

**THE CONSTITUTIONAL ORIGINS OF THE PRESIDENT'S  
FOREIGN AFFAIRS POWER**

An Honors Fellows Thesis

by

OLIVER PETER THOMA

Submitted to the Honors Programs Office  
Texas A&M University  
in partial fulfillment of the requirements for the designation as

HONORS UNDERGRADUATE RESEARCH FELLOW

April 2011

Major: Political Science

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## ABSTRACT

The Constitutional Origins of the President's Foreign Affairs Power. (April 2011)

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The question of the executive's authority over foreign affairs has been debated constantly over the life of the Constitution. Rather than try to discern the answer to this question from only the well-known Framers, this scholarly endeavor proposes to unlock the original understanding of the Constitution to the "citizens, polemicists, and convention delegates who participated in one way or another in ratification." Recent scholarship in the nature of the executive's foreign affair power has suffered from a lesser degree of scrutiny than other constitutional subjects. Few scholars have addressed the original source of authority and legitimacy of the Constitution—its ratification—as a means of determining whether the modern presidency continues to abuse or respect the powers the Constitution has invested in it. Those that have looked to the historical context of the Constitution's ratification and believe that public sentiment toward the executive was more characterized by fear rather than want of energy have reached their conclusion because of select sampling from an extraordinary era in American constitutionalism.

The research will be divided among three major historical periods of American constitutionalism: (1) the pre-revolutionary era (early 1700s until 1775) while America was still comprised of 13 British colonies and most constitutional concerns were focused on Parliament's abuses of power and the Executive's complicity; (2) the executive interregnum (1775 until the early 1780s) wherein the American public feared executive authority and experimented with a weak executive; and (3) the period of legislative fear (early 1780s to 1790s) that acted as a catalyst for James Madison, Alexander Hamilton, and others to restore an energetic executive.

## **DEDICATION**

This work is dedicated to my parents, John and Linda Thoma. Thank you for your patience, love, hard work, and wisdom.

## ACKNOWLEDGMENTS

My sincerest thanks goes to Dr. Rogers for instilling in me a passion for US Constitutional law and history. From my very first undergraduate course in political science, Dr. Rogers taught me to appreciate that “brevity is the soul of wit.”

A heavy helping of thanks goes out to Dandy and Grandmother for letting me write most of my thesis in the pottery shed with only minor interruptions for hot tea and cookies from my mother. Thank the Lord I do not have to spend another Christmas writing like a madman.

I would be nowhere with out my Lord and Savior, Jesus Christ. Through the power of his grace I have begun to realize that “earth, if chosen instead of Heaven, will turn out to have been, all along, only a region in Hell: and earth, if put second to Heaven, to have been from the beginning a part of Heaven itself” (C. S. Lewis, *The Great Divorce* IX). Now I must use the tools of my education to bring Heaven to earth.

Last, but not least, my thanks go to my beautiful fiancée, Emily Jordan McNulty. I look forward to spending the rest of my life with you as we magnify God’s glorious plan of redemption. Just a fair warning: my book collection is only likely to get larger as our love grows stronger through the years.

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## CHAPTER I

### INTRODUCTION

Controversy and debate have surrounded the executive's exercise of foreign affairs powers—war power and treaty power—since the Washington administration. President Washington's *Neutrality Proclamation* of April 22, 1793, which nullified the United States' obligation to respond to France's declaration of war against Great Britain and Holland as per the *Treaty of Alliance with France* of 1778, further exacerbated the political division between Alexander Hamilton and James Madison in the form of the Pacificus-Helvidius Debates of 1793-1794. Two of the nation's most influential Framers debated whether the executive had the authority to interpret and terminate obligations of a treaty without legislative consent, and this debate has echoed across the history of the American executive. Morton J. Frisch (2007) described Hamilton's belief that "the direction of foreign policy is essentially an executive function" by interpreting the "Senate's treaty making and war powers as exceptions out of the general grant of power vested in the president" (xiii). In 2002, President Bush unilaterally withdrew from the Statute of Rome, which established the International Criminal Court, as well as interpreted the Geneva Convention as being not applicable to al Qaeda operatives.

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This thesis follows the style of *Public Choice*.

In 2011, President Obama actively intervened in Libya through covert operations and airstrikes without congressional approval. Both presidents' actions resurfaced the same debate over the extent of the executive's foreign affairs power that had begun over 200 years earlier in Hamilton and Madison's time.

The debate over the president's war powers has also had a lengthy history. "The United States has only declared war five times: during the War of 1812, the Mexican-American War of 1848, the Spanish-American War of 1898, and the two World Wars. Yet the United States has committed military forces into hostilities abroad at least 125 times in the Constitution's 207-year history" (Yoo 2005, 12). The history of American war reveals that a congressional declaration of war is not the norm, rather the executive's prerogative to engage in military action. Although Congress could have refused to grant the funding required by the executive to wage war, it has never done so. Harold Koh (1990) explains this interaction of the three branches as "executive initiative, congressional acquiescence, and judicial tolerance" (117). Despite historical practice of executive dominance over foreign affairs, scholars are still divided as to the true nature of the executive's authority over the foreign affairs power.

According to John Yoo, the works of Louis Henkin, Harold Koh, John Hart Ely, Thomas Franck, and Michael Glennon are considered the dominant paradigm in American foreign affairs law. These authors espouse the belief that "the Constitution requires the equal participation of Congress and the federal judiciary in national security decision

making” (Yoo 6). This school of thought considers any executive initiation of military hostility or treaty interpretation unconstitutional if explicit congressional approval is not received. On the other hand, scholars like John Yoo, Curtis Bradley, Sai Prakash, Michael Ramsey, and Jack Goldsmith challenge the dominant paradigm in American foreign affairs law. These “revisionists” base their methodology on the “constitutional text, structure, and original understanding” (7). Rather than pursue the elusive goal of discerning the Framers’ intent, this methodology advances a historical argument that analyzes the socio-political environment wherein the Constitution was ratified.

John Yoo claims that “[b]ecause the approval of the state ratifying conventions gave the Constitution its life, the understanding of those who participated in the ratification should guide our interpretation of the text” (28). Authors like Forrest McDonald and Jack Rakove have contributed immensely to scholars attempting to ascertain the original understanding of the delegates participating in the framing of the Constitution as well as the ratification debates. “For the argument that the original meaning...should be binding presents...a rule of law. It insists that original meaning should prevail...because the Constitution as supreme law rests on its ratification by the special, popularly elected conventions of 1787-88” (Rakove 1996, 9).

Recent scholarship in the nature of the executive’s foreign affair power has suffered from a lesser degree of scrutiny than other constitutional subjects. Few scholars have addressed the original source of authority and legitimacy of the Constitution—its

ratification—as a means of determining whether the modern presidency continues to abuse or respect the powers the Constitution has invested in it. Those that have looked to the historical context of the Constitution’s ratification and believe that public sentiment toward the executive was more characterized by fear rather than want of energy have reached their conclusion because of select sampling from an extraordinary era in American constitutionalism.

### **Hypothesis**

If the original understanding at the time of the Constitution’s ratification can be derived, the answer to whether the foreign affairs power was created as primarily an executive power can be discovered. Assuming this original understanding is possible, this proposal advances the hypothesis that an original understanding of the Constitution’s ratification will reveal that the foreign affairs power was primarily invested in the executive but concurrent with the other branches of government.

### **Methodology**

In order to derive an original understanding of the Constitution’s ratification, this research will cast a wide net across the political theorists, legal doctrines, and socio-political events that spurred the Constitution’s creation, ratification, and application. The research will be divided among three major historical periods of American constitutionalism: (1) the pre-revolutionary era (early 1700s until 1775) while America was still comprised of 13 British colonies and most constitutional concerns where

focused on Parliament's abuses of power and the Executive's complicity; (2) the executive interregnum (1775 until the early 1780s) wherein the American public feared executive authority and experimented with a weak executive; and (3) the period of legislative fear (early 1780s to 1790s) that acted as a catalyst for James Madison, Alexander Hamilton, and others to restore an energetic executive. The first period will focus on the transition from British to American constitutionalism that reached its consummation when the American colonies determined there was no other recourse but to separate from Great Britain. The second period will focus on the state and national experiments with a weak executive and demonstrate how this exceptional period was a result of Americans getting sucked into the rhetorical choice of leaders of the American Revolution. The third period will focus on the state and national events that led Americans to adopt an energetic executive within the US Constitution as well as the earliest application of the energetic executive with Washington's Neutrality Proclamation of 1793.

### **Summary**

The question of the executive's authority over foreign affairs has been debated constantly over the life of the Constitution. Rather than try to discern the answer to this question from only the well-known Framers, this scholarly endeavor proposes to unlock the original understanding of the Constitution to the "citizens, polemicists, and convention delegates who participated in one way or another in ratification" (8). In opposition to the dominant paradigm of American foreign affairs law, this research

grounds itself in the power and authority of the Constitution's history to determine whether the foreign affairs power is primarily, but not exclusively, an executive power.

## **CHAPTER II**

### **BRITISH CONSTITUTIONALISM TO AMERICAN CONSTITUTIONALISM**

Understanding the continuity of American constitutionalism—from a British colony to 13 separate nation-states to a national union of 13 states—is vital to discovering the historical answer to determine whether the President has primary authority over foreign affairs. The purpose of the first chapter is to address the reasons for the constitutional conflict that spawned the American Revolution and how these relate to the early American perceptions of the executive.

The American colonies and the British metropolis were continually debating the limits of constitutional authority—the balance of power—between each other. Did the American colonies have exclusive right to govern their internal affairs or did the British metropolis? Better yet, did the center of the British Empire share an equitable balance of power with its peripheries (i.e., colonies) by only governing external affairs while leaving the internal matters to the peripheries? This constitutional debate continued from the American colonial period in the early 1600s throughout the 1700s until the British accepted defeat at the Treaty of Paris in 1783 by which the American colonies were formally granted independence from the British constitutional center. Even then, the Americans struggled to find a balance between the national and state governments

that did not reach consummation until after the US Constitution was adopted by 9 states in 1788.

From the inception of the American colonies, their constitutional relationship with Britain was unlike any of the colonies from the medieval empire (e.g., Ireland, Wales, and Gascony). Jack Greene describes three major differences that characterized the American colonies in comparison with their older cousins. First, Greene (1986) notes the “three thousand miles” distance from the center of the British Empire (8). Second, the American colonies had a “population density [that] was low relative to the most fully occupied areas of Europe” and contained much land ready for colonization (and commercialization) (8). Unlike other British colonies, the American colonies were comprised of English emigrants (some voluntary, some compulsory) who inherited many English beliefs and customs rather than conquered indigenous people. The British perception of the indigenous Americans as primitive and pagan rendered the indigenous Americans of little threat to British colonization. Instead, the British forced out or bought out indigenous populations and replaced them with “emigrants from the British Isles” (8). Third, Greene points out that these new American colonies lacked the “long-settled local traditions, institutions, and patterns of social relations” that dictated the constitutional organization of previous British colonies (8). The American colonies’ primary purpose was to strengthen the commerce of the British Empire, and this purpose marked a new colonial identity that frustrated British expectations of colonial subservience and American expectations of internal autonomy: “Thus ‘intended to

increase the Wealth and Power of the[ir] native Kingdom,' these 'Colonies of Commerce,' people gradually come to perceive, were an entirely 'new species of colonizing, of modern date, and differing essentially from every other species of colonizing that is known' ” (9-10).

English colonization of the American colonies (as well as elsewhere) could not have occurred without a constitutional exchange between the center and the peripheries: the center would have to concede a degree of local autonomy to the peripheries in exchange for allegiance and commercial obligations from the peripheries.

Lacking the fiscal resources to enable them to undertake such territorial expansion on their own, English monarchs had no other means by which to establish the legitimacy of their claims to both new territories and...the allegiance of the inhabitants of those territories...without a series of reciprocal agreements, or...contracts that permitted the sponsors and the individual colonists a generous amount of political freedom and wide latitude to pursue their own personal objectives in return for extending the dominions of the sponsors and the monarchy over vast new areas in America. (11-12)

Although the metropolitan center never conceded its superior claims over “ ‘such inferior dominion[s],’ ” American colonists “ ‘grew up...in a spirit of independence and self-reliance’ ” that refused to concede all authority to an absolute central power (12).

