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I. INTRODUCTION

The time after war and crisis is a time for reflection, to learn from the harsh experiences of the recent past and to prepare for the future. Today we are in the process of learning our lessons from the Vietnam War. In both the press and official circles the mistakes (real or presumed) of the war are being analyzed, and remedies proposed. The success of our foreign relations, and all that depends on them, may well rest on how well we see what has been done and what ought to be done.

Other events have conspired with the war to give force to the view that a major cause of our foreign policy errors has been the excessive power of the President and the excessive weakness of Congress. At the writing of this article both houses of Congress have passed bills containing the premise that the ills of the Vietnam War, as well as other ills of our foreign policy, are due in large part to the immense discretionary power wielded by the President in foreign affairs. As the cure for these ills the measures of both houses propose to reduce and codify the President's discretion, and to involve Congress in its exercise. It is not surprising, perhaps, that this is the view of Congress, but is its view correct and its remedy prudent?

The central provisions of the bills, now in joint committee, can be briefly indicated. The Senate bill, S-440,[1] would limit the President's discretion to commit troops to hostilities without a declaration of war to the following purposes: (1) to repel, retaliate against, or forestall an armed attack on the United States, its territories, or possessions; (2) to repel or forestall an attack on American troops abroad; (3) to protect and evacuate, under specific circumstances, American citizens and nationals whose lives are under direct and imminent threat; and (4) to fulfill a specific statutory authorization (not a generalized treaty commitment).[2] Involve-

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1. S. 440, 92d Cong., 1st Sess. (1973).
2. S. 440, 92d Cong., 1st Sess. § 3(1)-(3) (1973).

ment in any of these hostilities would have to cease within 30 days unless Congress specifically authorized its continuance; and Congress might terminate involvement at any time within the 30 days by an act or by joint resolution (thus avoiding the threat of presidential veto).[3] The measure also contains provisions for prompt reporting of troop involvement and expeditious handling of the issue in Congress. The House bill, H.R.J. Res. 542,[4] differs from the Senate version in several ways, but most essentially in allowing the President 120 days instead of 30 in which to use troops without specific authorization.[5] In general, both bills seek to reduce the danger of unwise use of presidential discretion by reducing its scope, and by associating Congress in the exercise of that discretion that cannot be eliminated.

It is a cliche (though no less true for that) that the lessons we learn from one crisis are seldom adequate for the next. We prepare for an exigency already past and do not see the one coming on us. Whether the legislation outlined above would have improved United States policy in Vietnam is perhaps a moot point, although certainly not an uninteresting or undebatable one. The more important question is whether the proposed legislation will stand us in good stead in the future. To judge of this question we must look at the proposed law not only in terms of the immediate past or the present, but in terms of the permanent features of our form of government and of the international environment. Although it is tempting to judge the measures in terms of the policies and capacities of the current President and Congress, both Presidents and Congresses change, and the bills propose to set up a better relationship between *any* Congress and *any* President. It is the intent of this article to see what guidance we can get from some of the best thought within the American political tradition about the relationship between Congress and the President in foreign affairs. The teachings of these theorists raise some new questions and strong doubts about the wisdom of the proposed legislation to limit the President's discretion in the conduct of foreign affairs.

II. Separation of Powers and Foreign Affairs

It is first necessary to understand the strength of the view embodied in the proposed legislation that presidential action in for-

3. S. 440, 92d Cong., 1st Sess. § 6 (1973).
4. H.R.J. Res. 542, 92d Cong., 1st Sess. (1973).
5. 31 Cong. Q. 2,024-25 (weekly ed. July 21, 1973); 31 Cong. Q. 2,068-69 (weekly ed. July 28, 1973).

eign affairs should be limited. Passage of the bills by large majorities in both houses[6] was doubtless aided by animus toward Presidents Johnson and Nixon. It is also true that some persons outside the Congress probably saw the measure as a disguised way to advance partisan policies—since the current Congress supported policies more to their liking than did the current President. But the proposal also taps some of the most persistent themes of American political thought. That the rule of law ought to be substituted for discretion; that the unfettered discretion of one man is particularly to be feared; that Congress, composed of the representatives of the people, ought to be the supreme directing power of the government and the President the executor of its policies are views so persistent as almost to seem the very definition of republican government. It is this fact, above all others, that accounts for the plausibility of the legislation and for much of the strength of the support behind it.

While the legislation draws on profound currents in our political tradition, the debate over the legislation has examined the reasoning behind these views only in the most perfunctory manner. Each side claims to know the balance of power required by separation of powers, and appeals to the writings of famous American statesmen for support, without reaching the underlying reasons supporting the separation of powers doctrine and its application to international affairs. The situation is perhaps best revealed by reference to the most distinguished scholar to appear before the Senate Foreign Relations Committee last year in its hearings on a bill nearly identical to the one finally passed by the Senate. Professor Henry Steele Commager argued before the Committee that it could learn nothing from the theory of separation of powers because "[t]he constitution, as written in 1787 and as developed over a century and three quarters is of course a product of history, not the conclusion of a syllogism, and any consideration of the war powers must be rooted in history rather than in theory . . . ."[7] The historical meaning of separation of powers in foreign affairs, he goes on, is fear of kingship: "[T]he founding fathers were determined that no American executive would have the power of a George III or a Frederick The Great . . . ."[8] Professor Commager

6. The vote in the House was 224-170, and in the Senate, 72-18. 119 CONG. REC. 6283 (daily ed. July 18, 1973); 119 CONG. REC. 14,226 (daily ed. July 20, 1973).

