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The Constitution in Congress: The Third Congress, 1793-1795

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President Washington began his second term on March 4, 1793. Reluctant to run again, he had been persuaded that his country needed him, and he had not been opposed. It has been said, however, that in other respects the election of 1792 was our first “partisan” election. A plan to displace Vice President John Adams with New York Governor George Clinton attracted 50 of the 127 electoral votes. Thomas Jefferson rejoiced that there was now a “decided majority” for the “republican interest” in the House.¹ Although it was still perhaps premature to attach firm party labels to individual members of Congress,² a number of observers have concluded that at least one chamber of the Third Congress was in Republican hands.³

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¹ See Stanley Elkins and Eric McKittrick, *The Age of Federalism* 289 (Oxford 1993); James Roger Sharp, *American Politics in the Early Republic: The New Nation in Crisis* 53-60 (Yale 1993).

² See John C. Miller, *The Federalist Era: 1789-1801* 124 (Harper 1960) (“Even as late as the Third Congress . . . almost half the members of the House prided themselves upon being free of party ties and obligations.”). But see Forrest McDonald, *The Presidency of George Washington* 106-08 (Kansas 1974) (arguing that partisanship was widespread).

³ See, for example, Elkins and McKittrick, *Age of Federalism* at 365 (cited in note 1) (suggesting that the Republicans controlled both Houses). Most commentators seem to agree that the Federalists still controlled the Senate, though by the narrowest of margins. See, for example, Roy Swanson, *The United States Senate, 1787-1801: A Dissertation on*

War had broken out in Europe early in 1793, and Washington's first concern was to keep the United States out of it. The first session of the Third Congress was dominated by measures designed to prevent or prepare for war and the ways and means of financing them. Congress enacted a neutrality law; authorized the raising of additional troops, the construction of forts and arsenals, and the establishment of a navy; laid an embargo and a ban on arms exports; and debated discriminatory tariffs, nonintercourse with Great Britain, sequestration of British debts, and indemnity for depredations on our shipping. Congress adopted new taxes on carriages, snuff, and sugar, and conducted its first significant debate on the definition of direct taxes.

The second session proceeded in the shadow of the Whiskey Rebellion. Washington's actions in suppressing the uprising created no constitutional controversy, but his clumsy attempt to implicate the popular Democratic Societies in subversive activities triggered a major brouhaha over First Amendment freedoms.

It was the Third Congress that, after rejecting an interesting and little known set of alterations, proposed what became the Eleventh Amendment, limiting federal jurisdiction over suits against states. At the same time, a revised naturalization act gave federal judges new responsibilities that were hard to characterize as judicial. Faced with an embarrassing lacuna in the power to impeach, Congress took the easy way out by transferring the authority of an incompetent judge to another court. And in seating a "Delegate" from the Southwest Territory the House debated important questions concerning the nature of Congress itself.

There was much partisan rancor and wasting of time. The Senate was without a quorum for the first two weeks of the second session, and the House haggled for five days over its reply to the President's speech. Indeed, for a time there was considerable uncertainty whether the Third Congress would meet at all. An outbreak of yellow fever in Philadelphia lasting into the autumn of 1793 prompted Washington to ask several trusted

the First Fourteen Years of the Upper Legislative Body 283 (US GPO 1988); Thomas A. Mason, et al, eds, 15 *The Papers of James Madison* 146 (Virginia 1985). Having been defeated in a bid for reelection, Virginia's Alexander White lamented the hardening of party lines: "I never could reconcile to my mind a maxim which politicians say is necessary in the conduct of public affairs, that of going into all the measures of the Party whose general object you approve." Letter from Alexander White to James Madison (Nov 30, 1793), in Mason, et al, eds, 15 *The Papers of James Madison* at 145.

advisers whether he had authority to move Congress's December session to some safer location.⁴ Madison and Jefferson said no: Article II, § 3, which empowered the President to convene Congress on "extraordinary Occasions," authorized him to change only the time, not the place, of congressional meetings.⁵ Fortunately, the epidemic subsided in time to permit Congress to assemble in Philadelphia as planned, and Congress avoided future embarrassment by giving the President the authority the Framers had arguably failed to provide.⁶

After admitting the public to the debate over Albert Gallatin's qualifications,⁷ the Senate finally voted to open its doors generally during the conduct of "Legislative" business, but only after "suitable galleries" were built,⁸ and it did not happen during the Third Congress. Moreover, press coverage of House proceedings was skimpier than ever before. Apart from the war issues, there was rather little reported debate; much of the *Annals of Congress* reads like the Senate Journal. But, as al-

⁴ See Letter from George Washington to James Madison (Oct 14, 1793), in Mason, et al, eds, 15 *The Papers of James Madison* at 127 (cited in note 3); Letter from George Washington to Alexander Hamilton (Oct 14, 1793), in Harold C. Syrett, et al, eds, 15 *The Papers of Alexander Hamilton* 361 (Columbia 1969).

⁵ See Letter from James Madison to George Washington (Oct 24, 1793), in Mason, et al, eds, 15 *The Papers of James Madison* at 129-31 (cited in note 3); Letter from Thomas Jefferson to George Washington (Oct 17, 1793), in Paul Leicester Ford, ed, 6 *The Writings of Thomas Jefferson* 436 (Knickerbocker 1895). Even Hamilton, who argued convincingly that "[t]he reason of the thing as well as the words of the Constitution" were as applicable to the place as to the time of meeting ("The usual seat of the Government may be in possession of an enemy—it may be swallowed up by an earthquake."), doubted that the President could change the place without also changing the time. Letter from Alexander Hamilton to George Washington (Oct 24, 1793), in Syrett, et al, eds, 15 *The Papers of Alexander Hamilton* at 373-74 (cited in note 4). Noting that some had even questioned whether Congress itself could change a place of meeting it had once established, Washington thought this "a strained construction of the Constitution." Letter from George Washington to Edmund Randolph (Oct 14, 1793), in John C. Fitzpatrick, ed, 33 *The Writings of George Washington* 125, 127 (US GPO 1940).

⁶ See Letter from Thomas Jefferson to James Madison (Nov 2, 1793), in Mason, et al, eds, 15 *The Papers of James Madison* at 133 (cited in note 3); Act of Apr 3, 1794, 1 Stat 353 (authorizing the President to alter the place of meeting if conditions at the appointed spot were "hazardous to the lives or health of the members"). This provision was obviously necessary and proper to the operations of Congress, and the authority it delegated was confined by a narrow and meaningful standard. Thus it ought to have satisfied anyone but the occasional diehard who refused to accept Congress's 1790 decision that it had power to fix a temporary as well as a permanent seat of government, and it is still law. See Letter from Edmund Randolph to James Madison (Oct 28, 1793), in Mason, et al, eds, 15 *The Papers of James Madison* at 132; David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U Chi L Rev 775, 849 (1994); 2 USC § 27 (1988).

⁷ 4 *Annals of Cong* 43 (Feb 11, 1794).

⁸ 4 *Annals of Cong* 47 (Feb 20, 1794).

ways, much of what the Third Congress did and said in the debate about the constitutional issues that confronted it helps to inform our understanding of the Constitution.⁹

I. NEUTRALITY

A. The Proclamation

In the spring of 1793, after the Second Congress had adjourned, news reached Philadelphia that the revolutionary French government had declared war against Great Britain. On April 22, President Washington issued his famous neutrality proclamation.¹⁰

"[T]he duty and interest of the United States," wrote the President, required that they "adopt and pursue a conduct friendly and impartial toward the belligerent powers." He therefore deemed it appropriate "to declare the disposition of the United States" to act in a friendly and impartial manner, "and to warn the citizens of the United States carefully to avoid all acts and proceedings whatsoever which may in any manner tend to contravene such disposition." No citizen who offended the law of nations by participating in hostilities or by delivering contraband could count on our government for protection. Finally, said Washington, he had instructed the appropriate officers "to cause prosecutions to be instituted against all persons who shall, within the cognizance of the courts of the United States, violate the law of nations with respect to the powers at war, or any of them."¹¹

The President's Cabinet had unanimously approved a declaration along these lines, but Jefferson had expressed serious misgivings along the way, some of which were of a constitutional nature.¹² There followed an epic newspaper battle between

⁹ This article is the fourth in a series exploring debates and actions of the legislative and executive branches that help to illuminate constitutional questions. For earlier installments see David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government: 1789-1791*, 2 U Chi L Sch Roundtable 161 (1995); Currie, 61 U Chi L Rev 775 (cited in note 6); David P. Currie, *The Constitution in Congress: The Second Congress: 1791-1793*, 90 Nw U L Rev (forthcoming 1996).

¹⁰ George Washington, Proclamation, in James D. Richardson, ed, 1 *A Compilation of the Messages and Papers of the Presidents: 1789-1897* 156 (US Congress 1900). The story is told concisely in Elkins and McKittrick, *Age of Federalism* at 336-41 (cited in note 1), and in Abraham D. Sofaer, *War, Foreign Affairs and Constitutional Power: The Origins* 103-16 (Ballinger 1976). For a more detailed account see Charles M. Thomas, *American Neutrality in 1793: A Study in Cabinet Government* 13-52 (AMS 1967).

¹¹ George Washington, Proclamation, in Richardson, ed, 1 *Messages and Papers* at 156-57 (cited in note 10).

¹² See Jefferson's memorandum of this meeting in John Catanzariti, et al, eds, 25 *The*

Hamilton ("Pacificus") and Madison ("Helvidius") over the relative powers of the President and of Congress in the realm of foreign affairs.¹³

The principal objection to the proclamation was that, since only Congress could declare war, only Congress could commit us to peace. As Jefferson explained in a letter to Madison,

The [proclamation] as first proposed was to have been a declaration of neutrality. It was opposed on th[e] groun[d] . . . that a declaration of neutrality was a declaration there should be no war, to which the Executive was not competent.¹⁴

In response to Jefferson's concerns, however, the word "neutrality" (which was "understood to respect the future") was omitted from the proclamation. Thus, Hamilton was able to argue with considerable force in his first Pacificus essay that the objection lacked merit:

[The proclamation] only proclaims a *fact* with regard to the *existing state* of the Nation, informs the citizens of what the laws previously established require of them in that state, & warns them that these laws will be put into execution against [offenders].¹⁵

Congress remained "free to perform its own duties" as it saw fit;¹⁶ it could declare war or not, as it chose.

Hamilton's argument was powerful but not quite decisive, for Washington had not stopped at declaring our present condition of peace. Rather, he had proclaimed the "disposition" of the United States to pursue a friendly and impartial policy in accordance with his view of our "duty and interest." In a letter to Jefferson,

Papers of Thomas Jefferson 570 (Princeton 1992). See also Miller, *Federalist Era* at 128-29 (cited in note 2); Editorial Note, in Catanzariti, et al, eds, 25 *The Papers of Thomas Jefferson* at 571.

¹³ These letters, which can be found in Syrett, et al, eds, 15 *The Papers of Alexander Hamilton* at 33-43, 55-63, 65-69, 82-86, 90-95, 100-06, 130-35 (cited in note 4), and Mason, et al, eds, 15 *The Papers of James Madison* at 66-73, 80-87, 95-103, 106-10, 113-20 (cited in note 3) respectively, were also published together by J. and G.S. Gideon in 1845 under the title *The Letters of Pacificus and Helvidius (1845) with The Letters of Americanus* (Delmar 1976).

¹⁴ Letter from Thomas Jefferson to James Madison (June 23, 1793), in Mason, et al, eds, 15 *The Papers of James Madison* at 37 (cited in note 3).

¹⁵ Pacificus No 1, in Syrett, et al, eds, 15 *The Papers of Alexander Hamilton* at 43 (cited in note 4).

¹⁶ *Id* at 42.

Madison took the position that in so doing Washington had gone too far.¹⁷ Speaking to the public as Helvidius, Madison toned down his objection to avoid making it an attack on the popular President, explaining why use of the unfortunate term "disposition" did not justify interpreting the proclamation to declare a policy of peace:

Had the Proclamation prejudged the question on either side, and *proclaimed its decision to the world*; the Legislature, instead of being as free as it ought, might be thrown under the dilemma, of either sacrificing its judgment to that of the Executive; or by opposing the Executive judgment, of producing a relation between the two departments, extremely delicate among ourselves, and of the worst influence on the national character and interest abroad¹⁸

Madison's concern should not be dismissed out of hand. In the converse situation Washington and his Cabinet scrupulously insisted on several early occasions that no one outside the executive branch communicate directly with foreign governments lest the President be embarrassed in his conduct of foreign affairs.¹⁹

¹⁷ See Letter from James Madison to Thomas Jefferson (June 13, 1793), in Mason, et al, eds, 15 *The Papers of James Madison* at 29 (cited in note 3):

[A] proclamation on the subject could not properly go beyond a declaration of the fact that the U.S. were at war or peace, and an injunction of a suitable conduct on the Citizens. The right to decide the question whether the duty & interest of the U.S. require war or peace under any given circumstances, and whether their disposition be towards the one or the other seems to be essentially & exclusively involved in the right vested in the Legislature, of declaring war in time of peace; and in the P[resident] & S[enate] of making peace in time of war.

See also Letter from James Madison to Thomas Jefferson (June 19, 1793), in Mason, et al, eds, 15 *The Papers of James Madison* at 33 (arguing that the proclamation "seems to violate the forms & spirit of the Constitution, by making the executive Magistrate the organ of the disposition the duty & the interest of the Nation in relation to war & peace, subjects appropriated to other departments of the Government").

¹⁸ Helvidius No 5, in Mason, et al, eds, 15 *The Papers of James Madison* at 113, 116 (cited in note 3).

¹⁹ When the House exuberantly voiced its approval of the new French constitution in 1792, Washington expressed concern that "the legislature would be endeavoring to invade the executive." Jefferson persuaded him not to protest, arguing that the House "had a right, independently of legislation, to express sentiments on other subjects," so long as, in the case of statements regarding foreign nations, "instead of a direct communication, they should pass their sentiments through the President." See 3 *Annals of Cong* 100 (Mar 5, 1792); 3 *Annals of Cong* 106-07 (Mar 13, 1792); 3 *Annals of Cong* 456-57 (Mar 10, 1792); *Ana* of Mar 12, 1792, in H.A. Washington, ed, 9 *The Writings of Thomas Jefferson* 110-12 (Riker, Thorne 1854); Editorial Note, in Charles T. Cullen, et al, eds, 23 *The Papers of Thomas Jefferson* 221-22 (Princeton 1990).

Moreover, Hamilton's argument that the President had merely declared "the existing state of the Nation" seems not to have been entirely candid. In a later meeting to discuss what Washington should say to Congress about the proclamation, Hamilton was reported as saying that it had been intended as an expression of the President's opinion that war was contrary to our interests and that the President had every right to express his opinion.²⁰

However, Washington himself read the proclamation narrowly. "The President," Jefferson reported, "declared he never had an idea that he could bind Congress against declaring war, or that anything contained in his proclamation could look beyond the first day of their meeting." Sharing this interpretation, Jefferson said he was satisfied that the proclamation did not interfere with Congress's prerogatives: "I admitted the President, having received the nation at the close of Congress in a state of peace, was bound to preserve them in that state till Congress should meet again, and might proclaim anything which went no farther."²¹

When the House unanimously voted felicitations to France four years later on the adoption of a new flag, the resolution respectfully requested the President to forward the House's sentiments to the French authorities, and he did. See 5 *Annals of Cong* 195-200 (Jan 4, 1796); Letter from George Washington to the President of the Directory of the French Republic (Jan 7, 1796), in John C. Fitzpatrick, ed, 34 *The Writings of George Washington* at 419 (US GPO 1940). The Senate refused to go even that far, see 5 *Annals of Cong* 28-36 (Jan 5-6, 1796), after Oliver Ellsworth of Connecticut objected that "[n]othing . . . could be found in the Constitution to authorize either branch of the Legislature to keep up any kind of correspondence with a foreign nation." 5 *Annals of Cong* 32 (Jan 6, 1796). When Citizen Genêt brazenly persisted in addressing a French consul's credentials to Congress rather than to the President, Jefferson returned them with the curt reminder that the President was "the only channel of communication between this country and foreign nations . . . [B]ound to enforce respect to the order of things established by our Constitution, the President will issue no Exequatur to any consul or vice-consul, not directed to him in the usual form . . ." Letter from Thomas Jefferson to Mr. Genet (Nov 22, 1793), in H.A. Washington, ed, 4 *The Writings of Thomas Jefferson* 84-85 (Riker 1854), also reprinted in Walter Lowrie and Matthew St. Claire Clarke, eds, 1 *American State Papers (Foreign Relations)* 184 (Gales & Seaton 1832); see Edward S. Corwin, *The President: Office and Powers, 1787-1957* 208-09 (NYU 1957).