The metropolitan authorities of the Crown and Parliament sought to secure the constitutional inferiority of the American colonies between 1651 and 1696 through “a series of navigation acts designed to define the economic relationship between England and the colonies” (13). These acts sought to realign the economic priorities of the colonies toward the center by banning trade with “rival foreign powers” and mandating

economic activity in an effort to create a mercantilist system fueled the metropolitan center at the expense of the colonies' locally autonomous governments (13). The Crown's creation of the Lords of Trade in 1675 (later re-established as the Board of Trade in 1696) revealed the inertia that had gathered at the center to reign in the power of its peripheries.

The metropolitan authority's centralization agenda was evident by the apparent objectives of the Lords of Trade's actions. First, the Lords of Trade demanded greater enforcement of metropolitan demands from the royal governors: "Not only did it insist upon more frequent and fuller reports...within the colonies, but it also put the governors under much more detailed and rigid regulations than ever..." (14). Second, the Lords of Trade sought to significantly reduce the powers of the local "elected legislative assemblies" of which the metropolitan authorities believed was the "primary vehicles for colonial resistance to metropolitan policy" (14). The metropolitan center sought to eliminate the financial dependency that most governors had on their local assemblies since these assemblies controlled executive payrolls—each of the colonial assemblies believed that they paralleled Parliament's scope of power. Third, the Lords of Trade sought to make all American colonies royal colonies as well as "consolidate the colonies into three general governments," but their efforts to create the these three consolidated governments (e.g. Dominion of New England) disintegrated after the Glorious Revolution (15). Still seeing themselves as Englishmen, the colonists developed a deep

mistrust of centralized authority as they found themselves having to advocate for their claim to all of the rights of Englishmen in the face of the metropolitan subordination.

American colonists successfully frustrated most of the metropolitan's efforts to constitutionally subordinate the colonies between 1660 and 1760, but the metropolitan authorities of Crown and Parliament developed "working assumptions about the [constitutional] nature of the relationship between Britain and the colonies—between the center and the peripheries of the British Empire" (18). First, the metropolis believed that the colonies were "dependent entities, an idea that was at the heart of the familiar parent-child metaphor that was increasingly employed to describe the metropolitan-colonial connection" (18). Second, the metropolis believed that the colonies' existence was primarily for their commercial "contributions to the well-being" of England. Third, the metropolis demanded absolute subordination of the "political systems of the colonies..." (18). As Greene points out, the primary obstacle between the American colonies and the British center was defining and applying "such concepts as *dependence* and *subordination*" in a constitutional balance that honored the demands of both parties (18). American colonists did not yet question their allegiance to the British center, but they did question the British center's efforts to consolidate power in the Crown and Parliament at the expense of colonial rights.

The constitutional debate between the British center and American peripheries was heightened because of the different bases of power that supported the government from

which the two sides represented. Despite many shared customs and traditions, these competing forms of government, mixed and republican, created an inherent constitutional incompatibility that would result in war. The American colonial legislatures were far more representative of the general populace than British Parliament since more American colonists were able to meet the suffrage requirements than their British cousins and there was no large, landed aristocracy. Consequently, the British mixed form of government (royalty, aristocracy, free landowners) gave way in the American colonies to republican government where the power rested in the people at large rather than in social classes: “ ‘Instead of drawing nearer to the *mixt Forms*’ of the British constitution...the colonial governments were becoming more and more like ‘*pure Republic[s]*’ ” (33). This republican premise of government would find its way into the heart of the American Revolutionary War and the US Constitution alongside British constitutional institutions.

From 1679 until 1783, metropolitan authorities of the Crown and Parliament found the basis for their constitutional argument in a concept articulated in Poyning’s Law— Poyning introduced the law to the Irish Parliament in 1494 as Viceroy to the English Crown. As interpreted by metropolitan officials in the 17<sup>th</sup> and 18<sup>th</sup> Centuries, Poyning’s Law articulated the belief that colonial charters were limited to the original charters granted by the Crown: “the colonists could not ‘pretend to greater privileges than those [specifically] granted to them by Charter Act under the Great Seal’ ” (33-34). As the Lords of Trade stated in 1679, the precepts of this law rendered the Crown under no

obligation to honor constitutions established by the colonies beyond the original charter. Furthermore, the metropolitan authorities believed that the metropolis had no legislative power “*without* the grace of the crown” and that since all governing power was derived from the Crown, not the people, no rights of colonists or powers of colonial assemblies could supersede the mandates of the Crown (34). In essence, the Crown could demand anything not explicitly granted to the colonies in their original charter, even the abridgement of what the colonists believed as rights inherit to every Englishman.

American colonists responded to metropolitan declarations of absolute superiority like Poyning’s Law by asserting their pre-existing rights as Englishmen, which superseded any Crown granted charter. Citing Sir Edmund Coke, they claimed, “the charters, like the Magna Charta itself, were only ‘declaratory of *Old Rights*, and not...Grant[s] of *new ones*’ ” (36). Additionally, the American colonists based their constitutional arguments on the basis of custom, which played such a fundamental role in the development of British law and constitutionalism. Despite the rise of parliamentary supremacy—the notion that parliamentary legislation constitutionally superseded custom—, custom bore the force of law in the British Empire, especially in the American colonies where there was no longstanding legal or constitutional tradition. But, according to Thomas Rutherford, changes in custom as well as legislative proscription demand that “the governors and the people have mutually agreed to change the constitution” (39).

American constitutionalism began to emerge as a separate identity from British constitutionalism. American constitutionalism was built upon the premises of pre-existing rights as Englishmen, custom, and the need for consent from the peripheries to check centralization. The two forms of constitutionalism remain continuous since American constitutionalism grew out of British constitutionalism, but American constitutionalism had to assert its independence and sovereignty to fulfill its claims of legitimacy since the primary British constitutional arbiter (Parliament) refused to grant any constitutional grounds for argument to the American colonies. Along side the republican model of government, these early American constitutional premises served as the framework for which the American Revolution was fought and won.

According to Jack Greene, the metropolitan authorities “during the seven decades following the Glorious Revolution...never made a sustained effort to govern the colonies in ways that were at serious variance with colonial opinion” because of the “strategic [economic] importance” that the American colonies played. The American colonies’ economic growth relative to rival European powers led Parliamentary managers such as Sir Robert Walpole (arguable Britain’s first Prime Minister, 1721-1742) to “restrict the active role of government as much as possible and act only when it was expedient or necessary to do so...” (45). Sir Walpole managed domestic support most effectively by resolving conflict with “compromise and manipulation,” and Sir Walpole found a greater benefit in reaping the economic successes of the American colonies than in disrupting the metropolitan-colonial relations for the sake of centralization (46). In fact, British

constitutionalism after the Glorious Revolution (1689) experienced a great deal of decentralization: “During the eighty years following the Glorious Revolution, Britain seems to have experienced a significant redistribution of power to the localities... The same development was evident in Britain’s more distant peripheries in Ireland and America...” (63).

As a result of decentralization, American colonial assemblies developed a constitutionalism that mirrored the changes experienced by British Parliament such as creating a Bill of Rights and the right to representative government. Charles Gadsden, a South Carolina merchant, said, “though they [British Parliament and colonial assemblies] differ widely with regard to the extent of their different spheres of action, and the latter’s may be called a sphere within the former’s, yet they differ not an iota” (64). The American colonial assemblies established over 6 decades worth of tradition and usage that had become constitutional practice in the eyes of the colonists—including the protection of individual rights. On the other hand, Metropolitan authorities did not agree to this exact parallelism between British Parliament and American colonial assemblies. Parliament and the rest of the metropolitan apparatus believed that colonies were, as Lord Granville put it to Benjamin Franklin 1757 while serving as President of the Privy Council, subject to the dominion of the Crown and his ministers (of the Privy Council): “The King and [Privy] Council is THE LEGISLATOR of the Colonies; and when his Majesty’s instructions come there, they are the LAW OF THE LAND...” (52).

Colonial leaders responded to these declarations by the Crown “with Jealousy and Distrust upon the Royal Authority” (53). The centralist and absolutist declarations of the Crown alarmed colonists and cemented their belief in the need for representative assembly “that tend[ed] to balance...or keep...down” the Crown’s abuse of power (53). The rhetoric of the American colonists against the abuses of the executive began to emerge even while Parliament loomed in the background providing the necessary constitutional legitimacy for the Crown to pursue subordination of the colonies. Although most American colonial angst was directed at the Crown, Parliament had absorbed a great deal of sovereignty from the Crown as well as shared constitutionally liability for the actions against the American colonies.

### **Early American perception of the Crown and Parliament**

American perceptions of the British executive, the Crown, and the British legislature, Parliament (generally the House of Commons), throughout the 17<sup>th</sup> and 18<sup>th</sup> Centuries evolved as Parliament began to take a more visible role towards the 1760s. Although the general metropolitan consensus was that Parliament and the Crown had the authority to legislate in the Americans colonies without consent of the colonies, the Crown played a more visible role until the mid-18<sup>th</sup> Century since royal governors and their agents were the primary enforcement officers of royal and parliamentary decrees. As the Declaration of Independence states, some colonial governors under direction of the Crown (not to mention the Crown acting directly) had refused to grant assent to colonial legislation as well as prorogue some colonial assemblies. But many if not most of the American

colonial governors developed a close association with local colonial interests:

Ever since the 1670s, however, metropolitan officials had been slowly taking into their own hands the patronage to most key offices in the colonies with the result that most [colonial] governors...had few utilitarian resources through which they might have enhanced metropolitan authority in the colonies...Under these conditions, many governors...frequently aligned themselves with dominant political factions in the colonies...As a consequence, royal and proprietary governors in many colonies were fully integrated into the local political community and came to be identify and to be identified as much with the interests of the colonies as with those of the metropolis. (47)

The role of governors in the American colonies proved far less tyrannical as American rhetoric against the Crown suggests. After the metropolitan authorities sought to redirect appointment powers to London instead of the respective colonial governors, the colonial governors had meager means to enforce the metropolitan authority's bidding and still depended upon the local assemblies for funding. As a result, the colonial governors became integrated into the American colonial political atmosphere in a manner that did not reflect poorly on their executive capacity. Although the "crown, through its governors and its powers of legislative and judicial review, exerted the predominant role in metropolitan interactions with the colonies," the aggrandizement of British constitutional authority by Parliament since the Glorious Revolution at the expense of the Crown made Parliament a concurrent actor in metropolitan administration of the American colonies (66). The Crown's appeals to Parliament, as well as some colonies', revealed the Crown's inability to regulate the internal matters of the colonies and the need for Parliament to take a larger role in metropolitan-colonial relations around the 1760s.

During the first half of the 18<sup>th</sup> Century, metropolitan authorities and colonial assemblies sought out Parliament as a constitutional arbiter for metropolitan-colonial relations.

Until the 1760s, Parliament did not respond definitively in favor of either the Crown or the colonists. This constitutional limbo resulted in the Crown conceding power to Parliament and pushed the American colonists towards creating their own constitutional path that would be incompatible with Parliament. “[T]he assemblies themselves occasionally appealed to Parliament against what they regarded as arbitrary behavior of the crown” (59). “[M]etropolitan administrators counted on the assistance of Parliament to handle difficult colonial situations” (59-60). The Crown’s appeals to Parliament to increase royal authority admitted the growing sovereignty of Parliament over matters of the Empire, specifically colonies, that had been originally been considered dominions of the Crown. Parliament’s only major legislative activities regarding the colonies during the first half of the 18<sup>th</sup> Century were limited to external matters such as trade. As the 18<sup>th</sup> Century progressed, most metropolitan authorities believed that Parliament was the final constitutional arbiter for the entire Empire: “In all *British* Cases and over all Persons according to the *British* Constitution, the Legislature of *Great-Britain* [was] absolutely supreme and the *Dernieir Resort*”(68). Overall, colonists and Britons alike had begun to acknowledge—whether they agreed with it or not—the legitimacy of Parliament’s growing embodiment of the British Constitution: “the constitution became precisely what Parliament said it was” (58).

