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THE CONSTITUTION IN CONGRESS: THE SECOND CONGRESS, 1791-1793

David P. Currie*

The job of constitution-making did not end in Philadelphia in 1787, or even with the state ratifying conventions that followed. The First Congress, as I have said elsewhere, was practically a second constitutional convention. Not only did it propose twelve constitutional amendments, ten of which were immediately adopted; it also put meat on the bare bones of the Constitution itself as it began to set up the new Government and to work through the long list of its powers.¹

By the time the Second Congress first assembled in October 1791, the honeymoon was over. Having experienced the intoxication of constructing the machinery of government, Congress and the President settled into the more humdrum task of making it work.

The rift that had begun to divide the friends of the Constitution during the First Congress was soon to widen into a chasm. Basic philosophical differences separated Hamilton from Jefferson in the Cabinet, Ames from Madison in the House.² The intimidating presence of the saintly Washington kept a lid on the cauldron for a time, but the pot seethed with discord that boiled over into public bickering on more than one occasion.

The Second Congress spent much of its time completing the organization of the government. Additional agencies had to be created: the new Post Office, the Militia, the Mint. Government operations had to be supervised: the House investigated General St. Clair's defeat in the Indian wars and Alexander Hamilton's conduct of the Treasury. The first congressional reapportionment prompted the first presidential veto, and it was on constitutional grounds. Congress also

* Edward H. Levi Distinguished Service Professor of Law, The University of Chicago. Many thanks to Philip Shaikun and Jim Young for seminar papers that stimulated my thinking on the issues discussed in this paper; to Frank Easterbrook, Philip B. Kurland, and Lawrence Lessig for constructive criticism; to Dianne Kueck for valuable research assistance; and to the Nancy Goodman Feldman Fund and the Sonnenschein Faculty Research Fund for financial support.


² For an account of the accelerating feud between Hamilton and Jefferson see LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 222-36 (1948).
found time to enact legislation regulating presidential elections and succession. It implemented Article IV of the Constitution by passing a law to require the return of fugitives. And once more it debated the scope of its power to spend.

As in the First Congress, constitutional questions figured prominently in the debates. Many of the constitutional controversies that agitated the country during the Second Congress have since been largely forgotten; but that makes it all the more important that they be recounted now.3

I. Congress

Article I, Section 2 provisionally allocated sixty-five House seats among the states,4 and the First and Second Congresses were elected on the basis of that apportionment. Once the census required by that Section was completed, representatives were to be reallocated among the states “according to their respective numbers,” including three-fifths of the slaves.5 The same provision imposed two additional requirements: “The number of Representatives shall not exceed one for every thirty thousand, but each state shall have at least one Representative.”6 When the Second Congress convened, the 1790 census was on its desk, and the House devoted its attention almost immediately to the task.

John Laurance of New York initiated the debate by moving to set the total number of representatives at one for every thirty thousand persons.7 Opponents objected that this ratio would produce a House too large for efficient deliberation and too costly to maintain;8 sup-


5 Id.

6 Id.

7 3 ANNALS OF CONG. 148 (1791). [Editor’s Note: There are two versions of the Annals of Congress—one edited by Gales, and the other by Gales & Seaton. All citations herein to the Annals of Congress are to the Gales edition.] “The habit of thought in those days was not first to determine the total number of seats or house size and then to distribute them, but rather to fix upon some ‘ratio of representation,’ . . . and then allow the house size to fall where it may.” MICHEL L. BALINSKI & H. PEYTON YOUNG, FAIR REPRESENTATION: MEETING THE IDEAL OF ONE MAN, ONE VOTE 11 (1982). As in later proposals, it was understood that the population count had to be adjusted downward to include only three-fifths of the slaves.

8 3 ANNALS OF CONG. 154 (1791) (Rep. Clark); id. at 173 (Rep. Barnwell); see also id. at 155 (Rep. Laurance) (responding to both objections); cf. THE FEDERALIST NO. 55, at 342 (James
porters insisted a smaller House would make it impossible for members to know the views of their own constituents and would reduce the influence of the people.\(^9\)

Several speakers invoked the Constitution. Virginia’s Alexander White insisted at one point that the Constitution “plainly contemplate[d]” that the ratio would be one to thirty thousand.\(^10\) What it said, however, was that the number of representatives should not exceed one to thirty thousand, which was by no means the same thing. The difference in phrasing was no accident. The original draft had set a precise ratio; it was altered in response to Madison’s argument that as population increased a fixed apportionment formula would produce an unwieldy House.\(^11\)

Representative William Giles (also of Virginia) came close to suggesting that by proposing a constitutional amendment that would have fixed the ratio at exactly one to thirty thousand Congress had bound itself not to deviate from that figure.\(^12\) The amendment, however, had not been adopted.\(^13\) Moreover, it would have permitted a less generous ratio once the number of seats reached one hundred, and on the basis of the one-to-thirty thousand ratio it had already done so.\(^14\)

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\(^9\) 3 Annals of Cong. 181 (1791) (Rep. Page). Representative Sedgwick reckoned that a 1/30,000 ratio would produce 110 members, a 1/33,000 ratio would produce 104 members, a 1/34,000 ratio would produce 100 members, and a 1/40,000 ratio would produce 82 members. See id. at 149.

\(^10\) Id. at 201.


\(^12\) “But, he observed, that Congress had precluded itself from a right to exercise this discretionary power [to alter the ratio], by sending out to the several State Legislatures an amendment on this very subject.” 3 Annals of Cong. 178 (1791).

\(^13\) According to Representative Gerry, eight states had ratified the proposal at the time of this debate. See 3 Annals of Cong. 169 (1791); see also id. at 200 (“Mr. Macon said he did not conceive that the amendment referred to was to be a guide to the House till it was fully ratified; and, as it was uncertain whether it ever would be, we ought not to be swayed by it on this occasion.”).

\(^14\) Thereafter “there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred; after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.” 1 Stat. 97 (1789). The more plausible argument that Congress ought to comply with the proposed amendment in order to avoid having to revise the law in the event of its adoption; e.g., 3 Annals of Cong. 169 (1791) (Rep. Gerry); id. at 200 (Rep. Bourne), was not of constitutional dimension. Moreover, a year after ten of the twelve proposals had been approved by the states, adoption of the other two seemed, as Representative Macon suggested, id. at 200, a rather remote possibility. In any case, as Gerry ultimately conceded, id. at 169, the amendment would have left so much discretion to Congress that most of the ratios under discussion would have satisfied its requirements.
More to the point was the argument of North Carolina's Hugh Williamson that Congress should employ that ratio which "would leave the fewest fractions," i.e., would minimize deviations from the basic requirement that representation be proportional to population. Though this contention was not phrased in constitutional terms, it might well have been, for what Williamson was urging was maximum attainment of the constitutional goal.

After approving Laurance's suggestion of a one-to-thirty thousand ratio by a relatively narrow margin, the House passed a bill to that effect—apparently never doubting that, although Article I, Section 2 did not specify who was to make the necessary apportionment, it should be done by statute (presumably as necessary and proper to the operations of Congress) rather than by simple House resolution.

To determine the number of seats for each state, the House divided each state's adjusted population by thirty thousand and (because representatives are indivisible) rounded the quotient down to the nearest whole number. But dividing by thirty thousand left eight of the fifteen states with fractions of over fifteen thousand, which the bill ignored. Thus Connecticut, which had a population 7.895 times the divisor, was given only seven seats; Vermont, with a quotient of 2.851, was given two. As Williamson had suggested, the House bill left a number of states substantially underrepresented in relation to their numbers.

In the Senate, Vice President Adams broke a twelve-to-twelve tie to amend the House bill by substituting a ratio of one to thirty-three thousand. The result was to reduce Virginia's share by two seats and

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15 3 Annals of Cong. 154 (1791); see also id. at 244 (Rep. Sedgwick).
16 Id. at 191. The vote was 35 to 23. A subsequent motion to substitute a ratio of 1/34,000 was defeated 38 to 21. Id. at 208.
17 Id. at 210.
18 After the Senate had amended the ratio to 1/33,000, Representative Findley did protest that apportionment of House seats was basically the House's business, id. at 245, but neither he nor anyone else was recorded in the Annals as arguing that the House had power to apportion by resolution or House rule. Neither the House's power to judge "the elections, returns and qualifications of its own members" nor its authority to "determine the rules of its proceedings" appears to cover the case, but one might have argued that the power to apportion, like the power to investigate, was inherent or implied. Cf. Currie, Substantive Issues, supra note 1, at 169-71 (discussing the question of who was to implement the oath requirement of Article VI).
19 The complete figures are shown in the following table:
those of other large states by one—thus considerably enhancing the relative power of the smaller states.20

When the House began consideration of the Senate amendment, Fisher Ames supported it with a more focused version of Williamson’s earlier argument. The original House bill, he said, was unconstitutional. For it gave Virginia as many seats as six smaller states with an aggregate of seventy thousand more people, in contravention of the

<table>
<thead>
<tr>
<th>State</th>
<th>Adj. Pop.</th>
<th>Pop./30,000</th>
<th>Seats</th>
</tr>
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<tr>
<td>Connecticut</td>
<td>236,841</td>
<td>7.895</td>
<td>7</td>
</tr>
<tr>
<td>Delaware</td>
<td>55,540</td>
<td>1.851</td>
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<tr>
<td>Georgia</td>
<td>70,835</td>
<td>2.361</td>
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<tr>
<td>Kentucky</td>
<td>68,705</td>
<td>2.290</td>
<td>2</td>
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<tr>
<td>Maryland</td>
<td>278,514</td>
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<td>9</td>
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<tr>
<td>Massachusetts</td>
<td>475,527</td>
<td>15.844</td>
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<td>141,822</td>
<td>4.727</td>
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<td>New York</td>
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<td>11</td>
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<tr>
<td>Pennsylvania</td>
<td>432,879</td>
<td>14.429</td>
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<tr>
<td>Rhode Island</td>
<td>68,446</td>
<td>2.282</td>
<td>2</td>
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<tr>
<td>South Carolina</td>
<td>206,236</td>
<td>6.875</td>
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<tr>
<td>Vermont</td>
<td>85,533</td>
<td>2.851</td>
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<tr>
<td>Virginia</td>
<td>630,560</td>
<td>21.019</td>
<td>21</td>
</tr>
</tbody>
</table>

Total | 3,615,920 | 120.531 | 112 |

This table and those that follow are adapted from BALINSKI & YOUNG, supra note 7, at 11-15. For the original census figures see U.S. CENSUS OFFICE, RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES 3 (1976) [hereinafter 1790 CENSUS]. To understand the political dynamics of the debate it is important to note that small states tended to be the most underrepresented in this allocation.

20 3 ANNALS OF CONG. 46-47 (1791). The complete results were as follows:

In response to Findley’s suggestion that the Senate should defer to the House on questions of its own composition, see supra note 17, Hillhouse argued that the Senate was more impartial on such issues than the House itself. 3 ANNALS OF CONG. 245 (1791). Gerry reminded him, significantly in light of the results of the Senate vote, that small states had a disproportionate voice in the upper House. Id.; see also id. at 244 (Rep. Williamson) (noting that the Senate’s ratio would work to the disadvantage of the South).

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requirement that representatives be allocated on the basis of numbers.21 Similarly, added Vermont's Nathaniel Niles, both the House and Senate versions produced another "manifest inequality" by awarding Delaware, with its population of fifty-eight thousand, only a single representative.22 The constitutional principle of apportionment according to population, he argued, would be more nearly realized by giving Delaware a second seat.23

To do so, replied William Vans Murray of Maryland, would be unconstitutional. Delaware could not be given two representatives until it had sixty thousand inhabitants, because the Constitution forbade giving any state more than one seat for every thirty thousand persons.24 Ames took a different view: the one-to-thirty thousand ratio merely limited the total number of representatives in the House. It had nothing to do with how that number was to be apportioned; apportionment was governed by the independent provision that seats were to be allocated according to population.25 To apply the ratio to each state rather than to the nation as a whole, added Samuel Livermore of New Hampshire, offended the equality principle.26

After an extended deadlock between the two Houses,27 the Senate came up with a new proposal. Without revealing the basis of its apportionment, the new Senate version retained the House ratio of one to thirty thousand, preserved all the seats originally allotted by the House bill, and awarded an additional eight seats to those states having the largest fractions.28 One consequence was to raise the number of seats to 120, which was almost exactly one thirty-thousandth of the total adjusted population.29 Another was to increase significantly the representation of several of the smaller states. The

21 Id. at 246.
22 Since that figure contained a number of slaves, it should have been reduced to 55,540, but the point remains valid. See 1790 Census, supra note 19; 23 The Papers of Thomas Jefferson 370 (Charles T. Cullen et al. eds., 1990) [hereinafter Jefferson Papers].
23 3 Annals of Cong. 246 (1791).
24 Id. at 269; see also id. at 264 (Rep. Madison).
25 Id. at 409-11; see also id. at 266 (Rep. Boudinot).
26 Id. at 335. Theodore Sedgwick of Massachusetts, stressing that direct taxes as well as representatives were to be apportioned according to the census, pointed out that it would hardly comport with that standard to tax Rhode Island twice as much as Delaware, when their populations were practically equal. Id. at 248. At the same time, Ames added, parity between benefits and burdens was a fundamental principle of Article I; the Constitution would not permit use of different formulas for apportioning representation and taxes. Id. at 255-56.
28 3 Annals of Cong. 105-06 (1792).
29 The actual census figure was 3,615,920. See supra note 19. This correspondence led Hamilton to deduce that the Senate had actually reversed the House's approach, beginning by dividing the national adjusted population by 30,000 to determine the number of representatives and then allocating them in proportion to the population of the several states. See 11 The Papers of
third was to reduce greatly the deviations from the standard of apportionment according to numbers.\textsuperscript{30}

The House ultimately acquiesced,\textsuperscript{31} but the President did not. After requesting opinions from his four Cabinet officers (who divided evenly on the question),\textsuperscript{32} Washington vetoed the bill as unconstitutional:

First. The Constitution has prescribed that Representatives shall be apportioned among the several States according to their respective numbers; and there is no one proportion or divisor which, applied to the respective numbers of the States, will yield the number and allotment of Representatives proposed by the bill.

Second. The Constitution has also provided that the number of Representatives shall not exceed one for every thirty thousand; which restriction is, by the context, and by fair and obvious construction, to be applied to the separate and respective numbers of the States; and the bill has allotted to eight of the States more than one for every thirty thousand.\textsuperscript{33}

\begin{tabular}{|l|c|c|c|}
\hline
State & Adj. Pop. & Pop./30,000 & Seats \\
\hline
Connecticut & 236,841 & 7.895 & 8 \\
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Georgia & 70,835 & 2.361 & 2 \\
Kentucky & 68,705 & 2.290 & 2 \\
Maryland & 278,514 & 9.284 & 9 \\
Massachusetts & 475,327 & 15.844 & 16 \\
New Hampshire & 141,822 & 4.727 & 5 \\
New Jersey & 179,570 & 5.986 & 6 \\
New York & 331,589 & 11.039 & 11 \\
North Carolina & 353,523 & 11.784 & 12 \\
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Vermont & 85,533 & 2.851 & 3 \\
Virginia & 630,560 & 21.019 & 21 \\
\hline
Total & 3,615,920 & 120.531 & 120 \\
\hline
\end{tabular}

In this case, giving seats to the eight states with the largest fractions amounted to rounding off all fractions to the nearest whole number—a method recommended by Daniel Webster in 1832, utilized on occasion by Congress, and endorsed by a leading modern study as most likely to produce results approximating the constitutional standard. See \textit{Balinski & Young}, supra note 7, at 30-32, 42, 47, 86. Even Jefferson, who urged the President to veto the bill on constitutional grounds, conceded that it produced “a tolerably just result.” See \textit{23 Jefferson Papers, supra} note 22, at 370.

\textsuperscript{31} \textit{3 Annals of Cong.} 482-83 (1792).

\textsuperscript{32} Hamilton and Knox thought the bill was constitutional; Jefferson and Randolph thought it was not. All four opinions are reported in S. Doc. No. 234, 22d Cong., 1st Sess. (1832). \textit{See also 23 Jefferson Papers, supra} note 22, at 370; \textit{11 Hamilton Papers, supra} note 29, at 228.

\textsuperscript{33} \textit{See 3 Annals of Cong.} 539 (1792); James D. Richardson, \textit{1 A Compilation of the Messages and Papers of the Presidents} 1789-1897, at 124 (1900).
In other words, the bill as passed by Congress offended both the requirement that seats be apportioned according to population and the proviso that the number of representatives not exceed one to thirty thousand.

Neither objection seems to hold water. As Justice Story later pointed out in his treatise, nothing in the language of Article I, Section 2 appears to require that Congress employ a single ratio to determine the number of seats in each state; what it requires is that seats be apportioned to population. Since the number of representatives from each state must be a whole number, perfect conformity with the constitutional goal cannot be attained; unless every state has a population that is an exact multiple of the figure chosen, any apportionment will give some states a higher ratio of representatives to inhabitants than others. The most this provision can be held to require is that the apportionment be as nearly proportional to population as is practicable—subject, of course, to other restrictions on the size and apportionment of the House.