7. *Hearings Pursuant to S. 731, S.J. Res. 18, and S.J. Res. 59 Before the Comm. on Foreign Relations*, 92d Cong., 1st Sess. 18 (1972).

8. *Id.* at 18.

seeks to explain the Constitution in terms of specific historical events and fears, with the result that one need not examine the general reasoning in support of an arrangement that is, after all, fixed permanently in the United States Constitution. His view of separation of powers is not unique, however, but is only one manifestation of the general neglect or denigration of the theory of separation of powers in recent scholarship.

In general there are three prevelant views that stand in the way of the proper understanding of separation of powers. The first, which will be shown to be historically false, is that there was no theory in support of separation of powers, that is, that there was no chain of reasoning which showed that separation of powers would bring about generally beneficial results, but that it was only a response to a particular set of circumstances. This seems to be the view of Professor Commager.

The second view is that separation of powers is entirely a political matter. The power that ought to be in one branch or another is simply the power that a branch is able to take and maintain.[9] Seen in this light separation of powers seems merely to be a formula for flexibility. Power can switch from one branch to another as circumstances change. There is no such thing as the "correct" distribution of power. Separation of powers can thus provide us with no guidance about how power is to be divided or shared, but provides only the mechanism whereby it can be.

The third opinion is the opposite of the second. It holds that the separation of powers, far from being a formula for flexibility, is a formula for rigidity. A rigid separation, however, would bring the government to a standstill without achieving any beneficial results. If we take this view seriously we would put ourselves into a straightjacket with the most dire consequences for the country.[10]

Whatever the merit of these objections and criticisms, it must be said that separation of powers is not one of those arrangements that spontaneously recommends itself to the human mind. It appeared only recently in history, achieving its contemporary meaning only in the 17th century. While people have long known that governments perform different functions and that the tasks of government can be apportioned to different bodies, it was only in the 17th century that the opinion arose that the functions of govern-

9. *See, e.g.*, W. EBENSTEIN, *et al.*, AMERICAN DEMOCRACY IN WORLD PERSPECTIVE 134 (1967).

10. For the most influential argument for this position see J. BURNS, THE DEADLOCK OF DEMOCRACY (1963).

ment can be differentiated and each assigned on principle to a distinct department of government.[11]

Separation of powers in the sense just mentioned is a product of theory, contrary to Professor Commager's opinion. It was recommended by leading political thinkers long before it ever formed the basis for an actual regime.[12] When it did form the basis of a regime, in the American case, the men who adopted it could find no existing model, but constantly and consistently referred their readers to a theorist, Montesquieu.[13]

Not only is separation of powers a product of theory, but it counsels that the structure of government be formed according to theory. That is, it recommends that governmental functions be divided *on principle*, and not according to the prudential considerations of the moment. It counsels not flexibility, but fixity in the arrangement of governmental powers.[14]

Whether such a theory of separation of powers can result in good foreign policy is indeed a great question. But the answer can be seen only if we try to see first of all what can be said in behalf of this theory.

There is one further objection to be made to looking at these issues in the light of the theory of separation of powers. Granted that separation of powers provides a rationale for the ordering of internal affairs, it might be said, it has nothing to say about external affairs. Foreign affairs is a matter of national interest, but it is law, not interests, that can be divided into legislative, executive and judicial functions.

At one point in American history the separation of powers became a dogma reverenced for its alleged powers of protecting liberty. Like all such dogmas the original reasoning behind it was forgotten and the limits of its truth forgotten. This period of time coincided with relative quiet in the foreign affairs of the United States, which led to a neglect of the original conception of foreign affairs inherent in the doctrine. By the time men began to question

11. W. GWYN, THE MEANING OF SEPARATION OF POWERS 5 (1965).

12. Montesquieu's presentation of the doctrine as the practice of England is of course an idealization, if not falsification, of English practice.

13. "The oracle who is always consulted and cited on this subject is the celebrated Montesquieu." THE FEDERALIST No. 47, at 324 (J. Cooke ed. 1961) (J. Madison) [hereinafter cited as FEDERALIST].

