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***231** THE EXECUTIVE POWER OVER FOREIGN AFFAIRS

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***233** No foreign affairs scholar writes on a clean slate. Many eminent scholars and judges have labored to make sense of the Constitution's allocation of foreign affairs powers. Although these attempts often have little in common, they share one trait: They have given up on the Constitution. The received wisdom would have us believe that the foreign affairs Constitution contains enormous gaps that must be filled by reference to extratextual sources: practice, convenience, necessity, national security, international relations law and theory, inherent rights of sovereignty, and so forth. Yet reaching for these extratextual sources casts doubt on the entire enterprise, for one would think that the Constitution's text ought to play the preeminent role in discerning the Constitution's allocation of foreign affairs powers.

Perhaps due to the array of extratextual sources brought to bear, modern scholarship remains without a coherent and complete theory of the constitutional division of foreign affairs powers. First, there is no adequate explanation of the source and scope of the foreign affairs powers of the President. It is conventional wisdom that the President is, at minimum, the “sole organ” of communication with foreign nations and is empowered to direct and recall U.S. diplomats. Many scholars would go further, asserting that the President is the primary locus of foreign affairs power. Yet the President's enumerated powers do not seem to convey anything approaching even the minimum powers everyone assumes the President to enjoy. Second, there is no adequate explanation of the foreign affairs powers of Congress. Most scholars assume that Congress has a general power to legislate in foreign affairs matters, and many argue that Congress, rather than the President, should be the dominant decisionmaker. But the enumerated foreign affairs powers of Congress, while seemingly broader than the President's, also do not apparently encompass the full extent of the foreign affairs powers Congress is thought properly to exercise. Third, and most importantly, modern scholarship has achieved no consensus on even the most basic framework for resolving disputes over the allocation of particular foreign affairs powers not specifically mentioned in the Constitution's text. To pick a few examples, the power to terminate treaties, to enter into executive agreements, and to establish and enforce U.S. foreign policy are heatedly and inconclusively debated with no apparent hope of converging upon a common approach.

We need to wipe the foreign affairs slate clean and start over. In our view, modern scholarship should stop assuming that the Constitution's text says little about foreign affairs and stop treating

foreign affairs powers as “up for grabs,” to be resolved by hasty resort to extratextual sources. Outside the foreign affairs field, constitutional scholars agree that the text is the appropriate starting point. That should be true of foreign affairs scholarship as well. In this Article, we hope to show that the Constitution's ***234** text, properly construed, answers the supposedly perplexing foreign affairs questions posed above.

We argue that the text supplies four basic principles that provide a framework for resolving controversies over the source and allocation of foreign affairs powers. [FN1] First, and most importantly, the President enjoys a “residual” foreign affairs power under Article II, Section 1's grant of “the executive Power.” [FN2] As we seek to establish in this Article, the ordinary eighteenth-century meaning of executive power--as reflected, for example, in the works of leading political writers known to the constitutional generation, such as Locke, Montesquieu, and Blackstone--included foreign affairs powers. By using a common phrase infused with that meaning, the Constitution establishes a presumption that the President will enjoy those foreign affairs powers that were traditionally part of the executive power. [FN3] ***235** Second, the President's executive power over foreign affairs is limited by specific allocations of foreign affairs power to other entities-- such as the allocation of the power to declare war to Congress. Thus, the President has a circumscribed version of the traditional executive power over foreign affairs. Notwithstanding the common understanding of executive power, the President cannot regulate international commerce or grant letters of marque and reprisal. Third, Congress, in addition to its specific foreign affairs powers, has a derivative power to legislate in support of the President's executive power over foreign affairs and its own foreign affairs powers. But contrary to the conventional view, Congress does not have a general and independent authority over all foreign affairs matters. In particular, Congress cannot establish relations with a foreign country or establish foreign policy. Fourth, the President's executive power over foreign affairs does not extend to matters that were not part of the traditional executive power, even where they touch upon foreign affairs. In particular, the President cannot claim power over appropriations and lawmaking, even in the foreign affairs arena, by virtue of the executive power. That is to say, the President is not a lawmaker, even in foreign affairs.