Nor does the Constitution say that no state may have more than one representative for thirty thousand persons. It says that the number of representatives shall not exceed one per thirty thousand. As Ames argued, the most natural reading of this language is that it limits the total number of seats, and the history of the provision leaves no doubt that this was its purpose.

34 Washington had borrowed the ratio argument from Jefferson, who had concocted it by an exercise in synonymy:

[The clause . . . is express that representatives shall be apportioned among the several states according to their respective numbers. That is to say, they shall be apportioned by some common ratio. For proportion, and ratio, are equivalent words; and it is the definition of proportion among numbers, that they have a ratio common to all, or in other words a common divisor.

23 JEFFERSON PAPERS, supra note 22, at 371.

35 See JOSPEH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 676 (Brown, Shattuck & Co. 1833). Article I, § 2 appears to exclude the possibility of representative districts that cross state lines. Not only are members to be chosen “by the people of the several states” and seats apportioned “among the several states,” each representative is required to be “an inhabitant of that state in which he shall be chosen,” and in case of a vacancy “in the representation from any state, the executive authority thereof” is to order a special election. U.S. CONST. art. I, § 2; see also U.S. CONST. art. II, § 1 (providing that when the House selects the President “the votes shall be taken by states, the representation from each state having one vote”). Moreover, though § 2 contains no equivalent of § 3’s provision that “each Senator shall have one vote,” various provisions of the Constitution seem to contemplate that the same principle will apply to the House. See, e.g., U.S. CONST. art. I, § 5 (“one fifth of those present” may demand the yeas and nays); U.S. CONST. art. II, § 1 (apportioning electoral votes according to “the whole number of Senators and Representatives” to which each state is entitled).

36 STORY, supra note 35, at §§ 676, 680; see also 11 HAMILTON PAPERS, supra note 29, at 230 (“If this makes the apportionment not mathematically ‘according to the respective numbers of the several states’ so neither would the opposite principle of construction.”).
The original draft would have prescribed flatly one representative for each forty thousand persons. When Madison objected that as the population increased this ratio would produce a oversized and unwieldy House, it was amended to require no more than one for each forty thousand.  

When Williamson and others objected that at the outset one to forty thousand would produce too few members, it was revised to require no more than one to thirty thousand. When critics protested that Congress might be reluctant to increase the number of seats as permitted by this provision, Congress proposed a constitutional amendment that would have assured an increase in the size of the House by requiring one representative for each thirty thousand, until the total number reached one hundred members.

In short, the entire dispute was over the size of the House, not the method of apportionment. While the total number of representatives was not to exceed one for thirty thousand, they were to be apportioned as nearly as possible (while assuring that no state went unrepresented) in proportion to population.

On this understanding, not only was Washington wrong in finding the bill as enacted invalid; as Ames argued, the House bill, which conformed to the President's formula, was itself of doubtful constitutionality. For by refusing to award a seat for anything less than a full thirty thousand persons, the House plan produced glaring deviations from the constitutional standard of equal representation for equal numbers—deviations that would have been sharply reduced by approving the Senate plan. If Article I requires that representation be apportioned to population as nearly as practicable, it was the House bill, not the Senate version initially passed by both Houses, that failed the constitutional test.

37 See RECORDS OF THE FEDERAL CONVENTION, supra note 11, at 178, 221.
38 Id. at 511, 553, 612, 643-44.
39 See supra note 13. For excerpts from the voluminous debate leading to this proposal, see 1 ANNALS OF CONG. 734-56 (Joseph Gales ed., 1834) (1791).
40 Hamilton, who argued that the ratio could constitutionally be applied either to each state or to the population of the country as a whole, agreed that the reason for the requirement was "merely to determine a proportional limit which the number of the house of representatives shall not exceed." 11 HAMILTON PAPERS, supra note 29, at 229-30. Jefferson said only that "common sense" suggested that the ratio should be applied to each state separately and noted that the contrary interpretation had not occurred to anyone until late in the congressional proceedings. 23 JEFFERSON PAPERS, supra note 22, at 372-73. Despite his recognition that "[t]he object of fixing some limitation was to prevent the future existence of a very numerous and unwieldy house of representatives," Story thought Washington was right on this point, though he did not say why. See STORY, supra note 35, §§ 671, 676, 680. To the same effect, see WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 42-43 (Philip H. Nicklin ed., 2d ed. 1829).
41 "The longer the matter was discussed, the plainer did it become that the [House] method [of ignoring fractions] resulted in a decided inequality of representation, and thus in a violation
After an attempt to override the veto failed, the House passed a new bill applying a ratio of one to thirty-three thousand to each state and ignoring fractions. The Senate concurred, and the President signed the bill. Delaware still got only one representative for its fifty-eight thousand inhabitants. Two centuries of continued wrestling with the problem have demonstrated the daunting mathematical complexities involved in determining the optimal general formula for eliminating apportionment inequalities. Moreover, the statute finally adopted was much better in this regard than the original House bill it was designed to replace. But the bill that Washington vetoed was better still, and thus the solution that he forced upon Congress in 1792 cannot comfortably be reconciled with the constitutional requirement that states be represented in the House according to their respective numbers.

of the constitutional rule that representatives be apportioned according to population.” James, supra note 27, at 13 n.4.

3 Annals of Cong. 548, 550 (1792). This bill was the equivalent of the Senate amendment to the bill first passed by the House. See supra notes 18-19.

3 Annals of Cong. 120 (1792).


See generally United States Dep’t of Commerce v. Montana, 503 U.S. 442 (1992) (upholding an apportionment in which Montana was given only one representative for its 803,655 inhabitants although the national average was 1/572,466, on the ground that since no formula was perfect, considerable deference was due to the considered judgment of Congress in adopting a reasonable general rule); Balinski & Young, supra note 7; Laurence F. Schmeckebier, Congressional Apportionment (1941); Zechariah Chafee, Congressional Reapportionment, 42 Harv. L. Rev. 1015 (1929). Contrast the conclusion in Wesberry v. Sanders, 376 U.S. 1, 7 (1964), that with respect to districts within a single state—a subject on which the Constitution is silent—the mere command that representatives be chosen “by the people of the several states” implied that “as nearly as possible one man’s vote in a congressional election is to be worth as much as another’s.”

Rounding to the nearest whole number produces a result closer to true proportionality than rounding down whenever there are fractions greater than 0.5, as there were under the statutory formula.

Two election contests resolved by the House during the Second Congress contributed to our understanding of the constitutional standards governing both elections themselves and the machinery for passing upon them.

Before taking his seat as a Representative from Maryland, William Pinkney sent a letter of resignation to the Governor, who after ordering a special election (as Article I, § 2 requires in case of a “vacanc[y]”) certified to the House that John Francis Mercer had been chosen to replace him. Representative Giles, invoking British precedent, denied that a member of the House could create a vacancy by resigning. Echoed by Boudinot and Sedgwick, Giles also argued that only the House itself and not the Governor had authority to determine whether a vacancy existed; for “if the Executive in the present instance judges of the circumstances that cause a vacancy, he may do it in every instance; in which case, the members of the House may be reduced to hold their seats on a very precarious tenure indeed.” The House voted to seat Mercer, thus resolving both questions against Giles and in favor of the Governor (and rightly so). Though Article I, § 3 conspicuously contrasts with the House provision by providing for replacement of senators whenever vacancies happen “by resignation or otherwise,” there appears to be no plausible reason for treating the two chambers differently in this regard, and thus every rea-
II. The President

"On no problem did the Convention of 1787 expend more time," wrote Professor Corwin, "than that of devising a suitable method of choosing a President." Direct popular election was rejected out of fear that the people were incapable of making an informed choice, election by Congress on the basis of concern for the independence of the Executive. Article II, Section 1 embodied the ingenious solution: the President would be chosen by "electors," selected in each state "in such manner as the legislature thereof shall direct." In some respects Article II was quite precise about the electoral process. The electors were to "meet in their respective states" and cast two votes apiece, one of which should be for a candidate from some other state. They were to transmit a signed and certified list of their votes to the President of the Senate, who was to open the envelopes "in the presence of the Senate and House of Representatives," and the votes were then to be counted. The person receiving the most votes became President, if he had a majority; the runner-up became Vice President. There were detailed provisions for an election son to conclude that the difference in phrasing was accidental. As for Giles's fears about governors going about inventing vacancies in order to unseat uncongenial members of the House, the independence of that body seems adequately assured, as Smith and Gerry argued, by the provision of Article I, § 6 making each House "judge of the elections, returns and qualifications of its own members." See 3 ANNALS OF CONG. 205-09 (1791); M. ST. CLAIR CLARKE & DAVID A. HALL, CASES OF CONTESTED ELECTIONS IN CONGRESS 44-46 (Gales & Seaton, 1834).

The second controversy arose when former Georgia Representative James Jackson challenged the election in which he had been defeated for reelection by the Revolutionary General Anthony Wayne. A four-day hearing was conducted before the House itself, but not out of a sense of constitutional compulsion; over renewed objections by Livermore that the House could not delegate its responsibility, a standing committee had already been appointed to examine the evidence in election contests and report to the full body. 3 ANNALS OF CONG. 144-45 (1791). Having found irregularities that invalidated Wayne's election, the House refused to seat him. Giles and Madison argued that, as the candidate with the most valid votes, Jackson should be seated. The House deadlocked on political lines, and the Speaker cast a tie-breaking vote against seating Jackson, thus forcing a new election. Id. at 211-12, 458-72, 475-79; CLARKE & HALL, supra at 47-68. Since there was apparently no way of knowing which candidate would have won an untainted election, there is much to be said for this outcome.


49 "[I]t would be as unnatural to refer the choice of a proper character for the Chief Magistrate to the people," said George Mason at the Convention, "as it would, to refer a trial of colours to a blind man." RECORDS OF THE FEDERAL CONVENTION, supra note 11, at 31.

50 A President chosen by Congress, said Gouverneur Morris, would be "the mere creature of the Legislature." Id. at 29; see also THE FEDERALIST No. 68 (Alexander Hamilton); STORY, supra note 35, §§ 1450-51.

51 U.S. CONST. art. II, § 1. To reinforce the President's independence, the same section provided that no member of Congress and no "person holding an office of trust or profit under the United States" was eligible to serve as an elector. Id.; see STORY, supra note 35, at § 1467.

52 U.S. CONST. art. II, § 1, cl. 3, amended by U.S. CONST. amend. XII.

53 Id.
by the House of Representatives in case of a tie or the failure of any candidate to receive a majority.

Even these provisions, however, did not resolve all questions about presidential elections. To fill some of the gaps was the purpose of the Presidential Election and Succession Act of 1792.54

A. The Electoral College

Section 2 of the Act provided that the electors should meet to cast their votes on the first Wednesday in December of each election year; section 1 prescribed that the electors themselves should be chosen within the thirty-four days preceding their meeting.55 So far, so good; Article II, Section 1 explicitly empowers Congress to "determine the time of choosing the electors, and the day on which they shall give their votes."56 But Congress did not stop there, and not everything in the statute can so easily be explained.

The Act further provided that the executive authority of each state should deliver to the electors a certified list of the names of those who had been selected;57 that the electors should meet at a place designated by their state legislature; that they should make three lists of their votes, attaching copies of the certificate of their own appointments; that one copy should be sent to the President of the Senate by messenger by the first Wednesday in January, another forwarded to the same address by post, and the third delivered to the local federal judge.58 If no certificate was received by the specified date, the Secretary of State was to send a messenger to fetch it from the judge.59 For faithful delivery of the certificates the messengers were to receive twenty-five cents per mile; for neglect of their duty they were to forfeit one thousand dollars.60 Congress was to be in session on the second Wednesday in February for the opening and counting of the votes.61

This was all very sensible, and there was an obvious need for regulations of this nature. Embarrassingly, a provision that would expressly have authorized Congress to adopt them was dropped during

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54 Presidential Election and Succession Act of 1792, ch. 8, 1 Stat. 239.
55 Id.
56 U.S. Const. art. II. § 1. A provision to fix the time for choosing electors had been dropped from an earlier bill during the First Congress after several members argued that it would be preferable to leave the matter to the individual states, but no one contested Sherman's assertion that Congress had power to set this date as well as the time on which the electors would meet and cast their votes. See 2 ANNALS OF CONG. 1916-18 (1791).
57 Presidential Election and Succession Act § 4, 1 Stat. at 239, 240.
58 Id. § 2, 1 Stat. at 239, 240.
59 Id. § 4, 1 Stat. at 240.
60 Id. §§ 7-8, 1 Stat. at 240.
61 Id. § 5, 1 Stat. at 240. The details have been changed, but provisions covering the same ground are still in effect. 3 U.S.C. §§ 6, 9-15 (1988).
the Convention (we do not know why) by the Committee of Style.\textsuperscript{62} Unaware of this history or deeming it no obstacle, Congress must have concluded that regulating the manner in which the election results were compiled and transmitted was necessary and proper to the duties of Congress and of the Senate President with respect to the opening and counting of votes, or to assure the functioning of the presidency.\textsuperscript{63}

The \textit{Annals of Congress} reveal only one constitutional objection to any of these provisions. To require the "executive authority" of each state to certify a list of electors, said Representative Niles, involved "a blending of the respective powers" of state and federal governments that was "degrading to the Executive of the several States" and "not warranted by the Constitution."\textsuperscript{64} To a modern observer this provision raises an issue of intergovernmental immunity that is the converse of that discussed in \textit{McCulloch v. Maryland}.\textsuperscript{65} That is not quite the way Niles put it, and the House rejected his objection.\textsuperscript{66} At least two provisions adopted by the First Congress had similarly appeared to impose duties on state officers, and no one had perceived any constitutional problem.\textsuperscript{67} Niles's argument seems to reflect a growing sensitivity to the need to protect the independence of state governments.

Significantly, the Act made no attempt to regulate the process of choosing the electors themselves. In contrast to Article I, Section 4, which authorizes Congress to supersede most state rules governing the time, place, and manner of electing Senators and Representatives, Article II leaves the method of selecting electors entirely to the states, in

\textsuperscript{62} Before the committee rewrote it, the draft would have empowered Congress to "determine the time of choosing the Electors, and of their giving their votes; and the manner of certifying and transmitting their votes." RECORDS OF THE FEDERAL CONVENTION, \textit{supra} note 11, at 529. For the revised version see \textit{id}. at 573. In light of the Framers' clear desire to minimize congressional influence on the selection of the President, see \textit{supra} notes 47-48 and accompanying text, the omission may not have been accidental.

\textsuperscript{63} Article I, \S 4 expressly authorized Congress to fix by statute the date of its own meetings.

\textsuperscript{64} 3 \textit{ANNALS OF CONG.} 279 (1791). "[N]o person could be called upon to discharge any duty on behalf of the United States," he added more broadly, "who had not accepted of an appointment under their authority." \textit{Id.} Niles also worried what could be done "in case those Executives should refuse to comply." \textit{Id.}

\textsuperscript{65} 17 U.S. (11 Wheat.) 316 (1819); \textit{see} New York v. United States, 505 U.S. 144 (1992); Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1860).

\textsuperscript{66} 3 \textit{ANNALS OF CONG.} 280 (1791); \textit{see also id.} at 279 ("Mr. Sedgwick observed that if Congress were not authorized to call on the Executives of the several States, he could not conceive what description of persons they were empowered to call upon.").

\textsuperscript{67} \textit{See} Currie, \textit{Structure of Government}, \textit{supra} note 1, at 170-71 (discussing the form of oath to be taken by state officers under Article VI); Currie, \textit{Substantive Issues}, \textit{supra} note 1, at 792 n.93 (discussing the obligations of justices of the peace under the Seamen's Act); \textit{see also id.} at 820 n.267 (discussing prosecution of crimes under the statute governing relations with the Indians).
accordance with the Convention's desire to ensure that the President be independent of Congress.\textsuperscript{68}

The Act did, however, have something to say about the number of electors each state was to choose. The Constitution gave the states a number of electors equal to "the whole number of Senators and Representatives to which the state may be entitled in the Congress."\textsuperscript{69} The statute specified that this figure should be determined not at the time the electors were chosen but "at the time, when the President and Vice-President, thus to be chosen, should come into office"—that is, under the new apportionment that would be used to elect the next Congress rather than the provisional allotment of seats under which the Congress then sitting had been elected.\textsuperscript{70}

This too was an eminently sensible provision. According to Madison, "the Northern interest" (which stood to lose relative strength in the next Congress) argued strongly for the opposite result; but "the intrinsic rectitude" of basing electoral power on the latest census "turned the decision in both houses" in favor of using the new apportionment.\textsuperscript{71} It is not obvious, however, where Congress got authority to settle this issue. The Constitution was not silent on the question; the problem was to determine what it meant by the number of representatives to which each state was "entitled." Yet to allow each state to interpret the provision for itself would create an awkward situation when it was time to count the ballots.\textsuperscript{72} Did Article II imply that Congress (or the President of the Senate) was to determine

\textsuperscript{68} When a bill to regulate presidential elections was before the First Congress, Representative Giles argued that by prescribing that electors should be chosen "in such manner as the legislature . . . may direct" the Constitution implied that the legislatures were not permitted to make the choice themselves; electors were to be chosen by the people. 2 \textit{Annals of Cong.} 1916-17 (1791); \textit{see also id.} at 1916 (Rep. Carroll). Giles was immediately corrected from both ends of the political spectrum. The power was "left discretionary with the State Legislatures," said Jackson of Georgia—as Goodhue of Massachusetts added, "by the express words of the Constitution." \textit{Id.} at 1917. The states took advantage of the latitude thus afforded them to employ a wide variety of methods for choosing electors. In some states they were appointed by the legislature; in others they were elected by the people, sometimes by district and sometimes on a "general ticket"; \textit{i.e.}, at large. \textit{See Story, supra} note 35, at § 1466; \textit{see also McPherson v. Blacker, 146 U.S. 1 (1892).}

\textsuperscript{69} U.S. Const. art. II, § 1, cl. 2.

