compel the executive to disclose diplomatic documents against the President's judgment,<sup>97</sup> demonstrate that he believed the President's role in conducting diplomacy stemmed from independent constitutional responsibility.

Washington agreed with his advisors, and on February 26, he transmitted to the Senate a redacted set of the documents.<sup>98</sup> The President's cover letter explained that the omissions consisted of "those particulars, which, in my judgment, for public considerations, ought not to be communicated."<sup>99</sup> The Senate took no action in response to the President's arguably incomplete compliance with its request and Randolph wrote Washington a few

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tablishing a National Bank (Feb. 15, 1791), in POWELL, *supra* note 39, at 43 (stating that the President's veto "is the shield provided by the Constitution to protect against the invasions of the legislature: (1) the right of the executive; (2) of the judiciary; (3) of the states and state legislatures").

97. While Bradford's specific advice that Washington should exercise his discretion in determining what correspondence to give the Senate rested on his construction of the resolution, he prefaced his discussion with a general assertion that "it is the duty of the Executive to withhold such parts of the said correspondence as in the judgment of the Executive shall be deemed unsafe and improper to be disclosed." Dellinger & Powell, *supra* note 93, at 316. Only then did he focus on the construction to be given to the resolution. *See id.* (continuing that Bradford "also conceives" that his construction of the resolution is plausible (emphasis added)). The most natural way to understand Bradford's thinking is that he believed, or at least assumed, that the Senate could not compel disclosure against presidential judgment.

98. *See* Letter from George Washington to the Senate (Feb. 26, 1794), in 33 WRITINGS OF GEORGE WASHINGTON, *supra* note 92, at 282.

99. *Id.*

weeks later that his action "appears to have given general satisfaction."<sup>100</sup>

The significance of this 1794 episode is not entirely free of doubt. The unanimity of opinion among Washington, Hamilton, Randolph, Madison, and Wilson is impressive, but at first glance it appears that all we know with certainty is that they agreed that the President had the authority to exercise discretion in withholding documents. The bases on which everyone except Bradford reached this conclusion are not expressly recorded, and some of them may have seen the issue not so much as a matter of the authority of the President to conduct foreign affairs as of his autonomy in the conduct of executive business.<sup>101</sup> Even on that interpretation, however, it is clear that this group of distinguished constitutionalists saw nothing in the Constitution that obliged the President to reveal to the Senate diplomatic documents or information when in his sole judgment it would be contrary to the interests of the United States to do so. That viewpoint is difficult to square with an interpretation of the Constitution that accords Congress, or the Senate by virtue of its role in treaty-making and appointments, responsibility for initiating or directing the conduct of foreign policy. Furthermore, Attorney General Bradford clearly linked the President's discretion to withhold diplomatic papers to his constitutional responsibility for foreign affairs. In light of the views they expressed in other contexts, it is overwhelmingly likely that Washington and most or all of his other advisors agreed with Bradford, and understood Washington's response to the Senate resolution as an exercise of his independent authority with respect to foreign affairs.<sup>102</sup>

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100. Letter from Edmund Randolph to George Washington (Feb. 24 [sic], 1794), in 33 WRITINGS OF GEORGE WASHINGTON, *supra* note 92, at 282 n.8.

101. In 1792, the cabinet advised Washington that he "ought to communicate [to the House] such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public," without basing the asserted discretion to withhold documents on their subject matter. Jefferson, *supra* note 85, at 304 (discussing cabinet meeting of Apr. 2, 1792). Jefferson relied in part on a general separation of powers rationale. *See id.* at 303-35.

102. "When his constitutional duties were clear, as when engaging in diplomacy with foreign governments, [Washington] could assert his prerogatives as jealously as any modern president." PHELPS, *supra* note 15, at 178.

## IV.

In the spring of 1794, the Washington administration dispatched Chief Justice John Jay to negotiate a treaty with Great Britain that would resolve a variety of outstanding disputes between the United States and Britain, including American trading rights with the British West Indies and Britain's continued occupation of military posts on the border between the United States and Canada.<sup>103</sup> The agreement that Jay signed in November 1794 proved highly controversial, however, and many historians see the political and constitutional battles ignited by the Jay Treaty as a watershed in the early political history of the United States.<sup>104</sup> A bare two-thirds of the Senate gave its advice and consent to the treaty in a June 1795 special session, but conditioned its approval on the suspension pending renegotiation of an especially obnoxious provision.<sup>105</sup> Troubled by the strength of public opinion against the treaty, Washington hesitated over ratifying the treaty and then delayed promulgating it, even after word of Britain's acquiescence in the Senate's condition.<sup>106</sup> When the President finally proclaimed the treaty in effect on February 29, 1796, one result was a stormy debate in the House of Representatives that further polarized political views.

The immediate subject of the House debate was a motion, proposed by Edward Livingston on March 2, requesting the President to transmit to the House "a copy of [his] instructions" to Jay, "together with the correspondence and other documents relative to the . . . Treaty."<sup>107</sup> The real purpose of the motion had little to do with information, or indeed with the documents themselves, which had been freely available to members of the

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103. See ELKINS & MCKITRICK, *supra* note 48, at 388-89, 391.

104. See JAMES ROGER SHARP, *AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS* 117 (1993) ("The treaty that Jay negotiated and that Washington sent to the Senate divided the country like no other issue in the history of the young republic."). The secondary literature on this treaty is enormous. In addition to Sharp, see ELKINS & MCKITRICK, *supra* note 48, at 375-449.

105. See FLEXNER, *supra* note 66, at 209 (noting that the Senate recommended renegotiation of Article XII, "which limited the size of American ships admitted to the British West Indies and prohibited American trade in West Indian products").

106. See SHARP, *supra* note 104, at 118.

107. 5 ANNALS OF CONG. 400-01 (1796).

House and which Livingston himself admitted he had seen;<sup>108</sup> the goal was, instead, to create an opportunity to attack the treaty and to assert the authority of the Republican-dominated House to influence or block its implementation.<sup>109</sup> Unsurprisingly, therefore, the debate over Livingston's motion quickly became a verbal battle over the treaty and over the House's role in the treaty-making process. Modern interest in the debate's constitutional dimensions usually centers on the latter of the two issues. This Article, however, focuses on the extent to which participants in the 1796 debates assumed or asserted that the Constitution accords the executive independent constitutional authority over foreign affairs.<sup>110</sup>

Viewed from this perspective, perhaps the most striking feature of the debate is the extent to which almost everyone involved assumed that the President possessed the discretion to withhold documents that in his judgment it would be improper to disclose. Livingston himself modified his motion on the first day of debate to except "such . . . papers as any existing negotiation may render improper to be disclosed,"<sup>111</sup> and seemed not to have understood the amended resolution to limit the President's discretion over disclosure to information related to pending matters: he explained that "if the PRESIDENT had any reasons of State that would make the information improper [to disclose], he would say so."<sup>112</sup> Speech after speech, from both supporters and opponents of the motion, endorsed the legitimacy of executive discretion.<sup>113</sup> There were one or two dissenting voices,<sup>114</sup> and one

108. *See id.* at 629-30 (remarks of Edward Livingston).

109. *See* ELKINS & MCKITRICK, *supra* note 48, at 443-44; SHARP, *supra* note 104, at 127-29.

110. Questions of the President's independent authority over foreign policy and the House's role in treaty-making, while they are plainly not unrelated, are nonetheless distinct. It is logically possible to deny to the House any discretion to block the implementation of a treaty while according Congress (or the Senate) primary responsibility for formulating the foreign policy of the United States, including the policies the President should pursue in negotiating treaties.

111. 5 ANNALS OF CONG. 426 (1796) (modifying the motion because "a disclosure of papers relating to . . . any . . . pending negotiation might embarrass the Executive").

112. *Id.* at 428.

113. For statements by members of the House who supported the motion and thus viewed the House as having a legitimate basis for requesting the documents,



of Livingston's leading allies asserted that a presidential decision not to comply would raise a question about the relative powers of the House and the executive.<sup>115</sup> Taken as a whole, however, the debates give the strong impression that most mem-

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see *id.* at 435, 533-34 (remarks of Abraham Baldwin), 436-37 (remarks of Albert Gallatin), 449 (remarks of John Swanwick), 773 (remarks of James Madison). For statements by opponents of the motion, see *id.* at 437 (remarks of Ezekiel Gilbert), 453 (remarks of Nathaniel Smith), 458-59 (remarks of Robert Goodloe Harper), 475 (remarks of Roger Griswold), 656 (remarks of Joshua Coit).

114. The clearest was that of William Lyman, who asserted that "the House had the fullest right to the possession of any papers in the Executive department." *Id.* at 601 (remarks of William Lyman). In my reading of the debate, I discovered no other statement of similar breadth and clarity, although two other representatives made comments that may reflect similar views. See *id.* at 446 (remarks of John Nicholas) (stating in response to assertions of executive discretion that the resolution will "assert [the House's] right to [the papers], under a broad qualifying reservation, dictated by their own discretion, which prevents any embarrassment arising in pending negotiations from it"), 546-47 (remarks of James Holland) (conceding that "secrecy was necessary to effecting a Treaty of Peace" and that as a result "absolute power" to do so was vested in the President "guarded by two-thirds of the Senate," but contrasting commercial treaties where "secrecy is not essential"); see also SOFAER, *supra* note 14, at 88 ("Only one member [Sofaer's footnote cites William Lyman] . . . claimed that the House had an absolute power to obtain information it sought").

115. After admitting that "[i]f the PRESIDENT thinks proper not to give the information, he will tell the House so," Albert Gallatin remarked that "then a question may arise whether they shall get at those secrets whether he will or no." 5 ANNALS OF CONG. 436 (1796) (remarks of Albert Gallatin). After Washington refused to comply with the resolution, however, the President's critics justified their demand for a debate on his message solely on the ground that "if the House were not convinced by [the President's] reasons for refusing to comply] . . . then it would be proper that they should present to the public their reasons for differing with him." *Id.* at 762 (remarks of William B. Giles); see also *id.* at 763 (remarks of John Heath), 765 (remarks of Joseph B. Varnum), 765-66 (remarks of Jeremiah Crabb), 768 (remarks of William Findley). Gallatin himself conceded that the justification for further debate was not the President's action, but his arguments, which Gallatin took as a reflection on the House's motives. See *id.* at 764 (remarks of Albert Gallatin). Thomas Blount made a cryptic remark that may have hinted at the possibility of taking action in response to Washington's refusal, but later described the purpose of further discussion as ensuring that "the people may be rightly informed, that they may see that the House is attempting no encroachment." *Id.* at 763 (remarks of Thomas Blount); cf. *id.* at 762 (remarks of Thomas Blount) ("Perhaps, also . . . a consideration of the [President's] Message might lead to some further measure proper to be adopted").