14. This is not to say that there is no room for experimentation in distributing powers. There is because of the difficulty of determining where particular powers should be placed. Nor does it prohibit flexibility in policy. But if the system were perfected, the arrangement of powers would be fixed.

the doctrine again, they attacked not the original reasoning, but the dogma it had become. Separation of powers was attacked, for instance, for relying too much on the power of institutions instead of on social forces, yet scholarship has shown that this criticism can hardly be applied to the theories of the great exponent of the doctrine, Montesquieu.[15]

Yet the doctrine of separation of powers as originally conceived was concerned with the question of foreign affairs. This is evident in both Locke and Montesquieu. In Locke's theory of government, powers are divided into legislative, executive and federative, in which the executive power is the power to execute the laws of society within society and the federative the management of the security and interest of the public without.[16] In Montesquieu, powers are divided into legislative, executive and judicial. But the executive power is first defined as the power by which the magistrate "makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions."[17] The great exponents of separation of powers, far from being silent about foreign affairs, were keenly aware of the problems it posed. This is not to say that they successfully resolved the problems foreign affairs posed for their theories.

To see whether the reasoning in support of separation of powers can aid us in understanding the implications of the current legislation, we will look at the conception of executive discretion in foreign affairs found in Locke and Montesquieu, in the *Federalist Papers* and in a famous debate between Hamilton and Madison.

III. LOCKE AND EXECUTIVE PREROGATIVE

It is instructive to compare Locke's division of powers with that found in the American Constitution. To repeat, Locke divides the powers of government into legislative, executive and federative. Unlike the American Constitution, Locke distinguishes the federative power—the power to defend the commonwealth from foreign injury—from the legislative and executive powers (and fails to distinguish the judicial from the executive). There are two things in particular to note in the differences between Locke and the United

15. *See, e.g.*, H. MERRY, MONTESQUIEU'S SYSTEM OF NATURAL GOVERNMENT 360-65 (1970).

16. J. LOCKE, *The Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT §§ 143-48 (P. Laslett ed. 1960).

17. MONTESQUIEU, THE SPIRIT OF THE LAWS, Book XI, Ch. 6, at 51 (T. Nugent transl. 1949).

States Constitution for our purposes. The first, of course, is that Locke distinguishes the power to conduct foreign affairs as one of the three main powers of government, while this power (from Locke's view) is hidden in the American Constitution. It is not seen as a distinct function of government at all. The second is that the three powers of the American Government seem all in the service of law, but the same cannot be said for Locke's scheme. The American Government, of course, distinguishes the powers of government on the basis of a single principle—their function in a government of laws. A government of laws can be divided into those who make the law, those who execute the law and those who judge individuals under the law. Locke makes the distinction between making and executing the law, but the distinction between these powers and the power to defend the commonwealth is based on another principle. The first two powers can be understood in the service of law, to enunciate or to execute it, but the third cannot. This is clearly indicated by Locke in defining political power in the opening chapter of the *Second Treatise* as "*a Right* of making Laws with Penalties of Death, and consequently all less Penalties, for the Regulating and Preserving of Property, and of employing the force of the Community, in the Execution of such Laws and in the defence of the Common-wealth from Foreign Injury, and all this only for the Publick Good."[18] The federative power is not defined in terms of law, and Locke's division of powers is not determined by a single principle.

To see Locke's understanding of the federative power, let us first look at the comparison between federative and executive power, and then at the comparison between federative and legislative power. The federative and executive powers differ both in their objects and in their origins.

The object of the executive power is to execute the laws made by the legislative power. The federative power consists in the power "of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth . . . ."[19] While laws can in great measure direct the action of the executive, the affairs of the federative power must be left to "the Prudence and Wisdom of those whose hands it is in, to be managed for the publick good."[20] The reason for this is that domestic laws are meant to direct the actions of the subject and

18. J. LOCKE, *supra* note 16, § 3, at 286.
19. *Id.* § 146, at 383.
20. *Id.* § 147, at 384.

hence can lay down general rules, but what is to be done in foreign affairs depends on the actions and designs of men over whom the laws have no control.[21] The federative power must thus respond to particular actions and plans of foreign powers, but particular responses or anticipations can never be commanded by general laws.

These differences reflect a difference in the origin of the two powers. Men lack protection for their lives, liberties and estates in the state of nature. To remedy this lack, according to Locke's argument, men must institute a government of established, settled, known law received and allowed by common consent; with a "known and indifferent judge" with authority to settle differences and with the power to back up his sentence.[22] The executive power must be subordinate to the legislative power, for what must be instituted is a government of law not one of arbitrary power,[23] but the executive ought not to be the same body as the legislature. Both efficient administration and the rule of law require this separation. The legislature need not always be in session but the executive must. More importantly, if the laws are to apply to the legislators as to ordinary citizens, they must be executed by a distinct party in order that the legislators not create exceptions for their private interests.[24] Thus the executive power is created by the social compact to remedy a lack of protection for man in the state of nature, and is separated from the legislative power in practice as an auxiliary precaution to achieve the common good.

