1-1-1995

The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791

David P. Currie
When we think of constitutional interpretation, we think first of the courts. But judges are not the only public officials who interpret the Constitution. Legislators and executive officers do so every day. Whenever Congress considers a bill, for example, the first question it must answer is whether it has power to enact it; it is the Constitution that answers that question. Sometimes the constitutional question is never discussed. That in itself is a significant fact, for it suggests that no one doubted congressional authority. Often, however, constitutional questions are debated at length and with great dexterity both in executive communications and in the halls of Congress. Though the records of early congressional proceedings are incomplete, they afford us precious insights into how the Constitution was understood by those charged with making it a reality. Unlike judicial opinions, moreover, congressional debates on constitutional issues are largely unknown; to explore them is, for most of us, to embark on a voyage of discovery.

The place to begin this voyage is at the beginning. The first Congress convened in New York on March 4, 1789, and adjourned for the last time on March 3, 1791. In a separate article I have discussed the myriad of substantive issues, from taxation and trade to constitutional amendment and the admission of new states, that were addressed during that period. My present subject is

David P. Currie is the Edward H. Levi Distinguished Service Professor of Law at the University of Chicago. He wishes to thank the Kirkland & Ellis Faculty Research Fund, the Mayer, Brown & Platt Faculty Research Fund, the Morton C. Seeley Fund, the Raymond & Nancy Goodman Feldman Fund, and the Sonnenschein Faculty Research Fund for financial support; Charlene Bangs Bickford, Kenneth R. Bowling, and Helen E. Veit of the First Federal Congress Project for access to hitherto unpublished reports of the debates; Kenneth Bowling, Gerhard Casper, Richard Posner, and Richard Ross for invaluable advice and encouragement; and Keith Garza for exemplary research assistance.


2. See David P. Currie, *The Constitution in Congress: Substantive Issues in the First*
an equally variegated and fascinating array of structural constitutional issues that confronted the same Congress when it began to set up the government of the United States.3

I. Congress

The Constitution had a good deal to say about the structure and proceedings of Congress. Seats in the House of Representatives were to be apportioned among the states according to population and filled for two years by popular elections in which voter qualifications were tied to those set by state law.4 Each state legislature was to choose two Senators for staggered six-year terms.5 Distinct age, citizenship, and residence requirements were prescribed for Representatives and for Senators, and provision was made for filling vacancies.6 The “Times, Places, and Manner” of elections were to be determined by state law, unless Congress—"except as to the Places of chusing Senators"—should otherwise provide.7 Individual members were entitled to compensation determined by law,8 enjoyed a limited immunity from arrest while in session, and “for any Speech or Debate in either House” were not to be


5. Id § 3, cl 1, 2.
6. Id §§ 2, 3. In each case there was to be a special election to fill the remainder of the term; for the Senate there were to be interim appointments by the executive as well.
7. Id § 4.
8. Congress voted its members a salary of six dollars for each day they were in session plus travel expenses, providing a one dollar raise for Senators in 1795. Act of September 22, 1789, 1 Stat 70, 70-71. The differential between the two Houses provoked a lively and entertaining debate, but the only constitutional argument made in this connection was Representative Burke's insistence that disagreement between the House and Senate not prevent fulfillment of the obligation imposed by Article I, section 6 to provide some compensation to the members. See Gales, ed, 1 Annals at 676-84, 705-10, 923-26 (cited in note 1). See also Representative Gerry's contention, id at 706-09, that legislative independence required that members of Congress be fully compensated for their services. One of the twelve constitutional amendments proposed by the First Congress would have provided that no increase in congressional salaries could take effect until after the next election, in order to keep the members from lining their own pockets; two hundred years elapsed before it was ratified by three-fourths of the states, and its present status is disputed. See id at 756-57; Gales, ed, 2 Annals at 2033-40 (cited in note 1).
"questioned in any other Place."

Congress itself was to meet "at least once in every Year." A majority of each House would constitute a quorum, and each member was to be "bound by Oath or Affirmation, to support this Constitution." Each House was authorized to judge "the Elections, Returns and Qualifications of its own Members," to select its own officers (except that the Vice-President was made President of the Senate), to punish disorderly members, and (by a two-thirds vote) to "expel a Member." Each House was required to "keep a Journal of its Proceedings"; neither was permitted to "adjourn for more than three days, nor to any other Place," without the other's consent; the President was empowered to convene one or both Houses "on extraordinary Occasions." Legislation required the agreement of both Houses and was

10. Id § 4, cl 2. This meeting was to take place "on the first Monday in December, unless [Congress] shall by Law appoint a different Day." Id. When Congress adjourned its first session on September 29, 1789, it enacted a statute providing for a second session beginning on the first Monday of January, 1790. See Gales, ed, 1 Annals at 96 (cited in note 1); act of September 29, 1789, 1 Stat 96. See also Gales, ed, 1 Annals at 1074, adjourning the second session on August 12, 1790, to meet again the first Monday in December of the same year without embodying the decision in statutory form. Thus the First Congress sat for three sessions in the space of two years, adjourning for the last time on March 3, 1791, Gales, ed, 2 Annals at 1826, two years after the date set for the commencement of its first session. For debate over the constitutionality of a resolution to fix March 4, 1789, as the date on which the terms of members of the First Congress had begun, see id at 1636-38 and Gales, ed, 1 Annals at 1010-11.

When the second session began, Congress had to confront the interesting question of what to do about matters left unresolved at the end of the preceding meeting. Representatives Lee, Page, and White argued that Congress should follow the British Parliament's practice of considering all unfinished business de novo. Gales, ed, 1 Annals at 1084-88. Hartley responded that royal prorogation of Parliament was more final than voluntary adjournment of Congress and objected to the waste of effort involved in repeating work done in a previous session. Id at 1092-94. For the time being, however, both Houses voted to treat each session as an independent unit. Id at 1110-12. The end of a session wiped any unfinished business from the table; bills could not become law without being passed by both Houses within a single session. See id at 1115-18. For Maclay's report of parallel Senate deliberations on this issue, see De Pauw, ed, 9 Documentary History at 185-91 (cited in note 1).
12. Id, Art VI, cl 3.
13. Id, Art I, § 5, cl 1.
14. Id, §§ 2, 3.
15. Id, § 3, cl 4.
16. Id, § 5, cl 2.
17. Id, § 5, cl 3.
18. Id, cl 4.
19. Id, Art II, § 3. President Washington called a special session of the Senate on March 4, 1791, chiefly to secure confirmation of appointments to federal offices in Vermont. See Currie, 61 U Chi L Rev at 839-40 (cited in note 2). Whether Congress had inherent authority to call itself into special session ("[t]he Congress shall assemble at least once in every Year"), or whether it could authorize itself to do so by setting a flexible
subject to a suspensive presidential veto. As intricate as these provisions were, they obviously did not regulate every procedural detail. Consequently each House was also authorized to "determine the Rules of its Proceedings."

A. Rules

Deliberative bodies can scarcely function without procedural rules, and one of the first acts of each House was to adopt them. The rules were simple, but they established a number of important precedents.

Both Houses provided that bills should be read three times and might be referred to committees. The former provision could be said to encumber the legislative process and the latter to restrict the participation of individual members. Nevertheless both served to improve the quality of legislation—the one by inhibiting impulsive action and the other by permitting a division of labor. Moreover, both were sanctified by long tradition, so that neither could well

date for its next meeting ("such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day"), the First Congress did not have to decide. US Const, Art I, § 4, cl 1, 2 (emphasis added).

20. US Const, Art I, § 7, cl 1, 2.
21. Id, § 5, cl 2.
22. See Gales, ed, 1 Annals at 20-21 (cited in note 1) (Senate); id at 102-06, 127-28 (House). See also id at 19 (conference procedure for resolving disagreements between the two Houses).
23. Senate committees were to be elected by the members, House committees generally appointed by the Speaker. Both Houses optimistically prohibited reading and conversing while others were addressing the assembly. Id at 20-21 (Senate); id at 103 (House).
24. Two decisions of the German Constitutional Court illustrate the difficulty. In holding by a divided vote that the election of a small committee to oversee the budget of intelligence agencies was justified on security grounds although none of its members represented the unorthodox Green Party, the court acknowledged that the Basic Law implicitly gave each representative an equal right not only to vote but to participate in parliamentary deliberations and that arbitrary exclusion from committees on political grounds would be unconstitutional. 70 BVerfGE 324, 353, 365-66 (Ger Const Ct, 1986). See also id at 370 (Mahrenholz dissenting) (arguing that proportional representation of parties on committees was a constitutional command). More recently, the same court flatly held that a representative could not be denied all committee assignments simply because he was not a member of any party: "The guiding principle ... must be that of participation by every member." 80 BVerfGE 188, 219 (Ger Const Ct, 1989).

In contrast, and in accord with British precedent, the original Senate practice was that "a Senator who opposed the basic purpose of a bill was not to be appointed to the committee considering it. . . ." Roy Swanstrom, The United States Senate, 1787-1801 228 (GPO, 1988). Thus, "[i]n 1790 Hamilton's friends made certain that no opponents of the Secretary's program were named to the committee preparing the bill to establish the Bank of the United States." Id. Yet nobody seems to have complained: "committees were regarded merely as instrumentalities to accomplish the purposes of the Senate majority." Id at 229.

25. The English Parliament has assigned potential legislation to committees and required
be said on its face to impair the constitutional principle of representative government.

The House rules imposed additional restrictions, requiring that leave be obtained in order to introduce a bill or speak more than twice on the same question and forbidding members to vote on matters in which they were "immediately and particularly interested."26 If these provisions can be defended, it is on the ground that they went no further than was necessary to conduct business in an efficient, fair manner. Nobody is recorded as objecting that either the House or the Senate rules unconstitutionally limited the rights of individual members.27

bills to be read three times before passage since at least the late sixteenth century. See Thomas Smith, De Republica Anglorum 38-39 (Scolar, 1970); George Petyt, Treatise of the Law and Custom of the Parliaments of England 186 (Scholarly Resources, 1974). The Continental Congress continued these traditions. On its second day of deliberation, that body created two committees, one "to State the rights of the Colonies in general" and the other "to examine & report the several Statutes, which affect the trade and Manufactures of the colonies." 1 Journals of the Continental Congress 26 (GPO, 1774). The Continental Congress officially began requiring bills to be read three times before passage on May 4, 1781. 20 Journals of Continental Congress at 477-78 (cited in this note).

26. The practice of requiring leave for multiple speeches was common to both Parliament and the Continental Congress. See 1 Journals of Continental Congress at 26 (cited in note 25). Instructive on the question of bills is another German decision in which the court upheld the procedural requirement that bills be cleared by committee but struck down a rule requiring that any spending proposal be accompanied by a provision for financing it: substantive limitations on the content of bills infringed the constitutional rights of the individual member. 1 BVerfGE 144 (Ger Const Ct, 1952).

Although the Continental Congress did not speak directly to the issue of conflicts of interest, Jefferson cited ancient authority for such a rule: "Where the private interests of a Member are concerned in a bill or question he is to withdraw. And where such an interest has appeared, his voice has been disallowed, even after a division. In a case so contrary, not only to the laws of decency, but to the fundamental principles of the social compact, which denies to any man to be a judge in his own cause, it is for the honor of the House that this rule of immemorial observance should be strictly adhered to." William Holmes Brown, Jefferson's Manual and Rules of the House of Representatives § 367 at 165 (GPO, 1979).

John Adams, then a delegate to the Continental Congress, told of an attempt to prevent him from voting on matters concerning the Colonies' independence from Great Britain because he held an office under the new government of Massachusetts and, therefore, was "interested" in the question. Charles Francis Adams, 3 The Works of John Adams 25-28 (Little, Brown, 1851); 4 Journals of Continental Congress at 125-27 (cited in note 25). Presumably the conflict of interest provision adopted by the first House of Representatives did not forbid farmers to vote on measures affecting farming; if it did it would be difficult to reconcile with the principle of representative government.

27. Senator Maclay did raise objections with constitutional implications to the rule providing for referring bills passed by both Houses to a joint committee for reconciliation and correction of errors. Gales, ed, 1 Annals at 58-59 (cited in note 1). This procedure, he argued, gave the committee effective "power to alter the bill"—and thus, he seemed to be saying, to usurp the legislative function. See De Pauw, ed, 9 Documentary History at 197 (cited in note 1).
B. RECORDS

Article I, § 5 requires each House to "keep a Journal of its Proceedings" and to publish those parts of it not requiring secrecy. It does not say that congressional deliberations must be open to the public. The Senate chose to operate behind closed doors for several years despite repeated arguments that the blanket exclusion of the public was inconsistent with the principle of popular government on which the Constitution was based.

Moreover, neither chamber interpreted the journal provision to require a verbatim transcript of its proceedings. Senate debates were not reported at all until the public was finally admitted to hear them, and House debates made it into print only because it was in the interest of private entrepreneurs to record them. Senator William Maclay of Pennsylvania made notes of some of the deliberations in the upper House, but they are sketchy and unpublished; and there are significant gaps in the coverage of lower House proceedings as well.

29. See Gales, ed, 1 Annals at 15 (cited in note 1).
30. See, for example, id at 1005; Gales, ed, 2 Annals at 1810-12 (cited in note 1); De Pauw, ed, 9 Documentary History at 389. The argument for closed doors was to promote uninhibited discussion; the result was to make the House the center of attention. See Harry Ammon, James Monroe: The Quest for National Identity 82, 84 (McGraw-Hill, 1971). In keeping its doors closed, however, "[t]he Senate was merely following in the footsteps of its predecessor, the Congress of the Confederation. . . ." Swanstrom, The United States Senate at 68 (cited in note 24).
31. It does expressly require publication of the yeas and nays whenever requested by one-fifth of the members present, and both Houses complied with this provision. See, for example, Gales, ed, 1 Annals at 51 (Senate); id at 380 (House).
32. Recognizing the value of public records of its debates, the House argued over whether to allow private reporters to sit on the floor instead of in the public gallery in order to minimize errors—one reporter had converted a regulation of "harbors" into a regulation of "barbers"—but was unwilling to give them official sanction lest reporting errors be attributed to the House itself. See Gales, ed, 1 Annals at 1095-98. Reporting before the days of microphones and stenographic machines was a difficult business at best. Senator Maclay complained that the official Senate Journal, which contained only the formal actions of that body and a few messages from outsiders, revealed "neither System nor Integrity." De Pauw, ed, 9 Documentary History at 181.
33. See De Pauw, ed, 9 Documentary History. Unfortunately for posterity, Maclay was not reelected to the Senate in 1790. Id at xvi.
34. The Annals of Congress for 1789-1791 were taken primarily from Thomas Lloyd's Congressional Register (so long as it was published) and (thereafter) from John Fenno's Gazette of the United States. Other contemporary newspaper accounts are being collected and published as a part of the Documentary History of the First Congress, but they are incomplete as well. One reporter's editor, for example, "had required him to put every day's proceedings into one paper, which forced much abbreviation." White, The Federalists at 505 (cited in note 3). For further discussion of the inadequacies of the Annals, see Charles F. Hobson, et al, eds, 12 The Papers of James Madison 63-64 (Virginia, 1979); Hobson, et al, eds, 13 Madison Papers at 6-8 (cited in this note); James H. Hutson, The Creation of the Constitution: The Integrity of the Documentary Record, 65 Tex L Rev 1,
Nobody seems to have argued, as one might be tempted to argue today, that a full and accurate public record was indispensable to informed electoral decision and thus was embraced within the journal requirement or even—despite the possible negative inference from that provision—that it was implicit in the clauses providing for congressional elections.\textsuperscript{35}

C. Officers

Even before adopting its procedural rules, the House of Representatives without reported debate had chosen Frederick Augustus Muhlenberg of Pennsylvania as its Speaker and John Beckley as Clerk, in accordance with Article I, § 2.\textsuperscript{36} In the Senate, Vice-President Adams took his constitutional responsibilities seriously, not only presiding on a regular basis and breaking a number of ties with his casting vote but participating in debates as well.\textsuperscript{37} Interpreting quite literally the provision authorizing it to elect a President pro tempore "in the Absence of the Vice President,"\textsuperscript{38} the Senate declined to elect a permanent officer, making an ad hoc choice each time the Vice President was unable to attend.\textsuperscript{39}

\textsuperscript{35} Compare Article 42 of the modern German Basic Law, which expressly requires open proceedings absent a special need for secrecy, in order, as one Justice of the Constitutional Court put it, that "those who are represented be in a position to form their own judgment about the views of the delegates and parties in the assembly." 70 BVerfGE at 369 (Mahrenholz dissenting).

\textsuperscript{36} Gales, ed, 1 \textit{Annals} at 100 (cited in note 1). Representative Smith of South Carolina, who in a later Congress would have preferred Sedgwick as Speaker, nevertheless said of Muhlenberg: "We are very well pleased with him, as he is a candid & impartial Man." See George C. Rogers, Jr., ed, \textit{The Letters of William Loughton Smith to Edward Rutledge}, 70 SC Hist Mag 38, 49 (1969).

\textsuperscript{37} See US Const, Art I, § 3, cl 1; De Pauw, ed, 1 \textit{Documentary History} at 86, 135, 181, 189, 318, 324-25, 327, 341, 385, 387-88, 449-50, 456 (cited in note 1) (tiebreaking votes, including the crucial bill acknowledging the President's authority to remove the Secretary of Foreign Affairs); De Pauw, ed, 9 \textit{Documentary History passim} (cited in note 1); id at 5 ("The President [of the Senate] as usual made us two or three Speeches from the Chair."). But see Swanstrom, \textit{The United States Senate} at 255 (cited in note 24) (arguing that Adams's intervention was generally limited to procedural matters and that, apart from the controversy over presidential removal, he seldom attempted to influence the Senators' votes).

\textsuperscript{38} US Const, Art I, § 3, cl 5.