Washington himself anticipated that the House majority would make "a fresh demand, with strictures," and apparently was prepared to resist. See Letter from George Washington to Alexander Hamilton (Mar. 31, 1796), in 20 PAPERS OF ALEXANDER HAMILTON, *supra* note 52, at 104.

bers believed the President would possess some authority to determine whether to transmit documents falling within the resolution's scope.<sup>116</sup>

The most distinguished constitutionalist in the House, James Madison, played a somewhat equivocal role in the debate on Livingston's motion, but clearly agreed that the President could withhold documents if he deemed it proper to do so. Madison was deeply troubled by the politics of the motion, apparently fearing that it would play into the hands of the Federalists,<sup>117</sup> and he continued to adhere to the principle of executive control over diplomatic papers that he had endorsed in 1794. On the first day of the debate, Madison rose to stress the need for displaying "a proper delicacy to the other departments of Government" and to avoid "even the appearance of encroaching on the Constitutional rights of the Executive."<sup>118</sup> He therefore moved to amend the motion to except "so much of said papers as, in his judgment, it may not be consistent with the interest of the United States, at this time, to disclose."<sup>119</sup> The House adjourned soon thereafter, and the following day rejected Madison's amendment, the majority apparently made up of the votes of the more radical proponents of the motion combined with those of the motion's opponents.<sup>120</sup> After the motion was approved, with Madison

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116. See SOFAER, *supra* note 14, at 88 ("The debate also shows that members widely shared the view that the President had discretion to decline to furnish information requested."). An opponent of the motion later asserted without contradiction that the motion's supporters had conceded that "the PRESIDENT would exercise his discretion with respect to sending the papers." 5 ANNALS OF CONG. 768 (1796) (remarks of William Smith).

117. The day before the debate began, Madison optimistically wrote Jefferson that "[t]he policy of hazarding [Livingston's motion] is so questionable that he will probably let it sleep or withdraw it." Letter from James Madison to Thomas Jefferson (Mar. 6, 1796), in 16 THE PAPERS OF JAMES MADISON 247 (J.C.A. Stagg et al. eds., 1989).

118. 5 ANNALS OF CONG. 437-38 (1796) (remarks of James Madison).

119. *Id.* at 438.

120. See Letter from James Madison to James Monroe (Apr. 18, 1796), in 16 PAPERS OF JAMES MADISON, *supra* note 117, at 333 (noting that Madison's amendment "was opposed by the whole Treaty party, who being joined by the warmer men on the other side succeeded in rejecting it"); see also Letter from Fisher Ames to Christopher Gore (Mar. 11, 1796), in 2 WORKS OF FISHER AMES 1138 (W.B. Allen ed., Liberty Classics 1983) (1854) (stating that the Federalists "refused to accept Madison's amendment"). After this defeat, Madison made only one other sub-

voting for it, and Washington declined to comply, Madison became an active critic of the rationale behind Washington's lack of compliance, while reiterating his acknowledgement of the President's discretion to withhold sensitive information.<sup>121</sup>

The representatives who asserted the existence of presidential discretion over the disclosure of the Jay Treaty papers did so on a variety of grounds. Several members linked the President's authority to his overall control over the conduct of the executive branch's business.<sup>122</sup> It is possible that some members understood such presidential discretion as a nonconstitutional privilege or rule of prudence, subject to a legislative power of override, but others clearly stated the President's authority to be a corollary of the Constitution's general separation of powers: "[I]t must also be admitted that each department of Government ought to be the sole judge when to make any part of its proceedings public."<sup>123</sup> This was, apparently, Madison's view.<sup>124</sup>

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stantive speech, a somewhat baroque exposition of the possible interpretations of the relationship between the treaty-making power of the President and Senate and the legislative power of Congress. See 5 ANNALS OF CONG. 487-95 (1796) (remarks of James Madison). Fisher Ames, a vigorous opponent of the motion, dismissed Madison's speech as "cobweb," saying Madison "stated five constructions of the Constitution, and proceeded to suggest the difficulties in each, but was strangely wary in giving his opinion. Conscience made him a coward." Letter from Fisher Ames to Christopher Gore (Mar. 11, 1796), in 2 WORKS OF FISHER AMES, *supra*, at 1137-38.

121. See 5 ANNALS OF CONG. 773 (1796) (remarks of James Madison) (stating that he was "ready to admit that the Executive had a right, under a due responsibility . . . to withhold information, when of a nature that did not permit a disclosure of it at the time"). Madison later explained that he voted for Livingston's motion despite his belief that it was phrased "in terms too peremptory and unqualified" because he was "taking for granted that the President would exercise his responsible discretion on the subject." Madison, Detached Memoranda, *supra* note 13, at 545.

122. See 5 ANNALS OF CONG. 436 (1796) (remarks of Albert Gallatin) (arguing that the resolution does not "lay claim to the secrets of the Executive"), 449 (remarks of John Swanwick) (stating that the "House were daily in the habit of calling for information in this way" that the President "could withhold if not proper to be given"), 656 (remarks of Joshua Coit) (explaining that the "House had a right to call for any papers which might throw light on their deliberations. But . . . there was a discretion to be used by the Executive in giving up papers in his hands").

123. *Id.* at 453 (remarks of Nathaniel Smith); see also *id.* at 460-61 (remarks of Robert Goodloe Harper), 642 (remarks of John Williams); Letter from Alexander Hamilton to George Washington (Mar. 7, 1796), in 20 PAPERS OF ALEXANDER HAMILTON, *supra* note 52, at 68-69 (noting that presidential discretion to determine "how far and where to comply in such cases . . . is essential to preserve the limits

The most frequently asserted basis for executive discretion based the President's power to control the disclosure of documents on his constitutional authority over the conduct of foreign affairs. In a long, elaborate speech on the second day of the debate, William Smith opened this theme by attacking the resolution for its "tendency . . . indirectly to break down the Constitutional limits between the Executive and Legislative Departments."<sup>125</sup>

The Constitution had assigned to the Executive the business of negotiation with foreign Powers; this House can claim no right by the Constitution to interfere in such negotiations; every movement of the kind must be considered as an attempt to usurp powers not delegated, and will be resisted by the Executive; for a concession would be a surrender of the powers specially delegated to him, and a violation of his trust.<sup>126</sup>

Like Secretary Jefferson in 1790 and Attorney General Bradford in 1794, Representative Smith assumed that the conduct of foreign affairs requires the ability to communicate confidentially. Also like Jefferson and Bradford, he did so in terms that strongly implied that the President formulates as well as executes the Republic's foreign policy.<sup>127</sup> Smith's remarks about the executive's autonomy in the area of foreign affairs, furthermore, were not based solely on the exclusion of the House from the treaty-making process. His discussion of the President's relation to the agents he employs to conduct diplomacy made it plain

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between the Legislative and Executive Departments").

124. Madison explained after Washington refused to transmit any Jay Treaty papers that "[i]f the Executive conceived that, in relation to his own department, papers could not be safely communicated, he might, on that ground, refuse them, because he was the competent though a responsible judge within his own department." 5 ANNALS OF CONG. 773 (1796) (remarks of James Madison).

125. *Id.* at 440 (remarks of William Smith).

126. *Id.*

127. *See id.* at 441-42 ("Diplomatic transactions are in all countries of a secret nature; in the process of negotiation, many things are necessarily suggested, the publication of which may involve serious inconvenience and disadvantage to the parties negotiating. Our Constitution has, therefore, wisely assigned this duty to the Executive.").

that the Senate is equally excluded from the negotiation process, its role being limited to its power to approve or reject whatever agreements the President chooses to present to it.<sup>128</sup>

Other speakers echoed Smith's association of the President's power to withhold Jay Treaty documents with his independent constitutional authority over foreign affairs.<sup>129</sup> William Vans Murray, for example, explained that the Constitution had made a "grant of power, which is designated to present an efficient organ of sovereignty, through which the foreign relations of the Union are to be preserved for our use, and recognised by others."<sup>130</sup> While "the Treaty power" as a whole "is exclusively given to the PRESIDENT and Senate," it is the President, "as the organ of the nation's sovereignty," who has constitutional authority over both the beginning and the end of the process.<sup>131</sup> It is "the President [who is] to treat upon" the subjects of negotiation, and equally the President who alone has the "power to consent" to a treaty and thus make it bind this nation and be the "supreme law of the land."<sup>132</sup>

No where in that explicit and luminous body of our Government [i.e., the Constitution] is there to be found an expression that gives a right to Congress to negotiate or to make

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128. The power to negotiate treaties is one of the "rights which the PRESIDENT has derived from the people, as their representative, and which he exercises for their benefit. In the business of Treaties, the Constitution has provided no other check than the requisite concurrence of the Senate, and the right of impeachment by this House." *Id.* at 442; see also *id.* at 440 (noting that the Constitution delegates "the Executive [power] to the PRESIDENT," including the power to make treaties, "but they must be, for greater security, approved by two-thirds of the Senate"). For Smith's views on the President's freedom from Senate intrusion in the negotiating process, see the long paragraph in *id.* at 441.

129. See, e.g., *id.* at 458 (remarks of Robert Goodloe Harper) (arguing that the resolution "was an improper and unconstitutional interference with the Executive department" because making treaties is "the proper business of the Executive"), 475 (remarks of Thomas Hartley), 515 (remarks of Theodore Sedgwick), 573 (remarks of Benjamin Bourne) (stating that the House had no power "to make or to control the public will in any of our relations with foreign nations," but that the "PRESIDENT, qualified [by the Senate's advice and consent power] had expressly, and none else had such power").

130. *Id.* at 687 (remarks of William Vans Murray).

131. *Id.* at 687, 692.