The federative power, however, has another origin. The power the commonwealth exercises in foreign affairs is not derived from the social compact and the settled laws that constitute the body politic, but stems from the nature of any commonwealth as "one Body in the State of Nature, in respect of all other States or Persons out of its Community."[25] This power Locke calls "natural" because it corresponds to the "Power every Man naturally had before he entred into Society."[26] Although the authority of the one conducting foreign policy derives from the social compact within, the power that can be rightfully exercised by this authority is not derived from the compact because the compact does not create the right to govern affairs among those who are not part of it, *i.e.*

21. *Id.*
22. *Id.* §§ 124-26, at 368-69.
23. *Id.* § 149, at 384-85, § 152, at 386-87.
24. *Id.* § 143, at 382.
25. *Id.* § 145, at 383.
26. *Id.*

foreign governments. Since there is no compact between governments setting up such a right to legislate, governments stand in relation to one another as individuals stand to one another in the state of nature and have the right to judge for themselves what must be done. They can be restricted in this right neither by another government nor by their own people. The social compact can designate only who has this power, not how it is to be exercised.[27]

The characteristics of the federative power can be seen even more clearly if we compare it with the legislative power. Both the federative and executive power are said by Locke to be subordinate to the legislative power.[28] It is the creation of a legislative power that first distinguishes civil society from the state of nature, and it is the legislative power that has the right to direct the force of the community, whether in internal or external affairs.[29]

We have already partially indicated that this apparently clear superiority of the legislative power over the federative power gives way when one looks not at who has this power, but at what constitutes this power. The federative power, considered in its objects and methods, is not derived from the agreement of the social compact, but is natural. This means simply that no agreement among the citizens can affect the existence of the power required in foreign affairs. The substance of the federative power is not determined by agreement, but by the natural necessities of the case and by the fact that nations, like individuals in the state of nature, are their own judges in determining how far they must go in executing the law of nature. Hence all nations have equal powers in foreign affairs, and these powers are the same for limited governments as they are for absolute monarchies. There is an inalienable right in every commonwealth to take actions to preserve itself and to punish others.

Regarded from this viewpoint the federative power seems a rival to the legislative. The legislative power must guide society, but the federative power, in principle unlimited, speaks as the voice of the society to others just as the legislative power speaks as the voice of the society to itself. Regarded as powers, and not as particular persons or bodies, both have the power of sovereignty to command and to execute. The federative power seems clearly superior in its nature to the executive, and a rival to the legislative.

Now where is this power to be placed? It would seem that it

27. *Id.* Ch. 12.
28. *Id.* § 153, at 387-88.
29. *Id.* §§ 134-35, at 373-76.

ought to be united with the legislative power on the principle that only one body can be sovereign. The distinction between internal and external affairs cannot create harmony between the two. Internal policies can affect external and *vice versa*. However, Locke does not place it there, but says that executive and federative powers "are always almost united."[30] He then proceeds to give reasons why it can hardly be otherwise. In the first place both executive and federative powers require the command of the force of the community in order to execute the laws or defend the commonwealth. But to place the force of the commonwealth in distinct hands is "almost impracticable," for these persons might act separately, which would "be apt sometime or other to cause disorder and ruine."[31]

In the second place, since foreign affairs must be guided by prudence and not by laws, the federative power cannot reasonably be lodged in the legislative body. A legislature composed of numerous individuals, slow to act and often not in session, cannot provide "the dispatch and unity of direction which is indispensable to the conduct of foreign relations."[32] Without unity, and incapable of dispatch either because it is not in session or because it has many members, the legislative power does not have the prudence necessary for conducting foreign affairs, particularly in cases such as war, which admit "not of Plurality of Governours."[33] The federative power must thus be united with the executive power.

The difficulty that the federative power presents for Locke can be understood in the following way. The argument of the *Second Treatise* (as is well known) is, in one sense, an argument against absolute, arbitrary power. Locke, in contrast to Hobbes, repeatedly emphasizes that absolute monarchy is not a remedy for the defects of the state of nature. Men in the state of nature have the liberty to defend their rights against the injuries of others, but to give up their power to an absolute monarch is to disarm themselves and to arm the monarch to make a "prey of them when he pleases. He is being in a much worse condition who is exposed to the Arbitrary Power of one Man, who has the Command of 100000. than he that is expos'd to the Arbitrary Power of 100000. single Men: no Body being secure, that his Will, who has such a Command, is

30. *Id.* § 147, at 383.

31. *Id.* § 148, at 384.

32. For an elaboration of this argument see R. COX, LOCKE ON WAR AND PEACE 127 (1960).

33. J. LOCKE, *supra* note 16, § 108, at 358.

better, than that of other Men, though his Force be 100000; times stronger."[34] Arbitrary, absolute monarchy can never be a legitimate form of government.

Yet in explaining why it was that the first governments tended to be absolute monarchies, Locke cites the simplicity and poverty of those times, which raised few controversies, and man's greater concern for external affairs that followed from the lack of domestic fears and controversies. But, as our argument has already indicated, absolute monarchy is suited for the conduct of foreign affairs, particularly for the typical crisis of foreign affairs, war. "Twas natural for them to put themselves under a *Frame of Government*, which might best serve to that end; and chuse the wisest and bravest Man to conduct them in their Wars, and lead them out against their Enemies, and in this chiefly be their *Ruler*."[35] But when men began to fear each other more than they feared foreigners and to gain experience of the "Encroachments of Prerogative" and the "Inconveniences of Absolute Power," it became necessary to find ways to restrain the exorbitances and abuses of power.