\textsuperscript{39} Before Adams took office, for example, the Senate had chosen John Langdon of New Hampshire as President "for the sole purpose of opening and counting the votes for President of the United States." Gales, ed, 1 \textit{Annals} at 16-17. Several months later, when Adams was briefly absent, Langdon was elected once again. Id at 59. See also Brown, \textit{Jefferson's Manual} § 313 at 131 (cited in note 26) ("His office is understood to be determined on the Vice-President's appearing and taking the chair, or at the meeting of the Senate after the first recess."). The temporary nature of the office prevented the President pro tem from exercising any significant influence on legislative policy, and the position was not coveted. See Swanstrom, \textit{The United States Senate} at 257-60 (cited in note 24).
The constitutionally mandated presence of the President's successor at the head of the Senate raised fears in some quarters of undue executive influence on the legislature.\(^4\) There was nothing the Senate could do about the Vice-President's powers, which were plainly given to him by Article I, § 3. An important symbolic issue was at stake, however, when Adams insisted on signing official Senate documents as "John Adams, Vice President." "Sir," Maclay recorded himself as saying, "we know [y]ou not as Vice President within this House. [A]s President of the Senate only do we know you, as President of the Senate only can [y]ou sign or authenticate any Act of that body."\(^4\) Acknowledging that Maclay appeared to express the sentiments of a majority, Adams so far modified his practice as to sign as both "Vice President of the United States and President of the Senate."\(^4\) The controversy may seem trivial, but it was one of several early efforts by the Senate to establish its independence from the executive branch.

Wholly noncontroversial at the time, in contrast, were the appointments that have perhaps the most interest and significance for students of the Constitution today: within a few days after they first convened, each House elected a chaplain.\(^4\)

Under the Constitution as it then stood it might have been plausible enough to conclude that a chaplain was an appropriate "officer" for each chamber to select pursuant to Article I. After all, as Chief Justice Burger was to suggest nearly two centuries later, legislators obviously needed all the help they could get.\(^4\) But the practice was continued not only after Congress had proposed a constitutional amendment forbidding the passage of any law "respecting an establishment of religion"\(^4\) but also after the Amendment had been ratified and had become law.\(^4\)

As the Supreme Court would conclude long afterward,\(^4\) this history strongly suggested that Congress itself did not understand the appointment of chaplains to offend the Amendment it had proposed. It is true that Congress might have overlooked the possible inconsistency, that the legislators were not the ultimate judges of the meaning of their handiwork, and that the states rather than

\(^4\) Both Gerry and George Mason had objected in the Convention on this ground. As Gerry put it, "[w]e might as well put the President himself at the head of the Legislature." Max Farrand, ed, 2 The Records of the Federal Convention of 1787 536-37 (Yale, 2d ed 1937). See also George H. Haynes, 1 The Senate of the United States 204 (Russell & Russell, 1960) (noting "the obvious violence which even this assignment did to the theory of the separation of powers").

\(^4\) De Pauw, ed, 9 Documentary History at 43 (cited in note 1).

\(^4\) See id; De Pauw, ed, 6 Documentary History at 1609 (cited in note 1).

\(^4\) See Gales, ed, 1 Annals at 19, 24 (cited in note 1) (Senate); id at 242 (House).

\(^4\) Wallace v Jaffree, 472 US 38, 85 (1985) (Burger dissenting). On the other hand, nobody seemed to think it appropriate to appoint doctors or lawyers to tend to the legislators' medical or legal needs; tradition may well account for the distinction.

\(^4\) US Const, Amend I.

\(^4\) See Gales, ed, 3 Annals at 606 (cited in note 1) (Senate); id at 669 (House). See also Swanstrom, The United States Senate at 185-86 (cited in note 24).

Congress had given the Amendment the force of law. It is also true that the literal terms of the Amendment did not apply, because in appointing chaplains Congress had passed no "law." But it seems unlikely that the framers of the Establishment Clause would have meant to permit each House to do by separate resolution that which they were forbidden to do jointly; the most probable inference seems to be that at the time nobody considered the mere appointment of chaplains to be an "establishment" of religion.

The possible implications of this understanding far transcend the piddling question of legislative chaplains. It has since become standard learning that the Establishment Clause forbids any public measure whose purpose or primary effect is religious or which fosters "an excessive government entanglement with religion." The congressional decision with respect to chaplains seems to contradict this test on all three points, thus calling into question a number of subsequent Supreme Court holdings on such matters as school prayers and aid to parochial schools. So does the resolution adopted by both Houses at the end of their very first session, calling on the President (as he did) to "recommend to the people of the United States a day of public thanksgiving and prayer" on which to acknowledge "the many and signal favors of Almighty God. . . ."

The original understanding thus appears to have been that the Amendment did not forbid public endorsement of religion as such but only establishment as it had existed in England and in some of the states: the creation of a single official church.

D. OATHS

Another constitutional issue of considerable jurisprudential significance was raised when the First Congress confronted the humble problem of how to comply with Article VI's requirement that its members be "bound by Oath or Affirmation to support this Constitution," for Article VI said nothing about how or when the oath should be administered.

48. See id at 813-17 (Brennan dissenting).
50. See, for example, Engel v Vitale, 370 US 421 (1962) (holding that the state cannot compose prayers to be read aloud in public schools); Meek v Pittenger, 421 US 349 (1975) (holding that the state cannot provide educational equipment other than books to parochial schools). See also David P. Currie, The Constitution in the Supreme Court: The Second Century, 1888-1986 411, 531 (Chicago, 1990).
51. Gales, ed, 1 Annals at 92 (cited in note 1). For President Washington's resulting proclamation, see James D. Richardson, 1 A Compilation of the Messages and Papers of the Presidents 64 (Cong, 1900).
52. US Const, Art VI, cl 3.
53. Contrast US Const, Art II, § 1, cl 8, which spells out the precise terms of the oath required of the President "[b]efore he enter on the Execution of his Office." This oath was administered to Washington by the Chancellor of New York before a joint session of Congress in the Senate Chamber. Gales, ed, 1 Annals at 26-27 (cited in note 1). None of the latter details was prescribed by Article II.
Five days after achieving a quorum, the House adopted a resolution spelling out the form of the oath to be taken by its members. Two days later, at the House's request, the Chief Justice of New York administered the oath in the form the resolution had prescribed.

So far, so good; if the constitutional provision was to take effect, someone had to figure out the details of its implementation, and it made sense to conclude that the bodies to whose officers the requirement applied had implicit authority to do so—especially in light of the general rulemaking authority given to each House by Article I, § 5. At the same time it prescribed the form of the oath by resolution; however, the House appointed a committee to draft legislation on the same subject.

Insofar as legislators and legislative employees were concerned, such a statute could be explained as necessary and proper to the exercise of congressional powers, since neither members nor staff could function without taking the oath. Nor could there have been any constitutional objection to regulating the oath that Article VI required of federal executive and judicial officers, as the bill also did as it emerged from the House—for the Necessary and Proper Clause empowered Congress to enact legislation carrying into effect not only its own powers but also those vested in any other federal officer or department, and the regulation was as necessary for other officials as for members of Congress themselves.

The difficulty arose when the Senate amended the bill to prescribe the details of the oath to be taken by state officers, who were also subject to the requirement of Article VI. It was Elbridge Gerry of Massachusetts who raised the constitutional objection when the bill returned to the House, and it was a good one. No clause of the Constitution, he argued, gave Congress authority to regulate the oath to be taken by state officers. It was therefore up to the states themselves to do so, and if they did not, federal judges would annul their acts for want of constitutional authority to adopt them.

John Laurance of New York replied that Congress had power to make "all laws necessary or proper to carry the declarations of the constitution into effect"

54. Gales, ed, 1 Annals at 101.
55. Id at 106.
56. Id at 101.
57. De Pauw, ed, 6 Documentary History at 1611-13 (cited in note 1).
58. Maclay, joined by Ellsworth, had made similar arguments in the Senate, and Madison expressed doubts in the House. See De Pauw, ed, 9 Documentary History at 9-10, 21-23 (cited in note 1); De Pauw, ed, 10 Documentary History at 270-71 (cited in note 1).
59. Gales, ed, 1 Annals at 277-78. Gerry seemed to think that this outcome was ordained by the fact that the judges themselves were "bound to support the constitution." Id at 278. This was not only one of the earliest congressional affirmations of judicial review of both executive and legislative state action, but its rationale was broad enough to embrace federal action as well. Furthermore, its bottom line was surprisingly draconian; the Supreme Court never invalidated the acts of state legislatures on the ground that they had been unconstitutionally apportioned.
and thus to implement Article VI, but he was mistaken. As Gerry had already noted, Article I spoke only of laws needed to carry out the powers vested in some federal body. New Jersey's Elias Boudinot had a better justification:

The constitution said only that the officers of Government should be bound by oath, leaving to Congress to say what oath. In short it was the duty of the House . . . to detail the general principles laid down in the constitution, and reduce them to practice. In other words, Article VI itself implicitly authorized Congress to implement its provisions.

This was not a necessary conclusion. The principle that had justified the House in prescribing the form of the oath for its own personnel would have justified the states in doing the same for theirs. Indeed, Article IV's explicit provision authorizing Congress to effectuate the Full Faith and Credit Clause arguably strengthens the inference that when the Framers wanted Congress to implement constitutional provisions, they said so. On the other hand, as Chief Justice Marshall would later tell us, the last thing the Necessary and Proper Clause was meant to do was to limit the authority implicit in other constitutional provisions. Like the sweeping clause itself, the power to flesh out full faith and credit may have been inserted out of an abundance of caution.

In any event, the statute as enacted regulated the oath to be taken by state as well as federal officers. Four years later this action served as precedent for the far more significant Fugitive Slave Act, which implemented a clause of Article IV that was as silent with respect to congressional authority as the oath provision of Article VI. It was in the emotionally charged context of fugitive slaves that the Supreme Court would ultimately accept Boudinot's argument of implied authority in the great case of \textit{Prigg v Pennsylvania}.

\begin{itemize}
\item \textit{Prigg v Pennsylvania}, 60 US 539 (1842); see also David P. Currie, \textit{The Constitution in the Supreme Court: The First Hundred Years, 1789-1888} 241-46 (Chicago, 1983). Although the issue was not explicitly debated, the oath controversy was also a precedent of sorts for a second constitutional problem raised by the 1793 statute providing for the return of fugitives, since the later statute expressly imposed duties on state officers to apprehend and return them. 1 Stat at 302. By directing state officers to take a particular oath, the earlier law appeared to reflect the conviction that there was no barrier to its imposing duties on state officers if the regulation was otherwise within congressional power. Many years later the Supreme Court would find the imposition of such duties an infringement of implicit state sovereignty by analogy to the immunity principle of \textit{McCulloch, 17 US at 316. Kentucky v Dennison, 65 US (24 How) 66 (1860); Currie, The First Hundred Years at 245-47 (cited in this note). More recently, with the fading of implicit immunities of all}\end{itemize}
E. Instructions

From the beginning, members of the House were elected by the people themselves. Members of the Senate, on the other hand, were chosen by state legislatures, and it was soon suggested that they were mere agents subject to the instructions of those who had sent them. Maclay recorded in 1790 that South Carolina had instructed its Senators how to vote on the assumption of state debts, and he published an article urging other legislatures to follow this example. The next year, when Virginia Senators relied on legislative instructions in moving once again to open Senate proceedings to the public, Oliver Ellsworth, Robert Morris, and South Carolina's Ralph Izard protested. The States had no more power to instruct Senators, Izard insisted, than electors had to instruct the President of the United States.

Additional light was cast on this problem when South Carolina Representative Thomas Tucker proposed a constitutional amendment guaranteeing the people the right "to instruct their Representatives." Various speakers adverted with considerable force to the logistical difficulties involved in determining the sense of the people on particular issues. Others raised the more fundamental objection that binding instructions were inconsistent with the very idea of a deliberative body, and the proposal was roundly defeated.

There is less difficulty, of course, in ascertaining the views of a state legislature than those of the population at large. Moreover, there are countries in which federal legislative issues are effectively debated and passed upon by bodies whose members are directly responsible to constituent states—as members of kinds, the Court has changed its mind. Puerto Rico v Branstad, 483 US 219, 230 (1987) (expressly overruling Dennison).

68. US Const, Art I, § 2, cl 1.
69. Id, § 3, cl 1.
70. De Pauw, ed, 9 Documentary History at 199, 219 (cited in note 1). Several states did as Maclay advised. Swanstrom, The United States Senate at 162-71 (cited in note 24). North Carolina's first Senators, however, defied their instructions on the ground that they were independent once elected, and Maclay's own legislature refused even to express opinions on issues pending before the Senate on the ground that state assemblies had no part to play in federal legislation. Id. In the House, both Madison and William Smith of South Carolina indicated they understood Senators to be subject to state instructions. Gales, ed, 2 Annals at 1904, 1913 (cited in note 1).
72. Id at 388.
73. Gales, ed, 1 Annals at 761 (cited in note 1). South Carolina's House of Representatives had attempted to instruct the state's representatives as well as its Senators to support federal assumption of state debts. George C. Rogers, Jr., ed, The Letters of William Loughton Smith to Edward Rutledge, 69 SC Hist Mag 1, 111 (1968). Smith reported that Tucker, while willing to vote in accordance with the legislature's request, denied its right to bind him. Id. The resolution of the South Carolina House appears in id at 105 n 18.
74. Gales, ed, 1 Annals at 761-76. The vote against Tucker's amendment was forty-one to ten. Id at 776.
75. See, for example, Articles 50-51 of the Basic Law of the Federal Republic of Ger-
Congress were under the Articles of Confederation. Thus it was entirely plausible to argue that state election of Senators had been designed to preserve the tradition of a state check upon federal action—even though the significant provision of the Articles permitting the states to recall their delegates had been conspicuously omitted from the new Constitution.

The issue of state instructions to Senators was therefore both difficult and of transcendent importance. For better or worse, the question was never definitively resolved. It simmered for more than a century, only to be mooted in 1913 by the Seventeenth Amendment's provision that Senators too should be elected directly “by the people” — a revision that was prompted by the desire for greater democracy but that profoundly altered the balance of power in our federal system.

F. QUALIFICATIONS

“Each House,” says Article I, § 5, “shall be the Judge of the Elections, Returns, and Qualifications of its own Members.” Later events have confirmed that this clause poses a risk of arbitrary action against individual legislators, but, like the immunity provisions of the following section, it serves to guarantee the independence of Congress as a whole. Before it had sat for a month, the House of Representatives was called upon to act under this provision.

William Smith, elected as a Representative from South Carolina, had been born there before the Revolution. Having gone abroad to study, he was prevented by the war from returning until 1783. It was argued that when

---

many, under which a body composed of state executive officers plays a significant role in the enactment and enforcement of federal laws. For more details, see David P. Currie, The Constitution of the Federal Republic of Germany ch 2 (Chicago, 1994).

76. See Art of Confed, Art V (“[A] power reserved to each state, to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the Year.”).

77. See Swanstrom, The United States Senate at 160-61 (cited in note 24). Both Rufus King and John Jay had affirmed the state legislatures' right to instruct Senators during the state ratifying conventions. See Jonathan Elliot, 2 The Debates in the Several State Conventions 47, 283 (2d ed 1836).

78. See note 76.

79. For an excellent discussion of this issue, see Swanstrom, The United States Senate at 154-72 (cited in note 24).

80. US Const, Art I, § 5, cl 3.

81. See Powell v McCormack, 395 US 486 (1969) (giving the clause a narrow interpretation to minimize this danger).

82. See US Const, Art I, § 6, cl 1 (limited freedom from arrest and immunity for “any Speech or Debate in either House”).

83. See Gales, ed, 1 Annals at 149, 175, 342-43, 412-25 (cited in note 1). A more complete report of this proceeding appears in M. St. Clair Clarke and David A. Hall, Cases of Contested Elections in Congress 23-37 (Gales and Seaton, 1834).

84. Clarke and Hall, Contested Elections at 26 (cited in note 83).

85. Id.
elected to the House in 1788 he had not been "seven Years a Citizen of the United States," as Article I, § 2 required.\textsuperscript{46} The issue of who was a citizen of the United States was later to divide both the Supreme Court and the country,\textsuperscript{47} and the Constitution did not define the term.\textsuperscript{48} The members who spoke expressed a variety of views. Smith himself argued that South Carolina law made him a United States citizen,\textsuperscript{49} and Richard Bland Lee of Virginia agreed.\textsuperscript{50} James Jackson of Georgia, concerned lest the children of Tory loyalists be held citizens, refused to vote without proof that Smith had left South Carolina with the blessing of the state.\textsuperscript{51} James Madison, then a Representative from Virginia, offered the most interesting observations. State law was determinative, he argued, to the extent it could be ascertained.\textsuperscript{52} When state law did not afford an explicit answer, the House "must be guided by principles of a general nature."\textsuperscript{53} Citizenship generally depended upon place of birth, and Smith had been born to South Carolina settlers in South Carolina.\textsuperscript{54} When a colony became independent, the allegiance of its citizens was transferred to the new state, wherever they might be; and "[s]o far as we can judge" these general principles were in accord with South Carolina law.\textsuperscript{55} Only one Representative voted to deny Mr. Smith his seat.\textsuperscript{56} We do not know how many of his supporters were persuaded by Smith himself and how many by Madison, but the episode gave significant support both to the position that citizenship was based upon birthplace and that at least before 1789 it depended upon state law.