\textsuperscript{70} Presidential Election and Succession Act of 1792, ch. 8, 1 Stat. 239, § 1. This provision remains the law. 3 U.S.C. § 3 (1988).

\textsuperscript{71} \textbf{Letter from James Madison to Edmund Pendleton (Feb. 21, 1792), in 14 The Papers of James Madison 235} (Charles F. Hobson et al. eds., 1981) [hereinafter \textit{Madison Papers}]; \textit{see also 3 Annals of Cong.} 406 (1792) (Rep. Murray) (noting that "the present representation in Congress is by no means equal"). Madison was not altogether fair in blaming the pressure to employ the old apportionment on "the Northern interest"; it was Elbridge Gerry of Massachusetts who moved to use the new census, and his motion was adopted "with very little objection." \textit{Id.} at 405.

\textsuperscript{72} \textit{See 3 Annals of Cong.} 406 (1792) (Rep. Murray) (arguing that, if the states took differing views of how to determine the number of their electors, "there might appear before the
the validity of the ballots when they were opened? If so, making more precise the constitutional direction for determining the number of each state's electors might be necessary and proper to the opening and counting function. Nobody seems to have doubted that Congress had power to determine this question; but the theory on which its authority seems to rest was to be the subject of fierce controversy later on.

B. Succession

The most controversial aspect of the 1792 statute was the provisions it made for a vacancy in the office of President. If the President resigned or died, or if he was removed or unable to discharge his duties, Article II, Section 1 provided that his powers and duties should "devolve on the Vice President." The same paragraph went on to authorize Congress to "provide for the case of removal, death, resignation or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected."

When the question of presidential succession was initially taken up by the First Congress, William Smith of South Carolina had opened the discussion by moving that in default of both President and Vice

tribunal of the public two Presidents, or two men of great power claiming the Presidency of America".

73 It might also have been found necessary and proper to the functioning of the Presidency itself. Alternatively, congressional authority to implement the election provisions might have been found implicit in Article II by analogy to the arguments that prevailed in the First Congress with respect to the details of the oath that Article VI required of state officers. See Currie, Structure of Government, supra note 1, at 170-71.


75 U.S. CONST. art. II, § 1, cl. 6, amended by U.S. CONST. amend. XXV. Article II did not say who was to determine whether the President was incapable of performing his functions, and the term "devolve" left it unclear whether the President would resume his duties upon recovering from his disability. The statute did not answer either question. It did provide that a President or Vice President could resign or decline his office only by delivering a signed written statement to that effect to the Secretary of State. Presidential Election and Succession Act of 1792, ch. 8, 1 Stat. 239, 241, § 11. The same theories that would sustain this provision—that it was necessary and proper to the regulation of presidential succession or to the exercise of presidential powers, or implicit in Article II—would have justified Congress in specifying who was to make the decision of presidential disability. Yet in true ostrich fashion, Congress left this crucial question unregulated until 1971, when the Twenty-Fifth Amendment was adopted. For the variety of views as to the effect of the original provision, see CORWIN, supra note 48, at 52-53 (noting its failure in the cases of Presidents Garfield and Wilson).

76 U.S. CONST. art. II, § 1, cl. 6.
President responsibility should pass to the Secretary of State. \footnote{Id.; 2 Annals of Cong. 1902 (1791).} Objecting that this resolution would permit the Vice President in certain circumstances to choose his own successor, \footnote{If either of the [Cabinet] officers mentioned should be the person designated to supply the vacancy, it would be in the power of the Vice President, by virtue of the power of removing officers, absolutely to appoint a successor, without consulting either branch of the Legislature.” 2 Annals of Cong. 1902-03 (1791).} Livermore moved to substitute the President pro tempore of the Senate. \footnote{Id. at 1902. As Sherman said, the President pro tem succeeded the Vice President in presiding over the Senate; it was therefore “very natural” that he should succeed him as President as well. Id. at 1912.} The objections were numerous and vehement, and most of them were of constitutional dimension.

The President pro tempore, said White, was not an “officer” within the meaning of Article II and thus could not constitutionally be named. To place the President pro tem in the President’s chair would “give one branch of the Legislature the power of electing a President,” while the Constitution gave both branches “a right to an equal voice in the appointment”; it would “introduce the very evil intended to be guarded against.” \footnote{Id. at 1902 (Rep. Livermore).} Theodore Sedgwick added that the Senate did not always have a President pro tempore; “should the vacancy now happen, there would be no officer in the Senate that could be appointed.” \footnote{Id. at 1903.} Smith complained that to elevate the President pro tem would unconstitutionally “deprive a State of a vote in the Senate”; \footnote{Id. at 1904. Smith echoed both of these objections: if the President pro tem remained in the Senate, he would occupy two incompatible offices; if he resigned he would deprive his state of his vote. Id. at 1913.} Madison, assuming that he would remain a senator subject to state instructions, insisted he would “hold two offices at once” in violation of the separation of powers. \footnote{Id. at 1903; see also id. (Rep. Benson).}

Sedgwick suggested that the Chief Justice should be designated to assume the President’s duties, as his office “was considered as next to that of President.” \footnote{Id. at 1903; see also id. (Rep. Benson).} Madison retorted that this designation “would be blending the Judiciary and Executive”; \footnote{Id. at 1913.} Smith that the Chief Justice could not be spared from his judicial duties. \footnote{Id. at 1904.} Livermore had a different objection: if the President was impeached, it was the Chief Justice who presided over his trial. \footnote{Id. at 1911; see U.S. Const. art. I, § 3, cl. 6.} The implication was plain: there should be no possible suspicion that the Chief Justice was influenced in exercising that responsibility by the prospect that he might become Presi-
dent if the incumbent was convicted.\textsuperscript{88} James Jackson of Georgia, objecting to designation of the Chief Justice, suggested the Speaker of the House.\textsuperscript{89}

Ideally, said Livermore, it might be best to adopt a new constitutional provision “empowering the Electors who had chosen the President and Vice-President, in case of vacancy, to meet again, and make another choice.”\textsuperscript{90} He did not explain why he thought Congress could not prescribe this procedure by statute; perhaps he read the Constitution to say that only Congress could designate the President’s successor.\textsuperscript{91} Elbridge Gerry of Massachusetts seemed to think it unnecessary to call the electors together again; the problem could be solved by “filling the blank with the constitutional clause respecting the highest candidates who are primarily voted for as President and Vice President”—which appeared to mean that the House should choose among the candidates who had finished third through fifth in the preceding election.\textsuperscript{92}

The First Congress adjourned without resolving the conundrum—even though, as Giles had warned his colleagues, once a double vacancy occurred it would be too late to do anything about it. For succession was to be regulated by statute; no bill could become law without presentation to the President; if there was no President, no bill could be presented. “If the event should happen before it was provided for, there would be, he conceived, an end to this Government.”\textsuperscript{93}

In the Second Congress, the Senate passed a bill providing that, in the event of a double vacancy, the President’s duties should be discharged by the President pro tempore, or if that position was vacant, by the Speaker of the House.\textsuperscript{94} Jonathan Sturges of Connecticut renewed the earlier objection that neither the President pro tem nor the Speaker was an “officer” and added that as members of Congress they would be called upon to vote on the President’s salary.\textsuperscript{95} The implica-

\textsuperscript{88} A congressional committee in 1856 appropriately proposed to add the Chief Justice to the succession list, provided he had not presided at the impeachment of his predecessor. See Charles S. Hamlin, The Presidential Succession Act of 1886, 18 Harv. L. Rev. 182, 187 (1904).
\textsuperscript{89} 2 Annals of Cong. 1904 (1791).
\textsuperscript{90} Id. at 1911-12.
\textsuperscript{91} He may also have feared that the electors might select someone who was not an “officer,” but the proper remedy would appear to be to disallow their choice rather than to deny them jurisdiction.
\textsuperscript{92} 2 Annals of Cong. 1913 (1791). Gerry also suggested that succession was not limited, as others had argued, “to officers of the United States; [h]e supposed the views of Government may be extended even to officers of the several States.” Id.
\textsuperscript{93} Id. at 1914.
\textsuperscript{94} See 3 Annals of Cong. 278, 280 (1791).
\textsuperscript{95} Id. at 281.
 tion seemed to be that they might not do so impartially if they foresaw that they might end up receiving that salary themselves.96

Behind the constitutional arguments loomed the political fact that the Secretary of State was Thomas Jefferson.97 The House, in which Jefferson had many friends, voted largely on what we would now call party lines to place the Secretary of State next in line behind the Vice President.98 The Senate, more sympathetic to what would soon be known as the Federalist cause, refused to recede from its preference for its own President pro tempore.99 The House, as in the reapportionment controversy, finally yielded.100

But the constitutional issues that emerged in the House were fascinating and difficult, and the quality of the debate was high.101 Were the President pro tempore and the Speaker "officer[s]" eligible for designation as the President's surrogate under Article II, Section 1? It seems fair enough to assume, contrary to Gerry's suggestion, that the term was intended to limit the choice to someone with the relevant experience that came from current exercise of some federal function. On the other hand, Gerry was right that Article I, Section 2 seemed to treat the Speaker as an officer by directing the House to "choose their Speaker and other officers."102 Article I, Section 3 was not so plain

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96 This objection may be less serious than it appears, since Article I, § 6, cl. 1 expressly authorizes Congress to determine by statute the compensation of its own members. On the other hand it is arguable that, if the President's salary had been increased during the present term, no member of Congress could constitutionally exercise the President's powers. See U.S. Const. art. I, § 6, cl. 2:

No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, . . . the emoluments whereof shall have been increased during such time.

Whether the assumption of presidential powers under the statute would constitute an "appointment" to a "civil office under the Authority of the United States" within this clause is not clear, but there is no doubt that paying the increased salary to the Speaker or President pro tern would offend the spirit of the provision.

97 See 14 Madison Papers, supra note 71, at xix-xx; White, supra note 2, at 230-31.

98 3 Annals of Cong. 402 (1792).

99 Id. at 417.

100 Id. at 417-18; see Hamlin, supra note 88, at 186 ("Had it not been for the jealousy of Jefferson entertained by the Federalists, there is little doubt but that the Secretary of State would have been designated . . . ."); see also Rawle, supra note 40, at 56 (writing in 1829 that "it has become usual for the vice president to retire from the senate a few days before the close of the session, in order that a president pro tempore may be chosen, to be ready to act on emergencies").

101 Indeed in the First Congress the partisan nature of the controversy was muted. Both Sedgwick and William Smith, leaders of the developing Federalist faction, spoke against designating the President pro tem at that time, and it was Smith who first suggested the Secretary of State. Both voted for the President pro tem during the Second Congress.

102 3 Annals of Cong. 281 (1791).
with respect to the President pro tempore; but as Gerry said of the Speaker, "if he is not an officer, what is he?" Like the Speaker or the Vice President, the President pro tempore occupied a position of significant authority within one branch of the federal government; he surely met the usual dictionary definition of an officer.

The term "officer," or something like it, appears a number of other times in the Constitution. In Article I, Section 6, it plainly excludes both the Speaker and the President pro tempore; for in providing that "no person holding any office under the United States shall be a member of either House" the Framers obviously did not mean that Congress would have to select outsiders to preside over its proceedings. An earlier clause of Article II, Section 1 itself seems similarly to distinguish sharply between members of Congress and officers by providing that "no Senator or Representative, or person holding an office of trust or profit under the United States," is eligible to serve as a presidential elector. It would soon be forcefully argued that members of Congress were not "civil officers of the United States" subject to impeachment under Article II, Section 4, but that was partly on the ground that Article I, Section 5 provided a different remedy by empowering each House, by two-thirds vote, to "expel a member." Article I, Section 3 provides that judgment in impeachment cases may include disqualification from "any office of honor, trust or profit under the United States," Article I, Section 9 that no one holding such an office may accept gifts, emoluments, or titles from any foreign state without congressional consent. It is hard to find anything in the text or purpose of either of these provisions to justify construing them to apply only to executive and judicial officers. Thus, it is difficult to say that the Constitution adopts a single meaning of the

103 After prescribing that the Vice President shall be President of the Senate, § 3 adds that "The Senate shall choose their other officers, and also a President pro tempore . . . ." U.S. Const. art. I, § 3, cl. 5.
104 3 Annals of Cong. 281 (1791).
105 U.S. Const. art. I, § 6, cl. 2.
106 U.S. Const. art. II, § 1, cl. 2.
107 Indeed the analogy to impeachment may have been the reason several speakers during the debates on the presidential succession provision insisted that the President pro tempore was not an "officer of the United States," although this terminology does not appear in the succession provision. See, e.g., 2 Annals of Cong. 1902 (1791) (Rep. White). As reported in the Convention by the Committee of Style, this provision too had spoken expressly of an "officer of the United States." Records of the Federal Convention, supra note 11, at 573.
108 U.S. Const. art. I, § 5, cl. 2; see 8 Annals of Cong. 2283, 2289-90 (1789) (Ingersoll's argument against the impeachment of Senator Blount).
109 U.S. Const. art. I, § 3, cl. 7.
110 U.S. Const. art. I, § 9, cl. 8.
111 See also U.S. Const. art. II, § 2 (empowering the President, with the advice and consent of the Senate, to appoint diplomats, Supreme Court Justices, "and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law"); U.S. Const. art. II, § 3 (providing that the President "shall commission all the
term "office" or "officer"; each clause employing these terms must be interpreted according to its own context, history, and purpose.

In this light the most compelling arguments against permitting Congress to designate its own officers (or the Chief Justice) to step into the President's shoes are those respecting conflict of interest and separation of powers. To permit one person to exercise executive and legislative functions at the same time would deviate sharply from the general principle underlying Articles I and II and contradict the plain spirit, if not the literal prohibition, of the incompatibility clause. Thus, there is a strong argument that the Speaker or President pro tem could exercise the President's powers only by abandoning his seat in Congress.

At first glance Smith's fear that this course would deprive one state of representation seems unwarranted, for the Constitution makes explicit provision for filling vacancies in both the House and the Senate. But is it clear there would be a vacancy? Curiously, Article II, Section 1 does not say that the officer designated by Congress shall become President; it says he shall "act as President" until the President recovers from his disability or a new President is elected. The implication may be that we are not really dealing with succession at all; the officer who acts as President—"for the time being," as the statute specified—retains his previous position and resumes its duties once his services as surrogate are no longer required. If that is true, then Smith and Madison may have been right on both counts: for the President pro tempore to exercise presidential powers simultaneously diminishes his state's representation and blurs the separation of powers. Thus, it arguably should be constitutional for a member of Congress to act for the President only if he first resigns from the House or Senate; but there was no such requirement in the Act.

112 U.S. Const. art. I, § 6, cl. 2; see supra note 96 and accompanying text (quoting U.S. Const. art. I, § 6, cl. 2).
113 U.S. Const. art. I, §§ 2-3; see supra note 46.
114 U.S. Const. art. II, § 1, cl. 6. This language explains why it is not clear that the President pro tem or Speaker would in fact be "holding" the President's "office," in violation of the incompatibility clause, while exercising his functions.
115 Ultimately less troubling, though not without weight, is the argument that designating either the Speaker or the President pro tem permits the House or Senate to choose the President, contrary to the basic decision of the Framers as reflected in the electoral-college provisions. The Framers did not exclude Congress from presidential selection entirely; it is the House that chooses the President when the electors fail to do so. U.S. Const. art. II, § 1, cl. 3.
116 "The act thus violated the principle of the separation of powers by investing an officer of the national legislature in his quality as such with the full executive power." Corwin, supra note 48, at 56. The statute was revised in 1886 to provide for Cabinet officers to fill the President's place in order of the establishment of their offices, beginning with the Secretary of State.
C. Special Elections

One final provision in the 1792 statute warrants our attention. When the offices of President and Vice President were both vacant, the President pro tempore was not to fill out the President’s entire term; unless a new election was already imminent, there was to be a special election. Not only does this provision strengthen the inference that the President pro tem or Speaker was to return to Congress once the vacancy was filled or the disability removed, it raises constitutional perplexities of its own.