However, absolute monarchy remains the best government to guide the commonwealth in foreign affairs. The limitations of absolutism—settled laws based on consent, indifferent judges and united force in the service of laws—cannot be applied to foreign affairs. A quasi-monarchical power must be maintained under the form of limited government to meet threats from abroad.

What, then, prevents the abuse of this power? Locke does not specifically discuss the limits on the discretion of the federative power, and I believe it is crucial in understanding Locke's treatment of this power to recognize that the need for this monarchical power is seen only after one digs in the text. The general teaching is for limited government, and the federative power appears only as an exception or qualification of the general limitation of power.

The need for discretion, which seems to rule in foreign affairs, also appears, albeit with less frequency, in domestic affairs. Even in domestic affairs not everything can be done by making and applying laws. There are many "unforeseen and uncertain occurrences" that escape general rules, and cases in which rigid application of the law might inflict punishment unfairly. In these cases the law itself must give way to executive discretion, or rather, to "this Fundamental Law of Nature and Government, *viz.* That as

34. *Id.* § 137, at 377-78.
35. *Id.* § 107, at 357.

much as may be, *all* the Members of the Society are to be *preserved.*"[36] If the discretion is exercised for the public good, the people will go along for they "are very seldom, or never scrupulous, or nice in the point."[37] If quarrels should arise over the exercise of this discretion, the ultimate test is appeal to the sword. "The People have no other remedy in this, as in all other cases where they have no Judge on Earth, but to *appeal to Heaven.*"[38] This argument, made with regard to the executive power, applies with even greater force to the federative power in which greater discretion is required. As Professor Richard Cox notes, here the appeal to heaven is probably even less likely to occur, however, for the actions are taken against other countries, not against the citizens themselves, and the citizens will tend to feel themselves provoked only if heavy demands are made on the resources of the country in the form of such things as taxes and conscription. Even then the people may go along if they are convinced their security requires it.[39]

It should be said that the taxing and appropriation powers are in the hands of the legislative power, according to Locke, and it also has the right and responsibility of surveillance over the federative power.[40] But these are the extent of the limitations Locke discusses, and the clear upshot of his argument is that the executive-federative power must be given and will exercise great discretion in foreign affairs, and neither can this power be made subject to law nor the discretion improved by giving it to the legislative power.

Montesquieu's discussion of separation of powers, the most influential in the formation of the United States Constitution, is dominated by concern with individual liberty. This is immediately evident not only from the context of the discussion,[41] but by the fact that Montesquieu, unlike Locke, separates the judicial from the executive power. This difference is clearly meant to increase the individual's sense of legal security.[42] Locke is concerned with individual liberty, but, as we have seen, he is more immediately

36. *Id.* § 159, at 393.
37. *Id.* § 161, at 393.
38. *Id.* § 168, at 397.
39. R. Cox, *supra* note 32, at 129.
40. J. Locke, *supra* note 16, § 152, at 386-87.
41. The discussion, for example, appears in the Book entitled, "Of the Laws Which Establish Political Liberty with Regard to the Constitution." *See* Montesquieu, *supra* note 17, Book XI.
42. Montesquieu, *supra* note 17, Book XI, Ch. 6, at 51.

concerned with the protection of public security and the efficient operation of the powers of government. When discussing separation, Montesquieu mentions the need for discretion in foreign affairs and the advantages that a single man has in exercising discretion,[43] but he does not discuss at any length the nature of this discretion and the problems it raises. He is concerned with depicting the greatest amount of individual liberty that the constitution of a government can establish. He goes so far as to call this amount of liberty "extreme," and says explicitly that it is not always desirable.[44] It would take a careful exposition of *The Spirit of the Laws* to discover the conditions under which this liberty would become possible and desirable. This is not our present purpose.

On the other hand, it is important to notice that Montesquieu's concern does not lead him to tie the power to conduct foreign affairs any closer to the legislative power than does Locke. Indeed, when defining the executive power, he first says that it is the power by which the magistrate "makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions."[45] Only later does the executive power seem to comprehend the execution of domestic law as well.

There are two well-known aspects of Montesquieu's arguments concerning the constitutional establishment of political liberty that do affect the problem of foreign affairs as it appears in the American Constitution. The first is that liberty requires the independence and equality of the three branches of government, legislative, executive and judicial.[46] The second is that the three powers are meant to check each other.[47] Montesquieu does not give even the apparent superiority that Locke gives to the legislative branch, thus increasing both the prestige and the actual position of the executive branch. This position is protected by giving the executive branch a share of the legislative power, at least in the form of a veto.[48] It is obvious that these results of Montesquieu's concern with liberty only increase the problem that we saw in Locke: how can the discretion of the executive in foreign affairs be made compatible with a regime of liberty?

