

The Founders and Foreign Policy
An Introductory Essay
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Congress Project Seminar on
Congress' Role in Foreign Policymaking
Woodrow Wilson International Center for Scholars
Monday, May 18, 2009

In our progress towards political happiness, my station is new; and, if I may use the expression, I walk on untrodden ground. There is scarcely any part of my conduct which may not hereafter be drawn into precedent.

--President George Washington

The first president and first Congress were very conscious of the precedents they were setting both for their respective branches and in their dealings with each other. It's hard to believe now, but Congress even engaged in extensive debates over the proper term of address for the president on formal occasions. A committee of the House recommended that he be called quite simply, "the President of the United States," as referred to in the Constitution. The Senate, on the other hand, rejected the House report and, at the urging of their presiding officer, Vice President John Adams, expressed a preference for the title, "His Highness the President of the United States and protector of their liberties."

Representative James Madison (Va.), who was serving as de facto floor leader in the House and a close adviser to President Washington, led the opposition to the Senate's monarchical sounding title, with Washington's backing. Madison eventually prevailed and Adams in return earned the informal title, "His Rotundity," and prompted a Senate precedent that, in the future, vice presidents should not participate in Senate debates.¹

On a more serious matter, Washington made a good faith effort to follow what he thought was the Constitution's "advice and consent" requirement over treaties. He consequently made a personal trip to the Senate to consult with it over a proposed treaty with the Creek Indians. His visit turned into a disaster as the Senate at first sat in silence, then debated in a confused and disjointed manner until it finally decided to send the matter to a committee for further study. Washington stormed out of the Chamber, saying it defeated the whole purpose of his being there, and vowed never to do that again. Another precedent had been established, and that was that neither Washington nor any subsequent president would consult the Senate in person in advance of submitting a treaty. As presidential scholars Sidney Milkis and Michael Nelson observe:

Most significantly, Washington's failure to obtain the Senate's active cooperation in the preliminary work of making treaties firmly established the president's supremacy in matters of diplomacy. Presidents never did come to possess an unhampered treaty-making power, to be sure. Yet the Washington administration created a precedent that relegated the

Senate to approving or rejecting treaties that the executive had already negotiated.²

It seems difficult to comprehend now, but neither Washington, who had presided over the constitutional convention in Philadelphia just two years earlier, nor Madison, who is credited as being the “Father of the Constitution,” had a firm grasp of the proper roles of the president and Congress in foreign policymaking, let alone how the two branches should relate to each other over the weighty matters of state. Madison admitted as much in a letter to Washington shortly before the constitutional convention convened in 1787: “I have scarcely ventured as yet to form my own opinion either of the manner in which [the executive] ought to be constituted or of the authorities with which it ought to be clothed.”³

Madison’s own Virginia plan (also known as the “Randolph Plan” after the Virginia Governor who headed the state’s delegation and formally introduced the plan), formed the initial draft from which the convention worked. It had only a vaguely worded outline for an executive, without specific powers or duties. It merely provided that “a National Executive” be instituted, chosen by the National Legislature, with “general authority to execute National laws,” and enjoy such other “Executive rights vested in Congress by the Confederation.”⁴ Even after the office of president of the United States was fleshed out by the convention a few months later, Madison seemed to pay little attention to how the office might actually operate.

When Madison, Hamilton and Jay divvied up who would write which articles for New York newspapers (later published as the *Federalist Papers*) to persuade delegates to the New York ratifying convention to approve the proposed Constitution, it was Hamilton who wrote the bulk of the articles dealing with the presidency (Nos. 69-70). In describing the virtues of the presidency, Hamilton identified “energy” as the requisite quality for good government. Energy was, among other things, “essential to the protection of the community against foreign attacks,” and “against the enterprises and assaults of ambition, of faction, and of anarchy.” The presidency provided energy because of the office’s unitary character which clothed the president with the virtues of “decision, activity, secrecy, and dispatch...vigor and expedition.”⁵ While some have used the quote to argue the Founders’ intention of presidential supremacy in foreign affairs, others have pointed out that Hamilton was merely arguing in that article for a single executive as opposed to a plural or committee-style executive. (However, he would later adopt a more expansive view of the presidency, as we shall see.)