Unlike the second and third sections of Article I, which specifically call for elections to fill vacancies in the House or Senate, Article II does not say whether Congress may provide for special presidential elections. Yet the language of Article II, in contrast to an earlier version proposed during the Convention, does not simply authorize Congress to designate an officer to carry out the President’s functions. It begins by stating in general terms that Congress may “provide for the Case” of vacancy or incapacity, “declaring what Officer shall then act as President.” It is unclear from the text whether this designation is meant to be the sole provision Congress makes for the case, or whether Congress may make other provisions as well. There is always a possibility that the change in wording was meant to be merely stylistic; but if the Convention meant to limit Congress to naming an officer to hold the fort, it might better have stuck with the original version. Indeed the Convention records make clear that the final words of the clause, which direct that the designated officer act as President “until the disability be removed, or a President shall be elected,” were inserted at Madison’s request precisely to avoid the inference that there could be no special election.

Presidential Election and Succession Act of 1792, § 10, 1 Stat. 239, 240. Interestingly, though Article II spoke only of vacancies occurring by reason of “removal, death, resignation or inability,” § 10 provided for an election in the case of all vacancies, including those created by failure to elect a new President or Vice President (which nearly happened in 1800). See Story, supra note 35, §§ 1476-77 (noting the resultant constitutional question). Section 9 of the statute, which provided for the President pro tem or the Speaker to act pending the new election, applied only in the cases mentioned in Article II.

Randolph had proposed that the officer should serve “until the time of electing a President.” “Mr. Madison observed that this, as worded, would prevent a supply of the vacancy by an
Moreover, a special election made perfect sense, and Congress seems to have had no serious doubts as to its authority to prescribe one. But if a new President was to be elected, when would his term expire? In speaking of elections to "fill . . . vacancies" in the House or Senate, Article I seemed to imply that those who won special election to Congress would only complete the terms for which their predecessors had been chosen. This inference was strengthened by the facts that Section 2 appeared to contemplate a nationwide representative election every other year and that under Section 3 one-third of the Senators' terms were to expire every two years; and both Houses had expressly adopted this interpretation.

Article II contained no similar provisions. What it did say was that the President should hold office for four years. The Second Congress took this language literally and applied it to a President chosen by special election: "[T]he term of four years for which a President and Vice President shall be elected shall in all cases commence on the fourth day of March next succeeding the day on which the votes of the electors shall have been given." That is not the only possible interpretation. Arguably the four-year term provision applied only to a President chosen in accord with intermediate election of the President, and moved to substitute—"until such disability be removed, or a President shall be elected." Records of the Federal Convention, supra note 11, at 535. In the Virginia ratifying convention, in answer to an objection by George Mason, Madison insisted that "[w]hen the President and Vice-President die the election of another President will immediately take place." 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 487-88 (Jonathan Elliot ed., 2d ed. 1854); see also Hamlin, supra note 88, at 185-86 ("The above proceedings make it evident that the framers of the Constitution did not intend that the acting President should necessarily serve for the balance of the unexpired term; on the contrary, they so drafted the Constitution that, as regards at least the above clause, an intermediate election of President could be held.").

Smith had begun the debate by saying he thought that, "by the Constitution, a new election was not to take place till the term for which the President and Vice President had been elected was expired." 2 Annals of Cong. 1902 (1791). But no one echoed his concern, and he did not mention it again. See also Story, supra note 35, § 1477 (noting that the question had not been resolved) (citations omitted):

Every sincere friend of the constitution will naturally feel desirous of upholding the power, as far as he constitutionally may. But it would be more satisfactory, to provide for the case by some suitable amendment, which would clear away every doubt, and thus prevent a crisis dangerous to our future peace, if not to the existence of the government.

See 1 Annals of Cong. 1010 (1790); 2 Annals of Cong. 1636-38 (1790). Thus William Giles of Virginia, who had been named to succeed Theodorick Bland as a member of the First Congress in 1790, ran for reelection the same year and was returned as a member of the Second Congress. See Dice Robins Anderson, William Branch Giles: A Study in the Politics of Virginia and the Nation from 1790 to 1830, at 8-9, 16 (1914); Biographical Directory of the United States Congress, 1774-1989, at 1059 (G.P.O. 1989); see also Currie, Substantive Issues, supra note 1, at 839-40 n.386.

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123 U.S. Const. art. II, § 1, cl. 1.

124 Presidential Election and Succession Act of 1792, ch. 8, § 12, 1 Stat. 239, 241.
Article II itself. Arguably, since a comparison with Article I's two-year and staggered six-year periods suggested that Presidents should leave office at the end of a congressional term, it implied there were to be no special elections at all. It may be best not to be too quick to find answers in the Constitution to questions that were never posed. A special election seems a perfectly reasonable exercise of the power to make provision for vacancies in the office of President and Vice President, and it would have been perfectly reasonable to limit those elected to completing the unfinished term. That is what happens, after all, when the President's duties devolve upon the Vice President under the same clause of the Constitution; it can hardly be contrary to the constitutional plan.

III. THE POST OFFICE

Unable to surmount a difference of opinion over who was to designate the routes over which mail should be carried, the First Congress had passed a temporary measure essentially keeping in operation the Post Office established under the Confederation. The Second Congress resumed the debate and set up a new Post Office. In so doing it confronted and resolved a number of questions both of federalism and of the separation of powers.

A. Delegation

The consuming issue concerned the delegation of authority. The bill first presented to the House in 1790 contained a clause empowering the President to establish post offices and post roads. It was ex-

125 "He shall hold his office during the term of four years, and . . . be elected, as follows." U.S. CONST. art. I, § 1, cl. 1.
126 See CORWIN, supra note 48, at 56-57 ("[B]y the provisions which [the statute] made for an intermediate election for a full term it set at naught the synchrony evidently demanded by the Constitution in the choice of President with that of a new House of Representatives and one third of the Senate.").
127 "Whether Congress is empowered to provide for such an election is a matter of debate," wrote Professor Corwin in 1940, "but, if it is, then the position is at least plausible that it could limit the term of the President chosen to the unexpired term." Id. Livermore's suggested constitutional amendment would have authorized the electors last chosen to elect a President to complete the unexpired term. 2 ANNALS OF CONG. 1911-12 (1791). The provision for a special election was repealed in 1886, but the new law provided for a special session of Congress—presumably to decide, at the worst possible moment, whether a special election should be held. Presidential Succession Act of 1886, ch. 4, §§ 1, 3, 24 Stat. 1-2. For the history of this bill and discussions of the problems it raised see Hamlin, supra note 88, at 187-95.
128 Act of Sept. 22, 1789, ch. 16, 1 Stat. 70; Currie, Structure of Government, supra note 1, at 203. For the history of postal service before adoption of the Constitution see GERALD CULI- 
NAN, THE POST OFFICE DEPARTMENT 3-23 (1968); LINDSAY ROGERS, THE POSTAL POWER OF CONGRESS; A STUDY IN CONSTITUTIONAL EXPANSION 11-22 (1916).
cised after unidentified members objected: "[T]his is a power vested in Congress by an express clause in the Constitution, and therefore cannot be delegated to any person whatever."  

Several attempts were made to restore the provision leaving the choice of routes to the executive, especially after the Senate had endorsed such a delegation. Proponents argued that Congress could not intelligently pass upon the merits of particular routes, that local interests would distort the legislative judgment, that Congress would be overburdened with detail. A lengthy squabble over where the main route should cross North Carolina proved them right on all counts. Furthermore, the Confederation Congress had left the matter to the Postmaster General, "and very few complaints were heard." As for the constitutional question:

[I]t was said that the bill proposes no more... than is provided for in the other Executive Departments; the principles of conducting the business are established by the House; the mode of carrying those principles into execution is left with the Executive, and this of necessity is done in almost every case whatever.

Both Houses refused to recede on this issue, and the bill was lost.

The debate was resumed in the Second Congress when Representative Sedgwick moved to replace the detailed specification of routes in the House bill with a direction that the mail should be carried between Wiscasset, in the district of Maine, to Savannah, Georgia, "by such route as the President of the United States shall, from time to time, cause to be established." Livermore tied the nondelegation objection to basic democratic principle: "It was provided that the Government should be administered by Representatives, of the people's choice; so that every man, who has the right of voting, shall be in some measure concerned in making every law of the United

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130 2 ANNALS OF CONG. 1579 (1790); see U.S. Const. art. I, § 8, cl. 7 ("The Congress shall have power... to establish post offices and post roads."). The controversy is concisely recounted in White, supra note 2, at 77-79.

131 2 ANNALS OF CONG. 1697, 1734 (1790).

132 Id. at 1936-40.

133 Id. at 1734; see ART. OF CONFED. art. 4, 1 Stat. 4, 7 (1778) ("The United States, in Congress assembled, shall also have the sole and exclusive right and power of... establishing and regulating post offices from one State to another, throughout all the United States... "). The 1782 ordinance passed by the Confederation Congress authorized the Postmaster General to establish and maintain "a continued communication of posts throughout these United States," from New Hampshire to Georgia "and to and from such other parts of these United States, as from time to time, he shall judge necessary, or Congress shall direct." 23 J. CONT. CONG. 670 (1782).

134 2 ANNALS OF CONG. 1734-35 (1790).

135 See id. at 1737, 1743, 1755. The House's attempt to revive the bill in the following session fizzled after the dispiriting debate over the North Carolina route. See supra note 131 and accompanying text.

136 3 ANNALS OF CONG. 57, 229 (1792).
States.” If the designation of routes was left to the President, added John Page of Virginia, Congress might as well “leave him any other business of legislation; and I may move to adjourn and leave all the objects of legislation to his sole consideration and direction.”

Sedgwick responded that he had no desire “to resign all the business of the House to the President, or to anyone else; but he thought that the Executive part of the business ought to be left to Executive officers.”

Congress, he observed, are authorized not only to establish post offices and post roads, but also to borrow money; but is it understood that Congress are to go in a body to borrow every sum that may be requisite? They are also empowered to coin money; and if no part of their power be delegable, he did not know but they might be obliged to turn coiners, and work in the Mint themselves. Nay, they must even act the part of executioners, in punishing piracies committed on the high seas.

[T]he whole purpose... is answered, when the rules by which the business is to be conducted are pointed out by law.

Besides, said Sedgwick, the House bill itself delegated significant authority, for it authorized the Postmaster General “to establish such other roads as post roads, as to him may seem necessary.” Indeed, as Benson added, the parallel question of where to establish post offices was left entirely to executive discretion; “there is not a single post office designated by the bill.”

Sedgwick’s motion failed; the House ended up listing fifty-three stations through which the main post road should pass, and the Senate fell into line. Similarly, sections 9 and 10 of the Act prescribed postal rates in hideous detail—hardly the best use, one might have thought, of congressional time. Thus, the episode stands as some-

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137 Id. at 229-30. The House, Livermore added, might just as well “leave all the rest of the business to the discretion of the Postmaster, and permit him to settle the rates of postage, and every other particular relative to the post office, by saying, at once, ‘there shall be a Postmaster General, who shall have the whole government of the post office, under such regulations as he from time to time shall be pleased to enact.’” Id. at 230.

138 Id. at 233.

139 Id. at 230.

140 Id. at 230-31.

141 Id. at 230.

142 Id. at 236. Madison argued that in this respect too the bill was unconstitutional, for it failed even to specify how many postmasters were to be appointed, and “[t]he Constitution... expressly restrains the Executive from appointing officers, except such as are provided for by law.” Id. at 238; see Currie, Structure of Government, supra note 1, at 205 (discussing this issue in connection with the establishment of diplomatic offices).

143 See 3 ANNALS OF CONG. 241-42 (1791); Act of Feb. 20, 1792, § 1, 1 Stat. 232. As enacted, this section went on to list a number of side routes in a full page of fine print. Id. at 232-33.

144 See Act of Feb. 20, 1792, ch. 7, 1 Stat. 232, 235. If the President were permitted to set rates, Representative Hartley implied, he would be able to raise revenue on his own, and Congress would lose its crucial power of the purse. 3 ANNALS OF CONG. 231-32 (1791). The best answer to this argument is that Congress could limit his discretion by providing that postal fees
thing of a precedent for an extremely restrictive view of Congress’s power to delegate its authority to the executive.

However, as Sedgwick and Benson had noted, it was not a very strong precedent. Not only did the statute as enacted continue to leave it to the Postmaster General to provide for additional roads and, more significantly, to decide where to set up offices; it authorized him to provide for carrying the mail by horse or by carriage, “as he may judge most expedient,” and “as often as he . . . shall think proper,” in the light of “productiveness” and “other circumstances”; “to prescribe such regulations” for his subordinates “as may be found necessary”; “to superintend the business of the department in all the duties that are, or may be, assigned to it”; and to determine which of two or more routes between points on the statutory list should be designated as a post road.

In other words, the statute basically delegated to the Postmaster General the power to do whatever was necessary to deliver the mail. Congress’s insistence on setting the rates and designating the roads was hardly in keeping with the rest of the law. Despite all the crocodile tears, one is tempted to attribute the House’s zest for detail more to a taste for pork than to a principled concern for the virtues of representative government.

Moreover, although the principle that Congress may not abdicate its function is an important one (significantly, it was challenged by no one in the post-office debate), Sedgwick’s analogies were right on the mark. The nature of the subject, like that of borrowing and coining money, made it seem unlikely that the Framers would have wanted Congress to run the postal enterprise itself. As the statute itself recog-

should not exceed costs and tying expenditures to those prevailing in the market. Congress has since delegated the task of setting rates to the Postal Service, in collaboration with an independent Postal Rate Commission, while providing a standard whereby they shall be determined. 39 U.S.C. §§ 404(a), 3621-25 (1988 & Supp. 1993).

Act of Feb. 20, 1792, ch. 7, § 2, 1 Stat. 232-33. At Vining’s insistence, the original clause authorizing the Postmaster General himself to establish additional roads was replaced by one empowering him to hire contractors to do so. 3 ANNALS OF CONG. 251 (1791). It is not clear why it mattered.

Section 3 authorized the Postmaster General “to appoint . . . deputy postmasters, at all places where such shall be found necessary”; section 7 required each deputy to keep an office to collect and distribute the mail. Act of Feb. 20, 1792, ch. 7, 1 Stat. 232, 234.

Compare the same Congress’s broad delegation of authority to the President with respect to the raising of new troops to protect the frontiers. See infra note 231 and accompanying text.

See RICHARD E. WELCH, JR., THEODORE SEGWICK, FEDERALIST: A POLITICAL PORTRAIT 73 (1965). The current statute designates as “post roads” all railroads, all waters, canals, air routes, and public roads “during the time the mail is carried thereon,” and all “letter carrier routes established for the collection and delivery of mail.” 39 U.S.C. § 5003 (1988). Under §§ 5203 and 5402 the Postal Service decides where to establish surface mail routes and where to contract for air transportation of the mail. Thus the designation of post roads has now been left essentially to the Postal Service.
nized in most respects, management is an executive, not a legislative function. In later years Congress would often go much too far in delegating the power to make basic policy decisions to other organs of government. To conclude that it would have done so by allowing the Postmaster General or the President to decide where the mail should be carried seems little short of absurd.

B. Federalism and Other Problems

Issues of states' rights were never far beneath the surface during the 1790s, and when Thomas Fitzsimons of Pennsylvania suggested that mail contractors be authorized also to carry passengers, he was promptly met by the plea of a want of federal power. The Constitution, said Abraham Venable, "was totally silent on the subject of passengers"; the Postal Clause "simply relates to the transportation of letters." That was fair enough; and it was not enough to make the passenger provision necessary and proper to the exercise of that power, Niles argued, that "by granting to the carrier of your mail the right to carry passengers for hire, the carriage of the mail may be a little less expensive." The usual parade of horribles was trotted out to show that if Congress could authorize the carriage of passengers there was nothing it could not do: "[T]he States might have spared... all their deliberations on the Constitution, and have constituted a Congress, with general authority to legislate on every subject, and in any matter it might think proper."


151 Moreover, the test so ably enunciated by proponents of the delegation was later adopted by the Supreme Court and served us well for many years: the legislature should establish the principle, leaving it to the executive to carry it into effect. See, e.g., J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928); Buttfield v. Stranahan, 192 U.S. 470 (1904); 3 ANNALS OF CONG. 229 (1791) (Rep. Sedgwick); Currie, supra note 150, at 16-19, 195. Whether the statute as envisioned by Sedgwick would have set forth a "principle" for determining where to designate post roads is less clear (contrast Steele's proposal, 2 ANNALS OF CONG. 1936 (1791), that the executive be directed to establish a post road between Wiscasset and Savannah by "the most direct route"), but a sympathetic court could have found it implicit that the decision was to ensure a fair balance of adequate service and reasonable cost.

152 3 ANNALS OF CONG. 303-06 (1792).

