

The American Presidency and the Remake of World Politics

Max Schreiber*

Abstract: *This article explores how the Presidency's creation in 1787 reenergized and reorganized American foreign policy after the young nation struggled to effectively make deals and protect national interests upon winning independence from the British in 1783. Structurally, the Presidency enabled the federal government to avoid the division and indiscretion that prevented the States and Congress alike from achieving diplomatic success. Normatively, the Presidency also motivated European monarchs to begin treating the United States like a world rival; the office was viewed as a near-equal to the Sovereigns and it replaced European frustration toward Congress with excitement about the young country. Finally, the Presidency was a democratic victory, as it is the first example in western history of the people getting a direct say through the republican Electoral College in how their leadership conducted foreign policy. These legal changes primed America for success abroad and were soon emulated by the very European powers who had regularly out-negotiated American diplomats and Congress during the Articles of Confederation era.*

Keywords: *Executive power, US diplomacy, The President, Early American history*

Introduction

The cardinal moment in American foreign policy's early history was the creation of the Presidency. Through the "creation of a strong executive" at the Constitutional Convention, the Founders enabled the United States to negotiate with a unified voice and on equal terms against their European counterparts, all of which were led diplomatically by sovereign monarchs.¹ This near-plenary authority over foreign affairs is part of what former US Attorney General William Barr called the "real miracle" from the Constitutional Convention.² Furthermore, the Presidency revolutionized diplomacy by giving "we the people" a say in how America was represented

*Mr. Schreiber is an attorney at the Hamilton Lincoln Law Institute in Washington, DC, and a 2022 cum laude graduate of Harvard Law School. He is an active-duty intelligence officer in the United States Space Force. Between law school and OTS, Mr. Schreiber was the 2022 Bolton Caldwell Fellow in the Solicitor General's Office of West Virginia. Mr. Schreiber recently published the article "Talking Space," regarding strategic messaging and public diplomacy in the space domain, in the Air Force's Space Race and the Strategic Defense Initiative.

¹ William P. Barr, "The Role of the Executive," *Harvard Journal of Law and Public Policy* 43 (2020): 607.

² Barr, "The Executive," 607.

abroad. Before the Presidency, “[w]ars and peace, [and] alliances and treaties, were made not according to the will of the people or in conformity with their interests, but at the will, the pleasure, or the caprice of the sovereign.”³ Accordingly, empowering an elected kingmaker for the United States became its “leading social invention and [] main contribution to democratic governance.”⁴ Together, the democratic input and executive authority entrusted to the President revolutionized foreign affairs not just for the young United States, but the world.

This article explores how the Presidency reenergized and reorganized American foreign policy, after the young nation struggled to effectively make deals and protect national interests after winning independence from the British in 1783. The federal government from 1776 until 1787 consisted solely of a weak Congress, which could not police inter-state trade disputes and which had no legitimacy in the eyes of powerful monarchs abroad. Congress’ failures proved the solution to American frustrations with monarchy did not lie in overcorrecting governance by committee. Accordingly, the Constitutional Convention tried splitting the difference: It assigned operational and discretionary powers to the new President while giving supervisory and formal war powers to Congress. Making the President the face of the nation reflected the importance of a strong, unified voice in foreign affairs for American success.⁵

The Presidency instantly and significantly changed the way Americans conducted foreign affairs—and in the process, it empowered the country for international achievement. First, the Constitution’s structure empowered the President to negotiate *for* the States, which gave his word legitimacy and reduced inter-State trade disputes. It also removed the divided and indiscrete Congress from direct involvement in delicate trade and military discussions with

³ Willis Fletcher Johnson, *America’s Foreign Relations* (New York 1916), vol. 1, 3.

⁴ Sydney Hyman, *The American President* (New York 1954), 4.

⁵ U.S. Const. art. II.

foreign leaders. Second, the Presidency was a normative catalyst for how European powers viewed the United States. Whereas Congress got little respect from the West's monarchs, the President—with his broad diplomatic authority and command of the military—commanded similar stature and was viewed as an equal player on the world stage. Finally, the President's unique status as an *elected* executive gave the American people a direct say on how their interests abroad were represented, and empowered the President abroad in a way other European monarchs could not replicate.

The miracle of the Presidency was a breakthrough for diplomacy—and it ensured America was well-served by its executives for difficult challenges throughout our history. May its vital framework, as detailed in this brief history, live on.

Diplomatic Paralysis after the Treaty of Paris

The United States went without any President after its victory in the Revolutionary War. Initially, a sole Congress led the nation under the “Articles of Confederation,” which—like a useless academic committee—gave each State equal say in the national government and had no real power to enforce its policies. For foreign affairs, the Articles stated plainly, “no treaty [] shall be made whereby ... States shall be restrained from imposing such imposts and duties on foreigners ... or from prohibiting the exportation or importation of any [goods].”⁶ Accordingly, the upstart nation was immediately handicapped by an inability to enforce any binding international agreement.

Nothing epitomized the Articles' failure better than its approach to international trade, which paralyzed relations with all three European powers: France, England, and Spain.⁷ For

⁶ Articles of Confederation, art. IX.

⁷ Paul A. Gilje, “Commerce and Conquest in Early American Foreign Relations, 1750-1850,” 37 *Journal of the Early Republic* 37 (2017): 751, <https://www.jstor.org/stable/90014990>.

example, in 1785 Congress dispatched Thomas Jefferson to negotiate an economic treaty with France, hoping to stimulate trade. But the French knew the States could neuter tariff enforcement, so they did not trust any bargain made on Congress' behalf—and accordingly, none were made.⁸ Negotiations with England fared no better. On an almost daily basis, States violated trade provisions in the Treaty of Paris signed after the Revolutionary War.⁹ Congress sent John Adams to formalize trade policy with London—something the States recognized the country needed—but they refused to jointly implement pre-negotiation policies that would have earned actual concessions from the English.¹⁰

Nowhere did the Articles serve America worse, however, than with Spain. In 1784, Spain announced it would not recognize the Treaty of Paris—an international humiliation and rejection of the American republican experiment.¹¹ The Treaty gave America the right to free navigation of the Mississippi River, a claim Spain (which then controlled substantial land in the Gulf Coast) contested.¹² This outraged the southern States, which prioritized the Mississippi as critical to economic growth and future exploration. Meanwhile, the northern States—with greater ties to Europe and reliance on trade—were increasingly enthusiastic to formalize a trade deal with Spain.¹³ When Spanish diplomats arrived in the United States to discuss a possible treaty, one aide observed that “[t]he enthusiasm of the people of the United States for liberty, independence and popular government has ... already [changed] into disorder.”¹⁴ To bridge this divide John

⁸ Johnson, *America's Foreign Relations*, 135.