132. *Id.*

Treaties. This power is classed with the Executive power expressly, and must exclude the Legislature. . . . There must exist somewhere a power, an organ to preserve these relations [to other nations], to fulfil the duties, and discharge the obligations which flow from the Law of Nations. . . . The Constitution not only recognises this collective and essential capacity of the American nation, but organizes it for action in a way that scarcely admits of even ingenious misconstructions; it has placed it in the Executive, who, by and with the advice of two-thirds of the Senate, can make Treaties.<sup>133</sup>

Even Albert Gallatin, the intellectual leader of the motion's proponents, conceded that the actual conduct of foreign affairs was beyond the authority of the House or Congress as a whole: "the power claimed by the House was not that of negotiating and proposing Treaties; it was not an active and operative power of making and repealing Treaties; . . . it was only a negative, a restraining power on those subjects over which Congress had the right to legislate."<sup>134</sup>

The President's power to withhold diplomatic documents thus is a necessary corollary of his authority to conduct negotiations and to preserve the confidentiality of the policy goals he seeks through diplomacy.<sup>135</sup> For Murray, for Smith, and for a signifi-

133. *Id.* at 688-89. Like Smith, Murray saw the Senate's treaty-making role as an ancillary check on an essentially executive power. *See id.* at 692-93 (stating that the Constitution gives the President "the power to make Treaties" on the condition that he adheres to "the mode pointed out as essential to his power of consenting"—the Senate's advice and consent).

134. *Id.* at 745 (remarks of Albert Gallatin).

135. Murray denounced Livingston's resolution for "affect[ing] the secrets which ought to be kept from foreign Powers. [The resolution] might lead to a disclosure, to foreign nations, through this House, of certain points in our foreign relations, and in the estimate of our own domestic interests, that might do us mischief." *Id.* at 430 (remarks of William Vans Murray). Bear in mind that Murray was discussing secrets possibly to be found in executive branch documents such as Washington's instructions to Jay; it is, therefore, the executive's views on "our foreign relations" and the executive's "estimate of our own domestic interests" that are at issue. *Cf. id.* at 612 (remarks of Uriah Tracy) (stating the resolution's call for diplomatic papers was novel and denying that it "was similar, in point of principle, to [the practice] of calling on Heads of Departments for papers and documents to assist the House in Legislative business"), 717-25 (remarks of Chauncey Goodrich); Letter from Alexander Hamilton to George Washington (Mar. 7, 1796), in 20 PAPERS OF ALEXANDER HAMILTON, *supra* note 52, at 68 ("A discretion in the Executive Department how far and

cant number of their vocal colleagues, Livingston's motion implicated the Constitution's fundamental distribution of powers relating to foreign affairs: "The Executive also had an undoubted Constitutional right, and it would be his duty to exercise his discretion on this subject, and withhold any papers, the disclosure of which would, in his judgment, be injurious to the United States."<sup>136</sup> Theophilus Bradbury argued that:

The PRESIDENT . . . represents the people as their executive agent, and is possessed of all executive power, and the power of making Treaties. The true question [presented by the motion] was, shall one constituted representative authority usurp the power and control the acts assigned by the Constitution to another representative authority of the same free people? They certainly ought not.<sup>137</sup>

On March 24, the House approved Livingston's motion by a 62-37 vote, and the resolution was presented to President Washington the following day.<sup>138</sup> On March 30, Washington responded with a message refusing to transmit any of the requested papers, on the ground that the confidential "nature of foreign negotiations" and the Constitution's deliberate limitation of the treaty power to the President and Senate demanded that he refuse "to establish a dangerous precedent" by giving the House access to "all the papers respecting a negotiation with a foreign Power."<sup>139</sup> Washington's hardline response, and his invocation of the proceedings of the Philadelphia convention in support of his constitutional views, provoked another vigorous debate over the House's powers, and another resolution, approved on April 7, asserting the House's power to decline to appropriate funds for the Treaty.<sup>140</sup> In the end, though, the House voted—by a razor-thin majority—to approve the funds anyway.<sup>141</sup>

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where to comply in such cases is essential to the due conduct of foreign negotiations . . .").

136. 5 ANNALS OF CONG. 675 (1796) (remarks of James Hillhouse).

137. *Id.* at 552 (remarks of Theophilus Bradbury).

138. *See id.* at 760.

139. *Id.* (message of President George Washington).

140. *See id.* at 771-72, 781-82.

141. *See id.* at 1294 (recording a vote in the affirmative of 51 to 48). Three weeks after Washington's message, Madison claimed that "[t]he prevailing belief" had been

From the perspective of institutional precedent, the Jay Treaty episode came to an uncertain conclusion. Washington claimed the authority to withhold diplomatic correspondence, and the House made no effort to compel him to act otherwise. At the same time, the House did not concede the legitimacy of Washington's refusal to comply, and asserted in turn its authority to refuse to appropriate funds, although it did not act on the authority claimed. The debate over Livingston's motion, however, is of great importance to the enquiry underway in this Article, because it provides further evidence of the existence in the Founding-era of a view of the Constitution that gives to the President independent authority over the conduct of foreign relations. Many contributors to the debate echoed themes familiar from the earlier events examined by this Article: the textual argument that the conduct of foreign affairs is "executive" by definition; the functional argument that the nature of diplomacy makes the executive branch the most efficient locus of authority over foreign affairs and that the Constitution consequently should be read to place that authority in the President; the

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that he would send a part if not the whole of the papers applied for. If he thought any part improper to be disclosed, or if he wished to assert his prerogative without coming to a rupture with the House, it was seen to be easy for him to avoid that extremity by that expedient.

Letter from James Madison to James Monroe (Apr. 18, 1796), in 16 PAPERS OF JAMES MADISON, *supra* note 117, at 333. Madison may have underestimated the extent to which Washington's Federalist advisers and allies preferred a blanket refusal. See Letter from Alexander Hamilton to George Washington (Mar. 28, 1796), in 20 PAPERS OF ALEXANDER HAMILTON, *supra* note 52, at 84-85 (noting that "it will be best, after the usurpation attempted by the house of Representatives, to send none & to resist in totality"); Letter from Alexander Hamilton to George Washington (Mar. 26, 1796), in 20 PAPERS OF ALEXANDER HAMILTON, *supra* note 52, at 82 (maintaining that "the Papers ought all to be refused"); Letter from Alexander Hamilton to George Washington (Mar. 7, 1796), in 20 PAPERS OF ALEXANDER HAMILTON, *supra* note 52, at 68 ("The opinion of those who think here is, that if the motion succeeds, it ought not to be complied with."); Letter from Fisher Ames to Christopher Gore (Mar. 11, 1796), in 2 WORKS OF FISHER AMES, *supra* note 120, at 1138 (stating before the resolution was approved that Washington "may, and I hope he will, set down his foot, and refuse them"). Within the cabinet, only Attorney General Charles Lee favored compliance. See 20 PAPERS OF ALEXANDER HAMILTON, *supra* note 52, at 105 n.3.

On the aftermath of Washington's refusal to comply with the resolution, see ELKINS & MCKITRICK, *supra* note 48, at 445-49.



assertion of presidential control over the disclosure of sensitive diplomatic information, with its clear implication that the legislative branch is not expected or entitled to have general access to such information. On occasion, finally, there are suggestions that the President's authority with respect to foreign affairs includes or implies special responsibility for the security of the Republic, although the possible connection between the conduct of foreign affairs and the President's powers as Commander-in-Chief intimated in the *Little Sarah* case was not explored.<sup>142</sup>

The Jay Treaty debates also provide additional details about the scope of the foreign affairs power that some Founders believed that the Constitution delegated exclusively to the President. Both friends and foes of Livingston's motion made it clear that they understood the President to have independent responsibility for the goals American diplomats pursued,<sup>143</sup> and the

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142. For example, James Holland, a Republican and a supporter of Livingston's motion, distinguished commercial treaties from treaties of peace. See 5 ANNALS OF CONG. 546-47 (1796) (remarks of James Holland). The former could best be pursued "by an association of the three branches of Government [the House, Senate and President]." *Id.* at 547. Holland continued:

[T]he Executive had absolute power to make peace, as by the Constitution he is declared Commander-in-Chief of all the Armies, his situation enabled him to be the best judge of the forces and of the force he had to contend with, and as secrecy was necessary to effecting a Treaty of Peace, that power was properly vested in him, guarded by two-thirds of the Senate.

*Id.* at 546-47. According to Holland, therefore, the question of whether to seek peace—surely one of the most important foreign policy issues imaginable—is exclusively presidential. At least as reported, his language also suggests that the Senate's role would be confined to preventing the President from committing the nation to an improvident treaty.

For other statements linking foreign affairs and national security, see *id.* at 718 (remarks of Chauncey Goodrich) (stating that the "primary end of Treaties, or the chief motive for making them, are to protect and advance our national interests . . . [and] to guard ourselves against aggressions within our jurisdiction or elsewhere"); Alexander Hamilton, Draft Message to the House of Representatives (Mar. 29, 1796), in 20 PAPERS OF ALEXANDER HAMILTON, *supra* note 52, at 100 (arguing that the treaty-making power is "necessarily" broad "else it could not answer those purposes of national security and interest in the external relations of a Country for which it is designed").

143. In addition to the speeches cited *supra* note 113, see 5 ANNALS OF CONG. 589 (1796) (remarks of William Findley) ("[The] negotiating part of making Treaties is partly of an Executive nature . . . and is . . . vested in the PRESIDENT and the Senate. . . . [T]he power of negotiating . . . includes . . . the appointment of envoys

motion's opponents defined the objects on which the President could negotiate—and thus the substantive matters as to which the President could determine the foreign policy objectives of the United States—very broadly.<sup>144</sup> At the same time, executive responsibility in the formulation and pursuit of foreign policy was described as part of an overall constitutional structure that accords Congress significant, but different, powers relating to foreign affairs.<sup>145</sup> What was absent from the debate is of great significance: Despite the great vigor and intellectual energy with which the Republican spokesmen advocated an expansive role for the House (and Congress) in the implementation of treaties, they seldom, if ever, made statements easily read to support the late twentieth-century conventional wisdom that Congress enjoys constitutional primacy in the formulation and direction of foreign policy.

## V.

The best-known early document that appears to accord the President broad constitutional authority over foreign affairs is the speech then-Representative John Marshall gave in the House of Representatives on March 7, 1800, during a debate on the so-called Jonathan Robbins (or Thomas Nash) case.<sup>146</sup> In the speech, Marshall described the President as “the sole organ of

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and instructing them . . . .”), 673 (remarks of James Hillhouse) (noting that “[t]he PRESIDENT has the power of sending Ambassadors or Ministers to foreign nations to negotiate Treaties, or for other purposes”).

144. See, e.g., 5 ANNALS OF CONG. 516-17 (1796) (remarks of Theodore Sedgwick), 550-51 (remarks of Theophilus Bradbury), 718 (remarks of Chauncey Goodrich).