153 Id. at 310.

154 Id. at 308.

155 Id. at 309 (Rep. Niles). An unidentified speaker also suggested that to grant authority to carry passengers over routes on which the states had granted monopolies would take the property of the franchise holders without compensation, in violation of the Fifth Amendment. Id. at 304. This objection was brushed aside by observing that federal law was supreme. Id. at 306. This was of course what the Supreme Court was to say of the New York steamboat monopoly in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), but Gibbons did not address the taking question. The supremacy of federal law would not obviate the need for compensation if the United States condemned land that had been granted by a state; if there is a distinction, it may lie in the
This time there was force to the objection, and the passenger provision was defeated.\footnote{156}{See 3 Annals of Cong. 311 (1792). If the commerce power authorized Congress to license ships, as the First Congress had concluded, see Currie, Substantive Issues, supra note 1, at 788-89, it would seem equally to authorize Congress to license the carriage of interstate passengers on land, as the Supreme Court would ultimately conclude, cf. California v. Central Pac. R.R., 127 U.S. 1 (1888); but no one is reported to have invoked the Commerce Clause during the passenger debate in 1792.} In other respects, however, Congress took an appropriately generous view of its postal power. The statute declared it a crime to obstruct, rob, open, embezzle, or abandon the mail, or to demand more than the lawful rate for its delivery.\footnote{157}{Act of Feb. 20, 1792, ch. 7, §§ 5, 11, 16, 17, 1 Stat. 232, 234-37.} It exempted deputy postmasters and mail carriers from militia duties, reflecting the need to protect postal operation from interference even by the states.\footnote{158}{Id. § 27, 1 Stat. at 239; cf. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).} Finally, it forbade anyone other than the postmasters and their agents to carry letters or packages for hire, in order, as the statute itself suggested, to prevent the post office from losing revenue.\footnote{159}{Act of Feb. 20, 1792, § 14, 1 Stat. at 232, 236. An exception was made to permit the carriage of newspapers, possibly on grounds of freedom of the press. When Livermore moved to strike a clause allowing postal contractors to carry newspapers as well as mail, Page objected on this ground. 3 Annals of Cong. 286 (1791).} If Congress can ensure the solvency of the post office by protecting it from competition, it would not be a huge leap to conclude it could do so by authorizing the carriage of passengers; yet most of these measures had antecedents in the ordinances adopted under the Confederation,\footnote{160}{The 1782 Ordinance had contained both a set of prohibitions limited to postal agents and a monopoly provision, and an earlier ordinance had excused deputy postmasters "from those public duties which may call them from attendance at their offices." See 23 J. Cont. Cong. 671-74 (1782); Rogers, supra note 128, at 15.} and no one is recorded as raising constitutional objections to any of them.\footnote{161}{Chief Justice Marshall invoked the mail-robbery provision as a precedent for Congress's power to establish a national bank in McCulloch, 17 U.S. (4 Wheat.) at 385-86. The postal monopoly was upheld without discussion in United States v. Thompson, 28 F. Cas. 97, 98 (D. Mass. 1846) (No. 16,489); according to Rogers, supra note 128, at 41, as of 1916, with one exception in the literature, its constitutionality had never been questioned. See also United States v. Kochersperger, 26 F. Cas. 803, 803 (C.C.E.D. Pa. 1860) (No. 15,541) ("No government has ever organized a system of posts without securing to itself, to some extent, a monopoly of the carriage of letters and mailable packets.").}

There were vehement objections, however, to section 19 of the statute, which authorized free delivery of mail to and from a variety of federal officials, including members of Congress.\footnote{162}{Act of Feb. 20, 1792, ch. 7, § 19, 1 Stat. 232, 237-38.} The Constitution, said Jeremiah Wadsworth of Connecticut, carefully listed the privileges of senators and representatives, and franking was not among

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Defenders of the privilege argued that franking was for the benefit of the people, not of the members, since it facilitated the exchange of information, the right of petition, and the intelligent exercise of political rights. Gerry’s fears that omission of the privilege threatened freedom of the press (because congressmen were in the habit of sending newspapers to their constituents) came close to suggesting that the First Amendment entitled publishers to a subsidy, which the language of that provision did not support. But the argument against “privilege” was a red herring. The power to establish a post office implied, as the statute recognized, authority to set postal rates; the power to set rates includes the power to set them at zero. To put it another way, the power to establish a post office is the power to carry the mail, for a fee or for nothing, and in any event free carriage of the mail to and from government offices is plainly necessary and proper to their operation.

Finally, section 26 of the Act, which made provision for sending mail abroad, quietly authorized the Postmaster General to “make arrangements with the postmasters in any foreign country for the reciprocal receipt and delivery of letters and packets” between the two nations. Such arrangements were obviously appropriate, and the provision was subject to no reported debate. Yet an “arrangement” with a foreign country looks very much like a treaty, for which Article II requires Senate consent, and the statute said nothing about Senate approval. Congress seems to have concluded, as the Supreme Court has since confirmed, that not every agreement with a foreign nation

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163 3 ANNALS OF CONG. 275 (1791); see also id. at 298-99 (Reps. Murray and Giles). Contrast Article 48(3) of the German Basic Law, which explicitly grants members of the national legislature the right to ride free on federally owned means of transportation.

164 See 3 ANNALS OF CONG. 276-77 (1791).

165 See id. at 289-90; see also id. at 252, where an unidentified speaker argued that to omit franking “would be levelling a deadly stroke at the liberty of the press.” Newspapers were given another subsidy by § 22 of the statute, which set a rate of 1¢ for sending them up to 100 miles and 1 1/2¢ for longer journeys, as compared with 6¢ for sending a letter up to 30 miles. Act of Feb. 28, 1792, ch. 7, §§ 9, 22, 1 Stat. at 232, 235, 238.

166 See Act of Feb. 28, 1792, §§ 6, 7, 1 Stat. at 232, 235. The Articles of Confederation had expressly authorized Congress to “exact[ ] such postage . . . as may be requisite to defray the expenses” of the office, Art. 4, 1 Stat. 7 (1778), but the Second Congress sensibly inferred that the reason for omitting this language was that it was superfluous.

167 Compare the exemption of charitable organizations from certain taxes and of indigents from the payment of court costs. See also infra notes 283-300 and accompanying text (discussing financial benefits for cod fishermen).


was a treaty. It would have been helpful if someone had told us when the issue first arose how to distinguish agreements that require Senate consent from those that do not, for the requirement was meant as a significant check on executive authority.

IV. THE MINT

Compared with the travails of establishing the Post Office, the Mint was a piece of cake. As Sedgwick had predicted in the postal debate, nobody suggested that Congress had to coin money itself. The statute, enacted a few weeks after the postal bill, set up a mint with its own Director and other officers, to be located at the seat of government, "for the purpose of a national coinage." Yet Congress was

170 See United States v. Belmont, 301 U.S. 324 (1937); CORWIN, supra note 48, at 235-39; LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 57 (1990). An opinion from Solicitor General William Howard Taft in 1890 affirmed the validity of the postal provision on the ground of "usage since the adoption of the Constitution" while conceding that a different result might be reached by ordinary rules of construction if the issue were new. 19 Op. Att'y Gen. 513, 515, 521 (1890).

171 The current provision has eliminated the euphemism, brazenly authorizing the Postal Service with presidential approval to "negotiate and conclude postal treaties or conventions." 39 U.S.C. § 407 (1988). For an early attempt to distinguish "treaties," which the states may not make at all, from "compacts," which they may make with congressional consent, U.S. CONST. art. I, § 10, cl. 3, see St. George Tucker, Appendix to 1 BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 310 (St. George Tucker ed., London, Birch & Small 1803) (suggesting that compacts are agreements "concerning transitory or local affairs, or such as cannot possibly affect any other interest but that of the parties").

172 The Articles of Confederation had given Congress exclusive authority to regulate "the alloy and value of coin struck by their own authority, or by that of the respective States." Art. 9, § 4, 1 Stat. 7 (1778). Pursuant to this provision, Congress in 1786 authorized the minting of federal coins, but nothing but pennies and half-pennies was made. See A. BARTON HEPBURN, A HISTORY OF CURRENCY IN THE UNITED STATES 33-40 (1924). For Hamilton's "justly celebrated" 1791 report to the House, see id. at 41, which deplored the prevailing "disorder" and laid out detailed specifications for establishment of the Mint, see 7 HAMILTON PAPERS, supra note 29, at 570-607. A few weeks after receiving this report the First Congress by resolution provided that a mint should be established "under such regulations as shall be directed by law" and empowered the President to get started by hiring artists and procuring tools; but it was another year before the necessary "regulations" were adopted. See 1 Stat. 225 (1791). For a glimpse of the difficulties encountered by the Mint in actually producing coins during its early years see WHITE, supra note 2, at 139-43.

173 Act of Apr. 2, 1792, ch. 7, § 1, 1 Stat. 246; see U.S. CONST. art. I, § 8, cl. 5 ("The Congress shall have power ... to coin money, regulate the value thereof, and of foreign coin ... "). Section 2 of the statute authorized the Director to employ "as many clerks, workmen and servants, as he shall from time to time find necessary, subject to the approbation of the President of the United States." Act of Apr. 2, 1792, § 2, 1 Stat. at 246. Not only did this provision (like the clause respecting deputy postmasters of which Madison complained, see supra note 142) fail to specify the number of positions to be filled, but appointment by the head of a department with presidential approval was not one of the methods specified for the appointment of inferior officers under Article II, § 2. The best explanation seems to be that Congress did not consider "clerks, workmen and servants" to be "officers" within the meaning of Article II. See Buckley v. Valeo, 421 U.S. 1 (1976).
notably stingy in delegating authority to the Director; it insisted on specifying not only the precise denominations of coins to be issued (from half cents to ten-dollar eagles) and the exact proportions of gold, silver, and copper they were to contain but even the "devices and legends" that were to appear upon them.\footnote{174} Indeed the only debate on the entire bill reported in the \textit{Annals} concerned the momentous question whether to strike out a clause providing that coins should bear a likeness of the incumbent President, which opponents were quick to describe as yet another "stamp of Royalty."\footnote{175}

In accordance with the constitutional authorization to coin money and "regulate the value thereof," Congress went on to set the relative value of gold and silver coins at fifteen to one.\footnote{176} More intriguing was section 16 of the statute, which declared all gold and silver coins produced at the Mint to be legal tender.\footnote{177} Congress was not expressly authorized to declare what was legal tender; when it tried to give that quality to paper money during the Civil War, the Supreme

\footnote{174} "Upon one side of each of the said coins there shall be an impression emblematic of liberty, with an inscription of the word Liberty, and the year of the coinage . . . ." Act of Apr. 2, 1792, ch. 7, §§ 9-10, 12-13, 1 Stat. 246, 248-49. All these matters are still strictly regulated by statute. \textit{See} 31 U.S.C. § 5112 (1988 & Supp. 1993). In contrast, section 8 of the 1792 law authorized the President in the most general terms to provide "such buildings . . . as shall appear to him requisite" for the Mint's purposes—a purely managerial task like many of those entrusted in similarly broad terms to the Postmaster General and to the Commissioners for the District of Columbia. 1 Stat. 246, 247-48; \textit{see supra} notes 145-47 and accompanying text; \textit{see also} Currie, \textit{Substantive Issues, supra} note 1, at 847-50. A lot in Philadelphia was promptly purchased and a building constructed—"[t]he first building erected in the United States for public use, under the authority of the Federal Government." \textit{Illuminated History of the United States Mint} 14 (Philadelphia, George G. Evans 1888). Thus, the executive understanding was that the purchase of land and the construction of buildings were necessary and proper to the coinage of money, which of course they were.

\footnote{175} 3 \textit{Annals of Cong.} 484 (1791) (Rep. Page). Even Julius Caesar, Williamson protested, had not dared to put his own face on Roman coins, "but only ventured to cause the figure of an elephant to be impressed thereon; that by a pun on the Carthaginian name of that animal, . . . he might be said to be on the coin." \textit{Id.} Fortunately for democracy, the enemies of monarchy once again prevailed. \textit{Id.} at 485-86, 489-90; \textit{cf.} Currie, \textit{Structure of Government, supra} note 1, at 194-95 (discussing the equally unsuccessful attempt to add to the President's title). For an amusing account of a similar objection to the choice of an eagle on the ground that it was the "king of birds" and thus a symbol of monarchy, see \textit{Illuminated History of the United States Mint, supra} note 174, at 15.

\footnote{176} Act of Apr. 2, 1792, § 10, 1 Stat. at 246, 248. "It has been justly remarked, that the power 'to coin money' would, doubtless, include that of regulating its value, had the latter power not been inserted. But the constitution abounds with pleonasms and repetitions of this nature." \textit{Story, supra} note 35, § 1112.

\footnote{177} 1 Stat. at 246, 250; \textit{see also} Act of Feb. 9, 1792, ch. 5, §§ 1-2, 1 Stat. 300, which not only regulated the value of foreign coins in accordance with the express terms of Art. I, § 8, but went on to declare some of them legal tender until the Mint had had three years to produce an adequate supply of domestic money. \textit{See 7 Hamilton Papers, supra} note 29, at 604-05. Unexpected delays in minting the new coins combined with other factors to keep foreign coins in circulation for many years. \textit{See Hebburn, supra} note 172, at 46-47.
Court initially said it had acted beyond its powers. But paper money is not "coin"; prescribing the legal status of coins may well be necessary and proper to producing them even if it is not a regulation of their "value," and that seems to have been Congress's view.

Two final provisions of the Act should be briefly noted. The first required officers and clerks to take an oath to perform their duties faithfully; the second set up a committee to inspect coins in order to verify that they satisfied the statutory standards. Both provisions were plainly necessary and proper to the coining of money. What was striking was that the oath was to be taken before "some judge of the United States," and that the Chief Justice was a member of the committee. Thus, the Mint Act was yet another example of an early tendency of Congress to impose nonjudicial duties on federal judges; and it is to a more famous example of that tendency that we now turn.


179 See James B. Thayer, Legal Tender, 1 Harv. L. Rev. 73, 75 (1887) (arguing that, in view of "the usual functions of coined money, and the usual powers of a government in regard to it," the power to make "any coin" legal tender "is fairly, although not necessarily, implied in that of coining and regulating the value of coin"). Article I, § 10's provision forbidding the states to "make any thing but gold or silver coin a tender in payment of debts" does not help much in resolving this question. U.S. Const. art. I, § 10, cl. 1. At first glance it appears to imply that the question of legal tender is for Congress to resolve; on closer inspection it may permit the states to make gold and silver legal tender. Whether they may do so exclusively or only until Congress acts seems to depend on the interpretation of the provisions respecting congressional authority.

180 Act of Apr. 2, 1792, ch. 16, §§ 4, 18 1 Stat. 246, 247, 250. Similarly, § 5 required three of the Mint's officers to post bonds for faithful and diligent performance. Id. at 247.

181 So was § 19, which provided stiff punishment for officers debasing coins or embezzling either coins or metal. Id. at 250. In contrast to the statute governing the Post Office, nothing was said about punishing private citizens who robbed the Mint or even those who counterfeited coins, though Article I, § 8, cl. 6 expressly made counterfeiting a subject of congressional power. The 1790 statute defining crimes against the United States had penalized counterfeiting securities but not coins. See Currie, Substantive Issues, supra note 1, at 832 n.336; Letter from John Jay to George Washington (Nov. 13, 1790), in 3 The Correspondence and Public Papers of John Jay 405, 406 (Henry P. Johnston ed., New York, Putnam 1891) (calling attention to the omission and urging that it be rectified: "It appears to me more expedient that this offence, as respects current coin, should be punished in a uniform manner throughout the nation, rather than be left to State laws and State courts.").


183 Among the offices created by the Mint statute was that of Chief Coiner, whose duties were just what the name implies. Id. at 246-47, §§ 1, 3. Although Congress remained in session for nearly a week after the President signed the bill, no Coiner was nominated during that period. Not long after Congress went home, Jefferson asked Attorney General Randolph whether in these circumstances the President was authorized to make a recess appointment under Article II, § 2. Randolph replied that he was not. The President was permitted to make such appointments only to fill "vacancies that may happen during the recess of the Senate," and this vacancy had arisen upon creation of the office, while the Senate was still sitting. As an exception to the
V. The Courts

Just a few days before the statute establishing the Mint became law, President Washington signed an Act whose purpose was, among other things, "to regulate the Claims to Invalid Pensions."\(^{184}\) Revolutionary veterans disabled in the line of duty were to apply to the circuit courts, which were to determine the extent of the injury and transmit their findings and opinion, if favorable to the applicant, to the "Secretary at War."\(^{185}\) The Secretary, in turn, was to place the applicant's name on the pension list, unless he had "cause to suspect imposition or mistake."\(^{186}\)

This was the Act that five Justices, sitting on circuit, promptly found unconstitutional in *Hayburn's Case*.\(^{187}\) To modern eyes the Justices' reasons look highly persuasive: the statute either gave the courts the nonjudicial task of issuing advisory opinions to the executive or gave the Secretary the judicial task of reviewing court decisions, contrary in either case to the terms and purposes of Article III.\(^{188}\) Apparently neither objection had occurred to Congress; the *Annals* reveal no debate of any kind on the pension bill. The Act was a well-intentioned effort to spare Congress the tedious and unsuitable job of passing upon the merits of individual claims;\(^{189}\) as already noted, this was by no means the first time that Congress had sought to take advantage of the presence of underemployed federal judges in all parts of the country by assigning them duties other than the decision of garden-variety lawsuits.\(^{190}\)

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\(^{184}\) Act of Mar. 23, 1792, ch. 11, 1 Stat. 243.