In 1799 Congress recognized this principle by making it a crime for private citizens to negotiate with foreign governments without the President's consent. Logan Act, 1 Stat 613 (1799), codified at 18 USC § 953 (1988). See also the German Constitutional Court's decision, on similar grounds, that individual states had no power to conduct advisory referenda on the desirability of stationing nuclear weapons on German soil. 8 BVerfGE 104, 105 (1958); David P. Currie, *The Constitution of the Federal Republic of Germany* 79 (Chicago 1994).

²⁰ Ana of Nov 8, 1793, in Washington, ed, 9 *The Writings of Thomas Jefferson* at 177, 178 (cited in note 19). Compare Sofaer, *War, Foreign Affairs and Constitutional Power* at 115 (cited in note 10) (arguing that by issuing and enforcing the proclamation without calling Congress into special session the President and his Cabinet unilaterally determined a policy of neutrality "for about a seven-month period").

²¹ Ana of Nov 8, 1793, in Washington, ed, 9 *The Writings of Thomas Jefferson* at 179

Hamilton, as *Pacificus*, had made the same point: the fact that only Congress could declare war meant that the President had a "duty . . . to preserve Peace"; Washington would have intruded on legislative authority if he had *not* taken steps to prevent individuals from provoking a war that Congress had not declared.²²

It is easy to see how hostile acts by the President himself may improperly interfere with Congress's power to determine whether or not to declare war.²³ Before we can find that the President has a duty to take affirmative action to prevent similar actions by private parties, however, we must find that he has the power to do so, and it is not so obvious that he has.

Hamilton took the occasion to argue for the broadest possible interpretation of the opening clause of Article II, § 1, which declares that "the executive Power shall be vested in [the] President." This grant of authority, Hamilton argued, was not limited to the particular powers enumerated in the provisions that followed. "[T]he difficulty of a complete and perfect specification of all the cases of Executive authority . . . would render it improbable" in any event that the general terms of the Vesting Clause were meant to be restricted by the enumeration.²⁴ Moreover, this inference was reinforced by the contrast in phrasing between Articles I and II. For the first article conspicuously conferred on Congress only the "legislative powers herein granted"; the second contained no such restriction.²⁵ Since the executive was the traditional "*organ* of intercourse . . . [with] foreign Nations," proclaiming our neutrality was an executive function;²⁶ and since it fell within none of the exceptions to the general principle expressed in the Vesting Clause, the President had acted within his powers.²⁷

(cited in note 19).

²² *Pacificus* No 1, in Syrett, et al, eds, 15 *The Papers of Alexander Hamilton* at 40 (cited in note 4).

²³ Compare the congressional debate over President Polk's provocative actions toward Mexico in 1846 and the resulting preliminary vote to condemn him for forcing the United States into an undeclared war. *Cong Globe*, 30th Cong, 1st Sess 95 (Jan 3, 1848). See also David Gray Adler, *The President's War-Making Power*, in Thomas E. Cronin, ed, *Inventing the American Presidency* 119, 138-39 (Kansas 1989).

²⁴ *Pacificus* No 1, in Syrett, et al, eds, 15 *The Papers of Alexander Hamilton* at 39 (cited in note 4).

²⁵ *Id.*

²⁶ *Id.* at 37.

²⁷ *Id.* at 39-40. Madison did not attack Hamilton's general principle that the Vesting Clause empowered the President to exercise all powers of federal concern that were properly classed as executive; he argued instead that the provisions in Article I for making treaties and declaring war were not narrow exceptions to the general principle but

To this day the crucial controversy over Hamilton's interpretation of the Vesting Clause has never been authoritatively resolved.²⁸ The difference in phrasing between Articles I and II is suggestive but not decisive; like other differences in phrasing, it may well have been accidental. The Vesting Clause was plainly designed to codify James Wilson's suggestion "that the Executive consist of a single person" rather than a committee;²⁹ the "herein granted" language in Article I was added without explanation by the Committee of Style, which was not supposed to make substantive changes.³⁰ Indeed, to take seriously the omission of similar language from Article II might suggest that the President could exercise executive powers that have always been understood not to be federal at all, for the "herein granted" language of Article I is a principal source of the basic tenet that legislative powers not enumerated are reserved to the states. There is thus much to be said for concluding that, as has recently been urged, the Vesting Clause does nothing more than show "*who has the executive power[,] not what that power is . . .*"³¹

But the validity of the neutrality proclamation does not stand or fall with Hamilton's all-encompassing approach to the Vesting Clause. To begin with, assuming that the declaration did not invade the powers of Congress, it would have sufficed to show that, as the Supreme Court has since concluded, the President had broad implicit authority over foreign affairs.³² The wide-

evidence that both powers were legislative rather than executive. Helvidius No 1, in Mason, et al, eds, 15 *The Papers of James Madison* at 67-73 (cited in note 3). With respect to foreign affairs, however, Jefferson had already taken Hamilton's position. See Jefferson's Opinion on the Powers of the Senate Respecting Diplomatic Appointments, Apr 24, 1790, in Julian P. Boyd, et al, eds, 16 *The Papers of Thomas Jefferson* 378, 379 (Princeton 1961) ("The transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, *except* as to such portions of it as are specially submitted to the Senate.").

²⁸ The question was debated in the opinions in the *Steel Seizure Case*, but enough Justices concluded that Congress had implicitly forbidden the President's action that it is impossible to say that a majority either embraced or rejected Hamilton's interpretation. See *Youngstown Sheet & Tube Co. v Sawyer*, 343 US 579 (1952); David P. Currie, *The Constitution in the Supreme Court: The Second Century, 1888-1986* 365-69 (Chicago 1990).

²⁹ See Max Farrand, ed, 1 *The Records of the Federal Convention of 1787* 64-66, 88-89, 96-97 (Yale 1911); Max Farrand, ed, 2 *The Records of the Federal Convention* 134, 145, 171, 401, 597 (Yale 1911).

³⁰ See Farrand, ed, 1 *Records of the Federal Convention* at 291 (cited in note 29); Farrand, ed, 2 *Records of the Federal Convention* at 151, 152, 163, 565, 590 (cited in note 29). See also *id* at 547 ("a Committee of five to revise the style of and to arrange the articles agreed to by the House").

³¹ See Lawrence Lessig and Cass R. Sunstein, *The President and the Administration*, 94 Colum L Rev 1, 47-48 (1994).

³² *United States v Curtiss-Wright Export Corp.*, 299 US 304, 315-19 (1936); Currie,

spread conviction that foreign relations was meant to be essentially a federal matter, as it had been under the Articles of Confederation;³³ the conspicuous advantages possessed by the executive in terms of the secrecy and dispatch essential to the conduct of foreign affairs;³⁴ the fact that foreign affairs remained a matter of royal prerogative in Great Britain;³⁵ and the meager list of foreign affairs powers expressly given to other branches all lend support to this conclusion. The express grants of foreign affairs authority to the President, of course, were equally sparse. Madison's Helvidius papers demonstrated that he took no such latitudinarian view of presidential powers in foreign affairs;³⁶ even Hamilton's assumption that the federal government as a whole had plenary authority in this area would be hotly disputed in the debates over the controversial Aliens Act five years later.³⁷

But there was no need to adopt a broad view of the President's implicit or inherent foreign affairs powers in order to sustain the proclamation. Both Hamilton and Madison ultimately defended it as an exercise of his express constitutional duty to

Constitution in the Supreme Court: The Second Century at 231 n 140 (cited in note 28). See also Louis Henkin, *Foreign Affairs and the Constitution* 44 (Norton 1972).

³³ "It will not be disputed," wrote Hamilton, "that the management of the affairs of this country with foreign nations is confided to the Government of the [United States]." *Pacificus* No 1, in Syrett, et al, eds, 15 *The Papers of Alexander Hamilton* at 36 (cited in note 4). See also *Fong Yue Ting v United States*, 149 US 698, 711-12 (1893); Henkin, *Foreign Affairs and the Constitution* at 15 (cited in note 32) ("Foreign affairs are national affairs."). On the Confederation and its antecedents see Richard B. Morris, *The Forging of the Union, 1781-1789* 63 (Harper & Row 1987) ("Congress's right to conduct foreign relations—wartime defense and diplomacy, including the negotiation of treaties—stood unchallenged throughout the Revolutionary period."). The foreign affairs powers of the Confederation Congress, which on their face were no broader than those granted to the President and Congress under the new Constitution, are listed in Article IX, § 1 of the Articles of Confederation, reprinted in 1 Stat 4, 6 (1778).

³⁴ See *Federalist* 64 (Jay), in Clinton Rossiter, ed, *The Federalist Papers* 390, 392-93 (Mentor 1961); *Federalist* 75 (Hamilton), in Rossiter, ed, *The Federalist Papers* at 449, 451-52.

³⁵ See William M. Blackstone, 1 *Commentaries* *242-51; Sofaer, *War, Foreign Affairs and Constitutional Power* at 10-11 (cited in note 10).

³⁶ See, for example, Helvidius No 1, in Mason, et al, eds, 15 *The Papers of James Madison* at 69 (cited in note 3). See also Bruce Stein, *The Framers' Intent and the Early Years of the Republic*, 11 Hofstra L Rev 413, 511 (1982) (arguing that "the distribution of power shows clearly that the Framers intended the Congress to predominate in foreign policy").

³⁷ 1 Stat 570 (1798). Nevertheless, wrote Professor Corwin a century and a half afterward, "Hamilton's contention that the 'executive power' clause of the Constitution embraces a prerogative in the diplomatic field which is plenary except as it is curtailed by more specific clauses of the Constitution has consistently prospered." Corwin, *President: Office and Powers* at 252-53 (cited in note 19).

"take care that the laws be faithfully executed." Hamilton made this point at the end of his first *Pacificus* paper,³⁸ and Madison acknowledged it in *Helvidius*. The danger that the actions of indiscreet citizens might involve us in an undeclared war and "the duty of the Executive to preserve peace by enforcing its laws," wrote Madison, "might have been sufficient grounds" for the President's action.³⁹

In bowing to the President's obligation to enforce the laws, Madison may have given away the strongest argument against the neutrality proclamation. Of course Article II, § 3 required the President to enforce the laws. But Article I, § 8 empowered Congress, not the President, to "define and punish . . . Offenses against the Law of Nations";⁴⁰ and, with minor exceptions not here relevant,⁴¹ Congress had not done so. Thus, in threatening to prosecute individuals who offended the law of nations, the President was arguably arrogating to himself or to the courts a power the Constitution had placed in Congress.⁴²

Congress had, of course, given the federal circuit courts jurisdiction over "all crimes and offences cognizable under the authority of the United States."⁴³ The law of nations, as the Supreme Court was soon to hold, was binding on the United States of its own force.⁴⁴ Indeed the Second Circuit has recently concluded,

³⁸ See *Pacificus* No 1, in Syrett, et al, eds, 15 *The Papers of Alexander Hamilton* at 43 (cited in note 4).

³⁹ *Helvidius* No 5, in Mason, et al, eds, 15 *The Papers of James Madison* at 115 (cited in note 3). See also Joseph Story, 3 *Commentaries on the Constitution of the United States* § 1564 at 419-20 (Da Capo 1970).

⁴⁰ US Const, Art I, § 8, cl 10.

⁴¹ Sections 25-28 of the Crimes Act of 1790, 1 Stat 112, 117-18, forbade interference with foreign diplomats. See Currie, 61 U Chi L Rev at 832-33 (cited in note 6).

⁴² See Stein, 11 Hofstra L Rev at 468, 475-76 (cited in note 36).

⁴³ Judiciary Act of 1789, § 11, 1 Stat 73, 78-79. For the argument that Senate deletion of the restrictive words "and defined by the laws of the same" from an earlier draft shows that this provision was meant to embrace nonstatutory crimes, see Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv L Rev 49, 73 (1923).

⁴⁴ *Glass v The Sloop Betsey*, 3 US (3 Dall) 6, 15-16 (1794) (holding that a federal district court had jurisdiction to decide whether restitution for a vessel taken as a war prize could "be made consistently with the laws of nations and the treaties and laws of the United States"); Charles Warren, 1 *The Supreme Court in United States History* 116-18 (Little, Brown 1924). For a more celebrated, if not explicit, ruling on the same point, see *The Paquete Habana*, 175 US 677 (1900). See also Opinion of Edmund Randolph (June 26, 1792), in Benjamin F. Hall, comp, 1 *Official Opinions of the Attorneys General of the United States* 27 (Robert Farnham 1852) ("The law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land."). Accord Louis Henkin, *International Law as Law in the United States*, 82 Mich L Rev 1555, 1561 (1984).

in upholding a provision of the 1789 Judiciary Act giving federal courts jurisdiction over certain tort actions arising under international law, that the law of nations was a law of the United States within the meaning of Article III.⁴⁵ It arguably follows, as Hamilton argued in *Pacificus*, that the law of nations was one of the "laws" the President was bound to enforce under Article II even in the absence of congressional action.⁴⁶

There are at least two challenges to the application of these arguments in the context of criminal prosecution.⁴⁷ First, authority to enforce customary international law in criminal cases is difficult to reconcile with the Supreme Court's rejection of a federal common law of crimes⁴⁸ and with the concern for fair warning that helps to explain that decision.⁴⁹ Second, if offenses against the law of nations were already punishable, one wonders why Congress was given power in Article I, § 8 to proscribe them.

⁴⁵ *Filartiga v Pena-Irala*, 630 F2d 876, 885 (2d Cir 1980) (stating that "the law of nations . . . has always been part of the federal common law").

⁴⁶ *Pacificus* No 1, in Syrett, et al, eds, 15 *The Papers of Alexander Hamilton* at 43 (cited in note 4). See also Restatement (Third) of the Foreign Relations Law of the United States § 111 comment c at 43-44 (1987); Louis Henkin, *The President and International Law*, 80 Am J Intl L 930, 934 (1986) ("The President's duty to take care that the laws be faithfully executed includes not only statutes of Congress and judge-made law, but also treaties and principles of customary law."). Jefferson, in a letter to Monroe, acknowledged that those who committed hostile acts against nations with which we were at peace could be punished even in the absence of a statute. Letter from Thomas Jefferson to James Monroe (July 14, 1793), in Washington, ed, 4 *The Writings of Thomas Jefferson* at 17, 19 (cited in note 19). For the contrary view see Arthur M. Weisburd, *The Executive Branch and International Law*, 41 Vand L Rev 1205, 1233 (1988).

⁴⁷ The argument that the alien tort claims provision might be explained on the narrower ground that it implicitly federalized the law of nations or authorized the federal courts to do so (see *Textile Workers Union v Lincoln Mills*, 353 US 448, 450 (1957)), however anachronistic, would seem to be equally applicable in the criminal context on the basis of § 11 of the same statute (see note 43), which gave the courts jurisdiction over federal crimes.

⁴⁸ *United States v Hudson*, 11 US (7 Cranch) 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."). Justice Chase had taken this position on circuit as early as 1798; Judge Peters disagreed with him, and somehow the defendant was convicted. *United States v Worrall*, 28 F Cases 774, 778-80 (No 16,766) (C C D Pa 1798).

⁴⁹ See Zephaniah Swift, *A System of the Laws of the State of Connecticut* 365-66 (Byrne 1795) (arguing that punishment for common law crimes "manifestly partakes of the odious nature of an ex post facto law, and subjects a man to an inconvenience which he could not possibly foresee, or calculate upon, at the time of doing the act"); Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U Pa L Rev 1003, 1061-62 (1985). See also Article 103(2) of the German constitution (Basic Law), which forbids punishment for any act not defined as a crime in advance by written law. See Currie, *Constitution of the Federal Republic of Germany* at 130 (cited in note 19).

The Convention record suggests possible answers to the latter question. The power to "punish" offenses seems to have been included in order to make clear that the subject was one of federal rather than state concern;⁵⁰ the power to "define" them was added because of a conviction that the law of nations was "often too vague and deficient to be a rule."⁵¹ Neither of these explanations is necessarily inconsistent with the conclusion that the law of nations is binding on the courts of its own force in cases in which it can be fairly ascertained or that the President may take steps to enforce it even though Congress has not acted.⁵²

Moreover, the Supreme Court did not reject the notion of a federal common law of crimes until *United States v Hudson* in 1812,⁵³ and even then the law of nations was arguably distinguishable. *Hudson* was a garden-variety libel case, explainable in part by the legitimate fear that federal prosecution would undermine states' rights; no one argued that foreign relations should be left to the states.⁵⁴ The opinion that the law of nations was one of the "laws" the President was bound to execute was widespread in 1793, and the text of the proclamation demonstrates that Washington shared that conviction. Thus, even if he was ultimately wrong on this question, his action did not represent a claim of presidential authority to create new criminal of-

⁵⁰ See Farrand, ed, 2 *Records of the Federal Convention* at 316 (cited in note 29) (Madison arguing, in support of the provision of the same clause respecting piracy and felonies on the high seas, that there would be "neither uniformity nor stability in the law" if the matter were left to the states); Federalist 42 (Madison), in Rossiter, ed, *The Federalist Papers* at 265 (cited in note 34) (complaining that by making no provision for offenses against the law of nations the Articles of Confederation "[left] it in the power of any indiscreet member to embroil the Confederacy with foreign nations"); Story, 3 *Commentaries* §§ 1158, 1160 at 56, 57-58 (cited in note 39).

