The Pacificus-Helvidius Debate (1793-94)

The outbreak of war between France and Britain after the French Revolution led President George Washington to issue a Proclamation of Neutrality in 1793, declaring that the United States would "pursue a conduct friendly and impartial towards the belligerent powers." At the time, the United States had a defensive treaty of alliance with France, signed in 1778 with the now-deposed French monarchy. It was unclear whether America's treaty with France applied, since France had launched an offensive war. Washington's cabinet – and the nation at large – was divided: supporters of France included Secretary of State Thomas Jefferson and Congressman James Madison, while Treasury Secretary Alexander Hamilton and others support Britain.

Washington's neutrality proclamation sparked a spirited public debate between Hamilton (Pacificus) and Madison (Hevlidius), published pseudonymously in Gazette of the United States, a Philadelphia newspaper. Among other issues, the two founding fathers contested the nature and extent of executive power under the Constitution. Excerpts from the Pacificus-Hevlidius debate follow Washington's 1793 Neutrality Proclamation. Also included below is a 1793 letter from Jefferson to Madison imploring him to "take up your pen" and respond to Hamilton.

Proclamation of Neutrality

[Philadelphia, 22 April 1793]

WHEREAS it appears that a state of war exists between Austria, Prussia, Sardinia, Great-Britain, and the United Netherlands, of the one part, and France on the other, and the duty and interest of the United States require, that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerent powers:

I have therefore thought fit by these presents to declare the disposition of the United States to observe the conduct aforesaid towards those powers respectively; and to exhort and warn the citizens of the United States carefully to avoid all acts and proceedings whatsover, which may in any manner tend to contravene such disposition.

And I do hereby also make known that whosoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations, by committing, aiding or abetting hostilities against any of the said powers, or by carrying to any of them those articles, which are deemed contraband by the *modern* usage of nations, will not receive the protection of the United States, against such punishment or forfeiture: and further, that I have given instructions to those officers, to whom it belongs, to cause prosecutions to be instituted against all persons, who shall, within the cognizance of the courts of the United States, violate the Law of Nations, with respect to the powers at war, or any of them.

IN TESTIMONY WHEREOF I have caused the Seal of the United States of America to be affixed to these presents, and signed the same with my hand. Done at the city of Philadelphia, the twenty-second day of April, one thousand seven hundred and ninety-three, and of the Independence of the United States of America the seventeenth.

Go. WASHINGTON.

Pacificus Number I [Hamilton]

[Philadelphia, June 29, 1793]

As attempts are making very dangerous to the peace, and it is to be feared not very friendly to the constitution of the UStates—it becomes the duty of those who wish well to both to endeavour to prevent their success.

The objections which have been raised against the Proclamation of Neutrality lately issued by the President have been urged in a spirit of acrimony and invective, which demonstrates, that more was in view than merely a free discussion of an important public measure; that the discussion covers a design of weakening the confidence of the People in the author of the measure; in order to remove or lessen a powerful obstacle to the success of an opposition to the Government, which however it may change its form, according to circumstances, seems still to be adhered to and pursued with persevering Industry.…

The objections in question fall under three heads—

1. That the Proclamation was without authority

2. That it was contrary to our treaties with France

3. That it was contrary to the gratitude, which is due from this to that country; for the succours rendered us in our own Revolution.

4. That it was out of time & unnecessary.

In order to judge of the solidity of the first of these objection[s], it is necessary to examine what is the nature and design of a proclamation of neutrality.

The true nature & design of such an act is—to *make known* to the powers at War and to the Citizens of the Country, whose Government does the Act that such country is in the condition of a Nation at Peace with the belligerent parties, and under no obligations of Treaty, to become an *associate in the war* with either of them; that this being its situation its intention is to observe a conduct conformable with it and to perform towards each the duties of neutrality; and as a consequence of this state of things, to give warning to all within its jurisdiction to abstain from acts that shall contravene those duties, under the penalties which the laws of the land (of which the law of Nations is a part) annexes to acts of contravention.

This, and no more, is conceived to be the true import of a Proclamation of Neutrality.

It does not imply, that the Nation which makes the declaration will forbear to perform to any of the warring Powers any stipulations in Treaties which can be performed without rendering it an *associate* or *party* in the War. It therefore does not imply in our case, that the UStates will not make those distinctions, between the present belligerent powers, which are stipulated in the 17th and 22d articles of our Treaty with France; because these distinctions are not incompatible with a state of neutrality; they will in no shape render the UStates an *associate* or *party* in the War. . . .

If this be a just view of the true force and import of the Proclamation, it will remain to see whether the President in issuing it acted within his proper sphere, or stepped beyond the bounds of his constitutional authority and duty.

It will not be disputed that the management of the affairs of this country with foreign nations is confided to the Government of the UStates.

It can as little be disputed, that a Proclamation of Neutrality, where a Nation is at liberty to keep out of a War in which other Nations are engaged and means so to do, is a *usual* and a *proper* measure. *Its main object and effect are to prevent the Nation being immediately responsible for acts done by its citizens, without the privity or connivance of the Government, in contravention of the principles of neutrality.*

An object this of the greatest importance to a Country whose true interest lies in the preservation of peace.

The inquiry then is—what department of the Government of the UStates is the prop[er] one to make a declaration of Neutrality in the cases in which the engagements [of] the Nation permit and its interests require such a declaration.

A correct and well informed mind will discern at once that it can belong neit[her] to the Legislative nor Judicial Department and of course must belong to the Executive.

The Legislative Department is not the *organ* of intercourse between the UStates and foreign Nations. It is charged neither with *making* nor *interpreting* Treaties. It is therefore not naturally that Organ of the Government which is to pronounce the existing condition of the Nation, with regard to foreign Powers, or to admonish the Citizens of their obligations and duties as founded upon that condition of things. Still less is it charged with enforcing the execution and observance of these obligations and those duties.

It is equally obvious that the act in question is foreign to the Judiciary Department of the Government. The province of that Department is to decide litigations in particular cases. It is indeed charged with the interpretation of treaties; but it exercises this function only in the litigated cases; that is where contending parties bring before it a specific controversy. It has no concern with pronouncing upon the external political relations of Treaties between Government and Government. This position is too plain to need being insisted upon.

It must then of necessity belong to the Executive Department to exercise the function in Question—when a proper case for the exercise of it occurs.

It appears to be connected with that department in various capacities, as the *organ* of intercourse between the Nation and foreign Nations—as the interpreter of the National Treaties in those cases in which the Judiciary is not competent, that is in the cases between Government and Government—as that Power, which is charged with the Execution of the Laws, of which Treaties form a part—as that Power which is charged with the command and application of the Public Force.

This view of the subject is so natural and obvious—so analogous to general theory and practice—that no doubt can be entertained of its justness, unless such doubt can be deduced from particular provisions of the Constitution of the UStates.

Let us see then if cause for such doubt is to be found in that constitution.

The second Article of the Constitution of the UStates, section 1st, establishes this general Proposition, That “The Executive Power shall be vested in a President of the United States of America.”

The same article in a succeeding Section proceeds to designate particular cases of Executive Power. It declares among other things that the President shall be Commander in Cheif [sic] of the army and navy of the UStates and of the Militia of the several states when called into the actual

service of the UStates, that he shall have power by and with the advice of the senate to make treaties; that it shall be his duty to receive ambassadors and other public Ministers and to take care that the laws be faithfully executed.