\(^{185}\) *Id.* § 2, 1 Stat. at 244.

\(^{186}\) *Id.* § 4, 1 Stat. at 244. For the background of this statute see *White, supra* note 2, at 355-58.

\(^{187}\) 2 U.S. (2 Dall.) 409, 410-14 n.(a) (1792). The letter from the Pennsylvania Circuit is also printed in 3 *Annals of Cong.* 572-73 (1792), that of the North Carolina judges in *id.* at 1319-22.

\(^{188}\) Professor Tushnet has suggested that there may have been no executive revision because the Secretary was authorized to find "imposition or mistake" "only in cases where the applicant had not served in the armed forces during the Revolutionary War—an issue not determined by the circuit courts." Mark Tushnet, *Dual Office Holding and the Constitution: A View from Hayburn's Case*, in *Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789*, at 196, 201 (Maeva Marcus ed., 1992).


\(^{190}\) See Tushnet, *supra* note 188, at 196, 197-99. In addition to the Mint provisions just cited, see *supra* note 58 and accompanying text (delivery of one copy of presidential electors' certificates to the District Court); *see also* Currie, *Structure of Government, supra* note 1, at 213 (advisory reports by District Judges to Secretary of Treasury respecting mitigation of penalties for nonpayment of tariff and tonnage duties); Currie, *Substantive Issues, supra* note 1, at 827 (deposit of copyrighted material with District Court clerk). Compare Representative Murray's un-
Rebuffed by the judges, Hayburn turned to Congress for relief.191 “This being the first instance in which a court of justice had declared a law of Congress to be unconstitutional,” the reporter tantalizingly informs us, “the novelty of the case produced a variety of opinions with respect to the measures to be taken on the occasion.”192 Alas, he does not tell us what those opinions were. Though there were reports of considerable private grumbling about the decision,193 there is no indication in the Annals that any member of Congress publicly challenged either the judges’ power to strike down federal statutes or their conclusion that the pension law was invalid.194 So far as we can tell, Congress respectfully accepted the Court’s decision and set about to find an alternative solution that would withstand judicial scrutiny.

The revised statute, enacted the following year, still provided for evidence to be taken before a federal judge (this time the district judge), and for the judge to send his findings with respect to disability to the Secretary of War. This time, however, authority to take evidence was lodged not in the “courts” but in the “judges.” Moreover, the Secretary was not to make a decision; he was to “make a statement of the cases . . . to Congress, with such circumstances and remarks, as may be necessary, in order to enable them to take such order thereon, as they may judge proper.”195 In other words, the judges were not to act in a judicial capacity, and the Secretary was no longer to review their decisions.

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191 3 ANNALS OF CONG. 556 (1793).
192 Id. at 557.
193 Ames wrote to a friend that “[t]he decision of the Judges, on the validity of our pension law, is generally censured as indiscreet and erroneous.” Letter of Fisher Ames to Thomas Dwight (Apr. 5, 1792), in 1 THE WORKS OF FISHER Ames, AS PUBLISHED BY SETH Ames 116, 117 (W.B. Allen, ed., Boston, Little, Brown & Co. 1854) [hereinafter Ames’s Works]. Madison privately intimated that “perhaps [the judges] may be wrong in the exertion of their power” and noted that confirmation of that power was disquieting to “those who do not wish congress to be controled or doubted whilst its proceedings correspond to their views.” Letter of James Madison to Henry Lee (Apr. 15, 1792), in 14 MADISON PAPERS, supra note 71, at 287, 288. Republican newspapers strongly applauded the decision; Federalist papers tended to be non-committal. See CHARLES Warren, I THE Supreme court in united states history 72-77 (1926).
194 Representative Murray did say it would be desirable to provide “some regular mode in which the Judges . . . shall give official notice of their refusal to act under any law of Congress, on the ground of unconstitutionality,” but nothing came of this sensible proposal. 3 ANNALS OF CONG. 557 (1792).
195 Act of Feb. 28, 1792, ch. 17, §§ 1-2, 1 Stat. 324-25. Section 1, which authorized the judges to appoint three-member commissions to take the evidence as an alternative to hearing it themselves, raised additional questions as to the meaning of Article II’s provision permitting Congress to vest the appointment of inferior officers “in the President alone, in the courts of law, or in the heads of departments.”
From the perspective of the late twentieth century the new statute seems hard to distinguish from the old. The judges were still to be in the business of giving advisory opinions, whether to the Secretary or to Congress. Nevertheless the revisions demonstrate not disregard for the Hayburn decision, but an honest effort to comply with its limitations. For the new provisions could not be construed to subject judicial decisions to executive or legislative review. The judges themselves had suggested that it might be permissible to ask them to step off the bench to perform nonjudicial duties,196 and Congress clearly continued to think there was no problem.197

Unfortunately, there was no reported debate on the revised law either. Thus the congressional proceedings cast little light on the important constitutional questions that were raised by the pension statutes, but they do suggest both a relaxed view of the boundaries between judicial and executive power and early congressional acceptance of judicial review.

VI. THE MILITIA

The First Congress had twice authorized the President to call out the militia in order to protect frontier settlers against Indians.198 The Second Congress enacted a comprehensive statute to establish a uniform militia199 and empowered the President to use it to repel invasions, to suppress insurrections, and to enforce federal laws.200

196 See Hayburn’s Case, 2 U.S. (2 Dal.) 409, 410 n.(a), 413 n.(a) (1792). Some of the judges had in fact processed claims as “Commissioners” under the earlier law; the 1793 statute preserved whatever rights those determinations established, making it the duty of the Secretary and the Attorney General to seek a Supreme Court determination of the validity of the “Commissioners’ ” actions. Act. of Feb. 28, 1792, § 3, 1 Stat. at 325. The Court held that the judges had no authority to act as Commissioners, but whether on statutory or constitutional grounds it did not say. United States v. Todd (unreported), discussed in Currie, supra note 178, at 9-11.

197 When Washington later that year asked the Justices of the Supreme Court a number of questions respecting our relations to belligerent powers during the war between England and France, they refused to answer; but not all of their reasons were applicable to the lower federal courts. See Correspondence of the Justices, reprinted in Paul M. Bator et al., Hart & Wechsler’s The Federal Courts and the Federal System 65-67 (3d ed. 1988). Conversely, the revised patent law adopted by the Second Congress in 1793 provided for “final” resolution of conflicting claims to the same invention by ad hoc arbitration boards, even though such controversies appeared to fall within the judicial power as defined by Article III, § 2, which § 1 of the same Article says shall be vested in judges with tenure during good behavior. Act of Feb. 21, 1793, ch. 11, § 9, 1 Stat. 318, 322-23. The Annals reveal no debate on this provision. Section 5 of the Act, in contrast, explicitly gave the federal circuit courts original but not exclusive jurisdiction of suits for patent infringement. Id. at 322.

198 Act of Apr. 30, 1790, ch. 10, § 16, 1 Stat. 119, 121; Act of Sept. 29, 1789, ch. 25, § 5, 1 Stat. 95, 97; see Currie, Substantive Issues, supra note 1, at 813-15.

199 Act of May 8, 1792, ch. 33, 1 Stat. 271.

A. Organization

As adopted, the basic Act declared that "every free able-bodied white male citizen" should be enrolled in the militia; that he should provide himself with "a good musket or firelock" and other necessary equipment, which should be exempt from judicial execution; that members of Congress, federal officers and employees, postal contractors, pilots, seamen, and others exempted by state law were not required to serve. Each state's militia was to be "arranged into divisions, brigades, regiments, battalions and companies" as its legislature might direct (with specific suggestions that should be followed if "convenient"), but there were detailed provisions for the number, rank, and duties of officers the states were to appoint and the relative proportions of infantry, artillery, and horse. The "rules of discipline" adopted by the Continental Congress in 1779 were to be observed throughout the United States, and each commanding officer was to see that his troops were exercised and trained agreeably to those rules.

The peculiar mélange of state and federal authority embodied in this statute was the product of the constitutional compromise reflected in Clause 16 of Article I, Section 8, which provided as follows:

The Congress shall have power . . . to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.

As the vigorous debates on the uniform militia bill reveal, these provisions leave unresolved a number of questions respecting the boundaries between federal and state authority. Moreover, the advocates of a narrow interpretation of federal powers labored under a peculiar disadvantage in this field; as Sedgwick pointedly observed when

201 Act of May 8, 1792, ch. 33, §§ 1-2, 1 Stat. 271-72.
202 Id. §§ 3-6, 10, 1 Stat. at 271-72.
203 Id. § 1 Stat. at 273. Section 9 provided that any militiaman wounded or disabled while called into federal service should be cared for at public (presumably federal) expense. Plainly this provision was necessary and proper to the purposes for which the militia was to be employed. Id. § 9, 1 Stat. at 293.
204 The Articles of Confederation had required each state to "keep up a well-regulated and disciplined militia, sufficiently armed and accoutred," from which Congress could requisition troops as needed for the common defense. ART. OF CONFD. art. 6, § 4; art. 9, § 5, 1 Stat. 5, 7 (1778). Complaints about ill-disciplined state militias lay behind the grant of additional authority to Congress in the new Constitution. See RECORDS OF THE FEDERAL CONVENTION, supra note 11, at 330 (Mr. Pinckney), 386-87 (Messrs. Madison and Randolph).
strengthening amendments were offered in 1795, the alternative to an effective militia was the detested standing army.205

No one had any difficulty with the last clauses of the constitutional provision. As the Constitution requires, the statute left it to the states to select officers and to train the troops according to rules prescribed by Congress.206 There were scattered objections to requiring militiamen to arm themselves and to exempting their equipment from execution,207 but they got nowhere; it was only "governing" the militia, not "arming" it, that was reserved to the states until the militia was called into federal service,208 and soldiers without guns could hardly be expected to perform their functions.209

205 4 ANNALS OF CONG. 1069 (1795).
206 "Leaving the appointment of officers to the States," Randolph had said at the Convention, "protects the people ag[ain]st every apprehension [of federal oppression] that could produce murmur." RECORDS OF THE FEDERAL CONVENTION, supra note 11, at 387.
207 See 3 ANNALS OF CONG. 420-21 (1792) (Rep. Sumter) (arguing that Congress could not require troops to arm themselves until they were federalized); 2 ANNALS OF CONG. 1867 (1790) (Rep. Livermore) (arguing that exemption from civil process was a matter of state police power).
208 One of the most difficult challenges posed by the Militia Clause is to draw the line between "disciplining" the militia, for which Congress could provide at any time, and "governing" it, which it could do only when the militia had been called into federal service. At the Convention, Rufus King had said that "disciplining" meant "prescribing the manual exercise evolutions &c," RECORDS OF THE FEDERAL CONVENTION, supra note 11, at 385, and the Constitution itself spoke of "training the militia according to the discipline prescribed by Congress"—thus, intimating that "discipline" related to training rather than to a general code of conduct. The 1779 rules of discipline that the 1792 statute made applicable to the militia confirm this interpretation; unlike the old Articles of War that the First Congress had made applicable to the regular army, see Currie, Substantive Issues, supra note 1, at 814, they deal in detail with such military skills as marching, setting up camp, and the use of firearms and say nothing about military offenses. See Regulations for the Order and Discipline of the Troops of the United States, in BARON VON STEUBEN AND HIS REGULATIONS (Joseph R. Riling ed., 1966); see also 13 J. CONT. CONG. 384-85 (1779).
209 See 2 ANNALS OF CONG. 1867 (1790) (Rep. Boudinot) (arguing that authority to exempt from process was incidental and thus implied). The requirement that troops provide their own guns was no more an unapportioned direct tax contrary to Article I, §§ 2, 9 (as Niles contended, 3 ANNALS OF CONG. 421 (1792)) than was their basic obligation to serve. Indeed Sherman had raised the same objection to a provision for penalties for refusal to serve (2 ANNALS OF CONG. 1864 (1790)), but not every civic duty is a "tax," whether or not not "direct." Penalties for refusing to respond when the militia was called into federal service were provided by § 5 of the Act dealing with that subject. Act of May 2, 1792, ch. 28, 1 Stat. 264. Penalties for failing to arm oneself, however, were unaccountably omitted, although even such a rabid states'-righter as Giles conceded three years later, when Congress unaccountably declined to remedy the omission, that since arming was necessary and proper penalties were too. 4 ANNALS OF CONG. 1071 (1795).

Vining went so far as to suggest Congress could require the states to pay for arming the militia (as King had argued in the Convention, RECORDS OF THE FEDERAL CONVENTION, supra note 11, at 385), but Tucker argued it could not. 2 ANNALS OF CONG. 1855 (1790). The Act imposed a number of affirmative duties on state militia officers, and something of the sort may be implicit in the unusual constitutional provision for federal rules to be carried out by the states; yet a relatively innocuous provision that would have required justices of the peace to read a
The question of exemptions from service was hotly debated. A petition from the Quakers asked to be excused on grounds of conscientious objection. Madison supported their request in deference to freedom of conscience, without suggesting that the First Amendment required an exemption; Aedanus Burke branded the duty to serve an unconstitutional burden on the free exercise of religion. Jackson retorted that to exempt Quakers would "make the whole community turn Quakers" in order to escape the obligation and thus establish the Quaker religion. Most speakers treated the question as one of federalism or policy, and it was left to the states.

In a preview of the argument over franking, some argued that an exemption for members of Congress was forbidden because the Constitution contained an exclusive list of their privileges, others that it was required to ensure legislative independence. Exemptions for those engaged in federal business are easy; they are necessary to the functioning of the government. Exemptions for anyone else, Bloodworth argued, had to be left to the states and most of them were. But exempting seamen and pilots from militia duty was arguably (like lighthouses) necessary and proper to the conduct of interstate and foreign commerce. More generally, by analogy to the case of franking, the power to determine who would be in the militia surely included the power to say who would not, but whether it was for Congress to decide who should serve was the most disputed issue of the entire debate.

Representative Thomas Tucker of South Carolina raised the question in the First Congress by moving to leave the composition of the militia to the states. His motion failed, but so did the bill; and the debate was renewed when the matter was taken up in the Second Congress. Article I gave Congress authority, Sturges noted, only to

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presidential warning to the insurgents was dropped from the companion bill after members complained that state officers could not be compelled to enforce federal law. See 3 ANNALS OF CONG. 579 (1792) (Reps. Clark and White, opposed by Rep. Gerry).

210 2 ANNALS OF CONG. 1859 (1790).
211 Id. at 1871.
212 Id. at 1865.
213 Id. at 1869.
214 See id. at 1868-75. The debates in Congress when the religion clauses were proposed suggested they neither required nor forbade exemptions for conscientious objectors. See Currie, Substantive Issues, supra note 1, at 854.
215 See 2 ANNALS OF CONG. 1856-59, 1868 (1790).
216 The postal statute, adopted the same Spring, repeated the exemption for postal workers. See supra note 158 and accompanying text.
217 2 ANNALS OF CONG. 1868 (1790).
218 See Currie, Substantive Issues, supra note 1, at 796-98, 791-92 (discussing lighthouses and the labor relations of seamen).
220 Id. at 1885.
“organize” the militia, not to create it; Congress’s sole task was one of “forming, arming, and arranging” such men and materials as the states might choose to make available. But the term was plainly susceptible to broader interpretation. Congress’s power would be nugatory, Joshua Seney and James Hillhouse protested, if it could not establish a militia. For, as Murray observed, many states had neither militias nor militia laws; and thus the constitutional provision “must respect a militia to be formed or created” by federal authority.

Rufus King had told the Convention that “organizing the Committee meant, proportioning the officers and men.” But the power to divide state militias into regiments is so trivial that it is difficult to imagine the Convention’s taking the trouble to grant it. To the modern eye a grant of power to organize the militia is analogous to the power to establish post offices, to raise armies, or to provide a navy; it is the power to bring an institution, vital to the attainment of important federal interests, into existence. And that is how Congress, after intensive discussion, interpreted the provision. Sturges’s motion was defeated; the statute prescribed who was to constitute the militia.

