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The Presidential Monopoly of Foreign Relations

Raoul Berger
Harvard University Law School

THE PRESIDENTIAL MONOPOLY OF FOREIGN RELATIONS

*Raoul Berger**

A frequent recurrence to the fundamental principles of the constitution . . . [is] absolutely necessary to preserve the advantages of liberty and to maintain a free government.—Massachusetts Constitution of 1780†

SOMETHING of the wonder that suffuses a child upon learning that a mighty oak sprang from a tiny acorn fills one who peers behind the tapestry of conventional learning and beholds how meager are the sources of presidential claims to monopolistic control of foreign relations.[1] Sweeping formulation of such claims was made by Woodrow Wilson, then president of Princeton University:

> One of the greatest of the President's powers . . . [is] his control, which is very absolute, of the foreign relations of the nation. The initiative in foreign affairs, which the President possesses without any restriction whatever, is virtually the power to control them absolutely. The President . . . may guide every step of diplomacy, and to guide diplomacy is to determine what treaties must be made, if the faith and prestige of the government are to be maintained. He need disclose no step of negotiation until it is complete, and when in any critical matter it is completed the government is virtually committed. Whatever its disinclination, the Senate may feel itself committed also.[2]

Wilson felt no need to advert to the constitutional problems presented by his statement, but apparently regarded it as dogma beyond need of demonstration. In his own person as President of the United States, Wilson was later to suffer a disastrous refutation when the Senate rejected the Versailles Treaty and League of Nations, which

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* Charles Warren Senior Fellow in American Legal History, Harvard University Law School. A.B. 1932, University of Cincinnati; J.D. 1935, Northwestern University; LL.M. 1938, Harvard University.—Ed.

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† MASS. CONST., art. XXVIII (1780), in 1 B. POORE, FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS 959 (1877). This constitution was John "Adams' handiwork." 1 P. SMITH, JOHN ADAMS 440 (1962). The New Hampshire Constitution of 1784, art. I, § 38, contains an almost identical provision, 2 B. POORE, *supra*, at 1283, as does the Pennsylvania Constitution of 1776, art. XIV. 2 *id.* at 1542.

1. The word "monopoly" is borrowed from the caption "Negotiation a Presidential Monopoly" in E. Corwin's 1953 revision of the official CONSTITUTION OF THE UNITED STATES OF AMERICA—ANALYSIS AND INTERPRETATION 412.

2. W. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 77-78 (1908).

he had negotiated according to his dogma. The cost of presidential absolutism came high.[3]

Today, we are told, war is merely an instrument of foreign policy;[4] four times in this century presidential foreign policy has entangled us in great wars—World Wars I and II, Korea, and Vietnam.[5] As Wilson indicated, the President's foreign policy can present the nation with an all but irreversible *fait accompli*.[6] At a time when the havoc of war immediately threatens every man, woman, and child, when the sacrifices war requires in property, blood, even life itself, are staggering,[7] it needs to be asked whether the Founders left such risks for the decision of a single man.[8]

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3. Wilson stated that the "spirit of the Constitution" called on the President to keep "himself in confidential communication with the leaders of the Senate while his plans are in course, when their advice will be of service to him and his information of the greatest service to them, in order that there may be veritable counsel and a real accommodation of views instead of a final challenge and contest." *Id.* at 139-40.

4. "[T]he military machine has simply become an instrument for achieving presidential policy objectives." Monaghan, *Presidential War-Making*, 50 B.U. L. REV. 19, 31 (1970); Reveley, *Presidential War-Making: Constitutional Prerogative or Usurpation?*, 55 VA. L. REV. 1243, 1245-46 (1969). Clausewitz, the pioneer military theorist, regarded war "as a continuation of national policy." B. TUCHMAN, THE GUNS OF AUGUST 95 (1962). Our war in Vietnam is the creature of presidential foreign policy.

5. Edward Corwin wrote: "Our three wars of outstanding importance prior to World War II were all the direct outcome of Presidential policies in the making of which Congress had but a minor part." E. CORWIN, TOTAL WAR AND THE CONSTITUTION 13 (1947) [hereinafter CORWIN, TOTAL WAR]. For Franklin Roosevelt's prewar policy, see S. MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 991-1001 (1965). The President "has always possessed the power to bring the country to war, if he so chose." McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy* (pts. 1-2), 54 YALE L.J. 181, 535, at 614 (1945). "[P]residential hegemony over the shaping of foreign policies . . . lead to the need to use armed forces." Reveley, *supra* note 4, at 1304.

6. E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 274 (3d ed. 1948) [hereinafter CORWIN, THE PRESIDENT] refers to the "ability of the President simply by his day-to-day conduct of our foreign relations to create situations from which escape except by the route of war is difficult or impossible." The President may "so conduct the foreign intercourse, the diplomatic negotiations with other governments, as to force a war . . . ." J. POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES § 672, at 447 (3d ed. 1875). *See also* Reveley, *supra* note 4, at 1245-47. *Cf.* text accompanying note 2 *supra*. The President "may conduct a vital phase of foreign policy literally for years without Congressional control, as with foreign policy toward Japan before the last war, toward Russia during the war, and toward China after the war." Such policy-making "may lead to policies for which there is inadequate support, as with Wilson, and had not Pearl Harbor intervened, conceivably with Roosevelt." R. DAHL, CONGRESS AND FOREIGN POLICY 173 (1950).

7. As Hugh Gaitskill, leader of the British Labor Party, said in 1960, "[F]oreign affairs concern the lives and destinies of all of us today." *Quoted in* P. RICHARDS, PARLIAMENT AND FOREIGN AFFAIRS 72 (1967). In England, "it has been abundantly clear to the majority of voters that their well-being and their very existence depends far more upon international developments than on domestic political issues." *Id.* at 31.

8. "The conclusion is unavoidable, for example, that in the years preceding Pearl Harbor, President Roosevelt and his advisers believed that many of their foreign policies could not have secured the support of a majority in Congress. Important

The mounting tide of "executive agreements," many of which are kept secret from the Senate,[9] led the Senate in February 1972 to vote 81 to 0 for the Case Bill,[10] which would require that all international agreements be sent to the Congress for information. Senator Sam J. Ervin, Jr., thereafter introduced a bill that would authorize Congress to veto any executive agreement within sixty days of its transmittal.[11] Do such bills constitute an unconstitutional invasion of exclusive presidential prerogatives? This question is a facet of the broader issue of "executive privilege": may information respecting the conduct of foreign affairs—for example, the disbursement of funds appropriated for defense[12] or for foreign aid,[13] or the acquisition of foreign bases[14]—be withheld from Congress on the ground that congressional inquiry encroaches on presidential prerogatives?

Because of the widespread ramifications of foreign relations, discussion must perforce be confined to presidential executive agreements, and whether the Senate may be excluded from knowledge of, and participation in, negotiations with foreign nations as a part of the treaty-making process.[15] Mention only can be made of the legis-

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foreign policies were made without prior or subsequent congressional consent." R. DAHL, *supra* note 6, at 178. He adds: "President and State Department believed they had information, experience, and a grasp of issues involved that the Congress and electorate lacked." *Id.* at 180.

9. *See* note 191 *infra* and accompanying text.

10. S. 596, 92d Cong., 1st Sess. *See* 118 CONG. REC. S. 1904-10 (daily ed. Feb. 16, 1972). *See generally* N.Y. Times, May 1, 1972, at 32, col. 1. For sequel, see note 14 *infra*.

11. S. 3475, 92d Cong., 2d Sess. *See* 118 CONG. REC. S. 5787-88 (daily ed. April 11, 1972). *See generally* N.Y. Times, May 1, 1972, at 32, col. 1. For subsequent developments, see note 14 *infra*.

12. Judge Learned Hand asked, "[I]s it not possible to argue that Congress, especially now that the appropriations for the Armed Forces are the largest items of the budget, should be allowed to inquire in as much detail as it wishes, not only how past appropriations have in fact been spent, but in general about the conduct of the national defense?" L. HAND, THE BILL OF RIGHTS 17-18 (1958).

13. *See Hearings on S. 1125 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 27 (1971) [hereinafter *Hearings*]. Senator J.W. Fulbright, Chairman of the Foreign Relations Committee, testified: "I have made repeated efforts to secure access to the 5-year plan for military assistance for use by the Foreign Relations Committee in its consideration of military assistance under the foreign aid authorization bill." In vain.

14. On June 19, 1972, the Senate voted to cut off funds for recently concluded military base agreements with Portugal and Bahrein unless the agreements are submitted to the Senate as treaties. The Executive did not comply with an earlier Senate resolution asking for submission of the executive agreements as treaties on the ground that they had already been concluded. 118 CONG. REC. S. 9653 (daily ed. June 19, 1972); N.Y. Times, June 20, 1972, at 1, col. 1; at 15, col. 1. Many millions of dollars were involved.

15. Recall Wilson's 1908 remark that the President "need disclose no step of negotiation until it is complete . . . [and then] the government is virtually committed," at text accompanying note 2 *supra*. True, Congress may reject a treaty,

lative shortcomings which have contributed to the all but total takeover of foreign relations by the President, and of the need for procedural reform in the Senate if its participation is to be effective.[16] Could we view the matter as an original question, that is, were we drafting or amending a Constitution and free to decide where power is best vested, such factors might persuade that exclusive power in the premises is best lodged in the President. Apart from the countervailing considerations, however, if the Constitution provides for Senate participation in treaty-making, the Senate cannot now be barred on the ground that it lacks the wisdom and machinery to participate effectively.[17] "The peculiar circumstances of the moment," said Marshall, "may render a measure more or less wise, but cannot render it more or less constitutional."[18] Accordingly, the focus of discussion will be the constitutionality of presidential monopoly claims. The starting place, of course, must be the constitutional text itself, in the light of such illumination as is provided by the intention of the Framers and the understanding of the Ratifiers.

I. Negotiation of Treaties

A. *The Text of the Constitution*

Article II, section 2, of the Constitution provides that the President

> shall have power, by and with the Advice and Consent of the Senate, to make Treaties . . . and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers . . . .

Section 3 provides that "he shall receive Ambassadors and other public Ministers . . . ." From these provisions Justice Sutherland distilled his often quoted statement that with respect to

> external affairs . . . participation in the exercise of the power is significantly limited. In this vast external realm . . . the President

but the shift in policy may have "disastrous consequences for the international structure of power." R. Dahl, *supra* note 6, at 97.

16. For an excellent discussion of the entire problem, see R. Dahl, *supra* note 6. *See also* text accompanying notes 293-311 *infra*.

17. For improvements in the congressional machinery, see R. Dahl, *supra* note 6, at 146-48. Many consider the presidential policy that involved us in the Vietnam War a monumental folly, among them General Charles de Gaulle. *See* Berger, *War-Making by the President*, 121 U. Pa. L. Rev. 29, 83 (1972) [hereinafter Berger, *War-Making*]. R. Dahl, *supra*, at 264, states that "to the extent that the executive is capable of solving its problems without accepting Congressional collaboration, it must become more and more the democratic shadow" of a "frank dictatorship." *See also id.* at 116.

18. G. Gunther, John Marshall's Defense of McCulloch v. Maryland 190-91 (1969).

> alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.[19]

When, however, we look to the text, we find that the only power given to the President alone was the power to "receive Ambassadors." Even the power to "appoint Ambassadors" was made subject to Senate "advice and consent."

Some years after the Constitutional Convention, Hamilton placed exaggerated emphasis on the power to receive Ambassadors,[20] ignoring the pains he himself took in *The Federalist No. 69* to downgrade the power:

> The President is also to be authorized to receive ambassadors and other public ministers. This, though it has been a rich theme of declamation, is more a matter of dignity than of authority. It is a circumstance which will be without consequence in the administration of the government; and it was far more convenient . . . than that there should be a necessity of convening the legislature . . . upon every arrival of a foreign minister . . . .[21]

Before he ascended to the bench, Justice Sutherland wrote a book in which he stated: "It will be observed that the advice and consent of the Senate qualifies the power of the President to *make*, and not to *negotiate*, treaties."[22] The wish was father to that thought. No mention whatever of "negotiate" is to be found in the constitutional text, so that it could hardly be singled out for qualification. What power to "negotiate" a treaty exists must derive from the power to "make" a treaty; and since the "make" power is expressly subject to "advice and consent," it follows that the power to "negotiate" a treaty is likewise so qualified. Nor does history disclose an intention to separate the "negotiate" component for independent presidential exercise; to the contrary, as will appear, the Founders intended the Senate to participate in all stages of treaty-making. They knew well enough how to single out a particular function for independent presidential exercise, as when they provided that the President

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19. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (emphasis original). It should be borne in mind that in addition to participation in treaty-making and the appointment of ambassadors by the Senate, Congress has *exclusive* power over other aspects of foreign relations, namely, foreign commerce and duties or tariffs. U.S. CONST. art. I, § 8, cl. 1, 3.

20. *See* text accompanying notes 90-92 *infra*.

21. THE FEDERALIST No. 69, at 451 (Mod. Lib. ed. 1941).

22. G. SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 122 (1919) (emphasis original).

"shall *nominate,* and by and with the Advice and Consent of the Senate, shall *appoint* Ambassadors . . . ." The fact that they did not equally provide that "he shall *negotiate,* and by and with the Advice and Consent of the Senate, *make* treaties" speaks volumes against the Sutherland reading. The comparison was tellingly drawn by Senator Henry Cabot Lodge, himself no mean historian:

> [T]he carefully phrased section gives the President absolute and unrestricted right to nominate, and the Senate can only advise and consent to the appointment, of a given person. All right to interfere in the remotest degree with the power of nomination and the consequent power of selection is wholly taken from the Senate. Very different is the wording of the treaty clause. There the words "by and with the advice and consent of" come in after the words "shall have power" and before the power referred to is defined. The "advice and consent of the Senate" are therefore coextensive with the "power" conferred on the President, which is "to make treaties," and apply to the entire process of treaty-making.[23]

As Lodge's analysis indicates, the textual terms are to be scrutinized with greatest care, the more so because the Framers were fastidious draftsmen. What Chief Justice Taney discerned on the face of the Constitution is richly attested by the Convention records: "[N]o word was unnecessarily used, or needlessly added. . . . Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood."[24]

What does the word "advice" connote? As early as 1806, Senator Anderson pointed out that the "advice should precede the making of the treaty," that the word was employed "for the purpose of obtaining the opinion of the Senate as to the principles upon which the treaty should be made."[25] In 1906, Senator Augustus Bacon developed this analysis: "We do not advise men after they have made up their minds and after they have acted; we advise men while they are considering, while they are deliberating, and before they have determined, and before they have acted."[26] Unless "advice" is so understood, it is superfluous; it would have sufficed to require only Senate "consent" for the "making" of a treaty. So the process was understood by President Washington.[27]

In 1917, Edward S. Corwin countered with the argument that "in

23. *Quoted in* R. HAYDEN, THE SENATE AND TREATIES: 1787-1817, at 17 (1920).

24. Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 571 (1840).

25. *Quoted in* R. HAYDEN, *supra* note 23, at 202 n.1.

26. 40 CONG. REC. 2126.

27. *See* text accompanying notes 62-77 *infra. See also* remarks of Rufus King, who had been a Framer, text accompanying note 141 *infra.*

connection with *appointments* the Senate's function of *'advice and consent' is* discharged by a mere 'yes' and 'no.' "[28] "Advice" does not come too late when it surfaces after a "nomination," for the nomination has in nowise committed the President or the nation. But to be effective, "advice" respecting "making" of a treaty must come before the positions of the negotiating parties have crystallized. In any event, Corwin leaves unanswered why "nomination" was freed of "advice and consent" whereas "treaty-making" was not. He himself later stated that "the Constitutional clause evidently assumes that the President and the Senate will be associated throughout the entire process of making a treaty . . . ."[29]

B. *The Understanding of the Founders*

Few are the instances in which deductions from the text are so unmistakably confirmed by the meaning attached to the terms by the Founders themselves. But first a glimpse of the English antecedents, for the Framers were constantly alive to English practices.[30]

Perhaps the most extensive claim to participation in foreign affairs was made by the House of Commons in a petition to James I of December 9, 1621, which stated with respect to matters of peace and war, "we cannot conceive that . . . the state of your kingdom, are matters at any time unfit for our deepest consideration in time of Parliament . . . ."[31] The constitutional changes in the conduct of for-

28. E. CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS 183 n.4 (1917) (emphasis original) [hereinafter CORWIN, CONTROL].

29. E. CORWIN, *supra* note 1, at 412. In THE PRESIDENT, *supra* note 6, at 253, Corwin states that the "significant thing" about the phraseology of the treaty-clause "is that it associates the President with the Senate *throughout the entire process of treaty-making*." (Emphasis original.) McDougal & Lans, *supra* note 5, at 553, state: "The Framers assumed . . . that the Senate would participate equally with the President in the active direction of all negotiations and all aspects of foreign policy . . . ." *See also id.* at 220. Compare with the foregoing history Dean Acheson's assertion that "the negotiation of [a treaty] is given to one branch and the ratification to another." *Hearings, supra* note 13, at 264. He considered that the Senate was limited to "exercising its constitutional power to make a treaty by ratifying it." *Id.* at 261.

30. On a related point, George Mason said in the Convention, "He considered the caution observed in Great Britain on this point as the paladium [*sic*] of the public liberty." 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 327 (1911). Madison referred to British appropriation practices in THE FEDERALIST NO. 41, *supra* note 21, at 265. Madison, John Marshall, and others assured the Virginia convention that the provision for jury trial carried with it all its attributes under English practice, including, specifically, the right to challenge jurors. 3 J. ELLIOT, DEBATES IN THE SEVERAL CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 531, 546, 558-59, 573 (2d ed. 1836). *See* R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 87 n.160, 143 n.97, 197, 217-18 (1972) [hereinafter BERGER, IMPEACHMENT]. *Cf. id.* at 4, 30 n.107, 89, 98, 99, 101, 122, 171 n.217. *See also* note 45 *infra*.

31. J. TANNER, CONSTITUTIONAL DOCUMENTS OF THE REIGN OF JAMES I, A.D. 1603-1625, at 281 (1930).

eign affairs during the revolutionary seventeenth century—by which the Founders were more influenced than by eighteenth century developments[32]—have been admirably described by Edward B. Turner, and for present purposes a few examples drawn from Turner may suffice. By virtue of its power over supplies, Parliament constrained the headstrong James I to promise "to make no treaty without first acquainting parliament and requesting its advice."[33] When "the long parliament was sitting the king informed the members of the alliance which he was about to make with the Dutch, and asked for advice."[34] After the Restoration, "the commons aimed at nothing less than direction and control . . . . More and more, information was called for, and the commons insisted on a share in foreign policy if they were to supply the means of carrying it out."[35] In 1763, "the lord chancellor declared . . . that 'the King . . . hath made your Counsels the Foundation of all His Proceedings' [abroad]."[36] The Parliament objected that negotiations respecting the second partition treaty (1700) "had been carried through without the advice of parliament" and "then proceeded to impeach those who had assisted William in making it."[37] In the Hanoverian period, the "participation of parliament in foreign affairs and even its supervision of them was . . . fully recognized, but not its power to direct them."[38] By 1714, "Parliament

32. B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967). Compare colonial reliance on Coke for judicial review, notwithstanding that Blackstone had plumped for "parliamentary supremacy," R. BERGER, CONGRESS V. THE SUPREME COURT 23-26, 29 n.101 (1969) [hereinafter BERGER, CONGRESS]; and their frequent references to Stuart absolutism, BERGER, IMPEACHMENT, *supra* note 30, at 5, 99; Goebel, *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555, 563 (1938); note 45 *infra*.