G. ELECTIONS

Representative Smith did not contest the statement of facts in the petition

\textsuperscript{86} Id at 23; Gales, ed, 1 Annals at 149 (cited in note 1).
\textsuperscript{87} See Dred Scott v Sandford, 60 US (19 How) 393 (1857).
\textsuperscript{88} The Fourteenth Amendment has since done so: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." US Const, Amend XIV.
\textsuperscript{89} Gales, ed, 1 Annals at 413-18. For a fuller statement of the facts, see De Fauw, ed, 10 Documentary History at 765-72 (cited in note 1).
\textsuperscript{90} Gales, ed, 1 Annals at 418-19. Smith reported that in private conversation Boudinot had insisted that the question was one of "civil Law" with which state law had nothing to do but that he had abandoned that position on finding "that the House were of a different opinion." See Rogers, 69 SC Hist Mag at 3 (cited in note 73).
\textsuperscript{91} Gales, ed, 1 Annals at 423-24.
\textsuperscript{92} Id at 420.
\textsuperscript{93} Id.
\textsuperscript{94} Id at 421.
\textsuperscript{95} Id at 422-23.
\textsuperscript{96} See id at 425. The dissenter was Jonathan Grout of Massachusetts, who apparently said nothing on this issue in debate—as he generally did on other issues as well. Compare David P. Currie, The Most Insignificant Justice: A Preliminary Inquiry, 50 U Chi L Rev 466 (1983).
challenging his eligibility, and the House determined his case in plenary session. The very next day, however, when the entire New Jersey delegation was challenged on the basis of alleged irregularities in election procedure, a committee was appointed to take evidence and "report to the House all such facts as shall arise from the proofs and allegations of the respective parties."

The committee in turn reported that it could not complete its task without the testimony of absent witnesses and that some of the petitioners had asked to be heard by counsel. Various members spoke on each side of the counsel question without detailing their reasons, and the request was ultimately withdrawn.

More basic was the question of what to do about absent witnesses. Fisher Ames of Massachusetts urged that judges of the New Jersey state courts be commissioned to take evidence on behalf of the House in order to avoid the inconvenience of bringing the witnesses to New York. Boudinot, who was one of the challenged members, argued that this procedure would effectively deprive other parties of the right of cross-examination and require decision on a cold record. New Hampshire's Samuel Livermore, on the same side, contended that the clause making the House "judge" of its members' elections required it to hear all the evidence itself. Laurance, on the other hand, argued that the power to judge implied authority to "determine in what manner the investigation of such a subject shall be prosecuted."

After this discussion, the reporter observes, it grew late, and the House

---

97. See Gales, ed, 1 Annals at 413 (cited in note 1). Nevertheless both Laurance and Boudinot argued the case should be sent back to committee for further sifting of the evidence, in order to avoid burdening the House as a whole. See De Pauw, ed, 10 Documentary History at 764-65 (cited in note 1); Clarke and Hall, Contested Elections at 24-25 (cited in note 83).

98. Gales, ed, 1 Annals at 425.

99. Id. This case is reported in Clarke and Hall, Contested Elections at 38-44. For the facts underlying the challenge, see George Adams Boyd, Elias Boudinot: Patriot and Statesman 1740-1821 154-55 (Princeton, 1952).

100. Gales, ed, 1 Annals at 663.

101. Id at 663-67. "[Mr. Page] said, if the jurisdiction of the House was questioned, the parties had an indubitable right to be heard by counsel, and he hoped no gentleman would refuse the people of the United States a privilege of this important nature, which had always been enjoyed by the subjects of Great Britain." Id at 667. He did not say he found this right anywhere in the Constitution, but he did not seem to consider it a matter of legislative grace. Id.

102. Id at 664-65.

103. Id at 664.

104. Id at 666-67. Livermore and Thatcher had made the same argument in opposing recommitment of the challenge to Rep. Smith. See De Pauw, ed, 10 Documentary History at 765 (cited in note 1); Clarke and Hall, Contested Elections at 24-25 (cited in note 83).

105. Gales, ed, 1 Annals at 665. Lee argued that "the whole business" should be left to a committee in accordance with the practice of the British House of Commons because "the example of so old and so experienced a legislative body could be followed with safety and propriety." Id at 666.
adjourned.\textsuperscript{106} The next entry, over a month later, informs us of a second committee report making certain findings of fact.\textsuperscript{107} After considering this report, and after hearing speeches by Smith and Laurance for and against the validity of the election, the House determined that the challenged Representatives had been duly elected.\textsuperscript{108}

The controversy over the New Jersey representatives thus raised a number of interesting constitutional questions regarding election contests—from the power to delegate responsibility and to gather evidence to the authority to co-opt state officers and the rights of parties to cross-examination and counsel. The sketchy record makes it difficult to say whether the House resolved any of these questions beyond concluding that it could employ a committee to report on the facts, but there was much force to Laurance's observation that, even apart from the House's express authority to adopt rules to govern its proceedings, a good deal of discretion in how to find facts was implicit in the provision making each House the judge of its members' elections.

\textbf{H. Enumeration}

The New Jersey controversy concerned only the manner of investigation; the Constitution left no doubt that House elections were an appropriate subject for House inquiry. A more basic question regarding the extent of congressional authority to acquire information arose when Congress turned to implementing the command of Article I, § 2, that a census be taken within three years after its first meeting.

In contrast to the oath requirement of Article VI, the census provision explicitly provided for congressional implementation: the enumeration was to be made "in such Manner as [Congress] shall by Law direct."\textsuperscript{109} The interesting question was the permissible scope of the information that was to be obtained.

The purpose of the enumeration, according to Article I, was to provide the basis for apportioning both congressional seats and direct taxes among the states "according to their respective Numbers."\textsuperscript{110} Those numbers, the Constitution further provided, were to be determined by counting the number of "free Persons," excluding "Indians not taxed," and adding "three-fifths of all other persons"—that is, of the slaves.\textsuperscript{111} As enacted, however, the census bill required that the population be further broken down by sex and by age—although neither of these characteristics was relevant to the purposes for which the Constitution

\textsuperscript{106} Id at 667.
\textsuperscript{107} Id at 785-86.
\textsuperscript{108} Id at 866-67; see also De Pauw, ed, \textit{Documentary History} at 1394-99 (cited in note 1).
\textsuperscript{109} US Const, Art 1, § 2, cl 3.
\textsuperscript{110} Id.
\textsuperscript{111} Id. See also US Const, Art I, § 9, cl 4 ("No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.").
The Constitution in Congress

177

required the enumeration to be made. Indeed, at one point the bill had been even broader, requiring the census-takers to classify the population by occupation as well. This requirement was later deleted, but both the earlier version and the statute itself raised the question of whether Congress was not seeking more information than it had any right to demand.

It was the ubiquitous Madison who had promoted the idea of a census of occupations, and he had waxed enthusiastic over the utility of the information it would produce. Several members objected, arguing among other things that the inquiry would serve no legitimate purpose and might lead the public to suspect ulterior congressional designs.

Commendably, Madison made no effort to defend his additional questions on the basis of the census provision. His position was that knowledge of individual occupations would be useful to Congress in devising later substantive legislation:

I take it, sir, that in order to accommodate our laws to the real situation of our constituents, we ought to be acquainted with that situation. ... If gentlemen have any doubts with respect to [the] utility [of this information], I cannot satisfy them in a better manner, than by referring them to the debates which took place upon the bills intendedcollaterally to benefit the agricultural, commercial, and manufacturing parts of the community. Did they not wish then to know the relative proportion of each, and the exact number of every division, in order that they might rest their arguments on facts, instead of assertions and conjectures? Will any gentleman pretend to doubt but our regulations would have been better accommodated to the real state of the society than they are?

In short, the information that went beyond what was required for the apportionment of representatives and taxes was necessary and proper to the informed enactment of legislation on various subjects within the express authority of Congress.

Similar arguments were later to support a broad power of congressional investigation. The inclusion of questions concerning age and sex in the original census suggests that Congress was already persuaded by the essence of Madison's position.

112. Act of March 1, 1790, 1 Stat 101.
113. See Gales, ed, 1 Annals at 1145-47 (cited in note 1).
114. See Gales, ed, 1 Annals at 1115, 1145-46.
116. Gales, ed, 1 Annals at 1146. See also id at 1115.
118. Madison did suggest that Congress ought not to inquire as to persons "who are employed in teaching and inculcating the duties of religion" because "the General Government is proscribed from interfering, in any manner whatever, in matters respecting religion; and it may be thought to do this, in ascertaining who [are], and who are not
I. INVESTIGATION

Another question of the extent of congressional powers of inquiry arose soon after the enumeration controversy when Senator Robert Morris of Pennsylvania asked that commissioners be appointed to investigate his own conduct as Superintendent of Finance under the Confederation. The Senate sidestepped the constitutional problem by passing a resolution requesting the President to appoint commissioners for the purpose. In the House, however, Connecticut's Roger Sherman provoked a minor storm by moving to refer the investigation to a committee of five members of Congress.

Gerry at once protested on constitutional grounds. Unlike the Confederation Congress, he argued, the new House had only legislative powers; short of impeachment, supervision of executive conduct was an executive matter entrusted exclusively to the President. Madison replied that the House had the right to "possess itself of the fullest information in order to doing justice to the country and to public officers," and the committee was appointed. Thus within a year of its first meeting, in the face of an explicit constitutional challenge, the House of Representatives flatly asserted a broad power to investigate the conduct of a former executive in order to do "justice" to the officer and to the country as a whole.

No such authority, of course, was expressly given to either House. It had been easy enough to find authority to gather relevant information implicit in the powers to legislate and to resolve election disputes, and Gerry's argument reminds us that it was fairly implicit in the impeachment power, too. But neither Madison nor anyone else suggested that the investigation of Morris was relevant to an election contest, to an impeachment, or to any prospective legis-

ministers of the Gospel." Gales, ed, 1 Annals at 1146 (cited in note 1). Not only does this passage reflect a healthy recognition that the power of investigation was limited to matters of legitimate legislative concern, it also suggests a rather strict notion of what it meant to pass laws "respecting an establishment of religion, or prohibiting the free exercise thereof." US Const, Amend I.

119. See Gales, ed, 1 Annals at 1168; Gales, ed, 2 Annals at 2168-70 (cited in note 1).
120. See Gales, ed, 1 Annals at 1233. Maclay thought the whole business a sleazy effort by Morris to divert attention from his personal financial difficulties by focusing on his unchallenged public accounts, but he raised no constitutional objections to this procedure. See De Pauw, ed, 9 Documentary History at 199 (cited in note 1).
121. Id at 1515.
122. Id.
123. Id.
124. See id at 1514-15. The Committee's report, filed nearly a year later, id at 2017, recited that it was "impossible" to examine Morris's accounts in detail, enclosed copies of relevant documents for the members to peruse, and refrained from any commentary on the propriety of the conduct it had been appointed to explore. Hobson, et al, eds, 13 Madison Papers at 392-93 (cited in note 34).
125. See US Const, Art I, § 2, cl 5 ("The House of Representatives . . . shall have the sole Power of Impeachment.").
Although the last argument could easily have been made. Many years later the Supreme Court would convincingly conclude that “doing justice” was not enough to justify congressional inquiry; investigations designed simply to determine the existence of past wrongdoing were not ancillary to any legitimate congressional function.

II. The Special Role of the Senate

Apart from impeachment, the functions of the House of Representatives were restricted to those incident to legislation and to the quasi-legislative process of constitutional amendment. The Senate, on the other hand, was given a role to play in two important functions otherwise entrusted to the executive: the appointment of officers and the making of treaties. Article II, § 2 empowered the President to make both appointments and treaties “by and with the Advice and Consent of the Senate”—requiring a two-thirds majority in the latter case.

On May 25, 1789, as the reporter informs us, the Senate “for the first time, entered upon executive business” as it acknowledged the receipt of a communication from President Washington enclosing two Indian treaties concluded at Fort Harmar in January and an explanatory statement by War Secretary Henry Knox. A few weeks later, after what seems to have been a prolonged examination of the “fitness” of the nominee, the Senate consented to the appointment of William Short as chargé d’affaires in France during the absence of the Minister, Thomas Jefferson.

Having thus moistened their toes, the President and the Senate rolled up their cuffs and waded into the task of defining their respective roles with respect to executive affairs.

126. No impeachment inquiry had been instituted, and the likelihood of any such proceeding was reduced by the fact that Morris was no longer in office. Nor was there any suggestion that integrity was a qualification for election to the Senate or that Morris’s conduct justified his expulsion under Article I, § 5, cl 2.

127. An understanding of past practices might well have led to new regulations designed to protect against the future abuse of authority. See Philip B. Kurland, Watergate and the Constitution 20-23 (Chicago, 1978).

128. Kilbourn v Thompson, 103 US 168 (1881); Currie, The First Hundred Years at 436-38 (cited in note 67).

129. US Const, Art II, § 2, cl 2. Recognizing the distinct nature of these functions, the Senate kept its records of appointment and treaty matters in a separate Executive Journal, and executive matters were excluded from the 1794 resolution otherwise admitting the public to Senate deliberations, apparently on grounds of confidentiality. See Gales, ed, 1 Annals at 40-42 (cited in note 1).

130. See Gales, ed, 1 Annals at 40-42. Knox, who had not yet been appointed Secretary of War under the new Constitution, was serving in that capacity by virtue of an appointment by the Confederation Congress. He was renominated on September 11, 1789, and confirmed the next day. Id at 80, 81.

131. See De Pauw, ed, 2 Documentary History at 8-9 (cited in note 1); Gales, ed, 1 Annals at 47. Jefferson’s aim was to spend a short time at home for rest and recreation. On September 26 he was nominated to be Secretary of State, and the Senate immediately confirmed. Gales, ed, 1 Annals at 93.

132. “Before its final adjournment was reached, the twilight zone in which lie the
A. THE FRENCH CONSULAR CONVENTION

On July 21, the Senate requested John Jay, who as Secretary of Foreign Affairs under the Confederation was still in office, to appear and inform the Senators about a consular agreement that Jefferson had concluded with France in November, 1788. The Secretary appeared and argued that the treaty should be approved. The Senators agreed, unanimously resolving “[t]hat the Senate do consent to the said convention, and advise the President of the United States to ratify the same.”

This episode passed without recorded friction, but it set several interesting precedents. First, like the Indian treaties that still lay on the table, the consular agreement had been concluded before the first meeting of the new Congress; both the President and the Senate assumed that the advice and consent provision nevertheless applied. Second, the Senate explicitly gave advice as well as consent, imparting not only its own imprimatur but also an unequivocal suggestion as to how the President should exercise his authority to perform the distinct act of final ratification. The form of the resolution thus illustrates both the imprecision of the common reference to Senate “ratification” of treaties and the original understanding that the President retained discretion to withhold ratification after the Senate had given its consent.

Finally, the consular incident demonstrates that the Senate understandably interpreted its treaty responsibilities to give it implicit power to acquire the information needed for the intelligent exercise of those responsibilities and to confer in person with executive officers in order to obtain it. Indeed, although the order respecting Jay’s appearance was cautiously phrased as a “request[,]” the cruder terms employed a few days earlier in “order[ing]” that the Secretary furnish copies of relevant documents and report on the accuracy of a translation appeared to assert the additional right to employ compulsory process against a high executive official. Nevertheless, the failure of either Jay or Washington to raise any objection based upon executive privilege

---

133. Gales, ed, 1 Annals at 52 (cited in note 1). The treaty itself appears in Act of November 14, 1788, 8 Stat 106.
134. Gales, ed, 1 Annals at 54-55.
135. Id at 55.
137. “This direct and personal intercourse between the executive and the Senate is an indication of the feeling which seems to have been prevalent that the latter really was a council of advice upon treaties and appointments—a council which expected to discuss these matters directly with the other branch of the government.” Ralston Hayden, The Senate and Treaties, 1789-1817 6 (MacMillan, 1920).
138. De Pauw, ed, 2 Documentary History at 10 (cited in note 1).
139. Id at 9.
cannot be taken to concede this important principle, since the President had directed the Secretary in advance to provide “whatever official Papers and information on the subject” the Senate might require.\textsuperscript{140}

\section*{B. The Fishbourn Affair}

A real ruckus erupted a few days later, however, when the Senate without recorded explanation rejected the nomination of Benjamin Fishbourn for the position of naval officer for the port of Savannah under the tariff law.\textsuperscript{141} Washington went up in flames:

Whatever may have been the reasons which induced your dissent, I am persuaded they were such as you deemed sufficient. Permit me to submit to your consideration whether, on occasions where the propriety of nominations appear [sic] questionable to you, it would not be expedient to communicate that circumstance to me, and thereby avail yourselves of the information which led me to make them, and which I would with pleasure lay before you.\textsuperscript{142}

While bowing to the Senate’s decision by nominating a substitute, the President went on to extol the virtues of his vanquished champion in an effort “to show that such a mode of proceeding” as he was suggesting “might be useful.”\textsuperscript{143}

Equally aware of the need for improved procedure, the Senate, without waiting for Washington’s reaction, had appointed a committee to confer with him “on the mode of communication proper to be pursued between him and the Senate” in appointment and treaty matters, and a motion had been introduced to declare it “the opinion of the Senate that their advice, and consent to the appointment of Officers should be given in the presence of the President.”\textsuperscript{144} Making clear his own preference for written communications with respect to ap-

\begin{flushleft}
\textsuperscript{140} Id at 7.
\end{flushleft}

\begin{flushleft}
\textsuperscript{141} Gales, ed, 1 \textit{Annals} at 60 (cited in note 1); De Pauw, ed, 2 \textit{Documentary History} at 23-24 (cited in note 1). Fishbourn was one of 102 individuals nominated at the same time for various customs offices, and he was the only one to be rejected. Gales, ed, 1 \textit{Annals} at 56-57, 61-62; De Pauw, ed, 2 \textit{Documentary History} at 13-23.
\end{flushleft}

\begin{flushleft}
\textsuperscript{142} Gales, ed, 1 \textit{Annals} at 61.
\end{flushleft}

\begin{flushleft}
\textsuperscript{143} Id. To hear the President tell it, Fishbourn was highly qualified, having served his state as legislator, executive councilor, militia officer, and customs agent after fighting bravely under Washington himself during the Revolution. On the hypothesis that the nominee had somehow aroused the enmity of one or both of Georgia’s own Senators, the episode has been cited as the first instance of the questionable practice that came to be known as senatorial courtesy; but there appears to be little evidence to support the hypothesis. See, for example, Haynes, 1 \textit{Senate of the United States} at 54 (cited in note 40); Haynes, 2 \textit{Senate of the United States} at 736-37 (cited in note 40) (repeating the suggestion); James Hart, \textit{The American Presidency in Action 1789} 123-25 (MacMillan, 1948) (questioning it); Swanstrom, \textit{The United States Senate} at 102-03 (cited in note 24) (summarizing the debate). The nomination of Fishbourn’s replacement was confirmed on the day it was received. Gales, ed, 1 \textit{Annals} at 62.
\end{flushleft}

\begin{flushleft}
\textsuperscript{144} De Pauw, ed, 2 \textit{Documentary History} at 24 (cited in note 1).
\end{flushleft}
pointments lest his presence inhibit free discussion by the Senate, Washington told the committee he favored a flexible arrangement permitting communications in a variety of forms and forums as circumstances might require.  