⁹ *Ibid*, 144.

¹⁰ Gerard Clarfield, “John Adams: The Marketplace, and American Foreign Policy,” *The New England Quarterly* 52, no.3 (1976): 355-56 (1979) <https://www.jstor.org/stable/365630>.

¹¹ Johnson, *America's Foreign Relations*, 138; Charles McCarthy, “The Attitude of Spain During the American Revolution,” *The Catholic Historical Review* 2, no.1 (1916): 50-51 <https://www.jstor.org/stable/25011387>.

¹² Michael Allen, “The Mississippi River Debate, 1785-1787,” 36(4) *Tennessee Historical Quarterly* 36, no.4 (1977): 447, <https://www.jstor.org/stable/42625782>.

¹³ Lawrence S. Kaplan, *Colonies Into Nation* (New York 1972), 171-73.

¹⁴ Letter from Francisco Rendon to Jose de Galvez (Jan. 30, 1784).

Jay, the Secretary of State, proposed a limited commercial treaty that ceded Mississippi use exclusively to Spain for twenty-five years.¹⁵ But many southerners preferred to “part with the [union] than relinquish navigation of the Mississippi.”¹⁶ The Jay proposal failed along regional lines and led both the northern and southern block of States to reconsider their commitment to the Union.¹⁷

After all this dysfunction, many Americans recognized the Articles of Confederation were an embarrassment of civilized governance.¹⁸ Congress became the butt of jokes for its ineffectiveness in foreign affairs.¹⁹ A powerful consortium of respected civil leaders realized the Articles better represented a national suicide pact—inviting either war, stagnation, or internal chaos—than they served as the charter of any future world power.²⁰ These frustrated nationalists, known as the Federalists, started advocating for a new constitutional structure that preserved the sovereignty of individual States while introducing a stronger federal government to handle national issues, especially for diplomatic engagements.²¹ And in the summer of 1787, the Federalists manifested enough support to hold a Convention to draft a new U.S. Constitution.

Who Calls the Shots? Political Undertones at the Convention

Significant social and political tension overshadowed the Constitutional Convention. States mismanaged their own finances after the Revolution, leading to a prolonged recession.²² Credit flowed with the viscosity of candle wax.²³ Rising income inequality compounded

¹⁵ Allen, “The Mississippi River Debate,” 455-56.

¹⁶ Letter from John Marshall to Arthur Lee (March 5, 1787).

¹⁷ Allen, “The Mississippi River Debate,” 463-67.

¹⁸ Gordon S. Wood, *The Creation of The American Republic 1776-1787* (Chapel Hill 1969), 471.

¹⁹ Jerrilyn Greene Marston, *King and Congress* (Princeton 1987), 306.

²⁰ John Altman, “The Articles and the Constitution: Similar in Nature, Different in Design,” *Pennsylvania Legacies* 3, no.1 (2003): 20-21.

²¹ See generally Merrill Jensen, *The New Nation: A History of the United States during the Confederation 1781-1789* (New York 1950), 423-26; Wood, *The American Republic*, 516-30.

²² Woody Holton, “Did Democracy Cause the Recession that Led to the Constitution?,” *Journal of American History* 92 (2005): 442-43, <https://www.jstor.org/stable/3659274>.

²³ Holton, “Democracy Cause the Recession,” 456.

economic angst.²⁴ Much of this was due to incompetence by the very State legislatures the Revolution empowered.²⁵ As James Madison explained, “every new election in the States [changes] one half of the representatives,” resulting in a somewhat randomized potpourri of legislators—some “without reading, experience or principle.”²⁶

Why fight the Revolution? From a foreign affairs perspective, partially to get a say in government, a marked contrast from the sovereign-driven whims of European diplomacy.²⁷ And partially for independence, which included the right to self-govern, severance from English mercantilism, and sovereignty under international law.²⁸ But the populist control and ineffective governance of the early 1780s quickly led America to consider the possibility they had overemphasized egalitarianism. The American public still wanted an ordered social hierarchy—just one with more mobility than the European nations their ancestors left behind.²⁹ And American elites expected to be major players on the world stage—they were aghast at recent diplomatic embarrassments. Accordingly, the Constitutional Convention was set up as a battle between “aristocracy and democracy” after recent frustrations with both.³⁰

To the benefit of America, the Convention delegates settled on an institutional vehicle—the President—which had substantial diplomatic authority *and* republican constraints. An American king was never considered. More radical democratic thoughts, including a “war ... on the virtue, property and distinctions in the community” were soundly rejected.³¹ So was the idea of equitable allocations for every class of society in government—something demographic bean

²⁴ Holton, “Democracy Cause the Recession,” 446.

²⁵ Wood, *The American Republic*, 476-77.

²⁶ *The Federalist No. 62* (J. Madison).

²⁷ Johnson, *America’s Foreign Relations*, 3.

²⁸ Declaration of Independence (Jul. 4, 1776).

²⁹ Wood, *The American Republic*, 490-92.

³⁰ *Ibid*, 484-85.

³¹ Letter from Thomas Sedgwick to Rufus King (June 18, 1787).

counters today have not given up on.³² Pragmatists recognized the country was served by *both* political egalitarianism and social order, and such thinking translated into the Convention's diplomatic philosophy. Alexander Hamilton in *The Federalist No. 35* recognized that American society was not as fragmented as often asserted, that all people have a mutual interest in good public policy, and that competent governance outperforms ingroup governance.³³ The immense power soon entrusted to the national government—and particularly the President in the realm of foreign affairs—was “deductible from the only source of just authority – the People.”³⁴

Presidential Architecture

When the Constitution was finished, the powers given to the President made the Office the “primary locus” of American diplomacy.³⁵ It was also “a remarkable democratic institution—the only figure elected by the nation as a whole.”³⁶ After settling on the issue of having one President—versus an executive council—the Convention pivoted to more interesting questions:³⁷ What authority would this office have, especially in the realm of foreign affairs?