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43. *Id.* Book XI, Ch. 6.
44. *Id.* Book XI, Ch. 6, at 162.
45. *Id.* Book XI, Ch. 6, at 151.
46. *Id.* Book XI, Ch. 6.
47. *Id.* Book XI, Ch. 6, at 159-60.
48. *Id.*

IV. The Federalist Papers and Foreign Affairs

Were we interested in determining definitely the answers given by the Constitution to the questions we have posed, it would be necessary at this point to carefully examine the Constitution and the debates at the Constitutional Convention and in the ratifying process. Since our aim, rather, is to examine the problems involved, and not to specify the answers given by the Constitution, we may rather look at what is acknowledged to be the best defense of the Constitution, the *Federalist Papers.*

When discussing foreign affairs, the *Federalist Papers* expresses the two-fold problem as we have seen it in Locke and Montesquieu. On the one hand, there are features peculiar to foreign affairs that dictate a different arrangement and hierarchy of powers than is the case in domestic affairs. On the other hand, measures required for the efficient management of foreign affairs are particularly threatening to republican liberty. The task is to combine effective management of foreign affairs with security for men's liberty.

The effective management of foreign affairs, according to the *Federalist Papers*, requires three things particularly threatening to men's liberty. The powers granted in foreign affairs cannot, in their nature, be limited; foreign affairs cannot be brought under the regularity of law; and the necessary discretionary powers should be in the hands of one man.

First, the power to care for the safety of the nation cannot be limited constitutionally. "The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed."[49] One can debate whether there should be a national government to direct defense, but once it is decided to have such a government, there can be no limits placed on the extent of its powers either by the government through law or by the people through the Constitution.

We have already seen the defense of this position by Locke, and the *Federalist Papers* repeats it. Among nations, unlike among citizens, there are no settled common principles. Without these principles conflict arises that actually or potentially involves servitude or extinction. Hence there is a tendency toward ruthless warfare that prevents limiting the power to conduct foreign affairs. As *Federalist* Number 41 succinctly states, "With what colour of propriety could the force necessary for defence, be limited by those

49. Federalist, *supra* note 13, No. 23, at 147 (A. Hamilton).

who cannot limit the force of offence?"[50] To attempt to limit the power of conducting foreign affairs is to plant "in the Constitution itself necessary usurpations of power . . . ."[51]

Secondly, the power necessary to conduct foreign affairs is not very susceptible to the regularity that law might impose on it. Here again the *Federalist* follows the argument we have already seen in Locke. Foreign affairs requires, in particular, secrecy and dispatch. *Federalist* Number 64 argues at length the need for spies, but secrecy is also needed for the more general intelligence and delicate negotiations required in making treaties. Dispatch is required because "[t]he loss of a battle, the death of a Prince, the removal of a minister, or other circumstances intervening to change the present posture and aspect of affairs, may turn the most favorable tide into a course opposite to our wishes."[52] Laws cannot guide men who must seize the moment.

Thirdly, it follows from the two points already made and others, that the power to conduct foreign affairs must be concentrated. This means that federalism does not have the scope in foreign affairs that it has in domestic affairs. The powers of the national government in foreign affairs cannot be limited by powers maintained by the states. Within the national government power in foreign affairs, as contrasted to domestic affairs, gravitates away from the House and the Supreme Court to the Senate and particularly to the President.

Publius most clearly outlines the deficiencies of the House in *Federalist* Number 75. Essentially there are three, stemming from the frequency of election of members and from their numbers. The variability of membership means that "[a]ccurate and comprehensive knowledge of foreign politics"[53] is not to be expected, and that "a steady and systematic adherence to the same views"[54] will be lacking. The large number of members, as well as their variability, means that the House will not have "a nice and uniform sensibility to national character,"[55] nor will it be able to act with decision, secrecy and dispatch. Added to these objections to the House in itself is the fact that in combination with the Senate and the President, the concurrence of too many bodies would be required,

50. FEDERALIST, *supra* note 13, No. 41, at 270 (J. Madison).
51. *Id.*
52. FEDERALIST, *supra* note 13, No. 64, at 435 (J. Jay).
53. FEDERALIST, *supra* note 13, No. 75, at 507 (A. Hamilton).
54. *Id.*
55. *Id.*

complicating and slowing business that requires dispatch.[56] *Federalist* Number 64 expands these considerations by pointing out the need for system and steadiness in foreign affairs, which can come only from a body with less variable membership and in whom the interests of the members are more closely connected with national concerns.[57]

The Supreme Court, on the other hand, does not suffer from these defects, but from its only marginal concern with an area in which there is so little room for law. Law cannot be made for international relations by the United States alone, and the law that does exist cannot properly be interpreted by a court subservient to only one of the parties that made the laws. The Court can be concerned with international law principally only in its effects on individual citizens of the United States, not with its effects on the country as a whole.[58]

The requirements of competency in foreign affairs thus seem to lead to the concentration of the power in the field into the hands of the Senate and the President. In comparing these two institutions it might seem that the Senate would have the advantage of steadiness of personnel and character, but the President the advantage in dispatch and secrecy. The proper conduct of foreign affairs might best be assured, then, by the proper combination of these two institutions: the Senate to dictate the broad and permanent measures of national policy and the President to execute daily operations and manage the crises requiring secrecy and dispatch. This view is strengthened when we consider the danger that concentration of power poses to liberty. The remedy for this danger would seem to be the same: share power as much as possible between the President and Senate.