⁵¹ Farrand, ed, 2 *Records of the Federal Convention* at 615 (cited in note 29) (Gouverneur Morris).

⁵² In civil admiralty cases, for example, the federal courts have long been held to have authority to develop a general maritime law despite the fact that Congress may legislate in the same field. Compare *The Lottawanna*, 88 US (21 Wall) 558, 574-76 (1874), with *Butler v Boston & Savannah Steamship Co.*, 130 US 527, 557 (1889).

⁵³ 11 US (7 Cranch) 32 (1912). See note 48.

⁵⁴ See Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 Vand L Rev 819, 843-44 (1989). See also *United States v Coolidge*, 25 F Cases 619, 621-22 (No 14,857), (C C D Mass 1813), where Justice Story distinguished *Hudson* on the ground that federal judges had traditionally had power to enforce nonstatutory rules in admiralty. Accord James Kent, 1 *Commentaries on American Law* 318-21 (Da Capo 1971). In the Supreme Court, despite an invitation by several Justices to reexamine the question, the Attorney General declared that he considered *Hudson* controlling, and "[u]nder these circumstances" the Court elected to follow *Hudson*. *United States v Coolidge*, 14 US (1 Wheat) 415, 416-17 (1816).

fenses; he was merely asserting the right to do his duty by enforcing preexisting law.

B. The Aftermath

Proclaiming neutrality, however, was one thing; enforcing it was another. Since the law of nations had not been codified, its contours remained murky. On Washington's orders, Jefferson posed a famous list of clarifying questions to the Justices of the Supreme Court.⁵⁵ Stymied by their refusal to render advisory opinions,⁵⁶ the Cabinet then formulated a set of "regulations"⁵⁷ reflecting an executive interpretation of international law—for the President cannot fulfill his obligation to take care that the law be executed without making a preliminary determination of what it means.⁵⁸

Even before the regulations were adopted, and at Jefferson's request,⁵⁹ a U.S. citizen named Gideon Henfield was indicted in federal court for serving as prize master aboard a French privateer that preyed upon British shipping. Echoed by the Repub-

⁵⁵ Jefferson's covering letter to the Justices is reprinted in Washington, ed, 4 *The Writings of Thomas Jefferson* at 22 (cited in note 19), the questions themselves in Fitzpatrick, ed, 33 *The Writings of George Washington* at 15-19 (cited in note 5).

⁵⁶ Henry P. Johnston, ed, 3 *The Correspondence and Public Papers of John Jay* 488-89 (Knickerbocker 1891); Syrett, et al, eds, 15 *The Papers of Alexander Hamilton* at 110-11 n 1 (cited in note 4). The entire correspondence appears in Paul M. Bator, et al, eds, *Hart & Wechsler's The Federal Courts and the Federal System* 65-67 (Foundation 3d ed 1988). For discussion of this incident see Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 S Ct Rev 123, 144-55; David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888* 11-14 (Chicago 1985). The Justices' refusal was the more striking in that, only a few months before, Jay had responded (privately) to an inquiry from Hamilton by composing a draft of a neutrality proclamation for the President's use. See Letter from Alexander Hamilton to John Jay (April 9, 1793), in Harold C. Syrett, et al, eds, 14 *The Papers of Alexander Hamilton* 299-300 (Columbia 1969); Letter from John Jay to Alexander Hamilton (Apr 11, 1793), in Syrett, et al, eds, 14 *The Papers of Alexander Hamilton* at 307-10. See also Wheeler, 1973 S Ct Rev at 145 ("The general understanding during that period was that federal judges, like their English counterparts, were to render advice to the executive and legislative branches.").

⁵⁷ See Washington, ed, 9 *The Writings of Thomas Jefferson* at 440-41 (cited in note 19); Lowrie and Clarke, eds, 1 *American State Papers* at 140-41 (cited in note 19); Elkins and McKittrick, *Age of Federalism* at 352-53 (cited in note 1).

⁵⁸ See *Pacificus* No 1, in Syrett, et al, eds, 15 *The Papers of Alexander Hamilton* at 43 (cited in note 4). But see Stein, 11 *Hofstra L Rev* at 473 (cited in note 36) ("The administration's neutrality measures resemble a legislative enactment rather than a mere executive enforcement of the laws.").

⁵⁹ Despite his qualms about the proclamation itself, Jefferson enforced neutrality vigorously; he had no more desire to see the United States dragged into war than anyone else. See Thomas, *American Neutrality in 1793* at 35, 51 (cited in note 10); Dumas Malone, 3 *Jefferson and His Time (Jefferson and the Ordeal of Liberty)* 69-73 (Little, Brown 1962).

lican press, the defendant argued that he had violated no enforceable law. The court, however, disagreed. By taking part in hostilities against nations with which we were at peace, Justice Wilson instructed the jury, Henfield had offended both the law of nations and treaties declaring a state of peace, and thus he had committed an offense against the United States.⁶⁰

Henfield was nevertheless acquitted. Jefferson thought the jury had been unwilling to punish a man who had not known he was breaking the law.⁶¹ Some observers have hinted at nullification by "a pro-French jury,"⁶² others that the jury may have accepted the argument that there could be no punishment in the absence of a statute.⁶³

In any event, the acquittal of Henfield dealt a severe blow to the policy of neutrality.⁶⁴ Although Washington accepted the view of the majority of his Cabinet that there was no need to call Congress into special session,⁶⁵ he made neutrality his first order of business when the Third Congress met in December 1793, informing the lawmakers of what he had done to preserve the peace and urging them "to extend the legal code and the jurisdiction of the Courts of the United States to many cases which,

⁶⁰ *Henfield's Case*, 11 F Cases 1099, 1105-09 (No 6,360) (C C D Pa 1793). See also Chief Justice Jay's similar charge to a grand jury in the District of Virginia, reprinted in 11 F Cases at 1099-1105, and Johnston, ed, 3 *The Correspondence and Public Papers of John Jay* at 478-85 (cited in note 56); Julius Goebel, Jr., 1 *History of the Supreme Court of the United States* 624-27 (Macmillan 1971). Attorney General Randolph, in an opinion rendered to the Secretary of State, had concluded that Henfield's actions were punishable as violations of the peace treaties and of "the common law . . . of disturbing the peace." Lowrie and Clarke, eds, 1 *American State Papers* at 152 (cited in note 19). Article VI, § 2 made treaties, according to Randolph, the law of the land; whether their peace provisions should be construed as self-executing was a more difficult matter. See Henkin, *Foreign Affairs and the Constitution* at 156-61 (cited in note 32).

⁶¹ See Letter from Thomas Jefferson to Gouverneur Morris (Aug 16, 1793), in Washington, ed, 4 *The Writings of Thomas Jefferson* at 31, 38 (cited in note 19), reprinted in *Henfield's Case*, 11 F Cases at 1123 n 7.

⁶² Elkins and McKittrick, *Age of Federalism* at 353 (cited in note 1). See also Miller, *Federalist Era* at 135 (cited in note 2) (describing the jury as "strongly predisposed in favor of France").

⁶³ See Jules Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 Harv Intl L J 1, 14 (1983); Thomas, *American Neutrality in 1793* at 173 (cited in note 10).

⁶⁴ See John Marshall, 5 *The Life of George Washington, Commander in Chief of the American Forces and First President of the United States* 358-60 (AMS 1969).

⁶⁵ Jefferson had favored a special session, in part "[b]ecause several Legislative provisions are wanting to enable the government to steer steadily through the difficulties daily produced by the war of Europe, and to prevent our being involved in it by the incidents and perplexities to which it is constantly giving birth." Opinion relative to the propriety of convening the Legislature at an earlier period than that fixed by law (Aug 4, 1793), in Washington, ed, 9 *The Writings of Thomas Jefferson* at 441-42 (cited in note 19).

though dependent on principles already recognised, demand some further provisions."⁶⁶ Without recorded objection each House promptly praised the President for issuing his proclamation,⁶⁷ and Congress prescribed punishment for a number of crimes including those with which Henfield had been charged⁶⁸—in exercise of its indisputable authority "to define and punish . . . offenses against the law of nations."⁶⁹

⁶⁶ 4 Annals of Cong 10-11 (Dec 3, 1793).

⁶⁷ 4 Annals of Cong 17-18, 138-39 (Dec 6, 9, 1793). As early as August, Jefferson, recognizing the breadth of popular support for neutrality, had advised Madison that congressional Republicans should endorse neutrality without quibbling over who had the power to proclaim it. Letter from Thomas Jefferson to James Madison (Aug 11, 1793), in Mason, et al, eds, 15 *The Papers of James Madison* at 56-57 (cited in note 3).

⁶⁸ Act of June 5, 1794, 1 Stat 381 ("Neutrality Act"). Despite Jefferson's admonition (see note 67), support for the legislation was far from unanimous; the House divided sharply over many details of the bill, and Vice President Adams had to break a tie to pass it in the Senate. See 4 Annals of Cong 68, 743-57 (Mar 13, 1794; May 31-Jun 2, 1794). The current version of this statute, originally intended to be temporary, can be found at 18 USC §§ 958-67 (1988 & Supp 1993).

On March 24, 1794, Washington had issued a second proclamation warning that the enlistment of troops in Kentucky to attack the territories of a friendly power (Spain) was "contrary to the laws of nations" and calling on "courts, magistrates, and other officers" to suppress it. George Washington, Proclamation, in Richardson, ed, 1 *Messages and Papers of the Presidents* at 157-58 (cited in note 10). Since the Neutrality Act had not yet been adopted, this proclamation too was based on the theory that the President had authority to enforce the unwritten law of nations. For a brief sketch of the background of this proclamation, see Thomas, *American Neutrality in 1793* at 177-87 (cited in note 10).

⁶⁹ See *United States v Arjona*, 120 US 479, 488 (1887) (dictum); Letter from James Madison to Thomas Jefferson (Apr 2, 1798), in David B. Mattern, et al, eds, 17 *The Papers of James Madison* 104-05 (Virginia 1991). For the argument that the Neutrality Act went beyond the existing requirements of the law of nations, see Lobel, 24 Harv Intl L J at 16-20 (cited in note 63); for the view that the true basis of the statute lies in Congress's war powers, see id at 28.

Other issues of presidential authority over foreign affairs were debated within the executive branch during the same period. In April, 1793, as it approved Washington's neutrality proclamation, the Cabinet unanimously agreed that he should receive the new French minister, Edmond Genêt. Although Hamilton argued that to receive Genêt was to recognize the new French government, no one suggested consulting Congress—though Madison was soon to argue that the President's authority to "receive Ambassadors and other public Ministers," US Const, Art II, § 3, was purely ceremonial. See Ana of May 6, 1793, in Catanzariti, et al, eds, 25 *The Papers of Thomas Jefferson* at 666 (cited in note 12), also reprinted in Washington, ed, 9 *The Writings of Thomas Jefferson* at 142-43 (cited in note 19); Helvidius No 3, in Mason, et al, eds, 15 *The Papers of James Madison* at 95-98 (cited in note 3), quoting Federalist 69 (Hamilton), in Rossiter, ed *The Federalist Papers* at 420; Thomas, *American Neutrality in 1793* at 68-77 (cited in note 10); Corwin, *President: Office and Powers* at 213 (cited in note 19); Miller, *Federalist Era* at 129 (cited in note 2), citing Letter from Thomas Jefferson to Gouverneur Morris (Mar 12, 1793), in Catanzariti, et al, eds, 25 *The Papers of Thomas Jefferson* at 367 (noting that Jefferson had already instructed Gouverneur Morris to deal with the new French government).

After receiving written opinions from the Cabinet, Washington also rejected Hamilton's suggestion that the change of government had "suspended" U.S. obligations under the 1778 treaties with France, thus avoiding the difficult constitutional question

II. DEFENSE

At the same time President Washington informed the House and Senate of what he had done to keep the Nation out of war, he urged them to strengthen the national defenses. For even the best efforts to stay out of trouble might not succeed, and in any event, "[i]f we desire to avoid insult, we must be able to repel it; if we desire to secure peace, . . . it must be known that we are at all times ready for war."⁷⁰ Congress took its time in responding, but ultimately it enacted a package of defense measures that illuminated a number of aspects of congressional war powers.

A. The Scope of Federal Authority

Pursuant to its explicit authority "to raise and support Armies,"⁷¹ Congress provided for the fortification of harbors,⁷² the establishment of arsenals and armories,⁷³ and the enlistment of

whether the President alone could terminate a treaty. See Ana of Apr 18, 1793, in Catanzariti, et al, eds, 25 *The Papers of Thomas Jefferson* at 666, also reprinted in Washington, ed, 9 *The Writings of Thomas Jefferson* at 143; Pacificus No 1, in Syrett, et al, eds, 15 *The Papers of Alexander Hamilton* at 41-42 (cited in note 4); Helvidius No 3, in Mason, et al, eds, 15 *The Papers of James Madison* at 98-101; Thomas, *American Neutrality in 1793* at 54-66; *Goldwater v Carter*, 444 US 996 (1979). Finally, when it became necessary to ask for the recall of the impossible Genêt for continually flouting our neutrality, it was Washington, as arbiter of our diplomatic relations (again presumably under the authority to receive foreign envoys), who made the decision (on the basis of a unanimous Cabinet recommendation), and Jefferson who willingly carried it out, without suggesting that Congress should have any say in the matter. See Ana of Aug 1, 1793, in Washington, ed, 9 *The Writings of Thomas Jefferson* at 162; Corwin, *President: Office and Powers* at 213; Miller, *Federalist Era* at 131-39; Elkins and McKittrick, *Age of Federalism* at 351-52 (cited in note 1).

⁷⁰ 4 Annals of Cong 12 (Dec 3, 1793).

⁷¹ US Const, Art I, § 8, cl 12.

⁷² Act of Mar 20, 1794, 1 Stat 345. Section 3 of the statute authorized the President to accept any land ceded for this purpose by a state under Art I, § 8, cl 17, which expressly mentions "Forts, Magazines, Arsenals, [and] dock-Yards." See Act of Mar 20, 1794 § 3, 1 Stat at 346. Recognizing that national defenses ought not depend on the will of any individual state, Congress provided in the same section authority to acquire the necessary land by purchase, indicating an understanding that clause 17 was not meant to limit the authority implicit in other provisions, but only to provide a means for acquiring the power of "exclusive legislation" over areas acquired for the stated purposes. See *Fort Leavenworth R.R. v Lowe*, 114 US 525, 530 (1885).

A different question of the meaning of clause 17 was raised when the President called Congress's attention to the fact that several states had qualified their cessions of lighthouses to the United States by reserving the right to serve process within the ceded areas. 4 Annals of Cong 36 (Jan 21, 1794). Congress approved these reservations, suggesting that it read the constitutional provision giving it the power of "exclusive legislation" over such areas not to require it to exclude state authority entirely. Act of Mar 2, 1795, 1 Stat 426. Compare Currie, 61 U Chi L Rev at 848 (cited in note 6).

⁷³ Act of Apr 2, 1794, 1 Stat 352.

additional troops.⁷⁴ Similarly, although no Navy Department was yet established,⁷⁵ Congress laid the foundations for the Navy by authorizing the construction or purchase of six frigates⁷⁶ and ten galleys⁷⁷ under its power "[t]o provide and maintain a Navy."⁷⁸ In addition, Congress authorized the President to require the executives of the various states to hold a specified number of militiamen "in readiness to march at a moment's warning,"⁷⁹ presumably as an incident to employing them, under the authority provided two years earlier, to repel any possible invasion.⁸⁰

Less obvious perhaps in their constitutional bases were two further measures taken by the Third Congress: a ban on arms exports⁸¹ and an embargo on the departure of ships bound for foreign ports.⁸² In the literal sense both were regulations of foreign commerce, unless one is prepared to accept a distinction between regulations and prohibitions that is more formal than substantial⁸³ and that cannot be justified in terms of the known purposes of the Commerce Clause.⁸⁴ The protective tariff provi-

⁷⁴ Act of May 9, 1794, 1 Stat 366. See also Act of Mar 3, 1795, 1 Stat 430. In a paragraph largely devoted to improvement of the militia, Washington alluded to the desirability of providing "an opportunity for the study of those branches of the military art which can scarcely ever be attained by practice alone." 4 Annals of Cong 12 (Dec 3, 1793). Jefferson had advised the President a few days earlier that Congress had no authority to establish a military academy, though it seems preposterous to deny that the power to raise and support armies includes the power to train them. See Ana of Nov 23, 1793, in Washington, ed, 9 *The Writings of Thomas Jefferson* at 182 (cited in note 19). Congress did not act on Washington's suggestion; it was not until 1802 that the academy at West Point was founded, and then on the initiative of President Jefferson. See Act of Mar 16, 1802 § 27, 2 Stat 132, 137; James Ripley Jacobs, *The Beginning of the U.S. Army, 1783-1812* 280, 288-89 (Princeton 1947).