The Convention appointed a “Committee of Detail” to promulgate a constitution that suited the consensus of the delegates. Originally, the Committee classified making war and treaties as legislative power.³⁸ But it also recognized the need for speed, secrecy, discretion, and prudent judgment to execute diplomatic initiatives.³⁹ So, the Committee first assigned the new Senate chamber alone the powers over war and trade.⁴⁰ The Senate—with its members having

³² Richard Henry Lee, “Letters of a Federal Farmer,” in Paul L. Ford, *Pamphlets on the Constitution of the United States 288-89* (1888); Wood, *The American Republic*, 496.

³³ *The Federalist No. 35* (A. Hamilton).

³⁴ Letter from John Jay to George Washington (Jan. 7, 1787).

³⁵ Saikrishna B. Prakash and Michael D. Ramsey, “The Executive Power Over Foreign Affairs,” *Yale Law Journal* 111 (2011): 233.

³⁶ Barr, “The Executive,” 613.

³⁷ Norman A. Graebner, “Foreign Affairs and the U.S. Constitution, 1787-1788,” *Proceedings of the Massachusetts Historical Society* 98 (1986): 4-5 <https://www.jstor.org/stable/25080958>.

³⁸ Graebner, “Foreign Affairs,” 6.

³⁹ Eric Nelson, *The Royalist Revolution: Monarchy and the American Founding* (Cambridge 2014), 221-24.

⁴⁰ Prakash and Ramsey, “The Executive Power,” 284.

longer terms and being chosen by the State legislatures—theoretically insulated Senators from political pressures that previously complicated diplomatic negotiating. And it also retained the power to appoint diplomatic personnel in the initial proposal, just as the preceding Congress had.⁴¹

Separately, the Committee envisioned a singular President with authority to enforce the laws of Congress through an executive branch of government.⁴² As conceived, the President would mirror State governors, who traditionally lacked any foreign affairs power beyond executing the instructions of State legislatures.⁴³ The Senate would set foreign policy for the President to implement, with the Committee hoping the Senate's stature could win sufficient international respect. But the Convention hadn't yet figured out how the Senate—or the entire new Congress—would apportion representation amongst States. When that issue was settled by the “great compromise,” the calculus of the foreign affairs powers materially changed.⁴⁴

The Convention decided, via the Great Compromise, to make Congress a bicameral legislature that gave States equal representation in the Senate.⁴⁵ Thus, under the Committee's proposal, small States would—relative to population—dominate decisions about diplomacy.

Consequentially, big States and especially Virginia—the anchor of the south—turned against bestowing diplomatic powers solely to the Senate.⁴⁶ Further, giving the Senate the treaty power raised concerns over ratification. Only a couple of years earlier, treaty negotiations with Spain

⁴¹ Graebner, “Foreign Affairs,” 6-7.

⁴² 2 The Records of the Federal Convention of 1787 at 182-85.

⁴³ Quincy Wright, “The Control of the Foreign Relations of the United States: The Relative Rights, Duties, and Responsibilities of the President, of the Senate and the House, and of the Judiciary, in Theory and in Practice,” *Proceedings of the American Philosophical Society* 60, no.3 (1921): 238 <https://www.jstor.org/stable/984422>.

⁴⁴ Graebner, “Foreign Affairs,” 7-8.

⁴⁵ Jack N. Rakove, “The Great Compromise: Ideas, Interests, and the Politics of Constitution Making,” *The William and Mary Quarterly* 44, no.3 (1987): 424-25, <http://www.jstor.org/stable/1939765>.

⁴⁶ Graebner, “Foreign Affairs,” 8.

almost split the Union when the north and south could not agree on how to balance regional economic interests.⁴⁷

Assigning the Sovereign Powers

The Treatymaking Authority

After the Great Compromise, a revised consensus formed that treatymaking should be an executive function. As Edmund Burke tells it, “no one liked” the Committee’s decision to give the Senate treatymaking power.⁴⁸ One possible resolution was splitting treatymaking authority between the Senate and the executive branch, while John Mercer of Maryland tried arguing that treatymaking was solely an executive function.⁴⁹ The delegates quickly abandoned giving the Senate treaty power, fearing its group membership would make unity and discretion difficult—inviting the same inconsistency, feebleness, and paralysis as the Articles.⁵⁰

Instead, the Convention “unambiguously vested the executive power over foreign affairs” into the President through the Constitution’s “vesting” clause.⁵¹ As the Supreme Court explained in its 1936 decision *United States v. Curtiss-Wright Export Corp.*, the Vesting Clause’s “very delicate, plenary and exclusive power” made the President “the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress.”⁵² The President’s executive authority is found “not in the [textual] provisions of the Constitution,” but incorporated into the document via “the law of nations” as understood at the time of drafting and ratification.⁵³ Meanwhile, the Senate was

⁴⁷ Allen, “The Mississippi River Debate,” 463-67.

⁴⁸ Graebner, “Foreign Affairs,” 9-10.

⁴⁹ *Ibid*, 9-10.

⁵⁰ Prakash and Ramsey, “The Executive Power,” 269.

⁵¹ *Ibid*, 281.

⁵² *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

⁵³ *Ibid*, 318.

assigned limited and express supervisory roles over the President, such as the requirement to “advise and consent” over full treaties and nominated ambassadors.⁵⁴ *Curtis-Wright* is not without its critics: Acclaimed Yale law professor Harold Koh wrote in his book *The National Security Constitution* that the Constitution’s text, framework, and *power shared* amongst the three branches.”⁵⁵ But Koh’s argument does not adequately account for the Constitution as a *counterreaction* to both the Articles-era Congress’s impotence in treaty-making and the international disrespect America was receiving from a monarch-dominated Europe.⁵⁶ Centering the foreign affairs authority in the Presidency fixed both issues.