In the latter of that series of articles on the presidency, Hamilton argued for the president’s powers as commander-in-chief on grounds that “the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.” And he defended the shared treaty-making powers with the Senate on grounds that “the joint possession of the power in question... would afford a greater prospect of security than the separate possession of it by either of them.”⁶

Madison, on the other hand, dealt in the *Federalist Papers* with the shape and powers of Congress. In Federalist Nos. 62 and 63 he defended the powers and prerogatives of the Senate, particularly the Senate's role in foreign affairs. The lack of "some stable institution in government" to offset the "mutability in the public councils arising from a rapid succession of new members," wrote Madison, "forfeits the respect and confidence of other nations, and all the advantages connected with national character."⁷ That sense of national character "can never be sufficiently possessed by a numerous and changeable body," but "can only be found in a number so small that a sensible degree of praise and blame of public measures may be the portion of each individual."⁸

Madison biographer Gary Wills has noted that, "Jefferson agreed with Madison at the time of the convention" that the "popularly elected branch should handle money matters, but not foreign affairs." Quoting from a letter from Jefferson to Madison, "For though I think a house chosen by them [the people] will be very illy qualified for [affairs of] the union, for foreign nations, etc., yet this evil does not weigh against the good of preserving inviolate the fundamental principle that the people are not to be taxed but by representatives chosen immediately by themselves." As Wills notes, by the end of Washington's second term, Madison "was distorting the Constitution, exceeding his own authority, and trying to tear down what he had helped build up."⁹

The remainder of this essay will highlight two important instances in which the Founders, particularly Washington and Hamilton, on the one hand, and Madison and Jefferson, on the other, soon fell into disagreement over the relative powers of the branches to make American foreign policies—setting important early precedents. Constitutional scholar Edward S. Corwin once observed that the Constitution "is an invitation to struggle for the privilege of directing American foreign policy." While some may think the struggle began at the turn of the last century with the emergence of the modern presidency as America became a world power, as we shall see, the struggle has been with us from the very beginning of the republic.

Washington's Neutrality Proclamation

When the French Revolution of 1789 turned into a reign of terror, American relations with its former wartime ally began to chill. Public opinion began to turn against France in the spring of 1793 when word reached Philadelphia that Louis XVI had been beheaded. Washington convened a cabinet meeting on the issue at which Secretary of State Thomas Jefferson and Treasury Secretary Hamilton took opposite sides on whether the U.S. should maintain a position of neutrality in the war between France and Great Britain.

Jefferson argued against neutrality on grounds the 1778 treaty between the U.S. and France obligated the U.S. to provide France with the same assistance it had provided the U.S. in its revolution. Moreover, Jefferson argued that such unilateral executive action was unconstitutional because it was effectively a declaration of non-war—a matter that rightfully belonged to Congress.

Hamilton argued that the turmoil in France had taken away any permanent or legitimate regime, thereby abrogating any obligations under the terms of the treaty. Moreover, in the absence of a declaration of war, the executive had full power to declare and enforce American neutrality.

Washington came down on the side of Hamilton and issued the “neutrality proclamation” on April 22, 1793, though as a sop to Jefferson he avoided using the term “neutrality.” The proclamation nevertheless retained the full sense of the term by prohibiting American citizens from “committing, aiding, or abetting hostilities against any of the said powers, or by carrying to them any of those articles which are deemed contraband by the modern usage of nations.”¹⁰

Madison, still a Member of the House of Representatives, was in regular contact with his friend Jefferson and closely allied with his views. When Madison heard of the French monarch’s beheading, he commented, “If he was a traitor, he ought to be punished as well as another man.”¹¹

In a letter to Jefferson in June, Madison said the neutrality proclamation was not reconcilable with the express articles of the treaty the U.S. had with France to defend the American possessions of France during times of war. Madison said that unless he somehow had misread the Constitution, he did not think such a proclamation could go beyond “a declaration of the fact that the U.S. were at war or peace.” Moreover, he wrote, he always thought that “the right to decide such questions under any given circumstances,” seemed to be “essentially and exclusively...vested in the legislature [for] declaring war in time of peace,” and in the President and Senate “of making peace in time of war.”¹²