⁷⁵ Earlier in the session Madison had bravely opposed the creation of a Navy on the ground that it would be cheaper to go on paying tribute to the Barbary pirates. 4 Annals of Cong 433 (Feb 6, 1794). See also *id* at 434 (Rep Baldwin); Leonard White, *The Federalists: A Study in Administrative History* 156-57 (Macmillan 1948).

⁷⁶ Act of Mar 27, 1794, 1 Stat 350.

⁷⁷ Act of June 5, 1794, 1 Stat 376.

⁷⁸ US Const, Art I, § 8, cl 13.

⁷⁹ Act of May 9, 1794 § 1, 1 Stat 367, 367.

⁸⁰ See Act of May 2, 1792 § 1, 1 Stat 264, 264; US Const, Art I, § 8, cl 15. The modern eye may be struck by the fact that this statute imposed affirmative obligations on state officers, but Congress had done so before in the militia context, and this time too there was no constitutional objection.

⁸¹ Act of May 22, 1794, 1 Stat 369.

⁸² The embargo was first imposed for thirty days and then extended for thirty-seven more. Act of Mar 26, 1794, 1 Stat 400; Act of Apr 18, 1794, 1 Stat 401.

⁸³ Every regulation prohibits something, and every prohibition of one aspect of commerce is a regulation of commerce as a whole.

⁸⁴ See Currie, 61 U Chi L Rev at 781-82 (cited in note 6). Madison emphasized those purposes in moving to protect our foreign commerce through the enactment of retaliatory

sions enacted in 1789 had established without dissent that the power to regulate commerce included the power to restrict it.⁸⁵ Moreover, both the ban on arms exports and the embargo could be defended as exercises of the war powers, the former to ensure an adequate supply of arms for our own defense⁸⁶ and both to prevent incidents that belligerent nations might view as cause for war.⁸⁷ What was significant, as so often is the case, was the nonbarking dog. Though the Federalists were to scream constitu-

tariff, tonnage, and trade restrictions against Britain, as Jefferson had recently proposed. See 4 Annals of Cong 155-58, 209-11 (Jan 3, 14, 1794); Report of the Secretary of State on the Privileges and Restrictions on the Commerce of the United States in Foreign Countries, in Lowrie and Clarke, eds, 1 *American State Papers* at 300 (cited in note 19); Elkins and McKittrick, *Age of Federalism* at 375-88 (cited in note 1).

Madison would have used the resulting revenue to indemnify victims of British depredations. 4 Annals of Cong 156, 157 (Jan 3, 1794). Others advocated indemnity as well. See 4 Annals of Cong 535 (Mar 27, 1794) (Rep Dayton); 4 Annals of Cong 614 (Apr 30, 1794) (Rep Goodhue). No one challenged Congress's authority to provide it. Madison defended indemnity on the basis of the law of nations without saying why the law of nations was a source of congressional power; he might have argued it was necessary and proper to the encouragement of commerce. Compare the arguments for indemnity of officers and others injured in the Whiskey Rebellion, which was defended as a means of encouraging support for suppressing the insurrection and thus as necessary and proper to enforcing the laws. See 4 Annals of Cong 984-87, 989-1002 (Dec 16-17, 19, 1794); see also text accompanying note 136.

Jonathan Dayton of New Jersey, who would have established a fund for indemnification by sequestering debts owed to British subjects, defended his proposal as part of the overall defense package. 4 Annals of Cong 535 (Mar 27, 1794). Elias Boudinot, also of New Jersey, who opposed this measure on policy grounds, conceded that the power to sequester debts in reprisal for hostile acts was both recognized by the law of nations and implicit in the greater power to declare war. *Id.* at 537. See Miller, *Federalist Era* at 151-52 (cited in note 2) (adding that Hamilton "did not doubt that sequestration would lead to war . . . in the worst of causes—to enable debtors to escape from paying their creditors their just dues").

⁸⁵ See Currie, 61 U Chi L Rev at 781-82 (cited in note 6).

⁸⁶ The title of the Act described one of its purposes as "encouraging the Importation" of arms, and § 5 removed import duties on arms for a period of two years. See Act of May 22, 1794, 1 Stat at 370.

⁸⁷ Representative Sedgwick, who proposed the embargo, defended it as a means of preventing Great Britain from supplying her Caribbean possessions in the event of an attack on the French West Indies. See 4 Annals of Cong 500-04 (Mar 12, 1794). In 1793, however, Jefferson had denied that either the law of nations or U.S. policy required a ban on selling arms to belligerents; it was enough that the neutrality proclamation had warned arms traders that the Government would not protect them. See Letter from Thomas Jefferson to George Hammond (May 15, 1793), in H.A. Washington, ed, 3 *The Writings of Thomas Jefferson* 557-59 (Riker 1854); Thomas, *American Neutrality in 1793* at 247-50 (cited in note 10). See also Miller, *Federalist Era* at 154 (cited in note 2) (arguing that the embargo was "[i]ntended to prevent the capture of American ships by British cruisers").

tional objections to Jefferson's embargo in 1807,⁸⁸ nobody even hinted that an embargo was beyond Congress's power in 1794.⁸⁹

In order to finance this array of defense measures⁹⁰ Congress increased tariffs on specified imports⁹¹ and imposed excises on retailers of wines and foreign spirits,⁹² on snuff and refined sugar,⁹³ and on auction sales.⁹⁴ There was no serious constitutional objection to any of these measures. Tariffs had been enacted in 1789, and the new excises were indistinguishable from that assessed on whiskey producers in 1791.⁹⁵

A levy of one to ten dollars to be paid by the owners of carriages, attacked as a "direct" tax not apportioned among the states according to population as required by Article I, §§ 2 and 9, provoked a significant debate over the meaning of that concededly vague constitutional term. Samuel Dexter of Massachusetts and John Nicholas of Virginia agreed that (as Dexter put it) "all taxes are direct which are paid by the citizen without being recompensed by the consumer" but differed as to whether the carriage tax could be passed on.⁹⁶ William Vans Murray of Maryland thought the tax on carriages no different from that previously imposed on stills;⁹⁷ Samuel Smith of Maryland responded that, unlike carriages, stills were taxed only when they were used.⁹⁸ Theodore Sedgwick of Massachusetts anticipated the ar-

⁸⁸ See *United States v The William*, 28 F Cases 614 (No 16,700) (D Mass 1808) (upholding the embargo on both commerce and war-power grounds); Warren, 1 *Supreme Court in United States History* at 341-51 (cited in note 44).

⁸⁹ Alexander White, who had recently left Congress, defended the embargo as being "connected with War as well as with commerce, . . . Congress having the sole power in both these cases, their right to lay an Embargo will hardly be disputed." Letter from Alexander White to James Madison (Mar 30, 1794), in Mason, et al, eds, 15 *The Papers of James Madison* at 298 (cited in note 3).

⁹⁰ House members whined so over the inequity of each proposal for new taxes that Representative Dexter was moved at one point to remind his colleagues that "[i]f we have the benefits of Government, we must pay for them." 4 *Annals of Cong* 628 (May 2, 1794).

⁹¹ Act of June 7, 1794, 1 Stat 390.

⁹² Act of June 5, 1794, 1 Stat 376.

⁹³ Act of June 5, 1794, 1 Stat 384.

⁹⁴ Act of June 9, 1794, 1 Stat 397.

⁹⁵ See Currie, 61 U Chi L Rev at 785-88 (cited in note 6).

⁹⁶ 4 *Annals of Cong* 646 (May 6, 1794). See also Letter of Alexander White to James Madison (May 19, 1794), in Mason, et al, eds, 15 *The Papers of James Madison* at 335-36 (cited in note 3) (agreeing with Nicholas that it could not be); St. George Tucker, ed, 1 *Blackstone's Commentaries* 233-34 (Birch & Small 1803) (concluding on this basis that a tax on wheels would be indirect if assessed against the wheelwright but not if assessed against the carriage owner).

⁹⁷ 4 *Annals of Cong* 653 (May 7, 1794).

⁹⁸ Id. See also 4 *Annals of Cong* 730 (May 29, 1794) (Rep Ames) (insisting that "the [carriage] duty falls not on the possession, but the use").

guments that would dominate the opinions of the several Justices when the Supreme Court upheld the tax: "[I]t would astonish the people of America to be informed that they had made a Constitution by which pleasure carriages and other objects of luxury were excepted from contributing to the public exigencies," and "as several of the States had few or no carriages, no such apportionment could be made."⁹⁹ The tax was enacted;¹⁰⁰ the debates do not reveal a consensus as to why it was not "direct."

B. The President and Congress

More important at the time than the questions of federalism raised by the defense measures taken by the Third Congress were those of the separation of powers.

Representative Sedgwick had originally proposed that the decision whether to impose an embargo be left to the President: "On great occasions, confidence must be reposed in the Executive."¹⁰¹ Congress's decision to impose the embargo by joint resolution suggests a preference for reserving to itself the basic policy decision. Yet before adjourning, Congress delegated to the President authority to lay a new embargo during the legislative recess "whenever, in his opinion, the public safety shall so require" and "under such regulations as the circumstances . . . may require,"¹⁰² and no one is reported as suggesting any constitutional problem with this measure.¹⁰³ Similarly, although the number of galleys the President could construct or acquire was

⁹⁹ 4 Annals of Cong 644-45 (May 6, 1794). See also *Hylton v United States*, 3 US (3 Dall) 171 (1796); Currie, *Constitution in the Supreme Court: The First Hundred Years* at 31-37 (cited in note 56). A direct tax, which several members assumed would fall upon land, was rejected on policy grounds. See 4 Annals of Cong 640-42, 647 (May 5, 6, 1794).

¹⁰⁰ Act of June 5, 1794, 1 Stat 373.

¹⁰¹ 4 Annals of Cong 503 (Mar 12, 1794).

¹⁰² Act of June 4, 1794, 1 Stat 372. The discretion given by this statute was far broader than that upheld in the famous case of *The Cargo of the Brig Aurora v United States*, 11 US (7 Cranch) 382 (1813), where the Court struggled to demonstrate that, in determining whether England or France had ceased violating our neutrality, the President was merely making a finding of fact. See Currie, *Constitution in the Supreme Court: The First Hundred Years* at 118-19 (cited in note 56).

¹⁰³ Alexander White, noting the inconvenience of requiring passage of a statute when Congress might not be in session, wrote Madison that he saw "no objection" to authorizing the President to lay an embargo "under proper regulations." Letter from Alexander White to James Madison (Mar 30, 1794), in Mason, et al, eds, 15 *The Papers of James Madison* at 297-98 (cited in note 3). Along the same lines, just before its final adjournment the Third Congress empowered the President to permit the export of arms "in cases connected with the security of the commercial interest of the United States," Act of Mar 3, 1795, 1 Stat 444, despite the statute it had earlier enacted. See text accompanying note 81.

limited to ten after Madison insisted the statute must specify a number,¹⁰⁴ no one is recorded as having objected to the fact that the President was given virtually unlimited discretion to resolve the more fundamental question whether to build them at all, the statute authorizing him to do so if it "shall appear to him necessary for the protection of the United States."¹⁰⁵

The absence of objection was the more notable because, just a few days before, the House had emphatically rejected a bill that would have authorized but not required the President to raise an additional ten thousand troops after William Branch Giles of Virginia¹⁰⁶ and Madison had complained that it effectively transferred to the President Congress's power "to raise . . . armies"¹⁰⁷—an especially dangerous delegation, Madison added, in view of the Framers' clear decision to separate the power to raise troops from the power to command them.¹⁰⁸

Madison thus succeeded in preventing a delegation to the President of discretion whether or not to raise troops, but not in his further effort to provide that the troops that were raised "should only be employed for the protection of the frontier."¹⁰⁹ He did not argue that the Constitution limited the discretion the President could be given in determining how the troops should be employed, and indeed one can make the argument that his proposal would impermissibly have *limited* the President's constitutional authority as Commander in Chief.¹¹⁰ The same policy of separation that Madison invoked to deny that the President could raise troops, combined with the Framers' patent desire to avoid the inefficiencies and dangers of entrusting tactical and strategic decisions to a committee,¹¹¹ suggests that Congress infringes on the President's powers if it attempts to exercise the power of command. The counterargument is that defining the purposes for

¹⁰⁴ 4 Annals of Cong 762 (June 3, 1794). See also 4 Annals of Cong 764 (June 4, 1794) (Rep Dayton). Neither Madison nor Dayton expressly invoked the Constitution.

¹⁰⁵ Act of June 5, 1794 § 1, 1 Stat at 376.

¹⁰⁶ Giles was a leading representative of the developing Republican party. Richard E. Welch, Jr., *Theodore Sedgwick, Federalist: A Political Portrait* 134 (Weslyan 1965).

¹⁰⁷ 4 Annals of Cong 738 (May 30, 1794).

¹⁰⁸ Id. See also Madison's Political Observations (Apr 20, 1795), in Mason, et al, eds, 15 *The Papers of James Madison* at 511, 521 (cited in note 3).

¹⁰⁹ His proposed amendment to this effect received only twenty-six votes. See 4 Annals of Cong 1221 (Feb 13, 1795).

¹¹⁰ See US Const, Art II, § 2. This argument was apparently not made either; both sides treated the question as one purely of policy.

¹¹¹ "Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand." *Federalist* 74 (Hamilton), in Rossiter, ed, *The Federalist Papers* at 447 (cited in note 34).

which troops can be used is not a question of military tactics or strategy, but rather one of those basic policy decisions reserved to Congress by the various grants of legislative war powers. Arguably the question whether to employ troops is implicit in the question whether to fight, which Congress makes under its authority to declare war; arguably the power to raise troops includes authority to determine the purposes for which they may be used.

Yet another kind of separation-of-powers objection was raised when Abraham Clark of New Jersey asked the House to go beyond the embargo to forbid the importation of any articles produced in Great Britain or Ireland.¹¹² Defended as a classic regulation of commerce, which it was,¹¹³ this "nonintercourse" proposal was assailed as an invasion of the power of the President and Senate to make treaties, for the preamble of Clark's resolution revealed that its purpose was to put economic pressure on Britain to make reparations for violations of our neutral rights and to evacuate forts within our territory still occupied in defiance of the 1783 peace treaty.¹¹⁴ President Washington, as Sedgwick observed, had just sent a special envoy to England to negotiate on those very issues; to ban imports until Britain yielded on those points would dictate to the President what treaty to make.¹¹⁵

If this argument sounds familiar, it is because it is essentially the converse of the arguments the friends of France had made against the neutrality proclamation.¹¹⁶ By committing us to peace, it was then urged, the President obstructed Congress's authority to declare war; by cutting off trade, it was now insisted, Congress would impede the President's exercise of the treaty power.

¹¹² 4 Annals of Cong 561 (Apr 7, 1794). Passed by the House, the proposal was defeated by the Vice President's tie-breaking vote in the Senate. See 4 Annals of Cong 604-05 (Apr 24, 1794) (House); 4 Annals of Cong 89-90 (Apr 28, 1794) (Senate); Miller, *Federalist Era* at 154 (cited in note 2).

¹¹³ See Federalist 11, 22 (Hamilton), in Rossiter, ed, *The Federalist Papers* at 84-91, 143-45 (cited in note 34) (defending the grant of authority over foreign commerce as a means of enabling Congress to retaliate for foreign commercial restrictions).

¹¹⁴ 4 Annals of Cong 561 (Apr 7, 1794). Washington had complained of interference with our commerce by both Britain and France in a letter to Congress at the beginning of the session. 4 Annals of Cong 15 (Dec 5, 1793).

¹¹⁵ 4 Annals of Cong 569-70 (Apr 10, 1794). See also 4 Annals of Cong 584 (Apr 14, 1794) (Rep William Smith); 4 Annals of Cong 589 (Apr 14, 1794) (Rep Dexter). Since the President had already appointed a negotiator, opponents of the measure argued, Congress had no right to interfere. 4 Annals of Cong 600 (Apr 18, 1794).

¹¹⁶ See text accompanying notes 12-19.

One can distinguish the cases, if one likes, on the ground that in issuing his proclamation, President Washington disclaimed any intention of committing the country to anything more than an observance of its international obligations pending Congress's decision whether or not to declare war. On a more fundamental plane, however, both incidents demonstrate the perspicacity of Hamilton's insight in defense of the proclamation: in many matters involving foreign relations, the President and Congress have overlapping powers.¹¹⁷ Congress's authority to regulate commerce is as explicit as the President's authority to negotiate treaties. What one may do may frustrate the exercise of authority by the other. But there is no warrant in the Constitution for giving precedence to either; this is one of those situations in which, for better or worse, the Framers knowingly sacrificed coherence and efficiency in the interest of separation of powers.