33. Turner, *Parliament and Foreign Affairs, 1603-1760*, 38 ENG. HIST. REV. 172, 174 (1919).

34. *Id.* at 175.

35. *Id.* at 176.

36. *Id.* at 177. In 1701 the Commons advised the King to act in concert with the States General in treaty negotiations with France "to conduce to their security"; the King responded he had done so. 5 PARL. HIST. ENG. 1243 (1701). The King communicated the posture of the negotiations and in closing said that the "safety of England . . . does very much depend upon your Resolutions in this matter." *Id.* at 1250. In 1709, both Houses advised Queen Anne as to measures for a secure peace. 6 PARL. HIST. ENG. 788 (1709).

37. Turner, *supra* note 33, at 183. In 1715 the Commons "impeached Oxford because . . . he had misrepresented negotiations to the queen and hence to parliament," and so "prevented the just Advice of the Parliament to her Majesty." *Id.* at 188. Was it sheer coincidence that James Iredell told the North Carolina Ratification Convention that if the President "has concealed important intelligence" from the Senate and so induced them to consent to a treaty, he could be impeached? 4 J. ELLIOT, *supra* note 30, at 127.

38. Turner, *supra* note 33, at 188.

had established a degree of control over the executive and over all its actions—including foreign policy . . . ."[39]

All this was part of the struggle between Parliament and the King, which eventuated in parliamentary supremacy.[40] Thereafter came ministerial responsibility to Parliament rather than to the King, and management of foreign affairs by Ministers who, under orthodox theory, were under the control of Parliament. What such control could mean is illustrated by a resolution passed by the House of Commons in 1782—not without relevance to President Nixon's disregard of the repeal of the Gulf of Tonkin Resolution[41]—condemning the "farther prosecution" of the war with the American colonies on the ground that it was the means of "weakening the efforts of this country against her European enemies" and increasing the "mutual enmity, so fatal to the interests both of Great Britain and America."[42] When the ministry disregarded this resolution, a second resolution declared that "this House will consider as enemies" those who advise the "farther prosecution" of the war "for the purpose of reducing the revolted Colonies to obedience by force." Now Lord North buckled and bowed to the opinion of Parliament.[43] The Founders, who cited the ongoing impeachment of Warren Hastings,[44] were hardly unfamiliar with these pages of Hansard.[45]

When the revolting colonies assembled in the Continental Congress and dispensed with an executive, they carried the movement

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39. C. HILL, THE CENTURY OF REVOLUTION 1603-1714, at 2 (1961). Parliament had emerged "as the leading partner." G. TREVELYAN, ILLUSTRATED HISTORY OF ENGLAND 472 (1956).

40. *See generally* C. ROBERTS, THE GROWTH OF RESPONSIBLE GOVERNMENT IN STUART ENGLAND (1966).

41. Berger, *War-Making*, *supra* note 17, at 67.

42. 22 PARL. HIST. ENG. 1071 (1781-1782).

43. *Id.* at 1089, 1090, 1107 (1781-1782).

44. *E.g.*, George Mason, 2 M. FARRAND, *supra* note 30, at 550; John Vining, 1 ANNALS OF CONG. 373 (1789) (2d ed. 1836, print bearing the running page title "History of Congress").

45. Hamilton's statement in THE FEDERALIST No. 69, *supra* note 21, at 450-51 may suggest unfamiliarity with the English developments: "The king of Great Britain is the sole and absolute representative of the nation in all foreign transactions. He can of his own accord make treaties of peace, commerce . . . ." But he emphasized: "In this respect . . . there is no comparison between the intended power of the President and the actual power of the British sovereign. The one can perform alone what the other can do only with the concurrence of a branch of the legislature."

But compare Gouverneur Morris' reminder that in England "the real King [is] the Minister." 2 M. FARRAND, *supra* note 30, at 104. *Cf. id.* at 69. Note too the Founders' familiarity with the details of English impeachment practices. BERGER, IMPEACHMENT, *supra* note 30, at 54-55, 74-75, 84-85, 88-89. *See also Ex parte* Grossman, 267 U.S. 87, 108-09 (1925).

for parliamentary supremacy to its logical conclusion. Experience led them to make an exception for a Secretary of Foreign Affairs, and John Jay was appointed to the post.[46] But he was kept under a tight rein, as the Journals of the Congress disclose. There could be no secrets from Congress: "Any member of Congress shall have access" to the Secretary's books and records, read the resolution.[47]

To argue that all this was changed by the constitutional provision for an executive branch and the separation of powers is to lose sight of the course of historical development. The Framers—thirty of the fifty-five had been members of the Continental Congress[48]—began by adopting its practice. As late as August 6, the Convention Committee on Detail draft provided that "[t]he Senate . . . shall have power to make treaties."[49] During the debate, Madison "observed that the Senate represented the States alone," and, consequently, "the President should be an agent [not the exclusive agent] in Treaties."[50] As the Convention drew to a close, the Committee of Eleven proposed on September 4 that "[t]he President by and with the advice and Consent of the Senate, shall have power to make Treaties."[51] How this appeared to the Framers may be judged from Rufus King's remarks that "as the Executive was here joined in the business, there was a check [on the Senate] which did not exist in [the Continental] Congress."[52] It was the President, therefore, who was finally made a participant in the treaty-making process, which had been initially lodged—after the pattern of the Continental Congress—in the Sen-

46. 19 JOUR. CONTL. CONG. 43 (1781); 20 JOUR. CONTL. CONG. 638 (1781).

47. 22 JOUR. CONTL. CONG. 88 (1782).

48. The dual members were Abraham Baldwin, George Clymer, John Dickinson, Thomas Fitzsimons, Benjamin Franklin, Elbridge Gerry, Nicholas Gilman, Nathaniel Gorham, Bedford Gunning, Alexander Hamilton, Jared Ingersoll, Daniel of St. Thomas Jenifer, William S. Johnson, Rufus King, John Langdon, James Madison, James McHenry, Thomas Mifflin, Gouverneur Morris, Robert Morris, William Pierce, Charles Pinckney, Edmund Randolph, George Read, John Rutledge, Roger Sherman, Richard O. Spaight, George Washington, Hugh Williamson, and James Wilson.

The New Jersey Plan proposed to vest in Congress certain powers "in addition to the powers vested in the United States in Congress, by the present existing articles of Confederation." 1 M. FARRAND, *supra* note 30, at 243. In the New York Ratification Convention, Chancellor R.R. Livingston explained that the Continental Congress "have the very same" powers proposed for the new Congress, including the power "of *making* war and peace . . . they may involve us in a war at their pleasure . . . ." 2 J. ELLIOT, *supra* note 30, at 278 (emphasis added).

49. 2 M. FARRAND, *supra* note 30, at 183.

50. *Id.* at 392.

51. *Id.* at 498.

52. *Id.* at 540. "Not until September 7, ten days before the Convention's final adjournment, was the President made a participant in those powers." E. Corwin, *supra* note 1, at 412. Commenting on the concurrence of the two branches to make a treaty, Patrick Henry stated "the President, as distinguished from the Senate, is nothing." 3 J. ELLIOT, *supra* note 30, at 353.

ate alone. Not the slightest hint is to be found in the Convention records that thereby the President was meant to nose out the Senate from participation in any part of treaty-making. To the contrary, Hamilton explained in *The Federalist No. 75* that

> the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them. . . . It must indeed be clear to a demonstration that the joint possession of the power in question, by the President and Senate, would afford a greater prospect of security, than the separate possession of it by either of them.[53]

The same point had earlier been made by John Jay in *The Federalist No. 64*, and though he appreciated that negotiations with those who preferred to "rely on the secrecy of the President" might arise, he stressed that such secrecy was with respect to "those preparatory and auxiliary measures which are not otherwise important in a national view, than as they tend to facilitate the attainment of the objects of the negotiations." The President, "in forming [treaties] must act by the advice and consent of the Senate."[54] Corwin correctly reads Jay to mean that "[o]ccasions may arise . . . when the *initiation* of a negotiation may require great secrecy and dispatch, and at such times the President must undoubtedly *start the ball rolling*; but otherwise all negotiations of treaties will be the joint concern of President and Senate."[55]

The Ratification Conventions were given to understand that the Senate, without qualification, was to participate in the *making* of treaties. Some cumulative detail may be pardoned because of the importance of this point. In New York, Chancellor R. R. Livingston stated that the Senate "are to form treaties with foreign nations"; and Hamilton explained that "[t]hey, together with the President, are to manage all our concerns with foreign nations." Chancellor Livingston repeated that "[t]he Senate was to transact all foreign business."[56] In Pennsylvania, James Wilson said, "nor is there any doubt but the Senate and President possess the power of making"

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53. THE FEDERALIST No. 75, *supra* note 21, at 486, 488.

54. *Id.*, No. 64, at 419, 420.

55. CORWIN, THE PRESIDENT, *supra* note 6, at 253 (emphasis added). James Wilson told the Pennsylvania Convention, "I am not an advocate for secrecy in transactions relating to the public; not generally even in forming treaties . . . yet sometimes secrecy may be necessary, and therefore it becomes an argument against committing the knowledge of these transactions to too many persons," that is, the House of Representatives. 2 J. ELLIOT, *supra* note 30, at 506: the stock explanation why the House was excluded from treaty-making. *See, e.g.*, 3 *id.* at 509, 4 *id.* at 263, 280.

56. 2 J. ELLIOT, *supra* note 30, at 291, 306, 323.

treaties.[57] In North Carolina, Samuel Spencer stated that the Senate "are, in effect to form treaties."[58] And speaking to "intercourse with foreign powers," James Iredell said that it is the President's "duty to impart to the Senate every material intelligence he receives." If he "has concealed important intelligence . . . and by that means induced them [the Senate] to enter into measures . . . which they would not have consented to had the true state of things been disclosed to them," impeachment would lie.[59] With good reason, therefore, do even those commentators who construe the President's authority broadly agree that "the Senate was made a participant in his diplomatic powers."[60] Indeed, it would fly in the face of common sense to deduce that the Framers, after taking great precautions, as James Wilson said, to put it beyond the power of a "single man . . . to involve us in such distress [war],"[61] then unraveled all their labors by giving sole control of foreign policy, which can plunge a nation into war, to that very "single man."

C. *Washington's Contemporaneous Construction*

Were the meaning of the constitutional text and the understanding of the Framers and Ratifiers doubtful, we have the best of con-

57. *Id.* at 506.

58. 4 *id.* at 116.

59. *Id.* at 127. William Davie, a Framer, explained to the North Carolina Convention "that jealousy of executive power which has shown itself so strongly in all American governments, would not admit" of lodging the treaty power in the President alone. And because of "the extreme jealousy of the little states" it "became necessary to give them an absolute equality in making treaties." *Id.* at 120. In other words, Senate participation in treaty-making was required to satisfy small state jealousy. C.C. Pinckney's remark in the South Carolina Convention that the Senate was given "the power of agreeing or disagreeing to the terms proposed" by the President, *id.* at 265, is opposed to the decided consensus that treaty-*making* was a joint function.

60. CORWIN, THE PRESIDENT, *supra* note 6, at 366, 254; McDougal & Lans, *supra* note 5, at 207, 220. *See also* note 29 *supra* and accompanying text. Indeed, Corwin, looking at "the constitutional landscape," concluded that "the legislative power, was evidently intended originally to be the predominant one." CORWIN, TOTAL WAR, *supra* note 5, at 158. Were confirmation needed, Madison's statement in THE FEDERALIST No. 51, *supra* note 21, at 338, should suffice: "In republican government, the legislative authority necessarily predominates."

61. 2 J. ELLIOT, *supra* note 30, at 528. That acute student of constitutional government, Walter Bagehot, said that the Framers "shrank from placing sovereign power anywhere. They feared it would generate tyranny; George III had been a tyrant to them, and come what might, they would not make a George III." W. BAGEHOT, THE ENGLISH CONSTITUTION 218 (1964). It is virtually beyond debate that the intention of the Founders was to confer all power connected with war-making on Congress, leaving to the President only command of the armed forces and authority to repel sudden attack. *See* text accompanying notes 125-26 *infra*. For extended discussion, see Berger, *War-Making*, *supra* note 17.

temporaneous constructions[62]—by the presiding officer of the Convention, George Washington, our first President. In August 1789, he advised a Senate committee that

> [i]n all matters respecting *Treaties,* oral communications [to the Senate] seem indispensably necessary; because in these a variety of matters are contained, all of which not only require consideration, but some of them may undergo much discussion; to do which by written communications would be tedious without being satisfactory.[63]

Oral communications proved impracticable; but Washington continued to seek the Senate's advice by message before opening negotiations and "during their course."[64]

The facts have been beclouded by Corwin, who stated in 1917: "At the outset, Washington sought to associate the Senate with himself in the negotiation of treaties, but this method of proceeding went badly and was presently abandoned."[65] So, too, McDougal and Lans stated in 1945,

> it is clear that the Framers anticipated that the Senate would normally function as an executive council, advising the President or his subordinates during the course of negotiations, as had been the case under the Articles of Confederation. This proposal for continuous consultation or for any significant degree of advance consultation proved to be unworkable, and was abandoned during the administration of George Washington.[66]

All that "proved to be unworkable," however, was oral consultation with the Senate, and this because such was the awe in which Washington was held that the Senate felt inhibited from necessary debate by his presence.

In Washington's own view, treaties called for the independent legislative judgment of the Senate. "In treaties," he wrote, the agency of the Senate "is perhaps as much of a legislative nature, and

62. Respect for contemporaneous construction is deeply rooted in the past. In 1454, Chief Justice Prisot stated, "the Judges who gave these decisions in ancient times were nearer to the making of the statute than we now are, and had more acquaintance with it . . . ." Windham v. Felbridge, Y.B. 33 Hen. 4, f. 38, 41 pl. 17, *quoted in* C. ALLEN, LAW IN THE MAKING 193 (6th ed. 1958). For early American statements to the same effect, see Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 290 (1827).

63. 11 G. WASHINGTON, WRITINGS 417 (W. Ford ed. 1891) (emphasis original).

64. S. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 68 (2d ed. 1916); D. FLEMING, THE TREATY VETO OF THE AMERICAN SENATE 21 (1930): Washington "adhered to the practice of asking the advice of the Senate before negotiations were opened and during their course."

65. CORWIN, CONTROL, *supra* note 28, at 85.

66. McDougal & Lans, *supra* note 5, at 207.

the business may possibly be referred to their deliberations in their legislative chamber."[67] For details of Washington's first and last visits to the Senate, we are indebted to the Journal of Senator William Maclay. Washington told the Senate that "he had called on us for our advice and consent to some propositions respecting the treaty to be held with the southern Indians."[68] Those propositions were stated under seven heads in a paper handed over by Washington. Maclay spoke up: "The business is new to the Senate. It is of importance. It is our duty to inform ourselves, as well as possible, on the subject." Lee wanted to read a particular treaty. "The business labored with the Senate. There appeared an evident reluctance to proceed." Gunn then moved that a treaty with the Creeks be postponed until Monday; his motion was seconded. Maclay noted, "I saw no chance of a fair investigation of subjects while the President of the United States sat there, with his Secretary of War to support his opinions, and overawe the timid and neutral part of the Senate." The motion carried. Washington, Maclay records, was in a "violent fret." Nevertheless, he appeared again on Monday, and again, "shamefacedness, or I know not what, flowing from the presence of the President, kept everybody silent."[69] Oral communication, so uncomfortable to all concerned, was thereupon abandoned. But that Washington continued to seek advice from the Senate "before opening negotiations" is attested by a series of instances collected by Crandall, and confirmed by others.[70]

To demonstrate "the right of the President to refuse the Senate information with respect to a pending negotiation," Corwin alleges that "this ground was first asserted by Washington against a call by the House of Representatives for information with respect to the negotiation of the Jay Treaty of 1794."[71] This is a strange citation, for "in fact, all the papers affecting the negotiations . . . were laid

67. 11 G. WASHINGTON, *supra* note 63, at 418.

68. W. MACLAY, SKETCHES OF DEBATES IN THE FIRST SENATE OF THE UNITED STATES, 1789-90-91, at 122 (G. Harris ed. 1880).

69. *Id.* at 123-26. *See also* R. HAYDEN, *supra* note 23, at 20-27. Washington himself realized that "it could be no pleasing thing . . . for the President, on the one hand, to be present and hear the propriety of his nominations questioned, nor for the Senate, on the other hand, to be under the smallest restraint from his presence from the fullest and freest inquiry into the character of the person nominated." 11 G. WASHINGTON, *supra* note 63, at 418. That his presence would exercise a similar "restraint" on the Senate's "inquiry" into a *treaty* escaped him.

70. S. CRANDALL, *supra* note 64, at 68-70; R. HAYDEN, *supra* note 23, at 27-28, 32-34, 40, 47, 51-52, 54-55; Black, *The United States Senate and the Treaty Power*, 4 ROCKY MT. L. REV. 1, 6 (1931). *See also* note 64 *supra*. The practice, however, was not invariable. R. HAYDEN, *supra*, at 37.

71. CORWIN, CONTROL, *supra* note 28, at 90.

before the Senate."[72] The denial to the House was based on Washington's view that the treaty power was vested exclusively in the President and Senate, so that there was no "right in the House of Representatives to demand . . . all the papers respecting a negotiation with a foreign Power . . . ." He emphasized that he had no disposition to "withhold any information . . . which could be required of him as a right," instancing an impeachment proposal by the House.[73] This is poor stuff from which to fashion a right to refuse to *the Senate* information respecting pending negotiations.