Our framework reveals that there are no gaps in the Constitution's allocation of foreign affairs powers. The Constitution's text supplies a sound, comprehensive framework of foreign affairs powers without appeal to amorphous and disputed extratextual sources. Moreover, there is substantial evidence that this textual framework is the correct interpretation of the Constitution, as it comports with usage and practice before, during, and after the Constitution's ratification. Finally, other theories or frameworks have a rather difficult time of accounting for the evidence supporting our framework. To slight the foreign affairs meaning of executive power is to downplay Locke, Montesquieu, Blackstone, Washington, Jay, Jefferson, Hamilton, and even Madison.

I. The Shortcomings of Modern Foreign Affairs Scholarship

Modern discussion of the Constitution's allocation of foreign affairs powers suffers from two acute embarrassments. First, beyond the powers to declare war and enter into treaties, the discourse largely ignores the Constitution's text. [FN4] A common tenet of scholars who agree on little else is ***237** that once one moves beyond the war and treaty-making powers, the Constitution itself has

little to say about the relative roles of the President and Congress, but rather contains substantial gaps that compel resort to other considerations. Accordingly, a host of nontextual factors--practice, convenience, necessity, national security concerns, international relations theory, international law, inherent rights of sovereignty, and so forth-- drives "constitutional" scholarship in this area.

Second, modern foreign affairs scholarship has failed to provide a satisfactory account of the source and allocation of presidential and congressional foreign affairs powers. Scholars heatedly and inconclusively debate whether the President or Congress should have the supreme role in foreign affairs, and have sharp and seemingly insoluble disagreements over the allocation of particular foreign affairs powers, such as the power to terminate treaties, the power to set foreign policy, and the power to enter into executive agreements. Each branch has its able academic advocates, but there seems little prospect of resolution, or even agreement upon what the relevant considerations should be. And even when foreign affairs scholars agree upon an appropriate allocation in a particular area, they cannot explain why the conventional allocation is the correct one. Most everyone agrees, for example, that the President speaks for the United States in the international sphere and can instruct and recall ambassadors, and most agree that Congress can legislate with respect to a wide range of foreign affairs and national security matters. Yet there is little attempt to explain how these allocations cohere with the Constitution's text or to construct from these allocations a comprehensive theory of foreign affairs powers. [FN5]

The second difficulty is closely related to the first. Foreign affairs scholars have too quickly assumed that the Constitution's text does not adequately allocate foreign affairs powers. By discarding the textual moorings of constitutional law, however, they have been left adrift with no satisfactory guide in resolving these matters. A few examples illustrate why modern foreign affairs scholarship is lost.

A. The Fruitless Search for the Supreme Branch in Foreign Affairs

Judges, practitioners, and foreign affairs scholars have long debated whether the President or Congress should primarily direct U.S. foreign ***238** affairs. Commentators essentially divide into three camps: those who think that foreign affairs should be largely controlled by the President, those who see Congress as the dominant power in foreign affairs, and those who find no satisfactory allocation of foreign affairs powers. But these camps have not articulated a complete or convincing theory, nor one soundly based on the Constitution's text.

B. The Failure To Explain Allocations of Specific Foreign Affairs Powers

The debate fares no better when it moves from the generalized question of "supremacy" or "primacy" in foreign affairs to allocations of specific foreign affairs powers. Much of modern scholarship--from whichever of the foregoing camps--agrees upon certain "obvious" allocations of power: The President is the organ of communication with foreign governments and exercises authority over U.S. and foreign diplomats, and Congress legislates with respect to international matters. But modern scholars cannot explain the textual basis for these assumptions. Beyond this limited consensus, scholars fiercely debate the allocation of key foreign affairs powers, but again

they cite no textual authority for their positions.