On the strength of these consultations the Senate adopted a resolution expressly contemplating both written nominations and meetings with the President at any place he might select. If the President chose to come to the Senate Chamber, he would sit in the Vice-President’s chair; but, the Vice-President would still “be considered as at the head of the Senate” and most significantly would put all the questions, “either in the presence or absence of the President of the United States.” Thus once again the Senators insisted on asserting their independence: if the President elected to seek their advice in person, they were determined not to lose control of the proceeding.

C. THE SOUTHERN INDIANS

President Washington never took advantage of the opportunity to submit nominations in person, but on the very day the resolution was adopted he peremptorily informed the Senators that he would meet them in their chamber at 11:30 the next morning “to advise with them on the terms of the treaty to be negotiated with the Southern Indians.” He appeared as scheduled with Secretary Knox in tow and laid before the Senate a detailed written statement of facts and questions in which he solicited the Senate’s advice on what position to take in the coming negotiations.

This intricate document was read aloud twice over the din of passing carriages, and then Vice-President Adams began to ask for yes or no answers to the questions the President had posed. Maclay rose to object: “the business is new to the Senate, it is of importance, it is our duty to inform ourselves as well as possible on the Subject.” When he moved to refer the questions to a committee for that purpose, Washington “started up in a violent fret” and remonstrated that “[t]his defeats every purpose of my coming here.” Ultimately, however, he agreed to postpone the remaining consultation until the following

145. See id at 29; John Fitzpatrick, 30 The Writings of George Washington 373-79 (GPO, 1939).
146. See Gales, ed, 1 Annals at 66-67 (cited in note 1); De Pauw, ed, 2 Documentary History at 29-30.
147. See Swanstrom, The United States Senate at 98 (cited in note 24).
148. Gales, ed, 1 Annals at 67; De Pauw, ed, 2 Documentary History at 30. The President had already suggested the creation of a commission to negotiate with the Southern Indians. Gales, ed, 1 Annals at 60. A statute had been passed to provide for its expenses, Act of August 20, 1789, 1 Stat 54, and the Senate had consented to the appointment of the three commissioners, Gales, ed, 1 Annals at 66-67.
149. Gales, ed, 1 Annals at 67-71; De Pauw, ed, 2 Documentary History at 31-34.
150. “I could tell it was something about indians,” Maclay wrote after the first reading, “but was not master of one Sentence of it.” De Pauw, ed, 9 Documentary History at 128 (cited in note 1).
151. Id.
152. Id at 130.
Monday when, after debating the merits of each question in Washington's presence, the Senate gave him the requested advice.153

This famous confrontation resolved three critical questions regarding the Senate's authority with respect to treaties. First, both the President and the Senate plainly interpreted the power to advise and consent to include not merely approval of the finished product but also discussion in advance of the course of action to be pursued. The same understanding was evident the following year, when Washington asked the Senate what he should do to resolve differences with Great Britain over our northeastern boundary and was advised if negotiation failed to propose that the matter be submitted to arbitration.154 Thus the original understanding seems to have been that, at least with regard to treaties, the Senate would function as a true advisory council, not simply as a check on the arbitrary exercise of power.155 Indeed in the waning days of the First Congress, the President went so far as to ask and the Senate to give advice as to the meaning of an existing treaty, although this service scarcely seemed to have been embraced within the authority to advise and consent with respect to the making of treaties.156

153. Id at 128-32.
154. Gales, ed, 1 Annals at 980, 994 (cited in note 1). See also id at 1063-64 (the President asked and received permission to add a secret article respecting trade to the treaty with the Creeks that was in the process of negotiation pursuant to earlier Senate advice); id at 1072-73 (the President asked the Senate whether to enforce the existing treaty with the Cherokees or negotiate a new one and was advised to do whichever "the tranquillity and interest of the United States may require").
155. See Swanstrom, The United States Senate at 93 (cited in note 24); Louis Henkin, Constitutionalism, Democracy, and Foreign Affairs 49-50 (Columbia, 1990). This is not to suggest that the special advisory function of the Senate raised any question as to the constitutionality of Washington's well-known practice of seeking advice on a variety of matters from Representative James Madison and others, in addition to the Senate and the heads of departments whose opinions Article II expressly empowered him to obtain. See Swanstrom, The United States Senate at 93-95 (cited in note 24); Flexner, The New Nation at 214 (cited in note 3); Ralph Ketcham, James Madison, A Biography 286-87, 315-17, 319-21 (MacMillan, 1971) (noting that, among other things, during the first session of Congress, before department heads were appointed, Madison was in essence Washington's "aide, grand vizier, and prime minister"). The Justices of the Supreme Court were soon to invoke the Article II provision in support of their refusal to advise the President on abstract legal questions; see the so-called "Correspondence of the Justices" (1793), reprinted in Paul Bator, et al, Hart and Wechsler's The Federal Courts and the Federal System 65-67 (Foundation, 3d ed 1988), but it seems unlikely that the clauses giving the Senate and the Cabinet particular rights and duties in this regard were meant to deprive the President of the obvious benefits of talking to anyone else.
156. Gales, ed, 2 Annals at 1814-15 (cited in note 1). In early 1791, responding to a presidential message asking Congress to do "what to you shall seem most expedient" about "citizens of the United States in captivity at Algiers," id at 1783, the Senate resolved to "advise and consent that the President . . . take such measures as he may think necessary for the redemption" of the captives "provided the expense shall not exceed forty thousand dollars." Id at 1795-96. Necessary "measures" to secure the release of prisoners might of course have included a treaty, but the Senate's approval was not so limited; this resolution too suggests the Senate may have shared Representative Sherman's expansive
It is noteworthy that no comparable practice emerged with regard to appointments; from the outset the President simply submitted the names and the Senate voted yes or no.\textsuperscript{157} It has been suggested with some force that the text of Article II supported this discrepancy by making clear that it was the President alone who was to “nominate” officers; only their actual appointment required Senate participation.\textsuperscript{158} On the other side, it may be argued that this interpretation gives little effect to the explicit requirement that here, as in the case of treaties, the Senate provide the President not only with consent but with advice as well.

Second, as seemed to follow from their shared conception of the Senate's role as an advisory council, both parties plainly thought it appropriate for the President to consult with the Senate in person. Even when nothing was wanted beyond simple consent, as the Fishbourn controversy had shown, there was ample room for misunderstanding if the matter was handled entirely in writing; it seemed to go without saying that the flexibility of oral discussion would facilitate the giving of actual advice.

At the same time, however, Washington's method of seeking advice in the case of the Southern Indians posed a patent threat to the independence of the Senate in performing its advisory function. Washington had perceptively called attention to the problem himself when consulted by the Senate committee as to the proper means of communication on treaty and appointment matters.\textsuperscript{159} If the Senate was to participate meaningfully in the exercise, it required an opportunity both to study the President's proposals and to discuss them when the President was not around.\textsuperscript{160} “I saw no chance of a fair investigation,” Maclay had whispered at one point to Morris, “while the President of the U.S. sat there with his Secretary at War, to support his Opinions and over awe the timid and neutral part of the Senate.”\textsuperscript{161}


\textsuperscript{158} Swanstrom, \textit{The United States Senate} at 113 (cited in note 24). See also Federalist 76 (Hamilton), in Jacob E. Cooke, ed, \textit{The Federalist} 512 (Wesleyan, 1961) (“In the act of nomination his judgment alone would be exercised.”).

\textsuperscript{159} See text accompanying notes 141-43.


\textsuperscript{161} De Pauw, ed, \textit{9 Documentary History} at 130 (cited in note 1). “[H]e wishes Us to see with the Eyes and hear with the ears of his Secretary only, the Secretary to advance the Premisses the President to draw Conclusions. and to bear down our deliberations with his personal Authority & Presence, form only will be left for Us – This will not do with Americans.” Id at 130-31.
In insisting on postponing their answers until they could study the President's inquiries on their own, the Senators assured themselves the autonomy without which they could hardly have performed the checking function contemplated by Article II; and thus, the third result of the confrontation over the Southern Indians was to resolve apparently for all time a major issue of the balance of power between the two organs of government. The price of the Senate's victory was high, however, for Washington responded to his procedural defeat by resolving never to ask the Senate for advice in person again.162

D. THE FORT HARMAR TREATIES

When President Washington had presented the Indian treaties concluded at Fort Harmar to the Senate in May, he had not expressly asked for Senate consent. He had asked for advice, however, and Knox's accompanying letter had added that, if “the Senate of the United States should concur in their approbation” of the agreements, “it might be proper that the same should be ratified and published, with a proclamation enjoining an observance thereof.”163 On September 8, therefore, the Senate adopted a resolution advising the President “to execute and enjoin an observance of” one of the two treaties in question.164

Finding the suggestion that he “execute” the treaty ambiguous, the President asked for legal clarification. Did the Senate mean that he should ratify the agreement, or that he should enforce it without further ado because no ratification was required? “[A]s a check on the mistakes and indiscretions of ministers or commissioners,” Washington observed, it had been the practice of nations “not to consider any treaty negotiated and signed by such officers as final and conclusive, until ratified by the sovereign or government from which they derive their powers.”165 He was “inclined to think it would be advisable”

162. See Swanstrom, The United States Senate at 117-18 (cited in note 24); Flexner, 3 The New Nation at 216-18 (cited in note 3). It seems a pity that the parties were unable to agree on some means of preserving the advantages of face-to-face consultation while avoiding ignorance and intimidation. One way out might have been for the Senators, after discussing the matter both among themselves and with the Chief Executive, to vote by secret ballot. They had done so for a brief time on appointments, in order, as Maclay argued, to insulate them from fear of presidential or other reprisal. See De Pauw, ed, 9 Documentary History at 79-82 (cited in note 1). The resolution regulating the advice and consent procedure had repudiated that option by requiring the Senators to indicate their position viva voce. See Gales, ed, 1 Annals at 67 (cited in note 1); Swanstrom, The United States Senate at 98-99 (cited in note 24).


164. Gales, ed, 1 Annals at 79. The treaty approved was with the “Wiandot, Delaware, Ottawa, Chippewa, Pattawatima, and Sac Nations” and appears in Act of January 9, 1789, 7 Stat 28. The second agreement, with five of the Six Nations of the Iroquois, was not approved until the second session out of concern lest it impair New York and Massachusetts claims to certain lands. See Gales, ed, 1 Annals at 87; Act of January 7, 1789; 7 Stat 33.

165. Gales, ed, 1 Annals at 83 (cited in note 1). See William Prescott, 3 The History
to adopt the same practice in dealing with Indian treaties, even though they were
made by the chiefs themselves and thus required no ratification from the Indian
side, since they were "formed on our part by the agency of subordinate offi-
cers." Like the responsible statesman he was, Washington thought it impor-
tant "that this point should be well considered and settled, so that our national
proceedings, in this respect, may become uniform, and be directed by fixed and
stable principles." A Senate committee appointed to draft a reply argued against formal
ratification on the ground of precedent: "[t]he signature of treaties with the
Indian nations has ever been considered as a full completion thereof," and the
Senate's earlier resolution "authorizes the President of the United States to enjoin
a due observance thereof." This apparent effort to dispense with Presidential
ratification while preserving the Senate's own veto power raised a serious issue
of consistency, for if the negotiator's signature made a treaty binding there
seemed to be no room for later Senate consent.

Some of the thornier issues raised by this suggestion were avoided when the
Senate rejected the committee's report and embraced the President's position by
resolving to "advise and consent that the President of the United States ratify the
treaty." Implicit both in this resolution and in the committee report was the
assumption that agreements with Indian tribes were "treaties" requiring Senate
approval under Article II. Washington had made the same assumption in asking
the Senate for advice about treating with the Southern Indians a few weeks
before. Moreover, as Knox's letter on that occasion had indicated, Congress
had dealt with Indian nations by treaty throughout the Confederation peri-
od. There was nothing in the language of Article II to suggest that either the
President's power or that of the Senate was limited to agreements with foreign
countries, and there seemed as much reason to require Senate approval in the

---
/of the Reign of Ferdinand & Isabella The Catholic 87-91 (Little, Brown, 1838) (tracing
this practice to an unfortunate instance in which a Spanish emissary to France during their
reign had grievously abused his authority).
166. Gales, ed, 1 Annals at 83.
167. Id. See Casper, 30 Wm & Mary L Rev at 260 (cited in note 160) ("Washington . . . has found few matches among later Presidents in the deliberateness with which
he worried about what was right for the government as a whole. . . .").
168. Gales, ed, 1 Annals at 84.
169. Senate authority might have been reconciled with the finality of the negotiator's
action if the Senate had given its approval in advance, but that was not what had
happened. A requirement of subsequent approval by the Senate but not by the President
might have been justified on the ground that only the President had consented in advance,
but that was not what the committee said. These explanations assume either that the
President could delegate the power to make treaties or that the Senate could give its
consent in advance; and both assumptions could be disputed.
170. Gales, ed, 1 Annals at 87.
171. See text accompanying notes 144-58.
172. The Indian treaties concluded under the Confederation are reported in 7 Stat 13-
27.
173. Contrast US Const, Art I, § 8, cl 3, which expressly distinguishes between com-
one case as in the other.

The Fort Harmar controversy thus established that treaties with Indian nations required both Senate consent and presidential ratification. Thenceforth Indian treaties were subject to the same rules as treaties with foreign nations, until Congress legislated to forbid the negotiation of further Indian agreements in 1871.

### III. The Executive Branch

"The executive Power," said Article II simply, "shall be vested in a President of the United States of America." There were detailed provisions for the President's election and a brief description of his powers—some of which, as we have seen, he was to share with the Senate. There were provisions for his removal by an extraordinary Senate majority after impeachment by the House for "high Crimes and Misdemeanors" and for his replacement in case the office became vacant. Apart from prescribing the exact terms of the oath the President was to take before entering upon his duties, however,
Article II said very little about how the President was to perform his functions. It also said very little about the officers with whose assistance he was to perform them.183

A. THE PRESIDENT'S ROLE IN LEGISLATION

President Washington's first official act after taking the oath prescribed by Article II, § 1 was to deliver an inaugural address. One of the most conspicuous features of this speech was the reticence with which he approached the duty imposed upon him by § 3 of the same Article to "recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient." Declining to propose "particular measures," he diffidently commended to the legislators the list of their own constitutional powers, noting specifically that it would be up to them to determine to what extent to propose amendments to the Constitution itself under Article V. He justified this passive attitude by reference to "[t]he circumstances under which I now meet you," by which he seems to have meant the fact that both he and his auditors had just entered upon their duties.184

When Congress assembled for its second session in January, 1790, the President came to address both Houses once again.185 In fulfillment of his obligation under Article II, § 3 to periodically "give to the Congress information of the state of the Union," he congratulated the members on "the present favorable prospects of our public affairs," listed some accomplishments of the past months, and went on to identify additional matters deserving of congressional attention.186 This time he was somewhat more specific in making recommendations for legislative action, calling attention to such matters as the organization of the militia, the defense against Indian depredations, and the need for legislation respecting naturalization, currency, weights and measures, and the promotion of learning.187

Even on this occasion, however, he confined himself largely to suggesting areas of concern rather than particular solutions. Apart from urging Congress to act, as the Patent Clause expressly contemplated, to encourage invention, the closest he came to making a specific recommendation was to toss out the rather startling possibility of establishing a national university. Yet this suggestion too was cautiously phrased as merely one of several options "well worthy of a place in the deliberations of the Legislature."188

183. For a thorough study of the actual structure and operations of the executive department under Washington and Adams, see White, The Federalists (cited in note 3).
184. Gales, ed, 1 Annals at 27-29 (cited in note 1).
185. Id at 969-71.
186. Id.
187. Id.
188. Id at 970. See also White, The Federalists at 54-56 (cited in note 3) ("His messages went no further than to suggest subjects for consideration, and in no case did they contain any indication concerning the policy which he thought Congress should pursue. . . . The first Congress went through its first session without any known suggestions
Of course it was possible for Washington to package pointed recommendations in deferential terms without disguising his own preferences, as he did in urging the third session of the same Congress to consider "how far, and in what mode," it might be desirable to provide "such encouragements to our own navigation as will render our commerce and agriculture less dependent on foreign bottoms, which may fail us in the very moments most interesting to both of these great objects." But this fictionalization of deference may have represented the beginnings of a change of heart. For the unfeigned reticence of his initial address seems not to have been attributable solely to the "circumstances" with which he excused his silence on that occasion. With his usual punctiliousness, Washington appeared at first to be afraid that concrete presidential proposals might unduly influence an autonomous branch of government.

Fears of excessive executive influence also crept up in Congress. After Washington's second address, for example, Maclay complained to his diary about the "Servile" practice by which the Senate had elected to respond immediately to each suggestion made in a presidential speech:

It was a Stale ministerial Trick in Britain, to get the Houses of parliament to chime in with the speech, and then consider them as pledged to support any Measure which could be grafted on the Speech. It was the Socratic mode of Argument introduced into politicks, to entrap men into Measures they were not aware of.

Similarly, when the Postmaster General attached a proposed bill to a report submitted to the House of Representatives on behalf of the President, there were

from the President.").