A second point later made by Corwin stands no better. For his statement that "the relations of President and Senate in the realm of diplomacy came rapidly to assume a close approach to their present form," he relies on the Jay Treaty as "a prime illustration" of a treaty negotiated "under instructions in the framing of which the Senate had no hand . . . ."[74] At this time, the Federalists were in control of the Senate, and four Federalists, Oliver Ellsworth, George Cabot, Caleb Strong and Rufus King "were the backbone of the administration party in the Senate" and "dominated the entire proceeding." They suggested both the mission and the plenipotentiary to Washington, and then pressed Chief Justice John Jay to accept the post.[75] In effect, the Senate acted "through a small number of its members in whom both the executive and a majority of their colleagues had great confidence." In instructing the envoy, "the Senatorial group still exercised a powerful if not a predominant influence."[76] As Hayden observed: "The entire procedure, certainly, is very similar to that by which it later became customary to consult the Senate through the Committee on Foreign Relations before any important negotiation was embarked upon."[77]

D. *Marshall's "Sole Organ" of Foreign Relations*

One of the other pillars of the claimed presidential monopoly of foreign relations is John Marshall's famed statement in 1799 that "[t]he President is the sole organ of the nation in its external relations."[78] Upon this statement Justice Sutherland uncritically relied

72. 5 ANNALS OF CONG. 760 (1796).

73. *Id.* at 760-61. For a discussion of the incident, see Berger, *Executive Privilege v. Congressional Inquiry*, 12 UCLA L. REV. 1043, 1085-86 (1965) [hereinafter Berger, *Privilege*].

74. CORWIN, THE PRESIDENT, *supra* note 6, at 257.

75. R. HAYDEN, *supra* note 23, at 63, 65, 67, 92.

76. *Id.* at 71, 72. *Cf. id.* at 92.

77. *Id.* at 73.

78. 10 ANNALS OF CONG. 613 (1800).

in *United States v. Curtiss-Wright Export Corp.*,[79] and it was later cited by Justice Douglas in *United States v. Pink*.[80] Thus emboldened by "that arch constitutional conservative"[81]—Justice Sutherland, McDougal and Lans concluded that Marshall "indicated the constitutional basis for the consummation of direct Presidential [executive] agreements,"[82] from which the Senate was excluded. So it is that uncritical repetition of a statement torn from its context has raised it to the level of dogma.

Marshall spoke in the House of Representatives to the extradition of one Jonathan Robbins, charged with murder by Great Britain and surrendered to the British authorities without judicial hearing upon the order of President John Adams, who acted under an existing treaty.[83] Adams was under attack on the ground that the matter of surrender was for the courts, not the President. Patently, the participation of the Senate in treaty negotiations or in any other facet of foreign affairs was not remotely involved. The Robbins affair, replied Marshall, involved "a national demand made upon the nation" and was therefore

> not a case for judicial cognizance . . . . The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the *demand* of a foreign nation *can only be made on him.*
>
> . . . .
>
> He is charged to execute the laws. A treaty is declared to be a law. He must then execute a treaty . . . .
>
> Ought not [the President] to perform the object, although the particular mode of using the means has not been prescribed? Congress, unquestionably, *may prescribe the mode,* and Congress *may devolve on others the whole execution* of the contract; but, till this be done, it seems the duty of the Executive department, to execute the contract by any means it possesses.[84]

79. 299 U.S. 304, 319 (1936).

80. 315 U.S. 203, 229 (1942).

81. McDougal & Lans, *supra* note 5, at 255.

82. *Id.* at 249-50.

83. CORWIN, CONTROL, *supra* note 28, at 99.

84. 10 ANNALS OF CONG. 613-14 (emphasis added). In his influential *The President's Control of Foreign Relations*, Corwin stated that the "President is the organ of diplomatic intercourse . . . first, because of his powers in connection with the reception and dispatch of diplomatic agents and with treaty-making; secondly, because of the tradition of executive power adherent to his office." CORWIN, CONTROL, *supra* note 28, at 33. It follows, he stated, that "this power is presumptively his alone," *id.* at 35, and from this he glided into the "necessity of preserving to the President his full constitutional discretion in the conduct of our foreign relations." *Id.* at 37. But the power to "receive" ambassadors, Hamilton explained, was "without consequence," "more a matter of dignity than of authority." *See* text accompanying note 21 *supra*. And the treaty power requires Senate participation all along the way. *See* text accompanying

Corwin justly concluded, "Clearly, what Marshall had foremost in mind was simply the President's role as *instrument of communication* with other governments."[85] Stripped of later interpretive encrustations, Marshall merely affirmed that a demand for extradition under a treaty "can only be made upon" the President; and that he is free to fashion his own means of complying with the treaty and demand until Congress "prescribes the mode." Far from excluding Congress from this "sole organ" area, therefore, Marshall regarded the exercise of even this power as subject to congressional control.

E. *Hamilton's Later Views*

Corwin attributes the expansion of the "President's external role . . . in the first instance" to Hamilton, through the medium of his "Pacificus" papers in 1793.[86] Madison entered the lists under the nom de plume "Helvidius"; and John Quincy Adams remarked in 1836 that Madison "scrutinized the doctrines of Pacificus with an acuteness of intellect never perhaps surpassed," and that his "most forcible arguments are pointed with quotations from the papers of *The Federalist* written by Mr. Hamilton."[87] But "history," said Corwin, "has awarded the palm of victory to 'Pacificus,'" meaning that "[b]y his reading of the 'executive power' clause 'Pacificus' gave the President constitutional warrant to go ahead and apply the advantages of his position in a field of power to which they are specially adapted."[88] That "Pacificus'" views were congenial to presidential

note 55 *supra*. No "tradition of executive power" can diminish the constitutional provisions nor defeat the intention of the Founders.

Corwin, *id.* at 39, likewise relied on a Marshall dictum in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165-66 (1803), to bolster the "discretion" of the President "as the organ of communication." Marshall pointed to the act of Congress for establishing the department of foreign affairs, and said of the Secretary, "This officer, as his duties were *prescribed by that act*, is to conform precisely to the will of the President." (Emphasis added.) It was the President's statutory control of the Secretary in the frame of judicial review that was under discussion, not his total freedom from congressional control. Congress could of course repeal the act; it could not permanently abdicate the powers confided to it, as Corwin himself noted. CORWIN, THE PRESIDENT, *supra* note 6, at 9. And as we noted, Marshall himself recognized the overriding power of Congress even with respect to the President's sole power of communication.

85. CORWIN, THE PRESIDENT, *supra* note 6, at 216 (emphasis original). Earlier, CORWIN, CONTROL, *supra* note 28, at 102, he took exception to Marshall's assertion that "Congress may unquestionably prescribe the mode . . . ." But if the Marshall statement is to undergird presidential claims, it must be read entire, limited as Marshall confined it. Corwin recognizes that by Act of Congress, "complaints for extradition may be lodged with any court of record," but maintains that "the final act of surrender still rests with the discretion of the President." CORWIN, CONTROL, *supra*, at 103. That exclusive enclave is small indeed.

86. CORWIN, THE PRESIDENT, *supra* note 6, at 217.

87. *Id.* at 219, 466 n.34, *quoting* J.Q. ADAMS, EULOGY ON JAMES MADISON 46 (1836).

88. CORWIN, TOTAL WAR, *supra* note 5, at 12.

expansionism is hardly deniable; but whether they afforded a "constitutional warrant" must turn on the validity of his arguments rather than their subsequent adoption by Presidents whose purposes they served. For, as Lord Justice Denman stated, "the mere statement and restatement of a doctrine . . . cannot make it law, unless it can be traced to some competent authority."[89] The magic of Hamilton's name must not obscure the fact that he had executed a *volte-face*, repudiating assurances he had made both in *The Federalist* and in the New York Ratification Convention to procure adoption of the Constitution.

To still objections to the exclusive presidential power to "receive Ambassadors"—the sole foreign affairs power confided to the President alone—Hamilton had earlier assured the people that it "is more a matter of dignity than of authority . . . without consequence."[90] Now, as "Pacificus," he transformed this innocuous "dignity" into "the right of the executive to decide upon the obligations of the country with regard to foreign nations," so that had there been an "*offensive* and defensive" treaty with France, presidential recognition "of the new government . . . would have laid the Legislature under an obligation . . . of exercising its power of declaring war."[91] The "story as a whole," Corwin observes, "only emphasizes the essential truth of 'Helvidius' ' contention that 'Pacificus' ' reading of the executive power clause contravened, certainly in effect, the express intention of the Constitution that the war-declaring power [plus discretion when to exercise it] should lodge with the legislative authority."[92]

Hamilton also built upon the contrast between Article I, which provides that "all legislative powers herein granted shall be vested in a Congress," and Article II, which declares that "the Executive

89. O'Connell v. Regina, 8 Eng. Rep. 1061, 1143 (1844). Maitland too stated that "some statement about the 13th century does not become true because it has been constantly repeated, that a 'chain of testimony' is never stronger than its first link." *Quoted in* C. FIFOOT, FREDERIC WILLIAM MAITLAND: A LIFE 11 (1971).

90. *See* note 21 *supra* and accompanying text.

91. 4 A. HAMILTON, THE WORKS OF ALEXANDER HAMILTON 442 (H. Lodge ed. 1904) (emphasis original). With good reason, therefore, did Madison say that the reception clause merely provided "for a particular mode of communication . . . for the ceremony of admitting public ministers, of examining their credentials, and of authenticating their title," so that "it would be highly improper to magnify the function into an important prerogative . . . ." 6 J. MADISON, THE WRITINGS OF JAMES MADISON 162 (G. Hunt ed. 1906). "So visionary a prophet," said Madison, as would have foretold in 1788 that Hamilton would in 1793 elevate an admittedly inconsequential power to that of imposing on Congress an obligation to declare war, would not have been believed. *Id.* at 162-63.

92. CORWIN, TOTAL WAR, *supra* note 5, at 14. *See generally* Berger, *War-Making*, *supra* note 17.

power shall be vested in a President," brushing aside the enumeration of specific presidential powers that followed as not "derogating from the more comprehensive grant in the general clause."[93] Although the vast bulk of powers granted by the Constitution are conferred upon Congress, it is the President, according to Hamilton, who emerges with all but unlimited power.

His view is refuted by the historical record. The colonial period, Corwin said, "ended with the belief prevalent that 'the executive magistracy' was the natural enemy, the legislative assembly the natural friend of liberty . . . ."[94] In considerable part, this belief was an outgrowth of the fact that assemblies were elected by the colonists themselves whereas the governors were placed over them by the King.[95] In "most of the early state constitutions accordingly we find the gubernatorial office reduced almost to the dimensions of a symbol," with all roots in the royal prerogative cut.[96] Charles Warren thought it

> probable that Madison and Randolph in preparing the Virginia Plan had in mind the conception of Executive power which Thomas Jefferson had set forth in his Draft of a Fundamental Constitution for Virginia in 1783, as follows: ". . . . By Executive powers, we mean no reference to those powers exercised under our former government by the Crown as of its prerogative . . . . We give them these powers only, which are necessary to execute the laws (and administer the government) . . . ."[97]

The Virginia Plan, submitted to the Convention by Governor Edmund Randolph, proposed a "national executive . . . with power

93. 4 A. HAMILTON, *supra* note 91, at 438-39. For materials tracing the path to the words "executive power" see Berger, *Privilege*, *supra* note 73, at 1072-73.

94. CORWIN, THE PRESIDENT, *supra* note 6, at 4. Those who fashioned the States, said Madison, "seem never for a moment to have turned their eyes from the danger to liberty from the overgrown and all-grasping prerogative of an hereditary magistrate." THE FEDERALIST No. 48, *supra* note 21, at 322.

95. 1 J. WILSON, THE WORKS OF JAMES WILSON 292-93 (R. McCloskey ed. 1967).

96. CORWIN, THE PRESIDENT, *supra* note 6, at 4-5. For example, the Virginia Constitution of 1776 provides that the Governor shall "exercise the executive powers of government, according to the laws of this Commonwealth, and shall not, under any pretence, exercise any power or prerogative, by virtue of any law, statute, or custom of England." 2 B. POORE, FEDERAL AND STATE CONSTITUTIONS 1910-11 (1877). Section 33 of the Maryland Constitution of 1776 is almost identical. 1 B. POORE, *supra*, at 825. CORWIN, THE PRESIDENT, *supra* note 6, at 5, justifiably concludes that under the pre-Convention state constitutions, "Executive power . . . was cut off entirely from the resources of the common law and of English constitutional usage." In the Convention, James Wilson stated that he "did not consider the Prerogatives of the British monarch as a proper guide in defining the Executive powers." 1 M. FARRAND, *supra* note 30, at 65-66. Hamilton emphasized in THE FEDERALIST No. 69, *supra* note 21, at 448, that the President's authority as Commander in Chief would be "much inferior" to that of the British King. *See also* note 111 *infra*.

97. C. WARREN, THE MAKING OF THE CONSTITUTION 177 (1947).

to carry into execution the national laws—to appoint to offices, in cases not otherwise provided for . . . ."[98] Roger Sherman "considered the Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect . . . ."[99] Although James Wilson was the "leader of the 'strong executive' party,"[100] the "only powers he conceived strictly Executive were those of executing the laws, and appointing officers . . . ."[101] Madison emphasized that preliminarily it was essential "*to fix the extent* of the Executive authority . . . as *certain* powers were in their nature Executive, and *must be given* to that department . . . ." And he added that the executive powers "shd. be confined and defined."[102] Thereafter, the enumerated powers were slowly added.[103]

The explanation of executive power to the Ratifying Conventions reaffirmed these views. The executive powers were "precisely those of the governors," said James Bowdoin in Massachusetts, as did James Iredell in North Carolina.[104] "What are his powers?" said Governor Randolph in Virginia. "To see the laws executed. Every executive in America has that power."[105] In Pennsylvania, James Wilson, in order to defend the President against the charge that he "will be the tool of the Senate," pointed first to the fact that he was to be Commander in Chief, and then added, "There is another power of no small magnitude intrusted to this officer. 'He shall take care that the laws be faithfully executed.' "[106] Iredell likewise stressed that the "office of superintending the execution of the laws . . . is . . . of the utmost importance";[107] and this was likewise the view expressed in North Carolina by Archibald Maclaine.[108] Charles Pinckney, a Framer, said in South Carolina that "[h]is duties, will

98. 1 M. FARRAND, *supra* note 30, at 62-63. For approval by the Convention on July 17th, see 2 *id.* at 32-33.

99. 1 *id.* at 65.

100. CORWIN, THE PRESIDENT, *supra* note 6, at 11.

101. 1 M. FARRAND, *supra* note 30, at 66.

102. 1 *id.* at 66-67 (emphasis added). King's notes recorded: "Mad: agrees with Wilson in his definition of executive powers—executive powers ex vi termini, do not include the Rights of war and peace, &c. but the powers shd. be confined and defined—if large we shall have the Evils of elective Monarchies . . . ." *Id.* at 70. *See also* Berger, *Privilege*, *supra* note 73, at 1071-75.

103. *Cf.* CORWIN, THE PRESIDENT, *supra* note 6, at 11-12.

104. 2 J. ELLIOT, *supra* note 30, at 128; 4 *id.* at 107. For the governors' powers, see note 96 *supra* and accompanying text.

105. 3 J. ELLIOT, *supra* note 30, at 201.

106. 2 *id.* at 512-13.

107. 4 *id.* 106, 136.

108. *Id.* at 136.

be, to attend to the execution of the acts of Congress";[109] and, to ward off fears of "the dangers of the executive," Pinckney stressed that the President cannot "take a single step in his government, without [Senate] advice."[110] Another Framer, William Davie, told the North Carolina Convention that "that jealousy of executive power which has shown itself so strongly in all American governments, would not admit" of lodging the treaty powers in the President alone.[111]

Hamilton's own representations in the several numbers of *The Federalist* devoted to analysis of presidential powers did not part company with the Framers. Public sentiment would not permit it. "Calculating upon the aversion of the people to monarchy," he wrote, opponents of the Constitution "have endeavoured to enlist all their jealousies and apprehensions in opposition to the intended President . . . as the full-grown progeny of that detested parent."[112] To counter such fears, he launched upon a minute analysis of each of the enumerated powers; for example, the Commander in Chief was merely to be the "first General."[113] Nothing was "to be feared," from an executive "with the confined authorities" of the President.[114] And after thus enumerating several powers, Hamilton stated:

> The *only remaining powers* of the Executive are comprehended in giving information to Congress of the state of the Union; in recommending to their consideration such measures as he shall judge expedient; in convening them, or either branch, upon extraordinary occasions; in adjourning them when they cannot themselves agree upon the time of adjournment; in receiving ambassadors and other public ministers; in faithfully executing the laws; and in commissioning all the officers of the United States.[115]

When "Pacificus" shifted gears, he too lightly dismissed the effect of the enumeration of powers; for the Founders were repeatedly assured that there was little risk of oppression under "a government consisting of enumerated powers."[116] Governor Randolph said in the

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109. 3 M. FARRAND, *supra* note 30, at 111.

110. 4 J. ELLIOT, *supra* note 30, at 258.

111. *Id.* at 120. "Fear of a return of Executive authority like that exercised by the Royal Governors or by the King had been ever present in the states from the beginning of the Revolution." C. WARREN, *supra* note 97, at 173.

112. THE FEDERALIST No. 67, *supra* note 21, at 436.

113. THE FEDERALIST No. 69, *id.* at 448.

114. THE FEDERALIST No. 71, *id.* at 468.

115. THE FEDERALIST No. 77, *id.* at 501 (emphasis added).

116. James Wilson in 2 J. ELLIOT, *supra* note 30, at 436.

Virginia Convention that the powers of government "are enumerated. Is it not, then, fairly deductible, that it has no power but what is expressly given it?—for if its powers were to be general, an enumeration would be needless."[117] James Iredell told the North Carolina Convention, "It is necessary to particularize the powers intended to be given, in the Constitution, as having no existence before; but, after having enumerated what we give up, it follows . . . that whatever is done, by virtue of that authority, is legal . . . ."[118] It will be recalled that Madison stated in the Federal Convention that it was essential "*to fix the extent* of the Executive authority" and to give "*certain* powers" to the executive, and that the executive power should be "confined and defined."[119] *The Federalist* itself, per Madison, emphasized in *No. 14* that the jurisdiction of the federal government "is limited to certain enumerated objects,"[120] and in *No. 45* that "[t]he powers delegated . . . to the federal government are few and defined."[121] What Lee said in Virginia of Congress could equally have been said of the President: "[T]he liberties of the people are secure. . . . When a question arises with respect to the legality of any power, exercised or assumed by Congress [the question will be] . . . *Is it enumerated in the Constitution?* . . . It is otherwise arbitrary and unconstitutional."[122]

These were not the only departures by "Pacificus" from Hamilton's prior representations. Having erected a plenary executive power, "Pacificus" proceeded to whittle down "participation of the Senate in the making of treaties, and the power of the legislature to declare war" because "as exceptions out of the general 'executive power' vested in the President, they are to be construed strictly . . . ."[123] Not only does this run counter to the last-minute joinder of the President as a participant in the treaty power, but Hamilton

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117. 3 *id.* at 464.