1. The Unexplained Assumptions

Even the most committed advocate of congressional primacy usually admits that the President is the "sole organ of official communication" in foreign affairs. [FN45] Indeed, many scholars argue that the President is only a spokesperson, with only the few limited substantive powers set forth in Article II, Sections 2 and 3. [FN46] But how do they know the President speaks for the United States? If the Constitution says little about substantive presidential power over foreign affairs, it also says little about the President's supposed role as international spokesperson. If the President can claim only the powers of Article II, Sections 2 and 3, much of the ***244** President's role as sole communicative organ seems inexplicable. [FN47] Yet if the communicative role is found (by implication or some other means), why not also find further powers? We are not aware of anyone who has addressed this serious difficulty. [FN48]

On the other hand, advocates of presidential primacy generally assume the President has the role of spokesperson, and use this common ground as a foundation for implying even greater presidential foreign affairs powers. But their theory can be no stronger than its foundation, and they have not built their foundation on anything in the Constitution's text. [FN49] In sum, no one on either side of the debate can explain textually what everyone assumes: that the President is the sole organ of communication in external affairs.

***246** 2. The Unresolvable Debates

While some allocations of foreign affairs power are comfortably assumed in modern scholarship, others are heatedly debated. But again, few scholars make arguments based on the Constitution's text. Rather, most everyone assumes that the Constitution's text does not directly speak to these debated matters. The result is essentially a series of policy debates that shows no sign of satisfactory resolution.

In short, the Constitution's text plays little role in modern scholarship's attempts to allocate many specific and significant foreign affairs powers between the President and Congress. Modern scholarship agrees on some presidential foreign affairs powers, such as communication with foreign nations and recalling U.S. ambassadors, but it cannot explain how the ***252** Constitution grants the President these powers. Modern scholarship disagrees on the allocation of many other specific powers, including formulating foreign policy, entering into executive agreements, terminating treaties, and implementing foreign policy as law. But there is a scholarly consensus that the Constitution's text has nothing useful to say about these powers.

II. A Comprehensive Textual Theory of Foreign Affairs

We think better of our Constitution's text. In particular, we find unpersuasive modern foreign affairs scholarship's claim that the Constitution's text simply ignores fundamental questions of

foreign affairs law. In effect, modern scholars would have us believe that as the Philadelphia delegates struggled to work out a new government, they wholly neglected leading questions of foreign affairs law; that the ratifying conventions accepted the Constitution despite its supposedly evident foreign affairs gaps; and that the first federal politicians were wholly oblivious to the serious foreign affairs gaps in the Constitution.

We think all this highly unlikely. We think it far more plausible that the Constitution's drafters and ratifiers did have a basic understanding of the allocation of foreign affairs powers within the new government, and that the document they produced and ratified, properly interpreted, reflects this understanding. The statesmen who gathered in Philadelphia in 1787 thought carefully about the structure of their new government and its allocation of powers. In particular, they thought carefully about foreign affairs, for the Articles of Confederation's deficient treatment of foreign affairs was a leading reason for their meeting. [FN87] Similarly, the ratifying conventions discussed foreign affairs at length, and, in implementing the Constitution, the Washington Administration faced numerous foreign affairs challenges. Yet no one during this time pointed to the Constitution's supposed gaps in foreign affairs. We think this is because the Constitution, rather than being "strangely laconic" regarding foreign affairs, is positively voluble. In this Part, we defend a textual framework that reveals exactly how our Constitution speaks to foreign affairs.