It would not consist with the rules of sound construction to consider this enumeration of particular authorities as derogating from the more comprehensive grant contained in the general clause, further than as it may be coupled with express restrictions or qualifications; as in regard to the cooperation of the Senate in the appointment of Officers and the making of treaties; which are qualifica[tions] of the general executive powers of appointing officers and making treaties: Because the difficulty of a complete and perfect specification of all the cases of Executive authority would naturally dictate the use of general terms—and would render it improbable that a specification of certain particulars was designd as a substitute for those terms, when antecedently used. The different mode of expression employed in the constitution in regard to the two powers the Legislative and the Executive serves to confirm this inference. In the article which grants the legislative powers of the Governt. the expressions are—"*All Legislative powers herein granted shall be vested in a Congress of the UStates*"; in that which grants the Executive Power the expressions are, as already quoted "The Executive Po[wer] shall be vested in a President of the UStates of America."

The enumeration ought rather therefore to be considered as intended by way of greater caution, to specify and regulate the principal articles implied in the definition of Executive Power; leaving the rest to flow from the general grant of that power, interpreted in conformity to other parts [of] the constitution and to the principles of free government.

The general doctrine then of our constitution is, that the Executive Power of the Nation is vested in the President; subject only to the *exceptions* and *qu*[*a*]*lifications* which are expressed in the instrument.

Two of these have been already noticed—the participation of the Senate in the appointment of Officers and the making of Treaties. A third remains to be mentioned the right of the Legislature "to declare war and grant letters of marque and reprisal."

With these exceptions the Executive Power of the Union is completely lodged in the President. This mode of construing the Constitution has indeed been recognized by Congress in formal acts, upon full consideration and debate. The power of removal from office is an important instance.

And since upon general principles for reasons already given, the issuing of a proclamation of neutrality is merely an Executive Act; since also the general Executive Power of the Union is vested in the President, the conclusion is, that the step, which has been taken by him, is liable to no just exception on the score of authority.

It may be observed that this Inference w[ould] be just if the power of declaring war had [not] been vested in the Legislature, but that [this] power naturally includes the right of judg[ing] whether the Nation is under obligations to m[ake] war or not.

The answer to this is, that however true it may be, that th[e] right of the Legislature to declare wa[r] includes the right of judging whether the N[ation] be under obligations to make War or not—it will not follow that the Executive is in any case excluded from a similar right of Judgment, in the execution of its own functions.

If the Legislature have a right to make war on the one hand—it is on the other the duty of the Executive to preserve Peace till war is declared; and in fulfilling that duty, it must necessarily possess a right of judging what is the nature of the obligations which the treaties of the Country impose on the Government; and when in pursuance of this right it has concluded that there is nothing in them inconsistent with a *state* of neutrality, it becomes both its province and its duty to enforce the laws incident to that state of the Nation. The Executive is charged with the execution of all laws, the laws of Nations as well as the Municipal law, which recognises and adopts those laws. It is consequently bound, by faithfully executing the laws of neutrality, when that is the state of the Nation, to avoid giving a cause of war to foreign Powers.

This is the direct and proper end of the proclamation of neutrality. It declares to the UStates their situation with regard to the Powers at war and makes known to the Community that the laws incident to that situation will be enforced. In doing this, it conforms to an established usage of Nations, the operation of which as before remarked is to obviate a responsibility on the part of the whole Society, for secret and unknown violations of the rights of any of the warring parties by its citizens.

Those who object to the proclamation will readily admit that it is the right and duty of the Executive to judge of, or to interpret, those articles of our treaties which give to France particular privileges, in order to the enforcement of those privileges: But the necessary consequence of this is, that the Executive must judge what are the proper bounds of those privileges—what rights are given to other nations by our treaties with them—what rights the law of Nature and Nations gives and our treaties permit, in respect to those Nations with whom we have no treaties; in fine what are the reciprocal rights and obligations of the United States & of all & each of the powers at War.

The right of the Executive to receive ambassadors and other public Ministers may serve to illustrate the relative duties of the Executive and Legislative Departments. This right includes that of judging, in the case of a Revolution of Government in a foreign Country, whether the new rulers are competent organs of the National Will and ought to [be] recognised or not: And where a treaty antecedently exists between the UStates and such nation that right involves the power of giving operation or not to such treaty. For until the new Government is *acknowleged,* the treaties between the nations, as far at least as regards *public* rights, are of course suspended.

This power of determ[in]ing virtually in the case supposed upon the operation of national Treaties as a consequence, of the power to receive ambassadors and other public Ministers, is an important instance of the right of the Executive to decide the obligations of the Nation with regard to foreign Nations. To apply it to the case of France, if the<re> had been a Treaty of alliance *offensive* <and> defensive between the UStates and that Coun<try,> the unqualified acknowlegement of the new Government would have put the UStates in a condition to become an associate in the War in which France was engaged—and would have laid the Legislature under an obligation, if required, and there was otherwise no valid excuse, of exercising its power of declaring war.

This serves as an example of the right of the Executive, in certain cases, to determine the condition of the Nation, though it may consequentially affect the proper or improper exercise of the Power of the Legislature to declare war. The Executive indeed cannot control the exercise of that power—further than by the exer[c]ise of its general right of objecting to all acts of the Legislature; liable to being overruled by two thirds of both houses of Congress. The Legislature

is free to perform its own duties according to its own sense of them—though the Executive in the exercise of its constitutional powers, may establish an antecedent state of things which ought to weigh in the legislative decisions. From the division of the Executive Power there results, in referrence to it, a *concurrent* authority, in the distributed cases.

Hence in the case stated, though treaties can only be made by the President and Senate, their activity may be continued or suspended by the President alone.

No objection has been made to the Presidents having acknowleged the Republic of France, by the Reception of its Minister, without having consulted the Senate; though that body is connected with him in the making of Treaties, and though the consequence of his act of reception is to give operation to the Treaties heretofore made with that Country: But he is censured for having declared the UStates to be in a state of peace & neutrality, with regard to the Powers at War; because the right of *changing* that state & *declaring war* belongs to the Legislature.

It deserves to be remarked, that as the participation of the senate in the making of Treaties and the power of the Legislature to declare war are exceptions out of the general "Executive Power" vested in the President, they are to be construed strictly—and ought to be extended no further than is essential to their execution.

While therefore the Legislature can alone declare war, can alone actually transfer the nation from a state of Peace to a state of War—it belongs to the "Executive Power," to do whatever else the laws of Nations cooperating with the Treaties of the Country enjoin, in the intercourse of the UStates with foreign Powers.

In this distribution of powers the wisdom of our constitution is manifested. It is the province and duty of the Executive to preserve to the Nation the blessings of peace. The Legislature alone can interrupt those blessings, by placing the Nation in a state of War.

But though it has been thought adviseable to vindicate the authority of the Executive on this broad and comprehensive ground—it was not absolutely necessary to do so. That clause of the constitution which makes it his duty to "take care that the laws be faithfully executed" might alone have been relied upon, and this simple process of argument pursued.

The President is the constitutional Executor of the laws. Our Treaties and the laws of Nations form a part of the law of the land. He who is to execute the laws must first judge for himself of their meaning. In order to the observance of that conduct, which the laws of nations combined with our treaties prescribed to this country, in reference to the present War in Europe, it was necessary for the President to judge for himself whether there was any thing in our treaties incompatible with an adherence to neutrality. Having judged that there was not, he had a right, and if in his opinion the interests of the Nation required it, it was his duty, as Executor of the laws, to proclaim the neutrality of the Nation, to exhort all persons to observe it, and to warn them of the penalties which would attend its non observance.