When the Vesting Clause gave the President “the executive power,” that phrase was not—unlike a baby’s first words—some random farrago of English language. It was deliberate. Specifically, the clause reflects what, in 1787 political science terms, the Founders understood “executive power” to mean.⁵⁷ Because the Founders’ culture and politics derived from the Anglican tradition, the English political system is highly persuasive source as to what executive power constitutes. In England’s governmental structure, the Crown controls the executive power, and exercises almost all its authority in foreign affairs and war.⁵⁸ In fact, the Crown had little authority beyond these domains, as financial, regulatory, and legislative functions were reserved to Parliament.⁵⁹

Classical liberal scholars whom the Founders championed also supported interpreting the Vesting Clause to give the President near-plenary authority over foreign affairs.⁶⁰ These

⁵⁴ U.S. Const. art. II, § 2, cl. 2.

⁵⁵ Harold Koh, *The National Security Constitution* (New Haven 1990), 69.

⁵⁶ *Ibid.*, 69-84.

⁵⁷ Prakash and Ramsey, “The Executive Power,” 253.

⁵⁸ *Ibid.*, 253-54.

⁵⁹ *Ibid.*

⁶⁰ 1 *The Records of the Federal Convention of 1787*, at 437 (Max Farrand ed., 1966) (statement of Luther Martin) (citing Locke); *ibid.* at 71, 391 (citing Montesquieu), 472 (citing Blackstone).

philosophers were “the ideological origins of the American Revolution,” and their work was “quoted everywhere in the colonies, by everyone who claimed a broad awareness.”⁶¹ For example, the English philosopher John Locke argued that the “federative power” over “war and peace ... alliances, and [treaty] transactions” belonged to the nation, and whoever had the executive power also held the federative power because together they “are almost always united” and require “the force of society.”⁶² Montesquieu merged the two powers entirely,⁶³ treating them as indistinguishable and inseparable. William Blackstone, the esteemed English esquire whose analysis justified the Crown’s authority, wrote that the King “has the sole power of sending ambassadors to foreign states, and receiving ambassadors at home,” that he “make[s] treaties, leagues, and alliances with foreign states,” and that he maintains “the sole prerogative of making war and peace.”⁶⁴ This is because “what is done by the royal authority, with regard to foreign powers, is the act of the whole nation.”⁶⁵

Of course, the actual Founders made it publicly clear that the Convention gave the President substantial diplomatic authority too. Thomas Jefferson, the first Secretary of State under the new Constitution, believed foreign policy was “executive altogether,” subject only to the Senate’s express supervisory powers.⁶⁶ George Washington, early in his first Presidential term, described diplomacy with other nations as “my duty,” consistent with “the interests of the United States” and “circumstances ... most conducive to the public good.”⁶⁷ Alexander Hamilton wrote in *The Federalist No. 72* that “the actual conduct of foreign negotiations” is executive in

⁶¹ Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge 1967), 27.

⁶² John Locke, *Two Treatises of Government* (Peter Laslett ed., Cambridge 1963) (1690), 383.

⁶³ Baron De Montesquieu, *The Spirit of Laws* (Classics of Liberty Library 1994) (1751), 185.

⁶⁴ William Blackstone, *Commentaries on the Laws of England* (1765), vol.1, 249.

⁶⁵ *Ibid*, 252.

⁶⁶ Thomas Jefferson, *Opinion on the Powers of the Senate* (Apr. 24, 1790).

⁶⁷ George Washington, *Address to the United States Senate and House of Representatives* (Jan. 8, 1790).

nature, and that American ambassadors should be supervised and directed by the President.⁶⁸ In *The Federalist No. 84*, Hamilton further opined that the “management of foreign negotiations will naturally devolve” onto the President’s desk, subject to the Senate’s ultimate agreement.⁶⁹ And John Jay and Robert Livingston—*while* they were acting as Secretaries of State for Congress under the Articles—believed they were fulfilling an executive function.⁷⁰

Military Control and the War Powers

While the Vesting Clause gave the Presidency the sole power to conduct diplomacy, did it also give the office the war and peace powers? Making deals with other nations is a lesser authority than declaring or ending war with them. Much more so than diplomatic authorities, the formal war powers were hotly contested at the Convention. And the war powers debate was further complicated once the Convention gave the President sole command of the military via the “Commander in Chief” Clause.⁷¹ Would the President mirror the sovereigns in England and France, where Kings possessed both operational military control and the war powers? Or would these powers be shared in this new republic?

Fascinatingly, there was barely any debate over the Commander in Chief Clause during the Convention or in the Federalist Papers. From a theoretical perspective, entrusting the executive with operational military authority was entirely consistent with the law of nations.⁷² From a practical perspective, everyone at the Convention witnessed effectively delegating to General George Washington worked⁷³ And the Convention delegates inferred from experience

⁶⁸ *The Federalist No. 72* (A. Hamilton).

⁶⁹ *The Federalist No. 84* (A. Hamilton).

⁷⁰ Prakash and Ramsey, “The Executive Power,” 276.

⁷¹ U.S. Const. art. II, § 2.

⁷² *Curtiss-Wright Export Corp.*, 299 U.S. at 318.

⁷³ Hyman, *The American President*, 280.

during the Articles era how foolish it would be to give a structurally divided body like Congress operational control over the military.

Further, the “Commander in Chief” Clause was not limitless, as the Constitution provided buffers and checks against political-military consolidation. For example, while the military was “always at the disposal” of the President, the state militias (today’s National Guard) continued to serve at the direction of their Governors and, cumulatively, were far larger than the standing federal army.⁷⁴ Also, Congressional appropriations for the common defense could not extend beyond two years, so Congress could always use the power of the purse to limit the President’s command authority.⁷⁵

But the war powers, in contrast, went beyond command of the military—they addressed “initiating a state of war by a public act” such that one nation “declares herself an enemy to all the individual []” citizens of another.⁷⁶ This is the unrivaled choice only sovereigns make. In England, this decision traditionally belonged to the Crown.⁷⁷ Yet after hearing Pierce Butler’s recommendation to give the President alone the same power, future Vice President Elbridge Gerry shot back that he “never expected to hear in a republic a motion to empower the Executive alone to declare war.”⁷⁸ Separately, there was serious concern, primarily from James Madison, that the President—if his executive power included the war powers—could delay peace for political advantage.⁷⁹

The Convention gave Congress the formal war powers, but the Commander in Chief Clause ensured “the [P]resident played the primary role in war [operations] and a significant, if

⁷⁴ Hyman, *The American President*, 278.