A. Four Principles of Constitutional Foreign Affairs Powers

In our view, the Constitution's text reflects a foreign affairs framework that can be described with four basic principles. First, the President's executive power includes a general power over foreign affairs. By the first ***253** sentence of Article II, "the executive Power shall be vested" in the President. [FN88] Executive power, as commonly understood in the eighteenth century, included foreign affairs powers. As we elaborate below, Locke, Montesquieu, and Blackstone, the great political philosophers most familiar to the Framers, said that foreign affairs powers were part of the executive power. [FN89] Under the English system, as these writers described it, the Crown's powers over foreign affairs arose from its executive power. This was also the terminology of American writers and political leaders immediately before, during, and after the Constitution's ratification. Hence, in 1787, when the Constitution provided that the President would have "the executive Power," that would have been understood to mean not only that the President would have the power to execute the laws (the primary and essential meaning of "executive power" [FN90]), but also that the President would have foreign affairs powers. As a result, the starting point is that foreign affairs powers are presidential, not from some shadowy implication of national sovereignty, per Curtiss-Wright, but from the ordinary eighteenth-century meaning of executive power. [FN91]

Second, the President's executive foreign affairs power is residual, encompassing only those executive foreign affairs powers not allocated elsewhere by the Constitution's text. The Constitution's allocation of specific foreign affairs powers or roles to Congress or the Senate are properly read as assignments away from the President. Absent these specific allocations, by Article II, Section 1, all traditionally executive foreign affairs powers would be presidential. Perhaps, one could say from the text alone, some of the specific allocations might only grant Congress a shared power and not deny it to the President. The War Power Clause, for example, says only that Congress

can declare war, not (in so many words) ***254** that the President cannot. But, as we describe below, it is clear from context that everyone at the time understood the War Power Clause (and others like it) as giving the power to Congress and denying it to the President. The Constitution's drafters believed that the English system afforded too much foreign affairs power to the monarch through the undivided possession of the executive power, and that some aspects of the traditional executive power over foreign affairs had legislative overtones (including the war and treaty-making powers). [FN92] Accordingly, they divided the traditional executive power over foreign affairs by creating specific (but very substantial) exceptions to the general grant of executive power to the President. In the document they created, many key foreign affairs powers were either shared--such as the power to appoint ambassadors or make treaties--or allocated elsewhere--such as the power to declare war and issue letters of marque. As a result, once the drafting was complete, the President had a greatly diminished foreign affairs power as compared to the English monarchy. [FN93] But the President retained a residual power--that is, the President, as the possessor of "the executive Power," had those executive foreign affairs powers not allocated elsewhere by the text. In short, far from suffering from huge gaps, the Constitution has a simple default rule that we call the "residual principle": Foreign affairs powers not assigned elsewhere belong to the President, by virtue of the President's executive power; while foreign affairs powers specifically allocated elsewhere are not presidential powers, in spite of the President's executive power.

Third, the President's executive power over foreign affairs does not exceed the powers of the eighteenth-century English monarch over foreign affairs. This is a necessary corollary to the first principle, by which the President derives residual foreign affairs authority from the ordinary eighteenth-century understanding of "executive power." If the English monarch, the executive most immediately described by Locke, Montesquieu, and Blackstone, lacked a certain power, one would not think that the ordinary understanding of executive power could encompass it. Although the Crown had great power over foreign affairs, two powers that it generally lacked were the powers of legislation and finance. With limited ***255** exceptions, the Crown relied on Parliament to enact legislation and appropriate money in support of foreign policy goals. Because executive power did not include these powers, they were not granted to the U.S. President as a residual element of the executive power over foreign affairs. Congress has the appropriations power, unconstrained by any constitutional obligation to support presidential foreign affairs initiatives (since that obligation never existed in the English Parliament), [FN94] and Congress (and not the President) has the power to make law in support of foreign policy goals because the traditional executive power did not include the power to enact foreign affairs legislation. [FN95]