118. 4 *id.* at 179. Chief Justice Taney pointed out how "carefully" the Framers withheld from the executive branch "many of the powers belonging to the executive English government . . . and conferred . . . those powers only which were deemed essential." *Ex parte* Merryman, 17 F. Cas. 144, 149 (No. 9487) (C.C. Md. 1861). So too, Story stated that the powers with which the executive branch "is entrusted . . . are enumerated in the second and third sections . . . ." 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1489, at 327 (5th ed. 1891).

119. *See* text accompanying note 102 *supra*.

120. THE FEDERALIST No. 14, *supra* note 21, at 82.

121. THE FEDERALIST No. 45, *id.* at 303. For additional citations, see BERGER, CONGRESS, *supra* note 32, at 13-14, 377 n.52.

122. 3 J. ELLIOT, *supra* note 30, at 186 (emphasis original). Iredell said of the Supremacy Clause in the North Carolina Convention, "[T]he question . . . will always be, whether Congress had exceeded its authority." 4 *id.* at 179.

123. 4 A. HAMILTON, *supra* note 91, at 443.

himself had stated in *The Federalist No. 75* that the treaty power "partake[s] more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them."[124] Wilson and Madison stated in the Convention that some of the King's prerogatives "were of a Legislative nature. Among others that of war & peace"; and consequently those prerogatives were not "a proper guide in defining the Executive powers." The "only powers" they considered "strictly Executive were those of executing the laws, and appointing officers not appointed by the Legislature."[125] Later, Wilson stated that in the distribution of war powers *all* of the powers "naturally connected" with Congress' power to "declare war" were confided to it, leaving to the President only the direction of the armed forces once war was commenced by Congress or by foreign invasion.[126] If there was an "exception," it ran the other way, from the plenary war-making power of Congress for the executive function of "first General." So too, the treaty power, which was lodged in the Senate almost to the end of the Convention, and only then altered to admit presidential participation, hardly reflects a view that it is executive in nature.[127]

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124. THE FEDERALIST No. 75, *supra* note 21, at 486.

125. 1 M. FARRAND, *supra* note 30, at 65-66, 70.

126. 1 J. WILSON, *supra* note 95, at 433, 440. For extended discussion, see generally Berger, *War-Making, supra* note 17.

127. In his "Helvidius" papers, Madison reasons,

> 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 presuppose the existence of laws to be executed. A treaty is not an execution of laws: it does not presuppose 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 that the power of making treaties, which are confessedly laws, belongs naturally to the department which is to execute it, is to say that the executive department naturally includes a legislative power. In theory this is an absurdity—in practice a tyranny.

6 J. MADISON, *supra* note 91, at 145 (emphasis original). After serving as Secretary of State, Vice President Jefferson wrote in his MANUAL OF PARLIAMENTARY PRACTICE § 52, at 109 (Clark, Austin & Smith ed. 1856): "Treaties are legislative acts."

Corwin considers that Madison's view is inconsistent with his position during the "removal" debate in 1789. CORWIN, CONTROL, *supra* note 28, at 28-29. If Madison's 1789 views were inconsistent with the views he later expressed, the latter were consistent with the statements that are an index to construction of the Constitution. *See* BERGER, CONGRESS, *supra* note 32, at 76-81.

Then too, the issues were entirely different. The Constitution made no provision for removal from office, and there was no explanation by the Framers. Hence when Madison and others argued that the power ought to be in the Executive, they contradicted neither the express terms of the Constitution nor its history. Hamilton, however, did contradict the evident assumption writ large in the text that "the President and the Senate will be associated throughout the entire process of making a treaty . . . ." *See* text accompanying note 29 *supra*. And in his subsequent *Letters of Camillus*, Hamilton stated that because of the "most ample latitude" of the treaty power "it was carefully guarded; the cooperation of . . . the Senate . . . being required to make any treaty whatever." 6 A. HAMILTON, *supra* note 91, at 183.

After his "Pacificus" papers, Hamilton wrote in his *Letters of Camillus* that "the organization of the power of treaty in the Constitution was attacked and defended with an admission on both sides, of its being of the [legislative] character which I have assigned to it. Its great extent and importance . . . the legislative authority were mutually taken for granted . . . ."[128]

Of course, Hamilton was free to change *his* mind from time to time; but the meaning of the Constitution, as Jefferson stressed, is "to be found in the explanations of those who advocated it," upon which the people relied in adopting the Constitution.[129] Until the people are given the chance to say whether *they* have changed their minds, Hamilton's shift can furnish no "constitutional warrant" for an unconfined executive power.

"Pacificus' " view that the general executive power was not restricted by the specifically enumerated powers that followed was embraced by Chief Justice Taft in *Myers v. United States*[130] over the dissents of Justices Holmes[131] and Brandeis,[132] who gave short shrift to the executive power argument.[133] Not Taft's views, but those of Holmes and Brandeis subsequently prevailed with Justices Black, Douglas, Frankfurter and Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*.[134] Justice Jackson rejected the view that the executive power clause "is a grant in bulk of all conceivable executive power but regard[ed] it as an allocation to the presidential office of the generic powers thereafter stated."[135] Which view the newly recon-

128. 6 A. HAMILTON, *supra* note 91, at 185. In this letter Hamilton cited the dissent of George Mason from the Constitution on the ground that "[b]y declaring all treaties supreme laws of the land, the Executive and Senate have, *in many cases, an exclusive power of legislation* . . . ."; and he comments, "This shows the great extent of the power, in the conception of Mr. Mason: *in many cases* amounting to an *exclusive power of legislation*: nor did he object to the extent . . . ." *Id.* at 184 (emphasis original).

129. *Quoted in* 4 J. ELLIOT, *supra* note 30, at 446. So too, Madison clung "to the sense in which the Constitution was accepted and ratified by the Nation . . . . And if that be not the guide in expounding it, there can be no security for a consistent and stable government, more than for a faithful exercise of its powers." 9 J. MADISON, *supra* note 91, at 191.

130. 272 U.S. 52, 118, 128 (1925).

131. 272 U.S. at 177.

132. 272 U.S. at 244-47.

133. For a discussion, see Berger, *Privilege*, *supra* note 73, at 1073-76. McDougal & Lans, *supra* note 5, at 252, rely on *Myers* for the "construction of the first clause of Article II as a broad grant of residual power to the executive." *See also* McDougal & Lans, *supra*, at 295. In his 1953 edition of the Constitution, *supra* note 1, at 379, Corwin stated, "These enlarged conceptions of the executive power clause have been ratified by the Supreme Court" in the *Myers* case.

134. 343 U.S. 579, 587 (Black, J.), 610 (Frankfurter, J.), 641 (Jackson, J.) (1952). Justice Douglas stated: "Article II which vests the 'executive Power' in the President defines that power with particularity." 343 U.S. at 632.

135. 343 U.S. at 641.

structed Burger Court may opt for is an open question; but it cannot rewrite history. And it is the unmistakable lesson of history that the President was intentionally given a few enumerated powers, no more.

F. *The 1816 Senate Report*

Another hardy perennial frequently drawn forth in defense of presidential monopoly—by Justice Sutherland[136] and Dean Acheson[137] among others—is an 1816 Report by the Senate Committee on Foreign Relations, which counseled against "interference of the Senate in the direction of foreign negotiations."[138] This warning was based on notions of expediency, as to which men may differ, rather than upon the historical content of the treaty power. Opposed to this Report is a Senate debate in 1806, which discloses that the Senate then "believed that, constitutionally, it possessed authority to participate in treaty-making at any stage in the process,"[139] a belief later shared by Secretary of State Buchanan and President Polk.[140] A more important episode is the statement in the Senate by Senator Rufus King in 1818. King had been a member of the Continental Congress, of the Federal Convention where, as a member of the Committee on Detail, he helped draft the final provision for presidential participation in treaty-making, of the Massachusetts Ratification Convention, and of the Senate quadrumvirate, which piloted the Jay Treaty from beginning to end. Said King,

> [I]n respect to foreign affairs, the President has no exclusive binding power, except that of receiving Ambassadors . . . . [T]o the validity of all other definitive proceedings in the management of the foreign affairs, the Constitutional advice and consent of the Senate are indispensable . . . . [I]n this capacity the Senate may, and ought to, look into and watch over every branch of the foreign affairs . . . they may, therefore, at any time call for full and exact information respecting the foreign affairs . . . . To make a treaty includes all the proceedings by which it is made; and the advice and consent of the Senate being necessary in the making of treaties, must necessarily be so, touching the measures employed in making the same.[141]

King rejected the gloss "that the President shall make treaties, and

136. United States v. Curtiss-Wright Export Corp. 299 U.S. 304, 319 (1936). *See* text accompanying note 19 *supra*.

137. *Hearings, supra* note 13, at 260. The Report was also cited by Assistant Attorney General William H. Rehnquist, *id.* at 431.

138. *Quoted in* 299 U.S. at 319; *Hearings, supra* note 13, at 260.

139. R. HAYDEN, *supra* note 23, at 203, 199-203.

140. *See* Black, *supra* note 70, at 7-8.

141. 31 ANNALS OF CONG. 106-07 (1818).

by and with the consent of the Senate ratify the same."[142] Great weight attaches to his explanation, not merely because "he was there," but because it faithfully corresponds to the view that was taken of the treaty power by the Framers, the Ratifiers, and by President Washington.

G. *United States v. Curtiss-Wright Export Corporation: Inherent Presidential Power*

It remained for our time to furnish a powerful impetus to presidential expansionism in the shape of some ill-considered dicta in *United States v. Curtiss-Wright Export Corporation,* per Justice Sutherland,[143] to which the Court lent credit in *United States v. Pink.*[144] Despite searching criticism,[145] *Curtiss-Wright* has become the foundation of subsequent decisions and has all too frequently been cited for an omnipresent presidential power over foreign relations. The case proceeded from a Joint Resolution which authorized the President, upon making certain findings and engaging in consultations with other American Republics, to declare unlawful the sale of munitions to countries then engaged in armed conflict in the Chaco, namely Bolivia and Paraguay, if it "may contribute to the reestablishment of peace between those countries."[146] The sole issue was whether this was an improper delegation,[147] a question that might adequately have been answered under the *Field v. Clark*[148] line of cases. But the aims of Justice Sutherland soared beyond this modest goal; he would launch a theory of inherent presidential power over foreign relations.[149] To this end he confined the enumeration of powers doctrine to "domestic or internal affairs";[150] in for-

142. *Id.* Compare text accompanying notes 22-23 *supra.*

143. *See* text accompanying note 19 *supra.*

144. 315 U.S. 203, 229 (1942). The *Curtiss-Wright* dicta were brushed aside in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-36 & n.2 (1952), by Justice Jackson, who pointed out that *Curtiss-Wright* "involved, not the question of the President's power to act without congressional authority, but the question of his right to act under and in accord with an act of Congress." (Concurring opinion.)

145. *See* note 180 *infra. See also* Kurland, *The Impotence of Reticence,* 1968 DUKE L.J. 619, 622-23.

146. 299 U.S. at 312.

147. 299 U.S. at 315.

148. 143 U.S. 649 (1892). *See also* J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928). The cases are well analyzed in W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS 48-52 (5th ed. 1970).

149. As late as 1929, Willoughby wrote, "There can be no question as to the unconstitutional unsoundness, as well as the revolutionary character of the theory" of inherent powers. 1 W. WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 92 (2d ed. 1929).

150. 299 U.S. at 315-16.

eign affairs, he explained, in terms recalling the descent of the Holy Ghost, "the external sovereignty of Great Britain . . . immediately passed to the Union."[151] In this he was deceived. It hardly needs more than Madison's statement in *The Federalist No. 45*, that "[t]he powers delegated by the proposed Constitution are *few and defined* . . . [they] will be exercised principally on *external* objects, as war, peace, negotiation, and foreign commerce,"[152] to prove that the powers over *foreign relations* were enumerated and "defined." Deferring for the moment further comment on Sutherland's aberrant theory, let it be assumed that somehow the *nation* or Union obtained "inherent" powers over foreign relations, and it still needs to be shown how the power came to be vested *in the President.* For, as Justice Frankfurter pointed out, "the fact that power exists in the Government does not vest it in the President."[153] The "inherent power" theory, moreover, would circumvent the manifest intention of the Framers to create a federal government of limited and enumerated powers and defeat their purpose to condition presidential action in the field of foreign relations on congressional participation. Before examining the history Sutherland avouched, another ground of his opinion should be noticed: the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations," for which he trotted out Marshall's "sole organ" dictum and the Senate Committee Report of 1816,[154] earlier discussed.

McDougal and Lans, who relied heavily on these dicta,[155] acknowledged that Sutherland's analysis "unquestionably involves certain metaphorical elements and considerable differences of opinion about historical facts," but concluded that he "may have been expressing a thought more profound than any involved in quarrels about the naming of powers."[156] This is to conclude that Sutherland was right for the wrong reasons. Apparently the "profound" thought was the "important fact . . . that the imperatives of survival

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151. 299 U.S. at 317.

152. THE FEDERALIST No. 45, *supra* note 21, at 303 (emphasis added).

153. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 604 (1952) (concurring opinion).

154. 299 U.S. at 319-20.

155. McDougal & Lans, *supra* note 5, at 255-58. Dean Acheson, former Secretary of State, cited *Curtiss-Wright* to the Senate in July 1971. *Hearings, supra* note 13, at 260, 264.

156. McDougal & Lans, *supra* note 5, at 257-58. The Framers, we shall see, would have no part of his metaphors.

have required the Federal Government to exercise certain powers."[157] No "imperatives of survival" were at stake in *Curtiss-Wright* or in *Pink*, nor has there been any demonstration that the powers of the federal government were and are inadequate, still less how supra-constitutional powers came to rest in the President. Instead, the issue is whether the President may act without the participation of the Senate in the exercise of powers conferred on President and Senate *jointly*. The "quarrel," therefore, is not about the mere "naming of powers," but about presidential claims to exclusive power notwithstanding that the Constitution and Founders unmistakably meant the treaty power to be exercised jointly with the Senate.

It is high time that the mischievous and demonstrably wrong dicta of Justice Sutherland be put to rest. His view that the President enjoys extra-constitutional powers outside the sphere of enumerated powers was based on the theory that

> since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source . . . . [T]he powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States . . . . Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union. *See Penhallow* v. *Doane*, 3 Dall. 54, 80-81.[158]

Seldom have dicta more "obviously" been removed from the historical facts.

To the minds of the colonists, "thirteen sovereignties," as Chief Justice Jay said in 1793, "were considered as emerged from the principles of the revolution."[159] For this we need go no further than the Articles of Confederation, agreed to by the Continental Congress on November 5, 1777, signed by all the States save Maryland in 1778 and 1779, and ratified March 1, 1781.[160] Article II recited, "Each state retains its sovereignty, freedom and independence, and every Power . . . which is not . . . expressly delegated to the United States

157. *Id.* This reasoning is followed by Mathews, *The Constitutional Power of the President To Conclude International Agreements*, 64 YALE L.J. 345, 348 (1955).

158. 299 U.S. at 316-17.

159. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 470 (1793). The Massachusetts Constitution of 1780, art. IV, provided, "The people of this commonwealth have the sole and exclusive right of governing themselves as a free, sovereign, and independent State, and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction and right which is not, or may not hereafter be, by them expressly delegated to the United States of America in Congress assembled." 1 B. POORE, *supra* note 96, at 958.

160. H. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 111 (7th ed. 1963).

in Congress assembled." Article III provided, "The said states hereby severally enter into a firm league of friendship with each other, for their common defence . . . ." Mark that they entered into a "league"; they did not purport to create a "corporate" or "sovereign" body. Article IX then declared that "[t]he united states in congress assembled shall have the sole and exclusive right of determining on peace and war . . . entering into treaties and alliances." This express grant of war and treaty powers alone undermines Justice Sutherland's central premise that these powers were derived from "some other source" than the several States. If the new-born Continental Congress possessed "inherent" war and treaty powers from the outset, the express grant was gratuitous.

Nor did the Founders share Justice Sutherland's views on sovereignty. More pragmatic than he, they spoke, not in terms of sovereignty, but of power; and they were quite clear that the *people*, not even the cherished States, were sovereign. Power flowed from the people, not from the Crown to fill a vacuum. Hear James Iredell in North Carolina: "It is necessary to particularize the power intended *to be given,* as having *no existence before* . . . ."[161] "The people," stated Madison in the Convention, "were in fact the fountain of all power";[162] a part they conferred upon the individual States; and in the clause, "We, the people of the United States . . . do ordain and establish this Constitution," said Chief Justice Jay, "we see the people acting as sovereign of the whole country."[163] Sovereignty was taken by the people to themselves.

When Justice Sutherland cited *Penhallow v. Doane,*[164] he referred solely to the opinion of Justice William Paterson, ignoring the fact that the majority opinions of Justices Iredell and Cushing were to the contrary. The case arose on a state of facts that antedated the adoption of the Articles of Confederation; and Paterson stated that the Continental Congress exercised the "rights and powers of war," and that "states individually did not."[165] This, however, does not tell the whole story. For example, the Continental Congress resolved on November 4, 1775,

161. 4 J. ELLIOT, *supra* note 30, at 179 (emphasis added).

162. 2 M. FARRAND, *supra* note 30, at 476. For similar remarks by George Mason, James Iredell, James Wilson, and others, see BERGER, CONGRESS, *supra* note 32, 173 n. 99, 174-75. With justice, therefore, did Professor P.B. Kurland dismiss Justice Sutherland's "discovery" that "the presidential powers over foreign affairs derived not at all from the Constitution but rather from the Crown of England." Kurland, *supra* note 145, at 622. *See also* note 183 *infra.*

163. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 471 (1793).

164. 3 U.S. (3 Dall.) 54 (1795).

165. 3 U.S. (3 Dall.) at 80-81.

> [t]hat the town of Charleston ought to be defended against any attempts that may be made to take possession thereof by the enemies of America, and that the convention or council of safety of South Carolina, ought to pursue such measures, as to them shall seem most efficacious for the purpose, and that they proceed immediately to erect such fortifications and batteries in or near Charleston, as will best conduce to promote its security, the expence to be paid by said Colony.[166]

Other testimony that each of the Colonies was thought to possess war-making power is furnished by the July 12, 1776, draft of the Articles of Confederation: "The said Colonies unite themselves . . . and hereby severally enter into a firm League of Friendship . . . binding the said Colonies to assist one another against all Force offered to or attacks made upon them . . . ."[167] Indeed, as Justice Chase was to remark in a cognate case, the very fact of delegation of war power by the States to the Congress demonstrates that the States must have "rightfully possessed" it.[168] In the course of time, the States did not "individually" exercise the power of war; but that did not spring from absence of original power but from a voluntary surrender expressed both in the Article IX delegation and in the 1776 draft of Article XIII: "No colony . . . shall engage in any War without the previous Consent of the United States assembled, . . ."[169]—a provision that was preserved in Article VI of the Articles as adopted.