Parliament began to step out from the shadows and into colonial affairs in the mid-1700s

as a competitor with the Crown for what the American colonists saw as arbitrary and tyrannical threats to their individual rights. The first time that Parliament directly interfered with domestic colonial concerns was in Jamaica in 1733: “with the full approval of the Crown, it censured the Jamaica Assembly for making extravagant constitutional claims while resisting instructions from London” (69). This censure of the Jamaica Assembly acknowledges the complicity of the Crown and Parliament in meddling with domestic colonial affairs, but further Parliamentary intervention would enrage American colonists even more than the Crown alone. Parliament’s discussion of royal instruction laws in the colonies during the 1740s was recognized by most colonists as a direct threat to their individual rights as Englishmen: “Such legislation, the colonists contended, was ‘*contrary to the Constitution[s] of Great Britain & of the Plantations*’ and ‘*inconsistent with the Liberties & Privileges inherent in an Englishman whilst he is in a British Dominion*’ ” (Colden 1934, 310-312). Echoes of no legislation without representation began to emerge from American colonists. While metropolitan authorities believed that Parliamentary supremacy enabled Parliament to alter and abolish colonial constitutions, American colonists began to perceive Parliament as a threat to their individual liberties and representative government. The lack of a “formal and theoretically neutral mechanism to which people in the peripheries could appeal against an erring Parliament” forced many colonists to retreat to an American constitutionalism that refused to acknowledge an absolute governing body that was not accountable to those it governed (Greene 1986, 72).

Parliamentary refusal to enforce royal instruction laws in the colonies during the 1740s gave many American colonists a false hope that Parliament could serve as neutral constitutional arbiter. In 1757, Parliament condemned the Jamaica Assembly in language that William Knox claimed placed the colonial constitutions subservient to the whims of the metropolis: “the Colonys [sic] have no Constitution, but that mode of Government in each of them depends upon the good pleasure of the King, as expressed in his commission and Instructions to his Governor” (Barrow 1973). According to Greene, “The colonists failure to give major weight to such evidence provides impressive testimony to their basic trust in Parliament, which...was founded on Parliament’s not having acted toward the colonies before the 1760s in ways that could be perceived as unusual, arbitrary, or threatening” (73-74). The hopeful American colonial perception of Parliament as the last vestige of constitutional integrity was soon shattered after the events of the 1760s.

After victory against the French and Indians in the Seven Years’ War, the British center found itself in desperate need of monies to support the cost of the war as well as to secure its defenses on newly acquired territories from winning the war: “faced with a large war debt and high taxes in Great Britain, the imperial government initiated a program of taxing the colonies for revenue with the Sugar Act of 1764” (Greene 1975, 13). The proposed taxation scheme presented in the Sugar Act, which would be fulfilled by the Stamp Act the following year, provoked colonial outcry because of the economic devastation it could have on colonial economies. Constitutionally, the American

colonists questioned the legitimacy of Parliament's ability to directly tax the colonies. In 1765, Parliament passed two pieces of legislation that encompassed direct and indirect taxation of the colonies: the Stamp Act and the Quartering Act. Colonists bound together in the Stamp Act Congress and issued that famous statement that would be a constitutional battle cry: "That it is inseparably essential to the freedom of a people, and the undoubted rights of Englishmen, that no taxes should be imposed on them, but with their own consent, given personally, or by their representatives" (64). No taxation without representation was a successful cry among the colonists because Parliament repealed the Stamp Act in 1766, but, in the same breath, Parliament issued the Declaratory Act. The Declaratory Act claimed that Parliament acting in concert with the king had the "full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and peoples of *America*, subjects of the crown of Great Britain, in all cases whatsoever" (85). This act set the stringent and absolutist tone that Parliament would follow through the rest of the American Revolution with the Townshend Acts (1767), the Tea Act (1774), and the Intolerable Acts (1774); this act revealed Parliament's declaration of its own constitutional sovereignty over the colonies. After Parliament had explicitly declared its constitutional argument over the colonies in its laws, the American colonists had to solidify their constitutional argument.

### **The constitutional relationship with Britain thins**

The Declaration of Independence embodies the American constitutional argument against the British center and for separation from that center. The metropolitan's

aggressive actions leading up to 1776 were in an effort to subordinate the American colonies, but these actions marked the first time that the Crown had the full force of Parliament behind it, which was vital given Parliament's growing sovereignty. According to Carl Becker (1970), "the primary purpose of the Declaration was not to declare independence, but to proclaim to the world the reasons for declaring independence" (5). The American colonial response to the growing metropolitan threat in the 1760s and early 1770s was to find the constitutional and legal grounding that would justify their actions.

During the Townshend Act debate in the colonies, John Dickinson set forth a constitutional theory as to evaluate the legitimacy of Parliament's claim to possess the authority to tax the colonies. Dickinson recognizes that Parliament had historically exercised taxation to "regulate trade, and preserve or promote the mutually beneficial intercourse between the several constituent parts of the empire" (Dickinson 1768, 125). Dickson noted Parliament's sudden shift in agenda after the Stamp Acts and the attempted proroguing of the New York assembly for refusing to implement the Quartering Act; he draws a constitutional demarcation for Parliament's taxation of the colonies on the grounds of revenue versus trade regulation. He claimed that Parliamentary taxation for trade regulation was constitutional while taxation for explicit revenue purposes was unconstitutional because it violated the Englishman's age-old right to representation to the legislative bodies that tax him.

Benjamin Franklin in 1768 suggested to his fellow Americans that such a constitutional demarcation between taxes for revenue and taxes for trade regulation could not hold up to constitutional muster. Franklin reasoned that there could be “no middle ground...that Parliament had the power to make *all laws* for us, or that it has the power to make *no laws* for us...” (Becker 102). If the Americans acknowledged Parliament had any authority over the American colonies—even in the matter of external commerce, which they had regulated without much controversy for almost a century—, Franklin believed that Americans could not constitutionally partition Parliament’s authority over the colonies: all or nothing. Franklin’s argument marked a shift in American constitutional rhetoric.

The American colonists largely adopted Franklin’s constitutional argument, and, by 1770, Franklin advised that the following working assumption should be adopted: “That the colonies originally were constituted distinct States...and the whole conduct of the Crown and nation towards them until the Restoration. Since that period, the Parliament here has usurped an authority of making laws for them, which before it had not” (103). The American constitutional argument from 1770 on suggested that the Crown was the only British metropolitan authority to which the American colonies were beholden. Parliament’s authority over the American colonies became a dead letter to the American colonists. Until this time, American constitutionalism did not deny Parliament’s authority over external matters of the British Empire as a whole; but as revolution and independence from Great Britain became an increasingly unavoidable option, so did the

redaction of any parliamentary authority over the American colonies.

In the late 1760s and early 1770s, James Wilson began to compose a theory of relations that would solidify Franklin's view as well as set the foundations for the Declaration of Independence. Wilson (1804) claimed that the American colonies owed their "obedience and loyalty...to the kings of Great Britain...this union of allegiance produces a union of hearts" (3: 99). Furthermore, Wilson describes Parliament's relation to the colonies: "The connexion [sic] and harmony between Great Britain and us...will be better preserved by the operation of the legal prerogatives of the crown, than by the exertion of an unlimited authority by Parliament" (3: 99). Contrary to the anti-crown rhetoric laid out in the Declaration of Independence, Wilson believed that the Crown was the only valid constitutional means of connecting dominions within the Empire. Advocating a confederation view of the British Empire, Wilson acknowledged the constitutional compatibility of the center and peripheries as long as the peripheries maintained their own rights to self-government and representation, especially over domestic affairs.

Wilson's theory of metropolitan-colonial relations makes explicitly clear the nature of the Crown's foreign affairs prerogative as it relates to the British Empire. Wilson states, "the king is intrusted [sic] with the direction and management of the great machine of government...He makes war: he concludes peace: he forms alliances; he regulates domestic trade by his prerogative, and directs foreign commerce by his treaties with

those nations, with whom it is carried on...[rather] than by the exertion of an unlimited authority by Parliament” (3: 99). Wilson affirms the king’s appropriate constitutional place as a manager and director of foreign affairs. Wilson also acknowledges that the constitutional balance of the foreign affairs of his day does not recognize parliamentary supremacy in foreign affairs, but rather the Crown has the primary authority over leading foreign affairs.

As American constitutionalism separates itself from British constitutionalism, American constitutional arguments make clear that the republican character of American constitutionalism absorbs elements of the British Constitution, such as the executive’s prerogative (though not exclusive right) over foreign affairs.

The American constitutional argument prior to the Declaration of Independence had morphed from recognition of at least some bound of Parliamentary authority over the colonies to none at all. In Thomas Jefferson’s 1774 warning to the king entitled “A Summary View of the Rights of British-America” (1774), he rhetorically declares the American disbelief of any American colonial subservience to Parliament by declaring the egregious acts of Parliament as attempts to wholly (constitutional and otherwise) subjugate the colonies:

That thus we have hastened through the reigns which preceded his majesty’s, during which the violations of our right were less alarming, because repeated at more distant intervals than that rapid and bold succession of injuries which is likely to distinguish the present from all other periods of the American story. Scarcely have our minds been able to emerge from the astonishment into which one stroke of parliamentary

thunder has involved us, before another more heavy, and more alarming, is fallen on us. Single acts of tyranny may be ascribed to the accidental opinion of a day; but a series of oppressions have begun at a distinguished period, and pursued, unalterably through every change of ministers, too plainly prove a deliberate and systematical plan of reducing us to slavery. (Jefferson 231)

Jefferson's appeal to King George III affirms the active role that Parliament had assumed in the metropolitan-colonial relations during the almost two decades leading up to the American Revolution. Not only does Jefferson acknowledge Parliament's centralizing agenda for American colonial affairs, he also notes the surprise of the American colonial public when they realized Parliament's deciding role in precipitating constitutional conflict between the British center and the American peripheries. The extremely abusive role of the legislative admitted by Jefferson and the American public appears to run counter to the analysis offered by Jefferson (and the American people) in the Declaration of Independence.

The Declaration of Independence declares the grounds for its separation by the natural rights of every American against the tyranny of a wicked British King: "The History of the present King of Great-Britain is a History of repeated Injuries and Usurpations, all having in direct Object the Establishment of an absolute Tyranny over these States. To prove his, let Facts be submitted to a candid World" (Constitution/Declaration 1991, 36). Twenty-seven indictments against King George III later, the Declaration makes clear to all that the colonists renounce all responsibility for the separation and place the blame firmly on the king.

## **American independence**

The American relationship with Parliament drastically changed during the 1760s and 70s. American colonists discovered that legislatures could act just as tyrannically as one man. Parliament overstepped its bound by trying to dictate the internal affairs of the colonies. The American colonists dropped any mention from Parliament by the time the Declaration was written because the American constitutional argument for separation from Britain would have been inconsistent and weakened by trying to maintain any constitutional relationship to Parliament. Thus, the main defendant of the Declaration's indictments was King George III since he was the last (or only, depending on how you read the evolution of American constitutional arguments) constitutional tie to the American colonies; and, as a result, King George III was held responsible by American rhetoric for the violation of American colonists' natural rights. No king or parliament could ever violate American neither colonists' liberties nor their right to government by consent. In reality, the Crown and Parliament were concurrent actors with concurrent liabilities in the violation of American colonists' natural rights. Anti-executive sentiment during and after the American Revolution ignored the reality that a legislature could be just as bad or worse than a unitary executive. The American sentiment against a unitary executive during this time period must be cautiously examined in the light of this chapter's findings.

First, the emergence of American constitutionalism out of British constitutionalism was continuous. In Jack Greene's *Peripheries and Center* (1986), he argues in favor of a

historical perspective of American constitutionalism that “stresses the continuity of constitutional issues from the colonial period through the Revolution” (x). The development of American constitutionalism was heavily rooted in the British constitutional and legal traditions, and key geographical and demographic factors (i.e., distance from the British center, low population density with small indigenous population, and no longstanding societal traditions) enabled American colonists to apply British constitutional precepts in a new context that proved more republican in nature because of the power derived from the people rather than the social estates. The political traditions that emerged in the American colonies mimicked British political precepts and structures. When American colonial governments separated from the British center, these governments retained much of the British system of old: representative assemblies that mirrored Parliament in scope and purpose, governors retaining responsibilities as under British dominion, and civil society grew up with many “British” expectations for government operations. State constitutions post-Revolutionary War were merely enhanced versions of their British predecessors with more republican impulses.