Fourth, Congress has only its specifically enumerated powers in foreign affairs, but these include a power to legislate in support of the President. A textual approach compels the conclusion that Congress has only the powers granted to it by the text. [FN96] No provisions in Article I, Section 8 (the relevant text), either considered individually or taken together, amount to a comprehensive congressional authority over foreign affairs. But Congress has two important sources of lawmaking authority that, taken together, almost add up to a general power. [FN97] Congress, of course, enjoys explicit legislative powers in particular areas of foreign affairs, such as the power to regulate foreign commerce, declare war, etc., plus the power to make laws "necessary and proper" to effectuate these powers. [FN98] From our second and third principles, it should be clear that these

are independent powers of Congress, which can be exercised despite presidential opposition. [FN99] In addition, Congress also may invoke the Necessary and Proper Clause to carry into execution the powers granted to the President by the Constitution. From our first principle, this includes the power to carry into execution the President's residual foreign affairs powers. Thus Congress has the general power to legislate in support of the ***256** President's foreign policy goals. But this general power--unlike Congress's specifically enumerated powers--is subject to a key limitation. Since it is derivative of the President's power, it must be exercised in coordination with, and not in opposition to, the President. [FN100]

As a result the Constitution achieves a complex series of interbranch checks in foreign affairs. The President has a residual executive power, which means that only the President can speak for the United States on the international stage and can formulate foreign policy (narrowly understood). [FN101] At the same time, the President must rely on Congress (or two-thirds of the Senate) to give foreign policy any domestic legal effect. Congress can pursue foreign affairs goals independently from the President through legislation in areas where it has a specifically enumerated power, such as foreign commerce. In other areas, where Congress has only derivative power, it can act to support the President (or it can refuse to act), but it cannot pursue independent objectives. No single branch, acting alone, has complete control over the course of U.S. foreign affairs.

B. A Textual Defense of the Four Principles of Foreign Affairs Powers

Having outlined our four basic principles, in this Section we show why our textual claims make the most sense of the Constitution.

First, our interpretation accords with the way “executive power” was commonly used in the eighteenth century. Alternative readings either dismiss this prominent provision as an empty, decorative preface to Article II, or deny that it has the meaning in the Constitution that it did in eighteenth-century usage. Neither of these positions seems tenable. As to the Clause's supposed lack of any content, some scholars have argued in other contexts that the general grant of “the executive Power” likely lacks any independent substance, since it is followed by an enumeration of specific powers. Yet when one compares the introductory clauses of the first three Articles, the Article II Vesting Clause must be read as a grant of power. The Article I Vesting Clause explicitly indicates that Congress's legislative powers only extend to those powers “herein granted.” [FN102] The ***257** Article II Vesting Clause lacks such language, thereby suggesting that it may vest powers beyond those subsequently enumerated. [FN103] Moreover, the Judicial Power Clause-- Article III's counterpart to the Executive Power Clause--must vest power with the federal judiciary, because it is the only clause that could possibly vest any power with the federal judiciary. [FN104] Indeed, if that Clause grants no authority, federal judges lack a constitutional basis for their actions; save for salary and tenure, they would be mere creatures of statute. If the Judicial Power Clause grants authority, the analogous Executive Power Clause must bestow power as well because the Clauses are virtually in haec verba. [FN105]

Once one accepts that the Vesting Clause bestows some power, it is difficult to argue, in keeping with eighteenth-century understandings, that it does not convey foreign affairs power. As

we elaborate below, political theorists such as Locke, Blackstone, and Montesquieu, and leading members of the constitutional generation in the United States, including Washington, Jefferson, Madison, Hamilton, and an array of lesser figures, used executive power in various contexts to include foreign affairs powers. [FN106]

Second, our theory demonstrates how the Constitution completely allocates foreign affairs authority. Although we would not contend that the Constitution addresses every problem of governance, we think it appropriate to prefer a reading that does not yield enormous and troubling gaps. As discussed above, every competing theory believes that the Constitution's text fails to address many key issues of foreign affairs power. [FN107] In particular, every other theory agrees that the President's powers in Article II plus Congress's powers in Article I, Section 8 do not encompass all foreign affairs powers. As a result, "missing" powers must be found from implications unsupported by text or assumed as inherent attributes of sovereignty--or else it must be concluded that the Constitution's text (intentionally or not) failed to grant the federal government important foreign affairs powers. Moreover, these powers must then be allocated by a host of extratextual sources. Our theory, in contrast, derives a complete textual allocation. Hence, there is no need to reach ***258** outside the Constitution to justify the President's communicative and policymaking powers over foreign affairs, or Congress's limited ability to legislate with respect to foreign affairs matters not contained within the specific clauses of Article I, Section 8.