Justice James Iredell, whose opinion in *Penhallow* went unnoticed by Sutherland, understood all this full well. Each province, he pointed out, had comprised "a body politic," in nowise connected with the others "than as being subject to the same common sovereign."[170] "If congress," he continued, "previous to the articles of confederation, possessed any authority, it was an authority . . . derived from the people of each Province . . . . [T]his authority was conveyed by each body politic separately, and not by all the people in the several provinces, or states, jointly . . . ."[171] And he concluded that the war-making authority "was not possessed by Congress, unless given by all the states."[172] In this view he was joined by Justice Wil-

166. 3 JOUR. CONTL. CONG. 326 (1775).

167. 5 JOUR. CONTL. CONG. 546-47 (1776).

168. "Virginia had a right, as a sovereign and independent nation, to confiscate any British property within its territory, unless she had delegated that power to Congress . . . . [I]f she had before parted with such power, it must be conceded, that she once rightfully possessed it." Ware v. Hylton, 3 U.S. (3 Dall.) 199, 231 (1796).

169. 5 JOUR. CONTL. CONG. 549 (1776); H. COMMAGER, *supra* note 160, at 112.

170. 3 U.S. (3 Dall.) at 90.

171. 3 U.S. (3 Dall.) at 92-94.

172. 3 U.S. (3 Dall.) at 95.

liam Cushing;[173] and both are abundantly confirmed by the specific grants of war and treaty powers to the Congress in the Articles of Confederation.

Reliance for "inherent" war and treaty powers antedating the Articles of Confederation has also been placed[174] upon some remarks by Justice Chase in *Ware v. Hylton*:[175] "The powers of congress originated from necessity . . . they were *revolutionary* in their very nature . . . . It was absolutely and indispensably necessary that Congress should possess the power of *conducting* the war against *Great Britain,* and therefore, if not expressly given by all, (as it was by some of the States [who had ratified the Articles in 1778]) . . . Congress did rightfully possess *such* power."[176] A simpler and more prosaic explanation is at hand. Sitting and working together, the delegates from the thirteen States—who as early as July 1776 proposed in the draft Articles of Confederation to reduce to writing the necessary delegation by the States to Congress and who agreed to the Articles of Confederation in November 1777—presumably were agreed that the conduct of the war required centralization and therefore authorized the necessary "confederated" acts pending formal adoption of the proposed Articles. Roughly that view was taken by Iredell, one of the great Founders, who led the struggle for adoption of the Constitution in North Carolina.[177]

The invocation of the treaty signed with France by Benjamin Franklin and his fellow commissioners in February 1778, and ratified by Congress in May,[178] little advances the argument for "inherent" national power. Franklin and the other commissioners proceeded to France under express instructions to enter into a treaty with the King of France, carrying with them "letters of credence" (September 1776), running not from the Congress but from "The delegates of the United States of New Hampshire, Massachusetts Bay," and each of the other enumerated States.[179]

173. Justice Cushing stated: "I have no doubt of the sovereignty of the states, saving the powers delegated to Congress . . . to carry on, unitedly, the common defense in the open war . . . ." 3 U.S. (3 Dall.) at 117.

174. McDougal & Lans, *supra* note 5, at 258.

175. 3 U.S. (3 Dall.) 199 (1796).

176. 3 U.S. (3 Dall.) at 232 (emphasis original).

177. Despite his statement respecting "revolutionary" "necessity," Justice Chase himself stated in *Ware v. Hylton* that "all the powers actually exercised by congress, before [the confederation], were rightfully exercised, on the presumption not to be controverted, that they were so authorized by the people they represented, by an express or implied grant . . . ." 3 U.S. (3 Dall.) at 232.

178. *See* McDougal & Lans, *supra* note 5, at 258; 11 JOUR. CONTL. CONG. 421, 444, 457 (1778).

179. 5 JOUR. CONTL. CONG. 828, 833 (1776) (emphasis added). McDougal & Lans,

Doubtless the delegates from the several States believed themselves authorized to send Franklin in search of an alliance. The resulting treaty, it bears emphasis, was concluded with "the thirteen United States of North America, viz. New Hampshire, Massachusetts Bay," and so forth,[180] scarcely testimony that France thought it was concluding an alliance with a sovereign nation. But give the "revolutionary" central government its widest scope, and it still remains to ask, what relevance do deeds resulting from revolutionary necessity in the absence of an existing national structure have to a subsequent written document, such as the Articles of Confederation, which carefully enumerates the powers granted and reserves all powers not "expressly delegated"?[181] John Jay later wrote of the treaty-making power in *The Federalist No. 64* that "it should not be *delegated* but . . . with such precautions as will afford the highest security . . . ."[182]

Study of the constitutional records convinces that the Founders jealously insisted on a federal government of enumerated, strictly limited powers.[183] In creating first Governors, and then the President, they purposely cut all roots to the royal prerogative.[184] Not for them the aureole with which Justice Sutherland endowed the

supra note 5, at 537, therefore say truly that "these early Congresses . . . although controlling foreign policy, essentially functioned as councils of ambassadorial delegates from a group of federated states . . . ," a statement that undercuts Sutherland's dictum that the States never had external "sovereignty."

180. 11 JOUR. CONTL. CONG. 421 (1778). Sutherland, 299 U.S. at 317, also relied on Rufus King's remarks in the Convention: "The States were not 'sovereigns' in the sense contended for by some. They did not possess the peculiar features of sovereignty. They could not make war, nor peace, nor alliances, nor treaties." 1 M. FARRAND, *supra* note 30, at 323. But these remarks are at war with the facts.

Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946), furnishes additional confirmation for rejection of Sutherland's views. Levitan demonstrates that the Continental "Congress was a committee of safety having as its basic aim the defeat of Great Britain. At no time was it viewed, nor did it view itself as a governmental organization having legislative authority." *Id.* at 483. The "record of events leaves no doubts that treaty-making power was exercised by the States." *Id.* at 485. The States did not deem the 1778 Franklin treaty "binding on them, until they had individually ratified the treaty." *Id.* at 486. The 1776-1787 history, he concludes, "leaves little room for the acceptance of Mr. Justice Sutherland's 'inherent' powers, or in fact 'extra-constitutional' powers theory." *Id.* at 496.

That so solid a demonstration of the vulnerability of the Sutherland dicta should not have discouraged further citation is not the least remarkable chapter in the history of *Curtiss-Wright*.

181. Articles of Confederation, art. II, *quoted in* H. COMMAGER, *supra* note 160, at 111.

182. THE FEDERALIST No. 64, *supra* note 21, at 417.

183. *See* note 96; text accompanying notes 94-128 *supra*. For additional citations, see BERGER, CONGRESS, *supra* note 32, at 13-14, 377 n.52; Berger, *Privilege*, *supra* note 73, at 1075. *See also* text accompanying note 23 *supra*.

184. *See* notes 96-97 *supra* and accompanying text.

President's power over foreign relations. That power was no less circumscribed than the domestic powers as Madison made clear.[185] A supraconstitutional "residuum" of powers not granted expressly or by necessary implication was not only furthest from their thoughts,[186] but avowal of such a "residuum" would have affrighted them and barred adoption of the Constitution.[187] To conjure up an "inherent" executive power in the teeth of this history is both to shut our eyes to the historical record and to abort the plainly manifested intention of the Founders to create a federal government of limited and enumerated powers.

II. Executive Agreements

A. *Evolution*

Executive agreements are not mentioned in the Constitution, in the Constitutional Convention, or in the Ratification Conventions; indeed the term is of comparatively recent vintage.[188] Starting from a trickle,[189] executive agreements made by the President alone—which can involve large financial, and possibly military commitments[190]—have, since 1930, mounted to a flood. Many of these

185. *See* text accompanying note 152 *supra.*

186. In his 1791 Lectures, James Wilson, then a Justice of the Supreme Court, referred to the executive powers granted by the Constitution and to the presidential veto as "a guard to protect his powers against [the Legislature's] encroachment. Such powers and such a guard he ought to possess: but a just distribution of the powers of government requires that *he should possess no more.*" 1 J. Wilson, *supra* note 95, at 319 (emphasis added).

187. As Alexander White of Virginia stated in the First Congress, after insisting that the federal government must adhere to the limits described in the Constitution: "This was the ground on which the friends of the Government supported the Constitution . . . . [I]t could not have been supported on any other. If this principle had not been successfully maintained by its advocates in the convention of the state from which I come, the Constitution would never have been ratified." 1 Annals of Cong. 515 (1789). *Cf.* Berger, Congress, *supra* note 32, at 13-16.

188. "Actually there are few documents which bear the title 'executive agreement.' . . . But this phrase is used by the Department of State as the title of the series of publications listing important international agreements, negotiated subsequent to 1930, which did not receive Senatorial consent under Article II, Section 2, prior to ratification." McDougal & Lans, *supra* note 5, at 198 n.16.

189. The power was appraised modestly enough in 1917 in Corwin, Control, *supra* note 28, at 125, when he referred to "the President's prerogative in the making of international compacts of a temporary nature and not demanding enforcement by the courts," and prophetically stated that it "is likely to become larger before it begins to shrink."

"Since 1933 there has been a considerable extension in the use of the executive agreement, and it has been employed for purposes never contemplated by statesmen or writers before 1930. This movement was accelerated since the *Curtiss-Wright* decision in 1937, avowing a wide inherent power of the Federal government to deal with foreign affairs." Borchard, *Treaties and Executive Agreements—A Reply*, 54 Yale L.J. 616, 649 (1945).

190. Consider, for example the 435 million dollars in credits and assistance promised

agreements the State Department refuses to reveal even to the Senate,[191] the constitutional participant in the making of international agreements. Even apologists for executive agreements agree that secret agreements are undesirable and that they should be subject to debate and the "salutary influence of public opinion."[192]

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to Portugal in return for a twenty-five month extension of base rights in the Azores. N.Y. Times, April 3, 1972, at 7, col. 1. An editorial in the *Times* remarks, "the stationing of American troops abroad and the establishment of military bases . . . can commit the nation to war in some instances as thoroughly as a treaty of alliance." N.Y. Times, May 1, 1972, at 32, col. 1. For secret promises by Admiral Carney to Greece of atomic support, and a secret agreement governing nonwithdrawal of combat troops stationed in Europe, see C. SULZBERGER, A LONG ROW OF CANDLES 867, 923 (1969).

191. Indeed, a civil servant, apparently an officer or former officer of the State Department, suggested that "for controversial acts the Senate method may well be quietly abandoned, and the instruments handled as executive agreements." W. MCCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS 378 (1941).

Professor Philip B. Kurland, Chief Consultant to the Senate Subcommittee on Separation of Powers, stated before that Committee in an exchange with former Secretary of State Dean Acheson that "[t]his committee . . . attempted to secure from the State Department a list, not even the contents, but a list of executive agreements between this country and foreign countries and the State Department has been unwilling to afford that information to this committee. There are some hundred odd such agreements, the contents of which I think are unknown." *Hearings*, *supra* note 13, at 268. *See also* statement of Senator Sam J. Ervin, Jr., Washington Post, April 25, 1972, at A-7, col. 1. An editorial in the New York Times, May 1, 1972, at 32, col. 1, states:

> The tendency of Presidents to circumvent the Constitutional requirement for Senate approval of treaties by concluding executive agreements has reached extraordinary proportions in recent years. In the 150 years prior to 1939, the United States entered into 799 treaties and 1,182 executive agreements, one-and-one-half times as many. In the last 26 years, according to State Department compilations, 368 treaties have been concluded but fifteen times that many executive agreements have been signed—a total of 5,590. In addition, there are over 400 secret agreements, the nature of which the State Department declines to reveal. Moreover, thousands of other executive agreements evidently have been concluded by other governmental agencies, particularly the Defense Department, which reportedly refuses to disclose the details even to Congressional Committees.

Former Secretary of Defense, Clark Clifford, testified before the Senate that executive agreements lead "to excessive secrecy in policy-making, and [they] can lead to implied national commitments to other nations . . . ." Washington Post, April 25, 1972, at A-7, col. 3.

192. In the course of vigorous advocacy of executive agreements, McDougal and Lans stated: "No one believes that secret agreements—except to the extent necessitated by war-time exigencies—are desirable, . . . debate in the House of Representatives can only be an additional safeguard and provide public education of the highest value." McDougal & Lans, *supra* note 5, at 552-53. "In any situation," they said, "reference of an important international agreement to Congress has the undoubted advantage of stimulating public discussion of the issues involved and permits the Executive's judgment to be questioned and checked by independent critics . . . ." *Id.* at 555-56. Former Secretary of State Dean Acheson testified that "in most cases a legislative agreement would be better. You bring the House in and you have a much broader basis of support." He related that when he proposed that the UNNRA relief agreement should be an executive agreement, Senator Arthur Vandenberg exploded and "the State Department was scared off." *Hearings*, *supra* note 13, at 268. As "a rule, international agreements, as well as treaties, should be entered into only in such a way that the salutary influence of public opinion can be brought to bear on them; the country should not, as a rule, be bound by stipulations of executive agreements without its knowledge and without opportunity to protest." J. MATHEWS, AMERICAN FOREIGN RELATIONS: CONDUCT AND POLICIES 545-46 (1938).

Roused by this state of affairs, the Senate has recently moved to limit presidential circumvention of legislative prerogative by requiring that executive agreements be submitted for information, and is also considering legislation that would confirm Senate power to veto executive agreements.[193] Since executive agreements are said to spring from the President's independent powers,[194] it is necessary to investigate the premise on which such a theory rests and whether the bills presently before Congress invade an area exclusively entrusted to the President.[195]

Article II, section 2, of the Constitution provides that the President "shall have power, by and with the Advice and Consent of the Senate, to make Treaties . . . ." At the adoption of the Constitution, the word "treaties" had a broad connotation; in the words of Nicholas Bailey's (1729) dictionary, a treaty was "an agreement between two or more distinct Nations concerning Peace, Commerce, Navigation, etc." Hamilton construed "treaty" in the broadest terms:

> [F]rom the *best opportunity of knowing the fact,* I aver, that it was understood by *all* to be the intent of the provision to give that power the most ample latitude—to render it competent to all the stipulations which the exigencies of national affairs might require; competent to the making of treaties of alliance, treaties of commerce, treaties of peace, and every other species of convention usual among nations . . . . And it was emphatically for this reason that it was so carefully guarded; the cooperation of two-thirds of the Senate, with the President, being required to make any treaty whatever.[196]

Those indefatigable advocates of executive agreements, McDougal and Lans,[197] state that "there are no significant criteria,

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193. *See* text accompanying notes 9-11 *supra.*

194. McDougal & Lans, *supra* note 5, at 199. *Cf.* United States v. Pink, 315 U.S. 203, 229 (1942).

195. The discussion will be confined to the legality of an executive agreement as a matter of internal law, *i.e.,* its constitutional status. Its legal effect as a matter of international law, *e.g.,* whether a foreign nation is entitled to rely on an "unauthorized" executive agreement, is a separate question which is not here considered.

196. Letters of Camillus, *in* 6 A. HAMILTON, *supra* note 91, at 183 (emphasis original). Compare Story's restatement: "The power 'to make treaties' . . . embraces all sorts of treaties, for peace or war; for commerce or territory; for alliance or succors; for indemnity for injuries or payment of debts; for the recognition and enforcement of principles of public law; and for any other purposes, which the policy or interests of independent sovereigns may dictate in their intercourse with each other." 2 J. STORY, *supra* note 118, § 1508, at 338-39. The Hamilton-Story view is reflected in Geofroy v. Riggs, 133 U.S. 258, 266-67 (1890): "That the treaty power . . . extends to all proper subjects of negotiation between our government and the government of other nations, is clear . . . . It is not perceived that there is any limit to the questions which can be adjusted" subject to constitutional limitations.

197. Their article, *supra* note 5, runs to some 250 pages, the bulk of which is devoted to a plea for agreements fashioned by the President with the approval of a

under the Constitution . . . or in the diplomatic practice of this government, by which the *genus* 'treaty' can be distinguished from the *genus* 'executive agreement' other than the single criterion of the procedure or authority by which the United States' consent to ratification [by the Senate] is obtained."[198] It follows that the express provision for treaty-making by the Senate and President jointly—which embraces "all the stipulations which . . . national affairs might require . . . and every other species of convention"—covers the field,[199] and therefore, as Justice Jackson stated in the *Youngstown* case, the presidential claim to power is "clearly eliminated."[200] On the historical facts, the question, in the words of Professor Philip Kurland, is, "Should the Constitution really be read to mean that

majority of both Senate and House, as distinguished from consent by two thirds of the Senate alone. But they break more than one lance for the solo presidential agreement. *Id.* at 205, 223, 247-51, 311, 317, 338. With respect to the suggestion that the President has a plenary power to "make international agreements on any subject whatever," they state that "[i]t is not necessary . . . to come to a conclusion on this point. What is completely certain is that the powers of the Congress can be superadded to those of the President, and that the two sets of powers taken together are plenary." *Id.* at 246. Their comment on the argument that executive agreements conduce to the "dangers of 'secret diplomacy'" points up their ambivalence:

> These arguments appear to be rooted in a simple failure to differentiate between the two principal classes of executive agreements: those perfected by the President on his own responsibility, and those made in pursuance of Congressional authorization. The Constitution of the United States is, fortunately, sufficiently flexible that it presents no necessity for choosing between the Scylla of a foreign policy dominated by a Senatorial minority and the Charybdis of simple Presidential agreements. It offers a third and thoroughly democratic alternative: the Congressional-Executive agreement, eliminating both the possibility of arbitrary, injudicious or secret action and the disintegrating effects of minority obstructionism.

Id. at 552.

198. *Id.* at 199 (emphasis original). They also say, "Nor does the Constitution state any limitation upon the scope of the subject matter of treaties." *Id.* at 220. But McDougal and Lans conclude that "all distinctions in the naming of these agreements—'treaties,' 'executive agreements,' or 'Congressional-Executive agreements'—are merely convenient labels . . . ." *Id.* at 226.

Corwin also considers that "the criteria seem lacking for a nice differentiation of the prerogative under discussion [executive agreements] from the treaty making power, with the result that its curtailment . . . is a problem of practical statesmanship rather than of Constitutional Law." CORWIN, CONTROL, *supra* note 28, at 120-21. Given the express provision for Senate participation in treaty-making, any exclusion by solo presidential agreements from such participation plainly presents a problem of "constitutional law."

199. *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 639 (1952) (Jackson, J., concurring). Given that "treaties" cover the field, it is unimportant that the "Constitution does not provide that the treaty-making procedure is to be the exclusive mode." McDougal & Lans, *supra* note 5, at 216. Ordinarily, express mention of one mode is thought to exclude another, subject to rebuttal, for example, by a contrary legislative purpose. Here the legislative intention confirms the implication of exclusivity. The treaty power was granted to Senate and President jointly, as Hamilton explained, in order to "afford a greater prospect of security, than the separate possession of it by either of them." THE FEDERALIST No. 75, *supra* note 21, at 488. *See* text accompanying notes 205-13 *infra*.