More importantly, the American victory over the British did not solve the fundamental constitutional problem of balancing power between a political center or union of states and the respective peripheries or individual states. American constitutionalism grew to believe by 1776 that the British solution to this constitutional dilemma was terribly wrong—that is why the Americans fought for their independence. After the adoption of the US Constitution, the Americans were unified as the United States of America. The

adoption of the US Constitution solidified American constitutionalism in a document in order to avoid the bad experience of an amorphous British Constitution embodied in Parliament, but the constitutional debate on the balance between the center and the peripheries continued throughout the American Civil War—some would even say it continues today. This constitutional continuity began first with the British, and many of their traditions influenced American institutions. The executive is no exception. The republican nature of the United States would not and could not tolerate a king, but the US Constitution did adopt a unitary executive whose foreign affairs powers, in relation to the legislative and judicial branches, closely resemble the same prerogative exercised by the British King and some state governors between 1776 and 1788.

Second, the American colonial perception of the executive was skewed by the rhetoric espoused in the Declaration of Independence. Out of rhetorical and constitutional necessity, the American colonists had to sever their constitutional ties to Parliament despite attempts throughout the first half of the 18<sup>th</sup> Century to appeal to Parliament as a constitutional arbiter. Once the American colonists realized that Parliament as the constitutional arbiter of the British Empire and British Constitution would not enable the colonies to enjoy the fundamental rights that they believed inalienable from their existence, the American colonists—justifiably since Parliament and the Crown effectively argued after the 1760s that they had the authority to abridge the constitutions and charters of the American colonists, even in violation of natural laws acknowledged by the likes of Blackstone—severed their ties to Parliament in their constitutional

arguments and rhetoric. Consequently, the Crown was all that was left to blame for the tyrannical encroachments committed by the British center. The Declaration of Independence does not mention Parliament directly, but an indirect reference to Parliament is made: “He has combined with other to subject us to a jurisdiction foreign to our Constitution, and unacknowledged by our Laws; giving his Assent to their pretend acts of Legislation...” (*Declaration of Independence* 1991, 37). The American perception of the Crown became far worse after the Declaration and the subsequent war.

Thomas Paine’s *Common Sense* (1776), which became a sacred text to the revolutionary generation, embodies the American perspective of the Crown:

The nearer any government approaches to a republic the less business there is for a king. It is somewhat difficult to find a proper name for the government of England. Sir William Meredith calls it a republic; but in its present state it is unworthy of the name, because the corrupt influence of the crown, by having all the places in its disposal, hath so effectually swallowed up the power, and eaten out the virtue of the house of commons [the republican part of the constitution]... (Paine 275)

Paine’s words lead the reader to believe that the Crown is the primary conspirator in the subjugation of the American colonies. The rhetoric Paine employs seems to relieve Parliament of any complicity in the actions against the American colonies. Despite Parliament’s growing role as the British constitutional arbiter—which does not mean sovereign over all British affairs (i.e., foreign affairs since colonies were not foreign entities but member states of the Empire)—in the decades leading up to the American Revolution, Paine places the blame for the meltdown of metropolitan-colonial relations on the British king. More tellingly, Paine evokes the American constitutional foundation of

republicanism and attributes it to Parliament. Although Parliament was a constitutional institution that was more representative and therefore more republican than the Crown, Parliament's growing disregard for representative government in the American colonies on whatever grounds was far from republican. Obviating the history of Parliament and the American colonies over the past century, Paine demonstrates the anti-executive rhetoric that began to be popular among Revolutionary Americans. Although many state governors prior to the US Constitution and eventually the US President were instituted as republican executives directly accountable to the people from which they derived their Constitutional authority, the resentment of a unitary executive, acting in any capacity, became typical rhetoric between 1776 and the first half of the 1780s.

## CHAPTER III

### EXECUTIVE INTERREGNUM

This chapter will evaluate the treatment of the executive in the original state constitutions, specifically containing to foreign affairs, and compare these treatments with the anti-executive rhetoric expressed in the previous chapter. Also, the state legislative abuses preceding the Philadelphia Convention in 1787 will provide additional context for the development of anti-executive rhetoric. The continuous development of American constitutionalism from 13 independent states to the Articles of Confederation to the US Constitution will provide a historic backdrop that offers context for the foreign affairs power of the executive as understood during the drafting and ratification of the US Constitution. The continuity of American constitutionalism and the changing perceptions toward the executive in light of legislative abuses will reveal the abnormality of the argument that the US Constitution was drafted and ratified with the intention of subduing the executive more than other branches of government.

Once the American Revolution had begun, each colony effectively declared itself an independent and sovereign state. The loose confederation of the 13 former British colonies in America fought and formally won independence from Britain in 1783. In response to separation from British rule, the states began experimenting with their own constitutions. The republican spirit of the revolution was breathed into American constitutionalism as manifested in the states and built itself on the precept that the

government's power was derived solely from the people; therefore, the government of each state was constitutionally fashioned to fulfill the representative character that republicanism demanded. Until the US Constitution was adopted in 1788 by the formal consent of nine American states, American constitutionalism was not unified or consistent within each state; but the constitutional experiments that the original 13 American states conducted by fashioning their revolutionary era state constitutions provided a great deal of context for the drafting and ratification of the US Constitution.

### **Impact of American anti-executive rhetoric**

John Yoo outlines the American revolutionary response toward the executive: "The new state constitutions sought to tame the executive by placing explicit restrictions on its power and by diluting its structural unity and independence [from other branches]" (62). In line with the thinking of Thomas Paine, many state constitutions between 1776-1787 sought to weaken the executive's overall scope of powers. Yoo claims that the state constitutions remain central to the process of defining the executive's foreign affairs power because they provide a host of problems that the Framers of the US Constitution sought to remedy since the "mechanisms chosen by the revolutionaries to control the executive contrast sharply with the Constitution of 1787" (62). Most state constitutions between 1776 and 1787 removed the independence of the executive by selecting the executive (i.e., governor) from the legislature and compromised the unity of the executive by fostering plural executive institutions largely dependent on the legislature.

The anti-executive rhetoric of the American Revolution fostered a period of Executive Interregnum whereby the executive was weakened at the hands of the legislature.

Every state but New York invested the legislature with the power to select the governor and severely limited the term and eligibility of the governor. The result of placing the executive under direct appointment of the legislature contradicted the basic republican premise of direct responsibility and accountability to the people. Maryland's constitution of 1776 stated the anti-executive rhetoric quite plainly: "a long continuance, in the first executive departments of power or trust, is dangerous to liberty; a rotation, therefore, in these departments, is one of the best securities of permanent freedom" (Thorpe (1909) 3: 1689). The Pennsylvania constitution, which was probably the most anti-executive state constitution between 1776 and 1787, compromised the unitary character of the executive by creating a plural executive—a twelve men executive council (5: 3086-87). Many other states required that the governor deliberate every major decision with a special committee of the legislature before action could be taken.

Thomas Jefferson's draft for the Virginia constitution of 1776 simply labeled the executive as the "Administrator" (Boyd (1950) 337, 341). Yoo extrapolates Jefferson's proposal of the executive, which was rejected and replaced with George Mason's proposal, and accurately states that Jefferson's proposal sought to castrate the executive to the utmost degree, especially in foreign affairs: "Jefferson enumerated powers that the executive could *not* exercise... When it came to war powers, Jefferson's draft stated that

the administrator could not ‘declare war or peace, issue letters of marque or reprisal, raise or introduce armed forces, or build armed vessels...forts or strongholds’ ” (64).

Contrary to Jefferson’s plan to strip the executive of all foreign affairs powers, Virginia adopted George Mason’s plan. The Virginia constitution of 1776 did not completely strip the governor of his traditional (as inherited from British constitutionalism) authority over the primary direction of foreign affairs; instead, this constitution allowed that “the governor may embody the militia, with the advice of the Privy Council; and when embodied, shall alone have the direction of the militia, under the laws of the country” (Thorpe 7: 3815-3819). The Virginia governor was not entirely absorbed by the legislative branch since he retained traditional executive functions such as the sole general of state militia forces, but the Virginians did succeed in diluting the executive as it was understood under British Constitutionalism and the American colonial experience.

Yoo notes Jefferson’s persistence in trying to subjugate the executive, especially in foreign affairs, to the legislature were unsuccessful in practice; but Jefferson did succeed in widely circulating his thoughts on the executive:

The [Virginia constitutional] convention also deleted Jefferson’s enumeration of war powers forbidden to the executive. Undeterred, Jefferson offered his language as a constitutional amendment, but the members of the convention rejected it in favor of a provision permitting the governor, with the advice of a council of state, to ‘exercise the Executive powers of Government...’ Although a dead end, Jefferson’s scheme was widely circulated, and it provided an example of how the Framers could have created a legislature-first approach to war—had they chosen to do so.” (64)

Despite the widespread public knowledge of Jefferson's plan for a legislature superior to the executive, most states only placed "structural checks on the governor's power, it was not a substantive limitation on the executive branch's power" (64). Although state constitutions during the Executive interregnum experimented with narrowing the scope of executive prerogatives, as compared to British constitutionalism, the constitutional boundaries that narrowed executive power did not completely diminish or remove the executive's foreign affairs power (i.e., war and treaty making); and the US Constitution would not copy most of these structural limitations on executive power, especially over foreign affairs.

The anti-executive rhetoric that dominated the Executive Interregnum was not so pervasive that it seeped into the creation of the US Constitution. Willi Paul Adams' (1980) study of revolutionary state constitutions confirms the finite nature of the Executive Interregnum:

The striking fact of historical dimension is that the reaction against the colonial governor was so weak that it did not lead to [modern] parliamentary government with an executive committee of members of the legislature, but rather that within a decade the American system of presidential government evolved with full clarity and permanence. (271)

The history of colonial governors as provided in the first chapter reveals that there were fewer colonial governors that completely agreed with the British metropolitan authorities and brutally enforced metropolis policy—among those that did actively support the metropolis, their efforts would have been in vain without the support and energy of Parliament. The new American state constitutions of the revolutionary era did not

entirely embrace a legislative supremacy over all affairs since British Parliament had not even gained full supremacy by the time of the American Revolution (rather a king-in-Parliament system). The state constitutions of the Executive Interregnum subtly mimicked British constitutionalism, especially in the arena of foreign affairs.

Most telling is the fact that state constitutions during this era did not *entirely* subjugate the executive to the legislature nor did the US Constitution adopt such an approach despite the revolutionary rhetoric seemingly in favor of such subjugation.

John Adams's "Thoughts on Government," published in 1776, was widely read and implemented during the Executive Interregnum, especially concerning the executive. Adams' fear of a supreme legislature to handle executive and legislative duties is clearly stated: "A representative assembly, although extremely well qualified, and absolutely necessary, as a branch of the legislative, is unfit to exercise the executive power, for want of two essential properties, secrecy and dispatch" (John Adams, *Colonies to Nation* 308). The *Federalist Papers*, published over a decade later, would repeat some of the same arguments during the ratification debates of the US Constitution. These arguments, first articulated by Adams, claim that the legislative branch is not capable of fulfilling executive duties, especially duties of guiding the nation through war and peace, at the same efficiency as an executive independent from the legislature. Responding to actions of war and resolving violent conflict demands a speediness for safety's sake that a legislature with such a diverse and numerous body would rarely if ever achieve at the same pace as an independent executive.

Adams (1776) acknowledges the gross, unresponsive dangers of a monarchical executive like the British Crown, but he admits that the republican nature of an American executive must maintain a significant degree of independence and unity in order to best fulfill executive duties in the interest of the state: “let them...choose a governor, who, after being stripped of most of those badges of domination, called prerogatives, should have a free and independent exercise of his judgment, and be made also an integral part of the legislature” (309). The governor, Adams claims, should work in accord with the legislature but in such a way that enables the governor to act as an independent and unitary body capable of fulfilling his duties. Furthermore, Adams admits that his belief in a “free and independent” executive may be against the mainstream anti-executive movement of the Executive Interregnum (309). Adams offers the alternative of a council to advise the executive, but he maintains that the executive must maintain certain powers inherent to the executive for the benefit of the state. Of these specific powers, Adams argues that the executive must maintain “the command of the militia and of all your armies” (309).

Adams’ unmistakable reference to an integral foreign affairs power would ruffle the feather of modern scholars like Harlod Koh who argue that the executive is at best equal to the legislature in matters of foreign affairs. John Yoo interprets Adams’ statements about the executive as mirroring the British Constitution “after adjusting the branches of government to be more responsive to popular sovereignty” (65). Yoo captures the

republican sentiment of Adams' plan for government by reflecting on how Adams used popular sovereignty, a pillar of republicanism, to *adapt* (not completely disavow) British constitutional traditions, such as executive direction of foreign affairs. Adams provides a vivid picture of an executive with primary, albeit non-exclusive, powers over particular foreign affairs at the height of anti-executive rhetoric.

