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AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

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

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James Madison, **Speech on the Jay Treaty** (1796)[1]

Hamilton took to the newspapers under a pen name 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, including the broad power of the president and Senate to make treaties. The debate over the constitutional scope of the treaty power and its implications was also carried on 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.

. . . .

On comparing several passages in the Constitution, which had been already cited to the Committee, it appeared, that if taken literally, and without limit, they must necessarily clash with each other. Certain powers to regulate commerce, to declare war, to raise armies, to borrow money, etc. are first specifically vested in Congress. The power of making Treaties, which may relate to the same subjects, is afterwards vested in the PRESIDENT and two-thirds of the Senate; and it is declared in another place, that the Constitution and the Laws of the United States, made in pursuance thereof, and Treaties made, or to be made under the authority of the United States, shall be the supreme law of the land. . . .

The term supreme, as applied to Treaties, evidently meant a supremacy over the State Constitutions and laws, and not over the Constitution and Laws of the United States. And it was observable, that the judicial authority, and the existing laws, alone of the States, fell within the supremacy expressly enjoined. . . .

. . . .

It is an important, and appeared to him to be a decisive, view of the subject, that if the Treaty power alone could perform any one act for which the authority of Congress is required by the Constitution, it may perform every act for which the authority of that part of the Government is required. . . . If, by Treaty, therefore, as paramount to the Legislative power, the PRESIDENT and Senate can regulate trade, they can also declare war, they can raise armies to carry on war, and they can procure money to support armies. These powers, however different in their nature or importance, are on the same footing in the Constitution, and must share the same fate. . . .

As a further objection to the doctrine contended for, he called the attention of the Committee to another very serious consequence from it. The specific powers, as vested in Congress by the Constitution, are qualified by sundry exceptions, deemed of great importance to the safe exercise of them. These restrictions are contained in section 9 of the Constitution, and in the articles of amendment which have been added to it. . . . It was Congress, also, he observed, which was to make no law respecting an establishment of Religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, etc. Now, if the Legislative powers,

[1] *Annals of Congress*, 4th Cong., 1st sess. (March 10, 1796), 487–495.

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specifically vested in Congress, are to be no limitation or check to the Treaty power, it was evident that the exceptions to those powers, could be no limitation or check to the Treaty power. . . .

The Constitution of the United States is a Constitution of limitations and checks. The powers given up by the people of the purposes of Government had been divided into two great classes. One of these formed the State Governments; the other, the Federal Government. The powers of the Government had been further divided into three great departments; and the Legislative department again subdivided into two independent branches. Around each of these portions of power were seen also exceptions and qualifications, as additional guards against the abuses to which power is liable. With a view to this policy of the Constitution, it could not be unreasonable, if the clauses under discussion were thought doubtful, to lean towards a construction that would limit and control the Treaty-making power, rather than towards one that would make it omnipotent. . . .

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