⁷⁵ *Ibid*, 279.

⁷⁶ Michael D. Ramsey, “Textualism and War Powers,” *University of Chicago Law Review* 69 (2002): 1545; Emmerich de Vattel, *Law of Nations* (1758), § 225.

⁷⁷ Blackstone, *Commentaries*, 249.

⁷⁸ Peter Irons, *War Powers: How the Imperial Presidency Hijacked the Constitution* (New York 2005), 21.

⁷⁹ 1 *The Records of the Federal Convention of 1787*, at 540 (Max Farrand ed., 1966).

not primary, role in determining peace.”⁸⁰ Fearing tyranny if the President had the war powers, the Convention originally sought to give Congress alone the power to “make war.”⁸¹ But James Madison and Elbridge Gerry thought this language was too restrictive, believing it implied the President did not have the ability to use the military to deal with “exigent circumstances” and sudden attacks.⁸² Instead, the Convention settled on giving Congress the sole authority to “declare” war, as well as—by implication—the power to end it.⁸³ The war powers, therefore, were a partnership: The President would conduct war and repel invaders, but only the Congress could commit the United States to sustained conflict and define its scope. Madison cautioned that because “[t]he executive is the department of power most distinguished by its propensity to war,” it is the States and the people, through Congress, who “disarm this propensity of its influence.”⁸⁴

The Convention Spawns a Diplomatic Revolution

The Executive branch was a herculean diplomatic innovation in America’s early diplomatic history and future practice in three ways. First, it was real structural change that reoriented how the fledging national government conducted diplomacy. Second, the Presidency forced normative adjustments as to how other nations viewed the United States. It made America a more legitimate nation in the eyes of sovereign monarchs, especially in Europe—then the hub of global activity. Finally, the Presidency helped resolve the social tensions of the 1780s by giving Americans a say in their foreign affairs without materially degrading diplomatic discretion. Subsequent American foreign policy successes, driven by the Presidents, demonstrate that the office changed diplomacy not only in America, but around the world.

⁸⁰ John C. Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11* (Chicago 2005), 107-08.

⁸¹ Prakash and Ramsey, “The Executive Power,” 285.

⁸² Barr, “The Executive,” 609 (citing Locke).

⁸³ 2 *The Records of the Federal Convention of 1787* at 318.

⁸⁴ James Madison, “Letters of Helvidius, No. IV,” *Gazette U.S.* (Sept. 14, 1793).

The Presidency's Structural Changes

The structural change to American foreign affairs from the Presidency is conspicuous in the Constitution's text. As the previous chapter highlighted, the Vesting and Commander in Chief clauses cabined vast foreign affairs authority to the President.⁸⁵ This marked a substantial departure from the Articles, in two different dimensions: (a) the State-federal balance and (b) the inter-branch balance.

First, the Constitution choked off the States' ability to conduct foreign affairs. Under the Articles, the States conducted diplomacy via collective action through Congress, with each State having one vote on treaty instructions, ratifications, and commissioner selections.⁸⁶ Without the States' endorsement, the Articles Congress could not conduct *any* foreign affairs. And State disagreements had killed important trade deals with both Spain and England. In response, post-ratification America became "virtually a unitary state" when conducting diplomacy.⁸⁷ The Constitution commanded "[n]o State shall enter into any Treaty, Alliance, or Confederation."⁸⁸ This even limited State authority to conduct military operations against Indian tribes, a key function of State government at the time.⁸⁹ The Constitution commanded the "United States" conduct diplomacy as one nation, under one President. After ratification, the most direct input States had on diplomacy was through the Senate, where their legislatures selected Senators.⁹⁰

Relatedly, the Constitution's "Supremacy Clause" made it so that federal law was supreme in every State.⁹¹ The principle extended to treaties once they were ratified by the

⁸⁵ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318-20 (1936).

⁸⁶ Hyman, *The American President*, 276.

⁸⁷ Louis Henken, "Constitutional Issues in Foreign Policy," *Journal of International Affairs* 23, no.2 (1969): 211, <https://www.jstor.org/stable/24356624>.

⁸⁸ U.S. Const. art. I, § 10, cl. 1.

⁸⁹ John M. Mathews, "The States and Foreign Relations," *Michigan Law Review* 19, no.7 (1921): 691 <https://www.jstor.org/stable/1276996>.

⁹⁰ U.S. Const. art. I, § 3, cl. 1.

⁹¹ *Ibid*, art. VI, cl. 2.

Senate, meaning they applied equally and forcefully in every State. The Clause was consistent with international law:⁹² As Blackstone explained “whatever contracts, therefore, [the Sovereign King] engages in, no other power in the kingdom can legally delay, resist, or annul.”⁹³ And as Emmerich de Vattel wrote “treaties are sacred between nations,” and therefore “he who violates treaties, violates the law of nations.”⁹⁴ By giving the foreign affairs powers to the federal government, the Constitution ensured that the nation could be trusted in international negotiations.

Then, by giving discretionary foreign affairs powers to the President, the Constitution elevated the discretionary capabilities that the Articles’ Congress lacked.⁹⁵ Post-Constitution, the federal government did not have to pray States would cooperate in returning foreign criminals to their homeland as required under international law, like Pennsylvania refused to do with the French fugitive Charles Longchamps.⁹⁶ Nor did the federal government have to beg States to pay revenue for helping captive Americans, like what happened when American shippers were held hostage in Algiers only a few years earlier.⁹⁷ By creating a unitary and empowered executive organ at the federal level, the Constitution made it possible to effectuate American foreign policy.