B. Employment

But the Uniform Militia Act only set up the militia; it did not say how or when it was to be employed. Madison had called attention to the omission when the bill was first debated in 1790. That Article I authorized Congress to provide for calling out the militia seemed to

221 3 ANNALS OF CONG. 418-19, 420 (1792); accord id. at 419 (Rep. Livermore). Later in the debate, Jeremiah Smith objected even to permitting the President to divide the militia into regiments, battalions, and companies, on the ground that federal authority to organize the militia arose only when it was in federal service. Id. at 422. As in the case of arming the militia, see supra notes 207-09 and accompanying text, the text did not support him. Sumter’s argument was more plausible: that the Constitution empowered Congress only to provide for organizing the militia, leaving execution of its provisions to the states. 3 ANNALS OF CONG. 423 (1792). But the language may have been chosen only to indicate that Congress may delegate the task to some appropriate federal officer, see infra note 244 and accompanying text, and in any event Congress’s response to Sumter’s argument went beyond his suggestion; for as adopted the statute not only left it to the states to carry out legislative determinations as to how the militia should be structured but provided that the militia should be divided into regiments and other units “as the legislature of each state shall direct.” See supra note 202 and accompanying text.

222 3 ANNALS OF CONG. 420 (1792); see also id. (Rep. Wadsworth) (“The people in several States already avow the sentiment, that they think that Congress alone has the power to form the militia.”).

223 RECORDS OF THE FEDERAL CONVENTION, supra note 11, at 385.

224 One is tempted to add that, if Sturges was right about the narrow scope of congressional power, there was no reason for the explicit reservation of state authority to appoint officers. Yet, when Sherman moved in the Convention to delete the parallel reservation of state authority to train the militia, Ellsworth had opposed him on the ground that both reservations were necessary because “the term discipline was of vast extent and might be so expounded as to include all power on the subject.” Id.

225 2 ANNALS OF CONG. 1864 (1790).
refute any inference that the President could do so without statutory authorization on the basis of his position as Commander in Chief. Indeed, as Madison pointed out, on its face Article II gave the President authority to command the militia only "when in the service of the United States"—just as, we might add, it gave him authority over armies and navies only after Congress had raised or provided them. Contrary to Smith's suggestion, the statutes already enacted did not do the trick, since they authorized use of the militia only to protect the frontiers. Elias Boudinot denied that Congress had power to do what Madison asked: by authorizing Congress "[t]o provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions," the Constitution contemplated special legislation each time an emergency arose—not a general delegation of power to the President.

Madison's idea was dropped in the First Congress, but when the House passed the militia bill the following year the Senate amended it to empower the President to call out the militia to execute the laws, suppress insurrections, and repel invasions. Though these were the precise terms employed in the Constitution, several members of the House objected, arguing among other things that the delegation was too broad. "It was surely the duty of Congress," said Murray, who had argued for a broad interpretation of the power to organize the militia, "to define, with as much accuracy as possible, those situations which are to justify the execut[ive] in its interposition of a military force." Moreover, Murray argued, organization and employment of the militia were distinct subjects that ought not to be dealt with in a single bill, and the Senate amendment was defeated.

A House committee then brought in a separate bill authorizing the President to call out the militia, and it was attacked from both sides. Egbert Benson of New York preferred the language of the Senate amendment, which tracked the Constitution; Livermore thought the bill gave too much discretion to the President. Page moved to omit any provision for using the militia to execute the laws: good laws would be obeyed in any case, and bad ones ought not to be en-

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226 Id.
227 Id.
228 See supra note 184 and accompanying text.
229 2 ANNALS OF CONG. 1864 (1790); see also 3 ANNALS OF CONG. 579 (1792) (Rep. Livermore).
230 See 2 ANNALS OF CONG. 1867 (1790).
231 See 3 ANNALS OF CONG. 552 (1792).
232 Id. at 554.
233 Id. at 554-55.
234 See id. at 555, 557.
235 Id. at 574.
forced. John Francis Mercer of Maryland responded with much force that the central government should not have to depend upon the states to enforce its laws; White explained that every attempt of the committee to make the clause more definite had "only rendered it more obscure"; and Page's motion was lost.

The opposition to a broad delegation, however, produced significant results. Not only did the law as enacted provide that the President could activate the militia to suppress insurrections only upon state request (as Roger Sherman had argued the Constitution required), and to enforce the laws only if ordinary efforts were unavailing. House amendments permitted the President to act in the latter case only if the inability to enforce the law was certified by a federal judge and only after issuing a proclamation commanding the insurgents to disperse, and to use militiamen from other states only if Congress was not in session.

No one spoke up against the imposition of yet another apparently nonjudicial duty on federal judges, and the nondelegability argu-

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236 Id.; see also id. at 576 (Rep. Page) (insisting on "the right of refusing submission to unconstitutional acts").
237 Id. at 575.
238 Id. at 574.
239 Id. at 576.
240 Act of May 2, 1792, ch. 28, § 1, 1 Stat. 264.
241 2 ANNALS OF CONG. 1867 (1790). Since Article I, § 8 contains no such limitation, Sherman must have been referring to Article IV, § 4:

The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

U.S. CONST. art IV, § 4. Assuming that this provision qualifies the power granted Congress in Article I, § 8, it seems to require a state request only when the insurrection is directed against the state rather than the federal government; the statutory requirement was broader.

242 Act of May 2, 1792, ch. 28, § 2, 1 Stat. 264 ("combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act").
243 Id. §§ 2-3; see 3 ANNALS OF CONG. 577 (1792). Two of these requirements were omitted and the third watered down when the statute was replaced in 1795. Act of Feb. 28, 1795, ch. 36, §§ 1-3, 1 Stat. 424. In the case of invasion, the 1792 Act contained no comparable restrictions:

[W]henever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States, to call forth such number of the militia of the state or states most convenient to the place of danger or scene of action, as he may judge necessary to repel such invasion.

Act of May 2, 1792, ch. 28, § 1, 1 Stat. 264. Justice Story went out of his way to affirm the constitutionality of a later version of this provision in a case in which it had not been questioned:

[T]he power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasion is to provide the requisite force for action before the invader himself has reached the soil.

Martin v. Mott, 25 U.S. (12 Wheat.) 19, 29 (1827). The possibility that the Act delegated too much discretion to the President was not even suggested.

244 See RAWLE, supra note 40, at 156 (calling attention to the "incongruity" of this provision). In light of the arguments made in the controversy over presidential removal of executive officers
ment appears misguided. To say that Congress may "provide for" calling for the militia seems to negate the idea that Congress must determine in each case whether the militia shall be employed.\textsuperscript{245} As Sedgwick said in the post-roads debate, even the power to "borrow money" did not seem to contemplate that members of Congress would sign the I.O.U.'s.\textsuperscript{246} In authorizing the President to employ the militia when necessary to execute the laws, repel invasions, and suppress insurrections, Congress was doing exactly what the Constitution empowered it to do. Thus the limits that the statute placed on presidential discretion in this regard may have been a wise exercise of congressional judgment, and the fact that the Constitution did not itself authorize the President to call out the militia suggests that Congress was within its rights in imposing them. But since Article I, Section 8 plainly contemplates delegation, the argument that delegation is impermissible seems entirely out of place; and the Constitution itself seems to provide adequate standards to guide the President's decision—assuming, as conceded by advocates of delegation in the postal controversy, that standards are constitutionally required.\textsuperscript{247}

VII. THE ARMY

General Harmar, as I have elsewhere observed, got roundly thrashed by the Indians while undertaking a punitive mission along the Maumee River in 1790.\textsuperscript{248} General Arthur St. Clair, Governor of the Northwest Territory, set out the next year with a larger army for the same purpose, only to suffer an even more humiliating defeat.\textsuperscript{249} The House launched a full-scale investigation.\textsuperscript{250}

That Congress had implicit investigative powers had been established in 1790, when the House voted to look into Robert Morris's conduct as Superintendent of Finance under the Confederation.\textsuperscript{251}

during the First Congress, see Currie, Structure of Government, supra note 1, at 195-201, one might also wonder whether it was consistent with Article II to make the President's ability to ensure execution of the laws dependent upon the action of an officer not subject to presidential control.

\textsuperscript{245} Contrast the provision of the same section that "Congress shall have power . . . to declare war." U.S. CONST. art. I, § 8, cl. 11.

\textsuperscript{246} See supra note 140 and accompanying text.

\textsuperscript{247} See supra notes 129-51 and accompanying text. For the current version of the statute, see 10 U.S.C. § 3500 (1988 & Supp. 1993); for a controversial modern method of circumventing Article I's limits on the purposes for which Congress may provide for calling out the militia, see Perpich v. Department of Defense, 880 F.2d 11 (8th Cir. 1989).

\textsuperscript{248} See Currie, Substantive Issues, supra note 1, at 816.

\textsuperscript{249} See James R. Jacobs, The Beginning of the U.S. Army 66-123 (1947); Kohn, supra note 200, at 107-16.

\textsuperscript{250} For a concise account of the entire affair, see George C. Chalou, St. Clair's Defeat, 1792, in 1 Congress Investigates: A Documented History, 1792-1974 at 3-17 (Arthur M. Schlesinger, Jr. & Roger Bruns eds., 1975).

\textsuperscript{251} See Currie, Structure of Government, supra note 1, at 178-79.
The doubts expressed on that occasion seem to have evaporated by 1792; no one in the House was reported as denying its authority to investigate St. Clair's disaster. Little effort was expended in demonstrating that the inquiry served a legitimate legislative purpose. John Vining and John Steele suggested that it might lead to an impeachment; Williamson and Thomas Fitzsimons seemed to think that the power to appropriate money implied the power to investigate how it was spent. The obvious argument that investigation might lead to legislation respecting the recruitment, training, supply, or employment of troops was apparently not made.

Without further ado the House referred the matter to a committee, which it empowered "to call for such persons, papers, and records, as may be necessary to assist their inquiries." Concerned as always to set the appropriate precedent, President Washington assembled his Cabinet, which unanimously agreed that the House had power both to conduct the investigation and to call for the relevant papers, except for "those, the disclosure of which would injure the public."

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252 The principal debate was on a motion to request the President to institute the inquiry. After several members objected that this course would improperly reflect upon the President, the House voted to conduct its own investigation. See 3 Annals of Cong. 490-94 (1792).

253 Id. at 490, 491; see also id. at 681 (Rep. Ames).

254 Id. at 491, 492. Earlier in the Second Congress, when Josiah Parker argued that it was the duty of the House to investigate past expenditures before passing on new appropriations, Madison questioned whether passage of the appropriation bill should be held up pending such an inquiry, but he agreed it was the duty of the representatives as "guardians of the public money, . . . to satisfy themselves as far as possible of the sources from which money flowed into the Treasury [and] how that money was applied . . . ." Id. at 221, 226-27. Arthur Schlesinger, invoking British and colonial precedents, has argued more broadly that "the power to make laws implied the power to see whether they were faithfully executed." Arthur M. Schlesinger, Jr., Introduction to 1 Congress Investigates, supra note 250, at xix.

255 See Philip B. Kurland, Watergate and the Constitution 23 (1978). Before the investigation began, Congress had reacted to St. Clair's defeat by providing for the raising of three additional regiments to help protect the frontiers. Act of Mar. 5, 1792, ch. 9, 1 Stat. 241. What is notable about this statute is the breadth of discretion it gave the President. Section 12 permitted him to reduce the number of troops to be raised, or to raise none at all, "in case events shall in his judgment, render his so doing consistent with the public safety"; § 13 authorized him to call into service, at any time and for any period, "such number of cavalry as, in his judgment, may be necessary for the protection of the frontiers." Id. at 243. Many objections were made to the raising of additional troops as a matter of policy, 3 Annals of Cong. 337-48 (1792); in light of the fastidiousness elsewhere displayed by the Second Congress with respect to delegations of authority, it is interesting that no one is recorded in the Annals as having argued that this statute unconstitutionally transferred to the President Congress's power to raise armies. See supra notes 129-51 and accompanying text (discussing the designation of post roads).

256 3 Annals of Cong. 493 (1792).

The Second Congress

Committee was careful to ask only for "papers of a public nature," and the President instructed Secretary Knox to hand them over.258 The Committee heard evidence and issued a report exonerating St. Clair and blaming the debacle on mismanagement in the War Department.259 A motion to invite the Secretaries of War and of the Treasury to appear before the House to discuss the report failed after Abraham Venable complained that they might unduly influence the members.260 Page repeated the objection when Knox, feeling smirched by the report, asked for an opportunity to appear and defend himself against its insinuations.261 The matter was sent back to the Committee,262 which took additional evidence, corrected a few details, and basically adhered to its original conclusions.263

Since the House never acted on the revised report, little of immediate significance came of the St. Clair inquiry.264 But congressional investigation into the conduct of executive officers under the new Constitution was now firmly accepted not only by the House but by the President and his Cabinet as well.

VIII. The Treasury

The relative harmony that pervaded the discussions surrounding the St. Clair investigation was conspicuously missing a few months later when Representative William Giles presented to the House the first of two groups of proposed resolutions respecting the conduct of the Secretary of the Treasury, Alexander Hamilton.

Hamilton's financial policies, from assumption of state debts and the whiskey excise to the proposed subsidy of manufactures and the national bank, had long been the bane of the budding opposition to a strong central government.265 Giles, elected to replace the deceased

258 3 ANNALS OF CONG. 536, 549; see 23 JEFFERSON PAPERS, supra note 22, at 265. Thus although the groundwork was laid for the doctrine of executive privilege, there was no occasion to determine either its scope or its legitimacy in this case. See KURLAND, supra note 255, at 22.
260 3 ANNALS OF CONG. 679, 683, 684 (1792). By refusing to let the Secretaries appear, said one observer, the House "cut off the possible rise of cabinet government in the United States." Brant, supra note 3, at 367.
261 3 ANNALS OF CONG. 685, 688-89 (1792). Proposals to ask the Secretary of the Treasury for advice on such matters as raising new revenues and reducing the public debt precipitated a reprise of the heated but unconvincing argument that to ask executive officers for advice similarly gave them too much influence in legislative affairs. See 3 ANNALS OF CONG. 437-52, 695-708, 711-22; Currie, Structure of Government, supra note 1, at 190 n.195.
262 3 ANNALS OF CONG. 689 (1792).
263 Am. State Papers, supra note 259, at 41-44; Congress Investigates, supra note 250, at 93-100.
264 See Chalou, St. Clair's Defeat, supra note 250, at 17.
265 See Currie, Substantive Issues, supra note 1, at 785-88, 800-01, 806-12.
Theodorick Bland as a Representative from Virginia in the waning days of the First Congress, quickly became one of the Administration's most unbridled critics, and he thought he had the goods on the despised Secretary. In January 1793, after perusing a report filed by Hamilton at House request, he moved that the House ask the President and the Secretary for a variety of records respecting borrowing, the payment of foreign debts, transactions between the government and the Bank of the United States, the sinking fund established under the assumption law, and unapplied revenues in the Treasury. Casting general aspersions at Hamilton along the way, he intimated that the Secretary might have violated the law in several respects, and the House adopted his resolutions without recorded objection.\textsuperscript{266}

Hamilton complied with the House's request, but not to the satisfaction of Representative Giles.\textsuperscript{267} Without missing a beat Giles presented a new series of resolutions, this time to inform the President that, among other things, the Secretary of the Treasury had spent money in violation of the appropriation laws and had violated his duty to respond to the House inquiry.\textsuperscript{268}

The centerpiece of Giles's charges was that Hamilton had paid off one debt with funds that Congress had appropriated to pay another.\textsuperscript{269} The general principle that Giles invoked went to the heart of the separation of powers: when Article I, Section 9 said that no money could be drawn from the Treasury without a statutory appropriation, it might or might not permit Congress to make vague lump-sum appro-

\textsuperscript{266} See 3 ANNALS OF CONG. 835-40 (1793). Hamilton explained that his supporters had voted for these resolutions in order "to confound the attempt by giving a free course to investigation." Letter of Alexander Hamilton to William Short (Feb. 5, 1792), in 14 HAMILTON PAPERS, supra note 29, at 7. The background of this controversy is briefly sketched in MCDONALD, supra note 3, at 108-09 (affirming that Jefferson was "directing [Giles's] every move from backstage"), and in ELKINS & MCKITTRICK, supra note 3, at 295-301 (describing Giles as a man of "tempestuous passions" without the intelligence to govern them). For more detail on Jefferson's clandestine role, see 25 JEFFERSON PAPERS, supra note 23, at 280-92.

\textsuperscript{267} See 3 ANNALS OF CONG. 895 (1793). For the most important of Hamilton's responses, see 14 HAMILTON PAPERS, supra note 29, at 17, 68.

\textsuperscript{268} 3 ANNALS OF CONG. 899-900 (1793).