III. ST. DOMINGO

The most important spending controversy during the Third Congress concerned appropriations for the relief of refugees from disturbances in the French colony on the West Indian island of Hispaniola, known in the debates by the name of St. Domingo.

A number of French citizens had landed in Baltimore in the last days of 1793,¹¹⁸ where they had been supported by private and state contributions. Responding to a petition for federal assistance, a House committee urged that federal funds be made available,¹¹⁹ and they were,¹²⁰ but not until after yet another debate on the limits of the power to spend.

Virtually everyone wanted to help. Nicholas, doubting that Congress had authority "to bestow the money of their constituents on an act of charity," declared his willingness to tell the voters he had exceeded his powers and throw himself on their mercy.¹²¹ "In a case of this kind," Clark trumpeted, "we were not to be tied up by the Constitution."¹²²

¹¹⁷ *Pacificus No 1*, in Syrett, et al, eds, 15 *The Papers of Alexander Hamilton* at 40-42 (cited in note 4).

¹¹⁸ See 4 *Annals of Cong* 169-70 (Jan 10, 1794) (Rep Samuel Smith).

¹¹⁹ See Committee Report (Jan 10, 1794), in Lowrie and Clarke, eds, 1 *American State Papers* at 308 (cited in note 19).

¹²⁰ Act of Feb 12, 1794, 6 Stat 13.

¹²¹ 4 *Annals of Cong* 170, 172 (Jan 10, 1794).

¹²² 4 *Annals of Cong* 350 (Jan 28, 1794). See also William Smith's argument, in opposition to the resolutions proposed by Representative Giles during the Second Con-

Elias Boudinot of New Jersey, always an exponent of broad federal authority, trotted out the General Welfare Clause once again.¹²³ But although he professed to think it obvious that relief of Caribbean refugees came within that provision, it was not; even so latitudinarian an interpreter as Justice Story would later express doubt that the "general welfare of the United States" would be served by expenditures for building foreign palaces or "for propagating Mahometanism among the Turks."¹²⁴

As in the recent codfish controversy,¹²⁵ Madison found a way out of the dilemma that would enable Congress to satisfy the obligations of fraternité without "establishing a dangerous precedent, which might hereafter be perverted to the countenance of purposes very different from those of charity."¹²⁶ The United States owed money to France for assistance provided during the Revolution; Congress should authorize relief for the refugees in partial payment of this obligation.¹²⁷ That is what Congress did,¹²⁸ and thus the question of the meaning of the General Welfare Clause was avoided once again.¹²⁹

gress, respecting the right to ignore limitations in appropriation laws in an emergency. 3 Annals of Cong 901-02 (Feb 28, 1793).

¹²³ 4 Annals of Cong 172 (Jan 10, 1794).

¹²⁴ Joseph Story, 2 *Commentaries on the Constitution of the United States* § 919 at 382 (Da Capo 1970).

¹²⁵ In response to pleas for relief from New England cod fisherman economically pressed by foreign and domestic duties and competitors' "bounties" (subsidies), the Senate in early 1791 sent to the House a bill providing for the payment of a bounty—based on the size of the boats and the quantity of fish caught—to owners of vessels employed in cod fisheries. Several representatives, including Madison, objected that Congress had no authority to grant bounties, but others replied that Congress could do so under the taxing, spending, and commerce powers. In the end, Madison broke the impasse: while disavowing bounties as both dangerous and unnecessary, he suggested that the subsidy be considered a reimbursement for the domestic duties extracted from the cod fishermen. Thus Congress was merely paying a debt, not granting a bounty. His position satisfied both sides—the fishermen got their money, and the statute provided for an "allowance," rather than a bounty. See Currie, 90 *Nw U L Rev* (cited in note 9).

¹²⁶ 4 Annals of Cong 170 (Jan 10, 1794).

¹²⁷ 4 Annals of Cong 170-71 (Jan 10, 1794). One of the express purposes for which taxes may be laid and collected, of course, is "to pay the Debts . . . of the United States." US Const, Art I, § 8, cl 1.

¹²⁸ See Act of Feb 12, 1794 § 3, 6 Stat at 13 ("[T]he amount thereof shall be provisionally charged to the debit of the French Republic, subject to such future arrangements as shall be made thereon, between the government of the United States and the said Republic.").

¹²⁹ A month later, following the precedent of subsidy by tax forgiveness established in the codfish case, see note 125, Congress also forgave the tonnage duties assessed on the ship that had brought the refugees to this country. Act of Mar 7, 1794, 1 Stat 342.

IV. INSURRECTION

Congress was not in session in August 1794, when resistance to the liquor excise in western Pennsylvania became ugly. Pursuant to the authority Congress had given him two years before,¹³⁰ President Washington recited Justice Wilson's finding that ordinary processes were insufficient to enforce the laws, ordered the insurgents to disperse, and gave notice that he was taking steps to call out the militia.¹³¹ When this warning was ignored, he marched the militia to the rebellious counties in person, and the insurrection melted away before him.¹³²

By the time Congress reassembled in November it was all over. The President told Congress what he had done.¹³³ Congress commended him¹³⁴ and appropriated money to cover the cost of the expedition,¹³⁵ which he had undertaken in the reasonable expectation that Congress would pay for it later. Congress also authorized the expenditure of \$8,500 to indemnify federal officers and citizens who had supported them for property destroyed by the mob—an expenditure obviously necessary and proper, like the officers' salaries, to the execution of the laws.¹³⁶

¹³⁰ Act of May 2, 1792 § 1, 1 Stat at 264.

¹³¹ See George Washington, Proclamation, in Richardson, ed, 1 *Messages and Papers of the Presidents* at 158-60 (cited in note 10). As early as 1792 the President had warned against obstruction of the laws and directed federal officers to enforce them. *Id.* at 124-25.

¹³² See Washington's proclamation of Sept 25, 1794, in Richardson, ed, 1 *Messages and Papers of the Presidents* at 161-62 (cited in note 10), announcing that the militia was on its way. The story is told concisely in Miller, *Federalist Era* at 155-62 (cited in note 2), and in Sharp, *American Politics in the Early Republic* at 93-98 (cited in note 1), and less so in Elkins and McKittrick, *Age of Federalism* at 461-83 (cited in note 1). The most complete account can be found in Thomas P. Slaughter, *The Whiskey Rebellion: Frontier Epilogue to the American Revolution* (Oxford 1986).

¹³³ 4 Annals of Cong 787-91 (Nov 19, 1794).

¹³⁴ See 4 Annals of Cong 794 (Nov 21, 1794) (Senate); 4 Annals of Cong 947-49 (Nov 28, 1794) (House). At the President's request Congress authorized him to call up additional militiamen to prevent a new outbreak of violence, Act of Nov 29, 1794, 1 Stat 403, since the obligations of those initially summoned were about to expire. See 4 Annals of Cong 790 (Nov 19, 1794).

¹³⁵ Act of Dec 31, 1794, 1 Stat 404. Gallatin thought Washington should have called a special session of Congress, since the funds he used had been appropriated for the army, not for the militia. *A Sketch of the Finances of the United States*, in Henry Adams, ed, 3 *The Writings of Albert Gallatin* 69, 117-18 (Antiquarian 1960). See the discussion of this problem in connection with the Giles Resolutions in Currie, 90 *Nw U L Rev* (cited in note 9).

¹³⁶ Act of Feb 27, 1795, 1 Stat 423. See 4 Annals of Cong 996 (Dec 19, 1794) (Rep Hartley) ("When the officers know that they are to be protected in their persons and property—when the *posse comitatus* are informed that they are to be regarded in like manner—we may expect energy in the execution of the laws."). Congress also amended the law defining the occasions on which the President could call out the militia, eliminating some of the restrictions enacted in 1792. Act of Feb 28, 1795, 1 Stat 424; see Currie, 90

The President sensibly pardoned all who had taken part in the uprising,¹³⁷ including—in accord with the understanding expressed in the Philadelphia Convention—those who had not yet been put on trial.¹³⁸

Thus the Whiskey Rebellion came to a happy end; the new Government had survived its first crisis, to nearly everyone's satisfaction, and it had acted in full compliance with the Constitution. Along the way, however, the President had made one serious mistake. In his otherwise measured address to Congress, he had accused "certain self-created societies" of encouraging the insurrection.¹³⁹

Everyone knew what "societies" the President had in mind: the Democratic Societies, sometimes disparagingly called Jacobin Clubs, which had sprung up all over the country in the enthusi-

Nw U L Rev (cited in note 9). Washington's plea that Congress also strengthen the provisions respecting organization of the militia, however, fell on deaf ears despite powerful arguments by Sedgwick and others in favor of a vigorous exercise of congressional authority. See 4 Annals of Cong 791 (Nov 19, 1794) (Washington's plea); 4 Annals of Cong 1067-71 (Jan 9, 1795) (arguments by Sedgwick and others). The principal problem, spelled out in a report from the Secretary of War, was that Congress had required militiamen to arm themselves, but had provided no penalties to enforce the requirement, as even Giles conceded it had power to do. See 4 Annals of Cong 1396-97 (Dec 10, 1794) (report of Secretary of War); 4 Annals of Cong 1071 (Jan 9, 1795) (Giles's concession).

¹³⁷ See George Washington, Proclamation, in Richardson, ed, 1 *Messages and Papers of the Presidents* at 161-62 (cited in note 10). In his proclamation Washington had branded the insurrection as "treason," id at 159, and two of the insurgents were convicted of that offense after Justice Paterson charged the jury that if the object of the revolt was "to suppress the excise offices, and to prevent the execution of an act of congress," it met the constitutional definition of treason. *United States v Mitchell*, 26 F Cases 1277, 1281 (No 15,788) (C C D Pa 1795). As an original matter there seems to have been something to the argument of the defense, id at 1279, that not every case of organized resistance to the laws rose to the level of "levying war" against the United States, as Article III, § 3 required.

¹³⁸ See George Washington, Proclamation, in Richardson, ed, 1 *Messages and Papers of the Presidents* at 181 (cited in note 10); Farrand, ed, 2 *Records of the Federal Convention* at 426 (cited in note 29). See also Forrest McDonald, *The American Presidency: An Intellectual History* 240 (Kansas 1994) (arguing that by issuing a blanket amnesty Washington construed the pardon power to give him authority to make general dispensations of the laws). But see Corwin, *President: Office and Powers* at 137 (cited in note 19) (arguing that in light of common law tradition the pardon power should not have been construed to embrace a general amnesty).

¹³⁹ 4 Annals of Cong 788 (Nov 19, 1794). See Letter from James Madison to James Monroe (Dec 4, 1794), in Mason, et al, eds, 15 *The Papers of James Madison* at 406 (cited in note 3) (describing the remark as "perhaps the greatest error of his political life"). For the depth of Washington's feelings against these societies, see Letter from George Washington to Henry Lee (Aug 26, 1794), in Fitzpatrick, ed, 33 *The Writings of George Washington* at 474-76 (cited in note 5); Letter from George Washington to Major General Daniel Morgan (Oct 8, 1794), in Fitzpatrick, ed, 33 *The Writings of George Washington* at 524.

asm created by the French Revolution.¹⁴⁰ When Thomas Fitzsimons of Pennsylvania moved to insert in the House's ceremonial reply to the President's speech a paragraph expressing "reprobation" of these Societies,¹⁴¹ the friends of France exploded in wrath. If the Societies offended the law, said Giles, let them be brought to justice; but it was not the House's business to act as a board of censure or "to attempt checking or restraining public opinion."¹⁴² The Constitution gave Congress no authority to denounce private associations; members of the societies had "the inalienable privilege of thinking, of speaking, of writing, and of printing"; the proposal "confounded the innocent with the guilty" and condemned them all without a hearing.¹⁴³ Madison, who had voted with Giles less than two years earlier to condemn Alexander Hamilton without a hearing,¹⁴⁴ called the measure a vote of attainder;¹⁴⁵ Thomas Carnes of Georgia said it would infringe freedom of speech and assembly.¹⁴⁶

For a week the House debated nothing but its reply to the President's speech. The occasion was trivial but the principle important; the debate presaged the arguments over the Sedition Act.¹⁴⁷ Murray said he would not vote to abolish the Democratic Societies, but he saw nothing wrong in warning the people against them;¹⁴⁸ Madison responded that, as the infamous list

¹⁴⁰ See Miller, *Federalist Era* at 160-62 (cited in note 2); Elkins and McKittrick, *Age of Federalism* at 451-61 (cited in note 1); Sharp, *American Politics in the Early Republic* at 85-89 (cited in note 1).

¹⁴¹ 4 Annals of Cong 899 (Nov 24, 1794).

¹⁴² Id at 899-901. "[T]here was not an individual in America," Giles added, "who might not come under the charge of being a member of some one or other self-created society. Associations of this kind, religious, political, and philosophical, were to be found in every quarter of the Continent." Id at 899-900. See also id at 905 (Rep Nicholas) ("[B]ut I cannot agree to persecution for the sake of opinions.").

¹⁴³ 4 Annals of Cong 916-19 (Nov 26, 1795).

¹⁴⁴ See Currie, 90 Nw U L Rev (cited in note 9).

¹⁴⁵ 4 Annals of Cong 934 (Nov 27, 1794). Madison did not advert to the effort to besmirch Hamilton, but he distinguished the investigation of General St. Clair on the ground that, unlike the Democratic Societies, St. Clair was employed "in the public service." Id at 935.

¹⁴⁶ "Sir, by this amendment you would prevent the freedom of speech, and lock the mouths of men." 4 Annals of Cong 941 (Nov 27, 1794). See also Letter from Thomas Jefferson to James Madison (Dec 28, 1794), in Mason, et al, eds, 15 *The Papers of James Madison* at 426-27 (cited in note 3) ("It is wonderful indeed that the President should have permitted himself to be the organ of such an attack on the freedom of discussion, the freedom of writing, printing & publishing.").

¹⁴⁷ See Irving Brant, *James Madison: Father of the Constitution, 1787-1800* 419 (Bobbs-Merrill 1950).

¹⁴⁸ 4 Annals of Cong 906-07 (Nov 25, 1794). William Smith added that the House had had no hesitation in expressing opinions on matters outside its legislative competence

of "subversive" organizations compiled by the Attorney General taught us a century and a half later, denunciation was punishment too.¹⁴⁹ Dexter offered a more sinister defense of the censure proposal. Fisher Ames of Massachusetts had already argued, with considerable justice, that the right of assembly did not embrace a conspiracy to obstruct the laws;¹⁵⁰ Dexter asserted that the Constitution gave no one "the precious right of vilifying and misrepresenting their own Government and laws."¹⁵¹ Ames assailed the Societies for their secrecy¹⁵² and professed to find the very existence of private associations as intermediaries between citizens and their government a threat to republican principles.¹⁵³

Cooler heads ultimately prevailed, and the response was watered down greatly:

when, at the insistence of many of those who objected to criticizing the Democratic Societies, it had applauded the new French constitution. 4 Annals of Cong 942-43 (Nov 27, 1794). See also note 19.

¹⁴⁹ 4 Annals of Cong 934 (Nov 27, 1794). Madison was even more emphatic in private:

It must be seen that no two principles can be either more indefensible in reason, or more dangerous in practice—than that 1. arbitrary denunciations may punish, what the law permits, & what the Legislature has no right, by law, to prohibit—and that 2. the Govt. may stifle all censures whatever on its misdoings; for if it be itself the Judge it will never allow any censures to be just, and if it can suppress censures flowing from one lawful source it may those flowing from any other—from the press and from individuals as well as from Societies, &c.

Letter from James Madison to James Monroe (Dec 4, 1794), in Mason, et al, eds, 15 *The Papers of James Madison* at 405, 407 (cited in note 3). For discussion of the Attorney General's list see Currie, *Constitution in the Supreme Court: The Second Century* at 357 (cited in note 28).

¹⁵⁰ 4 Annals of Cong 922 (Nov 26, 1794).

¹⁵¹ 4 Annals of Cong 937 (Nov 27, 1794). See also 4 Annals of Cong 923 (Nov 26, 1794) (Rep Ames) (accusing the Societies of spreading, in Washington's words, "jealousies, suspicions and accusations of the Government").

¹⁵² "I would just ask, however, . . . [w]hether they meet in darkness; whether they hide their names, their numbers, and their doings; whether they shut their doors to admit information?" 4 Annals of Cong 923 (Nov 26, 1794). See also 4 Annals of Cong 902 (Nov 24, 1794) (Rep William Smith). "[I]s there no other place," Giles asked in reply, "where people bolt their doors, and vote in the dark? Is there not a branch of our Legislature which transacts its business in this way?" 4 Annals of Cong 919 (Nov 26, 1794). The Senate, the reader will recall, still had not admitted the public to its deliberations.