Hamilton assumed the role of public relations point man for Washington. Writing under the pseudonym, “Pacificus,” in John Fenno’s Federalist newspaper, *United States Gazette*, Hamilton said, “It is impossible, prejudice apart, not to perceive a delicate embarrassment between the theory and fact of our political relations with France.”¹³ He offered a sweeping interpretation of executive powers, noting that while the Constitution gave the Congress specific, enumerated powers in Article I, it did not limit or enumerate in Article II “the executive power...vested in the President of the United States.” The absence of the term “herein granted” in Article II thus meant the president was bound only by the exceptions and qualifications specified in the Constitution. When it came to foreign affairs, the powers of the president were limited only by the right of the Senate to ratify treaties and of Congress to declare war. The rights of the legislature did not hinder the executive on other matters of foreign policy which were “naturally” the domain of the president.¹⁴

As presidential scholars Milkis and Nelson conclude on this point, “Indeed, Hamilton set forth a theory of presidential power that not only delegated to the chief executive nearly absolute discretion in the conduct of foreign affairs, but also proposed a broad conception of ‘emergency powers’ that later presidents, particularly those in the twentieth century, would generously draw upon.”¹⁵

Jefferson did not want to let Hamilton's arguments go unanswered publicly, but was in no position as Washington's Secretary of State to mount a counter-offensive. So, he convinced Madison to take his own pseudonym and launch a counter-attack in Philip Freneau's *National Gazette* (that Jefferson had helped secretly found).

Writing as Helvidius, Madison strongly denied that foreign policy was "naturally" an executive power. The powers to declare war, conclude peace, form alliances were among "the highest acts of sovereignty, of which the legislative power must at least be an integral and preeminent part." The natural province of the executive "is to execute laws," wrote Helvidius, "as that of the legislature is to make laws. All his acts therefore, properly executive, must presuppose the existence of the laws to be executed." To imply that the president has a separate power to execute foreign policy is to assert that the executive branch has a legislative power. "Such an argument," concluded Madison, is "in theory...an absurdity—in practice a tyranny."¹⁶

Notwithstanding Madison's strong arguments in the dueling Pacificus-Helvidius letters, the neutrality proclamation was not challenged by Congress. The importance of this outcome, write Milkis and Nelson, was not only that it established the precedent that the president can unilaterally enunciate a policy of neutrality, but that it launched the ongoing debate over whether the president is limited by the letter of the Constitution or is a sovereign head of state with discretion to act independent of legal restraints (except where specifically spelled-out by the Constitution). The debate between Pacificus and Helvidius, conclude the authors, turns on nothing less than "the classical debate between the broad and narrow construction, the loose and strict interpretation of the Constitution."¹⁷

The Jay Treaty

The next major foreign policy confrontation between Washington's Federalists and the Jefferson's and Madison's Republicans did not occur until near the end of Washington's second term. Washington had sent Supreme Court Chief Justice John Jay to London to secretly negotiate a treaty with the British (Jefferson had resigned as Secretary of State on December 31, 1793). The treaty, signed in November 1794, won a pledge from Britain to evacuate, by 1796, its northwest military posts which had been on U.S. soil since the revolution. The treaty also provided the U.S. with the limited right to trade with the British West Indies. When some of terms of the secret treaty were leaked to the Democratic-Republican press in June 1795, "a political firestorm ensued that made both John Jay...and Washington the targets of vicious partisan attacks." The partisan attacks were prompted by a strong anti-British sentiment among the settlers on the northwest outposts where the British had stirred-up the Indians and rebellious slaves to attack the settlers, as well as anger among southern Democratic-Republicans because the treaty provide no compensation for the slave seized by the British at the end of the Revolution.¹⁸

While the treaty received the requisite two-thirds votes for ratification in the Federalist-controlled Senate, when it came to the House a year later, Madison, as the

acknowledged leader of the opposition, was determined to sink it one way or another. He saw the treaty as the last straw for the “Monocrats.” It was fellow Republican Edward Livingston of New York, however, who doubted whether Madison was up to the job of leading the fight in the House, and struck the first blow by introducing a resolution demanding that the president lay all documents relating to the treaty before the House. Madison attempted to soften the blow by offering an amendment to allow the president to determine which documents were relevant. But the House was not in a mood to compromise, and the Madison amendment was rejected by 10 votes.