Anti-executive rhetoric during the American Revolution succeeded in instilling public fear in the executive, but this rhetoric was limited in its impact on the development of American constitutionalism. John Yoo argues that American constitutionalism during the Executive Interregnum, despite anti-executive rhetoric, embodied a continuation of the British constitution: "if the states had wanted to reject the traditional model of Anglo-American war making, which was composed of executive initiative and legislative appropriations, their constitutions would have followed the lines suggested by Jefferson" (65). Adopting more of an Adams' approach, many state constitutions during the Executive interregnum refused to radically alter the "traditional allocation of powers between executive and legislative branches" and instead settled for the executive's primary authority over foreign affairs (65).

The state constitutions of New York, New Jersey, and Georgia show a continuation of the British tradition of the executive's primary authority over foreign affairs. All of these constitutions, in essence, declared that the executive (i.e., the governor) had "supreme executive power...[and] shall be captain-general and Commander in Chief

over all the militia, and other military and naval forces belonging to this State” (Thorpe 2: 782). New York’s strong executive from its 1777 constitution was held as a model for the US Constitution’s treatment of the executive since the New York governor was created as a strong independent and unitary executive, especially over foreign affairs such as direction of the military. Interestingly enough, Yoo points out that the New York legislature had “no enumerated war authorities for the assembly, which left the legislature its customary role in making funding decisions” (Yoo 67).

Keeping in line with the contemporary anti-executive sentiments of the Executive Interregnum, states such as Delaware, demanded checks on the executive’s war making powers: “[the] president, with the advice and consent of the privy council, may embody the militia, and act as captain-general and commander-in-chief...” (Thorpe 1: 564).

Despite such state experiments with dilution of executive primacy over foreign affairs, John Yoo points out that the authors of the US Constitution could have selected such checks on the executive’s traditional authority over foreign affairs:

These consultation provisions illustrate the common understanding among revolutionaries that the governor generally had no preexisting duty to consult with the legislature before sending the state into war. Correspondingly, if the Framers of the federal Constitution had wanted the president to consult either with the legislature or within the executive branch before embarking on a military venture, the could have easily borrowed from these state provisions and required the president to consult with the Senate (as some in the Constitutional Convention proposed) or some other body. (66)

The 13 separate American states’ experiments with constitution-making reveal continuity between American and British constitutionalism with structural changes that

reflected the republican spirit of revolutionary America even in spite of anti-executive rhetoric.

After 1777, state constitutions of Massachusetts (adopted in 1780) and New Hampshire (adopted in 1784) established an executive with primary authority over war. The Massachusetts' constitution contained wording like New York concerning the governor's sole authority to direct the operations of war, but the Massachusetts constitution also contained wording that affirmed the governor's power to *make* war:

The president of this state for the time being, shall be commander in chief of the army and navy, and all military forces of the state...and shall have full power by himself...to train, instruct, exercise and govern the militia and navy; and for the special defense and safety of this state to assemble in martial array, and put in warlike posture, the inhabitant thereof, and to lead and conduct them, and with them to encounter, expulse, resist and pursue by force of arms, as well by seas as by land, within and without the limits of this state; and also to kill, slay, destroy, if necessary, and conquer by all fitting ways, enterprise and means, all and every such person and persons as shall, at any time hereafter, in hostile manner, attempt or enterprise the destruction, invasion, detriment, or annoyance of this state; and to use and exercise over the army and navy, and over the militia in actual service, the law-martial in time of war, invasion, and also in rebellion, declared by the legislature to exist...and in fine, the president hereby is entrusted with all other powers incident to the office of captain-general and commander in chief, and admiral... (Thorpe 4: 2463-2464)

The litany of war powers enumerated on behalf of the governor demonstrates the primacy of the executive in war. John Yoo notes that the Massachusetts constitution of 1780 did not simply limit the governor to actions of defense but also for “offensive operations under the executive, who may use any means he sees fit...to achieve his war aims” (69). The Massachusetts model, fashioned as the anti-executive rhetoric was beginning to wane, offers a broad interpretation of executive war making powers.

Furthermore, the only legislative reference to war making aside from the traditional role of funding was to declare the domestic legal status of the state rather than granting executive permission to engage in war. Yoo claims that such a declaratory role is only a “judicial announcement” that acknowledges the executive’s initiation of war (offensive or defensive) and establishes “the governor’s authority to declare martial law” (69). Contrary to contemporary beliefs about the meaning of “declaring war,” the founding generation of the US Constitution who had lived through the Revolutionary War understood a declaration as a legislative act necessary to temporarily alter the domestic status of the nation to enable martial law—enables the government to temporarily act in a greater role over domestic legal affairs than it normally might.

Massachusetts and New Hampshire’s constitutional experiment with a strong, energetic executive would find its basic premises, such as executive primacy over war making (one of the most fundamental elements of foreign affairs), copied in the US Constitution. One of the most shocking evidences of the American constitutional tradition of executive primacy over foreign affairs was delivered in the “Essex Result.” After Massachusetts held a constitutional convention in 1778 that included limiting the governor’s war making powers “according to the laws...or the resolves of the General Court,” the people of Essex, Massachusetts resoundingly rejected the proposal of compromising the independence and energy of the executive (Handlin and Handlin 1966, 190). The people of Essex delivered their own recommendation for the governor’s war powers: “Let the Governor alone marshal the militia, and regulate the same, together

with the navy...Should Providence or Portsmouth towns outside of, but near, Massachusetts be attacked suddenly, a day's delay might be of most pernicious consequence. Was the consent of the legislative body, or a branch of it, necessary, a longer delay would be unavoidable" (Parsons 1859, 396). Despite anti-executive rhetoric, some of the American public saw the necessity for speed and efficiency during times of war—only an independent and unitary (as far as war powers are concerned) executive could fulfill this necessity.

One of the most anti-executive state constitutions during the Executive Interregnum was South Carolina. Its 1776 constitution declared "that the president and commander-in-chief [i.e., the governor] shall have no power to make war or peace, or enter into any final treaty, without the consent of the general assembly and legislative council" (Thorpe 6: 3247). South Carolina's 1778 constitution further refined its anti-executive nature by declaring "that the governor and commander-in-chief shall have no power to commence war, or conclude peace, or enter into any final treaty [without approval from the legislature]" (3255). Yoo argues that the South Carolina constitutions of 1776 and 1778 demonstrate two important means for deciphering the US Constitution's definition of executive authority over foreign affairs powers: "First, it indicates that the common understanding of war powers did not require the executive to receive formal legislative approval to commence hostilities [hence the explicit language used regarding the proscription of the executive's power]...Second, South Carolina's war clause provides yet another example of a path not taken by the Philadelphia delegates" (72). Despite

anti-executive rhetoric during the Executive Interregnum, Yoo magnificently points out that one of the greatest constitutional experiments with proscribing the executive's foreign affairs power—South Carolina—was not chosen for the US Constitution and thereby failed to hold a strong constitutional footing.

### **Failures of the Articles of Confederation**

The next American constitutional milestone was the final ratification of the Articles of Confederation in 1781. The Articles of Confederation seemed to rightfully emerge from the American Revolutionary spirit of localized sovereignty. In 1780, James Madison observed, regarding the Articles of Confederation, that “the nature and extent of the Union was determined by the circumstances of the crisis, rather than by any accurate delineation of the general authority” (Madison 6: 375). As the war against Britain wound down and less unified support was necessary, the states routinely did not comply with Congress (i.e., the only branch of national government established by the Articles of Confederation). As Jack Greene (1986) notes,

“[i]n the early modern British Empire the peripheries had found themselves on the defensive against the aggressive power of the center; under the Articles, it was precisely the opposite: the center found itself without sufficient authority to preserve the general interests of the United States against the power of the several states. (181)

Consequently, the factious interests of the states threatened to undermine the hard fought victory of the American Revolution.

The Congress of the Articles of Confederation, remarked Connecticut delegate Jesse Root, “ ‘[h]aving no permanent funds in its possession, nor the means of establishing any...[the] sovereign power of war and peace must feel itself weak and prevent or defeat almost every measure however necessary and render the execution languid, tardy, and oft times wholly abortive’ ” (Greene 1986,182). Without the sovereign power to govern war and peace, Congress (a king-in-parliament approach whereby the executive functions, judicial, and legislative functions were combined in one branch) lacked the ability to properly defend the United States from foreign adversaries and meddling as well as from rebel states. Alexander Hamilton observed of the states under the Articles of Confederation that

‘[each state was] more disposed to advance its own authority upon the ruins of the Confederacy, than to make any improper concessions in its favour...[the] excess[ive]...spirit of liberty which...made the particular states show a jealousy of all power not in their hands...[the] extreme jealousy of power...[led the states to pursue] monopolizing all power in themselves.’ (Greene 1986, 184)

The states’ individual ambitions paired with Congress’ inability to enforce its own mandates for requisitions and revenue led to a disastrous constitutional experiment that precipitated the creation and ratification of the US Constitution.

Some historians, like Arthur Bestor, claim that the Articles of Confederation prove that the founding generation of the United States wanted the powers of war and peace “to be arrived at through legislative deliberation—the very antithesis of the idea of vesting the power of war and peace in executive hands” (Bestor (1974) 527, 568). The frequency among state constitutions of powers of war and peace invested into the executive (even

with some privy council) as well as the ultimate unitary, independent executive adopted by the Framers and ratified by the American people provides enough evidence to discredit this opinion. John Yoo further adds that the combination of judicial, executive, and legislative functions that characterized the Congress of the Articles of the Confederation does not yield accurate evidence toward Bestor's claim—extraordinary sampling does not accurately prove an argument. Chief Justice John Marshall described the Articles of Confederation as a “league; and congress was a corps of ambassadors, to be recalled at the will of their masters” (Marshall (1970) 155, 199). The Congress of the Articles of Confederation was not a semi-perfect constitutional arrangement that would be marginally altered in the US Constitution. According to Yoo, this Congress did not have powers normal for a legislature: “Congress did not have powers that the revolutionaries normally associated with a legislature, such as the authority to regulate trade or to levy taxes—powers that remained with individual states” (76). The Articles of Confederation had effectively localized sovereignty within each state while leaving the Congress little authority to fulfill its obligation to manage national defenses and conduct international relations. In this light, the substantive changes to the Articles of Confederation embodied in the US Constitution are monumental: the national government was given the sovereign authority to enforce its laws and levy the revenues necessary to fulfill its foreign affairs duties

The issue of declaring war was addressed in the Articles of Confederation in a manner contrary to contemporary arguments. No explicit grant of declaring war was mentioned

in the Articles of Confederation, but Article VI states, “No state shall engage in any war without the consent of the united states in congress assembled, unless such state be actually invaded by enemies...” (Rossiter 1999, 535). Using Article VI, John Yoo reaffirms his belief that whatever was not utilized by the Framers of the US Constitution but readily available to them should be not be positively considered as a means of defining the term in question:

If the delegates to the Constitutional Convention had wanted to prohibit the president from initiating hostilities with another nation, they could have borrowed Article VI and adjusted it to apply to the federal executive as well. Article VI further suggests that the revolutionaries understood the declaration of war’s core purpose to be one relevant to international law...In short, the declaration of war clothed what would have been an illegal act by the states—sending warships against another nation—with a legal status in international law. (77)

First, Yoo points out that the Framers did not choose to limit the executive’s capacity to initiate hostilities. The declaration of war, granted to Congress under the US Constitution, would affect the international status of the United States’ military action rather than prohibit the executive’s power to commence military action. Keeping in line with British constitutional tradition, the executive would utilize his prerogative to initiate and direct hostilities while the legislature would exercise its prerogative of controlling the funding for military operations:

British practice also underscored the irrelevance of the declaration of war to the balance of war powers between Crown and Parliament...In fact, in the many wars fought after the Restoration (the Second and Third Anglo-Dutch Wars, King William’s War, the War of the Spanish Succession, the War of the Austrian Succession, and the Seven Years’ War), England declared war only once before or at the commencement of hostilities. (51)

Despite revolutionary rhetoric regarding the dismantling of any executive prerogatives, the war powers remained largely in the hands of the executive even in state constitutions during the Executive Interregnum.

