AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 4: The Early National Era – Separation of Powers

Alexander Hamilton, **"Pacificus No. 1"** (1793)[1]

Controversies over presidential foreign affairs powers arose early. Perhaps the most important was the debate surrounding the Neutrality Proclamation. George Washington believed the president could exercise some independent initiative when conducting foreign policy. Without waiting for legislative action, he issued a proclamation on April 22, 1793, which declared that the United States would remain neutral in the recently declared war between France and Britain. This action pleased pro-English Federalists, but not the more pro-French Republicans. The secretary of the treasury, Alexander Hamilton, approved this executive initiative and would have gone further. Hamilton thought President Washington should refuse to recognize the French revolutionaries as the legitimate government of France and should suspend previous treaties with France. Washington rejected this advice. He thought the treaty of Alliance was binding, but that the treaty did not require American assistance to France during this war.

The Neutrality Proclamation led to a newspaper war between Federalists and Republicans over presidential power. Under the pen name Pacificus, Hamilton published a series of essays defending the proclamation. Those essays asserted an expansive theory of presidential power and, in particular, the inherent power of the president to conduct foreign affairs. Secretary of State Thomas Jefferson persuaded the reluctant congressman James Madison to respond. Madison obliged with a series of essays under the name Helvidius. These essays sought to rebut Hamilton's argument that the " executive power" of the president was a wide-ranging authority over foreign affairs. For Jeffersonians, the Senate's role in ratifying treaties and the Congress's power to declare war were not just narrow exceptions to power vested in the president.

Hamilton's strong defense of presidential power was particularly notable. A few years later, the Federalist Chief Justice John Marshall emphasized the ways in which the war powers were wholly controlled by Congress when reviewing how the Adams administration had handled the capture of foreign ships during the undeclared war with France.[2] President Thomas Jefferson sent ships to the Mediterranean to protect American shipping from pirate attacks. At the same time, he took care to emphasize that he could not go "beyond the line of defense" and take "measures of offense . . . without the sanction of Congress." [3]

In 1794, Congress passed its own Neutrality Act, bringing the administration's policy under the constitutional authority of Congress. But in the meantime, Washington received the French ambassador (and thereby recognized the revolutionaries as the legitimate government of France) on his own authority. He later demanded the controversial French minister Edmund Genet's recall to France without consulting Congress on the question.

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It will not be disputed that the management of the affairs of this country with foreign nations is confided to the Government of the United States.

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The inquiry, then, is, what department of our government is the proper one to make a declaration of neutrality, when the engagements of the nation permit, and its interests require that it should be done?

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[1] Excerpt taken from Alexander Hamilton, Letter No. 1. In *Letters of Pacificus: Written in Justification of the President's Proclamation of Neutrality: Originally Published in the Year 1793* (Philadelphia: Samuel Smith, 1796).

[2] Talbot v. Seeman (1801); Little v. Barreme (1804).

[3] Thomas Jefferson, " First Annual Message, December 8, 1801," in *A Compilation of the Messages and Papers of the Presidents*, ed. James D. Richardson, vol. 1 (New York: Bureau of National Literature, 1905), 327.

A correct mind will discern at once, that it can belong neither to the legislative nor judicial department, and therefore of course must belong to the executive.

The legislative department is not the *organ* of intercourse between the United States and foreign nations. It is charged neither with *making* nor *interpreting* treaties. It is therefore not naturally that member of the government which is to pronounce on the existing condition of the nation with regard to foreign powers, or to admonish the citizens of their obligations and duties in consequence; still less is it charged with enforcing the observance of those obligations and duties.

It is equally obvious, that the act in question is foreign to the judiciary department. The province of that department is to decide the litigation in particular cases. It is indeed charged with the interpretations of treaties, but it exercises this function only where contending parties bring before it a specific controversy. It has no concern with pronouncing upon the external political relations of treaties between government and government. This position is too plain to need being insisted upon.

It must, then, of necessity belong to the executive department to exercise the function in question, when a proper case for it occurs.