This is in part the solution of the Constitution and the argument of the *Federalist Papers*, but the thrust of the *Federalist Papers* really goes in another direction. It is that the great discretion required in foreign affairs can be made compatible with republican government not by dispersing the power to the greatest extent possible, but by concentrating it in the hands of the President.

The reason for this is that concentrated power is power that can be held accountable. The decisive feature of the American President is that he is selected neither by hereditary succession nor by the legislature, but at least indirectly by the people. He can thus

56. *Id.*
57. FEDERALIST, *supra* note 13, No. 64, at 433-36 (J. Jay).
58. FEDERALIST, *supra* note 13, No. 22, at 143 (A. Hamilton).

be held accountable by the people. The clearer and more distinct his responsibilities, the easier he can be held to account.

In *Federalist* Number 70 Hamilton attempts to show that the concentration of executive power in a single person's hands is best both for the exercise of wise discretion and for protection of the liberty of the people. To split discretionary power is to conceal faults and destroy responsibility. Blame is switched from one party to another so plausibly that the real author cannot be determined, especially when the matter is complicated. Thus, the people would be deprived of their right to control their magistrate, by being unable to determine whom to censure. To use the example of the present legislation seeking to limit presidential discretion, if military activity is stopped by congressional inaction, is Congress to blame for any bad consequences or is the President to blame for using troops in the first place? If the President, in the face of a potentially hostile Congress, refuses to act, is he to blame or is Congress? Although it may be easy to see mismanagement, it will be difficult to determine its author. The result, according to *Federalist* Number 70, is that public opinion will no longer be able to exercise effective restraint. They will neither know whom to censure nor will their censure be effective since it will be divided among many. All "multiplication of the executive is rather dangerous than friendly to liberty."[59]

There are two powers in particular that need to be examined in the light of this general argument. The first is the power of the Senate to ratify treaties and the second the power of Congress to declare war. Hamilton argues that the treaty-making power's being split between the President and the Senate does not show that foreign affairs is not an executive matter. The truth is that the power to make treaties is neither legislative nor executive. The executive function comprises the "execution of the laws and the employment of the common strength, either for this purpose or for the common defence . . . ."[60] But a treaty is neither of these two things, but a contract with a foreign nation. On the other hand, while treaties have the force of law, they derive that force not from "rules prescribed by the sovereign to the subject,"[61] but from the obligations of good faith between sovereign and sovereign. Hence the power is not legislative either. This distinction in theory gives way in practice to the special advantages the Executive possesses

59. FEDERALIST, *supra* note 13, No. 70, at 479 (A. Hamilton).
60. FEDERALIST, *supra* note 13, No. 75, at 504 (A. Hamilton).
61. *Id.* at 504-05.

in negotiating and making treaties, and to their character as laws in their ratification by the Senate.[62]

The second power is the power to declare war. The varied interpretations that might be given to this power, and the extent of the issues it involves, are brought out more clearly in a debate between Hamilton and Madison that took place in 1793 than they are in the *Federalist Papers*.

V. PACIFICUS AND HELVIDIUS

On April 22, 1793, President Washington issued a Proclamation of Neutrality in the war that had broken out between France and Great Britain.[63] This action was attacked by those sympathetic to France on several grounds, among them that it exceeded the President's constitutional power. Hamilton undertook to defend the action in a series of articles in a Philadelphia newspaper, *The Gazette of the United States*, under the pseudonym "Pacificus." Jefferson, disturbed by the impact of Hamilton's articles, spurred Madison to reply in a series of letters printed in the same paper, under the name of "Helvidius."[64]

The part of Hamilton's argument that concerns us is his contention that the power to conduct foreign relations is an executive function granted to the President; that the power to declare war is an exception from these powers granted to Congress; and that, as an exception, it must be construed narrowly and cannot diminish the President's discretion in the exercise of powers constitutionally belonging to him. Hamilton's argument on the first point essentially follows the one we have sketched. Given this argument, the second follows from it. The third, a consequence of the first two, leads Hamilton to the conclusion that a President might so conduct affairs as to practically foreclose Congress's option to wage or not wage war. Congress always has the right to declare war, but the President might put it in a position in which it would find it difficult to do so. Hamilton's position receives some plausibility from the fact that the Constitutional Convention changed the originally suggested power of Congress to "make war and peace" to

62. *Id.* at 503-09.