¹⁵³ Political societies, he argued, served as "a substitute for representation"; when they acted in the name of those who were not members, they committed "an usurpation"; the result was "the power of the few over the many"; "[i]f the clubs prevail, they will be the Government." 4 Annals of Cong 923, 925 (Nov 26, 1794). See also 4 Annals of Cong 910 (Nov 25, 1794) (Rep Dexter) ("Such societies are proper in a country where Government is despotic, but it is improper that such societies should exist in a free country like the United States."). For a discussion of this point of view see Sharp, *American Politics in the Early Republic* at 100-03 (cited in note 1).

And we learn, with the greatest concern, that any misrepresentations whatever, of the Government and its proceedings, either by individuals or combinations of men, should have been made, and so far credited as to foment the flagrant outrage which has been committed on the laws.¹⁵⁴

There was no denunciation of the Democratic Societies as such, by name or by innuendo; there was no disparagement of the right to assemble—"concern" over "misrepresentations" is not necessarily inconsistent with the right to criticize the government. But the gulf between the developing parties in Congress was deeper and more hostile than ever, and it was clear that some members had a pretty narrow view of what the First Amendment meant by freedom of speech.

V. CITIZENSHIP

Congress had passed a hospitable naturalization law in 1790.¹⁵⁵ It passed a more niggardly one in 1795.¹⁵⁶

The new statute clarified two important points left unanswered in 1790. First, it mooted the controversy over whether Congress's naturalization power was exclusive, as its purpose seemed to suggest,¹⁵⁷ by providing that citizenship could be acquired only as provided in the act itself.¹⁵⁸ The uncontested assumption seemed to be that exclusivity was necessary and proper to the exercise of congressional authority to provide a "uniform" rule, as it clearly was.

The second clarification made it explicit that naturalization proceedings could be brought in federal as well as state courts.¹⁵⁹ It was surely appropriate that some federal agency share the burden of passing upon applications for national citizenship. To the twentieth-century observer, it is less obvious that that agency should be the courts. As under the pension law, which the courts had struck down for other reasons,¹⁶⁰ the typi-

¹⁵⁴ 4 Annals of Cong 947 (Nov 28, 1794).

¹⁵⁵ Act of Mar 26, 1790, 1 Stat 103. See Currie, 61 U Chi L Rev at 822-25 (cited in note 6).

¹⁵⁶ Act of Jan 29, 1795, 1 Stat 414.

¹⁵⁷ See Currie, 61 U Chi L Rev at 822 n 279 (cited in note 6).

¹⁵⁸ Act of Jan 29, 1795 § 1, 1 Stat at 414.

¹⁵⁹ Id. The earlier statute had ambiguously provided for application to "any common law court of record, in any one of [several] states." Act of Mar 26, 1790 § 1, 1 Stat at 103. See also Currie, 61 U Chi L Rev at 824-25 (cited in note 6).

¹⁶⁰ See *Hayburn's Case*, 2 US (2 Dall) 409, 410-14 n a (1792) (striking down the pension law primarily because the legislature could not assign nonjudicial duties to the

cal proceeding was *ex parte*; unless the Government chose to oppose a particular application—which the 1795 statute did not say it had the right to do—it was difficult to see how there was a “case” or “controversy” of the adversarial nature that we have come to understand to be required by Article III.¹⁶¹ There is no suggestion in the Annals that anyone in Congress shared this understanding in 1795.

But the main point of the new statute was to make it more difficult to become a citizen.¹⁶² Congress extended the two-year residence requirement to five years. It also required the applicant to announce his intention to become a citizen three years in advance and to renounce allegiance to his former sovereign.¹⁶³ More interesting to the constitutional scholar were two additional restrictions: the applicant was required to disclaim any foreign title or order of nobility, and to have “behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same.”¹⁶⁴

The latter condition enjoyed broad support. Sedgwick had begun the debate by warning of the perils of unchecked immigration from despotic and war-torn Europe: people who had not been brought up in a republic could not be expected to absorb its virtues overnight, and people from nations at war with one another could not be expected to get along.¹⁶⁵ Giles, from the opposite

judiciary).

¹⁶¹ Justice Brandeis would have to strain mightily to find a case or controversy when the question finally reached the Supreme Court a century and a quarter later. See *Tutun v United States*, 270 US 568 (1926); Currie, *Constitution in the Supreme Court: The Second Century* at 182-83 (cited in note 28); Wheeler, 1973 S Ct Rev at 134 n 61 (cited in note 56).

¹⁶² Dexter, in a speech badly truncated in the Annals, is said to have “described the present easy access to citizenship as dangerous and insufficient to prevent improper persons from being incorporated with the American people.” Frank George Franklin, *The Legislative History of Naturalization in the United States: From the Revolutionary War to 1861* 49 (Chicago 1906). Fears of unsuitable immigrants had been increased by the flood of refugees from the wars that broke out in the wake of the French Revolution. See the remarks of Representative Sedgwick noted in the text accompanying note 165; James H. Kettner, *The Development of American Citizenship 1608-1870* 239-40 (North Carolina 1978).

¹⁶³ Act of Jan 29, 1795 § 1, 1 Stat at 414. The first two of these requirements, but not the third, were made inapplicable to persons already residing in the United States. Id § 2, 1 Stat at 415.

¹⁶⁴ Id § 1, 1 Stat at 414. The 1790 act had required only that the applicant be “of good character” and swear “to support the constitution of the United States.” Act of Mar 26, 1790 § 1, 1 Stat at 103.

¹⁶⁵ 4 Annals of Cong 1005-09 (Dec 22, 1794).

end of the political spectrum, moved to require proof that the applicant was "attached to a Republican form of Government," in order "to prevent those poisonous communications from Europe, of which gentlemen were so much afraid."¹⁶⁶ There was much quibbling over the word "Republican," which had been appropriated by Madison and Jefferson's party; there was some objection to requiring the testimony of two witnesses, which was alleged to impose an undue burden on the poor.¹⁶⁷ Only Madison called attention to the more fundamental problem:

It [is] hard to make a man swear that he prefer[s] the Constitution of the United States, or to give any general opinion, because he may, in his own private judgment, think Monarchy or Aristocracy better and yet be honestly determined to support this Government as he finds it.¹⁶⁸

He did not put this objection on constitutional grounds, but the bitter lessons of the McCarthy period enable us to do so: a test of political orthodoxy for dispensing government benefits impinges on values protected by the First Amendment.¹⁶⁹

Possibly in response to Madison's criticism, the requirement of actual endorsement of constitutional principles was replaced by the more innocuous insistence on a finding that the applicant had *behaved* like a person attached to our Constitution¹⁷⁰—which was perhaps to say only that he must have been a law-abiding denizen. The doctrinal foundation for a constitutional attack on the original political test, moreover, was laid when the irrepressible Giles moved to add the requirement that the applicant renounce any preexisting titles.¹⁷¹

William Smith of South Carolina protested that Congress had no power to deprive anyone of his titles.¹⁷² Dexter added

¹⁶⁶ 4 Annals of Cong 1021 (Dec 26, 1794).

¹⁶⁷ Id at 1021-23.

¹⁶⁸ Id at 1022-23.

¹⁶⁹ See, for example, *Keyishian v Board of Regents*, 385 US 589 (1967) (State university procedure requiring teachers to answer questions regarding past or present communist activities as condition of employment violates First Amendment.); Currie, *Constitution in the Supreme Court: The Second Century* at 355-58 (cited in note 28); Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America* 301-14 (Harper & Row 1988). The tension was highlighted by Giles's frank admission that the purpose of his proposal was to keep out "poisonous communications." 4 Annals of Cong 1021 (Dec 26, 1794). See text accompanying note 166.

¹⁷⁰ See text accompanying note 164.

¹⁷¹ 4 Annals of Cong 1030 (Dec 31, 1794).

¹⁷² Id at 1030-31.

the analogy that constitutionalized Madison's objection to a political test: "An alien might as well be obliged to make a renunciation of his connexions with the Jacobin club. The one was fully as abhorrent to the Constitution as the other."¹⁷³ Giles, echoed by John Page of Virginia, gave the response later made familiar by Justice Holmes: no one was being deprived of anything; the nobleman could keep his title by not becoming a citizen.¹⁷⁴

Dexter threw the House into an uproar by blandly announcing that he would be happy to vote for the proposal if Giles would agree to an amendment requiring the applicant to renounce not only his titles but also his slaves.¹⁷⁵ Giles affected injury: "He was sorry to see slavery made a jest of in that House. . . . It had no proper connexion with the subject before the House."¹⁷⁶ John Heath of Virginia, who seldom spoke, swallowed the bait in a single gulp: since Congress could not forbid the importation of slaves, it could not require their renunciation as a condition of citizenship.¹⁷⁷ That, of course, was precisely Dexter's point:

¹⁷³ Id at 1031.

¹⁷⁴ Id at 1034 (Rep Giles); id at 1035 (Rep Page); *McAuliffe v Mayor of New Bedford*, 155 Mass 216, 29 NE 517, 517 (1892) (Holmes) ("The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."). Madison, who appeared to perceive the dangers of this approach, took a different tack that served to distinguish the Jacobin example: it was proper to require renunciation of hereditary titles because they were "proscribed by the Constitution." 4 Annals of Cong 1035 (Jan 1, 1795). See also id at 1039 (Rep Scott). Uriah Tracy of Connecticut set Madison straight: while Article I, § 9 forbade the United States to grant titles and federal officers to accept them, nothing in the Constitution prevented private citizens from receiving foreign titles, much less retaining those they had previously possessed. 4 Annals of Cong 1053 (Jan 2, 1795).

¹⁷⁵ 4 Annals of Cong 1039 (Jan 1, 1795). Thatcher twisted the knife by moving, as a second amendment, "and that he never will possess them." Id.

¹⁷⁶ Id. Similarly, when an unidentified member of the House suggested dropping the requirement that the militia be limited to white persons he was greeted with a cold reminder of political correctness: "[T]he subject was obviously and extremely improper for public discussion." 4 Annals of Cong 1234 (Feb 17, 1795). Yet it was the Third Congress that, in response to yet another petition from the Quakers, 4 Annals of Cong 249 (Jan 20, 1794), forbade sailing from the United States for the purpose of exporting slaves or of transporting inhabitants of one foreign country into slavery in another. Act of Mar 22, 1794, 1 Stat 347. Neither of these provisions fell within the twenty-year moratorium on congressional powers contained in Article I, § 9, and Congress evidently surmounted any doubts as to whether such provisions came within the commerce power, as the House had concluded in 1790. See Currie, 61 U Chi L Rev at 792-94 (cited in note 6). The Annals report no debate on these interesting provisions.

¹⁷⁷ 4 Annals of Cong 1040 (Jan 1, 1795). See also 4 Annals of Cong 1042 (Jan 2, 1795) (Rep McDowell). McDowell made a second and distinct argument against requiring renunciation of slaves: "What right had the House to say to a particular class of people, you shall not have that kind of property which other people have?" Id at 1042-43. He seemed to be suggesting that "naturalization" implied that new citizens, like new "states" under the Northwest Ordinance and the Supreme Court's interpretation of Article IV, § 3, were to be admitted on an equal footing with old ones. See *Coyle v Smith*, 221 US 559

since Congress could not strip individuals of their titles directly, it could not do so by indirection.

Dexter's conclusion was not unavoidable; some discretion as to who is an acceptable member of the community is obviously implicit in the authority to enact a uniform naturalization rule. Yet Dexter's reminder that this discretion must be limited if it was not to impinge on individual or state rights was welcome. The House had already debated the difficult problem of unconstitutional conditions in 1791, when it voted down a proposal to limit the political activities of revenue officers.¹⁷⁸ The Third Congress decreed that new citizens must renounce their titles but not their slaves;¹⁷⁹ its successors would have ample opportunities to wrestle with the analogous question of what conditions could permissibly be attached to federal grants¹⁸⁰ or to the admission of new states.¹⁸¹

(1911); Currie, 61 U Chi L Rev at 842 (cited in note 6). The argument is quite plausible: there is no reason to think the Framers would have looked kindly on the prospect of second-class citizens. The same principle of equality may help to explain the cold shoulder the House had given in 1790 to the suggestion that new citizens be denied the right to hold public office. See Currie, 61 U Chi L Rev at 823 (cited in note 6); Kettner, *Development of American Citizenship* at 237 (cited in note 162) ("Congress generally agreed [in 1790] that the Constitution barred attempts to establish gradations of rights among the mass of citizens . . ."). See also 4 Annals of Cong 1026-27 (Dec 29, 1794) (Rep Sedgwick) (hoping but doubting that Congress could find some way to permit aliens to hold property without giving them the right to vote).

¹⁷⁸ See Currie, 61 U Chi L Rev at 787 (cited in note 6).

¹⁷⁹ See Act of Jan 29, 1795 § 1, 1 Stat at 414; 4 Annals of Cong 1057 (Jan 2, 1795).

¹⁸⁰ See *United States v Butler*, 297 US 1 (1936) (holding unconstitutional an act intended to reduce agricultural surpluses by subsidizing farmers who agreed to limit production); *South Dakota v Dole*, 483 US 203 (1987) (upholding federal law directing government to withhold highway funds from states with minimum drinking age under twenty-one); Currie, *Constitution in the Supreme Court: The Second Century* at 227-31 (cited in note 28).

¹⁸¹ See, for example, the extensive debates leading to the Missouri Compromise, 35 Annals of Cong 467-69 (Mar 2, 1820); 36 Annals of Cong 1576-88 (Mar 2, 1820). Proposals to require state or congressional consent to restore U.S. citizenship to those who had renounced it (as Loyalists had done during the Revolution, and others had done in 1793 in order to fight for France without running afoul of the neutrality laws) produced a variety of constitutional objections. Madison, in a preview of the *Dred Scott* case, argued that Congress had no power to readmit American citizens, since only "aliens" could be naturalized. 4 Annals of Cong 1027 (Dec 29, 1794). See *Scott v Sandford*, 60 US (19 How) 393 (1856). In denying that expatriates were "aliens," Madison may have assumed, as Dexter asserted, that citizens could not renounce their allegiance at all; Murray reminded the House that the country had been built on the contrary principle. 4 Annals of Cong 1028 (Dec 30, 1794). The proposal to require special legislation was questioned on various grounds: mingling of federal and state authority, interference with exclusive federal and state prerogatives, and violation of the apparent requirement that naturalization laws be uniform. 4 Annals of Cong 1005 (Dec 22, 1794) (Rep Giles). It was not enacted.

VI. THE ELEVENTH AMENDMENT

For the second time in two years a judicial interpretation of the Constitution commanded congressional attention. When the Justices had struck down the pension law in *Hayburn's Case*,¹⁸² Congress had amended the statute.¹⁸³ When the Supreme Court held in *Chisholm v Georgia* that one state could be sued by the citizens of another,¹⁸⁴ Congress decided it was the Constitution that needed amending.

The text of Article III seemed to support the *Chisholm* decision: "The Judicial Power shall extend to . . . Controversies . . . between a State and Citizens of another State . . ."¹⁸⁵ Suits against unconsenting sovereigns, however, were unknown when the Constitution was written, and prominent framers from Madison to Marshall had assured the country that nothing in Article III would permit the states to be sued.¹⁸⁶

The decision, as one commentator has written, "fell upon the country with a profound shock."¹⁸⁷ Newspapers representing a rainbow of opinion protested what they viewed as an unexpected blow to state sovereignty.¹⁸⁸ Others spoke more concretely of prospective raids on state treasuries.¹⁸⁹ Georgia's House of Representatives passed a bill providing that anyone attempting to execute process in the *Chisholm* case should be "guilty of felony and shall suffer death, without benefit of clergy, by being hanged."¹⁹⁰

The adverse reaction was not universal.¹⁹¹ But other state legislatures called for a constitutional amendment to reverse the Court's decision,¹⁹² and one was introduced in the House the

¹⁸² 2 US (2 Dall) 409, 410-14 n a (1792).

¹⁸³ Act of Feb 28, 1793, 1 Stat 324.

¹⁸⁴ 2 US (2 Dall) 419 (1793). See Currie, *Constitution in the Supreme Court: The First Hundred Years* at 14-20 (cited in note 56).

¹⁸⁵ US Const, Art III, § 2, cl 1.

¹⁸⁶ Jonathan Elliot, 3 *The Debates on the Adoption of the Federal Constitution* 533 (Taylor & Maury 1854) (Madison); id at 555 (Marshall). See also Federalist 81 (Hamilton), in Rossiter, ed, *The Federalist Papers* at 487-88 (cited in note 34).