The Proclamation has been represented as enacting some new law. This is a view of it entirely erroneous. It only proclaims a *fact* with regard to the *existing state* of the Nation, informs the citizens of what the laws previously established require of them in that state, & warns them that these laws will be put in execution against the Infractors of them.

Thomas Jefferson to James Madison

[*July 7. 1793]*

Dear Sir

I wrote you on the 30th. ult. and shall be uneasy till I have heard you have received it. I have no letter from you this week. You will perceive by the inclosed papers that they are to be discontinued in their present form & a daily paper published in their stead, *if subscribers enough can be obtained.* I fear they cannot, for nobody here scarcely has ever taken his paper. You will see in these Colo. H's 2d. & 3d. pacificus. Nobody answers him, & his doctrine will therefore be taken for confessed. For god's sake, my dear Sir, take up your pen, select the most striking heresies, and cut him to peices in the face of the public. There is nobody else who can & will enter the lists with him. Never in my opinion, was so calamitous an appointment made, as that of the present minister of F. here. Hotheaded, all imagination, no judgment, passionate, disrespectful & even indecent towards the P. in his written as well as verbal communications, talking of appeals from him to Congress, from them to the people, urging the most unreasonable & groundless propositions, & in the most dictatorial style &c. &c. &c. If ever it should be necessary to lay his communications before Congress or the public, they will excite universal indignation. He renders my position immensely difficult. He does me justice personally, and, giving him time to vent himself & then cool, I am on a footing to advise him freely, & he respects it. But he breaks out again on the very first occasion, so as to shew that he is incapable of correcting himself. To complete our misfortune we have no channel of our own through which we can correct the irritating representations he may make. Adieu. Yours affectionately.

Helvidius Number I

[24 August 1793]

Several pieces with the signature of Pacificus were lately published, which have been read with singular pleasure and applause, by the foreigners and degenerate citizens among us, who hate our republican government, and the French revolution; whilst the publication seems to have been too little regarded, or too much despised by the steady friends to both.

Had the doctrines inculcated by the writer, with the natural consequences from them, been nakedly presented to the public, this treatment might have been proper. Their true character would then have struck every eye, and been rejected by the feelings of every heart. But they offer themselves to the reader in the dress of an elaborate dissertation; they are mingled with a few truths that may serve them as a passport to credulity; and they are introduced with professions of anxiety for the preservation of peace, for the welfare of the government, and for the respect due to the present head of the executive, that may prove a snare to patriotism.

In these disguises they have appeared to claim the attention I propose to bestow on them; with a view to shew, from the publication itself, that under colour of vindicating an important public act, of a chief magistrate, who enjoys the confidence and love of his country, principles are advanced which strike at the vitals of its constitution, as well as at its honor and true interest.

As it is not improbable that attempts may be made to apply insinuations which are seldom spared when particular purposes are to be answered, to the author of the ensuing observations, it may not be improper to premise, that he is a friend to the constitution, that he wishes for the

preservation of peace, and that the present chief magistrate has not a fellow-citizen, who is penetrated with deeper respect for his merits, or feels a purer solicitude for his glory.

This declaration is made with no view of courting a more favorable ear to what may be said than it deserves. The sole purpose of it is, to obviate imputations which might weaken the impressions of truth; and which are the more likely to be resorted to, in proportion as solid and fair arguments may be wanting.

The substance of the first piece, sifted from its inconsistencies and its vague expressions, may be thrown into the following propositions:

That the powers of declaring war and making treaties are, in their nature, executive powers:

That being particularly vested by the constitution in other departments, they are to be considered as exceptions out of the general grant to the executive department:

That being, as exceptions, to be construed strictly, the powers not strictly within them, remain with the executive:

That the executive consequently, as the organ of intercourse with foreign nations, and the interpreter and executor of treaties, and the law of nations, is authorised, to expound all articles of treaties, those involving questions of war and peace, as well as others; to judge of the obligations of the United States to make war or not, under any casus federis or eventual operation of the contract, relating to war; and, to pronounce the state of things resulting from the obligations of the United States, as understood by the executive:

That in particular the executive had authority to judge whether in the case of the mutual guaranty between the United States and France, the former were bound by it to engage in the war:

That the executive has, in pursuance of that authority, decided that the United States are not bound: And,

That its proclamation of the 22d of April last, is to be taken as the effect and expression of that decision.

The basis of the reasoning is, we perceive, the extraordinary doctrine, that the powers of making war and treaties, are in their nature executive; and therefore comprehended in the general grant of executive power, where not specially and strictly excepted out of the grant.

Let us examine this doctrine; and that we may avoid the possibility of mistating the writer, it shall be laid down in his own words: a precaution the more necessary, as scarce any thing else could outweigh the improbability, that so extravagant a tenet should be hazarded, at so early a day, in the face of the public.

His words are—"Two of these (exceptions and qualifications to the executive powers) have been already noticed—the participation of the Senate in the *appointment of officers,* and the *making of treaties.* A *third* remains to be mentioned—the right of the legislature to *declare war, and grant letters of marque and reprisal.*"

Again—"It deserves to be remarked, that as the participation of the Senate in the *making treaties,* and the power of the legislature to *declare war,* are *exceptions* out of the general *executive power,* vested in the President, they are to be construed *strictly,* and ought to be extended no farther than is essential to their execution."

If there be any countenance to these positions, it must be found either 1st, in the writers, of authority, on public law; or 2d, in the quality and operation of the powers to make war and treaties; or 3d, in the constitution of the United States.

It would be of little use to enter far into the first source of information, not only because our own reason and our own constitution, are the best guides; but because a just analysis and discrimination of the powers of government, according to their executive, legislative and judiciary qualities are not to be expected in the works of the most received jurists, who wrote before a critical attention was paid to those objects, and with their eyes too much on monarchical governments, where all powers are confounded in the sovereignty of the prince. It will be found however, I believe, that all of them, particularly Wolfius, Burlamaqui and Vattel, speak of the powers to declare war, to conclude peace, and to form alliances, as among the highest acts of the sovereignty; of which the legislative power must at least be an integral and preeminent part.

Writers, such as Locke and Montesquieu, who have discussed more particularly the principles of liberty and the structure of government, lie under the same disadvantage, of having written before these subjects were illuminated by the events and discussions which distinguish a very recent period. Both of them too are evidently warped by a regard to the particular government of England, to which one of them owed allegiance; and the other professed an admiration bordering on idolatry. Montesquieu, however, has rather distinguished himself by enforcing the reasons and the importance of avoiding a confusion of the several powers of government, than by enumerating and defining the powers which belong to each particular class. And Locke, notwithstanding the early date of his work on civil government, and the example of his own government before his eyes, admits that the particular powers in question, which, after some of the writers on public law he calls *federative,* are really *distinct* from the *executive,* though almost always united with it, and *hardly to be separated into distinct hands.* Had he not lived under a monarchy, in which these powers were united; or had he written by the lamp which truth now presents to lawgivers, the last observation would probably never have dropt from his pen. But let us quit a field of research which is more likely to perplex than to decide, and bring the question to other tests of which it will be more easy to judge.