63. Proclamation of Neutrality, April 22, 1793, in DOCUMENTS OF AMERICAN HISTORY 162 (H. Commager ed. 1968).

64. 15 THE PAPERS OF ALEXANDER HAMILTON 33-43, 55-68, 65-69, 82-86, 90-95, 100-06, 130-35 (H. Syrett ed. 1969); 6 WRITINGS OF JAMES MADISON 138-88 (G. Hunt ed. 1906) [hereinafter cited as MADISON].

"declare war."[65]

The difficulty with Hamilton's interpretation of the Constitution is its inability to explain why the power to declare war was given to Congress. Madison's reply is that this power was given to Congress because it is a legislative power. Madison's theoretical argument is that foreign affairs, like domestic affairs, is subject to separation of powers. The power of the President as commander in chief gives him the power to conduct a war. But those "who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether *a war ought to be commenced, continued, or concluded*. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws."[66]

Madison's argument from the Constitution is somewhat diminished by the change in congressional authority we have already noted, made in the Constitutional Convention, from making war and peace to declaring war. It is also diminished by the grant of power to the President to conclude a war (through treaty), and hence also at least a measure of power to continue a war, with the advice and consent of the Senate.

But the greater difficulty with Madison's argument is his attempt to split foreign affairs, like domestic affairs, between various branches in order that the foolish or tyrannical designs of one branch may be frustrated by another. This seems to be the essence of separation of powers. If one can divide powers in foreign affairs on principle, there must be some powers in their nature legislative. Hence Madison declares that the power to declare war determines "what the *laws shall be* with regard to other nations,"[67] or is equivalent to a domestic legislative act. But can a declaration of war be so understood? Far from being a general law, is it not rather the initiation of a particular act against a particular party? If so, it is not legislative in its nature.

Madison points out the great difficulty in Hamilton's argument. By arguing that the power to declare war cannot diminish the discretion of the President to exercise his functions, he opens the possibility of a President declaring peace and a Congress declaring war. The extreme of Hamilton's argument might lead to continual

65. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 319 (1911).

66. MADISON, *supra* note 64, at 148.

67. MADISON, *supra* note 64, at 149.

quarrel between the branches in their areas of overlapping powers. Yet it is precisely in declaring war that the country needs most to speak with one voice, according to Hamilton's argument itself.

VI. The War Powers Act

Madison's argument, which attempts to state that the powers in foreign relations can be separated on principle, is in contrast to the arguments of Locke and Montesquieu that we have sketched as well as to the thrust of the *Federalist*. Our brief discussion of it does not do it justice, but is justified by the failure of the legislation under consideration to move in Madison's direction. The current legislation does not attempt to specify certain powers belonging to Congress as legislative in their nature, and others to the President as executive, but to limit discretion and *share* the remaining discretion among Congress and the President. It is thus more like the creation of an executive council.

The views we have discussed raise three questions about this legislation. First, insofar as the legislation attempts to bring discretion under law, that is, to abolish some discretion, is it not an attempt to determine unilaterally what cannot be so determined? The occasion for the use of discretion in foreign affairs cannot be created by legislation, but depends on actions over which the President and Congress have a minimum degree of control. If circumstances arose that required the use of discretionary force but did not fit the congressional guidelines (and the legislation might even invite enemies to create such circumstances), the likely consequence would be a violation of law. The alternative would be a failure to act as the circumstances required. It can always be said that Congress could act through legislation or a declaration of war, but except in cases of great emergency, the very cases in which the legislation gives the President license to act, will it act with the dispatch that can seize the advantage of the moment?

Secondly, to the extent that the legislation aims to include Congress in the exercise of discretion—not only, be it noted, in the commencement of hostilities but in its continuation and end—it attempts to create an executive council not only out of the Senate, as some proposed at the Constitutional Convention, but out of the House as well. But will these bodies, taken singly and in unison, have those qualities that lead to the speedy and prudent exercise of discretion? The Congress might be able to declare an end to war, but it cannot enter into those negotiations and actions that might convince the other side to end it as well.

Thirdly, although the legislation is designed to tie the Presi-

dent's actions more closely to public opinion, one may wonder whether it will provide greater protection for liberty. The key to this protection, according to the *Federalist*, is responsibility. But under the legislation, the authors of actions will be uncertain and the blame weak through division. Rather than increase the responsibility of the President, the legislation may decrease it, as some of its critics on the left fear.

The danger of executive tyranny is not simply a mirage. But that danger cannot be adequately assessed or provided against without first seeing the strength of the argument in favor of executive discretion. When considering the nature of foreign affairs, it may be well to recall Locke's argument in favor of executive prerogative:

> [S]ince in some Governments the Lawmaking Power is not always in being, and is usually too numerous, and so too slow, for the *dispatch requisite* to Execution: and because also it is *impossible to foresee, and so by laws to provide for, all Accidents and Necessities, that may concern the publick*; or to make such Laws, as will do no harm . . . therefore there is a latitude left to the Executive power, to do many things of choice, which the Laws do not prescribe.[68]

68. J. LOCKE, *supra* note 16, § 160, at 393.