189. Gales, ed, 2 Annals at 1772 (cited in note 1). His position seemed no more difficult to discern when in the same speech he asked the legislators to consider whether there might be room for improvements in the judiciary system that they had just established "and, particularly, whether an uniform process of execution, on sentences issuing from the federal courts, be not desirable throughout all the States." Id. See also Gales, ed, 1 Annals at 82 (requesting Congress to give the President authority to call out the militia); id at 975 (transmitting Secretary Knox's plan for organizing the militia); Fitzpatrick, ed, 4 Washington Diaries at 60 (cited in note 145) (noting that he had sent Knox his thoughts on the militia question so that the Secretary could put them "into the form of a Bill").

190. See Flexner, 3 The New Nation at 221 (cited in note 3); McDonald, Washington at 78 (cited in note 3); Hart, Presidency in Action at 55-57 (cited in note 143); Swanstrom, The United States Senate at 260-62 (cited in note 24). According to Ralph Ketcham, Washington's original draft of his inaugural address had contained a "detailed legislative program" for Congress's consideration, which Madison omitted in rewriting the address out of a concern for separation of powers. Ketcham, Madison Biography at 277-78 (cited in note 155). As late as February, 1792, Washington wrote that "[m]otives of delicacy" had "uniformly restrained" him "from introducing any topick which relates to Legislative matters to members of either house of Congress, lest it should be suspected that he wished to influence the question before it." John C. Fitzpatrick, ed, 31 The Writings of George Washington at 493 (GPO, 1939).

Mr. Fitzsimons thought there was a degree of indelicacy, not to say impropriety, in permitting the Heads of Departments to bring bills before the House. He thought it was sufficient for them to make reports of facts, with their opinions thereon, and leave the rest to the discretion of the Legislature.\textsuperscript{192}

Page added that “no bill ought to be read in the House that did not originate with its leave,” and the report was referred to a committee for consideration.\textsuperscript{193}

The concern for congressional autonomy was legitimate, but it did not justify Washington's initial fastidiousness. In the two instances just cited Congress sensibly responded, not by attempting to silence the President, but by sending executive suggestions to committees\textsuperscript{194} and by establishing that only members could introduce bills.\textsuperscript{195} For there was nothing wrong with the President's making recommendations; that was what the Framers, cognizant of his opportunities for perceiving problems and possible solutions, had wisely encouraged him to do. The increasingly assertive tone of Washington's first three addresses suggests that he was gradually coming to accept the significant advisory role that the Constitution envisioned for him in the legislative process.\textsuperscript{196}

\textsuperscript{192} Gales, ed, 1 \textit{Annals} at 1114 (cited in note 1).

\textsuperscript{193} Id.

\textsuperscript{194} See id at 1094-95.

\textsuperscript{195} On the other hand, when a provision in the Treasury bill that would have required the Secretary to “digest and report plans for the improvement and management of the revenue, and the support of the public credit” was branded “a dangerous innovation upon the constitutional privilege of this House” that would give him “an undue influence within these walls,” it was watered down so that the Secretary would merely “digest and prepare” plans rather than report them—despite the sensible arguments of Benson and others that advice was useful and that nothing in the bill impaired the House’s right to make the ultimate decision. Id at 616-31. Even the opponents of secretarial reports, however, had to concede that the President himself was entitled to make recommendations. See id; Act of September 2, 1789, 1 Star 65; Casper, 30 Wm & Mary L Rev at 227-28 (cited in note 160). For the arguments of Gerry and Tucker that secretarial reports with respect to taxation would offend the Article I, § 7 provision that “all bills for raising revenue, \textit{shall originate} in the house,” US Const, Art I, § 7, cl 1 (emphasis added), and the sensible responses of Madison and others, see De Pauw, ed, 11 \textit{Documentary History} at 1055-73 (cited in note 1).

\textsuperscript{196} Moreover, the President’s reticence did not seem to be shared by his Treasury Secretary; the plan for the national bank and payment of revolutionary debts were based upon reports submitted by Hamilton in response to House requests. See Currie, 61 U Chi L Rev at 802, 808-12 (cited in note 2). “It was not long,” wrote Professor Corwin, “before the ever alert suspicion of Jefferson discovered that Hamilton's connection with Congress, whereby 'the whole action of the Legislature was . . . under the direction of the Treasury,' tended definitely to the overthrow of republican institutions.” Edward S. Corwin, \textit{The President: Office and Powers} 265-66 (NYU, 1940). For the more aggressive attitudes of Presidents Theodore Roosevelt, Woodrow Wilson, and Franklin Roosevelt toward the legislative process, see id at 267-82; for a discussion of the special relationship between the Treasury and Congress, see text accompanying notes 271-77.
Apart from authority to convene special sessions of Congress and to resolve disputes between the two Houses as to the time of adjournment,\textsuperscript{197} the President's remaining power with respect to legislation was the significant right to veto bills and other actions of both Houses, subject to override by a two-thirds vote in each chamber.\textsuperscript{198} Washington vetoed no congressional action during the First Congress, though he seriously considered doing so in the important case of the national bank.\textsuperscript{199} Here too, as with his right to propose legislation, he seems to have taken a singularly diffident view of his function, vetoing only two bills in eight years. Some have gone so far as to suggest that he initially thought that a veto was appropriate only on constitutional grounds.\textsuperscript{200} Neither the text nor the history of the veto provision seemed to support this restrictive interpretation,\textsuperscript{201} and if Washington ever embraced it he changed his mind; for he vetoed a bill on pure policy grounds shortly before leaving office in

\textsuperscript{197} US Const, Art II, § 3. The latter power, wrote Corwin in 1940, “has never been used,” while the former “has been used so often that the word 'extraordinary' in the constitutional clause has taken on a decidedly Pickwickian flavor.” Corwin, Office and Powers at 289 (cited in note 196). For a discussion of the first special session see Currie, 61 U Chi L Rev at 840 (cited in note 2).

\textsuperscript{198} US Const, Art I, § 7, cl 3.

\textsuperscript{199} See Currie, 61 U Chi L Rev at 811-12 (cited in note 2). Washington's hesitation regarding the bank bill induced him to ask Hamilton a procedural question of constitutional dimension: “To what precise period, by legal interpretation of the constitution, can the president retain [a bill] in his possession before it becomes a Law by the lapse of ten days?” Hamilton responded that the President had “ten days exclusive of that on which the Bill was delivered to you, and sundays,” so that a bill presented on Monday might be returned a week from Friday “at any time while Congress are setting” [sic] - a plainly reasonable interpretation of the Article I, § 7 provision for return “within ten days (Sundays excepted) after it shall have been presented to him.” See Harold C. Syrett and Jacob E. Cooke, eds, 8 The Papers of Alexander Hamilton 134-35 (Columbia, 1965); McDonald, Hamilton Biography at 204 (cited in note 3).

\textsuperscript{200} See McDonald, Washington at 77 (cited in note 3) (stating flatly that this was Washington's view); Flexner, 4 The New Nation at 281 (cited in note 3) (saying only that the President believed a major function of the veto was to protect the Constitution). Washington's first veto was of a 1792 bill apportioning congressional seats in a manner he thought contrary to the criteria laid down in Art I, § 2. See Richardson, 1 Messages and Papers at 124 (cited in note 51). As early as 1789, however, he had asked Madison whether if Congress passed a bill equating Senate and House salaries he ought to return it -on the policy ground that he thought there ought to be a difference in the wages of the members of the two branches of the Legislature.” See Fitzpatrick, ed, 30 Washington Writings at 394 (cited in note 190). Significantly, none of Washington's advisers seems to have doubted that the President could veto a bill on constitutional grounds, despite the widespread assumption that the courts could also review its constitutionality.

\textsuperscript{201} See Federalist 73 (Hamilton) at 495 (cited in note 158) (defending the President's veto not only as a check on encroachment upon executive prerogatives but also as a safeguard for the community against the enactment of improper laws”). But see Charles L. Black, Jr., Some Thoughts on the Veto, 40 L & Contemp Probs 87, 89-90 (Spring 1976) (stressing the first half of Hamilton's argument in asserting an "original understanding that the veto would be used only rarely, and certainly not as a means of systematic policy control over the legislative branch. . . . ")
B. EMOLUMENTS AND TITLES

Article II, § 1 provided that the President should “receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected,” and that he should “not receive within that Period any other Emolument from the United States, or any of them.” Alexander Hamilton had explained the reasons for these provisions in the Federalist. “[A] power over a man's support” was “a power over his will”; the salary guarantee meant that Congress could “neither weaken [the President’s] fortitude by operating upon his necessities; nor corrupt his integrity, by appealing to his avarice”; the ban on other emoluments assured that he would have “no pecuniary inducement to renounce or desert the independence intended for him by the Constitution.”

Washington caused something of a stir in his first inaugural address by disclaiming his constitutional compensation. His sense of duty, he announced, had always required him to serve his country without remuneration; and thus he requested Congress in making “estimates for the station in which I am placed” to provide only for payment of “such actual expenditures as the public good may be thought to require.”

Undeterred, Congress proceeded to debate and enact a statute providing the President with a twenty-five thousand dollar annual salary. John Page of Virginia began the House discussion by denying that Washington had the right to refuse his pay: “[t]he constitution requires that he shall receive a compensation, and it is our duty to provide it.” This was not a frivolous argument, for the salary provision was not designed for the President's benefit. If the constitutional premise was that financial independence was a crucial barrier to corruption, an officer who impoverished himself by declining his wages endangered the public interest. Moreover, if Washington was right that he need not accept his money, there would always be the risk that a President's waiver was not truly voluntary; reading the Constitution to mean what it said would obviate the need for inquiry on this unpromising score.

Thus Congress determined that Washington would be compensated whether he liked it or not, and the next question was how much to pay him. This too

---

202. See Richardson, 1 Messages and Papers at 211-12 (cited in note 51); Corwin, 2 Office and Powers at 284 (cited in note 196). Since this bill would have reduced the size of the army, Professor Black argued that its veto “may well be thought to fall within the category of defense of the presidential office. . . .” Black, 40 L & Contemp Probs at 90 (cited in note 201).
203. US Const, Art II, § 1, cl 7.
204. Federalist 73 (Hamilton) at 493-94 (cited in note 201).
205. Gales, ed, 1 Annals at 29 (cited in note 1).
206. Act of July 31, 1789, 1 Stat 72.
207. Gales, ed, 1 Annals at 659.
208. Washington accepted the salary despite his inaugural address. See George Washing-
turned out to be a constitutional question. The House committee had proposed that in addition to his salary the President be given a separate allowance to pay for a house, furniture, secretaries, clerks, carriages and horses, and Representative Laurance objected that this provision conferred an "emolument beyond the compensation contemplated in the constitution." Of course, as Abraham Baldwin of Georgia responded, it could hardly matter whether the President's compensation was stated in one provision or in two. Laurance's concern, however, went deeper. The question was whether payment of the President's expenses was, in the words of Representative Page, "compensation for his services" at all, and if not, whether it was a forbidden "emolument."

Arguably it was neither. Strictly speaking it compensated the President not for services but for expenditures, and it did not make him wealthier as a result of holding office. But if that was true, argued Theodore Sedgwick of Massachusetts, there would be nothing to prevent Congress from increasing expense allowances at will; and thus "one of the most salutary clauses in the constitution [would] be rendered nugatory." Internal Revenue agents have since developed tools for dealing with such problems, but there were additional objections to the expense provision. Congress chose to avoid the hornet's nest by dropping all references to expenses and voting a salary intended to be high enough to cover them.

210. Id at 659.
211. Id at 660.
212. Id at 659.
213. Id.
214. This allocation could scarcely be justified as compensation, said Livermore, since Congress was directing the President how to spend it; and Congress had no business dictating "the style in which he shall live." Id at 661. "[N]o part of the constitution," Representative Stone added, "gives us a right to dictate to him on this head." Id. Laurance had already raised yet another objection with respect to the provision for secretaries and clerks: to set their salaries would make them officers of the United States, and to do so would infringe the President's "right to employ a confidential person in the management of those concerns, for which the constitution has made him responsible." Id at 659. See the discussion of inferior officers in the text accompanying notes 283-88.
215. The Constitution said nothing about the Vice-President's remuneration, but some monetary provision was obviously necessary and proper to the exercise of his powers. Fisher Ames went further, suggesting the Constitution required that the Vice-President be paid:

Every man is eligible, by the constitution, to be chosen to this office; but if a competent support is not allowed, the choice will be confined to opulent characters. This is an aristocratic idea, and contravenes the spirit of the constitution.
The controversy over the practical question of how much the President should be paid, however, was pallid in comparison to the dispute that had raged at the very beginning over the purely formal question of how he should be addressed. In April, 1789, apparently at the instigation of Vice-President Adams, a joint committee was appointed to consider "what style or titles [if any] it will be proper to annex to the offices of President and Vice-President of the United States." The committee recommended that no titles be added to those specified in the Constitution, and the House agreed. The Senate balked, and a Senate committee then proposed that the President be addressed as "His Highness, the President of the United States of America, and Protector of their Liberties." Maclay argued that any such title would be unconstitutional. The Constitution had "designated our chief Magistrate by the Appellation of The President of the U.S. of America," and Congress could neither "add to [n]or diminish it, without infringing the Constitution." Moreover, Article I, § 9 expressly provided that "No Title of Nobility sh[ould] be granted by the United States"; "the appellations & Terms given to Nobility in the old World" were "contraband language" in this country.

Gales, ed, 1 Annals at 674 (cited in note 1).

Significantly, while making the Vice-President presiding officer of the Senate, the Constitution gave him no executive responsibility beyond being available in case the President was unable to act. See US Const, Art I, § 3, cl 4; id, Art II, § 1, cl 6. Consequently, when a House committee proposed that the Vice-President be paid five thousand dollars per year, John White of Virginia protested that there was nothing in the Constitution to assure that he perform services deserving of that princely sum and moved to allow him the President's salary when acting as President and a per diem such as that provided to members of Congress when actually present in the Senate. Gales, ed, 1 Annals at 658, 671.

If he had had anything to do with framing the Constitution, Representative Page retorted, he might "never have thought of such an officer; but as we have got him, we must maintain him," and at a level befitting the dignity of his position. Id at 671. Unlike the members of Congress, Sedgwick argued, the Vice-President "ought to remain constantly at the seat of Government" in order "to take the reins . . . when they shall fall out of the hands of the President"; and thus he would be unable to pursue any other occupation during his term. Id at 672. Madison, Ames, and Boudinot echoed these sentiments, and the $5,000 salary was approved. See id at 671-76; Act of September 24, 1789, 1 Stat 72.

216. See De Pauw, ed, 9 Documentary History at 4, 27-29 (cited in note 1).

217. Gales, ed, 1 Annals at 24. In return for his pains, Adams himself came to be referred to in private as "His Rotundity." See De Pauw, ed, 9 Documentary History at 33.

218. See Gales, ed, 1 Annals at 257; De Pauw, ed, 9 Documentary History at 28.

219. Gales, ed, 1 Annals at 257.

220. Id at 33-34.

221. Id at 36. Maclay recorded a slightly different formulation: "His Highness the President of the United States of America and Protector of the rights of the same." De Pauw, ed, 9 Documentary History at 29.

222. De Pauw, 9 Documentary History at 31 (cited in note 1). Representative Page echoed these arguments in the House. Gales, ed, 1 Annals at 333 (cited in note 1).
This quarrel may seem petty, but in adopting the nobility provision the Framers themselves had plainly recognized the importance of symbols. One thing both the Revolution and the Constitution were all about was to substitute a republic for an aristocracy, and to abjure exalted forms of address served to underline our commitment to that decision.\(^{223}\) When the House refused to recede from its disagreement, the Senate passed a resolution sulkily affirming the desirability of additional titles\(^{224}\) to assure "a due respect for the majesty of the people of the United States" in intercourse with other nations but yielding for the moment in the interest of "preserving harmony with the House of Representatives."\(^{225}\) That was the last that was heard about "His Highness the Protector of our Liberties"; ever since the President has been simply "the President of the United States," as Article II provides.\(^{226}\)

C. THE DEPARTMENT OF FOREIGN AFFAIRS

The greatest and best known struggle in the First Congress over the structure of government began on May 19, 1789, when Representative Boudinot moved to establish three executive departments to aid the President in carrying out his duties with respect to war, finance, and foreign affairs.\(^{227}\)

Virtually no one disputed the necessity for some such legislation. Recognizing

\(^{223}\) See the argument of Representative Tucker, Gales, ed, 1 Annals at 332. Tucker sounded slightly hysterical, however, in suggesting that the President's title might be the first step down the road to "a crown and hereditary succession." Id. As Madison argued in urging his colleagues not to deny the Senate the courtesy of appointing a conference committee to iron out the disagreement between the two chambers, "I believe a President of the United States, clothed with all the powers given in the constitution, would not be a dangerous person to the liberties of America, if you were to load him with all the titles of Europe or Asia." Id at 333.

\(^{224}\) Maclay reports that Adams at one point in the debate reminded the Senate that "there were Presidents of Fire Companies & of a Cricket Club." De Pauw, ed, 9 Documentary History at 28.

\(^{225}\) Gales, ed, 1 Annals at 36.

\(^{226}\) On the importance of symbols in the First Congress, see Casper, 30 Wm & Mary L Rev at 224-25 (cited in note 160). See also Miller, The Federalist Era at 9-10 (cited in note 3) (noting that the title controversy "consumed virtually all of the Senate's time from April 23 to May 14" and "revealed the existence of a dangerous fissure within the Federalist party.").