¹⁸⁷ See Warren, 1 *Supreme Court in United States History* at 96 (cited in note 44).

¹⁸⁸ Id at 96-98.

¹⁸⁹ Id at 99.

¹⁹⁰ Id at 100-01.

¹⁹¹ See generally Maeve Marcus and Natalie Wexler, *Suits Against States: Diversity of Opinion in the 1790s*, 1993 J S Ct Hist 73 (noting, among other things, that Maryland had not protested when it was sued, before *Chisholm*, in the Supreme Court).

¹⁹² The Massachusetts legislature, for example, finding *Chisholm* "repugnant to the first principles of a federal government," requested the state's Representatives and instructed its Senators to take all necessary steps to bring about an amendment that would

day after *Chisholm* was announced.¹⁹³ Amendment was one of the Senate's first priorities when Congress reconvened in December 1793, and by mid-March the proposal was on its way to the states.¹⁹⁴ President Adams proclaimed its ratification in 1798.¹⁹⁵ Thenceforth, said the Eleventh Amendment, "the Judicial power of the United States sh[ould] not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."¹⁹⁶

The Annals report no debate on the amendment. Each House discussed and endorsed it in a single day, almost without dissent.¹⁹⁷ It is plain that just about everybody in Congress agreed that the Supreme Court had misread the Constitution.¹⁹⁸

Notwithstanding this apparent consensus, there were three revealing attempts to water down the proposal. An unidentified Senator moved to limit the reach of the amendment so that it would bar only suits in which "the cause of action shall have arisen before the ratification of the amendment."¹⁹⁹ An unidentified Representative moved to close the federal courts only "[w]here such State shall have previously made provision in their

"remove any clause or article of the said Constitution, which can be construed to imply or justify a decision, that, a State is compellable to answer in any suit by an individual or individuals in any Court of the United States." Syrett, et al, eds, 15 *The Papers of Alexander Hamilton* at 313-14 n 3 (cited in note 4). See also Goebel, 1 *History of the Supreme Court* at 734-36 (cited in note 60).

¹⁹³ See Warren, 1 *Supreme Court in United States History* at 101 (cited in note 44).

¹⁹⁴ The amendment was proposed in the Senate on January 2, 1794, in the terms in which it was adopted. It passed the Senate January 14 and the House March 4; a joint resolution of March 12 requested that the President forward the proposal to the states. See 4 Annals of Cong 25, 30, 477, 499 (Jan 2, 14, 1794; Mar 4, 12, 1794); Amendment of the Constitution to prevent suits against States, 1 Stat 402 (1794). As in the case of the twelve amendments that had been proposed in 1789, neither Congress nor the President suggested that proposed amendments had to be presented for presidential approval or veto under Article I, § 7. See Currie, 61 U Chi L Rev at 856-57 (cited in note 6); *Hollingsworth v Virginia*, 3 US (3 Dall) 378 (1798); Currie, *Constitution in the Supreme Court: The First Hundred Years* at 20-23 (cited in note 56).

¹⁹⁵ John Adams, Special Message to the Senate and House, in Richardson, ed, 1 *Messages and Papers of the Presidents* at 260 (cited in note 10). For the curiously careless manner in which ratifications were recorded and proclaimed, see Warren, 1 *Supreme Court in United States History* at 101-02 n 2 (cited in note 44).

¹⁹⁶ US Const, Amend XI.

¹⁹⁷ The Senate vote was twenty-three to two, the House vote eighty-one to nine. See 4 Annals of Cong 30-31, 477-78 (Jan 14, 1794; Mar 4, 1794).

¹⁹⁸ See also Kent, 1 *Commentaries* at 415 (cited in note 54). Story, writing like Kent a generation and a half later, seemed to think *Chisholm* had been rightly decided. Story, 3 *Commentaries* § 1677 at 547-48 (cited in note 39).

¹⁹⁹ 4 Annals of Cong 30 (Jan 14, 1794).

own Courts, whereby such suit may be prosecuted to effect."²⁰⁰ Albert Gallatin, sitting briefly as a Pennsylvania Senator before succeeding Madison as opposition leader in the House,²⁰¹ moved to make an exception permitting states to be sued "in cases arising under treaties made under the authority of the United States."²⁰²

All three of these limiting proposals were rejected.²⁰³ Congress was unwilling to permit suits against states on future causes of action, or in cases in which no other forum was available, or

²⁰⁰ 4 Annals of Cong 476 (Mar 4, 1794).

²⁰¹ Born in Switzerland, Gallatin had come to the United States in 1780, engaged in farming, fought in the Revolution, taught French at Harvard, and taken an oath of allegiance to Virginia in 1785. When named to the Senate in 1793, he was challenged and unseated (after the Senate had taken action on the proposed amendment) on the ground that he had not been nine years a citizen of the United States, as Article I, § 3 required. See 4 Annals of Cong 19, 47-62 (Dec 11, 1793; Feb 20-28, 1794). Like the case of William Smith, see Currie, 2 U Chi L Sch Roundtable at 173-74 (cited in note 9), Gallatin's exclusion raised difficult questions of defining citizenship before the new Constitution took effect. As in Smith's case, the result was inconclusive; Gallatin lost by an unexplained vote of fourteen to twelve that appeared to be on what we would now call party lines. 4 Annals of Cong 57 (Feb 28, 1794). Raymond Walters, Jr., *Albert Gallatin: Jeffersonian Financier and Diplomat* 59-63 (Macmillan 1957). He was elected to the House as a member of the Fourth Congress and served there until he became Secretary of the Treasury in 1801. See Kettner, *Development of American Citizenship* at 232-35 (cited in note 162).

Two contests over House elections during the Third Congress made clear that, in exercising its responsibility to judge the elections of its members, the House was generally to apply state law. See 4 Annals of Cong 145-47, 148, 442-44, 453-55 (Dec 20, 24, 1793; Feb 10, 14, 1794); Matthew St. Clair Clarke and David A. Hall, *Cases of Contested Elections in Congress* 69-77 (Gales & Seaton 1834). As a general matter there was nothing surprising in this conclusion, since, as was pointed out in debate, Article I, § 4 expressly provided that state law should regulate the "times, places and manner" of holding congressional elections until Congress legislated a federal rule. 4 Annals of Cong 147 (Dec 20, 1793). The Delaware law that the House applied in the second case, however, required voters to pick two candidates for Representative, one of whom resided outside their own county. See also Article II, § 1, which makes an analogous provision for presidential elections. Whether the Residence Clause related to the "manner" of holding elections or to the qualifications of the candidate, and whether the states had authority to add to the qualifications of age, citizenship, and residence prescribed in Article I, § 2, the House apparently did not discuss.

The Annals also report a brief contretemps over the seating of one Gabriel Duvall, who had presented credentials as a Representative from Maryland in the place of John Francis Mercer, whose election had created a controversy only two years before. See 4 Annals of Cong 742 (May 31, 1794); 3 Annals of Cong 205-07 (Nov 22, 1791). Once a committee report was read finding that Mercer had resigned, Duvall was awarded his seat, which he occupied for the next sixteen months without ever opening his mouth—suggesting that his brief service in the House was a fertile training ground for the exemplary record of insignificance he was to compile in the twenty-five years he spent on the Supreme Court. See 4 Annals of Cong 873-75 (Nov 11, 1794); David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U Chi L Rev 466 (1983).

²⁰² See 4 Annals of Cong 30 (Jan 14, 1794).

²⁰³ Id; 4 Annals of Cong 476 (Mar 4, 1794).

even in cases arising under treaties. Only a handful of members—including Gallatin and Boudinot, but not Madison or even Ames—thought the Constitution should provide a mechanism to ensure that the states paid their debts.

Sovereign immunity is not fashionable today. Nor is it an attractive principle. When governments commit wrongs, they ought to be brought to book. When they violate federal rights, or the rights of citizens of other states or nations, they ought to be suable in federal court. But that was neither the view of the Third Congress nor the view of the state legislatures that approved its proposal.

The fate of Gallatin's modest request not to leave our foreign relations at the mercy of individual states should put to rest the modern heresy that the Eleventh Amendment does not apply to federal-question cases.²⁰⁴ One can imagine a scenario in which a motion to exempt treaty cases is voted down as unnecessary because the amendment itself is inapplicable to cases arising under federal law. But the language of the actual amendment is not conducive to such an interpretation; it flatly bars "any suit in law or equity" by diverse plaintiffs against a state. More important, the historical context belies any attempt at wishful thinking: as the prompt rejection of all ameliorating alterations shows, Congress was in no mood to permit *any* federal suit against a state by a citizen of another state or of a foreign country.

VII. THE DISTRICT OF NEW HAMPSHIRE

On April 3, 1794, President Washington signed into law an obscure little bill transferring the jurisdiction of the United States District Court for New Hampshire to the Circuit Court of that district, "until the end of the next session of Congress, or until a new district judge be appointed in that district, and no

²⁰⁴ The trouble started with Justice Brennan's unfortunate dissenting opinion in *Employees v Dep't of Public Health and Welfare of Missouri*, 411 US 279, 315-21 (1973), attacking the well-settled proposition (see *Hans v Louisiana*, 134 US 1, 10 (1890)) that the Arising Under Clause of Article III, § 2 contained an implied exception for suits against states. The argument was soon extended to the point of contending that federal-question cases were not barred even when they fell within the explicit terms of the Eleventh Amendment. See *Atascadero State Hospital v Scanlon*, 473 US 234, 290-91 (1985) (Brennan, joined by Marshall, Blackmun, and Stevens, dissenting). For a defense of *Hans*, see Currie, *Constitution in the Supreme Court: The Second Century* at 7-9 (cited in note 28).

longer.”²⁰⁵ This simple measure dealt a grave setback to the independence of the judiciary.

If the office of District Judge for New Hampshire had been vacant, we might have relegated the incident to a footnote as an example of ingenuity in ensuring that federal judicial business not be interrupted—wondering aloud why the President did not see that the vacancy was filled and whether, in assigning jurisdiction to the Circuit Court, Congress was not effectively usurping the power of appointment. But the office was not vacant. It had been occupied since 1789 by one John Sullivan, who for some time had been unable to perform his judicial duties.

John Sullivan was a war hero. Fighting beside Washington at battles from Long Island to Brandywine, he had risen to the rank of Major-General. When the Revolution was over he served in the Confederation Congress and as President (Governor) of New Hampshire. He was a leader in the struggle to ratify the Philadelphia Constitution²⁰⁶ and “a logical choice” for appointment as the state’s first federal judge²⁰⁷—“the only position in the appointment of the President,” one biographer ominously observed, “his health permitted him to accept.”²⁰⁸

At the time of his appointment Sullivan was still President of New Hampshire, and he did not immediately resign. The state legislature protested that it was improper for him to hold both offices at once, but did nothing.²⁰⁹ The federal Constitution makes clear that federal judges cannot simultaneously be members of Congress;²¹⁰ it says nothing about holding federal and state offices at the same time. One is tempted to mumble something about the spirit of the Constitution.

Sullivan resigned his state office in June 1790. It was not until a year later that the first case came before his federal court. Even then he was “not . . . particularly occupied by his judicial

²⁰⁵ Act of Apr 3, 1794 §§ 1, 3, 1 Stat 352, 353. Section 2 of the Act transferred the non-judicial duties of the District Judge under the latest version of the Pension Act, see Currie, 90 *Nw U L Rev* (cited in note 9), to the federal district attorney. Act of Apr 3, 1794 § 2, 1 Stat at 353.

²⁰⁶ See Charles P. Whittemore, *A General of the Revolution: John Sullivan of New Hampshire* 207-20, 228 (Columbia 1961); Thomas C. Amory, *The Military Services and Public Life of Major-General John Sullivan, of the American Revolutionary Army* 229-33 (Wiggin & Lunt 1868).

²⁰⁷ Whittemore, *General of the Revolution* at 222 (cited in note 206).

²⁰⁸ Amory, *Military Services and Public Life* at 241 (cited in note 206).

²⁰⁹ Whittemore, *General of the Revolution* at 223 (cited in note 206).

²¹⁰ US Const, Art I, § 6, cl 2.

duties," and by 1792 he had reached such a state of drunkenness and senility that he was incapable of sitting at all.²¹¹

At the urging of his "friends," Sullivan elected not to resign. Some person "over eager for the advancement of a friend" suggested that Washington do something about Sullivan; the President is said to have replied that "there was no man in the country he would not sooner remove than General Sullivan."²¹²

The truth of the matter was that the Framers had arguably made a mistake: in their commendable zeal to ensure an independent judicial branch,²¹³ they had neglected to provide any tools for removing an incompetent judge.

Impeachment, of course, required proof of "high Crimes [or] Misdemeanors," not mere inability to fulfill one's duties.²¹⁴ Later judges who approached Sullivan's lamentable condition were coaxed off the bench by their colleagues,²¹⁵ though they did not always react with grace.²¹⁶ But there was no way of making them go, and President Washington was unwilling even to try.

It was in this pitiful state of affairs that a House committee was charged with the task of devising a remedy in the event of the incapacity of a federal judge.²¹⁷ The result we know already: a bill to transfer Sullivan's duties to the Circuit Court,²¹⁸ which was adopted without recorded debate.²¹⁹

The crisis was real, the temptation great, the benefit clear: federal judicial business could once again be done in New Hampshire. The cost was greater, the action unforgivable: all Congress had to do to rid itself of a judge of whose opinions it disapproved

²¹¹ See Whittemore, *General of the Revolution* at 223-24 (cited in note 206).

²¹² Amory, *Military Service and Public Life* at 245 (cited in note 206).

²¹³ See *Federalist* 78 (Hamilton), in Rossiter, ed, *The Federalist Papers* at 464-72 (cited in note 34).

²¹⁴ US Const, Art II, § 4.

²¹⁵ Holmes wrote his letter of resignation on the day Chief Justice Hughes suggested it was time to hang up his robe. Sheldon M. Novick, *Honorable Justice: The Life of Oliver Wendell Holmes* 375 (Little, Brown 1989).

²¹⁶ Justice Field, when reminded by his executioner that thirty years before he had been chosen to give the fatal word to Justice Grier, observed that he had never done a dirtier day's work in his life. Charles Evans Hughes, *The Supreme Court of the United States: Its Foundation, Methods and Achievements: An Interpretation* 76 (Columbia 1928). Justice Douglas is said to have asserted the right to participate in deciding cases after he had been persuaded to retire. James F. Simon, *Independent Journey: The Life of William O. Douglas* 452-53 (Harper 1980).

²¹⁷ See 4 *Annals of Cong* 457-58, 468-69 (Feb 19, 27, 1794).

²¹⁸ See 4 *Annals of Cong* 482 (Mar 6, 1794).

²¹⁹ 4 *Annals of Cong* 528 (Mar 24-25, 1794) (noting that "some time" was spent on the proposition in the Committee of the Whole but reporting nothing of what was said). The yeas and nays were not taken.

was transfer his jurisdiction to another court. It is true that, since Article III vests the judicial power in the Supreme Court and "such inferior Courts as the Congress may, from time to time, ordain and establish," the legislature has a good deal of discretion in defining the jurisdiction of the lower federal courts.²²⁰ But unbridled legislative authority to transfer cases from one court to another makes a mockery of the constitutional guarantee that federal judges hold office "during good Behaviour."²²¹

The obvious remedy was to amend the Impeachment Clause to make incapacity a basis for the removal of a federal judge. After all, only a month had passed since Congress had proposed another constitutional amendment to correct a perceived deficiency in the jurisdictional provisions of Article III.²²² To be sure, a willful House and Senate could always cook up "incapacity" where none existed;²²³ but they could cook up "high crimes and misdemeanors" too, as they demonstrated in removing Sullivan's unhappy successor in 1804.²²⁴ The process by which Congress dealt with Sullivan in 1794 was subject to greater abuse than any plausible impeachment standard, for no finding of misconduct or even inadequacy—and no two-thirds vote of the Senate—was necessary to transfer jurisdiction from one court to another.

Perhaps the most charitable explanation for Congress's unfortunate action is that time was of the essence: judicial business in New Hampshire could not comfortably await ratification by three-fourths of the states. It seems not to have occurred to Congress in 1794, as it later would, that the good behavior standard

²²⁰ See *Sheldon v Sill*, 49 US (8 How) 441, 448-49 (1850) ("[H]aving a right to prescribe [federal jurisdiction], Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers.").

²²¹ US Const, Art III, § 1.

²²² See text accompanying notes 193-98.

²²³ As Story observed: "An attempt to fix the boundary between the region of ability and inability would much oftener give rise to personal, or party attachments and hostilities, than advance the interests of justice, or the public good. And instances of absolute imbecility would be too rare to justify the introduction of so dangerous a provision." Story, 3 *Commentaries* § 1619 at 486 (cited in note 39). The first sentence of this passage is taken almost verbatim from Federalist 79 (Hamilton), in Rossiter, ed, *The Federalist Papers* at 472. In place of the second, Hamilton had written, less convincingly, that "insanity without any formal or express provision, may be safely pronounced to be a virtual disqualification." Id at 474.