It appears to be connected with that department in various capacities:—As the *organ* of intercourse between the nation and foreign nations; as the *interpreter* of the national treaties, in those cases in which the judiciary is not competent—that is, between government and government; as the *power* which is charged with the execution of the laws, of which treaties form a part; as that which is charged with the command and disposition of the public force.

This view of the subject is so natural and obvious, so analogous to general theory and practice, that no doubt can be entertained of its justness, unless to be deduced from particular provisions of the Constitution of the United States.

Let us see, then, if cause for such doubt is to be found there.

The second article of the Constitution of the United States, section first, establishes this general proposition, that "the EXECUTIVE POWER shall be vested in a President of the United States of America."

The same article, in a succeeding section, proceeds to delineate particular cases of executive power. It declares, among other things, that the President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States; that he shall have power, by and with the advice and consent of the Senate, to make treaties; that it shall be his duty to receive ambassadors and other public ministers, *and to take care that the laws be faithfully executed.*

. . . . The difficulty of a complete enumeration of all the cases of executive authority would naturally dictate the use of general terms, and would render it improbable that a specification of certain particulars was designed as a substitute for those terms, when antecedently used. The different mode of expression employed in the Constitution, in regard to the two powers, the legislative and the executive, serves to confirm this inference. In the article which gives the legislative powers of the government, the expressions are: " All legislative powers herein granted shall be vested in a Congress of the United States." In that which grants the executive power, the expressions are: "*The executive power* shall be vested in a President of the United States."

The enumeration ought therefore to be considered as intended merely to specify the principal articles implied in the definition of executive power; leaving the rest to flow from the general grant of that power, interpreted in conformity with other parts of the Constitution, and with the principles of free government.

The general doctrine of our Constitution, then, is, that the *executive power* of the nation is vested in the President; subject only to the *exceptions* and *qualifications* which are expressed in the instrument.

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If, on the one hand, the Legislature have a right to declare war, it is on the other, the duty of the executive to preserve peace till the declaration is made; and in fulfilling this duty, it must necessarily possess a right of judging what is the nature of the obligations which the treaties of the country impose on the government; and when it has concluded that there is nothing in them inconsistent with neutrality, it becomes both its province and its duty to enforce the laws incident to that state of the nation. . . .

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The right of the executive to receive ambassadors and other public ministers, may serve to illustrate the relative duties of the executive and legislative departments. This right includes that of judging, in the case of a revolution of government in a foreign country, whether the new rulers are competent organs of the national will, and ought to be recognized or not; which, where a treaty antecedently exists between the United States and such nation, involves the power of continuing or suspending its operation. For until the new government is *acknowledged,* the treaties between the nations, so far at least as regards *public* rights, are of course suspended.

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This serves as an example of the right of the executive, in certain cases, to determine the condition of the nation, though it may, in its consequences, affect the exercise of the power of the Legislature to declare war. Nevertheless, the executive cannot thereby control the exercise of that power. The Legislature is still free to perform its duties, according to its own sense of them; though the executive, in the exercise of its constitutional powers, may establish an antecedent state of things, which ought to weigh in the legislative decisions.

The division of the executive power in the Constitution creates a *concurrent* authority in the cases to which it relates.

Hence, in the instance stated, treaties can only be made by the President and Senate jointly; but their activity may be continued or suspended by the President alone.

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It deserves to be remarked, that as the participation of the Senate in the making of treaties, and the power of the Legislature to declare war, are exceptions out of the general "executive power" vested in the President, they are to be construed strictly, and ought to be extended no further than is essential to their execution.

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The President is the Constitutional EXECUTOR of the laws. Our treaties, and the laws of nations, form a part of the law of the land. He who is to execute the laws must first judge for himself of their meaning. In order to the observance of that conduct which the laws of nations, combined with our treaties, prescribed to this country, in reference to the present war in Europe, it was necessary for the President to judge for himself, whether there was anything in our treaties incompatible with an adherence to neutrality. Having decided that there was not, he had a right, and if in his opinion the interest of the nation required it, it was his duty as executor of the laws, to proclaim the neutrality of the nation, to exhort all persons to observe it, and to warn them of the penalties which would attend its non-observance.

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