\(^{227}\) See Gales, ed, 1 Annals at 383-84. The Constitution is surprisingly sparse in respect to the President's foreign affairs authority, expressly giving him only power to receive foreign diplomats, to appoint our own, and to make treaties—and in the latter two cases requiring him to obtain the advice and consent of the Senate. See US Const, Art II, §§ 2-3. In requiring the Secretary of Foreign Affairs not only to carry on such dealings with our own and foreign ministers but also to conduct "such other matters respecting foreign affairs" as the President should direct, the First Congress appeared to share the modern conviction that a general authority over foreign affairs was either implicit in the unpromisingly drafted specific powers or the general provision vesting executive power in the President or inherent in the office itself. See Act of July 27, 1789, 1 Stat 28, 29; United States v Curtiss-Wright Export Corp., 299 US 304 (1936); Currie, The Second Century at 217-18 n 63 (cited in note 50).
that the President could not perform the functions entrusted to him all by himself, Article II authorized him to obtain written advice from "the principal Officer in each of the executive Departments" and with Senate consent to appoint not only judges but also "Ambassadors, other public Ministers, and Consuls" and "all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law."228 Not only did these provisions make clear the expectation that additional executive offices and departments would be created; they made equally plain that Congress had power to create them as necessary and proper to the execution of various powers granted to the President and Congress.229

Madison gave the members something concrete to chew on by moving to establish a Department of Foreign Affairs to be headed by a Secretary who was to be "appointed by the President, by and with the advice and consent of the Senate" and "removable by the President."230 Chew they did; over a month elapsed before the House passed a bill on the subject, and much of that time was spent in debating the constitutional conundrums posed by Madison's simple proposal.

Even the innocuous suggestion that the Secretary be appointed as Article II prescribed provoked dissent. To provide by law for the method of appointment, argued Representative Smith of South Carolina, would convey the impression that Congress was "conferring power," when in fact the Constitution gave it no discretion; the statute should say nothing about appointment one way or the other.231 Lee responded that Congress did have a choice, for Article II expressly authorized Congress "to vest the Appointment of . . . inferior Officers" elsewhere.232 The Secretary, he contended, was an inferior officer, because his only function was to aid the President in performing his duties.233 Under this interpretation, the President alone could have been empowered to appoint everybody except Justices of the Supreme Court, and it was quickly repudiated. "The inferior officers mentioned in the constitution," said Smith, "are clerks and other subordinate persons," not the heads of departments; and the reference to appointment by the President and Senate was struck from Madison's proposal.234

229. See Gales, ed, 1 Annals at 383 (cited in note 1) (Rep. Boudinot). Senator Maclay thought the President should nominate officers without prior legislation establishing their offices. See 9 De Pauw, ed, Documentary History at 104-05 (cited in note 1). In the House, however, "that the principles of organization for the executive offices should be settled by legislation was taken for granted." Casper, 30 Wm & Mary L Rev at 233 (cited in note 160). For further discussion of this question, see text accompanying notes 273-284.
230. Gales, ed, 1 Annals at 385.
231. Id at 386.
233. Gales, ed, 1 Annals at 386.
234. Id at 386-87. As enacted, the statute made no reference to the method of appointing the Secretary, but it did provide for a Chief Clerk to be appointed by the
Smith's second objection was to the provision making the Secretary "removable by the President." For Article II, § 4 provided that civil officers of the United States should be removed from office when convicted of high crimes and misdemeanors by the Senate, and that, Smith argued, meant there was no other way to remove them. \(235\) Madison sensibly replied that the impeachment provision had been designed to provide "a supplemental security for the good behavior of the public officers," not to limit the President's authority to discharge them,\(^2\) and Smith's contrary interpretation received little support from other members.\(^3\)

Theodorick Bland of Virginia had a more challenging basis for complaint about the provision for presidential removal. If the President could remove an officer whom the Senate had approved, he might circumvent the Senate's authority by giving a recess appointment to an individual whom the Senators had already rejected.\(^2\) Bland therefore opined that "the same power that appointed had, or ought to have, the power of removal"; the Senate's power of consent extended not only to naming officers but to dismissing them as well.\(^2\)

Hamilton had said as much in the Federalist,\(^2\) but the words did not seem
to support him; what Article II said was that the President should appoint officers with the advice and consent of the Senate. As Smith cogently observed, removal power was not implied in the authority to select the President, Vice-President, or members of Congress—not even, he noted interestingly, in the case of the Senate. Moreover, the distinction the Constitution seemed to draw between appointment and removal of executive officers could easily be justified in terms of Hamilton's own explanation that the purpose of the provision was to “prevent[] the appointment of unfit characters,” although he was right that a Senate check on removal would also “contribute to the stability of the administration.”

In the House debate, Madison was quick to disown the position Hamilton had taken. “[O]ne of the most prominent features of the constitution” was the President's responsibility for executive affairs. The Senate had been given a say in the appointing process because as a collective body it had better knowledge of possible candidates than any individual could have; but that limitation was consistent with presidential responsibility because unlike a senatorial veto on removal it permitted “no person” to be “forced upon him as an assistant by any other branch of the Government.”

Several other members agreed with Bland, but his motion that the proposal be amended to provide for removal “by and with the advice and consent of the Senate” was defeated. It was Gerry who raised the third and final argument against Madison's proposal: even if neither the Impeachment Clause nor the Appointments Clause prevented the President from removing the Secretary, nothing in the Constitution authorized him to do so; and he had only those powers which the Constitution conferred.

There were two ways to repulse this attack, and both were employed. Laurance had already made the defense of confession and avoidance: since the Constitution did not provide one way or the other, Congress was free—under the necessary and proper clause, as Thomas Hartley of Pennsylvania later added—to give the President removal power or not, and it made sense to do so. George Clymer of Pennsylvania, in contrast, took the high road of direct denial: “the power of removal was an executive power” and thus was vested in

---

241. Gales, ed, 1 Annals at 392. See the discussion of the role of Senators as representatives of the states, text accompanying notes 69-78.
242. Federalist 76 (Hamilton) at 509, 513 (cited in note 158).
243. Federalist 77 (Hamilton) at 515, citing Federalist 76 (Hamilton) (cited in note 158).
244. Gales, ed, 1 Annals at 394-95 (cited in note 1).
245. See, for example, id at 389 (Rep. Jackson); id at 391 (Rep. White); id at 395-96 (Rep. Gerry).
246. Id at 397-98.
247. Id at 395. See also id at 475 (Rep. Smith) (“I call upon gentlemen to show me where it is said that the President shall remove from office.”).
248. Id at 500.
249. Id at 392-93.
the President "by the express words" of Article II.\textsuperscript{250}

It was at this point that in the Committee of the Whole "[t]he question was . . . taken, and carried by a considerable majority, in favor of declaring the power of removal to be in the President."\textsuperscript{251} The reader will observe that this resolution left the difference of opinion between Clymer and Laurance unresolved. It did not say whether the President had removal power because the Constitution had given it to him or because Congress in its discretion had chosen to confer it. The House did not have to answer that question in order to agree that the President could discharge the Secretary, but it would be crucial if Congress ever decided to prohibit presidential removal.

The debate was resumed a few weeks later, when a bill was presented to carry out the principles agreed to in the Committee of the Whole.\textsuperscript{252} The House talked of nothing else for a week. In the process, all the arguments that had been made before were repeated and enlarged upon. There were also a few new twists, however. In particular, the difference of opinion among the supporters of presidential removal was brought into the foreground, and the argument that the Constitution itself gave the President this authority was substantially reinforced.

When Madison endorsed Clymer's position that removal was an executive power vested in the President by Article II,\textsuperscript{253} Smith and White leapt to the attack. There was nothing intrinsically executive about removal, Smith argued; he knew of no state in which the Governor had any such power.\textsuperscript{254} Moreover, White contended, the Constitution did not give the President all powers that might abstractly be classified as executive: "the executive powers so vested, are those enumerated in the constitution."

The former argument was troubling, and the latter potentially fatal. For despite the conspicuous textual contrast between Article II and Article I, which expressly vested in Congress only those legislative powers "herein granted,"\textsuperscript{255} it seemed unlikely that the Framers had meant to give the President blanket authority to do everything that could theoretically be termed executive, especially since the critical words of Article I had been inserted without explanation by the Committee of Style;\textsuperscript{256} at the very least there seemed to be an implicit restriction to executive matters that could fairly be deemed of federal concern.

Nevertheless, as Fisher Ames pointed out, the case did not depend on the

\textsuperscript{250} Id at 397.
\textsuperscript{251} Id at 399.
\textsuperscript{252} Id at 473.
\textsuperscript{253} Id at 481. Madison had initially argued that the matter lay in the discretion of Congress, and he acknowledged his change of mind. See id at 389, 480.
\textsuperscript{254} Id at 490.
\textsuperscript{255} Id at 485.
\textsuperscript{256} US Const, Art I, § 1. Article III is equally explicit, vesting the judicial power in specified courts and defining that power to embrace a finite list of disputes. See Farrand, 2 Records of the Federal Convention at 547, 565, 590 (cited in note 40); Charles C. Thach, Jr., The Creation of the Presidency, 1775-1789, in Johns Hopkins University, 40 Johns Hopkins University Studies in Historical and Political Science 138-39 (1922).
argument that removal was in itself an unenumerated executive function:

The constitution places all executive power in the hands of the President, and could he personally execute all the laws, there would be no occasion for establishing auxiliaries; but the circumscribed powers of human nature in one man, demand the aid of others... He must therefore have assistants. But in order that he may be responsible to his country, he must have a choice in selecting his assistants, a control over them, with power to remove them when he finds the qualifications which induced their appointment cease to exist.258

In other words, removal authority was implicit in the enumerated powers of the President, because he could exercise none of them without subordinates subject to his supervision and control. Madison succinctly restated the point a few minutes later: “if the officer when once appointed is not to depend upon the President for his official existence, ... I confess I do not see how the president can take care that the laws be faithfully executed.”259

It was at this point that Egbert Benson of New York offered an amendment that was to divide the supporters of presidential removal power. A proposal to specify the manner of appointment had already been dropped after it was argued to imply a power of choice foreclosed by Article II;260 Benson made the same argument with respect to removal. That the Secretary was removable by the President was the command of the Constitution itself; to say the same thing in the statute was to suggest that the power was for Congress to give or withhold. The bill should therefore be amended to acknowledge the President's constitutional prerogative by providing that the Secretary's custodial duties should devolve upon his clerk “whenever the said officer shall be removed by the President.”261

Sedgwick protested that it made no sense after having won the debate for the supporters of the removal power to quarrel over a purely academic question.262 Nevertheless the question was put, and Benson prevailed. The words “whenever the said officer shall be removed by the President” were inserted,263 and the words “to be removable by the President” were dropped.264 Thus at first glance it might appear that the House had agreed with Benson that the Constitution

258. Gales, ed, 1 Annals at 492 (cited in note 1).
259. Id at 516. Ames later repeated the point: “[i]n the constitution the President is required to see the laws faithfully executed. He cannot do that without he has a control over officers appointed to aid him in the performance of his duty [sic].” Id at 561. To put the argument another way, to place the conduct of foreign affairs in the hands of an officer not subject to presidential control would offend the Article II command that the enumerated executive powers be vested in the President. See Morrison, 487 US at 105-07 (Scalia dissenting).
260. See text accompanying notes 225-27.
261. Gales, ed, 1 Annals at 525-27.
262. Id at 602.
263. Id at 602-03.
264. Id at 608.
itself gave the President the power of removal.265

Unfortunately the matter was not so simple. For better or worse, the two halves of Benson's proposal were put to the House separately. The members first voted thirty to eighteen to add Benson's "whenever" language. All those who had spoken in favor of presidential removal voted aye, whether they thought that Article II settled the question or left the matter to Congress. The House then voted thirty-one to nineteen to drop the phrase "to be removable by the President." The numbers were virtually identical, but it was a different majority. For on this question the proponents of Article II power prevailed only because they were joined by a substantial number of members who had opposed presidential removal altogether.266

The original coalition was patched up again when it came time for the House to pass the amended bill,267 and after a similar discussion in the Senate268 Benson's "whenever" formula became law.269 Thus it was the considered judgment of a majority in both Houses that the President could remove the Secretary of Foreign Affairs, but there was no consensus as to whether he got that authority from Congress or from the Constitution itself.270

D. OTHER OFFICERS

Once the great controversy over presidential removal was resolved, Congress moved quickly to set up War and Treasury Departments, each headed by a Secretary whose tenure was described by the same "whenever" formula that had been so painstakingly worked out for the Secretary of Foreign Affairs.271 In

266. Fifteen of the thirty members who voted to add "whenever" voted not to delete "to be removable"; sixteen of the eighteen who voted not to add "whenever" voted to delete "to be removable." These were the members who were opposed to presidential removal entirely. Only sixteen of the forty-eight who voted on both questions voted for both, that is, for Benson's substitution. Justice Brandeis worked this all out in his dissent in Myers, 272 US at 286-87 n 75. See also Corwin, Office and Powers at 87 (cited in note 196). That was not enough to make him correct on the merits; my own view is that Ames's argument was overpowering. See Currie, The Second Century at 194-95 (cited in note 50).
267. The final vote was twenty-nine to twenty-two. See Gales, ed, 1 Annals at 614 (cited in note 1).
269. 1 Stat at 29. Vice-President Adams had to cast a tie-breaking vote in the Senate. See De Pauw, ed, 9 Documentary History at 115.
270. "[T]he real significance of the debate," wrote Professor Casper, "lies in the multitude of views expressed about the significance and meaning of separation of powers." Casper, 30 Wm & Mary L Rev at 237 (cited in note 160).
271. See Gales, ed, 1 Annals at 412; Act of August 5, 1789, 1 Stat 49-50; 1 Stat at 65-67 (1789). The Treasury bill, however, also provided for a Comptroller whose duties included determining the validity of claims against the government. 1 Stat at 66. Because this task was more judicial than executive, Madison argued, the President should not
other respects, however, the statute governing the Treasury differed significantly from those setting up the other two departments. To begin with, the Treasury was not expressly designated an "executive" department, as the others were. Nor was the distinction purely stylistic, for the Treasury Secretary was given specific duties that made him in part an agent of Congress. For one thing, he was directed to make estimates of "public revenue" and "public expenditures," which formed the basis of taxing and spending legislation. For another, he was instructed to report to either House "in person or in writing," on "all matters referred to him by the Senate or the House of Representatives, or which shall appertain to his office."

The debate on these provisions was marked by deep concern over undue executive influence on the House. No one seems to have made the converse argument that they gave Congress excessive power over the executive—apparently Alexander Hamilton got exactly what he wanted. Regardless of who was encroaching upon whom, the Treasury statute incarnated an officer with a mix of executive and legislative functions that was remarkable in a system of supposedly separate powers: "the Secretary . . . was seen as an indispensable, direct arm of the House . . . ."

control it; either the Comptroller should not be removable, or his decisions should be subject to Supreme Court review. Gales, ed, 1 Annals at 635-37.

This proposal raised more difficulties than it resolved. It was by no means clear that the Comptroller's function was judicial. Until the Treasury had rejected the claim, it was hard to identify the adverse parties who characterized the ordinary judicial proceeding. Moreover, if the matter was judicial, Article III appeared to require that it be decided by a judge with tenure during good behavior and irreducible salary. US Const, Art III, § 1. Finally, unless the Comptroller could somehow be considered a judicial officer, it was not obvious how the Supreme Court could be empowered to review his decision. Under Article III, unless a state or a (foreign) diplomat was a party, id, § 2, cl 2, the Supreme Court's jurisdiction was appellate, not original. Madison withdrew his motion after several colleagues spoke against it. Gales, ed, 1 Annals at 637-39. As enacted, the statute said nothing about the removal of inferior officers. See Act of August 5, 1789, 1 Stat 65-67.

272. See 1 Stat at 28-29 (Foreign Affairs); 1 Stat at 49-50 (War); 1 Stat at 65-67 (Treasury). Nor was the Treasury Secretary, like his two colleagues, explicitly directed to perform his duties "as the President . . . shall . . . order or instruct." Id at 29 (Foreign Affairs); id at 50 (War).

273. 1 Stat at 65-66. For some of the first results of this provision see the discussion of early appropriations in Currie, 61 U Chi L Rev at 795-96 (cited in note 2). 274. 1 Stat at 65-66. Hamilton's famous reports on public credit, on the national bank, and on manufactures, were made on the basis of this provision. Currie, 61 U Chi L Rev at 795 n 113 (cited in note 2).

275. See note 166.

276. See McDonald, Hamilton Biography at 133 (cited in note 3). In his book on the Washington Administration, the same author argues that the aim of Congress in enacting these provisions was "to curtail the executive and aggrandise the House" but that the result was to enable Hamilton "to become, for practical purposes, an American 'prime minister.'" McDonald, George Washington at 37 (cited in note 3).

277. Casper, 30 Wm & Mary L Rev at 241 (cited in note 160) (adding that as soon as Hamilton was confirmed the Committee of Ways and Means was discharged and its functions were "turned . . . over to him"). See also Corwin, Office and Powers at 79.
Foreign Affairs, War, and the Treasury were the only three executive departments set up by the First Congress. Representative John Vining of Delaware proposed a Home Department with a variety of largely archival functions, but, after a brief debate centered on a less than overwhelming cost argument, many of these duties were added to those of the Secretary of Foreign Affairs, who was renamed the Secretary of State.278 Pressed for time, Congress enacted a temporary measure providing for appointment of a Postmaster General “subject to the direction of the President,” but to carry out duties specified for his predecessors by the Confederation Congress.279 The Judiciary Act provided for an Attorney General to render legal advice to the executive and to represent the United States before the Supreme Court and for District Attorneys to represent it elsewhere, but they were not part of any executive department, and the statute did not say who was to appoint or to remove them.280 In prescribing that each of the government’s attorneys be “a meet person learned in the law,”281 Congress significantly, if sensibly, restricted the President’s discretion in selecting them. Nobody seems to have suggested that in so doing Congress

---

278. See Gales, ed, 1 Annals at 692-95; Act of September 15, 1789, 1 Stat 68. Representative Vining observed that it was not obvious why it would be more expensive for the duties in question to be performed by a new Home Department than by anyone else. Gales, ed, 1 Annals at 694. Nor was there any logical connection between these responsibilities and those initially assigned to the Secretary of Foreign Affairs. Representative Huntington had suggested that the Secretary be chosen because at the moment he seemed to be “not so much overcharged with business but that he might attend to the major part of the duties mentioned.” Gales, ed, 1 Annals at 693. The implication seemed to be that by increasing his responsibilities, Congress might avoid having to pay another Secretary’s salary.