Finally, the Constitution installed considerable guardrails to prevent abuse of presidential power, beyond the Senate’s advice and consent on treaties and diplomatic appointments. Both houses of Congress reserved the power to lay duties on foreign commerce and regulate foreign

⁹² Graebner, “Foreign Affairs,” 16.

⁹³ William Blackstone, *Commentaries on the Laws of England* (London 1765), vol. 1, 249.

⁹⁴ Emmerich de Vattel, *Law of Nations* (1758), §§ 219, 221.

⁹⁵ Nelson, *The Royalist Revolution*, 221-24.

⁹⁶ Mary Giunta et al., *The Emerging Nation: A documentary History of the Foreign Relations of the United States under the Articles of Confederation, 1780-89* (Washington, D.C. 1996), vol. 2, 372-73.

⁹⁷ Johnson, *America’s Foreign Relations*, 144-145.

trade.⁹⁸ The Congress was also responsible for building and maintaining a navy⁹⁹—a key signal of legitimate nationhood—as well as providing for the common defense.¹⁰⁰ Even the Judiciary was given a minor role in diplomacy, getting jurisdiction over controversies arising out of ambassadors, ministers, and consuls, as well as the ability to interpret treaties when resolving judicial cases.¹⁰¹ However, since its inception, the Supreme Court is reticent to cast judgement on the President’s foreign affairs decisions, sustaining language in the seminal 1803 case *Marbury v. Madison* that remarked the President’s discretion in this realm “can never be examinable by the courts.”¹⁰²

From these structural changes, Professor Yoo remarks that the “customary executive power over foreign affairs [] returned to a unitary, energetic executive, but one that took the form of a republican president rather than a hereditary monarch.”¹⁰³ This constitutional paradigm is best explained in Justice Robert Jackson’s famous Supreme Court concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, where the Court rejected President Truman’s attempt to seize a steel plant at risk of strike in the midst of the Korean War. Justice Jackson explained that while the Executive maintained tremendous discretion and authority in war and foreign affairs, the extent of those powers could be calibrated based on the action (or inaction) of Congress.¹⁰⁴ But for truly exigent circumstances, the President was entrusted to shoot first and ask Congress

⁹⁸ U.S. Const. art. I, § 8, cl. 3.

⁹⁹ *Ibid*, cl. 13.

¹⁰⁰ *Ibid*, cl. 1.

¹⁰¹ Johnson, *America’s Foreign Relations*, 150-151.

¹⁰² Jide Nzelibe, “The Uniqueness of Foreign Affairs,” *Iowa Law Review* 89 (2004): 946 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803)).

¹⁰³ Yoo, *The Powers*, 107-08.

¹⁰⁴ Patricia L. Bellia, “Executive Power in Youngstown’s Shadows,” *Constitutional Commentary* 19 (2002): 100 (discussing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring)).

later.¹⁰⁵ Giving the President this freedom to act ensured America did not concede any strategic advantage on the battlefield or in diplomacy to quick-moving monarchs and tyrants abroad.¹⁰⁶

As the historian Willis Johnson tells it, the structural changes made at the Constitutional Convention—and especially the Presidential powers—"[remedied] the defects of the old [Articles of] Confederation so far as the conduct of foreign affairs was concerned."¹⁰⁷

The Presidency's Normative Changes

Separately, the Presidency normatively changed how American diplomacy was perceived by European counterparties. Beyond the Articles' structural deficiencies, American foreign policy struggled because Congress did not resemble the European monarchs America negotiated with. Candidly, America was not yet "in da club."¹⁰⁸ In 1787, Europeans simply played a different game of statesmanship: Raw power was the principal concern.¹⁰⁹ And monarchical authority was at its apex in foreign affairs, with dynasticism a major motivation for international relations.¹¹⁰ The palace intrigue, egos, and strategy ensured European diplomatic affairs stayed dynamic and unpredictable.¹¹¹ Prior to the Presidency, anytime Congressional representatives met to negotiate with a European power, America was essentially pitting a committee of disagreeable lawyers against a drunk sailor.

Thus, the Presidency signaled America was a serious nation ready to conduct foreign affairs in a similar fashion to other great nations. The President alone would negotiate treaties and command troops on behalf of the States, much like the sovereigns of other countries did.

¹⁰⁵ Barr, "The Executive," 609.

¹⁰⁶ Godfrey Hodgson, "The Virtues and Vices of Democracy in Conducting Foreign Affairs," *University of Miami Law Review* 43 (1988): 217 (Irving Kristol speaking).

¹⁰⁷ Johnson, *America's Foreign Relations*, 151.

¹⁰⁸ Fifty Cent, *In Da Club* (2003).

¹⁰⁹ Johnson, *America's Foreign Relations*, 3.

¹¹⁰ Jeremy Black, "Britain's Foreign Alliances in the Eighteenth Century," *Albion* 20, no.4 (1988): 580, <https://www.jstor.org/stable/4050198>.

¹¹¹ *Ibid*, 581-82.

This change was welcome across the Atlantic, given that the European superpowers—England, France, and Spain—all quickly lost faith in America’s word after various diplomatic failures in the 1780s.¹¹² Further, while the President could not staff the government with friends and allies without Senate approval, he was free to associate, negotiate and make executive agreements with whichever monarch he wanted to abroad.¹¹³ With a President to lead it, America became the hottest free agent on the world stage overnight. Suddenly, the French and British—both of which wanted to maintain influence in the States but dreaded negotiating with Congress—could barter and charm for one man’s attention.

Further, because the Presidency is the only federal office elected throughout the nation, foreign diplomats went to the President to get the pulse of the American people, and the President—being duly elected—best represented it. So, with all the raw monarchical politics that dominated Europe, the ruling Kings and Queens finally could put a face to the American interest and spirit. Such impact cannot be understated: Just like the initial construction of the American navy during the Revolution legitimized the rebellious colonies as one nation in the eyes of the world,¹¹⁴ the creation of a singular executive to represent America abroad had similar effect.