200. 343 U.S. 579, 639 (1952).

by calling an agreement an executive agreement rather than a treaty, the obligation to secure Senate approval is dissolved?"[201]

Fired by zeal in the midst of World War II to prevent another holocaust by the building of a world union, and to forestall obstruction to this union by a "wilful," "undemocratic" Senate minority[202] —such as blocked our adherence to the League of Nations— McDougal and Lans consigned to deepest limbo the "assumption that the treaty-making procedure is exclusive." They stamped as vain all "efforts to woo [the] enigmatic meaning" of the treaty clause; the "true intention" of the Framers they considered "a speculative domain of impenetrable obscurity."[203] However impenetrable the intention of the Framers may be in other respects, they made clear beyond doubt that the specific objective of the treaty clause was to preclude the President, acting alone, from entering into international agreements. This point is so vital as to bear detailed exposition.

Hamilton, who has been said to reflect the consensus of the Framers,[204] stated in *The Federalist No. 75,* that treaties are

> agreements between sovereign and sovereign . . . the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them . . . it would be utterly unsafe and improper to entrust [the entire power of making treaties] to an elective magistrate . . . . The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States . . . . It must indeed be clear to a demonstration that the joint possession of the power in question, by the President and the Senate, would afford a greater prospect of security, than the separate possession of it by either of them.[205]

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201. Kurland, *supra* note 145, at 626.

202. *See* McDougal & Lans, *supra* note 5, at 187, 535, 563, 565, 567, 569, 575, 602.

203. *Id.* at 216-17.

204. "It cannot be reasonably doubted that Hamilton was here, as at other points, endeavoring to reproduce the matured conclusions of the Convention itself." E. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW 44 (1914).

205. THE FEDERALIST No. 75, *supra* note 21, at 486-87, 488. Apparently the point loomed so large in the public mind that it had earlier been made by John Jay in No. 64, and by Hamilton in No. 69. Jay said: "The power of making treaties is an important one, especially as it relates to war, peace and commerce; it should not be delegated but in such a mode, and with such precautions, as will afford the highest security that it will be exercised by men the best qualified for the purpose, and in the manner most conducive to the public good," *i.e.,* as provided by the treaty clause. *Id.* at 417. In No. 69, Hamilton stated: "The king of Great Britain is the sole and absolute representative of the nation in *all* foreign transactions. He can

A number of Framers spoke to the same effect in the Ratification Conventions. James Wilson said in Pennsylvania, "[I]f the powers of either branch are perverted, it must be with the approbation of some one of the other branches of government. Thus checked on each side, they can do no one act of themselves."[206] In South Carolina, C. C. Pinckney said, "Surely there is greater security in vesting this power as the present Constitution has vested it, than in any other body. Would the gentleman vest it in the President alone? If he would, his assertion that the power we have granted was as dangerous as the power vested by Parliament in the proclamations of Henry VIII, might have been, perhaps, warranted . . . . [The Senate] joined with the President . . . form together a body in whom can be best and most safely vested the diplomatic power of the Union."[207] In North Carolina, William Davie stated that "jealousy of executive power" would not permit a grant of treaty power to the President alone.[208] Shortly thereafter, Roger Sherman, a delegate to the Constitutional Convention, stated in the First Congress,

> [t]he establishment of every treaty requires the voice of the Senate, as does the appointment of every officer for conducting the business. These two objects are expressly provided for in the Constitution, and they lead me to believe that the two bodies ought to act jointly in *every transaction* which respects the business of negotiation with foreign powers . . . . There is something more required than responsibility in conducting treaties. The Constitution contemplates the united wisdom of the President and Senate, in order to make treaties . . . . The more wisdom there is employed, the greater security there is that the public business will be well done.[209]

Across the vista of forty-five years, Joseph Story restated these views.[210]

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of his own accord make treaties of peace, commerce, alliance, and of every other description . . . . In this respect, therefore, there is no comparison between the intended power of the President, and the actual power of the British sovereign. The one can perform alone what the other can do only with the concurrence of a branch of the legislature." *Id.* at 450-51 (emphasis added).

206. 2 J. ELLIOT, *supra* note 30, at 466. And he stated: "Neither the President nor the Senate, solely, can complete a treaty; they are checks upon each other, and are so balanced as to produce security to the people." *Id.* at 507.

207. 4 *id.* at 280-81.

208. *Id.* at 120.

209. 1 ANNALS OF CONG. 1085 (1789) (emphasis added). *See also* text accompanying notes 48-63 *supra*.

210. 2 J. STORY, *supra* note 118, § 1512, at 341, 343-44:

> Considering the delicacy and extent of the power, it is too much to expect that a free people would confide to a single magistrate, however respectable, the sole authority to act conclusively, as well as exclusively, upon the subject of treaties . . . . But however proper it may be in a monarchy, there is no American statesman but must feel that such a prerogative in an American president would be inex-

Thus, the Founders made unmistakably plain their intention to withhold from the President the power to enter into treaties all by himself, because, as Francis Corbin said in Virginia, "It would be dangerous to give this power to the President alone."[211] Hence, they circumscribed his power over foreign intercourse by requiring Senate participation in "every . . . species of convention usual among nations."[212] To circumvent that careful design by a mere change of labels, by substituting the words "executive agreements" for "treaties"—bearing in mind the absence of "significant criteria" for distinguishing between the two—is to reduce the restrictions so carefully fashioned by the Framers to ropes of sand.[213]

McDougal and Lans maintain, however, that the

> Framers themselves explicitly recognized that there are international agreements other than treaties and put this recognition into the document. In Article I, Section 10 the Constitution . . . provides that "No state shall enter into any treaty, alliance or confederation," but continues that "No state shall, without the consent of Congress . . . enter into any agreement or compact with another state, or with a foreign power." Unless one takes the position that the Framers sought to deny to the Federal Government the power to use techniques of agreement made available to the states—an argument completely refuted by the debates at the Convention and by contemporaneous history—the conclusion is inescapable that the Federal Government was intended to have the power to make "agreements" or "compacts."[214]

To the contrary, the fact that the Framers explicitly authorized

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pedient and dangerous. It would be inconsistent with that wholesome jealousy which all republics ought to cherish, of all depositaries of power . . . .
See also id. § 1515.

211. 3 J. ELLIOT, *supra* note 30, at 509.

212. Letters of Camillus, *in* 6 A. HAMILTON, *supra* note 91, at 183. *See* text accompanying note 196 *supra*.

213. Compare McDougal & Lans, *supra* note 5, at 199, *quoted* in text at note 198. A lay view was aptly expressed in an editorial of the New York Times, April 17, 1944, at 22, col. 1: to suggest that "treaties" be called "agreements," said the *Times*, "is merely to argue that we can get around the Constitution by conspiring with each other to call a spade by another name." *See also* K. COLEGROVE, THE AMERICAN SENATE AND WORLD PEACE 31, 110 (1944); 2 C. HYDE, INTERNATIONAL LAW 1417 (2d ed. 1945). "The people," said 1 J. STORY, *supra* note 118, § 451, at 345, make and adopt constitutions, and "must be supposed to read them, with the help of common sense, and cannot be presumed to admit in them any recondite meaning . . . ." Justice Richard Yates, a delegate to the Convention from New York, took for granted in 1788 that judges would be bound to "give such meaning to the constitution, as comports best with the common, and generally received acceptation of the words in which it is expressed, regarding their ordinary and popular use . . . ." *Quoted in* E. CORWIN, COURT OVER CONSTITUTION 235 (1938). So broad was the popular understanding of the scope of "treaty," as evidenced by Hamilton, that it left no room for other international agreements.

214. McDougal & Lans, *supra* note 5, at 221.

the States to enter into "agreements" but omitted to do so in the case of the President implies a deliberate decision to withhold that power from him.[215] It is a non sequitur, moreover, to deduce from a grant of power to a State to make "agreements" *with the consent* of Congress, a presidential power to make such agreements altogether free of congressional consent; let alone that such a construction collides with the Founders' unmistakable intention to limit presidential action in the diplomatic area by the requirement of Senate consent. The rule of construction is to carry out, not to defeat, that intention.[216]

So too, the McDougal-Lans appeal to history is misconceived. Of course, there was general recognition of the vices of a weak, ineffectual federal government; but to many this did not seem nearly so perilous as a potentially tyrannical central government.[217] It is also true that a woeful deficiency under the Articles of Confederation had been State noncompliance with treaties, and the Constitution therefore made treaties enforceable against the States.[218] But as Willoughby points out, "[i]n the State ratifying conventions the fact that treaties were to be superior to State constitutions and laws created not a little fear of possible oppression."[219] Well aware of such sentiments, the Framers had taken pains to circumscribe the power.[220]

At every turn there was jealous suspicion of a centralized government and insistence upon a grudging, carefully limited grant of enumerated powers.[221] The Framers went so far as expressly to empower the President to ask for written opinions from executive

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215. Compare T.I.M.E., Inc. v. United States, 359 U.S. 464, 471 (1959): "We find it impossible to impute to Congress an intention to give such a right to shippers under the Motor Carrier Act when the very sections which established that right in Part I [for railroads] were wholly omitted in the Motor Carrier Act." Then too, the State "agreement" clause was contrived to meet a special situation. *See* text accompanying notes 230-31 *infra*.

216. We cannot rightly prefer "a meaning which will defeat rather than effectuate the constitutional purpose." United States v. Classic, 313 U.S. 299, 316 (1941). In the First Congress, Elbridge Gerry stated, "Why should we construe any part of the Constitution in such a manner as to destroy its essential principles, when a more consonant construction can be obtained?" 1 ANNALS OF CONG. 473 (1789).

217. *See* BERGER, CONGRESS, *supra* note 32, at 8-14, 260-61.

218. *Id.* at 135, 234-35, 239, 307, 309, 372-73, 380, 381 n.73.

219. 1 W. WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 520 (2d ed. 1929).

220. *See* text accompanying notes 94-122 *supra*.

221. For example, E. Pierce, speaking generally, stated in Massachusetts, "I believe such a superior power ought to be in Congress. But I would have it distinctly bounded, that everyone may know the utmost limits of it . . . ." 2 J. ELLIOT, *supra* note 30, at 77. *See also* Samuel Stillman, *id.* at 176; text accompanying notes 116-22 *supra*.

department heads;[222] but under the reasoning of McDougal and Lans, the Framers had no qualms about entrusting to the President "inherent" powers of unlimited scope![223] Lee, however, assured the Virginia Ratification Convention that "[w]hen a question arises with respect to the legality of any power, exercised or assumed by Congress [the question will be] . . . *Is it enumerated in the Constitution?* . . . It is otherwise arbitrary and unconstitutional."[224] The President was not held in higher esteem, witness the frequent outcries against monarchical tendencies, and the power given Congress to impeach the President. Notwithstanding assurances such as that of Lee,[225] the people demanded the tenth amendment to make sure that powers not delegated to the federal government were reserved to the States.

Another factor contributing to insistence on Senate participation in treaty-making was noted by William Davie, who explained that because of "the extreme jealousy of the little states" it "became necessary to give them absolute equality [in the Senate] in making treaties,"[226] a statement confirmed by another Framer, Richard Spaight.[227] To conceive that the "little states" would then leave the barn door wide open so that the President could singlehandedly enter into executive agreements without their concurrence is to upend history. McDougal and Lans explain that "[t]he need to propitiate the small states—a rationale whose contemporary invalidity is indicated in a subsequent Section [of their article, which dwells on the diminishing importance of States' Rights]—surely might have been adequate reason for failure to state more explicitly the scope of powers conferred" on the House,[228] and, by parity of reasoning, on the President. More baldly stated, this is an appeal to repudiate the representations and compromise made to secure the adherence of the small States to the Constitution, a sorry basis for the authors' high-minded plea for a more "democratic" process. In seeking the meaning of constitutional language, it is the understanding of the Framers that is all important. As Justice Iredell, who had fought valiantly but vainly for ratification in North Carolina, said, "We are too apt, in estimating a law passed at a

222. U.S. CONST. art. II, § 2, cl. 1.

223. The point was made by Justice Jackson in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640-41 (1952) (concurring opinion).

224. 3 J. ELLIOT, *supra* note 30, at 186.

225. BERGER, CONGRESS, *supra* note 32, at 13-14, 124-35.

226. 4 J. ELLIOT, *supra* note 30, at 120. *See* McDougal & Lans, *supra* note 5, at 538.

227. 4 J. ELLIOT, *supra* note 30, at 27.

228. McDougal & Lans, *supra* note 5, at 236.

remote period, to combine, in our consideration, all the subsequent events which have had an influence upon it, instead of confining ourselves (which we ought to do) to the existing circumstances at the time of its passing."[229]

Before leaving the State "compact" clause, a word as to the distinction there drawn between a "treaty, alliance or confederation" and an "agreement or compact." How does this square with the comprehensive scope given to the treaty clause by Hamilton? "Agreements" and "compacts" between some States, regulating boundaries, rights of fishery, and the like—of which the Framers were doubtless aware—had been entered into prior to adoption of the Constitution.[230] It is reasonable to infer that the "compact" clause provided for such arrangements, drawing a distinction between them and the more political "treaty, alliance or confederation," which were forbidden absolutely. Given the broad understanding of federal treaties recorded by Hamilton, there is no place in the treaty clause for the more restricted reading of "treaty" as it is used in the "compact" clause, where a distinction was made to meet a special situation. It is familiar learning that the same words may have different meanings in the different contexts of the same statute when they are directed to different purposes.[231] In any event, the decisive factor is not the content of "agreement" so much as the fact that the sole use of that word in the Constitution was conditioned on consent by Congress. It cannot be divorced from such consent in order to liberate the President from the consent of the Senate that the treaty clause requires.

It remains to consider a remarkable assertion by McDougal and Lans: where executive "agreements are predicated upon the President's independent constitutional powers, such as in the field of foreign relations, under the separation of powers doctrine, Congressional action might not affect . . . the domestic effect of the agreement . . . ."[232] They are aware that "a treaty may be terminated . . . by a Congressional act . . .";[233] but

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229. Ware v. Hylton, 3 U.S. (3 Dall.) 199, 267 (1796).

230. Weinfield, *What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts?"*, 3 U. CHI. L. REV. 453, 464 (1936). Writing in 1803, Judge St. George Tucker cited the Virginia-Maryland "compact" of 1785 for the regulation of navigation on boundary waters and the like, as an example of the "agreements or compacts" contemplated by the compact clause. 1 W. BLACKSTONE, COMMENTARIES, app., at 309 (Tucker ed. 1803).

231. Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 433-34 (1932).

232. McDougal & Lans, *supra* note 5, at 338.

233. *Id.* at 334.

> if the subject of the [executive] agreement is a matter within the President's special constitutional competence—related, for example, to the recognition of a foreign government or to an exercise of his authority as Commander-in-Chief . . . the separation of powers doctrine might . . . permit the President to disregard the statute as an unconstitutional invasion of his own power.[234]

Thus an executive agreement, nowhere mentioned in the Constitution, is exalted above a treaty for which explicit provision is made—a treaty may be repealed by Congress, not so an executive agreement!

The Commander-in-Chief power is ill-suited to support such a claim. Hamilton explained that this authority "would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral . . .";[235] and Corwin properly understood this to mean that the President "will have no powers that any high military or naval commander . . . might not have,"[236] an unlikely source of power to enter into untouchable international agreements. Then, too, virtually every State Constitution had made the Governor "Commander in Chief," who was to act under the laws of the State, which is to say, subject to legislative governance.[237] Reiterated emphasis in the several Ratifying Conventions that the President's major function was to execute the laws,[238] reinforced by the Article II, section 3 provision that "he shall take care that the laws be faithfully executed," reflects the same concern and repels any inference that the Commander-in-Chief clause conferred power which soars above the "law-making" powers of Congress. Similarly, the President's power of "recognition" derives from his power to "receive" ambassadors, which Hamilton was constrained to explain "is more a matter of dignity than of

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234. *Id.* at 317.

235. THE FEDERALIST No. 69, *supra* note 21, at 448.

236. CORWIN, THE PRESIDENT, *supra* note 6, at 276. For extended discussion, see Berger, *War-Making*, *supra* note 17, at 37-38. Compare the Supreme Court statement in Tucker v. Alexandroff, 183 U.S. 424, 435 (1902) that the "commander-in-chief" would require statutory authorization for the return under treaty of Russian deserters. *See* text accompanying note 243 *infra*.

237. Article VII of the Massachusetts Constitution of 1780 provides that the Governor shall be "commander-in-chief," and that his powers shall "be exercised agreeably to . . . the laws of the land and not otherwise." 1 B. POORE, *supra* note 96, at 965-66. For Delaware, Article 9, *id.* at 275; for Georgia, Article 33, *id.* at 381; for New Hampshire (identical with Massachusetts'), 2 *id.* at 1288.

Hamilton stated in THE FEDERALIST No. 69, *supra* note 21, at 449: "The constitutions of several of the States expressly declare their governors to be commanders-in-chief . . . and it may well be a question, whether those of New Hampshire and Massachusetts, in particular, do not, in this instance, confer larger powers upon their respective governors, than could be claimed by a President of the United States."

238. *See* text accompanying notes 97-109 *supra*.

authority" and "will be without consequence in the administration of the government. . . ."[239] On such flimsy foundations McDougal and Lans would erect an "independent" presidential power to enter into executive agreements, which are beyond "invasion" by Congress.

The crowning incongruity is their appeal to the separation of powers to protect such solo agreements from congressional invasion. What magic in the dubious, inexplicit presidential solo power calls forth a protection denied to the *express* provision for Senate participation in the all-inclusive treaty-making power? Why does respect for express constitutional provisions exhibit "mechanical, filiopietistic" slavery to words[240] whereas invocation of *implicit* doctrines such as the separation of powers is free of that taint? To my mind, McDougal and Lans apply a double standard of constitutional interpretation, turning on whose ox is gored.

B. *Supreme Court Decisions*

Constitutional "law" seldom exhibits such frail underpinning as was mustered by McDougal and Lans for judicial recognition of solo presidential executive agreements. Consider their reliance on *Tucker v. Alexandroff*,[241] in which "the Supreme Court intimated by way of dictum that the President was empowered to make agreements permitting passage of foreign troops through the United States and could thereby divest all American officials of jurisdiction over such a military force."[242] The issue presented was whether a member of the Russian navy, who had deserted while awaiting the launching of a Russian war ship in Philadelphia, came within a Russian treaty calling for return of deserters from Russian ships. In passing, the Court remarked:

> While no act of Congress authorizes the executive department to permit the introduction of foreign troops, the power to give such permission without legislative assent was probably assumed to exist from the authority of the President as commander-in-chief. . . . It may be doubted, however, whether such power could be extended to the apprehension of deserters in the absence of positive legislation to that effect.[243]

As Corwin said, the question of the validity of "this species of agreement" was "touched upon in rather equivocal terms."[244] If this be

239. *See* text accompanying note 21 *supra*.