279. Act of September 22, 1789, 1 Stat 70; see Gales, ed, 1 Annals at 923, 927-28.

280. Act of September 24, 1789, 1 Stat 73, 92-93. Indeed, the District Attorneys were supervised not by the Attorney General but by the Secretary of State—a situation that hardly seemed conducive to the evolution of a uniform legal policy. White, The Federalists at 406 (cited in note 3). Early drafts of the Judiciary Act had provided that District Attorneys be appointed by the District Courts and the Attorney General by the Supreme Court. These provisions disappeared after Robert Livingston wrote (apparently to Ellsworth) suggesting that the Attorney General should be “appointed by the executive to which department he necessarily belongs.” See Susan Low Bloch, The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism, 1989 Duke L J 561, 567, 571 n 32.

281. 1 Stat at 92.
offended the appointment provisions of Article II.282

Other proposals, however, raised important and interesting questions as to what was included in the President's powers of nomination and appointment. On several occasions Congress provided by statute for the appointment of officers inferior to the heads of departments.283 From the beginning, however, there was evidence of an understanding that other public servants could be appointed although their offices had never been created by law.

One of Washington's first acts as President was to appoint Gouverneur Morris, entirely without statutory authority, as "a 'special agent' to explore the possibility of a commercial treaty with Great Britain."284 Maclay once took the position that he should do the same with the Secretary of Foreign Affairs.285

---

282. The following April, however, Representative Scott moved to excise from a bill to regulate Indian commerce a requirement that the Superintendent of Indian Affairs be a military officer. Gales, ed, 2 Annals at 1575 (cited in note 1). Scott argued, among other things, that this restriction both "infringe[d] the power of the President" and "blended the civil and military characters." Id. In response it was noted that "the President and Senate are restricted in their appointments of officers in several other departments," and the Attorney General was cited as an example. Id. When the bill was enacted, the military qualification had disappeared—the precedents suggested for reasons of policy rather than constitutional compulsion. Act of July 22, 1790, 1 Stat 137. See Corwin, Office and Powers at 70-71 (cited in note 196) (noting the "vast variety of qualifications" laid down over the years for federal appointments but adding that it was "universally conceded that some choice, however small, must be left to the appointing authority").

A different issue respecting the appointment power arose during the second session in connection with a bill to create a commission to settle accounts between the United States and the states. Representatives Laurance and Gerry objected to the original draft of the bill on the ground that by designating the Secretary of the Treasury and the Comptroller as members of the Commission it usurped the appointing authority vested in the President and the Senate. Representative Sedgwick retorted with considerable force that the Constitution did not forbid Congress to attach additional duties to existing offices, and Madison argued that since the commission's functions were legislative, Congress could appoint its members. In the end, the offending language was removed—whether for reasons of policy or constitutional compulsion was not made clear. See NY Daily Gazette (June 2, 1790); Lloyd's Notes for June 1 and 2, 1790; Gazette of the United States, June 7, 1790; Act of August 5, 1790, 1 Stat 178.

283. For example, 1 Stat at 29 (Chief Clerk in Department of Foreign Affairs); 1 Stat at 50 (Chief Clerk in Department of War); 1 Stat at 65 (Comptroller, Auditor, Treasurer, Register, and Assistant to the Secretary). Under the authority conferred by the proviso to Article II, § 2, Congress provided for appointment of the two chief clerks and of the assistant by the respective Secretaries; it said nothing about their removal. See also Act of September 11, 1789, 1 Stat at 67-68 (authorizing each of the three Secretaries to appoint "such clerks . . . as they shall find necessary").

284. See Miller, The Federalist Era at 13 (cited in note 3); Fitzpatrick, ed, 30 Washington Writings at 439-42 (cited in note 190). Executive authority to make such appointments had long existed in England. See Corwin, Office and Powers at 65 (cited in note 196). See also id at 231 (arguing that appointments like that of Morris could "be reconciled with the Constitution only by invoking the Hamiltonian conception of residual executive power.").

285. De Pauw, ed, 9 Documentary History at 104-05 (cited in note 1), adding that the appointment would be subject to Senate confirmation under Article II. But the requirement
Laurance had gone even further in arguing that to set salaries for the President's secretaries and clerks would "infringe[] his right to employ a confidential person in the management of those concerns, for which the constitution has made him responsible." Madison responded that the President had no power to create offices, and there were other explanations for the omission of the contested provision. It thus cannot be said that Congress either accepted or rejected Laurance's interesting contention.

If Laurance's position could be defended on the ground that not every menial employee was an "officer of the United States," within the meaning of Article II, the same could hardly be said of ambassadors, other public ministers, or consuls. Yet when Congress turned to providing for intercourse with other nations in 1790, it conspicuously refrained from creating any such posts at all, simply authorizing the President to draw up to forty thousand dollars per year from the Treasury "for the support of such persons as he shall commission to serve the United States in foreign parts" and to pay their expenses.

A closer look at the Constitution may suggest why. The assumption that it is Congress that is to determine which offices are to be filled derives in part from the Necessary and Proper Clause and in part from Article II's reference to offices "which shall be established by Law." That qualification, however, appears to apply only to "other Officers of the United States, whose Appointments are not herein otherwise provided for," not to the preceding and separate provision for the appointment of "Ambassadors, other public Ministers and Consuls, [and] Judges of the Supreme Court." The text thus gave some support to Smith's argument that the President and Senate should "determine when and where to send ambassadors and other public ministers; all that the House has to do is to make provision for their support."

Of Senate consent applies only to officers who are named in that Article or whose offices are established by law. To permit the President to appoint to additional offices not created by statute would allow him to circumvent the important check of Senate consent. Gales, ed, 1 Annals at 639 (cited in note 1). If the President would have the power to hire "menial employees" without Senate consent, he could "infringe on the right of the legislature to control the expenses of its own members." 286

286. Gales, ed, 1 Annals at 659 (cited in note 1). 287. Id at 662.

288. See Buckley v Valeo, 424 US 1, 126 n 162 (1976); Corwin, Office and Powers at 72 (cited in note 196) (criticizing the accepted distinction between "officers" and "employees" as a device for "circumventing the apparent purpose of the Constitution" with respect to the appointment of inferior officers). 289. Act of July 1, 1790, 1 Stat 128. 290. See US Const, Art I, § 8, cl 18; id, Art II, § 2, cl 2.

291. Id, Art II, § 2, cl 2. 292. Gales, ed, 1 Annals at 1100. Accord id at 1101 (Rep. White). Representative Sherman, on the other hand, "was inclined to think that the Legislature ought to determine how many ministers should be employed abroad." Id. Representative Gerry had twice moved in the Convention to provide that offices could be established only by legislation, but without success. Madison had cryptically recorded that such a provision was "unnecessary." See Farrand, 2 Records of the Federal Convention at 550, 553 (cited in note 40). Attorney General Cushing relied on the phrasing of the appointment provision in reaffirming Representative Smith's conclusion in 1855. See 7 Op Att'y Gen 186, 193 (1855). Smith made clear that he viewed Congress's power of the purse as a "check" on
The textual argument applies to Justices as well as to diplomats, and Congress fixed the number of the former at six.\textsuperscript{293} It may be that Congress thought it had the power, but not the duty, to fix the number of offices in both cases and chose to exercise its authority only in the case of the judges. The contrast may also suggest, however, that the constitutional principle that dissuaded Congress from creating particular diplomatic offices was found not in the second section of Article II, but in the third.

Buried near the end of that section was an apparently innocuous provision directing the President to “receive Ambassadors and other public Ministers.”\textsuperscript{294} This duty could have been construed in a purely ceremonial sense, but it was not. It has long been understood that the decision to receive a foreign diplomat embodies a decision to recognize the government that dispatched him, and thus that the Reception Clause empowers the President to decide with which governments the United States shall have diplomatic relations.\textsuperscript{295} For Congress to create an embassy to Lower Slobbovia would appear to conflict with this presidential responsibility; and thus, it is arguable that, as Smith suggested, Congress could not have prescribed where our diplomats should be sent even if it had been so inclined.\textsuperscript{296} All that the failure to establish specific diplomatic offices by statute can fairly be said to prove, however, is that Congress did not think the Constitution required it to do so before the President and Senate could fill them.\textsuperscript{297}
Yet congressional reticence in this case was not confined to the question of what diplomatic offices should be established. The statute did not even prescribe what salary was to be paid to such envoys as the President, with Senate consent, might decide to appoint. It merely set upper limits to the sums that could be paid to individual officers, and to the total that could be expended in a single year.\textsuperscript{298}

The arguments on this provision had been largely a reprise of the controversy over presidential removal, ranging from the suggestion that the determination of salaries was incident to appointment or to treaty-making and thus could be made only by the President with Senate consent,\textsuperscript{299} to the position that it was an executive function entrusted to the President alone.\textsuperscript{300} Thomas Scott of Pennsylvania, however, put forward a new argument that had not been available in the removal debate:

\begin{quote}
I think disposing of, or giving away sums of public money, is a Legislative, not an Executive act, and cannot be performed in any other way than with all the formalities of Legislative authority.\textsuperscript{301}
\end{quote}

Thus, there was no point in arguing over whether salaries should be set by the President alone or with Senate consent, because “it would be improper to give it to either”—the setting of salaries being a legislative responsibility, Congress could not constitutionally delegate it to anyone else.\textsuperscript{302}

This argument was given credence by the provision of Article I, § 9 that no money should be drawn from the Treasury “but in Consequence of Appropriations made by Law.” Of course it was true that the bill did authorize the withdrawal of funds from the Treasury, but the Constitution arguably required Congress to determine not only how much to spend but also how to spend it. Sedgwick replied that Congress had already recognized the necessity for discretionary spending authority in providing for military supply.\textsuperscript{303} This exchange was an opening salvo in a continuing battle over the proper degree of specificity in congressional appropriations.\textsuperscript{304}

As in the removal debate, Laurance took the position that the Constitution did not answer the question,\textsuperscript{305} and this time the majority evidently agreed. In

\begin{footnotes}
\item[298] Gales, ed, \textit{1 Annals} at 1118-32.
\item[299] Id at 1119-20 (Reps. Lee and Stone); id at 1122-23 (Rep. Sherman) (arguing that by virtue of these provisions the President and the Senate “ought to act jointly in every transaction which respects the business of negotiation with foreign powers”). Smith’s reply was the one that had prevailed when the same argument was made with respect to removal: Article II gave the Senate a role in the appointment of officers but not in determining their salaries. Id at 1119.
\item[300] Id at 1124-25 (Rep. Benson).
\item[301] Gales, ed, \textit{1 Annals} at 1127.
\item[302] Id. See also Gazette of the United States (Jan 30, 1790) (Rep. Jackson).
\item[303] See Gales, \textit{1 Annals} at 1127-28 (“How else could the business of the quartermasters’ or commissaries’ departments be performed . . .?”).
\item[304] See also Currie, \textit{61 U Chi L Rev} at 795-96 (cited in note 2).
\item[305] Gales, ed, \textit{1 Annals} at 1121; Wright, \textit{American Foreign Relations} at 312-15, 324-
\end{footnotes}
prescribing ceilings for the remuneration of various types of officers, Congress rejected the thesis that the Constitution reserved the matter for the President with or without consent of the Senate. In leaving it to the President to determine the appropriate compensation within those limits, it rejected the argument that salaries could be set only by statute. The bottom line seemed to be that Congress could decide one way or another under its authority to enact laws necessary and proper to the execution of powers granted by the Constitution to various officers and departments of the federal government.306

IV. The Courts

Article III provided only the broad outlines of the structure and authority of the federal courts. The judicial power of the United States was to be vested in "one supreme Court" and in "such inferior Courts as the Congress may from time to time ordain and establish."307 The judges were to "hold their Offices during good Behavior,"308 and their salaries could not be "diminished during their Continuance in Office."309 The judicial power was defined to extend to an impressively long list of "cases" and "controversies," prominent among which were federal-question, diversity, and admiralty cases and those to which the United States was a party.310 If a state or a foreign diplomat was a party, the Supreme Court was to have "original Jurisdiction"; in all other enumerated cases it was to have "appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."311 The final provisions of Article III went on to guarantee a jury trial in criminal cases and to define treason.312

Given the leanness of these constitutional provisions, the question of how Congress would implement them was of first importance. The Judiciary Act, largely crafted by Oliver Ellsworth in the Senate and adopted on September 24, 1789,313 has been called "probably the most important and the most satisfactory Act ever passed by Congress."314 Recorded debates were unfortunately
meager, but the act itself established a number of significant constitutional precedents.

A. THE LOWER FEDERAL COURTS

The one issue on which significant debate was recorded arose when Tucker and Livermore argued on policy grounds that Congress ought to limit lower federal courts to the decision of admiralty cases. Smith responded with the policy argument that Supreme Court review was inadequate to protect federal rights, but he had constitutional arguments as well. In extending the judicial power to enumerated categories of cases, he suggested, Article III required the erection of federal trial courts to determine them, and the tenure provision of the same Article forbade leaving those cases to state judges “who, in many instances, hold their places for a limited period.”

As Jackson argued, by vesting judicial power in the Supreme Court and “such inferior courts as the Congress may from time to time ordain and establish,” Article III seemed to refute Smith's contentions by giving Congress discretion as to the establishment of inferior federal courts. Smith argued that Congress's discretion extended only to how many inferior courts to establish, not to whether to establish them at all. But the text certainly did not compel this conclusion. Moreover, the well-known history confirms that the wording ultimately adopted was a compromise between those who thought the Constitution should itself establish inferior courts and those who thought there should be only a Supreme Court—Wilson and Madison having justified the change of phrasing on the ground that “there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not to establish them.”

Since Congress decided to establish lower federal courts, it did not have to


315. “Mr. Benson said, the Senate had employed a great deal of time in perfecting this bill, and he believed had done it tolerably well; besides, the session was now drawing to a close; he therefore wished as few alterations as possible to be made in it, lest they should not get it through before the adjournment.” Gales, ed, 1 Annals at 812 (cited in note 1).

316. Id at 813-14, 826-28.

317. “[I]t would be *felo da se* to trust the collection of the revenue of the United States to the State judicatures.” Id at 830. See also id at 843-44 (Rep. Madison).

318. Id at 831-32. See also id at 859-61 (Rep. Gerry). Despite his predictable objection to the creation of an “expensive and enormous” federal judiciary, Maclay surprisingly concluded at one point not only that the Constitution required federal jurisdiction over all federal-question cases but also that state courts would have no jurisdiction to decide them. De Fauw, ed, 9 Documentary History at 10, 85-87, 116 (cited in note 1).

319. US Const, Art III, § 1; Gales, ed, 1 Annals at 833 (cited in note 1).

320. Gales, ed, 1 Annals at 849-50.

determine whether or not it was required to do so. The statute itself, however, clearly reveals Congress's conviction that nothing in the Constitution required it to give federal trial courts jurisdiction over all the cases and controversies enumerated in Article III. For apart from civil and criminal cases brought by the Government, the district courts were to sit basically in admiralty, and the circuit courts in diversity and alienage cases involving more than $500. There was no general grant of federal-question jurisdiction.\textsuperscript{322}

Since Congress did not have to create lower courts at all, it might appear obvious that it did not have to give them jurisdiction over any particular category of cases.\textsuperscript{323} As Justice Story was to demonstrate a generation later, however, the matter was not so simple. For while Article III gave Congress discretion as to the existence and powers of inferior federal courts, it also provided in ostensibly mandatory terms that “[t]he judicial Power shall extend” to the enumerated classes of cases.\textsuperscript{324} Arguably the two provisions should have been reconciled by concluding that the entire judicial power had to be vested in some federal court: Congress could withhold jurisdiction of particular cases from the inferior courts only if it permitted the Supreme Court to hear them.\textsuperscript{325}

Congress evidently disagreed, for the Judiciary Act did not satisfy this model. Diversity cases excluded from the circuit courts by the jurisdictional amount, for example, were excluded from the federal courts altogether, for the Supreme Court was given no authority to review state-court judgments in cases in which diversity was the sole basis of federal jurisdiction.\textsuperscript{326} Thus, Congress seems to have agreed with Maryland Representative Michael Stone that the courts were no more required to exercise the entire judicial power than Congress was required to exercise all the legislative authority conferred by Article I.\textsuperscript{327}

One should not be too quick, however, to leap to the further conclusion that Congress thought it had complete discretion to exclude Article III cases from

\textsuperscript{322} The Judiciary Act of 1789, 1 Stat 73, 76-79, §§ 9-12. The district courts also had jurisdiction of actions “where an alien sues for a tort only in violation of the law of nations or a treaty of the United States,” and of “suits against consuls or vice-consuls,” id at 76-77, § 9, while a claimant to land worth more than five hundred dollars under the grant of a state other than that in which the action was brought could remove to circuit court under § 12. Id at 79, § 12. For reliance on a semicolon to support the novel position that the jurisdictional minimum was inapplicable to diversity cases originally filed in federal court, see Wilfred J. Ritz, \textit{Rewriting the History of the Judiciary Act of 1789} 57 (Oklahoma, 1990).

323. \textit{Sheldon v Sill}, 49 US (13 How) 441, 449 (1850) (upholding the clause of § 11 precluding jurisdiction when diversity of citizenship had been created by assignment of a chose in action: “[I]t would seem to follow, also, that, having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies.”).


326. See 1 Stat at 85-87. The same was true of Government civil cases involving less than one hundred dollars, which were excluded from the district courts by § 9. See id at 76-77.

327. Gales, ed, 1 \textit{Annals} at 854-55 (cited in note 1).
federal courts. As Story also observed, in contrast to federal-question, admiralty, and diplomatic cases, the Constitution did not expressly extend the judicial power to “all” controversies between citizens of different states, and the difference in phrasing might have been deliberate: “The vital importance of all the cases enumerated in the first class to the national sovereignty, might warrant such a distinction.” The First Congress, Story added, seemed, “in a good degree,... to have adopted this distinction,” for “[i]n the first class of cases, the jurisdiction is not limited except by the subject matter; in the second, it is made materially to depend upon the value in controversy.”