The contemporary debate over the American president's war powers has also had a lengthy history. "The United States has only declared war five times: during the War of 1812, the Mexican-American War of 1848, the Spanish-American War of 1898, and the two World Wars. Yet the United States has committed military forces into hostilities abroad at least 125 times in the Constitution's 207-year history" (12). The history of American war reveals that a congressional declaration of war is not the norm, rather the executive's prerogative to engage in military action. Although Congress could have refused to grant the funding required by the executive to wage war, it has never done so. The pre-Constitution history and post-Constitution history of the declaration of war reveals a 300-year tradition from British to American Constitutionalism of executive power to initiate and command military operations with the financial support of the legislature. But the inability of the Congress under the Articles of Confederation to raise the revenue and forces necessary to enforce its 1783 Treaty with Britain as well as defend its western outposts helped precipitate the cries for a new constitutional system.

### **Legislative abuses**

By 1787 the inefficiency and impotence of the Articles of Confederation created the necessity for a new form of government, only accomplished under a new constitution.

James Madison, perhaps the most influential force on the drafting of the US

Constitution, paid very close attention to constitutional experiments that had occurred during the decade after the Declaration of Independence. His greatest contribution to American constitutionalism, the theory of faction, revolved around a central theme of the Constitution: securing individual rights. According to Jack Rakove (1996), Madison departed from the traditional thought that the legislature was responsible for protecting individual rights: “The crucial departure in [Madison’s] thinking, however, occurred *after* 1785, and it involved asking *why*, in a republic, the purposeful decision of the legislature posed a greater threat to rights than did capricious acts of the executive” (313). Madison’s theory of faction acknowledged that the legislature could act as a worse tyrant than a single executive, and Madison believed that “the problem of rights was no longer to protect the people from the government but to defend minorities and individuals against popular majorities acting *through* Government” (313).

Madison’s contribution proved wearisome because it questioned “the fundamental principle of republican Government, that the majority who rule in such Governments are the safest Guardians both of public good and of private rights” (353-354). His analysis of state economic legislation and Shay’s Rebellion revealed that the security of private property rights was in jeopardy. In his 1787 “Vices on the Political System of the United States,” Madison (1906) outlines his fear of legislative tyranny among the states:

3. *Violations of the Law of Nations and of Treaties.* From the number of Legislatures...irregularities of this kind must frequently happen...The Treaty of peace—the treaty with France—the treaty with Holland have each been violated...4. *Trespases of the States on the Rights of Each Other*...Paper money, installments of debt, occlusion of Courts, making property a legal tender, may likewise be deemed aggressions on the rights

of other States... 11. *Injustice of the Laws of States*...their injustice betrays a defect still more alarming...because it brings into question the fundamental principle of republican Government, that the majority who rule...are the safest Guardians both of public Good and of private rights. (Madison 2: 361-369)

State legislatures proved a greater threat to economic rights such as contract and private property through the passage of debtor relief laws than the executive. Madison recognized that a constitutional union under a federal government would be required to prevent destructive economic competition between the states, especially for trade with other nations. The dilemma of protecting economic rights demonstrated to Madison that the legislative possessed elastic powers that had the potential to engulf individual rights.

Madison's analysis provided the model for his agenda at the Constitutional Convention: the protection of individual rights against factious majorities (Rakove 314-316).

Madison's contributions to the drafting of the US Constitution at the Constitutional Convention centered largely on controlling the dangerous possibilities that could only arise from the legislature, and it was through the abuses of the state legislatures that Madison had learned to fear them. In *Federalist No. 10*, Madison echoes his "Vices of the Political System of the United States" by listing his grievances with the state legislatures enabling the oppression of minority rights: "A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it..." (Rossiter 79).

Madison believed that the legislature had the potential to wield a great abuse to individual rights, greater than the executive; but he also determined at what level the legislative would prove most dangerous. Madison's theory of faction determined the possibility for faction as inversely proportionally to the population: the greater the population, the less chance of faction. The greatest possibility of faction lay within the individual states. Madison's chief cause throughout the framing of the Constitution was to provide the national legislature an unlimited veto over state legislation. Madison saw the states' disregard of their declarations of rights prior to the Constitution; thus, he believed that only a national veto would suffice in protecting individual liberties. Madison's goal of achieving a national veto over state legislatures contradicted the revolutionary sentiments about localized sovereignty (and would in some senses contradict his states' rights stance with the Jeffersonian Democratic-Republican party). This apparent contradiction or, rather, turn in political philosophy demonstrates the fear of the legislature as being greater than that of the executive.

Others in the founding generation had recognized that states and their legislatures had become dangerous to the United States under the Articles of Confederation. John Jay wrote to Thomas Jefferson in 1786 regarding the problems arising in the states: "A reluctance to taxes, an impatience of government, a rage for property and little regard to the means of acquiring it, together with a desire of equality in all things, seem to actuate the mass of those who are uneasy in their circumstances" (John Adams 1850-56, 1: 165). Samuel Osgood wrote to John Adams on similar matters in 1786: "The federal

government seems to be as near a crisis as it is possible...The State governments are weak and selfish enough, and they will of course annihilate the first...It is said that the insurgents [Shays' rebellion] have two objectives in view; one, to reduce their state debt and those securities given by the United States...the other; to annihilate private debts" (Kurland and Lerner 1987, 165). The states individually and corporately faced large unpaid debt that had accumulated from the Revolutionary War. The weight of this debt frustrated foreign relations with foreign creditors such as France.

Populist movements within the states (e.g., Shays' rebellion) had sought to pass debtor relief laws that would have eliminated private debt accumulated individually during the Revolutionary War, especially among small farmers. Classist tensions emerged and populist majorities that sought to abridge the minority rights of debt holders and landowners were trampling upon individual liberties within the state legislatures. Madison's theory of faction and the well-documented concerns of other members of the founding generation demonstrate that the legislative branch hosted their greatest fears of government abuses of individual liberties. The Executive Interregnum had officially ended in mid-1780s as fears of the abuses of the executive gave way to fears of the abuses of the legislature.

The anti-executive rhetoric of the revolution had been proven less factual by the mid-1780s than pure rhetoric. Even in the historical context of the metropolitan-colonial relations of 1680s-1770s, the legislature was a necessary element to subjugate individual

rights. Early experiments in American constitutionalism (1776-1787) had revealed that the legislature posed the greatest threat to individual liberties rather than the executive. The foreign affairs powers of the executive were diluted in many state constitutions and the Articles of Confederation, but the traditional substantive authority of the executive over foreign affairs was maintained to a degree despite varying structural arrangements that sought to dilute the executive's independence and unitary nature. Ultimately, the US Constitution would reject such dilution and restore the executive to its primary authority albeit not exclusive power over foreign affairs.

## CHAPTER IV

### RATIFICATION OF THE FOREIGN AFFAIRS POWER

After the Constitution was completed at the Philadelphia Convention in 1787, state ratification debates began in earnest as Federalists in every state sought to adopt the Constitution as swift as possible. Ten state legislatures had called for elections to the special ratification conventions by the end of 1787. The newspapers were filled with political commentary from Federalists and Anti-Federalists praising and lamenting the virtues and vices of the new Constitution. Alexander Hamilton, John Jay, and James Madison led the Federalist debate through their publication of the *Federalist Papers* from 1787 to 1788, which offers extensive political theory justifying the necessity, form, and inception of the Constitution. In *Federalist No. 15* Hamilton illuminates the deficiencies of the Articles of Confederation: some of the greatest deficiencies deal with foreign affairs and common defense both of which are largely remedied by the institution of the presidency.

Some of the greatest deficiencies of the Articles of Confederation according to the Federalists were the lack of domestic enforcement for national laws as well as disunity in foreign affairs. The new Constitution sought to unify the United States foreign affairs in the locus of the general government—states could no longer conduct their own foreign affairs without the approval of Congress. The President was vested with “the executive Power”: a general grant of power that would include all executive functions

not otherwise prohibited or qualified. The new Constitution placed the President as chief executive and commander-in-chief of the armed forces and navy—responsible for directing the common defense of the United States. The President, with the advice and consent of the Senate, was responsible for directing foreign relations through the making of treaties and the appointment of ambassadors.

Yet the future of the American Presidency was unclear to the American public. Few would have predicted its evolution, especially during the 20<sup>th</sup> Century, but the ratifying conventions of 1787-1789 built on the tradition of executive power as exercised by their former king and more recently by state governors—as this thesis has disclosed. The new nation that would be formed under the Constitution needed a chief executive capable of managing foreign affairs with a unity and independence that would preserve the efficacy and prestige of the office at home and abroad. The references to the President during the ratification debate era (1787-1789) support the general argument of this paper that the President was to have primary direction over war and treaty powers but not exclusive control.

First, Hamilton cites the large amounts of debt to foreign as well as domestic creditors that were incurred as a result of the American Revolutionary War (1775-1783): “Do we owe debts to our citizens contracted in a time of imminent peril for the preservation of our political existence? These remain without any satisfactory provision for their discharge” (Rossiter 101). Second and most important, Hamilton declares the American

states susceptibility to foreign aggression and interference, especially in matters of commerce: “Are we in a condition to resent or to repel the aggression?...Are we entitled by nature and compact to a free participation in the navigation of the Mississippi? Spain excludes us from it” (102). Many Federalists were concerned with the Spanish control of the Mississippi River because it hindered western expansion and commerce.

Hamilton continues: “Is commerce of importance to national wealth? Ours is at the lowest point of declension. Is respectability in the eyes of foreign powers a safeguard against foreign encroachments? The imbecility of our government forbids them to treat with us” (102). The loose confederation under the Articles of Confederation could not protect and support the domestic and international commerce of the States because it lacked the naval power and general military resources to secure and enforce American property from foreign aggression. The naval threat of Spain and Great Britain loomed large in early American history, and American diplomacy under the Articles of Confederation was not taken seriously by foreign nations such as Spain and Great Britain. For the Federalists, the necessity of ratifying the Constitution was strongest for reason of common defense.

Third, Hamilton claims that the general government under the Articles of Confederation is “destitute of energy” necessary to enforce its mandates to states for quotas and requisitions to maintain defense, relieve debt, and regulate commerce (103). Skeptical of the states’ loose affiliation to each other, Hamilton cites the dangerous history of “good faith” alliances: “...giving an instructive but afflicting lesson to mankind how

little dependence is to be placed on treaties which have no other sanction than the obligations of good faith..." (104). In *Federalist No. 21*, Hamilton reiterates that the future of the American states depends on an effective general government with greater means of enforcement than the general government of the Articles of Confederation: "The peace of society and the stability of government depend absolutely on the efficacy of the precautions adopted on this head" (136). According to the Federalists, the states could not expect to retain all sovereignty in exchange for the treaty of common defense, which was most central, albeit impotently executed, to the Articles of Confederation. In order to cement the Union of the 13 American states, the Federalists believed that a new general government with enumerated powers over all of the states was necessary. The necessity of a general government with the ability to enforce its own laws depended on the authority of congress to make laws and the authority of the executive to enforce them.

The Anti-Federalists, the major opponents to the new Constitution, feared the unitary executive as a reincarnation of the British King. Cato, a famous Anti-Federalist, wrote in 1787 that the presidential prerogatives, or powers, in war and peace are the same as King George III:

[F]or though it may be asserted that the king of Great Britain has the express power of making peace or war, yet he never thinks it prudent so to do without the advice of his parliament from whom he is to do derive his support, and therefore these powers, in both president and king, are substantially the same: he is the generalissimo of the nation, and of course, has the command and control of the army, navy and militia... Will not the exercise of these powers therefore tend either to the establishment of a vile and arbitrary aristocracy, or monarchy? (Storing 1981, 3: 500)

The Anti-Federalist arguments as represented by Cato seem to assume that (1) the President is to be unitary, and (2) the President is the primary operator of matters of war and peace. Cato's complaints against the President's power (although his letter addresses more than just the foreign affairs power) acknowledge the primary albeit not exclusive capacity of the President to direct war and peace. Present day historians and legal scholars who suggest that the President was not the primary authority over foreign affairs would have to blatantly ignore one of the Anti-Federalists' major concerns with the creation of the American Presidency as embodied in the 1787 Constitution.

Patrick Henry, a famous opponent of adopting the Constitution and an Anti-Federalist spokesman, voiced his fear in the power of the American President and the institution's resemblance to the British Crown during the Virginia Convention in 1788. His adroit demagoguery was extreme in its interpretation of the American President, but the theme of his statements on the American President acknowledge its primacy over matters of war and peace.