240. *See* text accompanying note 271 *infra*.

241. 183 U.S. 424 (1902).

242. McDougal & Lans, *supra* note 5, at 310.

243. 183 U.S. at 435.

244. CORWIN, CONTROL, *supra* note 28, at 118.

judicial recognition of executive agreements, the Court's emphasis that return of deserters required legislative assent confines it to the narrowest compass.

Next, McDougal and Lans state:

> The general powers of the President to make executive agreements seem to have been first touched by the Supreme Court in 1933, in *Monaco v. Mississippi* wherein Chief Justice Hughes stated: "The National Government, by virtue of its control of our foreign relations is entitled to employ the resources of diplomatic negotiations and to effect such an international settlement as may be found appropriate, *through treaty, agreement of arbitration, or otherwise.*"[245]

The question in *Monaco* was whether a state could be sued by a foreign state without her consent; whether the President could make an executive agreement by himself was not in issue. Hughes' reference to the power of the "National Government" to act does not necessarily imply that the President is authorized to act without the consent of the Senate. A redistribution of constitutional powers should not rest on strained inferences.[246]

McDougal and Lans next summon the *Curtiss-Wright* case.[247] That case, it will be recalled, was later dismissed by Justice Jackson because it "involved, not the question of the President's power to act without congressional authority, but the question of his right to act in accord with an act of Congress."[248] Justice Sutherland's dictum regarding the President's "inherent" powers is without historical foundation; and his reliance on Marshall for the statement that "participation in the exercise of the power [over external affairs] is significantly limited"[249] all but perverts Marshall's "sole organ" remark.[250] Subsequent reliance on Sutherland's dicta underscores the wisdom of Marshall's dismissal of his own dicta in *Marbury v. Madison*[251] when they were pressed upon him in a subsequent case.[252]

245. McDougal & Lans, *supra* note 5, at 310, *quoting* 292 U.S. 313, 331 (1934) (emphasis by McDougal & Lans).

246. As the Supreme Court stated in Brady v. Roosevelt S.S. Co., 317 U.S. 575, 580-81 (1943), "[S]uch a basic change in one of the fundamentals of the law of agency should hardly be left to conjecture."

247. McDougal & Lans, *supra* note 5, at 255-56, 310.

248. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-36 & n.2 (1952) (concurring opinion). *Curtiss-Wright* merely held that the congressional delegation to the President was constitutional. 299 U.S. at 327-28.

249. 299 U.S. at 319. For refutation of Sutherland's "inherent" power dictum, see text accompanying notes 94-122, 143-87 *supra.*

250. *See* text accompanying notes 78-85 *supra.*

251. 5 U.S. (1 Cranch) 137 (1803).

252. It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions

"The dicta of the *Monaco* and *Curtiss-Wright* cases," McDougal and Lans tell us, "were the capstones of the decisions in the *Belmont* and *Pink* cases, dealing with the validity and interpretation of an assignment of Russian-owned assets in the United States, which was one of several executive agreements negotiated when the United States recognized the Soviet government in 1933."[253] In the *Belmont* case,[254] Justice Sutherland once more delivered himself of sweeping dicta:

> [I]n respect of what was done here, the Executive had authority to speak as the sole organ of that [national] government. The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty making clause of the Constitution . . . require the advice and consent of the Senate.[255]

No account was taken by Sutherland of the history which demonstrates the intention of the Founders to withhold from the President the right to enter into international agreements without Senate consent. Instead, he reasoned from *B. Altman & Co. v. United States*[256] that an international compact may be distinguished from a treaty. There a reciprocal agreement had been made with France under authority of the Tariff Act; and the sole question presented to the Court was whether Congress, by permitting a direct appeal to the Supreme Court with respect to treaties, intended to encompass such a compact. In answering this question, the Court stated, "True, that under the Constitution . . . the treaty-making power is vested in the President, by and with the advice and consent of the Senate," but it concluded that the reciprocal agreement "was a *compact*

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are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-400 (1821).

253. McDougal & Lans, *supra* note 5, at 311.

254. United States v. Belmont, 301 U.S. 324 (1937).

255. 301 U.S. at 330. Sutherland disposed of the issues in lordly fashion: that the agreements "were within the competence of the President may not be doubted." Earlier he had stated that "international agreements which are not treaties in the full constitutional sense, are perhaps confined to such as affect administrative matters, as distinguished from policies, and those which are of only individual concern, or of limited scope and duration, as distinguished from those of general consequence and permanent character." G. SUTHERLAND, *supra* note 22, at 121.

Borchard stated that about 5 million dollars were accepted in return for the sacrifice of 300 million dollars in American claims arising out of confiscations in Russia. Borchard, *supra* note 189, at 647.

256. 224 U.S. 583 (1912).

authorized by the Congress . . . and *such a compact* is a treaty" for the purposes of the appeals statute.[257] In thus treating the authorized compact as a treaty for the purposes of a special appeals statute, the Court did not purport to sanction executive agreements not authorized by Congress, a jump unhesitatingly made by Justice Sutherland. Justice Stone, in an opinion joined by Justices Brandeis and Cardozo, concurred with a key reservation:

> We may, for present purposes, assume that the United States, by treaty . . . *could alter the policy* which a *State might otherwise adopt.* It is unnecessary to consider whether the present agreement between the two governments can rightly be given the same effect as a treaty within this rule, for neither the allegations . . . nor the diplomatic exchanges, suggest that the United States has either recognized or declared that any *state policy is to be overridden.*[258]

And so we arrive at *United States v. Pink,*[259] in which the issue reserved by Justice Stone was presented, and where Justice Douglas, citing *Belmont* and *Curtiss-Wright,* stated that the

> Litvinov Assignment was an international compact which did not require the participation of the Senate. . . . Power to remove such obstacles to full recognition as settlement of claims of our nationals . . . certainly is a modest implied power of the President who is the "sole organ of the federal government in the field of international relations."[260]

The *Pink* case had no occasion to rule that a presidential agreement could be made against the wishes of Congress; and in fact Justice Douglas said that the executive policy had been "tacitly" recognized by congressional appointment of commissioners to determine American claims against the Soviet fund.[261] The dissent of Chief Justice Stone, in which Justice Roberts joined, is incontrovertible: "[W]e are referred to no authority which would sustain such an exercise of power as is said to have been exerted here by mere assignment unratified by the Senate."[262]

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257. 224 U.S. at 600, 601 (emphasis added).

258. 301 U.S. at 336 (emphasis added).

259. 315 U.S. 203 (1942).

260. 315 U.S. at 229. The Government had argued that "[t]he authority of the President to enter into executive agreements with foreign nations without the consent of the Senate *is established,*" citing *Monaco* and *Curtiss-Wright,* 315 U.S. at 208 (emphasis added). Thus are dicta blown up into "established" law.

261. 315 U.S. at 227-28.

262. 315 U.S. at 249. McDougal & Lans, *supra* note 5, at 310, also rely on Watts v. United States, 1 Wash. Terr. 288, 294 (1870), for the proposition that "an executive agreement between Great Britain and the United States . . . with regard to jurisdiction over San Juan Island, was deemed to modify the Organic Law of the territory, as

We need only recall Davie's references to the prevalent distrust of executive power,[263] to the jealous insistence by the small States on participation in treaty-making on an equal basis in the Senate,[264] to the fears that surfaced in the Ratification Conventions—despite Senate participation—that the power to override state laws might lead to oppression,[265] in order to conclude that without Senate participation the treaty power would have found no acceptance. To allow an executive agreement to override state law or policy on the ground that it represents "a modest implied power" is to ignore the Founders' plain intention to withhold that power from the President.

This is confirmed by Article VI, which makes only "Laws" and "Treaties" the "supreme law of the land," binding upon the states.[266] It would require a constitutional amendment, for which the *Pink* case is an inadequate substitute, to make an "executive agreement," concluded by the President alone, equally binding.

At best, the not so "modest implied power" of the President to enter into such agreements with the tacit consent of Congress amounts to no more than a concurrent power that Congress can curtail by statute, as Justice Jackson reminded us in the *Steel Seizure* case.[267] Were the issue presented anew by a congressional challenge to presidential entry into executive agreements without its consent, the cases would be far from conclusive.

III. Adaptation by Usage

There is no dispute about the intention of the Founders to make the Senate an equal partner in the conduct of foreign affairs. Nor is this a case in which "plain meaning is an illusory goal,"[268] or in which an ambiguous grant to the President may be clarified by resort to his long-continued "practice." Were the textual requirement of Senate "advice and consent" in the making of treaties

enacted by Congress." Whether one can distill such a "holding" from the three separate opinions in the case is at least debatable; and one may question whether the Supreme Court would allow a presidential agreement to override an Act of Congress. *See* text accompanying note 267 *infra*.

263. *See* text accompanying note 111 *supra*.

264. *See* text accompanying note 226 *supra*.

265. *See* text accompanying note 219 *supra*.

266. For discussion of the "binding" phrase, see Berger, Congress, *supra* note 32, at 233-34.

267. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637-39 (1952). Given concurrent powers, Chief Justice Marshall held in an early war-power case, a congressional statute must prevail. Little v. Barreme, 6 U.S. (2 Cranch) 170, 177-78 (1804).

268. Reveley, *supra* note 4, at 1251.

equivocal, its meaning was made clear beyond peradventure by the explanations of the Framers and Ratifiers.[269] We begin, therefore, with an unambiguous constitutional requirement that treaties—meaning all international agreements, and all that goes into their making—are to be the *joint* function of President and Senate.

"Adaptation by usage" is a label designed to render palatable the disagreeable claim that the President may by his own practices revise the Constitution, that he may disrupt the constitutional distribution of powers, considered inviolable under the separation of powers.[270] For McDougal and Lans, one who opposes this claim is enslaved by "the words of the Constitution as timeless absolutes," a prey "to mechanical, filio-pietistic theory":[271] "Whether these powers are based on an *interpretation* of the language of the Constitution or on *usage* is, strictly, a matter of concern only for rhetoricians . . . ."[272] Impatiently brushing aside "the absolute artifacts of verbal archeology," "the idiosyncratic purposes of the Framers," they maintain that "continuance of [a] practice by successive administrations throughout our history makes its contemporary constitutionality unquestionable."[273] In blunter terms, usurpation of

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269. Influential apologists for expanded presidential powers are agreed in this. *See* text accompanying note 29 *supra*.

270. In rejecting the demand of the House for documents respecting the Jay Treaty, President Washington said, "It is essential to the due administration of the Government, that the boundaries fixed by the Constitution between the different departments should be preserved." 5 ANNALS OF CONG. 761-62 (1796). The executive branch clings to the separation of powers when it claims a right to withhold information from Congress under the doctrine of "executive privilege." *See* testimony of Secretary of State William P. Rogers and Assistant Attorney General William H. Rehnquist in July 1971. *Hearings*, *supra* note 13, at 473, 430. Compare Justice Douglas in *Youngstown*, 343 U.S. at 632 (concurring opinion): "If we sanctioned the present exercise of power by the President, we would be expanding Article II of the Constitution and rewriting it to suit the political conveniences of the present emergency." *See also* Berger, *War-Making*, *supra* note 17, at 68-69 n.256.

What the separation of powers meant to the Founders was spelled out in the Massachusetts Constitution of 1780, drafted by John Adams. Article XXX provides: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; . . . to the end it may be a government of laws, not of men." 1 B. POORE, *supra* note 96, at 960. *See also* the New Hampshire Constitution of 1784, pt. I, art. 37, 2 *id.* at 1283, and the Georgia Constitution of 1777, art. I, 1 *id.* at 378.

Charles Pinckney submitted to the Convention that the President "cannot be cloathed with those executive authorities the Chief Magistrate of a Government often possesses; because they are vested in the Legislature, and cannot be used or delegated by them in any, but the specified mode." 3 M. FARRAND, *supra* note 30, at 111.

271. McDougal & Lans, *supra* note 5, at 212.

272. *Id.* at 239 n.104 (emphasis original).

273. *Id.* at 291. *Compare* their comment, "The phrase 'treaty of peace,' when bereft of the reification which makes it some mysterious, special kind of an agreement," is included in the scope of presidential executive agreements, *id.* at 286, *with* events

power, if repeated often enough, accomplishes an amendment of the Constitution and a transfer of power.[274]

Although this view has commended itself to the academicians, it has not won the assent of the Supreme Court. In *Powell v. McCormack*,[275] the House of Representatives argued that the exclusion of Adam Clayton Powell on grounds not enumerated in the Constitution was supported by earlier, similar House exclusions; but the Court declared: "That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date."[276] From George Washington on,[277] "usurpation" of power has not been a mere pejorative expletive but

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in the Convention. Madison moved to "except treaties of peace" from the two-thirds concurrence provision. Gerry objected that treaties of peace were of especial importance; and Hugh Williamson stated, "Treaties of peace should be guarded at least by requiring the same concurrence as in other Treaties." 2 M. FARRAND, *supra* note 30, at 540-41. The exception was rejected. For the Framers a treaty of peace was unmistakably a "special kind of agreement," for reasons which were not at all "mysterious."

274. A "practice so deeply embedded in our governmental structure should be treated as decisive of the constitutional issue." Monaghan, *supra* note 4, at 31. "[H]istory has legitimated the practice of presidential war-making." *Id.* at 29. For similar views, see Ratner, *The Coordinated Warmaking Power—Legislative, Executive and Judicial Roles*, 44 S. CAL. L. REV. 461, 467 (1971). *Cf.* Reveley, *supra* note 4, at 1250-57.

"If acts forbidden by a reasonable reading of the rules continue to be performed it is highly unrealistic to regard the rules as complete statements of the law. To constitute 'the law' the course of conduct dictated by the rules must be the one followed in actual practice." Reveley, *supra*, at 1253, citing McDougal, *Jurisprudence for a Free Society*, 1 GA. L. REV. 1, 4 (1966). We cannot march "in the lock-step of the Framers' intent, . . . upon occasion even the clear intent of the Drafters must be abandoned without the process of formal amendment, if the Constitution is to minister successfully to needs created by changing times." Reveley, *supra*, at 1253. What are the "needs" for presidential war-making, or for presidential monopoly of foreign relations? Compare note 192 *supra*.

In justice to Reveley, he equally condemns the automatic assumption that practice makes constitutional, *supra*, at 1253, and proffers a compromise, which all too shortly put is: "In determining the meaning of any constitutional provision, the ultimate criterion must be the long-term best interests of the country." Reveley, *supra*, at 1251, 1253-56. Who is to determine that issue? If that decision is for the President, analysis is little advanced. Under the Constitution, the decision maker must be the people, by means of an amendment.

John Quincy Adams arraigned President Tyler in 1842 for "gross abuse of constitutional power, and bold assumption of power never vested in him by law." *Quoted in* Warren, *Presidential Declaration of Independence*, 10 B.U. L. REV. 1, 13 (1930).

275. 395 U.S. 486 (1969).

276. 395 U.S. at 546. In Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 549, 588 (1952), the Court stated: "It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers" vested in the Government.

277. *See* text accompanying note 292 *infra*.

expressive rather of an abiding fear fed by the deepest wells of our constitutional history.[278]

It is therefore McDougal and Lans, I suggest, who were word-intoxicated. For the issue is not one of words but of *power*. Whence does the President derive authority to transfer to himself exclusively the power conferred by the Constitution on President and Senate jointly? To this McDougal and Lans replied,

> [i]t is utterly fantastic to suppose that a document framed 150 years ago "to start a government experiment for an agricultural, sectional, seaboard folk of some three millions" could be interpreted today . . . in terms of the "true meaning" of its original Framers for the purpose of controlling the "government of a nation, a hundred and thirty millions strong, whose population and advanced industrial civilization have spread across a continent." Each generation of citizens must in a very real sense interpret the words of the Framers to create its own constitution.[279]

From which "generation of citizens" did the President derive a mandate to revise the Constitution under the guise of "interpretation"?

It is not as if the Framers did not foresee that the fledgling, seacoast nation would cover the continent and from time to time need to change the Constitution. For in Article V they provided a process of amendment, not, to be sure, made too easy;[280] but this was for protection of minorities against roughshod majorities. Because, in the words of McDougal and Lans, "the process of amendment is politically difficult, other modes of change have emerged."[281] Truly

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278. For citations, see BERGER, CONGRESS, *supra* note 32, at 12-14, 24, 126-27, 131-33, 136-40.

279. McDougal & Lans, *supra* note 5, at 214-15, *quoting from* Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 3 (1934). Ratner, *supra* note 274, at 467, tells us that "constitutional policy for ensuing epochs is not congealed in the mold of 1787 referants."

280. The Founders fully understood the difficulties of amendment. Thus Patrick Henry argued in the Virginia Convention, "four of the smallest states, that do not collectively contain one tenth part of the population . . . may obstruct the most salutary and necessary amendments." 3 J. ELLIOT, *supra* note 30, at 49. But the prevailing view was expressed in the North Carolina Convention by James Iredell: The Constitution "can be altered with as much regularity, and as little confusion, as any Act of Assembly; not, indeed, quite so easily, which would be extremely impolitic . . . so that alterations can without difficulty be made agreeable to the general sense of the people." 4 *id.* at 177. In Massachusetts, Charles Jarvis said, "[W]e shall have in this article an adequate provision for all the purposes of political reformation." 2 *Id.* at 116.

281. McDougal & Lans, *supra* note 5, at 293. The young Woodrow Wilson, in CONGRESSIONAL GOVERNMENT 242 (1885), likewise stated that "[t]he legal processes of constitutional change are so slow and cumbersome that we have been constrained to adopt a serviceable framework of fictions which enables us easily to preserve the forms

a marvelous non sequitur: because the amending process is cumbersome—and designedly so—the servants of the people may informally amend the Constitution without consulting them![282]

"The people," said James Iredell, "have chosen to be governed under such and such principles. They have not chosen to be governed or promised to submit upon any other . . . ."[283] Conscious that a mandate for change must proceed from the people, McDougal and Lans argue that

> [t]he crucial constitutional fact is that *the people* (Presidents, Supreme Court Justices, Senators, Congressmen *and electorate*) who have lived under the document for 150 years have interpreted it . . . [to] authorize the making of international agreements other than treaties on most of the important problems of peace and war.[284]

Now the inescapable fact is that such issues have never really been explained to the people;[285] much less has the judgment of the elec-

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without laboriously obeying the spirit of the Constitution . . . ."! Because of the "difficulty of its formal amendment process, alteration by usage has proved to be the principal means of modifying our fundamental law." Reveley, *supra* note 4, at 1252. Amendment is difficult: ergo, the President writes himself a blank check to act outside constitutional bounds.