Moreover, we cannot imagine any other plausible reading of the text that would give a full allocation of foreign affairs power. Many key foreign affairs powers that surely would have been known to the Framers cannot be encompassed by an ordinary reading of the specific provisions of the Constitution: among others, the power to set foreign policy and speak internationally on behalf of the United States, the power to direct and to recall ambassadors, the power to enter into nontreaty agreements, the power to terminate treaties, and the power to implement foreign affairs powers legislatively in areas not covered by Congress's specifically enumerated powers. [FN108]

***259** Third, we do not see any compelling textual arguments against our position. The principal objection based on text alone, we imagine, is that reading "the executive Power" to include unallocated foreign affairs power renders superfluous some of the specific allocations of Article II, Sections 2 and 3. Obviously this is not true with respect to the allocation of treaty power and appointment of ambassadors, as these clauses, by granting a senatorial role, qualify what otherwise would be in our view exclusive presidential powers. But perhaps some might believe that the Commander-in-Chief power and the authority to receive ambassadors could be derived from our view of "the executive Power" even if not specifically listed in Article II, Sections 2 and 3.

We do not believe that our reading renders the Commander-in-Chief Clause redundant. The Constitution grants Congress substantial military powers not only to declare war, but also to "raise and support Armies"; to "provide and maintain a Navy"; to "make rules for the Government and Regulation of the land and naval forces"; and to "provide for organizing, arming and disciplining the Militia." [FN110] Absent the Commander-in-Chief Clause, even the most steadfast believer in

the President's residual foreign affairs powers might conclude that Congress enjoys all military powers. The Commander-in-Chief Clause ensures shared power over the military despite the substantial grants to Congress. [FN111]

The power to receive ambassadors, on the other hand, probably would lie with the President as part of "the executive Power" even without the express declaration in Article II, Section 3. But even in the absence of an ***260** explanation for this Clause, we think that a small redundancy should not defeat the entire theory, especially in the absence of a competing theory that provides a more satisfactory textual explanation. [FN112] Indeed, we regard our reading as entirely consistent with eighteenth-century drafting principles. As James Madison explained: "Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recitation of particulars." [FN113] Following the general principle established by vesting the executive power with the President, Sections 2 and 3 explain and qualify the general principle. [FN114]

Fourth, our approach is consistent with broader principles of separation of powers and checks and balances.

Finally, our interpretation is remarkably consistent with Founding-era definitions, commentary, and practice. [FN119] As we illustrate below, discussions of the allocation of foreign affairs power in this period show a broad consensus about the meaning of executive power and a general understanding that the President had foreign affairs powers beyond those specifically enumerated.

***262** C. Allocating "Missing" Foreign Affairs Powers

Our four principles of foreign affairs power suggest that there is no remarkable lacuna in the foreign affairs Constitution. We do not claim that our residual principle provides a ready solution to all constitutional foreign affairs questions. We do, however, think it goes further than most modern foreign affairs scholarship in providing a textual framework with which to begin answering these questions. To give some indication of how our framework would work in practice, in this Section we consider its application to some of the foreign affairs difficulties sketched above.

As to the overall locus of foreign affairs authority, our framework occupies a middle ground between the extremes. The advocates of presidential primacy are correct to an extent in arguing that the President has powers over foreign affairs that go far beyond the powers of Article II, Sections 2 and 3. However, these residual executive powers are subject to the three substantial limitations discussed above and not always acknowledged by presidential advocates, namely: (1) The powers explicitly conveyed to Congress by the Constitution are conveyed away from the President and are not in any sense shared powers (although the President retains some influence over them through the veto); (2) the President has no appropriations power, and no automatic right to foreign affairs funds; and (3) the President has no independent lawmaking authority in foreign affairs but depends upon Congress (or the Senate) to give presidential foreign affairs initiatives the force of law.