2. If we consult for a moment, the nature and operation of the two powers to declare war and make treaties, it will be impossible not to see that they can never fall within a proper definition of executive powers. The natural province of the executive magistrate is to execute laws, as that of the legislature is to make laws. All his acts therefore, properly executive, must presuppose the existence of the laws to be executed. A treaty is not an execution of laws: it does not pre-suppose the existence of laws. It is, on the contrary, to have itself the force of a *law,* and to be carried into *execution,* like all *other laws,* by the *executive magistrate.* To say then that the power of making treaties which are confessedly laws, belongs naturally to the department which is to execute laws, is to say, that the executive department naturally includes a legislative power. In theory, this is an absurdity—in practice a tyranny.

The power to declare war is subject to similar reasoning. A declaration that there shall be war, is not an execution of laws: it does not suppose preexisting laws to be executed: it is not in any respect, an act merely executive. It is, on the contrary, one of the most deliberative acts that can be performed; and when performed, has the effect of *repealing* all the *laws* operating in a state of peace, so far as they are inconsistent with a state of war: and of *enacting* as *a rule for the executive,* a *new code* adapted to the relation between the society and its foreign enemy. In like

manner a conclusion of peace *annuls* all the *laws* peculiar to a state of war, and *revives* the general *laws* incident to a state of peace.

These remarks will be strengthened by adding that treaties, particularly treaties of peace, have sometimes the effect of changing not only the external laws of the society, but operate also on the internal code, which is purely municipal, and to which the legislative authority of the country is of itself competent and compleat.

From this view of the subject it must be evident, that although the executive may be a convenient organ of preliminary communications with foreign governments, on the subjects of treaty or war; and the proper agent for carrying into execution the final determinations of the competent authority; yet it can have no pretensions from the nature of the powers in question compared with the nature of the executive trust, to that essential agency which gives validity to such determinations.

It must be further evident that, if these powers be not in their nature purely legislative, they partake so much more of that, than of any other quality, that under a constitution leaving them to result to their most natural department, the legislature would be without a rival in its claim.

Another important inference to be noted is, that the powers of making war and treaty being substantially of a legislative, not an executive nature, the rule of interpreting exceptions strictly, must narrow instead of enlarging executive pretensions on those subjects.

3. It remains to be enquired whether there be any thing in the constitution itself which shews that the powers of making war and peace are considered as of an executive nature, and as comprehended within a general grant of executive power.

It will not be pretended that this appears from any *direct* position to be found in the instrument.

If it were *deducible* from any particular expressions it may be presumed that the publication would have saved us the trouble of the research.

Does the doctrine then result from the actual distribution of powers among the several branches of the government? Or from any fair analogy between the powers of war and treaty and the enumerated powers vested in the executive alone?

Let us examine.

In the general distribution of powers, we find that of declaring war expressly vested in the Congress, where every other legislative power is declared to be vested, and without any other qualification than what is common to every other legislative act. The constitutional idea of this power would seem then clearly to be, that it is of a legislative and not an executive nature.

This conclusion becomes irresistible, when it is recollected, that the constitution cannot be supposed to have placed either any power legislative in its nature, entirely among executive powers, or any power executive in its nature, entirely among legislative powers, without charging the constitution, with that kind of intermixture and consolidation of different powers, which would violate a fundamental principle in the organization of free governments. If it were not unnecessary to enlarge on this topic here, it could be shewn, that the constitution was originally vindicated, and has been constantly expounded, with a disavowal of any such intermixture.

The power of treaties is vested jointly in the President and in the Senate, which is a branch of the legislature. From this arrangement merely, there can be no inference that would necessarily exclude the power from the executive class: since the senate is joined with the President in another power, that of appointing to offices, which as far as relate to executive offices at least, is considered as of an executive nature. Yet on the other hand, there are sufficient indications that the power of treaties is regarded by the constitution as materially different from mere executive power, and as having more affinity to the legislative than to the executive character.

One circumstance indicating this, is the constitutional regulation under which the senate give their consent in the case of treaties. In all other cases the consent of the body is expressed by a majority of voices. In this particular case, a concurrence of two thirds at least is made necessary, as a substitute or compensation for the other branch of the legislature, which on certain occasions, could not be conveniently a party to the transaction.

But the conclusive circumstance is, that treaties when formed according to the constitutional mode, are confessedly to have the force and operation of *laws,* and are to be a rule for the courts in controversies between man and man, as much as any *other laws.* They are even emphatically declared by the constitution to be "the supreme law of the land."

So far the argument from the constitution is precisely in opposition to the doctrine. As little will be gained in its favour from a comparison of the two powers, with those particularly vested in the President alone.

As there are but few it will be most satisfactory to review them one by one.

"The President shall be commander in chief of the army and navy of the United States, and of the militia when called into the actual service of the United States."

There can be no relation worth examining between this power and the general power of making treaties. And instead of being analogous to the power of declaring war, it affords a striking illustration of the incompatibility of the two powers in the same hands. 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.

"He may require the opinion in writing of the principal officers in each of the executive departments upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offences against the United States, except in case of impeachment." These powers can have nothing to do with the subject.

"The President shall have power to fill up vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of the next session." The same remark is applicable to this power, as also to that of "receiving ambassadors, other public ministers and consuls." The particular use attempted to be made of this last power will be considered in another place.

"He shall take care that the laws shall be faithfully executed and shall commission all officers of the United States." To see the laws faithfully executed constitutes the essence of the executive authority. But what relation has it to the power of making treaties and war, that is, of determining what the *laws shall be* with regard to other nations? No other certainly than what subsists

between the powers of executing and enacting laws; no other consequently, than what forbids a coalition of the powers in the same department.

I pass over the few other specified functions assigned to the President, such as that of convening of the legislature, &c. &c. which cannot be drawn into the present question.

It may be proper however to take notice of the power of removal from office, which appears to have been adjudged to the President by the laws establishing the executive departments; and which the writer has endeavoured to press into his service. To justify any favourable inference from this case, it must be shewn, that the powers of war and treaties are of a kindred nature to the power of removal, or at least are equally within a grant of executive power. Nothing of this sort has been attempted, nor probably will be attempted. Nothing can in truth be clearer, than that no analogy, or shade of analogy, can be traced between a power in the supreme officer responsible for the faithful execution of the laws, to displace a subaltern officer employed in the execution of the laws; and a power to make treaties, and to declare war, such as these have been found to be in their nature, their operation, and their consequences.

Thus it appears that by whatever standard we try this doctrine, it must be condemned as no less vicious in theory than it would be dangerous in practice. It is countenanced neither by the writers on law; nor by the nature of the powers themselves; nor by any general arrangements or particular expressions, or plausible analogies, to be found in the constitution.

Whence then can the writer have borrowed it?

There is but one answer to this question.

The power of making treaties and the power of declaring war, are *royal prerogatives* in the *British government,* and are accordingly treated as Executive prerogatives by *British commentators*.

We shall be the more confirmed in the necessity of this solution of the problem, by looking back to the aera of the constitution, and satisfying ourselves that the writer could not have been misled by the doctrines maintained by our own commentators on our own government. That I may not ramble beyond prescribed limits, I shall content myself with an extract from a work which entered into a systematic explanation and defence of the constitution, and to which there has frequently been ascribed some influence in conciliating the public assent to the government in the form proposed. Three circumstances conspire in giving weight to this cotemporary exposition. It was made at a time when no application to *persons* or *measures* could bias: The opinion given was not transiently mentioned, but formally and critically elucidated: It related to a point in the constitution which must consequently have been viewed as of importance in the public mind. The passage relates to the power of making treaties; that of declaring war, being arranged with such obvious propriety among the legislative powers, as to be passed over without particular discussion.