If your American chief be a man of ambition and abilities, how easy it is for him to render himself absolute! The army is in his hands...I would rather infinitely—and I am sure most of this Convention are of the same opinion—have a king, lord, and commons, than a government so replete with such insupportable evils...the President, in the field, at the head of the army, can prescribe the terms on which he shall reign master, so far that it will puzzle any American ever to get his neck from under the galling yoke...Away with your President! [W]e shall have a king: the army will salute him monarch: your militia will leave you, and assist in making him king, and fight against you... (Elliot 1888, 3: 512-513)

Henry's claims about the American President resonate with Cato's fear that the American President would exercise an absolute authority like the despotic kings

common to European history. The crucial point of note is that such absolutism would require command over the military—a key war power—to initiate and direct military action. Both Cato and Henry affirm the common Anti-Federalist belief that the American President’s primary authority over the war power in order to voice their fear of presidential absolutism.

Despite Anti-Federalist claims that the American President was an exact replica of the British monarch and bound to absolutism, Federalist James Wilson at the Pennsylvania Ratifying Convention (December 1787) noted a fundamental difference between the American and British Executives circa 1787. The republican character of the American executive made the President responsive to the general public through elections and impeachment whereas the British Crown was incorruptible and could not be truly held responsible by law. Wilson states, “The next good quality that I remark is, that the *executive authority is one*...that this officer is placed high, and is possessed of power far from being contemptible; yet not a *single privilege* is annexed to his character; far from being above the laws, he is amenable to them...by *impeachment*” (Elliot 3: 501).

Wilson’s praise of the unitary executive strongly affirms the republican character of the American President. This republican character serves as a fundamental distinction of the American President from the British Crown (c. 1787) even though both shared a similar purview over foreign affairs—powers of war and peace. The American Revolution’s republican character was echoed in the institution of the American President by virtue of

his or her direct connection to the citizenry and the laws that everyone under the domain of the United States had to follow—no exceptions.

The President’s authority over powers of peace—that is, treaties—as contained in Article 2, Section 2 of the Constitution give the President primary authority to make and conclude treaties with the “advice and consent of the Senate.” At the Pennsylvania Ratification Convention in December of 1787, James Wilson explicates his understanding of the President’s peace powers. First, Wilson notes the distribution of the treaty power between the Senate and the President. Wilson states:

We are told that the share which the Senate have in making treaties is exceptionable; but here they are also under a check, by a constituent part of the government, and nearly the immediate representative of the people—I mean the President of the United States. They [the Senate] can make no treaty without his consent. The same observation applies in the appointment of officers. Every officer must be nominated solely and exclusively by the President. (Elliot 4: 40)

Wilson’s statement comments of the check that the President has on the Senate, and he views the President as the most direct representative of the public partaking in the process of making treaties since the House of Representatives is excluded. Wilson notes the different characteristics of a treaty as compared with legislation:

But though treaties are to have the force of laws, they are in some important respects very different than other acts of legislation. In making laws, our own consent alone is necessary. In forming treaties, the concurrence of another power becomes necessary. Treaties...are truly contracts, or compacts, between the different states, nations, or princes...[treaties] originate differently from laws. They are made by equal parties, and each has half of the bargain to make; they will be made between us and powers at the distance of three thousand miles. (4: 40)

Since treaties involve (at least) two independent countries, the treaty making process requires at least one government representative from each country to negotiate in the interests of their respective country. In terms of republican principles, the President is best suited to represent and direct treaty negotiations (even through a proxy such as an ambassador or the Secretary of State) of the whole American citizenry. The Senate acts as a check on the President's actions, but the Senate cannot act outside of the purview of the President's direction.

Wilson notes that the Senate cannot act without the consent of the President, but Wilson clarifies the possible confusion that could arise from his contrapositive of the actual text in the Constitution as cited earlier: the President is the primary director of treaties by virtue of his direction over the appointment of officers primarily engaged in diplomacy (i.e., the State Department or diplomatic corps). The peace power of treaty making blends executive and legislative functions but not in a way that grants the Senate and President equal power (just as the House of Representatives does not have the same authority over directing war as the President does even though the House of Representatives are the only body capable of funding the war).

Treaties are to be enacted as supreme laws of the land: a legislative function. Treaties must be negotiated by the "diplomatic corps" (i.e., what we know as the State Department), which is under the direction President by virtue of his sole appointment power to appoint ambassadors and other officials involved in treaty making: an

executive function (4: 40). Wilson explains that the legislative role is necessary to fulfill the domestic legal implications of a treaty, and he explains that the executive role is necessary and primary given its direct responsibility for foreign affairs as well as the enforcement of treaties at home and abroad (or at the very least seeking remedy for international violations of such treaties). Wilson closes his exposition on the distribution of the treaty making power of the executive—listed under the executive article with the Senate as a qualification on the general grant of power to the executive—by stating, “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” (4: 40).

### **The first test of the executive’s foreign affairs power**

After the US Constitution was conceived at the Constitutional Convention in 1787, the Ratification debates did not officially give birth to the Constitution until 1788 when New Hampshire became the ninth state to approve the Constitution; but it was not until after the Virginia and New York Ratification conventions passed the Constitution that same year that the life of the Constitution was given its full power. The first presidential administration began with George Washington in 1789, which lasted until 1797 when John Adams succeeded him. President Washington formulated the role of the presidency with little specific guidance: he crafted the role of statesman and fulfilled the Revolutionary Spirit’s desire for a Patriot-King who would put the good of the nation before his own.

In 1793, France declared war on Great Britain and Holland, already embroiled with Austria, Prussia, and Sardinia. President Washington took a bold step by issuing the Neutrality Proclamation of 1793, which annulled America's obligation to aid France in war under Article Eleven of the 1778 Treaty of Alliance with France. President Washington determined that the "duty and interest of the United States require, that they [the United States] should with sincerity and good faith adopt and pursue a conduct friendly and impartial towards the belligerent Powers..." (Frisch 1). Washington's pragmatism—staying out of war avoided disrupting vital commerce with England and Spain since both had strong commercial navies, and staying out of war prevented the United States from engaging in a war it could not afford financially, materially, and/or in terms of human capital—was not well received by the entire public. Many believed that Washington was being ungrateful for France's assistance during the Revolutionary War, and some political leaders, especially those of Jeffersonian inclination, saw Washington's action as an excessive and unconstitutional exercise of executive authority. Alexander Hamilton believed otherwise.

In June of 1793, Hamilton published his first letter under the pseudonym Pacificus in defense of Washington's exercise of executive authority. In response to Hamilton's series of Pacificus letters, Thomas Jefferson wrote James Madison expressing his outrage at Hamilton: "For god's sake, my dear Sir, take up your pen, select [Hamilton's] most striking heresies, and cut him to pieces in the face of the public...Never in my opinion, was so calamitous an appointment made, as that of the present minister of F.

here [i.e., Hamilton]” (54). Jefferson coaxed Madison into developing a series of rebuttals to Hamilton’s *Pacificus* letters under the pseudonym of Helvidius. The *Pacificus*-Helvidius debate that ensued frames the context for the first major constitutional battle between the executive and the legislative in the direction of foreign affairs. Hamilton’s broad construction of executive powers was in stark contrast to Madison’s strict construction. This conflict was the first of many in defining the distribution of powers in foreign affairs, and the arguments on each side have set the tone for the past 218 years. These arguments will provide the basis for the concluding arguments of this research.

Hamilton’s “*Pacificus I*” defines the major objections to Washington’s neutrality proclamation and then responds to each with each letter—this first letter provides the foundation for his view on the bounds of power that the Constitution’s has vested in the executive. First, Hamilton addresses the objection “That the Proclamation was without authority” (Frisch 9). Hamilton dissects the accepted meaning of the day for a neutrality proclamation as a means of understanding what agency in the United States’ government had the proper authority to issue the proclamation of neutrality:

The true nature & design of such an act is—to *make known* to the powers at War and to the Citizens of the Country, whose Government does the Act that such country is in the condition of a Nation at Peace with the belligerent parties, and under no obligations of Treaty, to become an *associate in the war*...[the proclamation’s] *main object and effect are to prevent the Nation being immediately responsible for acts done by its citizens, without the privity or connivance of the Government, in contravention to the principles of neutrality.* (9-10)

According to the laws of Nations (i.e., international law), Hamilton believes that the United States is not obligated to engage in war on account of its treaty with France. Hamilton stresses that by issuing the Proclamation, Washington simply sought to maintain a peaceful status with all nations, which would not preclude the United States from fulfilling its obligations under the Treaty with France. The United States had a right to annul the eleventh article of the Treaty with France since the treaty was defensive and France's actions toward its opponents were offensive, but the United States was still obligated under international law (that is, the law of Nations) to fulfill all other obligations of the Treaty that did not threaten the United States' status of peace. Additionally, the proclamation declared that all United States' citizens that violated this proclamation by non-neutral (i.e., aggressive actions siding with one or more of the parties engaged in war) actions would be subject to punishment under United States' law and not guaranteed the assistance of the United States should they be captured and/or prosecuted by other nations engaged in the war.

Second, Hamilton explicates which department of government is most suitable to issue the Neutrality Proclamation by examining each department's function in light of the definition of a neutrality proclamation as stated before. Hamilton states that the legislature "is not the organ of intercourse between the UStates and Foreign Nations" (11). Since the Constitution does not charge the legislative department with the task of interpreting and making treaties, the legislature cannot be the proper source of a making and interpreting treaties according to Hamilton. Since the judiciary department has "no

concern with pronouncing upon the external political relations of Treaties between Government and Government,” Hamilton believes that the judiciary is least suited to interpreting and making treaties. Finally, Hamilton turns to the executive department and declares it the proper organ of “intercourse between the Nation and foreign Nations—as the interpreter of the National Treaties in those cases in which the Judiciary is not competent, that is in the cases between Government and Government” (11). Furthermore, Hamilton states that treaties naturally fall into the executive’s primary duty to execute the laws with the “Power which is charged with the command and application of Public Force” (11).

Hamilton’s main argument and mode of constitutional interpretation—broad construction—emerges in the final half of “Pacificus I.” Hamilton believed that Article II of the Constitution, which grants executive powers and duties, was a general grant of executive power to the President with some qualifications or exceptions. The difference by which the Constitution granted legislative power versus executive power was key to Hamilton’s interpretation:

The different mode of expression employed in the constitution I regard to...the Legislative and Executive serves to confirm this inference. In the article which grants the legislative powers...the expressions are—‘*All legislative powers herein granted shall be vested in a Congress of the UStates*’; in that which grants the Executive Power the expressions are...‘The EXECUTIVE POWER shall be vested in a President of the United States of America. (12)

The general grant of executive power versus the limited enumeration of legislative power was a fundamental constitutional guidepost that enabled Hamilton to link the

making and interpreting of treaties to the executive power of the president—with the qualification of the advice and consent of the Senate. In response to criticism that the Constitution limited executive powers to those explicitly mentioned in Article II, Hamilton argued that the “difficulty of a complete and perfect specification of all the cases of Executive authority would naturally dictate the use of general terms” (12).

Criticisms that the legislature’s power to declare war demonstrated a limit on the executive’s foreign affairs powers did not bother Hamilton’s constitutional construction of the executive’s powers. He responded that Executive is not prohibited to decide whether the nation is under obligations to make war or not “in the execution of its own functions” (13). The executive’s ability to interpret treaties necessarily falls into his/her domain since enforcing treaty obligations is one of the executive’s duties. Furthermore, Hamilton argues that the Constitution explicitly mentions the President’s powers of appointment and receiving foreign dignitaries as a signification of the President’s primary power over foreign affairs—in this case, treaties. Hamilton uses the example of the President’s power to recognize or not recognize the foreign dignitaries and their respective nations: this establishes a linkage between the power to recognize foreign nations and their representatives and interpreting treaties.

One of Hamilton’s famous contributions to constitutional interpretation is the idea of concurrent powers. Hamilton believed that the three branches of government with their respective spheres of power intersected in particular instances. For example, “treaties,”

according to Hamilton, “can only be made by the President and Senate, their activity may be continued or suspended by the President alone” (15). Although the Senate and the President both participate in making treaties, the distribution of power is not strictly speaking equal: the President directs the treaty making process and can terminate the treaty making process.