Rather than rallying to Livingston’s side, Madison hesitated, and in so doing, lost control of his party in the House. The Livingston amendment was adopted, but Washington adamantly refused to provide any of the requested information, claiming executive privilege because, he argued, only the Senate had any authority under the Constitution to view materials relating to a treaty.¹⁹

Madison reentered the picture in March 1796 by creating a new constitutional issue over the treaty. He maintained that the House of Representatives had certain delegated powers under the Constitution to implement treaties, namely the power to appropriate money to implement them. In the Jay Treaty, there were several commissions created to settle those issues not resolved by the treaty, and they would require funding. A debate proceeded for the entire month of April 1796 over whether the House would provide the funds needed to pay for the commissions (roughly \$90,000). Washington’s resolute stand against turning over papers had worn down the opposition and the implementing legislation was eventually approved by the House, 51 to 48—a staggering defeat for the Democratic-Republicans. Two more precedents had been established in favor of the president: the president’s right to invoke executive privilege and refuse to turn-over certain papers to Congress (or at least the House); and, for the time being, the precedent that the House could not be involved in foreign policy making (or at least treaty-making).²⁰

Conclusion

As later developments would reveal, however, Madison’s basic argument about Congress’ powers of the purse would become a very influential consideration in the successful implementation of U.S. foreign policy and as a check against the unilateralist tendencies of presidents to chart their own course abroad. Presidents today would be foolish to dismiss the House out of hand as being irrelevant in foreign policymaking, as much as they would on domestic policymaking. Madison may have had second thoughts from his constitutional convention days about foreign affairs being the natural domain of the Senate, and domestic affairs being that of the House. But his later reversal would prove both prescient and vital in counterbalancing the rapid growth in presidential powers with the full assertion of foreign policy prerogatives by both houses of Congress.

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Endnotes

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- ¹ *The American Presidency: Origins and Development, 1776-1998*, Sidney M. Milkis and Michael Nelson, editors (Washington: CQ Press, 1999), 70
- ² *Id.*, 75.
- ³ *Id.*, 27.
- ⁴ “Variant Texts of the Virginia Plan, Presented by Edmund Randolph to the Federal Convention, May 29, 1787,” Text A., *Documents Illustrative of the Formation of the Union of the American States* (Washington: Government Printing Office, 1927), 954.
- ⁵ Alexander Hamilton, Federalist No. 70, quoted in *The American Presidency*, 59.
- ⁶ *Id.*, Federalist Nos. 74 and 75, quoted in *The American Presidency*, 60.
- ⁷ Federalist No. 62, *The Federalist Papers* (New York: The New American Library of World Literature, Inc., Mentor Book, 1961), 380.
- ⁸ Federalist No. 63, *Id.*, 382-83.
- ⁹ Gary Wills, *James Madison* (New York: Times Books, Henry Holt & Co., The American Presidents Series, 2002), 41.
- ¹⁰ *The American Presidency*, 77.
- ¹¹ Robert Allen Rutland, *James Madison: The Founding Father* (Columbia, Missouri: University of Missouri Press, 1987), 120-121.
- ¹² To Thomas Jefferson, June 13, 1793, *James Madison: Writings*, Jack N. Rakove, editor (New York: The Library of America, 1999), 535
- ¹³ Rutland, 121.
- ¹⁴ Milkis and Nelson, 78-79.
- ¹⁵ *Id.*, 79.
- ¹⁶ Helvidius No. 1, *James Madison: Writings*, 540-41.
- ¹⁷ Milkis and Nelson, 79.
- ¹⁸ *Id.*, 86.
- ¹⁹ Rutland, 141.
- ²⁰ Milkis and Nelson, 88.