282. In the First Congress, Elbridge Gerry, one of the Framers, stated, "If it is an omitted case, an attempt in the legislature to supply the defect, will in fact be an attempt to amend the Constitution. But this can only be done in the way pointed out by the fifth article of that instrument, and an attempt to amend it any other way may be a high crime or misdemeanor . . . ." The people, he added, have "directed a particular mode of making amendments, which we are not at liberty to depart from. . . . Such a power would render the most important clause in the Constitution nugatory." 1 ANNALS OF CONG. 503 (1789). The Doyen of American legal historians, Willard Hurst, remarked in our time that the informal amendment approach "is a way of practically reading Article V out of the Federal Constitution . . . . [The Framers] provided a defined, regular procedure for changing or adapting it." *Discussion in* E. CAHN, SUPREME COURT AND SUPREME LAW 74 (1954). "The framers of the Constitution might have adopted a different method . . . . It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed." Hawke v. Smith, 253 U.S. 221, 227 (1920).

283. 2 G. MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 146 (1857). *See also* BERGER, CONGRESS, *supra* note 32, at 13-14.

284. McDougal & Lans, *supra* note 5, at 216 (emphasis added). They also state that "[i]n preferring to alter the Constitution by informal adaptation, the *American people* have also been motivated by a wise realization of the inevitable transiency of political arrangements." *Id.* at 294 (emphasis added).

285. Compare Professor Felix Frankfurter's advice to President Franklin D. Roosevelt in 1937: "[T]he Supreme Court for about a quarter of a century has distorted the power of judicial review into a revision of legislative policy, thereby usurping powers belonging to the Congress . . . ." And "[p]eople have been taught to believe that when the Supreme Court speaks it is not they who speak but the Constitution, whereas, of course, in so many vital cases, it is *they* who speak and *not* the Constitution. And I verily believe that that is what the country needs most to understand." ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928-1945, at 384, 383 (M. Freedman ed. 1967) (emphasis original).

torate ever been solicited. Would "the people," for example, have approved the Supreme Court's freshly minted "interpretation" of "due process" in the 1880's—whereby it repeatedly overturned amelioratory socio-economic legislation—had they been told that up to that time "due process" connoted "procedural" due process only, which did not vitiate such legislation, and that the shift to a "substantive" content was a purely judicial construct without foundation in constitutional history?[286] Would "the people" approve the presidential revision whereunder the President claims power, acting alone, to commit us to a Vietnam War, if they were told that the bloodletting is justified, not by the constitutional text nor by the intention of the Framers (which runs clearly to the contrary), but by a boot-strap theory of power built upon successive usurpations?[287] Reveley, who is sympathetic to amendment by "usage," sapiently observes that the "general public takes a relatively black letter view of the Constitution," and that the "subtleties" of amendment "by usage . . . would probably be lost on the general public."[288] It is therefore idle to impute informal ratification of the presidential power take-over to "the people." "The people" have been told that the President has exercised power conferred upon him by the Constitution, by which, in their benighted way, they understand textual warrant, not a long-continued violation of the Constitution.

Alexander Hamilton, the daring pioneer advocate of expanded presidential powers, stated with respect to the *express* treaty powers (as distinguished from a power merely rested on "usage") that

> a delegated authority [*e.g.*, the President] cannot alter the constituting act, unless so expressly authorized by the constituting power.

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286. Charles P. Curtis, an ardent advocate of "adaptation" of the Constitution, states that when the Framers put "due process of law . . . into the Fifth Amendment, its meaning was as fixed and definite as the common law could make a phrase. It had been chiseled into the law so incisively that any lawyer and a few others, could read it and understand it. It meant a procedural process, which could be easily ascertained from almost any law book. We turned the legal phrase into common speech and raised its meaning into the similitude of justice itself." Curtis, *Review and Majority Rule*, in E. CAHN, *supra* note 282, at 170, 177. McCloskey refers to "the years after 1877 when the slow accumulation of precedent was transmuting the due process clause and the commerce clause into the legal embodiment of a laissez-faire philosophy." R. MCCLOSKEY, THE MODERN SUPREME COURT 206 (1972). *See also* Hamilton, *The Path of Due Process of Law*, in THE CONSTITUTION RECONSIDERED 167 (C. Read ed. 1938).

287. Seeking to strike a compromise between "strict construction" and free "adaptation," Reveley, *supra* note 4, at 1293, states that "unless there is pressing need for its amendment, popular understanding of the rule of law dictates adherence to provisions whose language and initial intent seems clear. The power vested in Congress to declare war is a primal instance of such a provision."

288. Reveley, *supra* note 4, at 1293, 1255 n.31.

> *An agent cannot new model his own commission.* A treaty, for example, *cannot transfer* the legislative power to the executive department.[289]

Now Hamilton's followers would claim that the President *can* by virtue of his own "usage" "new model his own commission" and "transfer the legislative power to the executive."

To a believer in constitutional government, in the separation of powers as a safeguard against dictatorship,[290] there is no room for a take-over by the President of powers that were denied to him, and, as our times demonstrate, denied with good reason. "Ours is a government of divided authority," declared Justice Black in 1957, "on the assumption that in division there is not only strength but freedom from tyranny."[291] If present exigencies demand a redistribution of powers in which Congress was originally fully to share—a presidential power by his conduct of foreign affairs to propel the nation into war without consulting Congress—that decision ought candidly to be submitted to the people in the form of a proposed amendment, not masked by euphemisms. For me, the polestar remains the advice given to the nation by George Washington:

> The necessity of reciprocal checks in the exercise of political power; by dividing and distributing it into different depositories, and constituting each the guardian of the Public Weal against invasions by the others has been evinced. . . . To preserve them must be as necessary as to institute them. If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.[292]

289. Letters of Camillus, 6 A. HAMILTON, *supra* note 91, at 166 (emphasis added).

290. *See* note 270 *supra.*

291. Reid v. Covert, 354 U.S. 1, 40 (1957).

292. 35 THE WRITINGS OF GEORGE WASHINGTON 228-29 (J. Fitzpatrick ed. 1940). The Massachusetts Constitution of 1780, art. XVIII, states that the people "have a right to require of their lawgivers and magistrates an exact and constant observance" of the "fundamental principles of the constitution" which are "absolutely necessary to preserve the advantages of liberty and to maintain a free government." 1 B. POORE, *supra* note 96, at 959.

How does Washington's advice square with the statement that the Constitution is "being ceaselessly adapted, *as its Framers intended,* to the problems of 'ages to come' "? McDougal & Lans, *supra* note 5, at 294 (emphasis added). Marshall expressly disclaimed that his "ages to come" dictum was meant to condone any enlargement of powers. *See* Berger, *War-Making, supra* note 17, at 50-52.

IV. Conclusion

It cannot seriously be maintained that either solo presidential executive agreements or a presidential monopoly of foreign relations in particular negotiations, find warrant in the constitutional text. Instead, the unmistakable intention of the Founders was to constitute the Senate an equal partner in this domain for the greater security of the nation. The argument for monopoly is rested on long-continued practice—"adaptation by usage"—which in less polite terms means that the executive may "new model his own commission." That way, sober scholars have concluded, lies the road to dictatorship.[293]

Already solo presidential operations have plunged the nation into calamitous and divisive adventures. In that light, to move from constitutional to practical considerations, such deficiencies as Senate participation may exhibit[294] are greatly overshadowed by the perils of presidential monopoly. A presidential reallocation of constitutional powers, to paraphrase Washington, is a cure worse than the disease. Whatever the force of the practical arguments, assumptions of practical convenience are hardly a basis for setting aside express constitutional provisions.

Arguments of practical convenience and wisdom, moreover, run at least as strongly against as for "monopoly" claims. Behind presidential claims to sole control lies the complacent assumption that the President and his advisers have a monopoly on wisdom.[295] One need not subscribe to all the harsh criticism of presidential policy in Vietnam to entertain large doubts as to its wisdom. Recently, the President's neglect to advise Japan of his forthcoming visit to China, his heavy-handed treatment of Japanese economic relations with the United States have, in the opinion of former Under Secretary of State George Ball, needlessly alienated the Japanese and danger-

293. R. Dahl, *supra* note 6, at 116, 264; Kurland, *supra* note 145, at 625, 628.

294. For suggested internal reforms of Congress, see R. Dahl, *supra* note 6, at 140-68.

295. For citations, see Berger, *War-Making, supra* note 17, at 84.

At the time of the Roosevelt-Churchill Atlantic Conference, "President and State Department believed they had information, experience, and a grasp of issues involved that Congress and electorate lacked. Responsibility to Congress, they evidently believed, would have led to suicidal policies. They therefore chose to avoid Congressional control over certain aspects of foreign policy." R. Dahl, *supra* note 6, at 180. Dahl concludes that if Roosevelt's appraisal was correct, "this is the severest condemnation possible of the arrangement for information and intelligence [*i.e.*, presidential withholding on the theory of executive privilege] by which Congress as contrasted with the President possessed such a terrifying incapacity for rationality and understanding of international events in a moment of great national crisis." *Id.*

ously strained if not irretrievably injured a valuable alliance.[296] Presidents, too, can be lacking in wisdom.

It is a mistake to exalt presidential over senatorial expertise in the conduct of foreign affairs. Granted that the State Department may develop a corps of experts, "the more closely debate moves towards broad and basic policy," Robert Dahl notes, "the more competent is the legislative decision likely to be, and correspondingly less competent is the expert."[297] Nor is the Senate Foreign Relations Committee to be underrated in terms of expertise. Over the years, the Committee has had within its ranks "an imposing array of great names";[298] today the Chairman, Senator J. William Fulbright, measures up to any member of the State Department in sheer intellectual power and experience.[299] A sampling of the 1928-1949 period disclosed that a foreign policy proposal was likely to be examined by men "who ha[d] been serving on the Foreign Relations Committee for almost seven and a half years on the average—a rather substantial apprenticeship."[300] Contrast this with appointments as Secretary of State of men like William Rogers, who had virtually no experience in foreign affairs.[301] Consultation with the

296. Ball, *We Are Playing a Dangerous Game with Japan*, N.Y. Times, June 25, 1972, § 6 (Magazine), at 10. Moreover, there is "no guarantee that all the rationality of the executive-administrative will be used for any other purpose than fulfilling in foreign policy the private preferences of the President or members of the State Department." R. DAHL, *supra* note 6, at 181. For example, "the most remarkable feature of [Lord] Halifax's unwavering support for the appeasement of Nazi Germany was his utter incomprehension of the widespread and growing revulsion for this policy." P. RICHARDS, *supra* note 7, at 73.

297. R. DAHL, *supra* note 6, at 244.

298. *Id.* at 146. Among others were Andrew Jackson, Henry Clay, Daniel Webster, Stephen A. Douglas, William H. Seward, Charles Sumner, Elihu Root, Henry Cabot Lodge.

299. As a freshman member of the House, Fulbright introduced a resolution in 1943 respecting post-war participation in an organization for preservation of peace, to avoid a repetition of the Versailles Treaty rejection. J. ROBINSON, CONGRESS AND FOREIGN POLICY MAKING: A STUDY IN LEGISLATIVE INFLUENCE AND INITIATIVE 33-34 (1962). Robinson, at 211, states: "Fulbright's reputation in and out of the Senate is that of a thoughtful, learned man, perhaps one of the most intellectual Senators in the whole history of the institution. He has been identified with many 'right' and far-sighted positions since he was elected to the Senate in 1944." Former Ambassador John Kenneth Galbraith stated, "Over the last half-decade Fulbright, Morse, Gruening, Kennedy, Cooper, Church, Hatfield and McGovern have surely been more sensible than the senior officials of the Department of State. On the average I think we are safer if we keep foreign policy under the influence of men who must be re-elected." Galbraith, *Book Review*, N.Y. Times, Oct. 8, 1972, § 7, at 1, 12.

300. R. DAHL, *supra* note 6, at 148.

301. Viscount James Bryce, who served as British Ambassador to the United States and was an informed observer of the American political scene, stated that the Secretary of State "is sometimes a man of first-rate gifts, but more frequently only a politician selected because of his party standing, and possessing little knowledge of world affairs." 2 J. BRYCE, MODERN DEMOCRACIES 373 (1921). The example par excellence is Wilson's

Senate therefore broadens the range of experience that may be brought to bear on a problem.[302] Its utility is attested by the fact that a galaxy of noted State Department executives—John Hay, Elihu Root, George Marshall, Robert Lovett, and W. Averill Harriman—were in the habit of consulting with the Senate.[303]

Harriman emphasized that if foreign policy is to obtain support, the people must understand it; the Senate is the forum of debate which enlightens public opinion[304] and facilitates a rational decision by the electorate. Such debate "serves to expose differences, disunity."[305] Singlehanded control of foreign policy "may lead to policies for which there is inadequate support, as with Wilson, and had not Pearl Harbor intervened, conceivably with Roosevelt,"[306] and at the moment, with Vietnam. Now that war is an instrument of foreign policy, consultation with the Senate—and thus with the people who are to shed their blood in effectuation of that policy—

selection of William Jennings Bryan, who went on to glory in the Scopes' Monkey Trial.

302. Senator Augustus Bacon said in 1906:

> There are Senators here who have been here for a generation and whose advice and counsel would be valuable to any President .... An Election to the Presidency does not ipso facto endow one with all knowledge and wisdom, and it is not an unreasonable suggestion that in the aggregate of ninety Senators, many of them men of large experience, there is more knowledge of public affairs, more of correct judgment, of the requirements of the public interests than is possessed by any one man in the United States, whoever he may be.

40 CONG. REG. 2137. Recall Benjamin Franklin's tribute to the collective judgment at the end of the Federal Convention. 2 M. FARRAND, *supra* note 30, at 642.

303. *Hearings*, *supra* note 13, at 262-63, 359-60; J. ROBINSON, *supra* note 299, at 45, 47. Lovett stated that "when a line . . . had the imprimatur of the Senate Foreign Relations Committee, we . . . [knew] that we were going to be backed up, and that is of tremendous importance in negotiation." K. BAILEY & D. SAMUEL, CONGRESS AT WORK 387-88 (1952). For additional examples of presidential collaboration with the Senate, see J. ROBINSON, *supra*, at 37, 50, 54; R. DAHL, *supra* note 6, at 207-10.

304. Harriman, a veteran participant in foreign affairs, stated, "[N]o foreign policy will stick unless the American people are behind it. And unless Congress understands it the American people aren't going to understand it." *Hearings*, *supra* note 13, at 360. *See* CORWIN, THE PRESIDENT, *supra* note 6, at 224. Even those doughty advocates of executive agreements, McDougal and Lans, consider that in "any situation reference of an important international agreement to Congress has the undoubted advantage of stimulating public discussion of the issues involved and permits the Executive's judgment to be questioned and checked by independent critics . . . ." McDougal & Lans, *supra* note 5, at 555-56.

305. R. DAHL, *supra* note 6, at 125. "In the conduct of foreign affairs, unity is one of the most important assets leadership can possess, disagreement one of the greatest liabilities." *Id.* at 221. *See also id.* at 262. In addition to the examples cited by Dahl, there is the current divisiveness over Vietnam, which toppled one President and has strewn boulders in the path of another, in no little part because the people were not really consulted. Compare the split in the English cabinet and Parliament immediately before the outbreak of World War I, bridged over only when Germany invaded Belgium. B. TUCHMAN, *supra* note 4, at 91, 118.

306. R. DAHL, *supra* note 6, at 173. It was "primarily a deep-seated distrust of leadership that forced the rigid and inflexible provisions into the neutrality legislation of the pre-war period." *Id.* at 248. *Cf. id.* at 178-79.

is indispensable.[307] Popular judgment of such issues is not to be held in contempt.[308] Viscount James Bryce, a devoted admirer of the democratic process, deduced from a number of examples that in the democracies the people had judged more wisely than those to whom the conduct of foreign affairs was confided, whereas "the faults chargeable to monarchs and oligarchies have been less pardonable and more harmful to the peace and progress of mankind."[309]

Upon a foreign policy fashioned by a behind-the-scenes conclave which, a recent critic charges, is accountable neither to Congress nor the people,[310] McDougal and Lans have themselves made the fitting comment:

> [U]ntil we are furnished with a formula for the selection of the elite, we are entitled to doubt that the minority has any unique monopoly of wisdom. Government by a self-designated elite—like that of benevolent despotism or of Plato's philosopher kings—may be a good form of government for some people, but it is not the American way.[311]

307. What Joseph Story said of the power to declare war is no less applicable to foreign policy which must embroil us in war: it is "so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nation . . . . The representatives of the people . . . have a right to be consulted as to its propriety and necessity." 2 J. STORY, *supra* note 118, § 1171, at 91-92. The principles which "inspire a nation's foreign policy [are] . . . too grave in consequences, to be determined by any authority lower than that of the people." 2 J. BRYCE, *supra* note 301, at 368. For a policy that entails widespread sacrifice, "widespread agreement is necessary." R. DAHL, *supra* note 6, at 222. Without it, we witness the wide-scale draft evasion and desertion of the current Vietnam conflict.

308. In a book review of D. ACHESON, GRAPES FROM THORNS (1972), Alfred Kazin remarks that Acheson "distrust[ed] the popular mind" and that a "striking omission" from the "record of his years in the State Department, 'Present at the Creation,' is any consideration of how his foreign policy related to the people." N.Y. Times, May 28, 1972, § 7, at 2, 24.

Acheson himself recorded in PRESENT AT THE CREATION 101 (1969) the "anguishing hours" he spent in the Senate to "suffer fools gladly." "People like Mr. Acheson," testified Senator Fulbright, "make no bones about it. They just say [Senators] are boobs and ought to have nothing to do with foreign policy . . . ." *Hearings, supra* note 13, at 468. Acheson, Ambassador Douglas Dillon stated, "made great mistakes in foreign policy because he never took the country and the Congress into his confidence." C. SULZBERGER, *supra* note 190, at 1017.

309. 2 J. BRYCE, *supra* note 301, at 383. Of conflicts between the Ministers and working-class opinion over the American Civil War, the Russo-Turkish War and the Boer War, Bryce states, "[I]n all three cases the 'classes' [who conducted foreign affairs] would appear to have been less wise than the 'masses.'" *Id.* at 377, 379. Consider the gross miscalculations of the German and Austro-Hungarian regimes which triggered World War I. *See also* note 295 *supra.*

310. R. BARNET, ROOTS OF THE WAR (1972). Senator Fulbright complained of the "centralization of foreign policy powers in a small elite of experts and intellectuals surrounding the President. One of the most striking revelations to emerge from the Pentagon papers was the extraordinary secrecy with which the inner circle of the Johnson administration made their fateful decisions of 1964 and 1965." *Hearings, supra* note 13, at 23.

311. McDougal & Lans, *supra* note 5, at 577-78. The authors were referring to a "minority" of the Senate.