This concurrence of power is an embodiment of the checks and balances central to American government (contrary to Madison’s retort as Helvidius that concurrent powers was a confusing doctrine). In response to criticism that the executive was interfering with the legislature’s power to declare war—which as determined earlier in the paper was extremely limited to the domestic legal condition rather than the process of directing and making war—Hamilton argues that an executive action, such as interpreting a treaty, that affects the preconditions under which the legislature makes declarations of war does not preclude the executive from those actions. Hamilton gives the example that if the treaty with France had been offensive as well as defensive, the United States’ legislature would have been required to declare war, but Washington’s interpretation of the treaty prevented the legislature from having to fulfill that obligation. Although the executive may not be capable of declaring war, the executive can establish “an antecedent state of things” according to Hamilton (15). This idea that the executive could establish an antecedent state of things embodies the consequences of Hamilton’s concurrent powers doctrine.

Hamilton confirms the practice of the President's establishment of an antecedent state of things when President Washington entertained the Minister from the new Republic of France. President Washington's reception of the Minister from the newly formed regime was a formal recognition on behalf of the United States of the new regime's status as a nation, but, as Hamilton points out, President Washington received the Minister and thereby formally recognized the new Republic of France "without having consulted the Senate; thought that body is connected with him in the making of Treaties, and thought the consequences of his act of reception is to give operation to the Treaties heretofore made with that Country..." (15-16). Hamilton notes the inconsistency with which the critics of Washington's Neutrality Proclamation ignore this example while decrying his interpretation of the treaty on the sole basis of the legislature's right to declare war. The legislature's right to declare war, which is an exception out of the general grant of executive power, does not prohibit the President from interpreting the treaty with France nor from maintaining a neutral position in order to preserve peace. Rather, the executive is charged with the duty to execute the treaty as he sees fit until the legislature brings the nation into a state of war. In light of the historical context of the right to declare war as previously discussed in this research, Washington's critics used an expansive view of the legislature's right to declare war to justify their criticisms. Hamilton believed that president had the primary power of foreign affairs in war and in peace.

Madison, on the other hand, employed a strict construction of the executive powers granted under the Constitution. Madison begins "Helvidius I" by confronting

Hamilton's belief that the actions of declaring war and making treaties were executive in nature. Second, Madison points out Hamilton's broad constitutional construction of executive powers—that the executive was given a general grant of power with specific qualifications or exceptions. Madison believes Hamilton's mode of constitutional interpretation is flawed, but Madison's meticulous style allows him to build up to this conclusion by looking to three major sources of authority or evidence. First, Madison examines respected authors on public affairs such as Vattel and Locke. Paraphrasing from the works of Vattel, Wolfius, and Burlamaqui, Madison states that these authoritative authors believed that “the powers to declare war, to conclude peace, and to form alliances, [were] among the highest acts of sovereignty; of which the legislative power must at least be an integral and preeminent part” (Frisch 58). Madison believed that these authors' statements on the true nature of the actions of declaring war, concluding peace, and treaty making demanded that the legislative have a primary role in such activities. If true, such a definition of declaring war and treaty making would render Hamilton's definition void.

Madison then turns a critical eye toward Locke and Montesquieu's definition of the nature of declaring war and treaty making. Madison automatically discounts their status as an authoritative source given that both were “warped by a regard to the particular government of England, to which one of them owed allegiance; and the other professed an admiration bordering on idolatry” (58). Madison advocates for Montesquieu's strict separation of powers within the government by function, which is later used to justify his

aversion to Hamilton's concurrent powers doctrine. Madison then cites Locke's discussion of the federative power as being separate from the executive as a means of undermining Hamilton's reasoning, but Madison's interpretation of Locke is terribly short-sighted and corrupted by Madison's own disdain for Locke's loyalty to the British Crown.

John Locke's twelfth chapter of his *Second Treatise of Civil Government* explicates the nature of legislative versus executive power, and Locke adds the federative power to the list. Locke stated that the federative power encompassed the "power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth" (Locke 1946, 73). Locke goes on to explain the almost inseparable connection between the executive and federative powers. For Locke, executive power was first and foremost the "execution of municipal laws of the society within itself upon all that are parts of it," which is purely domestic enforcement. Then Locke defines the federative power as the "management of the security and interest of the public without, with all those that it may receive benefit or damage from, yet they [the executive power] are always almost united" (73). Locke notes that his definition of executive power encompassed strictly domestic concerns whereas the federative power was the foreign version of the same responsibility of enforcement of international law as well as the common defense. For Locke and his retrospective view of human history, the executive power was almost always conjoined with the federative power given their similarities of function only separated by the domestic and foreign spheres. Furthermore

and most detrimental to Madison's overarching argument, Locke notes the need for active management rather than positive law in dealing with the issues concerning the federative power, which Locke believed that the executive was more capable than the legislature to fulfill: "And though the federative power in the well or ill management of [the federative power] be of great moment to the commonwealth, yet it is much less capable to be directed by antecedent, standing, positive laws than the executive..." (73).

Locke further states the impracticality and loss of efficiency that would result of from separating the executive and federative powers:

Though, as I said, the executive and federative power of every community be really distinct in themselves, yet they are hardly to be separated and placed at the same time in the hands of distinct persons; for both of them requiring the force of the society for their exercise, it is almost impracticable to place the force of the commonwealth in distinct and not subordinate hands; or that the executive and federative power should be placed in persons that might act separately, whereby the force of the public would be under different commands, which would be apt some time or other to cause disorder and ruin. (73-74)

Madison's misleading statement that Locke did not believe that powers of war and peace (i.e., foreign affairs powers) to be executive in nature is corrected by a full treatment of Locke's statements on the federative power. Locke saw the federative power as a different category of power than the executive, but Locke's definition of the federative power reveals that it was more of a foreign application of executive power than fundamentally separate from it. The reason that Locke saw these two powers (federative and executive) as distinct but conjoined was that the federative dealt with a foreign sphere while the executive dealt with the domestic sphere, but both powers demanded

the same means of enforcement to fulfill their duties—that is, domestic and foreign enforcement agencies such as state militias, the armed forces, and other agencies with the explicit responsibility of enforcing law. To separate these powers would prove disastrous according to Locke, which undermines Madison’s argument.

After discussing authoritative authors on public affairs, Madison turned to the operation of the powers to declare war and make treaties. He believed that since the actual, day-to-day function of these powers failed to meet a purely executive definition (according to his interpretation of Hamilton’s standard) that they could not be executive and therefore had to, by nature, be characteristic of another department of government. According to Madison, the proper definition of executive power was anything under the “natural province of the executive magistrate...to execute laws...” (Frisch 59). Madison further states that since laws must preexist before they can be legislated, “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*” (59). Madison’s line of reasoning concluded in the idea that for the executive to have by nature a function such as treaty making would mean that the executive possesses an executive power: “In theory this an absurdity—in practice a tyranny” (59).

Madison firmly believed that the treaty making power was legislative by nature rather than executive. Hamilton and participants at the Constitutional Conventions, such as

James Wilson of Pennsylvania, disagreed with Madison's interpretation because they believed that treaties were categorically different from traditional legislation for two reasons. First, treaties may have the force of law but involve negotiations between (at least) two unique national governments. Government to government treaties are a contract between the two unique governments and demand the equal consent of both governments. Second, treaties originate differently than domestic laws since two unique governments are the source of the treaty. Such treaty making demands negotiations between governments that is inherently a federative power, demanding the participation of the governmental agent capable of representing the nation as a whole: the American president, a representative of the whole population—the most republican of institutions—, is best suited to direct treaty negotiations.

Madison furthers his operations reasoning by comparing treaty making powers with the power to declare war. Since a declaration changes the domestic legal environment until that state of war ends, the act of declaring war is a legislative rather than executive act. Madison believes that the ability to change the domestic legal status of the nation should rest with the executive. Hamilton on the other hand believes that the declaration of war is limited to the American legislature not by virtue of the legislative nature of such an act nor by the impact of the act—to change the domestic legal environment. Rather, Hamilton believes that the legislature's right to declare war has no impact on the executive's ability to influence the antecedent state of things. In fact, Hamilton claims that it is the executive's

[duty]...to preserve Peace till war is declared; and in fulfilling that duty, it must necessarily possess a right of judging what is the nature of the obligations which the treaties of the Country impose on the Government; and when in pursuance of this right it has concluded that there is nothing in them inconsistent with a *state* of neutrality, it becomes its province and its duty to enforce the laws incident to that state of the Nation. (13-14)

Although treaties can have an impact on the domestic legal environment (i.e., the antecedent state of things), Hamilton denies Madison's argument that such an impact makes treaty making an inherently legislative act.

As if to provide a safety net to his argument, Madison further asserts that if his argument about the operations of war and treaty powers is not purely legislative, the legislature is the department of government most qualified to have primary authority over these powers. In addition to this assertion Madison equivocates "declaring war" and "making war"—intentionally or unintentionally, I do not know. Such an equivocation would be proven incorrect by the historical context of British constitutionalism from which American constitutionalism was primarily derived and adapted, even if Madison refuses to believe it.

Finally, Madison turns to the Constitution to disprove Hamilton's claims of a general grant of executive power. Madison first attacks Hamilton's belief that the limited enumeration of powers to the legislative versus the general grant of power to the executive had significance. Madison finds Hamilton's "analogy" flawed on the basis that "we find that of declaring war expressly vested in the Congress, where every other legislative power is declared to be vested, and without any other qualification...The

constitutional idea of this power would seem...that it is of a legislative and not an executive nature” (60). Madison’s statement indicates his belief that the Constitution would not put a legislative power among all executive powers or an executive power among all legislative powers. Contrary to Hamilton’s idea of concurrent powers, Madison denies that the Constitution would be so confusing as to intermingle powers: “that kind of intermixture and consolidation of different powers, which would violate a fundamental principle in the organization of free governments” (61).

Furthermore, Madison claims that it is imprudent to allow those who direct a war to “be proper or safe judges, whether a *war ought* to be *commenced, continued, or concluded*. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws” (62). Madison claims that the separation between the treaty making power and the American president’s clear power over war operations is analogous to the separation between the direction of war and its source of funding, but Madison’s claim is tenuous at best since the power of treaties has never had a history of being inherently legislative, especially when viewed through the lens of British and early American constitutionalism.

## CHAPTER V

### CONCLUSION

Anti-Executive rhetoric engorged the American public during the Revolutionary. Authors like Thomas Paine ignored British Parliament's growing role as the primary constitutional arbiter in the decades leading up to 1776, and, as a result, the American public blamed the King for the meltdown of metropolitan-colonial relations. Parliament had blatantly abandoned the republican principles that Americans so desperately fought to uphold, and the King was a complicit actor but certainly not the primary one. By the mid-1780s in the wake of state constitutional experiments and the Articles of Confederation, the anti-executive rhetoric of the revolution was rendered as less than factual. The American experience during the metropolitan-colonial relations with Britain of 1680-1776 that the legislature was a necessary element to subjugate individual rights was repeated again during the late 1770s and early 1780s. Early experiments in American constitutionalism during this period had revealed that the legislature posed a greater threat to individual liberties than the executive.

The Ratification Debates marked the culmination of American constitutionalism over the previous century and served as the lifeblood and authority, derived from the people, of the Constitution. These debates were founded upon the historical context of the executive's foreign affairs power that had continuously developed from British

Constitutionalism to American Constitutionalism. The US Constitution rejected the dilution of executive unity and power over foreign affairs that states had experimented with prior to 1787. The Constitution restored the executive to its primary authority albeit not exclusive power over foreign affairs, and even the Anti-Federalists recognized this shift in power back to the executive since it was one of their primary concerns.

President Washington conducted the first exercise of the executive's new foreign affairs power in 1793 when he issued a neutrality proclamation to keep the US out of war with Europe because of its treaty with France. Madison and Jefferson were enraged by Washington's actions and sought to constrain the executive immediately, but Hamilton adeptly defended Washington's position by looking at the language of the Constitution in light of the ratification debates and the continuous development from British to American constitutionalism. The debate that took place between Hamilton and Madison in the Pacificus-Helvidius letters marked the beginning of a debate that has spanned two centuries. Who is right? This research shows that although both proponents of Hamilton and Madison have legitimate arguments, ultimately Hamilton's argument finds itself closest to the original meaning of the Constitution's foreign affairs power.

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