"Tho' several writers on the subject of government place that power (*of making treaties*) in the class of *Executive authorities,* yet this is *evidently* an *arbitrary disposition.* For if we attend *carefully,* to its operation, it will be found to partake *more* of the *legislative* than of the *executive* character, though it does not seem strictly to fall within the definition of either of them. The essence of the legislative authority, is to enact laws; or in other words, to prescribe rules for the regulation of the society. While the execution of the laws and the employment of the common strength, either for this purpose, or for the common defence, seem to comprize *all* the

functions of the *Executive magistrate.* The power of making treaties is *plainly* neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the enaction of new ones, and still less to an exertion of the common strength. Its objects are contracts with foreign nations, which have the *force of law,* but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong properly neither to the legislative nor to the executive. The qualities elsewhere detailed as indispensable in the management of foreign *negociations,* point out the executive as the most fit agent in those transactions: whilst the vast importance of the trust, and the operation of treaties *as Laws,* plead strongly for the participation of the whole or a part of the *legislative body* in the office of making them." Federalist [75]

It will not fail to be remarked on this commentary, that whatever doubts may be started as to the correctness of its reasoning against the legislative nature of the power to make treaties: it is *clear, consistent* and *confident,* in deciding that the power is *plainly* and *evidently* not an *executive power.*

Helvidius

Helvidius Number II

[31 August 1793]

The doctrine which has been examined, is pregnant with inferences and consequences against which no ramparts in the constitution could defend the public liberty, or scarcely the forms of Republican government. Were it once established that the powers of war and treaty are in their nature executive; that so far as they are not by strict construction transferred to the legislature, they actually belong to the executive; that of course all powers not less executive in their nature than those powers, if not granted to the legislature may be claimed by the executive: if granted, are to be taken *strictly,* with a residuary right in the executive; or, as will hereafter appear, perhaps claimed as a concurrent right by the executive; and no citizen could any longer guess at the character of the government under which he lives; the most penetrating jurist would be unable to scan the extent of constructive prerogative.

Leaving however to the leisure of the reader deductions which the author having omitted might not chuse to own, I proceed to the examination of one, with which that liberty cannot be taken.

"However true it may be (says he) that the right of the legislature to declare war *includes the right of judging* whether the legislature be under obligations to make war or not, it will not follow that the executive is *in any case* excluded from a *similar right* of judging in the execution of its own functions."

A material error of the writer in this application of his doctrine lies in his shrinking from its regular consequences. Had he stuck to his principle in its full extent, and reasoned from it without restraint, he would only have had to defend himself against his opponents. By yielding the great point, that the right to declare war, *tho' to be taken strictly,* includes the right to judge whether the nation be under obligation to make war or not, he is compelled to defend his argument not only against others but against himself also. Observe how he struggles in his own toils.

He had before admitted that the right to declare war is vested in the legislature. He here admits that the right to declare war includes the right to judge whether the United States be obliged to declare war or not. Can the inference be avoided, that the executive instead of having a similar right to judge, is as much excluded from the right to judge as from the right to declare?

If the right to declare war be an exception out of the general grant to the executive power; every thing included in the right must be included in the exception; and being included in the exception, is excluded from the grant.

He cannot disentangle himself by considering the right of the executive to judge as *concurrent* with that of the legislature. For if the executive have a concurrent right to judge, and the right to judge be included in (it is in fact the very essence of) the right to declare, he must go on and say that the executive has a concurrent right also to declare. And then what will he do with his other admission, that the power to declare is an exception out of the executive power.

Perhaps an attempt may be made to creep out of the difficulty through the words "in the execution of its functions." Here again he must equally fail.

Whatever difficulties may arise in defining the executive authority in particular cases, there can be none in deciding on an authority clearly placed by the constitution in another department. In this case the constitution has decided what shall not be deemed an executive authority; tho' it may not have clearly decided in every case what shall be so deemed. The declaring of war is expressly made a legislative function. The judging of the obligations to make war, is admitted to be included as a legislative function. Whenever then a question occurs whether war shall be declared, or whether public stipulations require it, the question necessarily belongs to the department to which these functions belong—And no other department can be *in the execution of its proper functions,* if it should undertake to decide such a question.

There can be no refuge against this conclusion, but in the pretext of a *concurrent* right in both departments to judge of the obligations to declare war, and this must be intended by the writer when he says, "it will not follow that the executive is excluded *in any case* from a *similar right* of judging &c."

As this is the ground on which the ultimate defence is to be made, and which must either be maintained, or the works erected on it, demolished; it will be proper to give its strength a fair trial.

It has been seen that the idea of a *concurrent* right is at variance with other ideas advanced or admitted by the writer. Laying aside for the present that consideration, it seems impossible to avoid concluding that if the executive has a concurrent right with the legislature to judge of obligations to declare war, and the right to judge be essentially included in the right to declare, it must have the same right to declare as it has to judge; & by another analogy, the same right to judge of other causes of war, as of the particular cause found in a public stipulation. So that whenever the executive *in the course of its functions* shall meet with these cases, it must either infer an equal authority in all, or acknowledge its want of authority in any.

If any doubt can remain, or rather if any doubt could ever have arisen, which side of the alternative ought to be embraced, it can be with those only who overlook or reject some of the most obvious and essential truths in political science.

The power to judge of the causes of war as involved in the power to declare war, is expressly vested where all other legislative powers are vested, that is, in the Congress of the United States.

It is consequently determined by the constitution to be a *Legislative power.* Now omitting the enquiry here in what respects a compound power may be partly legislative, and partly executive, and accordingly vested *partly* in the one, and *partly* in the other department, or *jointly* in both; a remark used on another occasion is equally conclusive on this, that the same power, cannot belong *in the whole,* to *both* departments, or be properly so vested as to operate *separately* in *each.* Still more evident is it, that the same *specific function or act,* cannot possibly belong to the *two* departments and be *separately* exerciseable by *each.*

Legislative power may be *concurrently* vested in different legislative bodies. Executive powers may be concurrently vested in different executive magistrates. In legislative acts the executive may have a participation, as in the qualified negative on the laws. In executive acts, the legislature, or at least a branch of it, may participate, as in the appointment to offices. Arrangements of this sort are familiar in theory, as well as in practice. But an independent exercise of an *executive act,* by the legislature *alone,* or of a *legislative act* by the executive *alone,* one or other of which must happen in every case where the same act is exerciseable by each, and the latter of which would happen in the case urged by the writer, is contrary to one of the first and best maxims of a well organized government, and ought never to be founded in a forced construction, much less in opposition to a fair one. Instances, it is true, may be discovered among ourselves where this maxim, has not been faithfully pursued; but being generally acknowledged to be errors, they confirm, rather than impeach the truth and value of the maxim.

It may happen also that different independent departments, the legislative and executive, for example, may in the exercise of their functions, interpret the constitution differently, and thence lay claim each to the same power. This difference of opinion is an inconvenience not entirely to be avoided. It results from what may be called, if it be thought fit, a *concurrent* right to expound the constitution. But *this species* of concurrence is obviously and radically different from that in question. The former supposes the constitution to have given the power to one department only; and the doubt to be to which it has been given. The latter supposes it to belong to both; and that it may be exercised by either or both, according to the course of exigencies.

A concurrent authority in two independent departments to perform the same function with respect to the same thing, would be as awkward in practice, as it is unnatural in theory.