145. See, e.g., *id.* at 649 (remarks of John Williams) (stating that it was “prudent and right” for the President to inform the Senate of “instructions which he had given his Ministers” on the Jay Treaty, but the President had not “diminished his power by asking advice”), 673-74 (remarks of James Hillhouse) (noting that “the PRESIDENT has the power of sending Ambassadors or Ministers to foreign nations to negotiate Treaties, or for other purposes, [but] it is equally clear that if no money is appropriated for that purpose, he cannot exercise the power”).

146. See John Marshall, Speech (Mar. 7, 1800) [hereinafter Marshall Speech], in 4 THE PAPERS OF JOHN MARSHALL 82, 104 (Charles T. Cullen ed., 1984). I shall refer to this edition of the speech, which is based on the corrected version of the speech that was published as a pamphlet, rather than to the parallel text in 10 ANNALS OF CONG. 596-618 (1800).

the nation in its external relations, and its sole representative with foreign nations"<sup>147</sup>—language that is obviously congenial to those seeking to defend independent presidential authority over the conduct of foreign affairs. The importance of understanding what Marshall actually meant by this expression stems in part from his personal stature as a constitutionalist, but perhaps even more because of the praise that has been accorded over time to the speech. Marshall's own contemporaries viewed it as a masterful argument: Albert Gallatin, one of the leading Republican speakers in the debate, reportedly rejected pleas to speak in response to the speech. "Gentlemen," said Gallatin, "answer it yourself. For my part, I think it is unanswerable."<sup>148</sup> Thomas Jefferson, no uncritical admirer of Marshall even in 1800, summarized the debate by writing that "[Edward] Livingston, [John] Nicholas & Gallatin distinguished themselves on one side & J. Marshall greatly on the other,"<sup>149</sup> and Marshall's speech alone among these efforts was immediately published as a pamphlet.<sup>150</sup> Nineteenth-century commentary was glowing,<sup>151</sup> and the fifth volume of Henry Wheaton's Supreme Court Reports included the speech as an appendix, which must have suggested to many readers that the speech enjoyed something of the authority of a judicial opinion.<sup>152</sup>

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147. Marshall Speech, *supra* note 146, at 104.

148. JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 262 (1996).

149. Letter from Thomas Jefferson to James Madison (Mar. 8, 1800), in 17 THE PAPERS OF JAMES MADISON 368 (David B. Mattern et al. eds., 1991).

150. See 4 PAPERS OF JOHN MARSHALL, *supra* note 146, at 82 (noting publication in Philadelphia in 1800). It is a striking fact that, of the major efforts by speakers on either side of the issue, only Marshall's speech survives. The *Annals of Congress* note lengthy speeches by James Bayard for the Federalists and John Nicholas and Albert Gallatin for the Republicans, see 10 ANNALS OF CONG. 595, 596 (1800) (remarks of James Bayard, John Nicholas, and Albert Gallatin), as well as a response by Nicholas to Marshall, see *id.* at 619 (remarks of John Nicholas), but only Marshall's remarks are reproduced.

151. See, e.g., HENRY ADAMS, THE LIFE OF ALBERT GALLATIN 232 (Peter Smith 1943) (1879) ("[Marshall's speech] stands without a parallel in our Congressional debates."); Joseph Story, *Life, Character, and Services of Chief Justice Marshall* (1835), reprinted in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 639, 672 (Da Capo Press 1972) (William W. Story ed., 1852) (noting that Marshall's speech was "one of the most consummate juridical arguments which was ever pronounced in the halls of legislation . . . [a] *Réponse sans réplique*, an answer so irresistible, that it admitted of no reply").

152. See *Speech of the Honourable John Marshall*, 18 U.S. (5 Wheat.), app. note

In later years the Court's members have reenforced that impression by express reliance on the speech as an authoritative statement of law. Justice George Sutherland's opinion for the Court in *United States v. Curtiss-Wright Export Corp.*<sup>153</sup> quoted Marshall's "great argument" as crucial support for its far-reaching description of the President's "plenary" foreign affairs powers,<sup>154</sup> but other, less controversial opinions have cited it for a variety of purposes as well.<sup>155</sup>

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I (1820). Wheaton's reports often included appendices, but they usually "consist[ed] of extended discussions of doctrinal issues" authored by Wheaton or (anonymously) by Justice Story. G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE*, 1815-1835, at 402 (1988). Marshall's speech must have stood out, to its advantage, as a legal authority rather than a work of scholarship. The reason Wheaton printed the speech is unclear. He may have included it because the Robbins episode and the speech itself were cited during arguments by Charles Jared Ingersoll and Thomas Sergeant in *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 82 n.a, 87 n.b (1820). On the other hand, given Wheaton's approach to reporting advocacy, which appears sometimes to have included reshaping or even improving the lawyers' arguments on occasion, the references to Marshall's speech that were attributed to counsel may well have originated with Wheaton. See WHITE, *supra*, at 392-400 (discussing Wheaton's "interventionist reporting"). In light of Story's enthusiasm for the speech and his close relations with Wheaton, it is possible that Story prompted Wheaton to include it in the reports precisely in order to lend the appearance of authority to the speech. Story engaged in similar behavior with respect to other documents the reasoning of which he approved. See, e.g., 1 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 375 & n.6 (Da Capo Press 1970) (1833) (praising and quoting at great length from a letter of James Madison); 2 *id.* at 543 n.1 (quoting many pages from President Andrew Jackson's anti-nullification proclamation).

153. 299 U.S. 304 (1936).

154. See *id.* at 319-20.

155. See, e.g., *Haig v. Agee*, 453 U.S. 280, 291 (1982); *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 475, 551 n.6 (1977) (Rehnquist, J., dissenting); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 766 (1972) (plurality opinion); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 684-85 (1952) (Vinson, J., dissenting) (stating that "this Court [has] had occasion to give its express approval" to Marshall's reasoning); *Fong Yue Ting v. United States*, 149 U.S. 698, 714 (1893) (referring to "the masterly and conclusive argument of John Marshall"); *In re Kaine*, 55 U.S. (14 How.) 103, 112 (1852) (disagreeing with Marshall's views on the executive's authority to extradite someone with statutory authority, but acknowledging that his speech had enjoyed "much celebrity, then and since, for its ability and astuteness"); 137-38 (Nelson, J., dissenting) (discussing at length Marshall's "celebrated speech"); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 539-40 (1838). The reasons for the justices' interest in the speech, and the uses to which they have put its authority, have varied. The point for present purposes is simply that the Supreme Court's repeated praise has increased the practical importance of

In 1971, Justice John Marshall Harlan quoted Marshall's speech and asserted that "[f]rom that time, shortly after the founding of the Nation, to this, there has been no substantial challenge to [Marshall's] description of the scope of executive power."<sup>156</sup> Whatever the case may have been when Harlan wrote his opinion in *New York Times v. United States*, the advocates of congressional primacy in foreign affairs see Marshall's argument in very different terms at the end of the century, specifically, as strong support for their own views about Congress's primacy in the formulation and direction of foreign policy.

Louis Fisher's interpretation of Marshall's remarks is representative. Discussing Justice Sutherland's citation of Marshall in *Curtiss-Wright*, Fisher writes that "Sutherland wrenched Marshall's statement from context to imply a position Marshall never advanced. At no time . . . did Marshall suggest that the President could act unilaterally to make foreign policy. Quite the contrary."<sup>157</sup> Marshall, according to Fisher, plainly argued that foreign policy is formulated through the treaty-making or legislative processes; Marshall's reference to the President's role as "sole organ" referred to the executive's role "in implementing national policy. . . . The President merely *announced* policy; he did not *make* it."<sup>158</sup>

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the speech to discussions of executive responsibility in foreign affairs.

156. *New York Times v. United States*, 403 U.S. 713, 756 (1971) (Harlan, J., dissenting). Marshall's speech, in Harlan's view, was precedent for the proposition that the President enjoys "constitutional primacy in the field of foreign affairs." *Id.* at 756.

157. FISHER, *supra* note 2, at 60.

158. *Id.* at 60-61; see also LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 97 (4th ed. 1997). Mr. Fisher's apparent equating of implementing foreign policy with announcing it seems debatable, but for present purposes his main point is clear. See GLENNON, *supra* note 2, at 24 (suggesting that "what Marshall had foremost in mind was simply the President's role as instrument of communication with other governments" (quoting EDWARD CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957, at 178 (4th ed. 1957))); KOH, *supra* note 2, at 95 (arguing that by "sole organ" Marshall "originally meant [the president's] mastery of our diplomatic communications with the outside world"); WORMUTH & FIRMAGE, *supra* note 2, at 181-82 ("At no time during Marshall's speech did he assert that the President's exclusive power to communicate with other nations on behalf of the United States involved power to make foreign policy.").

In order to decipher what Marshall meant to communicate about the scope of executive power, we must read with care what he actually said, in the context in which he said it. Marshall's speech was one of the culminating efforts in the debate over Jonathan Robbins—or Thomas Nash, the individual's identity being at issue—that consumed much of the House's time for over three weeks in the late winter of 1800.

Thomas Nash was a petty officer in the Royal Navy suspected of committing mutiny and murder on the British frigate *Hermione* in 1797.<sup>159</sup> In 1799, an individual calling himself Jonathan Robbins sailed into Charleston, South Carolina, as a crewmember on board an American merchant ship.<sup>160</sup> Robbins was identified as Nash and taken into federal custody, apparently under a warrant issued by United States District Judge Thomas Bee.<sup>161</sup> The British consul in Charleston requested that Robbins/Nash be extradited to stand trial pursuant to Article 27 of the Jay Treaty.<sup>162</sup> Judge Bee agreed that the evidence of Nash's identity was sufficient to warrant extradition under the Treaty but politely declined to turn Robbins/Nash over, explaining that he could not act under Article 27 without the

159. Both the facts of the Robbins/Nash affair, and its political and constitutional dimensions are discussed in Larry D. Cress, *The Jonathan Robbins Incident: Extradition and the Separation of Powers in the Adams Administration*, 111 ESSEX INST. HIST. COLLECTIONS 99 (1975), and in Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229 (1990).

160. See Wedgwood, *supra* note 159, at 237.

161. See *id.*

162. Article 27 of the Treaty provided that both countries

on mutual requisitions, by them respectively . . . will deliver up to justice all persons, who, being charged with murder or forgery, committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other, provided that this shall only be done on such evidence of criminality, as, according to the laws of the place, where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offence had there been committed.