Using the Presidency to gain foreign respect was intentional: Thomas Jefferson wrote in support of the Constitution’s ratification that someday the election of the President of the United States would be far more interesting to nations around the globe than whoever the King of Poland was.¹¹⁵ He may have understated this goal. By creating an institution that was “not unlike the Crown” with similar “color and pageantry,” the Constitution successfully reengaged

¹¹² Marston, *King and Congress*, 306; Johnson, *America’s Foreign Relations*, 130-45.

¹¹³ Hyman, *The American President*, 92.

¹¹⁴ Sam Willis, *The Struggle for Sea Power* (New York 2016), 81.

¹¹⁵ Hyman, *The American President*, 6.

European monarchs and reenergized the world about American potential.¹¹⁶ In fact, the Constitution's foreign affairs structure was so successful and respected internationally that soon enough English politicians started debating it for themselves.¹¹⁷

Even Koh's skepticism of a unitary executive concedes the normative hegemony of the Presidency in foreign affairs. In explaining his shared foreign-affairs model, Koh cites cooperation between President Washington and Congress on issues like the Neutrality Proclamation, initiating military action, and the *Jay Treaty*.¹¹⁸ But in all these scenarios, President Washington *led* the relevant American policymaking on his own, with Congress following. Washington issued the initial Neutrality Declaration as an executive policy, he moved troops on his own accord, and he initiated treaty discussions with England and gave the American envoy its instructions.¹¹⁹ Further, Washington was the "sole constitutional responsibility for *communicating* with foreign nations"—something Koh is mistaken to dismiss.¹²⁰ The abilities to act first and to be the sole voice on foreign affairs are overwhelming even within a "shared" constitutional model like the to which one Koh adheres. Presidential leadership through the foreign affairs power often incentivizes Congress to fall in line, something Koh himself observed happened often during the George Washington era and beyond.¹²¹

¹¹⁶ *Ibid*, 13.

¹¹⁷ Quincy Wright, "The Control of Foreign Relations," *The American Political Science Review* 15, no.1 (1921): 3, <https://www.jstor.org/stable/1944023>.

¹¹⁸ Koh, *National Security Constitution*, 78-79.

¹¹⁹ John Yoo, "George Washington and the Executive Power," *University of St. Thomas Law Journal of Law and Public Policy* 5 (2010): 19-21; George Washington, Proclamation of Neutrality (Apr. 22, 1793); Forrest McDonald, *The Presidency of George Washington* (Lawrence, Kansas 1974): 139-41.

¹²⁰ Koh, *National Security Constitution*, 78.

¹²¹ *Ibid*, 74-100.

The Presidency's Democratic Changes

The Presidency's last great diplomatic legacy was its radical commitment to representative governance, especially as a vehicle to directly effectuate the people's "ordinary political energy" abroad.¹²² In 1787, every American either lived under sovereign regimes or had ancestors who lived under sovereign regimes where the heads of state were born, not elected. Accordingly, foreign affairs in these regimes served "dynastic and personal ends."¹²³ The Articles' Congress offered a democratic alternative which collectively could make treaties, declare war, and appoint ambassadors.¹²⁴ But that approach proved fractured and ineffective—a decade of diplomatic disaster demonstrated as much. And while the American political milieu remained optimistically egalitarian, there was deserved concern—particularly amongst the governing class—that the nation was prioritizing dysfunctional democracy over competent governance and the national interest. So, they split the difference—entrusting the diplomatic authority to one man (presumably an elite), who would be elected and restrained by a *republican* mechanism, the Electoral College.¹²⁵

Modern legal orthodoxy interprets the American constitutional structure as intentionally designed to "tame" majoritarian influence by dividing powers and creating a system of checks, balances, and guaranteed rights to insulate political minorities from majoritarian rule.¹²⁶ But others like Richard Parker, the populist law professor, contend the Constitution is (or should be) a vehicle for unleashing the popular will. The democratic versus aristocrat divide at the Convention lives on: Parker notes concerns about majoritarian governance are overblown, as it

¹²² Richard D. Parker, "Here, the People Rule: A Constitutional Populist Manifesto," *Valparaiso University Law Review* 27 (1993): 531.

¹²³ Wright, "The Control," 13.

¹²⁴ Hyman, *The American President*, 276.

¹²⁵ Barr, "The Executive," 613.

¹²⁶ Parker, "Here, the People Rule," 531-32, 558-59.

was an “open question” under the American system whether the majority rules at all—especially in this modern era of subpar voter turnout, lobbyists, agency bureaucrats, and industry’s “revolving door” with government.¹²⁷ Instead, he proposes that the constitutional system’s “fundamental requirement” is that it should be “systematically responsive” to the will of the people.¹²⁸ At least amongst the original Constitution, the Presidency represents a bold attempt to make American diplomacy systematically responsive to popular will.

Two constitutional features link the President to the people when he implements foreign affairs:¹²⁹ First, the President is elected and maintains office alone. There is no shared responsibility or blame, so the President’s diplomatic agenda is directly accountable. The polity may value other issues more sharply than foreign affairs in terms of how they vote or critique the President, but that is their prerogative—the direct line to give the President feedback on diplomatic decisions exists through election. This is in complete contrast to Congress, which works jointly as two bicameral houses, and the Judiciary, which is unelected and likewise operates by committee. Unlike a king, the President must cooperate with the popular will to survive and succeed politically, by fulfilling the people’s “public philosophy.”¹³⁰

Second, because the President executes the foreign affairs powers largely alone, there is a straight line from his policies and personnel to the consequences this nation faces beyond our borders. Without the support of the people, the President has no power abroad; but with it, the President has better stature than any monarch, because the people have blessed—or even reaffirmed through re-election—his judgment. *Vox populi, vox dei.*¹³¹ When executing

¹²⁷ *Ibid.*, 559.

¹²⁸ *Ibid.*, 572.

¹²⁹ Phillip R. Trimble, “Foreign Affairs Law and Democracy,” *Michigan Law Review* 89 (1991): 1376.

¹³⁰ Philip Abbott, *The Exemplary Presidency: Franklin D. Roosevelt and the American Political Tradition* (Amherst 1990), 6-14.