If the legislature and executive have both a right to judge of the obligations to make war or not, it must sometimes happen, though not at present, that they will judge differently. The executive may proceed to consider the question to-day, may determine that the United States are not bound to take part in a war, and *in the execution of its functions* proclaim that determination to all the world. To-morrow, the legislature may follow in the consideration of the same subject, may determine that the obligations impose war on the United States, and *in the execution of its functions,* enter into a *constitutional declaration,* expressly contradicting the *constitutional proclamation.*

In what light does this present the constitution to the people who established it? In what light would it present to the world, a nation, thus speaking, thro' two different organs, equally constitutional and authentic, two opposite languages, on the same subject and under the same existing circumstances?

But it is not with the legislative rights alone that this doctrine interferes. The rights of the judiciary may be equally invaded. For it is clear that if a right declared by the constitution to be legislative, and actually vested by it in the legislature, leaves, notwithstanding, a similar right in

the executive whenever a case for exercising it occurs, *in the course of its functions:* a right declared to be judiciary and vested in that department may, on the same principle, be assumed and exercised by the executive *in the course of its functions:* and it is evident that occasions and pretexts for the latter interference may be as frequent as for the former. So again the judiciary department may find equal occasions in the execution of *its* functions, for usurping the authorities of the executive: and the legislature for stepping into the jurisdiction of both. And thus all the powers of government, of which a partition is so carefully made among the several branches, would be thrown into absolute hotchpot, and exposed to a general scramble.

It is time however for the writer himself to be heard, in defence of his text. His comment is in the words following:

"If the legislature have a right to make war on the one hand, it is on the other the duty of the executive to preserve peace, till war is declared; and in fulfilling that duty, it must necessarily possess a right of judging what is the nature of the obligations which the treaties of the country impose on the government; and when in pursuance of this right it has concluded that there is nothing inconsistent with a state of neutrality, it becomes both its province and its duty to enforce the laws incident to that state of the nation. The executive is charged with the execution of all laws, the laws of nations, as well as the municipal law which recognizes, and adopts those laws. It is consequently bound, by faithfully executing the laws of neutrality, when that is the state of the nation, to avoid giving a cause of war to foreign powers."

To do full justice to this master piece of logic, the reader must have the patience to follow it step by step.

If the legislature have a right to make war on the one hand, it is on the other, the duty of the executive to preserve peace till war is declared.

It will be observed that here is an explicit and peremptory assertion, that it is the *duty* of the executive *to preserve peace,* till *war is declared.*

And in fulfilling that duty it must necessarily possess a right of judging what is the nature of the obligations which the treaties of the country impose on the government: That is to say, in fulfilling *the duty to preserve peace,* it must necessarily possess the right to judge whether *peace ought to be preserved;* in other words *whether its duty should be performed.* Can words express a flatter contradiction? It is self evident that the *duty* in this case is so far from *necessarily implying the right,* that it *necessarily excludes it.*

And when in pursuance of this right it has concluded that there is nothing in them (obligations) inconsistent with a state of neutrality, it becomes *both its province and its duty to enforce the laws incident to that state of the nation.*

And what if it should conclude that there is something inconsistent? Is it or is it not the province and duty of the executive to enforce the same laws? Say it is, you destroy the right to judge. Say it is not, you cancel the duty to obey.

Take this sentence in connection with the preceeding and the contradictions are multiplied. Take it by itself, and it makes the right to judge and conclude whether war be obligatory, absolute, and operative; and the duty to preserve peace, subordinate and conditional.

It will have been remarked by the attentive reader that the term *peace* in the first clause has been silently exchanged in the present one, for the term *neutrality.* Nothing however is gained by

shifting the terms. Neutrality means peace; with an allusion to the circumstance of other nations being at war. The term has no reference to the existence or non-existence of treaties or alliances between the nation at peace and the nations at war. The laws incident to a state of neutrality, are the laws incident to a state of peace, with such circumstantial modifications only as are required by the new relation of the nations at war: Until war therefore be duly authorised by the United States they are as *actually* neutral when other nations are at war, as they are at peace, (if such a distinction in the terms is to be kept up) when other nations are not at war. The existence of *eventual* engagements which can only take effect on the declaration of the legislature, cannot, without that declaration, change the *actual* state of the country, any more in the eye of the executive than in the eye of the judiciary department. The laws to be the guide of both, remain the same to each, and the same to both.

Nor would more be gained by allowing the writer to define than to shift the term neutrality. For suppose, if you please, the existence of obligations to join in war to be inconsistent with neutrality, the question returns upon him, what laws are to be inforced by the executive until effect shall be given to those obligations by the declaration of the legislature? Are they to be the laws incident to those obligations, that is incident to war? However strongly the doctrines or deductions of the writer may tend to this point, it will not be avowed. Are the laws to be enforced by the executive, then, in such a state of things, to be the *same* as if no such obligations existed? Admit this, which you must admit if you reject the other alternative, and the argument lands precisely where it embarked—in the position, that it is the absolute duty of the executive in all cases to preserve peace till war is declared, not that it is "*to become* the province and duty of the executive" after it has concluded that there is nothing in those obligations inconsistent with a state of peace and neutrality. The right to judge and conclude therefore so solemnly maintained in the text is lost in the comment.

We shall see whether it can be reinstated by what follows—

The executive is charged with the execution of all laws, the laws of nations as well as the municipal law which recognizes and adopts those laws. It is consequently bound, by faithfully executing the laws of neutrality when that is the state of the nation, to avoid giving cause of war to foreign powers.

The first sentence is a truth, but nothing to the point in question. The last is *partly true* in its proper meaning, but *totally untrue* in the meaning of the writer. That the executive is bound faithfully to execute the laws of neutrality, whilst those laws continue unaltered by the competent authority, is true; but not for the reason here given, to wit, to avoid giving cause of war to foreign powers. It is bound to the faithful execution of these as of all other laws internal and external, by the nature of its trust and the sanction of its oath, even if turbulent citizens should consider its so doing as a cause of war at home, or unfriendly nations should consider its so doing, as a cause of war abroad. The duty of the executive to preserve external peace, can no more suspend the force of external laws, than its duty to preserve internal peace can suspend the force of municipal laws.

It is certain that a faithful execution of the laws of neutrality may tend as much in some cases, to incur war from one quarter, as in others to avoid war from other quarters. The executive must nevertheless execute the laws of neutrality whilst in force, and leave it to the legislature to decide whether they ought to be altered or not. The executive has no other discretion than to convene and give information to the legislature on occasions that may demand it; and whilst this discretion is duly exercised the trust of the executive is satisfied, and that department is not

responsible for the consequences. It could not be made responsible for them without vesting it with the legislative as well as with the executive trust.

These remarks are obvious and conclusive, on the supposition that the expression "laws of neutrality" means simply what the words import, and what alone they can mean, to give force or colour to the inference of the writer from his own premises. As the inference itself however in its proper meaning, does not approach towards his avowed object, which is to work out a prerogative for the executive to judge, in common with the legislature, whether there be cause of war or not in a public obligation, it is to be presumed that "in faithfully executing the laws of neutrality" an exercise of that prerogative was meant to be included. On this supposition the inference, as will have been seen, does not result from his own premises, and has been already so amply discussed, and, it is conceived, so clearly disproved, that not a word more can be necessary on this branch of his argument.