Treaty of Amity, Commerce and Navigation, Nov. 19, 1794, U.S.-Gr. Brit., art. 27, 8 Stat. 116, 129 (1794).

It is unclear whether Robbins/Nash was arrested at the instigation of the consul and with compliance with Article 27 in mind or for possible violation of the federal statute criminalizing murder and piracy on the high seas. See Wedgwood, *supra* note 159, at 287. In any event, there is no record that he was ever indicted by the federal grand jury. See *id.*

President's sanction.<sup>163</sup> The British minister to the United States then asked Secretary of State Timothy Pickering to obtain President John Adams's approval.<sup>164</sup> Replying to Pickering's request for instructions, Adams agreed with Bee that the case was a proper one for extradition but expressed doubt about the President's authority to "direc[t] the judge, to deliver up the offender. . . . I have no objection to advize and request him to do it."<sup>165</sup> Pickering then wrote Bee and communicated the President's "advice and request" that Thomas Nash [] may be delivered up" to the British authorities.<sup>166</sup> After some delay,<sup>167</sup> Bee ordered Robbins/Nash transferred to British custody, and in mid-August the Royal Navy convicted and executed him.<sup>168</sup>

Recent scholars have generally attributed the House's interest in the Robbins/Nash matter to a largely partisan Republican effort to embarrass the Adams administration by any means possible, and the actual course of the House debate tends to confirm this suspicion.<sup>169</sup> In the early stages of the House's delib-

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163. See Wedgwood, *supra* note 159, at 288.

164. See *id.* at 288-89.

165. Letter from John Adams to Timothy Pickering (May 21, 1799) in ADAMS PAPERS, LETTERS RECEIVED AND OTHER LOOSE PAPERS, roll 119 (Mass. Historical Soc'y microfilm ed.), *quoted in* Wedgwood, *supra* note 159, at 290.

166. Letter from Timothy Pickering to U.S. District Judge Thomas Bee (June 3, 1799), in 10 ANNALS OF CONG. 516 (1800); see also Letter from Robert Liston to Timothy Pickering (May 23, 1799), in 10 ANNALS OF CONG. 516 (1800) (requesting Pickering to seek the President's "orders that the said Thomas Nash be delivered up to justice" because "Judge Bee and the Federal Attorney were of opinion that he could not with propriety be delivered up, without a previous requisition on my part made to the Executive Government of the United States"); Letter from John Adams to Timothy Pickering (May 21, 1799), *quoted in* Wedgwood, *supra* note 159, at 290.

167. The delay was initially at the request of the British consul, but was extended when Robbins/Nash swore out an affidavit that he was a native-born United States citizen and had been impressed into the Royal Navy—facts that if true would have persuaded most Americans, including John Marshall, that he should not be extradited under the Treaty. See Marshall Speech, *supra* note 146, at 108-09; Wedgwood, *supra* note 159, at 294-99.

168. See Wedgwood, *supra* note 159, at 304.

169. As the *Marshall Papers*' editors argue:

Much of the time at this session [of Congress] was spent in lengthy partisan debate. Political issues were seized upon by Republicans as a way to embarrass Federalist congressmen and the administration, which caused delays in the consideration of more serious legislative issues. Attention, as always, was given to public opinion and the upcoming presidential election.

erations, Republicans made much of the possibility that the Adams administration had recklessly given up a persecuted American to his death at the hands of those who had kidnapped him.<sup>170</sup> As the debate proceeded and the evidence appeared to mount that Robbins/Nash had lied about his citizenship, the Republicans shifted their focus, first to a charge that the administration's conduct with respect to Robbins/Nash was culpably different from its handling of an earlier incident,<sup>171</sup> and then to the constitutional argument set forth in a set of resolutions proposed by Edward Livingston.<sup>172</sup>

Livingston's argument, as presented in his resolution, was quite straightforward. The Constitution "declares that the Judiciary power shall extend to all questions arising under the Constitution, laws, and treaties, of the United States, and to all cases of admiralty and maritime jurisdiction."<sup>173</sup> Therefore, the

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Congressional Career, 4 PAPERS OF JOHN MARSHALL, *supra* note 146, at 35 (editorial note). The *Marshall Papers*' editors have provided an admirable and succinct summary of the course of the Republicans' charges. *See id.* at 35-36. Marshall himself was decidedly of the opinion that the Robbins/Nash debate was "for the purpose principally of affecting the next election of President." Letter from John Marshall to Reuben George (Mar. 16, 1800), in 4 PAPERS OF JOHN MARSHALL, *supra* note 146, at 114; *see also* SMITH, *supra* note 148, at 258-59 (providing an account of the Republican response to the Robbins/Nash matter).

170. *See* SMITH, *supra* note 148, at 605 n.146. Marshall addressed the citizenship question only at the end of his speech, and explained that although it was irrelevant to the question before the House, the "subject . . . was so calculated to interest the public feelings, that he must be excused for stating his opinion on it." Marshall Speech, *supra* note 146, at 108. Ironically, it now appears plausible that Robbins/Nash actually was an American. *See* Cress, *supra* note 159, at 116-18 (discussing evidence suggesting that Robbins was an American and concluding that Britain's claim to Robbins was "doubtful").

171. In 1798, three seamen accused of participating in the *Hermione* mutiny were tried and acquitted of piracy (and in one case murder) in a federal circuit court in New Jersey. Professor Wedgwood has carefully sorted through the convoluted history of the Adams administration's involvement in this prosecution, and in the British efforts to secure extradition of the defendants. *See* Wedgwood, *supra* note 159, at 268-86.

172. *See* 10 ANNALS OF CONG. 532-33, 618-19 (1800).

173. *Id.* at 533. Livingston also cited the requirements of Article III, section 2, clause 3, respecting trial by jury and the location of the trials of crimes committed outside the limits of any state, *see id.*, which Marshall construed to be an additional premise supporting Livingston's second proposition, *see* Marshall Speech, *supra* note 146, at 95. Marshall responded to this reasoning with a brisk series of observations: Article III plainly has reference only to criminal trials in "our own courts," a deci-



legal issues raised by the accusations against Robbins/Nash and the British extradition request—whether the alleged crime was committed within exclusive British jurisdiction, whether the case fell within Article 27 of the Jay Treaty, and whether Robbins/Nash's claim of United States citizenship was properly addressed—"are all matters exclusively of judicial inquiry, as arising from treaties, laws, Constitutional provisions, and cases of admiralty and maritime jurisdiction."<sup>174</sup> The conclusion followed, according to Livingston, that Adams's "decision of those [exclusively judicial] questions . . . against the jurisdiction of the courts of the United States," was "a dangerous interference of the Executive with Judicial decisions," and Judge Bee's compliance was "a sacrifice of the Constitutional independence of the Judicial power."<sup>175</sup> Livingston's motion thus did not directly invite the House to take a position on whether Article 27 of the Jay Treaty applied; its censure of the President rested entirely on the claim that he had violated the constitutional separation of powers by usurping the role of the judiciary.

Marshall introduced his March 7 speech with an extensive argument that "the case of Thomas Nash, as stated to the President, was completely within the 27th article of the treaty."<sup>176</sup> His reason for dealing at length with that issue was, at least in part, the fact that Gallatin, Nicholas, and Livingston had argued to the contrary.<sup>177</sup> Doing so, however, also enabled Marshall to focus attention on the fact that the only claim actually before the House was that the President had acted *incorrectly*, in terms of the distribution of powers in the American governmental system, in ensuring that the United States acted *correctly* with

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sion to extradite an accused pursuant to a treaty is not a criminal trial but the performance "of a national compact"; Article III does not even extend to military and naval trials within the United States military; the act of "sending [Robbins/Nash] out of the United States" was not a punishment for the crime of which he was accused. *Id.* at 101-03.

174. 10 ANNALS OF CONG. 533 (1800).

175. *Id.*

176. Marshall Speech, *supra* note 146, at 83.

177. The speeches by Gallatin, Nicholas, and Livingston are not extant, but are mentioned in Marshall's speech. See *id.* at 84, 89-90 (Gallatin), 87-88 (Nicholas), 93-94 (Livingston).

respect to "an act to which the American Nation was bound by a most solemn compact."<sup>178</sup>

Marshall began his refutation of this narrow (and indeed slightly odd) accusation with a summary of his conclusion and a statement of the common ground between his views and those of the Republicans. In Marshall's judgment, "the case was a case for executive and not judicial decision," and thus the resolutions were mistaken, but he came to that conclusion on the basis of the same assumptions about the importance of separation of powers and "the duty of each department to resist the encroachments of the others" trumpeted by Livingston.<sup>179</sup> Livingston, however, had misunderstood his own premises, a misunderstanding evidenced by his motion's inadvertent but "very material mis-statement" of the language of the Constitution.<sup>180</sup> The proposed resolutions asserted that the Constitution extends "the judicial power . . . to *all questions* arising under the constitution, treaties and laws;" in fact, however, Article III vests the judiciary with power over "*all cases in law and equity* arising under the constitution, laws and treaties of the United States."<sup>181</sup> The difference between Livingston's wording and that of the Constitution was not merely verbal: the activities of both Congress and the executive regularly and indeed almost unavoidably require each to resolve *questions* about the meaning and application of the Constitution, laws and treaties. In doing so, they remain within the sphere of "political power" that the Constitution confers on them and denies to the courts, which are limited, as the actual language of Article III reflects, to the resolution of *cases*, "forensic litigation" between parties subject to the compulsive authority of the judiciary.<sup>182</sup>

Marshall gave several examples of questions arising under treaties, yet plainly beyond judicial competence: "the establishment of the boundary line between the American and British dominions" under the Jay Treaty; the question addressed by the

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178. *Id.* at 94; see also *id.* at 83-94 (discussing the Article 27 issue).

179. *Id.* at 95.

180. *Id.*

181. *Id.*

182. See *id.* at 95-96.

President in 1793 regarding whether the 1778 alliance with France involved the United States in the French Republic's war with Britain and Holland; and the decisions of the Washington administration about the legal status of "prizes [captured by belligerent vessels] within the jurisdiction of the United States [and of] privateers fitted out in their ports."<sup>183</sup> In each case, it was clear, according to Marshall, that a resolution of the proper interpretation of a treaty or of the principles of the law of nations was indispensable to the exercise of political power by one or both of the political branches.<sup>184</sup> In such cases, Livingston's own premise about the duty to resist "encroachments" would require the relevant political branch to resist judicial usurpation of the political branch's authority to decide the questions of law concerned, a duty equally applicable to the authority to address extradition requests under the Jay Treaty.<sup>185</sup>

The *casus foederis* of the guaranty [the alliance with France] was a question of law but no man would have hazarded the opinion; that such a question must be carried into court, and only be there decided. So the *casus foederis* under the 27th article of the treaty with Britain is a question of law, but of political law. The question to be decided is whether the particular case proposed be one, in which the nation has bound

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183. *Id.* at 96-98.