¹³¹ R.F., *Vox Populi, Vox Dei* (1709) (Translated as “the voice of the people is the voice of God”).

diplomacy, the President acts as the “delegate [] of his people” because, unlike with traditional contract law, the negotiation of foreign agreements is not conducted in an individual capacity.¹³² As the Founding Fathers maintained, the President got power from the people and executed it on their behalf.¹³³

Compare the structure of Congress with that of the Presidency. Tip O’Neill, the 47th Speaker of the House who held the job from 1977 to 1987, once proclaimed “all politics is local.”¹³⁴ Accordingly, as the journalist Irving Kristol explains, congressmen “do not see the world ... they see their own restricted, parochial interests.”¹³⁵ Voters hold Congressmen responsible for crappy infrastructure and rising crime; they hold the President accountable for war. By virtue of being elected nationwide, the President is more isolated from local politics, and thus able to devote resources and attention to national and international issues.¹³⁶ Further, Presidents and Kings engage in intermural negotiation as heads of state, whereas Congress performs intramural negotiation across committees, parties, and the two houses.¹³⁷

The courts’ hesitancy to weigh in on foreign affairs issues further strengthens the connection between the Presidency and political authority. The Supreme Court held that the federal courts are “not the principal arena” for deciding what the President may do abroad, so these battles must be “fought between [] the political branches, in the press, in the bar associations, and legal journals.”¹³⁸ If some take issue with the President’s foreign policy, they must persuade the voters to impose a political price for his decisions.¹³⁹ “Boundary disputes”

¹³² Blackstone, *Commentaries*, 245.

¹³³ Letter from John Jay to George Washington (Jan. 7, 1787).

¹³⁴ Thomas O’Neill, *Man of the House* (New York 1987), 26.

¹³⁵ Hodgson, “The Virtues and Vices,” 217 (Irving Kristol).

¹³⁶ Hyman, *The American President*, 54-55.

¹³⁷ Wright, “The Control,” 16.

¹³⁸ Henkin, “Constitutional Issues,” 211.

¹³⁹ *Ibid.*

between Congress and the President in foreign affairs are essentially public relations wars over Constitutional ambiguity (with much of it, as the Supreme Court often reminds us, almost always vested in the President).¹⁴⁰ Other common attacks against Presidents over isolationism, anti-interventionism, or usurpation of authority are grounded in conveying to the voters that the President's current actions abroad are not "acceptable."¹⁴¹ These types of critiques are grounded in the democratic process—and therefore, they empower it.

Even Professor Koh, who criticizes a unilateral Presidency in diplomacy, nevertheless acknowledges the importance of democratic input to the President's foreign affairs powers. He makes three pertinent observations: First, that Judge Abraham Sofaer, Legal Adviser to the Reagan and Bush State Departments, believed the President is attuned to both "the legislative and the popular will" in his decision-making.¹⁴² Second, that Congress would act to supplement the popular foreign policy decisions of President Washington, such as when it expanded the Neutrality Proclamation of 1793 with the Neutrality Act of 1794.¹⁴³ The President's popular authority on foreign affairs *led* Congress and bolstered his own governance—Washington, as a unanimous President, demonstrated this principle better than anyone else. Third, when (soon to be Chief Justice) John Marshall said on the House floor in 1800 that the Presidency was the "sole organ" of the nation's foreign relations, this "uncontroversial" remark amongst the American public forced Congress to acquiesce to such a principle too.¹⁴⁴ Thus, even for skeptics of a President-led foreign policy like Koh, the popular will serves as a force multiplier for the President's diplomatic authority.

¹⁴⁰ *Youngstown Sheet*, 343 U.S. at 635-38 (Jackson, J., concurring).

¹⁴¹ Henkin, "Constitutional Issues," 211.

¹⁴² Koh, *National Security Constitution*, 80.

¹⁴³ *Ibid*, 78-79.

¹⁴⁴ *Ibid*, 81.

Beyond America's borders, the world is full of friends, enemies, and other neutral or complicated nations whose relationships with the United States vary greatly. Accordingly, America takes a measured and dynamic approach to international relations.¹⁴⁵ By representing the nation as one office, the President can discern—efficiently and discretely—what each nation offers or expects of America, when our interests align, and when those interests change or conflict. The American people may not be scholars or experienced practitioners of diplomacy, but they understand relationships, fairness, and interests.¹⁴⁶ An effective President “relies on these simplicities” to represent the people as one nation.¹⁴⁷

Hyman wrote that “with each decision a President makes, he becomes less and less a President of all the people.”¹⁴⁸ As the President navigates difficult issues and makes consequential choices, he is judged. But Hyman's point is not incompatible with the Presidency as a Parker-like instrument for democratic rule. To maintain popular support, get re-elected, and be effective, the President does not need to govern according to the interests of “all the people;”¹⁴⁹ he need only respond to the aggregate interests of the voters.¹⁵⁰ As Parker would describe it, successful Presidents have interests that overlap with those of the people.¹⁵¹ The President's stake in both political preservation and legacy incentivizes that he acts in America's best interest when representing the nation. This is because liberty and prosperity, as Justice Learned Hand put it, live not in the Constitution, nor in the law, but in politics— “in the hearts of men and women.”¹⁵²

¹⁴⁵ Hodgson, “The Virtues and Vices,” 218 (Irving Kristol).

¹⁴⁶ *Ibid* (Irving Kristol).

¹⁴⁷ *Ibid* (Irving Kristol).

¹⁴⁸ Hyman, “The American President,” 54.

¹⁴⁹ *Ibid*.

¹⁵⁰ Parker, “Here, the People Rule,” 583.

¹⁵¹ *Ibid*, 572.

¹⁵² Learned Hand, *The Spirit of Liberty* (1952), 189-190.

Conclusion

The Constitution's structural changes—especially Article II—empowered a young America to effectuate foreign policy that was binding on the States and representative of the federal government. The Presidency forced European monarchs to treat America as a serious nation and immediately gave the United States the legitimacy it lacked with a lone Congress. And by reconciling aristocratic governance with republican constraints, the Presidency could effectuate foreign policy that effectively served the American people. On these grounds, the Presidency forever changed diplomacy and its creation and importance should be recognized accordingly.