Indeed the Judiciary Act came suggestively close to giving some federal court jurisdiction over all cases within the three categories in which Article III expressly employed the word “all.” Section 9 empowered the district courts to hear “all civil causes of admiralty and maritime jurisdiction”; § 13 comprehensively confirmed the Supreme Court's original jurisdiction over cases affecting foreign diplomats; and § 25 authorized the Supreme Court to review state-court judgments in federal-question cases. Although § 25 was hedged about with a variety of restrictions, it has been forcefully argued that at the very least it fulfilled the central constitutional purpose of providing a federal forum to assure the vindication of federal rights. Significantly, even opponents of broad

328. Martin, 14 US at 334. See also Akhil Reed Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 BU L Rev 205 (1985); Akhil Reed Amar, Reports of My Death Are Greatly Exaggerated: A Reply, 138 U Pa L Rev 1651, 1658-60 (1990) (pointing out, among other things, the striking parallel between the categories of cases with respect to which Article III omitted the word “all” and those with respect to which an earlier draft would explicitly have left federal jurisdiction to the discretion of Congress).


330. 1 Stat at 77. Criminal admiralty cases fell within exclusive federal jurisdiction under §§ 9 and 11. Id at 77-78.

331. 1 Stat at 76-77, § 9. For reservations as to the completeness of this provision, see Bator, et al, The Federal Courts at 386-87 n 41 (cited in note 155) (pointing out, among other things, that there was no provision for removal or appeal if a foreign diplomat sued in state court).

332. 1 Stat at 85-87, § 25.

333. Supreme Court review was limited to questions concerning the “validity” of federal or state action or the “construction” of a constitutional provision, treaty, federal “statute,” or “commission.” 1 Stat at 85-87. Nothing was said about review of questions of federal common law (which as a modern concept was probably not envisioned at the time), or the application of federal law (which might have been subsumed under its “construction”). Most notably, review was provided only in cases in which the state court rejected the claim of federal right. Id at 86.

federal jurisdiction tended to agree that federal courts should hear cases in these categories. As Livermore argued, "if we have a Supreme Court, to which appeals can be carried [in federal-question cases], and an Admiralty Court for deciding cases of a maritime nature, our system will be useful and complete." Thus, while the Judiciary Act clearly reveals Congress's belief that it was not required to extend federal jurisdiction to all cases or controversies enumerated in Article III, it does not seem to be a good precedent for congressional power to strip all federal courts of authority to remedy the denial of a federal right.

In conspicuously declining to give the federal trial courts jurisdiction over all of the controversies within federal judicial power, and in expressly making the jurisdiction it did give them "concurrent with the courts of the several States" in most civil cases, Congress clearly rejected any argument that the grant of judicial power in Article III was exclusive. This conclusion does seem to follow from the Convention compromise, since it seems highly unlikely that the Framers intended the consequence of a congressional decision not to create lower federal courts to be that Article III cases outside the Supreme Court's narrow original jurisdiction could not be heard at all. At the same time, the express statutory provisions making federal jurisdiction in criminal and maritime matters exclusive testify to Congress's reasonable conclusion that the exclusion of state courts might sometimes be necessary and proper to effectuate the purposes that the grant of federal judicial authority was meant to serve.

The Judiciary Act scrupulously followed the Constitution in assigning to the inferior federal courts only the decision of "cases" and "controversies" that were traditionally judicial. In 1790, however, after Hamilton reported that many shipowners had incurred liability for penalties and forfeitures through ignorance

---

336. See 1 Stat at 77, § 9 (alien tort, government, diversity, and alienage cases). See id at 80-81 (original but not exclusive jurisdiction of Supreme Court in certain cases).
337. Stone and Livermore both made the interesting suggestion that the Supremacy Clause required state courts to entertain claims based on federal law, Gales, ed, 1 Annals at 840-43, 863 (cited in note 1), but Congress cannot be said to have taken a position one way or another on this suggestion. Compare Testa v Katt, 330 US 386 (1947) and General Oil Co. v Crain, 209 US 211 (1908).
338. Hamilton had anticipated this question in The Federalist, noting that federal jurisdiction would normally be concurrent because of the tradition that the courts of one sovereign regularly heard cases involving the laws of another. The Federalist No 82 (Hamilton) at 555 (cited in note 158). Thus the compromise appears to dispose of Smith's tenure argument as well. Apparently, the Framers reasonably thought the countervailing interests of federalism outweighed any danger that state judges might not be sufficiently independent to decide cases without fear of reprisal, especially since there was little risk that they would be dominated by the President or Congress. See Thomas G. Krattenmaker, Article III and Judicial Independence: Why the New Bankruptcy Courts Are Unconstitutional, 70 Georgetown L J 297, 304-05 (1981).
339. See 1 Stat at 76-79, §§ 9-12 (also excluding the state courts from suits against consuls and vice-consuls), and the various provisions for exclusive original Supreme Court jurisdiction in id at 80-81.
of the recently enacted tariff and tonnage duties, Congress directed district judges after adversarial proceedings to report the facts to the Secretary of the Treasury, who was given "power to mitigate or remit" any such penalty "if in his opinion the same was incurred without wilful negligence or any intention of fraud." A Senate amendment to the original bill that would have vested mitigation authority in a committee of three Cabinet officers had been deleted after objections that it gave judicial power to the executive; yet the act, as adopted, seemed both to leave this problem unresolved and to compound the difficulty by conferring purely advisory powers on the judges.

In only two instances, moreover, did the Judiciary Act arguably give federal courts jurisdiction over judicial matters outside the enumeration of Article III. Most suspiciously, if the five hundred dollar minimum was satisfied, § 11 purported to give the circuit courts jurisdiction of all cases in which "an alien [was] a party," although the corresponding clause of the Constitution spoke only of controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." There was no recorded debate on this provision. In light of the care exercised elsewhere in the statute to avoid exceeding the limits implicit in Article III's enumeration, the Supreme Court may well have been right to conclude that in this instance, as well, Congress had no intention of going beyond the constitutional provision.

341. Act of May 26, 1790, 1 Stat 122, 123.
343. Compare Hayburn's Case, 2 US (2 Dall) 408 (1792), where three circuit courts including five of the six Supreme Court Justices struck down a similar provision respecting military pensions. See also Act of August 12, 1790, 1 Stat at 186, making the Chief Justice a member of a committee to supervise the repurchase of government obligations. Given the absence of any incompatibility clause comparable to that forbidding simultaneous exercise of legislative and executive functions (US Const, Art I, § 6, cl 2), Congress evidently saw no constitutional impediment to giving the same officer both judicial and executive functions. See Mistretta v United States, 488 US 361 (1989); Mark Tushnet, Dual Office Holding and the Constitution: A View from Hayburn's Case, in Maeva Marcus, ed, Origins of the Federal Judiciary 196 (Oxford, 1992).
344. 1 Stat at 78-79; US Const, Art III, § 2, cl 1.
345. Hodgson v Bowerbank, 9 US (5 Cranch) 303 (1809); Mossman v Higginson, 4 US (4 Dall) 12 (1800); Currie, The First Hundred Years at 29-30, 89-90 (cited in note 67). As a stopgap measure, the overburdened legislators directed lower federal courts in common law cases to follow "the forms of writs and executions, . . . modes of process and rates of fees" prescribed by state law, but avoided any problem of delegating federal authority to the states by adopting only those forms, modes, and rates "now used or allowed" in state courts. Act of September 29, 1789, 1 Stat 93. The "forms and modes of proceedings" in equity and admiralty cases, in contrast, were to be "according to the course of the civil law"—a less precise reference that arguably left considerable room for judicial discretion. Id at 93-94. The Necessary and Proper Clause seemed to give Congress authority to adopt procedural rules for federal courts, though judicial authority to do so was arguably implicit in Article III's grant of judicial power, and judicial independence might plausibly be argued to require that judicial authority be exclusive. See Wayman v
More difficult to explain on this ground was § 9's interesting provision giving the district courts jurisdiction over "all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Some have argued that the precipitating cause of this enactment was an attack by one Frenchman on another, and the Second Circuit has recently upheld its application to a suit between two aliens on the ground that the case arose under federal law: "[t]he constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law."  

B. THE SUPREME COURT

The Judiciary Act also resolved a number of interesting and important constitutional questions in defining the jurisdiction and powers of the Supreme Court. First, as already noted, § 25 confirmed the Court's authority to review federal questions decided by state courts—a conclusion hardly surprising in light of precedent under the relatively feeble Articles of Confederation and the debates in the Constitutional Convention. Second, both § 25 and § 22 re-
flected a broad view of Congress's power to make "exceptions" to the appellate jurisdiction of the Supreme Court. For, as already indicated, the former section provided for review of state judgments only in federal-question cases, while the latter made no provision for appellate review of federal criminal convictions. The argument that Congress was authorized to make exceptions only to Supreme Court review of factual determinations was thus not the view of the First Congress. Nor was Congress of the view that it could make no exceptions to the Supreme Court's jurisdiction without entrusting the excluded cases to some other federal court, for as also noted above, the statute left significant categories of cases outside federal jurisdiction altogether.

The original jurisdiction of the Supreme Court was defined essentially as in Article III itself, embracing cases in which states or foreign diplomats were parties. Notably, however, the Supreme Court's jurisdiction in state cases was limited to "controversies of a civil nature," suggesting that Congress

350. See 1 Stat at 84-87.
351. Id.
352. See Henry J. Merry, Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis, 47 Minn L Rev 53 (1962). By providing for writ of error rather than appeal, the Judiciary Act did limit Supreme Court review of the facts—not only in common law actions, as did the contemporaneously proposed seventh amendment, but in equity and admiralty cases too. 1 Stat 84-87 §§ 22, 25 (1789). Professor Casper views these provisions, along with those restricting equity powers and guaranteeing the civil jury, as elements in a general design of the First Congress to democratize and limit the courts—out of fears lest the judges made independent by Article III might themselves exercise arbitrary power. See 1 Stat at 77, 80, 82, §§ 9, 12, 16; US Const, Amend VII; Gerhard Casper, The Judiciary Act of 1789 and Judicial Independence, in Marcus, Origins of the Federal Judiciary 281 (cited in note 343). Five of the first eight amendments, Casper points out, dealt with "matters mostly concerning the courts." Id.
353. Nevertheless Congress was careful to insist that the Supreme Court be open in most, if not all, cases in which a state court had denied a federal claim, thus preserving to a substantial degree the Court's essential authority to keep states from infringing upon federal constitutional rights. See text accompanying notes 286-290. Moreover, despite the absence of Supreme Court review of federal criminal convictions, the principle of judicial review that would be confirmed in Marbury v Madison, 5 US (1 Cranch) 137 (1803), ensured that even in such cases constitutional objections would be heard by some federal court. See id. Arguably the most serious failing of the Judiciary Act from the standpoint of an adequate modern system of judicial review was the absence of any provision guaranteeing access to the courts to those injured by public officers who acted illegally without seeking judicial assistance. Compare 42 USC § 1983 (1988) with 28 USC § 1343(a)(3) (1988). Apparently the First Congress thought no such provision was constitutionally required. Compare Grundgesetz [Basic Law] Art 19(4) (FRG) (Should any person's right be violated by public authority, recourse to the court shall be open to him); Bivens v Six Unknown Named Agents, 403 US 388 (1971) (semble).
354. 1 Stat 80-81 § 13 (1789). Compare US Const, Art III, § 2, cl 2. Like that of the inferior courts, this jurisdiction was partly concurrent and partly exclusive. See text accompanying notes 291-94. By essentially repeating the Constitution's general reference to matters "in which a State shall be Party," this section did nothing to resolve the question whether a state could be made defendant, and nothing was said on the subject during debate. US Const, Art III, § 2, cl 2; see Chisholm v Georgia, 2 US (2 Dall) 419 (1793).
believed either that criminal cases fell outside the constitutional provision for "cases . . . in which a state shall be party," or that it was not required to vest in the Supreme Court the entire original jurisdiction defined by Article III.\textsuperscript{355} Both of these interpretations seem doubtful. First, although the disputes to which the judicial power was extended by virtue of the state's presence as a litigant were described by the arguably narrower term "controversies" rather than "cases," the Framers seemed to treat the two terms as equivalent in giving the Supreme Court original jurisdiction of "cases" to which a state was a party.\textsuperscript{356} In addition, the reasons for jurisdiction seem as strong in criminal as in civil cases.\textsuperscript{357} The explicit provision authorizing Congress to make exceptions to the \textit{appellate} jurisdiction,\textsuperscript{358} moreover, casts considerable doubt on the alternative hypothesis that Congress may make exceptions from the original jurisdiction as well.

Buried at the end of § 13 was a provision authorizing the Supreme Court to issue writs of mandamus "to any courts appointed, or persons holding office, under the authority of the United States."\textsuperscript{359} This was the provision that \textit{Marbury v Madison} struck down on the ground that Congress had no power to expand the original jurisdiction beyond those cases enumerated in Article III.\textsuperscript{360} The constitutional question could easily have gone the other way,\textsuperscript{361} but it would be wrong to conclude that Congress interpreted Article III differently from the Court. Because the authority to issue mandamus appears in a sentence otherwise dedicated to appellate jurisdiction it seems likely that the mandamus power was meant to be appellate as well.\textsuperscript{362}

In contrast to its later decision with respect to diplomatic appointments,\textsuperscript{363} Congress set the number of Justices at six.\textsuperscript{364} This provision need not imply that Congress thought the Constitution required it to fix the number of Justices, since there were obvious reasons of policy for having precisely six. The figure was inconvenient, since as Jackson noted, an even number would enhance the risk of stalemate.\textsuperscript{365} But six Justices made sense in terms of Congress's additional decision to divide the country into three judicial circuits, and to assign two

\begin{footnotesize}
\begin{enumerate}
\item[355.] 1 Stat 80-81 § 13 (1789); US Const, Art III, § 2.
\item[356.] 1 Stat 80-81 § 13 (1789).
\item[357.] But see \textit{Wisconsin v Pelican Insurance Co.}, 127 US 265, 300 (1888) (holding that the Court did not have original jurisdiction to compel a Louisiana corporation to pay a fine to the state of Wisconsin for violating a Wisconsin law).
\item[358.] US Const, Art III, § 2, cl 2.
\item[359.] 1 Stat at 81.
\item[360.] \textit{Marbury}, 5 US at 171-80.
\item[361.] See \textit{Cohens v Virginia}, 19 US (6 Wheat) 264, 399-402 (1821) (limiting the \textit{Marbury} dictum); \textit{Börhr v Preston}, 111 US 252, 260 (1884) (holding Congress could constitutionally give the Court appellate jurisdiction where Article III said it should have original).
\item[362.] See Currie, \textit{The First Hundred Years} at 67-68 (cited in note 67).
\item[363.] See text accompanying notes 255-69.
\item[364.] 1 Stat at 73, § 1.
\item[365.] Gales, ed, \textit{1 Annals} at 812 (cited in note 1).
\end{enumerate}
\end{footnotesize}
Justices to each of the circuit courts. 366

No one is reported as objecting at the time, but the Justices themselves were soon to protest against this additional assignment on both constitutional and practical grounds. 367 The most serious constitutional argument was that, when sitting on circuit, the Justices would be expected to act as trial judges in cases not within the Supreme Court's original jurisdiction. The response that, in so doing, they were not acting as the Supreme Court raised a constitutional difficulty of its own: if they were to exercise two offices, they arguably had to be given two appointments under Article II.

When these issues reached the Supreme Court in 1803, the Court upheld Congress's power to impose circuit duties on the Justices without reaching the merits: "practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction." 368 The provision for circuit riding thus illustrates in starkest form the influence that congressional interpretation of the Constitution can have on the course of judicial decision.

V. Conclusion

It should be plain from this summary that both the first President and the First Congress took the Constitution very seriously. Constitutional questions cropped up in the House and Senate every time somebody sneezed, and one proposal after another was subjected to intensive debate to determine its compatibility with relevant constitutional provisions. Members of Congress plainly thought it necessary to demonstrate that the Constitution supported their actions, and thus everything they did, as well as everything they said, helps to inform our understanding of particular constitutional provisions.

The arguments employed during the First Congress helped also to develop an understanding of the techniques of constitutional interpretation. Most of the tools of construction we recognize today were employed in the debates: text, structure, history, purpose, practice, and the avoidance of absurd consequences. Despite the deliberate decision of the Convention not to publish an official record of its proceedings, various members invoked their recollection of events at Philadelphia to illuminate the meaning of particular provisions; they were met with very modern arguments for ignoring them.

The quality of the constitutional debates in the First Congress was impressively high. The members exhibited an intimate knowledge of what the Constitution actually said. Moreover, they had obviously devoted considerable effort to trying to figure out what its various provisions might mean. In the great controversy over removal of cabinet officers, for instance, the House debates brought

366. 1 Stat 74-75, § 4.
368. Stuart v Laird, 5 US (1 Cranch) 299, 309 (1803); Currie, The First Hundred Years at 74-77 (cited in note 67).
forth virtually all the constitutional arguments that anyone has come up with in
two centuries of second-guessing—as they did on many other issues of greater or
lesser importance, which as a practical matter they settled for all time.

In short, not only the debates, but also the actions taken or rejected by the
First Congress, constitute a practical interpretation of the Constitution by able
and diligent officers sworn to support it and charged with the responsibility to
put it into practice. The legislative interpretation was not binding. It was not
always unanimous. It was not always convincing. It was not always clear that
Congress was even aware of the existence of a constitutional problem. Sometimes, like judges, members of Congress must have been advocates for a prede-
termined position. Nevertheless, the records of the First Congress afford impor-
tant evidence of what thoughtful and responsible public servants close to the
adoption of the Constitution thought it meant. What they thought is surely of
interest not only to historians, but also to anyone trying two hundred years later
to figure out what the Constitution means.