184. *See id.* at 96-101.

185. Marshall discussed the handling of prizes at considerable length because the Republicans had relied heavily on the Washington administration's actions as precedent for their claim that the judiciary had exclusive jurisdiction to decide such questions. *See id.* at 98-101. Marshall admitted that the administration had disclaimed any power to "dismiss or decide upon" a private lawsuit brought in federal court, and that "[u]ltimately it was settled that the fact [where the prize was seized] should be investigated in the courts," *id.* at 101, but he insisted that neither of these facts showed any disavowal of the executive's authority to resolve questions of international law free of judicial interference, *see id.* at 102-04. In fact, the Washington administration expressly asserted the executive's competence to decide cases "brought before the executive as a national demand," *id.* at 99, rather than being filed in court, while the courts acknowledged that their decisions in individual lawsuits should be "regulated by the principles established by the executive department," *id.* at 101. Whether Marshall's argument at this point is entirely satisfactory is beside the point for our purposes; what is significant is his obvious desire to establish as broad a scope for independent executive decisionmaking as the facts would bear.

itself to act, and this is a question depending on principles never submitted to courts.<sup>186</sup>

Therefore the fact that a decision to extradite Robbins/Nash involved "points of law," which Marshall cheerfully admitted, in no way proved that the decision belonged exclusively—or indeed at all—to the courts. Questions of "political law" are necessarily decided by the political branches.

We are now in a position to examine the controversial "sole organ" passage. In the context of Marshall's speech, its function was to explain why the decision to extradite Robbins/Nash was a question of political law, properly decided by the executive rather than the courts. In formulating his argument, Marshall looked to the nature of the matter raising the issue, the functions to be exercised in addressing the issue, and the type of judgment employed in considering the issue. The first issue was simple: the question only arose, Marshall pointed out, because of "a national demand made upon the nation," and thus necessarily lay beyond the jurisdiction of any court.<sup>187</sup>

Furthermore, the governmental tasks involved in addressing a demand for extradition under Article 27 clearly pointed to the executive as the appropriate branch to act. Marshall listed three tasks, each executive by constitutional assignment and constitutional function. First, Britain necessarily made its extradition request to the President because he was the only legitimate channel of official communication between foreign governments and the United States, "the sole organ of the nation in its external relations, and its sole representative with foreign nations."<sup>188</sup> Second, any positive response to an extradition request would require the employment of federal authority to apprehend, hold, and turn over the object of the request.<sup>189</sup> Any exercise of this

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186. *Id.* at 103-04. Compare Marshall's statement a moment earlier that the questions on whether the United States was obligated to return as "illegally seized" prizes "captured within three miles of the American coast, or by privateers fitted out in American ports" were "questions of political law, proper to be decided . . . by the executive and not by the courts." *Id.* at 103.

187. *Id.* at 104 ("Of consequence the demand is not a case for judicial cognizance.").

188. *Id.*

189. *See id.* at 105.

authority is necessarily and constitutionally under the President's supervision, because he "possesses the whole executive power" and "holds and directs the force of the nation."<sup>190</sup> Third, the decision whether to honor an extradition request involves the interpretation and enforcement of the international obligations of the United States. As the parallel example of the prize cases illustrated,<sup>191</sup> by charging the President with the duty to execute treaties and entrusting him with the only effective means ("the force of the nation") of carrying out American obligations in the international arena, the President "is marked out by the constitution" as the branch of government responsible and empowered to act in such a case.<sup>192</sup>

The type of decision involved in responding to an extradition request, finally, confirmed for Marshall the conclusion that "[t]he executive is not only the constitutional department, but . . . the proper department, to which the power in question may most wisely and most safely be confided."<sup>193</sup> Such a decision involves not only a judgment about the correct means of honoring the duties of the United States to other countries and of the American government to the American people,<sup>194</sup> but also consideration of the foreign policy interests of the United States. Under our constitutional structure, according to Marshall, it is the executive, not Congress, that is expected and required to have the knowledge necessary to evaluate those interests:

If at any time policy may temper the strict execution of the contract, where may that political discretion be placed so safely, as in the department, whose duty it is to understand precisely, the state of the political intercourse and connection

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190. *Id.* at 104.

191. Marshall had remarked earlier that the Washington administration's assertion of executive authority to determine the "principles" governing prize cases "is found, on fair and full examination, to be precisely and unequivocally the same, with that which was made in the case under consideration." *Id.* at 101.

192. *Id.* at 104.

193. *Id.* at 105.

194. Marshall reasoned that such judgments belong to "[t]he department which is entrusted with the whole foreign intercourse of the nation, with the negotiation of its treaties, with the power of demanding a reciprocal performance of the article, which is accountable to the nation for the violation of its engagements, with foreign nations, and for the consequences resulting from such violations." *Id.*

between the United States and foreign nations; to understand the manner in which the particular stipulation is explained and performed by foreign nations; and to understand completely the state of the union?<sup>195</sup>

The conclusion to be drawn from these considerations, Marshall stated bluntly, was that

according to the principles of the American government, the question whether the nation has or has not bound itself to deliver up any individual, charged with having committed murder or forgery within the jurisdiction of Britain, is a question the power to decide which, rests alone with the executive department.<sup>196</sup>

Since that question was one "which duty obliged [President Adams] to determine," the executive's request that the federal court deliver Robbins/Nash to the British was plainly "the exercise of [an executive] right [that] was a necessary consequence of the determination of the principal question."<sup>197</sup> The accusation set out in Livingston's resolution that the President's action was "a dangerous interference" with the judiciary therefore was simply incorrect.<sup>198</sup>

The advocates of congressional primacy in foreign affairs and their executive-responsibility opponents are equally correct in thinking Marshall's speech important for their debate, and yet each side is partially mistaken in its reading of Marshall's meaning. The congressional-primacy scholars are correct in their interpretation of the sentence describing the President as "the

195. *Id.* Compare Marshall's description several years later of the issues raised by the prize cases: "The whole was an affair between the governments of the parties concerned, to be settled by reasons of state, not rules of law." 5 JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON 343 (AMS Press 1969) (1807). In this passage, Marshall plainly did not mean that the executive's resort to "reasons of state" excluded consideration of what he called "political law" in 1800: his next sentence referred to the executive's intention of "vindicating its own rights." *Id.* In 1807, as in 1800, Marshall was contrasting questions of political law to be decided by the executive with lawsuits involving individual claims that were cognizable by the courts.

196. Marshall Speech, *supra* note 146, at 106.

197. *Id.* at 106-07.

198. *See id.* at 107.

sole organ of the nation in its external relations":<sup>199</sup> in context, it is clear that Marshall was referring to the President's exclusive constitutional "role as *instrument of communication* with other governments."<sup>200</sup> It is equally clear, however, that they are in error in asserting that Marshall "[a]t no time . . . suggest[ed] that the President could act unilaterally to make foreign policy,"<sup>201</sup> although demonstrating this fact is slightly more complicated. Consider the following:

(1) Marshall expressly agreed with Livingston that "it was the duty of each department to resist the encroachments of the others" into its constitutional responsibilities while stressing the logical corollary that each branch had the duty to respect proper exercises of constitutional authority by the others.<sup>202</sup> The distinction Marshall drew between a presidential order "direct[ing] the judge at Charleston to decide for or against his own jurisdiction," and the actual conduct of the Adams administration is illustrative.<sup>203</sup> The former, hypothetical order would have been "a dangerous interference with judicial decisions and ought to have been resisted," while the executive's actual request that the court conform to the President's decision to honor the British demand was the exercise of an executive "right," to which the court properly conformed.<sup>204</sup> Marshall's position clearly implied that the President was obligated to maintain his autonomy to determine matters properly within the executive's sphere of responsibilities while implementing the decisions of the other branches acting within *their* constitutionally assigned domains: it was the President's "duty" to act on questions committed to him.<sup>205</sup>

(2) The execution of American duties, and the protection of American rights, under treaties and (the prize cases discussion indicated) under the law of nations, is, at least ordinarily, the

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199. *Id.* at 104.

200. GLENNON, *supra* note 2, at 24 (quoting CORWIN, *supra* note 158, at 178 (4th ed. 1957)).

201. FISHER, *supra* note 2, at 60.

202. Marshall Speech, *supra* note 146, at 95.

203. *Id.* at 107.

204. *Id.*

205. *See id.* at 103-08.

constitutional responsibility and duty of the President. Such matters involve questions "the power to decide which, rests *alone* with the executive department".<sup>206</sup> their "political" nature excludes the judiciary from addressing them, and the functions and judgment necessary to resolve them indicate that they belong to the executive rather than the legislative branch. This does not mean that the other branches are entirely disabled from acting in the area. The courts properly may exercise jurisdiction in individual lawsuits over prizes, and Congress properly may legislate the procedures to be followed in addressing extradition requests. Marshall made it clear that the courts are obliged to respect the executive's constitutional role;<sup>207</sup> whether he viewed Congress as similarly obligated is a more complex issue that is discussed below.

(3) Marshall plainly shared the assumption we have met repeatedly that the President alone is responsible for the ordinary conduct of United States foreign affairs, not in the sense that he and his diplomatic subordinates communicate the policy views of Congress, but in terms of making substantive decisions about specific policies to pursue. According to Marshall, it is the President—not Congress or the Senate—who is responsible for understanding "the state of the political intercourse and connection between the United States and foreign nations," as well as "the state of the union"; the President who must decide when to assert American rights in the international arena; and the President who is accountable to the American people for the consequences of foreign policy decisions.<sup>208</sup> In light of all this, it is highly improbable that Marshall intended to limit the President's power to "conduct[t] the foreign intercourse," to "hold and direct the force of the nation," and to "negotiate . . . all [the nation's] treaties," to the mere execution of previously determined congressional policies.<sup>209</sup> When Mar-

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206. *Id.* at 106 (emphasis added).

207. *See id.* at 99, 101.

208. *Id.* at 105.