Helvidius

Helvidius Number III

[7 September 1793]

In order to give color to a right in the Executive to exercise the Legislative power of judging whether there be a cause of war in a public stipulation—two other arguments are subjoined by the writer to that last examined.

The first is simply this, "It is the right and duty of the Executive to judge of and interpret those articles of our treaties which give to France particular privileges, *in order to the enforcement of those privileges,*" from which it is stated as a necessary consequence, that the Executive has certain other rights, among which is the right in question.

This argument is answered by a very obvious distinction. The first right is essential to the execution of the treaty *as a law in operation,* and interferes with no right invested in another Department. The second is not essential to the execution of the treaty or any other law; on the contrary the article to which the right is applied, cannot as has been shewn, from the very nature of it be *in operation* as a law without a previous declaration of the Legislature; and all the laws to be enforced by the Executive remain in the mean time precisely the same, whatever be the disposition or judgment of the Executive. This second right would also interfere with a right acknowledged to be in the Legislative Department.

If nothing else could suggest this distinction to the writer, he ought to have been reminded of it by his own words "in order to the enforcement of those privileges"—was it in order to *the enforcement* of the article of guaranty, that the right is ascribed to the Executive?

The other of the two arguments reduces itself into the following form: The Executive has the right to receive public Ministers; this right includes the right of deciding, in the case of a revolution, whether the new government sending the Minister, ought to be recognized or not; and this again, the right to give or refuse operation to pre-existing treaties.

The power of the Legislature to declare war and judge of the causes for declaring it, is one of the most express and explicit parts of the Constitution. To endeavor to abridge or *effect it* by strained inferences, and by hypothetical or singular occurrences, naturally warns the reader of some lurking fallacy.

The words of the Constitution are "he (the President) shall receive Ambassadors, other public Ministers and Consuls." I shall not undertake to examine what would be the precise extent and effect of this function in various cases which fancy may suggest, or which time may produce. It will be more proper to observe in general, and every candid reader will second the observation, that little if any thing more was intended by the clause, than to provide for a particular mode of communication, *almost* grown into a right among modern nations; by pointing out the department of the government, most proper for the ceremony of admitting public Ministers, of examining their credentials, and of authenticating their title to the privileges annexed to their character by the law of nations. This being the apparent design of the Constitution, it would be highly improper to magnify the function into an important prerogative, even where no rights of other departments could be affected by it.

To shew that the view here given of the clause is not a new construction, invented or strained for a particular occasion—I will take the liberty of recurring to the cotemporary work already quoted, which contains the obvious and original gloss put on this part of the Constitution by its friends and advocates.

"The President is also to be authorised to receive Ambassadors and other public Ministers. This, though it has been a rich theme of declamation, is more a matter of *dignity* than of *authority.* It is a circumstance, that will be *without consequence* in the administration of the government, and it is far more convenient that it should be arranged in this manner, than that there should be a necessity for convening the Legislature or one of its branches upon every arrival of a foreign Minister, though it were merely to take the place of a departed predecessor." Fed. [69]

Had it been foretold in the year 1788 when this work was published, that before the end of the year 1793, a writer, assuming the merit of being a friend to the Constitution, would appear, and gravely maintain, that this function, which was to be *without consequence* in the administration of the government, might have the consequence of deciding on the validity of revolutions in favor of liberty, "of putting the United States in a condition to become an associate in war," nay "of laying the *Legislature* under an *obligation* of *declaring* war," what would have been thought and said of so visionary a prophet?

The moderate opponents of the Constitution would probably have disowned his extravagance. By the advocates of the Constitution, his prediction must have been treated as "an experiment on public credulity, dictated either by a deliberate intention to deceive, or by the overflowings of a zeal too intemperate to be ingenuous." [Fed. 24]

But how does it follow from the function to receive Ambassadors and other public Ministers that so consequential a prerogative may be exercised by the Executive? When a foreign Minister presents himself, two questions immediately arise: Are his credentials from the existing and acting government of his country? Are they properly authenticated? These questions belong of necessity to the Executive; but they involve no cognizance of the question, whether those exercising the government have the right along with the possession. This belongs to the nation, and to the nation alone, on whom the government operates. The questions before the Executive are merely questions of fact; and the Executive would have precisely the same right, or rather be under the same necessity of deciding them, if its function was simply to receive *without any discretion to reject* public Ministers. It is evident, therefore, that if the Executive has a right to reject a public Minister it must be founded on some other consideration than a change in the

government or the newness of the government; and consequently a right to refuse to acknowledge a new government cannot be implied by the right to refuse a public Minister.

It is not denied that there may be cases in which a respect to the general principles of liberty, the essential rights of the people, or the over-ruling sentiments of humanity, might require a government, whether new or old, to be treated as an illegitimate despotism. Such are in fact discussed and admitted by the most approved authorities. But they are great and extraordinary cases, by no means submitted to so limited an organ of the national will as the Executive of the United States; and certainly not to be brought, by any torture of words, within the right to receive Ambassadors.

That the authority of the Executive does not extend to question, whether an existing government ought to be recognized or not, will still more clearly appear from an examination of the next inference of the writer, to wit, that the Executive has a right to give or refuse activity and operation to preexisting treaties. . . .

Hence the embarrassments and gross contradictions of the writer in defining, and applying his ultimate inference from the operation of the executive power with regard to public ministers.

At first it exhibits an "important instance of the right of the executive to decide the obligation of the nation with regard to foreign nations."

Rising from that, it confers on the executive, a right "to put the United States in a condition to become an associate in war."

And, at its full height authorises the executive "to lay the legislature under *an obligation* of declaring war."

From this towering prerogative, it suddenly brings down the executive to the right of "*consequentially affecting* the proper or improper exercise of the power of the legislature to declare war."

And then, by a caprice as unexpected as it is sudden, it espouses the cause of the legislature; rescues it from the executive right "to lay it under an *obligation* of declaring war"; and asserts it to be "*free* to perform its *own* duties, according to its *own* sense of them," without any other controul than what it is liable to, in every other legislative act.

The point at which it finally seems to rest, is, that "the executive in the exercise of its *constitutional powers,* may establish an antecedent state of things, which ought to *weigh* in the *legislative decisions*"; a prerogative which will import a great deal, or nothing, according to the handle by which you take it; and which, at the same time, you can take by no handle that does not clash with some inference preceding.

If "by weighing in the legislative decisions" be meant having *an influence* on the *expediency* of this or that decision in the *opinion* of the legislature; this is no more than what every antecedent state of things ought to have, from whatever cause proceeding; whether from the use or abuse of constitutional powers, or from the exercise of constitutional or assumed powers. In this sense the power to establish an antecedent state of things is not constituted. But then it is of no use to the writer, and is also in direct contradiction to the inference, that the executive may "lay the *legislature* under an *obligation* to decide in favor of *war.*"

If the meaning be as is implied by the force of the terms "constitutional powers" that the antecedent state of things produced by the executive, ought to have a *constitutional weight* with

the legislature: or, in plainer words, imposes a *constitutional obligation* on the *legislative decisions,* the writer will not only have to combat the arguments by which such a prerogative has been disproved: but to reconcile it with his last concession, that "the legislature is *free* to perform its duties according to its *own* sense of them." He must shew that the legislature is, at the same time, *constitutionally free* to pursue its *own judgment* and *constitutionally bound* by the *judgment of the executive.*

Helvidius

Helvidius Number IV

[14 September 1793]

The last papers compleated the view proposed to be taken of the arguments in support of the new and aspiring doctrine, which ascribes to the executive the prerogative of judging and deciding whether there be causes of war or not, in the obligations of treaties; notwithstanding the express provision in the constitution, by which the legislature is made the organ of the national will, on questions whether there be or be not a cause for declaring war. If the answer to these arguments has imparted the conviction which dictated it, the reader will have pronounced, that they are generally superficial, abounding in contradictions, never in the least degree conclusive to the main point, and not unfrequently conclusive against the writer himself: whilst the doctrine—that the powers of treaty and war, are in their nature executive powers—which forms the basis of those arguments, is as indefensible and as dangerous, as the particular doctrine to which they are applied.

