AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 4: The Early National Era – Powers of the National Government

Alexander Hamilton, **"Camillus No. 36"** (1796)[1]

Hamilton took to the newspapers under a pen name once again to defend the Washington administration during the controversy surrounding the Jay Treaty. In the "Camillus" essays, Hamilton offered a wide-ranging defense of the treaty. In this essay, he defended the treaty against objections that it exceeded the scope of the treaty-making power. Hamilton, as usual, took the opportunity to argue for an expansive understanding of the treaty-making power. The debate over the constitutional scope of the treaty power and its implications was also carried on in the halls of Congress. Republicans in Congress did not have the votes to prevent the Jay Treaty from being ratified, but they had far greater numbers in the House of Representatives. In the House, they threatened to obstruct the implementation of the Jay Treaty, and they continued to ask whether the Treaty itself was constitutional and what the obligations of the other branches might be once the Treaty had been ratified. James Madison was among those arguing that there must be some limits on what the president and the Senate could do through treaty.

It is now time to fulfill my promise of an examination of the constitutionality of the Treaty. Of all the objections which have been contrived against the instrument, those relating to this point are the most futile. If there be a political problem capable of complete demonstration, the constitutionality of the Treaty in all its parts is of this sort. . . .

The VI Article of the Constitution of the United States declares that "that Constitution and the laws of the U States made in pursuance thereof, and *all Treaties made or which shall be made under the authority of the U States*, shall be the *Supreme law of the land*, anything in the constitution or laws of any State to the contrary notwithstanding." A law of the land till revoked or annulled by the competent authority is binding not less on each branch or department of the Government than on each Individual of the Society. Each house of Congress collectively as well as the members of it separately are under a constitutional obligation to observe the injunctions of a preexisting law and to give it effect. If they act otherwise they infringe the constitution; the theory of which knows in such case no discretion on their part. . . .

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It was impossible for words more comprehensive to be used than those which grant the power to make treaties. They are such as would naturally be employed to confer a *plenipotentiary* authority. A power "to make Treaties," granted in these indefinite terms, extends to all kinds of treaties and with all the latitude which such a power under any form of Government can possess. The power "*to make*," implies a power to act *authoritatively* and *conclusively*; independent of the after clause which expressly places treaties among the Supreme Laws of the land. The thing to be made is a Treaty; With regard to the objects of the Treaty, there being no specification, there is of course a *charte blance*. . . .

The only constitutional exception to the power of making Treaties is that it shall not change the constitution; which results from this fundamental maxim that a delegated authority cannot rightfully transcend the constituting act unless so expressly authorized by the constituting Power. A treaty for example cannot transfer the legislative power to the Executive Department . . . .

Again there is also a *natural* exception to the power of making treaties, as there is to every other delegated power; which respects abuses of authority in palpable and extreme cases. On natural principles, a Treaty which should manifestly betray or sacrifice primary interests of the State would be null. But this presents a question foreign from that of the modification or distribution of constitutional

[1] *The Works of Alexander Hamilton*, ed. John C. Hamilton, vol. 7 (New York: Charles S. Francis & Company, 1851), 501–509.

powers. It applies to the case of the pernicious exercise of a power, where there is legal competency. Thus the power of Treaty, though extending to the right of making alliances offensive and defensive, may yet be exercised in making an alliance so obviously repugnant to the safety of the State as to justify the non-observance of the Contract.

Beyond these exceptions to the Power, none occurs that can be supported.

Those who have insisted upon towards invalidating the Treaty with Great Britain are not even plausible. They amount . . . . to affirming that all the objects upon which the legislative power may act in relation to our own Country are excepted out of the power to make Treaties.

Two obvious considerations refute this doctrine. One that the power to make Treaties and the power to make laws are different things, operating by different means, upon different subjects, the other, that the construction resulting from such a doctrine would defeat the power to make Treaties; while its opposite reconciles this power with the power of making laws. . . .

[T]he power of legislation employs are *laws* which it enacts or rules which it enjoins, the subject upon which it acts is *the Nation of whom it is*, the persons and property within the jurisdiction of that Nation. The means, which the Power of Treaty employs, are *contracts* with other nations, who may or may not enter into them, the subject upon which it acts is the *nations contracting* and those persons and things *of each* to which the contract relates. Though a Treaty may effect what a law can, yet a law cannot effect what a Treaty may. These discriminations are obvious and decisive; and however the operation of a Treaty may in some things resemble that of a law no two ideas are more distinct than that of *legislating* and *contracting*.

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The constitutional accordingly considers the Power of Treaty as different from that of Legislation. . . . Thus the power of making Treaties is placed in the class of Executive authorities; while the force of law is annexed to its results.