209. *Id.* at 104-05. Marshall's rejection of Gallatin's argument that extradition is an executive duty but "cannot be performed until Congress shall direct the mode of performance" is relevant in this regard. *Id.* Gallatin argued that the President could not "supply a legislative omission." *Id.* at 105. Marshall replied that "it is not admit-



shall called the President "the sole organ of the nation in its external relations," he did not by those specific words refer to independent presidential authority to make and pursue foreign policy, as some of his later readers have thought.<sup>210</sup> Nonetheless, he did think that the President possesses, as a consequence of our constitutional structure, such authority.

One sentence in Marshall's speech may appear to set in question the interpretation of his views offered by this Article and therefore demands closer attention. Three paragraphs after the "sole organ" language, Marshall asked rhetorically whether the President "[o]ught not . . . to perform the object [prescribed by Article 27 of the Jay Treaty], altho' the particular mode of using the means, has not been prescribed?"<sup>211</sup> He then went on to remark that "Congress unquestionably may prescribe the mode; and Congress may devolve on others the whole execution of the contract: but till this be done, it seems the duty of the executive department to execute the contract, by any means it possesses."<sup>212</sup>

Marshall here made two distinct affirmations about congressional authority. First, Congress "may prescribe the mode," which must mean "the particular mode of using the means," which in turn clearly refers to "[t]he means by which [the Article 27 duty] is to be performed—the force of the nation."<sup>213</sup> Congress, in other words, may regulate the ways in which the President directs the federal government's coercive military authority in the apprehension, detention, and delivery to Britain

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ted or believed that there is such a total omission in this case," and pointed to the Jay Treaty itself as supplying the rule of law that the President was to execute. *Id.* at 104-05. Fisher correctly notes that Marshall's argument at this point does not invoke a unilateral executive power to act, but rather supports the President's power to execute a treaty-made law by the joint action of the President and Senate. See FISHER, *supra* note 2, at 60-61. Even with this limitation recognized, Marshall's remarks refute any claim that he thought Congress possessed plenary control of foreign policy. More importantly, Fisher ignores the implications of Marshall's comments regarding the executive's duty to understand and act on the international relations and national interests of the United States.

210. See, e.g., FISHER, *supra* note 2, at 60-61 (describing Justice Sutherland's misconstrual of Marshall's statements).

211. Marshall Speech, *supra* note 146, at 104.

212. *Id.*

213. *Id.*

of persons found within the jurisdiction of the United States. This assertion is neither controversial nor in contradiction with a claim that the President possesses independent authority in the area of foreign affairs.

Second, Marshall admitted that Congress "may devolve on others the whole execution of the contract."<sup>214</sup> What precisely he had in mind is unclear. If the reference was to the possibility that Congress could by statute direct that Article 27 requests be handled entirely through judicial proceedings, this would not actually divest the executive entirely of responsibility (executive officers would still carry out the courts' orders) and indeed might not imply that the President would not determine the basic principles governing Article 27 extraditions.<sup>215</sup> The same observations would apply if Marshall was contemplating a statute entrusting the final disposition of Article 27 extradition requests to lower ranking executive officers (federal district attorneys, for example). In either case, Marshall's admission was simply a reflection of his belief that each branch, within its own constitutional sphere, may act on matters that are centrally the concern of another branch. Congress's power to legislate with respect to the individual liberty of persons within the jurisdiction of the United States no more contradicts presidential authority to direct United States relations with foreign nations than does the power of the federal courts to review through habeas corpus the executive's detention of someone in response to an extradition request under Article 27.<sup>216</sup> Because Marshall's meaning is unclear, it is impossible to be confident about the implications of his remark, but there is no compelling reason to read this one sentence to contradict the overall tenor of his comments.

The most likely interpretation of Marshall's 1800 speech is that his general assumptions about the constitutional distribution of authority over foreign affairs were similar to those of

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214. *Id.*

215. Recall Marshall's discussion of the prize cases. *See supra* notes 183-85 and accompanying text.

216. *See* Marshall Speech, *supra* note 146, at 106 (stating that an individual whom "the President should cause to be arrested under the treaty . . . may perhaps bring the question of the legality of his arrest, before a Judge by a writ of habeas corpus").

Jefferson in 1790, Washington's cabinet in the various events of 1793-94, and many speakers during the 1796 House debates over an earlier motion by Edward Livingston: Whatever authority Congress or the Senate may have to limit or control presidential discretion, the President ordinarily has responsibility for the direction of United States foreign policy and the initiation of diplomatic efforts. As in the 1793 discussions, furthermore, Marshall drew connections between the President's authority over foreign affairs and his power to direct "the force of the nation."<sup>217</sup>

## VI.

On February 15, 1816, the Senate Committee on Foreign Relations submitted a report to the Senate that is sometimes paired with Marshall's 1800 speech as authority for independent presidential authority over foreign affairs.<sup>218</sup> The report addressed a motion that the Senate give the President detailed advice about the goals to be pursued in United States negotiations with Great Britain.<sup>219</sup> In reporting unfavorably on the motion, the Committee described the President as "the constitutional representative of the United States with regard to foreign nations."<sup>220</sup> As with Marshall's speech, some modern advocates of the congressional-primacy interpretation of the Constitution deny that this language, or the report as a whole, provides support for the executive-responsibility view.<sup>221</sup> In fact, however, the

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217. *Id.*

218. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (quoting Marshall's speech and the Senate Report in conjunction).

219. See SENATE COMM. ON FOREIGN RELATIONS, 14TH CONG., REPORT OF FEB. 15, 1816 [hereinafter SENATE REPORT], reprinted in 8 COMPILATION OF REPORTS OF THE COMM. ON FOREIGN RELATIONS, 1789-1901, at 22-25 (1901).

220. *Id.* at 24.

221. See, e.g., GLENNON, *supra* note 2, at 24 (noting that the Committee "was referring to . . . the President's sole power to *communicate*"); Charles A. Lofgren, *United States v. Curtiss-Wright Export Corp.: An Historical Reassessment*, 83 YALE L.J. 1, 25-26 (1973) (characterizing the Committee's report as including "a mixture of grounds for not instructing the President" and summarizing the basis for the decision as one based on "prudential grounds"). Professor Lofgren's statement that the Committee "implicitly asserted that, pursuant to the Constitution, the Senate could instruct the President" on the goals of negotiation, *id.* at 26, does not seem a plausible reading of the report.

report *does* endorse a view of the Constitution that explicitly accords the President independent authority to make and pursue foreign policy.<sup>222</sup>

In order to grasp fully the significance of the 1816 report, one must read it in the context of the evolving history of the Senate Foreign Relations Committee. Before the end of 1816, the Senate had no standing committees of any sort, and at first no obvious pattern emerged in the Senate's occasional use of select committees to consider foreign affairs issues.<sup>223</sup> However, during the congressional special session of 1807-08, the Senate referred foreign affairs matters to eleven separate committees that were in fact "composed of a very small number of men" and that compositely amounted to "a real, although not a recognized standing committee on foreign relations."<sup>224</sup> After that period, the select Committee—appointed regularly and primarily to address issues relating to foreign affairs—became increasingly specialized, and by 1813 "had practically a monopoly of the business transacted by the Senate within its field."<sup>225</sup> Beginning in 1814, the Senate began to refer matters involving treaties to the Committee.<sup>226</sup> The Senate formally recognized the *de facto* jurisdiction and stability of membership of this Committee in December 1816 by establishing the Committee on Foreign Relations as its first standing committee.<sup>227</sup>

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222. See *infra* notes 231-34 and accompanying text.

223. See RALSTON HAYDEN, *THE SENATE AND TREATIES, 1789-1791*, at 193 & n.1 (Da Capo Press 1970) (1920).

224. *Id.* at 179-80. Hayden persuasively explains that "the fact preceded the form" and that the Senate Committee on Foreign Relations "was gradually coming into existence before it was formally recognized and named." *Id.* at 181; see also 17 ANNALS OF CONG. 19, 34, 50-53, 63-64, 78, 79, 104-05, 127-28, 151-53, 173-74, 178, 186, 361-71, 377-78 (1807-08) (providing further references to the activities of these committees).

225. HAYDEN, *supra* note 223, at 189; see also *id.* at 181-93 (tracing the development of the Committee between 1807 and December 1816). Beginning with the 1811-1812 session, the select committee was often referred to as "the Committee on Foreign Relations." *Id.* at 186.

226. See 2 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE 621 (1828); see also HAYDEN, *supra* note 223, at 192-93 (describing the referral of matters relating to the Treaty of Ghent to the Committee).

227. Two members of the new standing committee, Rufus King and S.W. Dana, had served on the last select committee, and a third, John Taylor, had been on an

The February 1816 report of present interest thus came almost at the end of the process of accumulating weight and influence that resulted in the transformation of a small group of influential senators, respected for their expertise in the field, into the standing Committee on Foreign Relations. The report was the product of men drawn from a subset of the Senate, almost certainly self-confident in its own judgment about foreign policy, whose personal and collective influence would be enhanced by an expansion of the Senate's role in foreign affairs. Presumably, they were aware that a decade earlier the Senate had adopted a resolution that did "request" the President to pursue some rather general goals in negotiating with Britain—a clear institutional precedent for the motion they were considering.<sup>228</sup> Nevertheless, the Committee declined even to address the merits of the advice that the proposed resolution would recommend to the President.<sup>229</sup> Instead, the Committee confined itself to a brief discussion of the lack of any need for the resolution, and a somewhat longer consideration of the question "[w]hether there be not serious objections to the interference of the Senate in the direction of foreign negotiations."<sup>230</sup>

The Committee's considered judgment was that there were indeed serious objections to Senate "interference," and that those objections were constitutional in nature.<sup>231</sup> As a preliminary matter, the Committee echoed the argument made in the 1790s that the Senate lacked the information to make sound judgments on foreign policy and that the nature of diplomacy made it ill-suited to direct negotiations.<sup>232</sup> By itself, this observation

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earlier such body. See 29 ANNALS OF CONG. 19, 20 (1815) (King and Dana); 30 ANNALS OF CONG. 32 (1816) (same); HAYDEN, *supra* note 223, at 185 (Taylor). On the influence of this group of senators, see HAYDEN, *supra* note 223, at 193-94 n.2.

228. See 15 ANNALS OF CONG. 91 (1806).

229. See SENATE REPORT, *supra* note 219, at 23-24 (describing the Committee's belief that "the resolution is unnecessary").

