AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

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

James Madison, **"Helvidius, No. 1"** (1793)[1]

Secretary of State Thomas Jefferson was also trying to maintain American neutrality in the war between France and Britain, while looking to build public support for French Republic. Jefferson was convinced that Hamilton's Pacificus essays represented a long-term threat to the health of the republic. He had unleashed constitutional "heresies" that had to be exposed for what they were.[2] Jefferson persuaded Madison to take up the task with a series of essays under the pen name Helvidius, also published in the National Gazette.

Hamilton had argued that the foreign affairs powers were by nature executive. The Constitution had carved out some narrow exceptions from the president's executive power to give to Congress. Madison responded to Hamilton by emphasizing that the treaty-making and war-declaring powers were, in essence, legislative powers, and these were lodged in Congress. "To see the laws faithfully executed constitutes the essence of the executive authority. But what relation has . . . [that to] determining what the laws shall be with regard to other nations?" And the commander in chief clause only "affords a striking illustration of the incompatibility of the two powers in the same hands. Those who are to conduct a war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws."[3] The president's role in foreign policy was to carry out the will of Congress.

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If we consult for a moment the nature and operation of the two powers to declare war and make treaties, it will be impossible not to see that they can never fall within a proper definition of executive powers. The natural province of the executive magistrate is to execute laws, as that of the legislature is to make laws. All his acts therefore, properly executive, must pre-suppose the existence of the laws to be executed. A treaty is not an execution of laws: it does not pre-suppose the existence of laws. It is, on the contrary, to have itself the force of a *law* and to be carried into *execution,* like all *other laws,* by the *executive magistrate*. To say then that the power of making treaties, which are confessedly laws, belongs naturally to the department which is to execute laws, is to say that the executive department naturally includes a legislative power. In theory, this is an absurdity—in practice a tyranny.

The power to declare war is subject to similar reasoning. A declaration that there shall be war is not an execution of laws: it does not suppose pre-existing laws to be executed: it is not in any respect an act merely executive. It is, on the contrary, one of the most deliberative acts that can be performed; and when performed, has the effect of *repealing* all the *laws* operating in a state of peace, so far as they are inconsistent with a state of war; and of *enacting* as *a rule for the executive* a *new code* adapted to the relation between the society and its foreign enemy. In like manner a conclusion of peace *annuls* all the *laws* peculiar to a state of war and *revives* the general *laws* incident to a state of peace.

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[1] Excerpt taken from James Madison, *Letters of Helvidius, written in reply to Pacificus, on the President's proclamation of neutrality* (Philadelphia: Samuel H. Smith, 1796).
[2] Thomas Jefferson, "To James Madison, July 7, 1793," in *The Writings of Thomas Jefferson*, ed. Paul Leicester Ford, vol. 7 (New York: G.P. Putnam's Sons, 1897), 436.
[3] Madison, Helvidius No. 1, in *Letters of Helvidius*, 10, 11.

From this view of the subject it must be evident that, although the executive may be a convenient organ of preliminary communications with foreign governments on the subjects of treaty or war, and the proper agent for carrying into execution the final determinations of the competent authority, yet it can have no pretensions from the nature of the powers in question compared with the nature of the executive trust, to that essential agency which gives validity to such determinations.

It must be further evident that, if these powers be not in their nature purely legislative, they partake so much more of that than of any other quality, that under a constitution leaving them to result to their most natural department, the legislature would be without a rival in its claim.

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3. It remains to be enquired whether there be any thing in the constitution itself which shows that the powers of making war and peace are considered as of an executive nature and as comprehended within a general grant of executive power.

It will not be pretended that this appears from any *direct* position to be found in the instrument.

If it were *deducible* from any particular expressions it may be presumed that the publication would have saved us the trouble of the research.

Does the doctrine then result from the actual distribution of powers among the several branches of the government? Or from any fair analogy between the powers of war and treaty and the enumerated powers vested in the executive alone?

Let us examine.

In the general distribution of powers, we find that of declaring war expressly vested in the Congress, where every other legislative power is declared to be vested, and without any other qualification than what is common to every other legislative act. The constitutional idea of this power would seem then clearly to be that it is of a legislative and not an executive nature.

This conclusion becomes irresistible when it is recollected that the constitution cannot be supposed to have placed either any power legislative in its nature entirely among executive powers or any power executive in its nature entirely among legislative powers, without charging the constitution with that kind of intermixture and consolidation of different powers which would violate a fundamental principle in the organization of free governments. If it were not unnecessary to enlarge on this topic here, it could be shown that the constitution was originally vindicated, and has been constantly expounded, with a disavowal of any such intermixture.

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