\textsuperscript{269} See id. at 900 (Resolution 3); id. at 918-20 (Rep. Findley); id. at 935-39 (Rep. Madison). Hamilton was also charged with having acted without authorization from the President and in one case with having deviated from the President's instructions, but as Boudinot pointed out the President was not complaining. Id. at 952.
but surely, when Congress specified how the money should be spent, its directions should be obeyed.\textsuperscript{271}

Ames and Boudinot responded that the statutes had not set up separate funds, so that Hamilton had acted within the express terms of the law.\textsuperscript{272} William Smith agreed but added that "in all Governments a discretionary latitude was implied in all Executive officers, where that discretion resulted from the nature of the office, or was in pursuance of general authority delegated by law."\textsuperscript{273} This passage may be taken to suggest that some play in the joints is implicit in even the most precise appropriation law, or in the Constitution itself.\textsuperscript{274} Earlier, however, he had directly challenged Giles's proposition that it was always the Secretary's duty to follow the law. That this was the "general rule" he acknowledged:

Yet it must be admitted, that there may be cases of a sufficient urgency to justify a departure from it, and to make it the duty of the Legislature to indemnify an officer; as if an adherence would in particular cases, and under particular circumstances, prove ruinous to the public credit, or prevent the taking measures essential to the public safety, against invasion or insurrection. In cases of that nature, and which cannot be foreseen by the Legislature nor guarded against, a discretionary authority must be deemed to reside in the President, or some other Executive officer, to be exercised for the public good; such exercise instead of being construed into a crime, would always meet with the approbation of the National Legislature. If there be any weight in these remarks, it does not then follow as a general rule, that it is essential to the due administration of the Government, that laws making specific appropriations should in all cases whatsoever, and under every circumstance, be strictly observed.\textsuperscript{275}

This time Smith seemed clearly to be saying that in some cases the Secretary was justified in violating the law.

Both Madison and William Findley of Pennsylvania, two of Giles's most voluble supporters, agreed with Smith that the law need

\textsuperscript{270} See Currie, \textit{Substantive Issues}, supra note 1, at 795-96. In fact the appropriation laws of the Second Congress were much more specific than those of the First, reflecting concerns for legislative control of spending that had been expressed during the First Congress as well as in the controversy over the Giles Resolutions. See Act of Feb. 28, 1793, ch. 18, 1 Stat. 325; Act of Dec. 23, 1791, ch. 3, 1 Stat. 226; see also Gerhard Casper, \textit{Appropriations of Power}, 13 U. Ark. Little Rock L.J. 1, 13 (1990) ("Any attempt to understand the development of the appropriations process in the last decade of the eighteenth century must appreciate that it coincided with the emergence of parties.").

\textsuperscript{271} See 3 \textit{Annals of Cong.} 920-21 (1793) (Rep. Findley). Giles's first two resolutions would have stated this principle in general terms. See id. at 900.

\textsuperscript{272} Id. at 948, 950-51.

\textsuperscript{273} See id. at 901-02, 911.

\textsuperscript{274} It is even arguable that if Congress gets too specific in prescribing how money is to be spent it usurps the executive function. Cf. United States v. Lovett, 328 U.S. 303 (1946) (striking down a law forbidding the payment of the plaintiff's salary as a bill of attainder).

\textsuperscript{275} 3 \textit{Annals of Cong.} 901-02 (1793).
not always be followed; but they denied that Hamilton had been justified in departing from the law in the case before them. There was some dispute about the facts. But if there was legal room for maneuver, it surely embraced what Hamilton's defenders said he had done, and if there was not he should have been forgiven; for to follow the letter of the law would apparently have required him to transport one sum of money home from Europe and another back to take its place.

But the more fundamental question was whether, assuming Hamilton had done something wrong, Giles's resolutions were an acceptable means of correcting him. The reason for sending these resolutions to the President, Smith protested, was "to direct the President to remove the Secretary from office." Thus the consequence of the proceeding was to find Hamilton guilty of criminal offenses and to punish him without trial. "The principles of the Constitution," he continued, "secure to every individual in every class of society, the precious advantage of being heard before he is condemned." Impeachment, Smith added, was the proper course; had Hamilton been impeached, he would have received a fair trial.

Even allowing for the fact that the President would have been under no obligation to discharge Hamilton, Smith's argument strikes a responsive chord. The difficulty is to explain how what Giles proposed differed from what the House had done with general approbation, only a few months before, in the case of General St. Clair.

In each case the House conducted an inquiry into possible official misconduct respecting, among other things, the use of appropriated funds. The information sought in Hamilton's case would have served the same legitimate purposes that had been invoked to justify the St.

276 Id. at 922, 941; see Lucius Wilmerding, Jr., The Spending Power 3-12 (1943) (adding similar statements and actions by early statesmen from Hamilton to Jefferson and concluding that the original understanding was that "[t]here are certain circumstances which constitute a law of necessity and self-preservation and which render the salus populi supreme over the written law").

277 See 3 Annals of Cong. 909-10 (1793) (Rep. Barnwell); id. at 912-13 (Rep. Smith); id. at 925 (Reps. Fitzsimons and Laurance); id. at 949 (Rep. Boudinot). For the assertion that Hamilton had not yet replaced the money he had used in Europe, see id. at 920 (Rep. Findley); id. at 939 (Rep. Madison). In 1794, after Hamilton had demanded a further investigation to clear his name, a committee composed largely of unsympathetic Republicans grudgingly gave him a clean bill of health. Am. State Papers, supra note 259, at 281-301; see 25 Jefferson Papers, supra note 22, at 280, 291; see also A Sketch of the Finances of the United States, in 3 Writings of Albert Gallatin 69, 111 (Henry Adams ed., Philadelphia, J.B. Lippincott & Co. 1879) (concluding that, though Hamilton had offended the letter of the law, his transgression was, "to a certain degree, rather a want of form than a substantial violation of the appropriation law").

278 A draft of the resolutions in Jefferson's handwriting had flatly declared that Hamilton was "guilty of maladministration" and "should, in the opinion of Congress, be removed from his office by the President of the United States." 25 Jefferson Papers, supra note 22, at 292-93.

279 3 Annals of Cong. 902-03 (1793); see also id. at 904 (Rep. Murray).
Clair investigation: possible impeachment and the supervision of federal funds. Moreover, the result of the St. Clair investigation was a legislative finding of executive misbehavior on the part of particular executive officers—which was just what Giles sought in the case of Hamilton.

Yet there were differences between the two cases. Representative Murray called attention to one of them in holding up the St. Clair investigation as a model of what should have been done in the Treasury inquiry: those suspected of misconduct in the earlier proceeding had been given an opportunity to defend themselves. "Resolutions of conviction," Murray concluded, "might rise out of the report of a committee of inquiry, who would act as a Grand Jury to the House, but could never precede it."

Appealing as Murray's distinction appears, his allusion to the grand jury reveals its weakness; for neither tradition nor the Constitution requires that a suspect be heard before he is indicted. What seems most critical is that the findings of misconduct in St. Clair's case were made in a committee report to the House itself as a prelude to further congressional action; in Hamilton's case they were meant to be an end in themselves. Thus the harm done to individuals by the conclusions in the St. Clair report was incidental to the acquisition of information for the legitimate purpose of possible impeachment; in Hamilton's case condemnation without a hearing was the object of the House's proposed action.

Nobody seriously defended Giles's approach, and all of his resolutions went down in flames. Only four members besides Giles voted for all of them, and one of the four was James Madison.

Many years later the unlamented House Committee on Un-American Affairs was to emulate Representative Giles by conducting investigations widely believed to be for the sake of exposure. We are but fallible mortals, the best of us; condemnation without trial was

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280 Id. at 904.
281 See id. at 955-56, 958-60, 963. The others were Ashe, Baldwin, and Macon. Findley, Mercer, and Parker voted for all save the resolution censuring Hamilton for not providing adequate information to the House; as Findley explained, he thought that was a matter more appropriately dealt with as a contempt of Congress. Id. at 963.
282 See Watkins v. United States, 354 U.S. 178, 200 (1957) ("We have no doubt that there is no congressional power to expose for the sake of exposure."); cf. Jenkins v. McKeithin, 395 U.S. 411 (1969) (holding similar state proceedings incompatible with due process). Both Watkins and Jenkins, however, involved investigations into the conduct of private individuals. The Court in Watkins added that "[w]e are not concerned with the power of the Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government," which Woodrow Wilson had vigorously advocated in his influential book. Woodrow Wilson, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 303-04 (Houghton, Mifflin 1885) quoted in Watkins, 354 U.S. at 200 n.33.
no more appropriate when the Father of the Constitution endorsed it in 1793.

IX. Codfish

The New England cod fisheries, Secretary of State Jefferson reported to the House in early 1791, were in parlous straits as a result of "heavy duties on their produce abroad, and bounties on that of their competitors; and duties at home on several articles particularly used in the Fisheries."283 The First Congress had given some relief in the form of an allowance on fish exports to make up for the customs duties paid on imported salt.284 But the sum was said to be inadequate, and it was paid to exporting merchants rather than to the fishermen.285 The Massachusetts legislature had petitioned the House for further relief, and the House had sought Jefferson's advice.286

Jefferson saw this occasion as an opportunity to impose retaliatory regulations and duties to counteract British restrictions on American trade.287 The crux of his recommendation was that the government should fulfill its "obligation of effectuating free markets" for exported fish by making "friendly arrangements towards those nations whose arrangements are friendly to us."288 He did not have to add that the result would be arrangements that were less friendly toward Great Britain.

The Senate seized upon a different remedy, sending to the House early in the Second Congress a bill that would provide for paying to the owners of vessels employed in the cod fisheries a "bounty" based upon the size of their boats and the quantity of fish they landed, to be divided among all their crew.289

Congress had no authority, said Giles in the House, to grant bounties.290 Yes it had, said South Carolina's Robert Barnwell; Congress could tax and spend for any purpose that would promote the general welfare.291 Not so, said Madison; as under the Articles of Confederation, the General Welfare Clause gave no such power. "[T]he meaning of the general terms in question must either be sought

286 19 Jefferson Papers, supra note 22, at 206.
287 See id. at 163. In the same vein, Madison had labored vainly in the First Congress for discrimination in tonnage duties between British and French vessels to retaliate for British restrictions. See Currie, Substantive Issues, supra note 1, at 782-83 n.39.
288 19 Jefferson Papers, supra note 22, at 220.
289 3 Annals of Cong. 366 (1792).
290 Id. at 363.
291 Id. at 375.
in the subsequent enumeration which limits and details them, or they convert the Government from one limited, as hitherto supposed, into a Government without any limits at all.”

Benjamin Goodhue of Massachusetts defended the subsidy as a defensive or commercial measure on the ground that the fishery provided “a copious nursery of hardy seamen” who would protect our commerce. Giles said we did not need a navy.

Madison offered an olive branch. He was disposed, he said, “to afford every constitutional encouragement to the fisheries”; but it was both dangerous and unnecessary to speak of bounties. Defenders of the bill had insisted that all that was involved was reimbursement of the tariffs paid on salt used to cure the fish. Very well; “if, in the allowance, nothing more is proposed than a mere reimbursement of the sum advanced, it is only paying a debt; and when we pay a debt, we ought not to claim the merit of granting a bounty.”

The bill was amended accordingly; the fishermen got their money, but the statute spoke of an “allowance” rather than a bounty. Once again Congress had managed to spend money for a purpose it found worthy without accepting Hamilton’s broad view of the General Welfare Clause. But it is not clear that very much was gained for states’ rights in the process. For one thing the codfish controversy suggests is that many goals that might be accomplished by subsidy can equally be achieved by selectively refunding taxes; and by passing the statute Congress acknowledged that the power to lay and collect taxes included the power to refund them in order to encourage activities it might not be able to promote directly.

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292 Id. at 386-87; see also Letter from James Madison to Henry Lee (Jan. 1, 1792), in 14 Madison Papers, supra note 71, at 179, 180 (“If not only the means, but the objects are unlimited, the parchment had better be thrown into the fire at once.”).

293 3 Annals of Cong. 366 (1792); see also id. at 369-70 (Rep. Ames).

294 Id. at 364.

295 Id. at 385.

296 See, e.g., id. at 366 (Rep. Goodhue) (“We only ask, in another mode, the usual drawback for the salt used on the fish.”); see also id. at 369 (Rep. Ames); id. at 376 (Rep. Gerry).

297 Id. at 386; see also id. at 367 (Rep. White); id. at 397-99 (Rep. Giles).

298 Act of Feb. 16, 1792, ch. 6, § 1-2, 1 Stat. 229.

299 For earlier chapters in this ongoing struggle, see Currie, Substantive Issues, supra note 1, at 796-801, 806-08, 810. As Ames recognized, the codfish controversy was a proxy for the federal subsidies proposed in Hamilton’s famous Report on Manufactures, see id. at 800-01 & n.147, which after resolution of the codfish dispute was never brought to a vote. See Letter of Fisher Ames to Thomas Dwight (Jan. 30, 1792), in 1 Ames’s Works, supra note 193, at 111, 112; see also Elkins & McKirrick, supra note 3, at 276-77.

300 See also Act of Mar. 1, 1793, ch. 19, 1 Stat. 329, 331 (§ 9 of the Indian Commerce Act of 1793) (authorizing the President to spend up to $20,000 per year “to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship”). Taking this practice as a monument to the inconsistency of those who opposed relief for the cod fishermen, Representative Gerry found no constitutional support for such payments. 3 Annals of Cong. 377 (1792). The Annals do not reveal what Members of Congress thought was their constitu-
X. Fugitives

A year later Congress passed a law to implement Article IV’s provisions requiring the return of fugitives from justice and runaway slaves.\(^3\) The *Annals* reveal no debate on any of its provisions.

Article IV, Section 2 required simply that fugitives of either description should be “delivered up” on the “demand” of the state or the “claim” of the slaveowner.\(^3\)\(^0\) The statute specified that it was the duty of the “executive authority” of the state or territory in which a person charged with crime was found, upon presentation of an indictment or affidavit, to have the fugitive arrested and turned over to the demanding party.\(^3\)\(^0\)\(^3\) With respect to slaves the statutory procedure was different: it was the responsibility of the owner to capture the runaway and bring him before a judge or magistrate, who, upon satisfactory proof, was to issue a certificate entitling the claimant to remove him from the state.\(^3\)\(^0\)\(^4\) To interfere with either process, or to harbor a known fugitive slave, was made a federal crime.\(^3\)\(^0\)\(^5\)

Article IV, Section 2 said nothing about any congressional power of implementation. Neither, however, did Article VI, which required state as well as federal officers to take an oath to support the Constitution. Yet the very first statute passed by the First Congress, over predictable constitutional objections, had prescribed the oath to be taken by both state and federal officers on the theory that congressional authority was implicit.\(^3\)\(^0\)\(^6\) This argument was no less applicable to Article IV, and it was the basis on which the Supreme Court in the nineteenth century upheld Congress’s power to adopt implementing

\(^{3}01\) Act of Feb. 12, 1793, ch. 7, 1 Stat. 302.

\(^{3}02\) Section 2 went on to state, redundantly, that the laws of the state into which a slave fled were ineffective to set him free.

\(^{3}03\) Act of Feb. 12, 1793, ch. 7, § 1, 1 Stat. 302.

\(^{3}04\) Id. § 3, 1 Stat. at 302. Article IV, § 2 spoke only of persons escaping from one “State” to another. The statute extended the obligation to cases of flight to or from a territory, presumably on the plausible basis of the power to “make all needful rules and regulations respecting the Territory or other property belonging to the United States.” U.S. CONSR. art. IV, § 3, cl. 2. The statute said nothing of flight to or from the district recently designated for the seat of government, over which Congress had the power of “exclusive legislation” under Article I, § 8.

\(^{3}05\) Act of Feb. 12, 1793, ch. 7, §§ 2, 4, 1 Stat. 302, 305.

\(^{3}06\) See Currie, *Structure of Government, supra* note 1, at 171.
legislation with respect to both fugitive slaves and fugitives from justice.  

There was also nothing entirely new about the fact that the statute imposed an affirmative duty on state executive officers to arrest fleeing criminals and return them; as already noted, both the First and Second Congresses had imposed occasional duties on state officers.  

Indeed in the case of fugitives, as in the case of the oath, it was arguable that the duty was imposed by the Constitution itself.  

Yet Representative Niles had protested on constitutional grounds when the Second Congress required Governors to certify who had been chosen to serve as presidential electors, and the Supreme Court made a prophet of him in 1860, reading the executive's obligation out of the 1793 statute to avoid holding it unconstitutional:  

[T]he Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State.  

The Court changed its mind on this question in 1987, but there are still limits to Congress's power to treat state officers as minions of the federal government.  

CONCLUSION  

With reapportionment according to the first census, regulation of presidential elections and succession, and establishment of the Post Office, the militia, and the Mint, the Second Congress substantially completed the task of setting up the new Government of the United States. With the St. Clair and Hamilton investigations it began to settle into its role as Grand Inquest of the nation.  

Sharp ideological differences had not been unknown to the First Congress. But the Giles Resolutions injected a new level of partisan vitriol that was to poison congressional proceedings until after the turn of the century. The quality of constitutional argument—notably by Ames and Sedgwick, Madison, Smith, and Murray—was still impressively high, but increasingly one has the sense that many speakers were tailoring their arguments to their conclusions.  

The crucial issues of foreign policy and defense that were about to arise would only make matters worse.

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308 See supra notes 64-67 and accompanying text.

309 See Dennison, 65 U.S. at 102-03.

310 Id. at 108.