230. *Id.* at 23.

231. See *id.* at 23-25.

232. See *id.* at 24. The Committee noted that the Senate "does not possess the means of acquiring" the "regular and secret intelligence" necessary to wise diplomacy, and that it "does not manage the correspondence with our ministers abroad nor with foreign ministers here. It must therefore, in general, be deficient in the information most essential to a correct decision." *Id.*

implied the assumption that the President has no duty, at least as an ordinary matter, to consult with the Senate to determine the goals of foreign policy. The Committee immediately went on, furthermore, to make what was rather clearly an express constitutional argument for the exclusion of the Senate from the formulation and implementation of foreign policy:

The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. . . . [The Committee] think[s] the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety.<sup>233</sup>

The Committee concluded that the Constitution's scheme of divided powers would be best served "the more separate and distinct in practice the negotiating and treaty ratifying power are kept."<sup>234</sup>

The 1816 description of the President as "the constitutional representative of the United States with regard to foreign nations" is reminiscent of Marshall's 1800 reference to the President as "the sole organ of the nation in its external relations, and its sole representative with foreign nations," but the gloss on the 1816 phrase's meaning supplied by the words that follow is significantly different. The Senate Committee's view was that the President is our "constitutional representative" in the sense

233. *Id.*

234. *Id.* at 24-25. The Committee's actual language was that "if any benefits be derived from the division of the legislature into two bodies, the more separate and distinct in practice the negotiating and treaty ratifying power are kept, the more safe the national interests." *Id.* The exact point of comparison the Committee had in view is unclear because the "division of the legislature into two bodies" must refer to the House and Senate, while "the negotiating and treaty ratifying power[s]" presumably are the President and Senate, respectively. My friend and colleague Neil Kinkopf has suggested a plausible candidate: just as the two houses of Congress are "separate and distinct in practice" in order to protect "the national interests," so should the President and Senate be in their respective roles in the treaty-making process.

that he “manages our concerns with foreign nations,” not that he simply communicates the Senate’s or Congress’s views.<sup>235</sup> The Committee’s acknowledgment of the President as the most competent decisionmaker on questions of “when, how, and upon what” to negotiate invoked the functional advantages of the executive in conducting diplomacy; a few sentences later the Committee referred to the executive’s superiority both in the formulation (“caution and unity of design”) and the execution (“secrecy and dispatch”) of foreign policy.<sup>236</sup> The Committee’s assertion that the President is “responsible to the Constitution,”<sup>237</sup> not to the Senate or the Congress as a whole, for “his conduct” of foreign relations provides additional confirmation that the Committee’s conclusion rested on its view of constitutional structure rather than on nonconstitutional grounds of prudence. It would have been odd in the extreme for the Committee to characterize senatorial advice on diplomatic matters as “interference . . . in the direction of foreign negotiations”<sup>238</sup> if such advice were constitutionally legitimate, and even stranger if the Constitution required the President to follow the Senate’s views when expressed.

The 1816 Senate Committee report adds no new themes to those we have already encountered, but it is nonetheless significant for this Article’s thesis. The report, written late in the Founding era, displays impressive similarities in reasoning and conclusions to texts and debates from the first decade of government under the Constitution. It adds further weight to the conclusion that one interpretive option in Founding-era constitutionalism was to read the Constitution to accord the President independent authority in the area of foreign affairs. The fact that this view was expressed in a formal document, by members of the Senate with some significant incentive to come to different conclusions, and that the Senate as a whole was, at the very least, undisturbed by the Committee’s opinion, strengthens this Article’s thesis that arguments supporting inde-

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235. *Id.* at 23.

236. *Id.*

237. *Id.* at 24.

238. *Id.*

pendent executive authority over foreign policy cannot be dismissed as sheerly opportunistic.<sup>239</sup>

## VII.

The assertion that the Founders uniformly understood the Constitution to vest Congress with primary responsibility for the formulation of United States foreign policy—an assertion with which many contemporary scholars begin their arguments—is, as it turns out, erroneous. At various important junctures in the Founding era, prominent Founders articulated a quite different understanding of our constitutional structure, one that accorded the President independent authority to formulate as well as to implement foreign policy. Indeed, it is quite clear that these Founders generally assumed that presidential management of American foreign affairs was the constitutional norm, whatever limits and exceptions they also may have recognized. The fact that executive responsibility was an interpretation of the Constitution sufficiently plausible that constitutionalists of the early Republic could invoke it in hotly contested disputes undercuts the conventional wisdom that it is a twentieth-century aberration. The fact that the early adherents to the executive-responsibility interpretation included Washington, Jefferson, Jay, Madison (at least at first), Marshall, and an impressive array of representatives and senators in the quarter century between 1790 and 1816, makes it a view to be reckoned with sheerly in terms of weighty support among the Founders. What more can we conclude?

An initial conclusion is negative: I do not suggest that we turn the conventional wisdom on its head and claim that the Founders agreed on an executive-responsibility model of the distribution of authority over foreign affairs. It is clear that the constitutional issues were debatable, both on the level of fundamental principle and with respect to the specific issues the Founders

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239. After accomplishing nothing in the course of several weeks of intermittent debate, the senator who proposed the resolution gave up and moved for the permanent postponement of further consideration of the resolution or the report. See 3 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE 30, 33, 37, 38, 40, 49 (1828).



considered.<sup>240</sup> We must also take proper note of the limits to the executive-responsibility arguments we have considered. Much is unclear about early executive-responsibility views, and there are many issues that no one in the Founding era seems to have considered. The Founders we have discussed paid little attention to the difference between describing an executive power as "independent," in the sense that it does not require a statutory basis for its exercise, and viewing it as "autonomous," in the sense that Congress's authority to regulate or prohibit its exercise is limited or absent.<sup>241</sup> Because the Founders often stated their constitutional views with great brevity, or in cryptic language, or articulated them as assumptions rather than arguments, we may wonder whether they had thought through the perhaps conflicting implications of their views on executive authority, legislative power, separation of powers, republican government, and so forth. Early presidents and Congresses wisely avoided direct conflict where possible, and except on the issue of legislative access to diplomatic papers, there were no out and out confrontations between the President and either or both houses of Congress in the period this Article addresses. As a consequence, we cannot be certain that views on either side of the debates would not have waived or moderated if the stakes had been raised.

The uncertainties and limits on what we can say are real, but the ambiguities should not be exaggerated. The precise scope that any individual Founder gave to the President's independent authority is never indisputable, except perhaps in Jefferson's 1790 opinion, which seems rather clearly to intend a definition of the President's authority as broad as the constitutional text will bear. At the same time, there are a range of issues on which we can speak with some confidence. The adherents to executive responsibility viewed the President's power to control the conduct of United States diplomacy as extending beyond the communication of the legislature's views to the actual formulation of

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240. My personal judgment is that the executive-responsibility side had the better argument, as well as a more impressive list of advocates, but that judgment is itself a normative argument about the best reading of the law of the Constitution.

241. This terminology is mine. See Powell, *supra* note 10, at 1713-17.

the foreign policy to be pursued through diplomacy. They rejected any general power on the part of Congress or the Senate to instruct the President in the management of foreign relations, and they did not think that presidential authority in the area of foreign affairs depends on statutory authorization. Most or all of them believed that the President is entitled to maintain the confidentiality of diplomatic information and foreign intelligence even against legislative enquiry, when in the President's judgment the nation's interests so require. At the same time, Founding-era proponents of executive responsibility recognized, explicitly and implicitly, that both the Constitution and the national interests oblige the President to recognize Congress's powers and to seek its cooperation.

The Founders we have considered, furthermore, demonstrated an impressive, if implicit, level of agreement on the types of arguments they considered cogent in interpreting the Constitution's distribution of authority over foreign affairs. From Jefferson's 1790 opinion on, they made extensive use of arguments based on considerations of the nature and necessities of conducting foreign policy. When an issue in foreign affairs could be addressed most efficiently through the exercise of qualities the executive was presumed to have and the legislature to lack, at least comparatively, that fact is treated as weighty evidence that the Constitution should be read to vest the executive with power to address the issue. Their invocation of what can seem at first blush purely formalistic textual arguments (e.g., "The transaction of business . . . is Executive altogether"<sup>242</sup>) often turns out in context to be a shorthand way of referring to arguments based on institutional capacity and national need. The Founders' often repeated, if invariably implicit, rejection of attempts to enhance the institutional capacities of the legislature shows that these arguments are not only pragmatic or prudential but structural as well. On a number of occasions, the Founders linked the President's authority with respect to foreign affairs to his authority to control the Republic's powers of coercion,

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242. Jefferson Opinion, *supra* note 35, at 343.

a connection that anticipated the later association of foreign affairs with national security as matters of special executive responsibility.<sup>243</sup> Finally, Founders who held executive-responsibility views rested them not on particular bits of constitutional text, but on the overall structure of government that the Constitution creates. They spent no time in the futile attempt, occasionally undertaken in the modern era, to make the vesting clause of Article II, section 1,<sup>244</sup> or the reception of ambassadors clause in Article II, section 3<sup>245</sup> support the weight of broad, independent executive authority. By the same token, of course, their constitutional views would be unshaken by an equally futile attempt to destroy the executive-responsibility position by defining it on an untenable textual basis. Their example suggests the centrality of structural and prudential reasoning in the analysis of the Constitution's distribution of authority over foreign affairs.

All too often, contemporary argument about the relative powers of Congress and the President over foreign affairs seeks what is intellectually a premature and undeserved victory: *the Founders all thought Congress would be predominant, therefore . . . ; Curtiss-Wright holds that the President's power is plenary, therefore . . .* The Founders' disagreements, however, should make us wary of easy answers to the hard questions foreign relations pose for the Republic's constitutional order. The pursuit of the nation's interests and the preservation of its security in the international domain are of such importance, and yet entail such difficult decisions, that they invite attempts to minimize the legal complications that the Constitution presents. However, the Founders' own practice in constitutional debate in this area displayed a rich mixture of textual, structural, prudential, and precedential arguments that amounts to a deliberate embrace of legal complexity. In our efforts to serve the purposes

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243. See, e.g., *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993) (referring to "foreign and military affairs" as ones "for which the President has unique responsibility").

244. See U.S. CONST. art. II, § 1.

245. See U.S. CONST. art. II, § 3.

of constitutional authority over foreign affairs, to "provide for the common defense [and] the general welfare,"<sup>246</sup> we would do well to follow their example.

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246. U.S. CONST. preamble.