²²⁴ See Eleanor Bushnell, *Crimes, Follies, and Misfortunes: The Federal Impeachment Trials* 43-55 (Illinois 1992) (describing the successful impeachment of the equally deficient and alcoholic Judge Pickering, also of the luckless District of New Hampshire).

might permit the creation of statutory machinery for circumventing an incompetent judge by the action of his judicial peers²²⁵—a procedure that, while diminishing the independence of the individual judge, does no violence to the central principle that the judiciary must be free from interference by the other branches it is expected to police.

VIII. THE SOUTHWEST DELEGATE

When the Third Congress convened for the second time in Philadelphia in November 1794, James White laid before the House his credentials as "Representative of the Territory of the United States South of the river Ohio, in the Congress of the United States."²²⁶ He was eventually seated, but only after a heated debate that went to the very nature of the House.

It was Zephaniah Swift, a new member from Connecticut, who raised the objection:

The Constitution has made no provision for such a member as this person is intended to be. If we can admit a Delegate to Congress or a member of the House of Representatives, we may with equal propriety admit a stranger from any quarter of the world.²²⁷

Article I, § 2 seemed to support him: "The House of Representatives shall be composed of members chosen . . . by the people of the several States."²²⁸

There were two arguments for seating the gentleman from the Southwest Territory, and William Smith espoused them both. First, he said, Mr. White was entitled to a seat "by the terms of an express compact with the people."²²⁹ What that meant was spelled out in the report of an ad hoc committee.²³⁰ The Northwest Ordinance had promised the residents of the Territory

²²⁵ See 28 USC § 372(c) (1988 & Supp 1993); Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U Pa L Rev 209, 232-33 (1993); Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U Pa L Rev 243, 259-76 (1993). See also 28 USC § 372(b) (1988) (authorizing appointment of an additional judge, not to be replaced after the need disappears, in case a disabled judge declines to retire).

²²⁶ 4 Annals of Cong 873 (Nov 11, 1794).

²²⁷ 4 Annals of Cong 884 (Nov 17, 1794).

²²⁸ Moreover, said Swift, if White was a member he could not be denied the right to vote, as had been proposed. The Constitution, he seemed to be saying, did not envision two distinct classes of members. *Id.*

²²⁹ *Id.* at 885. See also *id.* at 886 (Rep Dayton); *id.* at 887 (Rep Baldwin).

²³⁰ 4 Annals of Cong 888-89 (Nov 18, 1794).

Northwest of the Ohio, once they established a legislature, the right to send "a delegate to Congress, . . . with a right of debating, but not of voting."²³¹ After the new Constitution took effect, Congress had passed a statute giving this ordinance "[f]ull effect."²³² In conformity with the Act whereby North Carolina ceded to the United States the area that became the Southwest Territory,²³³ the Act of Congress establishing that territory granted its inhabitants "all the privileges, benefits, and advantages" set forth in the Northwest Ordinance.²³⁴

Of course no "compact" or Act of Congress could authorize what the Constitution forbade, and Article I seemed pretty clear that only the people of the states were entitled to representation in Congress. As far as the Northwest Territory was concerned, the promise in the Ordinance could plausibly be viewed as an engagement "entered into before [] the adoption of this Constitution" and thus, under Article VI, "as valid . . . under this Constitution, as under the Confederation."²³⁵ It is true that the entire Northwest Ordinance seemed to be unauthorized by the Articles of Confederation,²³⁶ but it was generally accepted as valid; and thus there was a respectable argument that Article VI required Congress to seat a delegate sent by the Northwest Territory.

No delegate from that territory, however, appeared until 1799, when young William Henry Harrison presented his credentials to the Sixth Congress.²³⁷ James White came from the

²³¹ 1 Stat 50, 52 n a (1789).

²³² *Id.* at 51.

²³³ See Act of Apr 2, 1790, 1 Stat 106, 108.

²³⁴ Act of May 26, 1790 § 1, 1 Stat 123, 123. See Currie, 61 U Chi L Rev at 842-45 (cited in note 6). Some difficulty was engendered by the fact that the Ordinance provided for a delegate to "Congress," which had originally meant the Congress of the Confederation. As Swift pointed out, the House of Representatives was not Congress. Boudinot contended that, since White had been elected by the territorial legislature, his proper place was in the Senate; Murray suggested that as a delegate to "Congress" he might be "entitled to a seat in both Houses." 4 Annals of Cong 884, 886 (Nov 7, 1794).

²³⁵ US Const, Art VI.

²³⁶ See Currie, 61 U Chi L Rev at 842 (cited in note 6).

²³⁷ Under the terms of the Ordinance, the delegate was to be chosen by the territorial legislature, which was not to be elected until the territory had a population of five thousand free adult males. Settlement was retarded by repeated Indian depredations until General Wayne's victory at Fallen Timbers in 1794 and the evacuation of the forts held by the British in defiance of the Peace Treaty, which occurred only after the Jay Treaty was approved in 1795. Consequently the population threshold was not reached until 1798, and the legislature first met in 1799. See Elkins and McKittrick, *Age of Federalism* at 436-39 (cited in note 1); Charles B. Galbreath, 1 *History of Ohio* 197-99 (American Historical Society 1925); Dorothy Burne Goebel, *William Henry Harrison: A Political Biography* 41-42 (Indiana Historical Bureau 1926); Robert M. Taylor, Jr., ed, *The Northwest Ordinance 1787: A Bicentennial Handbook* 52 (Indiana Historical Society 1987).

Southwest Territory, which had not been organized until 1790. It had no "engagement" antedating the Constitution and thus could derive no comfort from Article VI.

The argument based on the Northwest Ordinance therefore boiled down to an argument based on tradition, however brief. If the seating of a nonvoting territorial delegate was consistent with the provision of the Articles of Confederation for selection of congressional delegates "in such manner as the legislature of each State shall direct,"²³⁸ it was consistent with Article I, § 2 as well.

Smith's second argument helped to explain how the admission of a nonvoting delegate could be reconciled with that provision. The House could admit anyone it liked for purposes of debate; it could admit the Secretary of State.²³⁹ Indeed, Dayton added, the House had often called upon Cabinet officers for advice.²⁴⁰ In other words, Article I, § 2 spoke only to the method of selecting "[m]embers" of the House; as Madison observed in arguing that White was not required to take the oath prescribed by Article VI,²⁴¹ he was not a "member."²⁴²

This argument posed in starkest form the question of what it meant to be a "member" of Congress. Only the people of the states were entitled to elect "members," but members engaged in a variety of activities. They introduced bills, sat on committees, made motions, spoke in debate, and cast votes. The question was which of these functions were so central to the operation of the House that they could be exercised only by representatives chosen in accordance with Article I, § 2.

Voting, it seemed to be agreed, was at the core of the member's office,²⁴³ and the Ordinance had been careful to make clear that territorial delegates would not have the right to vote. For voting is the act whereby Congress makes decisions and thus

²³⁸ Articles of Confederation, Art V, § 1, reprinted in 1 Stat 4 (1778).

²³⁹ 4 Annals of Cong 885-86 (Nov 17, 1794) (Rep Smith). See also *id* at 885 (Rep Giles) ("If the House chose to consult the *gallery*—a resource for information that he should never wish to see adopted—they had a right to consult it, or to ask advice from any other quarter, notwithstanding the assertion of the gentleman from Connecticut [Rep Smith].").

²⁴⁰ *Id* at 886 (Rep Dayton).

²⁴¹ The Senators and Representatives shall be "bound by Oath or Affirmation, to support this Constitution . . ." See Currie, 2 U Chi L Sch Roundtable at 169 (cited in note 9).

²⁴² 4 Annals of Cong 889 (Nov 18, 1794).

²⁴³ See *id* at 890 (Rep Dayton); 4 Annals of Cong 887 (Nov 17, 1794) (Rep Baldwin); *id* at 885 (Rep Dexter).

actually exercises its various powers; anyone who can vote on the floor of Congress is pretty clearly a "member."²⁴⁴

Mere speaking, it was argued, was another matter. But when the House had innocuously asked the Secretary of the Treasury even for written advice, there had been a storm of protest,²⁴⁵ and in the investigation of General St. Clair, the House had insisted on hearing from Cabinet members in committee, not before the House itself.²⁴⁶ To be sure, admitting executive officers to congressional proceedings raises separation-of-powers concerns not present in the case of the Southwest Delegate.²⁴⁷ But as Swift pointed out, it was one thing "[t]o admit a person within the bar for the purpose of consulting him"; it was quite another to let him "take a permanent seat among the members, for the purpose of regularly debating."²⁴⁸ Conceding that the Delegate's position was "infinitely higher" than "that of an advocate allowed to plead at the bar of the House," Baldwin insisted that it was nevertheless "extremely short of the situation of a member of Congress."²⁴⁹

The House agreed with Baldwin; White was seated as a nonvoting Delegate from the Southwest Territory, in accordance with the tradition created by the Northwest Ordinance and the "compact" made when the territory was established.²⁵⁰ Since he was not a member of the House, White was neither required to take the oath nor entitled to a member's rights;²⁵¹ Congress

²⁴⁴ Compare Article 144(2) of the German constitution (since repealed), which satisfied the Allied concern that West Berlin not be incorporated into West Germany by denying its representatives in the West German parliament the right to vote. See Currie, *Constitution of the Federal Republic of Germany* at 89 (cited in note 19).

²⁴⁵ See Currie, 2 U Chi L Sch Roundtable at 190 nn 195, 196 (cited in note 9).

²⁴⁶ See 3 Annals of Cong 679-89 (Nov 13, 14, 1792).

²⁴⁷ Compare also the furor over the right of Cabinet officers to introduce bills, which was heatedly denied. Currie, 2 U Chi L Sch Roundtable at 189-90 (cited in note 9).

²⁴⁸ 4 Annals of Cong 888 (Nov 17, 1794).

²⁴⁹ Id at 887. It should not necessarily follow from the conclusion that nonmembers may be permitted to speak that members may be denied that privilege; membership implies the right to speak as well as to vote, and it ought to imply a basic equality among members. See Currie, 2 U Chi L Sch Roundtable at 164 n 24 (cited in note 9).

²⁵⁰ Dexter and Boudinot thought White could not be seated without an Act of Congress; Smith responded that the House "ought to decide their elections on their own authority," apparently under the power given each House by Article I, § 5 to judge "the Elections, Returns, and Qualifications of its own Members." 4 Annals of Cong 885-86 (Nov 17, 1794). Since the best argument for seating the Delegate was that he was not a "member," Smith might better have invoked the further provision of the same Section empowering each House to "determine the rules of its proceedings." White was seated by a simple vote of the House, as Smith had suggested. Id at 888.

²⁵¹ See 4 Annals of Cong 889-90 (Nov 18, 1794) (Reps Madison, Smith, Giles, and Dayton). A motion to require White to take the oath of office was rejected forty-two to thirty-

passed a law to provide him with franking privileges, reimbursement of expenses, and a salary,²⁵² all on the theory, one surmises, that these measures were necessary and proper to the operation of the House. All of this made very good sense,²⁵³ and so long as the Delegate was not given powers so extensive as to make him effectively a member of the House, it was not impossible to reconcile it with the Constitution.²⁵⁴

IX. THE FLAG

Let us close this survey of the work of the Third Congress by retracing our steps for a moment to the opening days of its first session in January 1794, when the House was asked to take a breather from momentous issues of war and peace to endorse a Senate bill to add two stars and two stripes to the national flag.

There was some grumbling about the expense of replacing existing flags, and several members without souls complained that the matter was too trivial to deserve congressional attention. Benjamin Goodhue of Massachusetts protested that if the bill passed it would not be long before the flag became hopelessly unwieldy: "It is very likely, before fifteen years elapse, we shall consist of twenty States."²⁵⁵ Boudinot pointed out that "the citizens of Vermont and Kentucky . . . might be affronted" if they

two. *Id.* at 890.

²⁵² Act of Dec 3, 1794, 1 Stat 403.

²⁵³ At one point, Giles moved to limit the Delegate to speaking "upon any question touching the rights and interests of the people in the Territory," as to which it made most sense to permit him to speak; but he was happy to withdraw this motion when it attracted no support, saying he had advanced the idea only to make it easier to "get the resolution through the House." 4 *Annals of Cong* 887 (Nov 14, 1794).

²⁵⁴ This issue arose again in heightened form in 1993, when the House extended to five Delegates (who had been given the right to vote in standing committees in 1970) the right also to vote in the Committee of the Whole—except that, if their votes were decisive, a new vote would be taken without them. The District of Columbia Circuit upheld this arrangement in *Michel v Anderson*, 14 F3d 623 (1994), relying largely on the First Congress's endorsement of the provision for a Delegate in the Northwest Ordinance and the powers exercised by William Henry Harrison (which included making motions and serving on committees) after his election to that position in 1799. *Id.* at 631. (The more significant decision to seat the Southwest Delegate, after the constitutional question had been fully debated, was not mentioned in the opinion.) The court warned, however, that the House had gone to the limit; similar rights for mayors, or a power to affect the result in the Committee of the Whole, or a vote of any kind on the floor of the House itself, would be unconstitutional. *Id.* at 630. These distinctions were all stated as a matter of fiat, and of course no voting rights followed from the eighteenth-century experience; the prevailing argument in 1794 was that all the Delegate could do was speak—a right that could be afforded to anyone.

²⁵⁵ 4 *Annals of Cong* 164 (Jan 7, 1794).

were not acknowledged by stars and stripes of their own, and the bill became law.²⁵⁶ No one questioned Congress's authority to enact it.

The Constitution says nothing about flags. Congress must have understood the power to prescribe one to be inherent in nationhood: every country needs a flag, and the states were in no position to provide it.²⁵⁷ Tradition supports this interpretation, as it supported the Third Congress in seating the Southwest Delegate, for the original flag of thirteen stars and stripes was adopted in 1777 by the Continental Congress, which had no express authority in the premises either.²⁵⁸

The banner Congress approved in 1794 would remain our national emblem until 1818. It was this flag that inspired Francis Scott Key during the War of 1812, long after its fifteen stars and stripes had ceased to represent the true state of the Union.²⁵⁹ When the number of states reached twenty, Congress was moved to act once more, and this time it made sure it would never have to be bothered again. From then on the flag was to consist of thirteen stripes and twenty stars, with a new star to be added on the admission of each new state.²⁶⁰ Thus the stars were to represent all the states of the Union, the stripes the original thirteen, and as far as the flag was concerned we could all live happily ever after.

²⁵⁶ See *id.* at 165; 4 Annals of Cong 166 (Jan 8, 1794) (reporting passage of bill); Act of Jan 13, 1794, 1 Stat 341. The House vote was a miserly fifty to forty-two.

²⁵⁷ See Frederick C. Hicks, *The Flag of the United States* 20, 87 (1926):

From the sculptures and paintings on the monuments of Egypt it is evident that the use of standards and flags was common in the Valley of the Nile thousands of years before the Christian era. . . . [Yet t]he use of a particular emblem to symbolize the authority and unity of a nation is of comparatively modern origin, and has been so used only during the last three or four centuries.

The German constitution of 1949 prescribes the colors of the national flag; authority to define other national symbols is understood to be inherent in the central government despite the fact that, as in the United States, all powers not delegated to the Federation are reserved to the constituent states. See German Grundgesetz, Arts 22, 30, 70; Theodor Maunz, et al, 3 Grundgesetz Kommentar, Art 70, Rdnr 46 at 20-21 (Beck 1993).

²⁵⁸ See Worthington Chauncey Ford, ed, 8 *Journals of the Continental Congress, 1774-1789* 464 (US GPO 1907); Hicks, *The Flag of the United States* at 99-100 (cited in note 257). See also *id.* at 101-05 (debunking the legend of Betsy Ross).

²⁵⁹ See Hicks, *Flag of the United States* at 145-46 (cited in note 257).

²⁶⁰ Act of Apr 4, 1818, 3 Stat 415. "A further increase in the number of stripes," wrote Congressman Hicks, "would have made the width of the flag disproportionate to its length, unless the stripes were narrowed, and this would have impaired its distinctness." Hicks, *The Flag of the United States* at 147 (cited in note 257). Goodhue, the reader will surely recall, had foreseen this problem in 1794. See text accompanying note 255.

Most of the Representatives who voted for the new flag in 1794 were associated with the faction that was soon to become the Republican party. The doctrine of inherent federal authority that justified their innocent action would come back to haunt them in 1798.²⁶¹

But that, like other fascinating stories of the Fourth and Fifth Congresses, is material for another day.

²⁶¹ See Aliens Act, 1 Stat at 570; 8 Annals of Cong 1957-59 (June 16, 1798) (Rep Sewall).