But it is not to be forgotten that these doctrines, though ever so clearly disproved, or ever so weakly defended, remain before the public a striking monument of the principles and views which are entertained and propagated in the community.

It is also to be remembered, that however the consequences flowing from such premises, may be disavowed at this time or by this individual, we are to regard it as morally certain, that in proportion as the doctrines make their way into the creed of the government, and the acquiescence of the public, every power that can be deduced from them, will be deduced and exercised sooner or later by those who may have an interest in so doing. The character of human nature gives this salutary warning to every sober and reflecting mind. And the history of government, in all its forms and in every period of time, ratifies the danger. A people therefore, who are so happy as to possess the inestimable blessing of a free and defined constitution, cannot be too watchful against the introduction, nor too critical in tracing the consequences, of new principles and new constructions, that may remove the landmarks of power.

Should the prerogative which has been examined, be allowed in its most limited sense, to usurp the public countenance, the interval would probably be very short, before it would be heard from some quarter or other, that the prerogative either amounts to nothing, or means a right to judge and conclude that the obligations of treaty impose war, as well as that they permit peace. That it is fair reasoning, to say, that if the prerogative exists at all, an *operative* rather than an *inert* character ought to be given to it.

In support of this conclusion, there would be enough to echo, <"that the prerogative in this active sense, is connected with the executive> in various capacities—as the organ of intercourse between the nation and foreign nations—as the interpreter of national treaties" (a violation of

which may be a cause of war) “as that power which is charged with the execution of the laws of which treaties make a part—as that power, which is charged with *the command and application of the public force.*”

With additional force, it might be said, that the executive is as much the *executor* as the *interpreter* of treaties: that if by virtue of the *first* character it is to judge of the *obligations* of treaties, it is by virtue of the *second,* equally authorised to carry those obligations *into effect.* Should there occur for example, a *casus federis,* claiming a military co-operation of the United States, and a military force should happen to be under the command of the executive, it must have the same right, as *executor of public treaties* to *employ* the public force, as it has in quality of *interpreter of public treaties* to decide whether it ought to be *employed.*

The case of a treaty of peace would be an auxiliary to comments of this sort. It is a condition annexed to every treaty that an infraction even of an important article, on one side extinguishes the obligations on the other: and the immediate consequence of a dissolution of a treaty of peace is a restoration of a state of war. If the executive is “to decide on the obligation of the nation with regard to foreign nations”—“to pronounce the *existing condition* (in the sense annexed by the writer) of the nation with regard to them; and to admonish the citizens of their obligations and duties as founded upon *that condition* of things”—“to judge what are the *reciprocal rights* and obligations of the United States, and of all and each of the powers at war:”—add, that if the executive moreover possesses all powers relating to war *not strictly* within the power *to declare war,* which any pupil of political casuistry, could distinguish from a mere *relapse* into a war, that *had been declared:* With this store of materials and the example given of the use to be made of them, would it be difficult to fabricate a power in the executive to plunge the nation into war, whenever a treaty of peace might happen to be infringed?

But if any difficulty should arise, there is another mode chalked out by which the end might clearly be brought about, even without the violation of the treaty of peace; especially if the other party should happen to change its government at the crisis. The executive, in that case, could *suspend* the treaty of peace *by refusing to receive an ambassador* from the *new* government, and the state of war *emerges of course.*

This is a sample of the use to which the extraordinary publication we are reviewing, might be turned. Some of the inferences could not be repelled at all. And the least regular of them must go smoothly down with those, who had swallowed the gross sophistry which wrapped up the original dose.

Every just view that can be taken of this subject, admonishes the public, of the necessity of a rigid adherence to the simple, the received and the fundamental doctrine of the constitution, that the power to declare war including the power of judging of the causes of war is *fully* and *exclusively* vested in the legislature: that the executive has no right, in any case to decide the question, whether there is or is not cause for declaring war: that the right of convening and informing Congress, whenever such a question seems to call for a decision, is all the right which the constitution has deemed requisite or proper: and that for such more than for any other contingency, this right was specially given to the executive.

In no part of the constitution is more wisdom to be found than in the clause which confides the question of war or peace to the legislature, and not to the executive department. Beside the objection to such a mixture of heterogeneous powers: the trust and the temptation would be too great for any one man: not such as nature may offer as the prodigy of many centuries, but such as

may be expected in the ordinary successions of magistracy. War is in fact the true nurse of executive aggrandizement. In war a physical force is to be created, and it is the executive will which is to direct it. In war the public treasures are to be unlocked, and it is the executive hand which is to dispense them. In war the honors and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered, and it is the executive brow they are to encircle. The strongest passions, and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honorable or venial love of fame, are all in conspiracy against the desire and duty of peace.

Hence it has grown into an axiom that the executive is the department of power most distinguished by its propensity to war: hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence.

As the best praise then that can be pronounced on an executive magistrate, is, that he is the friend of peace; a praise that rises in its value, as there may be a known capacity to shine in war: so it must be one of the most sacred duties of a free people, to mark the first omen in the society, of principles that may stimulate the hopes of other magistrates of another propensity, to intrude into questions on which its gratification depends. If a free people be a wise people also, they will not forget that the danger of surprise can never be so great, as when the advocates for the prerogative of war, can sheathe it in a symbol of peace.

The constitution has manifested a similar prudence in refusing to the executive the *sole* power of making peace. The trust in this instance also, would be too great for the wisdom, and the temptations too strong for the virtue, of a single citizen. The principal reasons on which the constitution proceeded in its regulation of the power of treaties, including treaties of peace, are so aptly furnished by the work already quoted more than once, that I shall borrow another comment from that source.

“However proper or safe it may be in a government where the executive magistrate is an hereditary monarch to commit to him the entire power of making treaties, it would be utterly unsafe and improper to entrust that power to an elective magistrate of four years duration. It has been remarked upon another occasion, and the remark is unquestionably just, that an hereditary monarch, though often the oppressor of his people, has personally too much at stake in the government to be in any material danger of being corrupted by foreign powers. But that a man raised from the station of a private citizen to the rank of chief magistrate, possessed of but a moderate or slender fortune, and looking forward to a period not very remote, when he may probably be obliged to return to the station from which he was taken, might sometimes be under temptations to sacrifice his duty to his interest, which it would require superlative virtue to withstand. An avaricious man might be tempted to betray the interests of the state to the acquisition of wealth. An ambitious man might make his own aggrandizement, by the aid of a foreign power, the price of his treachery to his constituents. The history of human conduct does not warrant that exalted opinion of human virtue, which would make it wise in a nation, to commit interests of so delicate and momentous a kind as *those which concern its intercourse* with the rest of the world, to the *sole* disposal of a magistrate, created and circumstanced, as would be a President of the United States.” [Fed 75] …

Helvidius