As to the assumed but unexplained foreign affairs powers, our framework provides solutions largely consistent with conventional assumptions and practices. The President's authority to speak

for the United States in foreign affairs, and to direct and recall ambassadors, stems from the President's executive power granted by Article II, Section 1. Congress has power to regulate foreign affairs matters beyond the specific clauses of Article I, Section 8, because Article I, Section 8, Clause 18 gives Congress power to legislate in support of the President's residual power over foreign affairs. [FN121] Thus, the basic outlines of foreign affairs authority have generally been correctly understood, although their constitutional basis has become obscured.

Our framework also suggests resolutions to previously unsettled foreign affairs disputes. To begin with an easy case, the President has the power to formulate and announce U.S. foreign policy (as presidents have done since ***263** the Founding). [FN122] That power was obviously part of the English monarch's executive power, as well as part of the executive power described by eighteenth-century political theorists. It was not conveyed to Congress (or the Senate) by any part of the Constitution; aside from its ability to declare war, Congress has no textual authority to develop or proclaim policy. Congress, of course, may pass laws, either under its enumerated powers or in support of an exercise of the President's power, and these laws may have foreign affairs effects, but Congress has no authority to declare the views of the United States on international matters, other than indirectly through legislation. [FN123] As a result, the power to originate and declare foreign policy is part of the residual executive power over foreign affairs given the President by Article II, Section 1.

On the other hand, just as the Constitution's text assigns foreign affairs policymaking authority to the President, it assigns foreign affairs lawmaking authority to Congress. This power generally did not adhere within the traditional executive power over foreign affairs, and areas in which the executive might have been thought to have had some regulatory power--most particularly foreign commerce--were specifically assigned to Congress in the Constitution's text. Moreover, the Constitution's text gives Congress the power to "make all Laws" needed to "carry[] into Execution" all powers vested by the Constitution in any other officer of the United States. [FN124] Lawmaking in support of foreign affairs goals, then, is not part of the President's residual power, and this allocation assures that the President must often look to Congress as a partner in foreign affairs endeavors. [FN125]

***264** The foregoing allocation suggests the appropriate resolution of the debate over executive agreements. [FN126] Since international agreements other than treaties are contemplated by the Constitution but are not allocated to a particular branch, they are part of the President's residual foreign affairs power. This power, however, is limited in three respects. First, the President's power to make international agreements cannot extend to agreements that are properly classified as treaties, since that power was given jointly to the President and Senate by the plain words of the Constitution. [FN127] Second, the President has no right to funds to implement executive agreements; that is a matter for Congress to decide through the normal legislative process. Third, contrary to some court decisions of the last century, the President's executive agreements cannot have the force of law, else the President would have a power greater than the English monarch's executive power. In other words, Congress must enact legislation to make executive agreements the law of the land. [FN128]

Finally, consider the question of treaty termination. In international law, treaties may be

terminated by their own terms--that is, the treaty itself ***265** may provide for termination, for example, by notice and the elapse of a specified amount of time--and they may be terminated by the occurrence of certain events, for example, changed circumstances or a material breach by one side, coupled with notice of termination. [FN129] Under U.S. constitutional law, the question is which branch has the power to make the requisite determinations and to direct the delivery of the appropriate notice. Although this question has greatly troubled foreign affairs scholarship, [FN130] our framework yields a clear answer. Terminating a treaty in accordance with its express terms or with international law is a power not mentioned directly in the Constitution, but was obviously part of the traditional executive's foreign affairs power. [FN131] Under our theory, such powers lie with the President.

VII. The Executive Power over Foreign Affairs in Washington's Administration

We have amassed considerable evidence that in the eighteenth century, the executive power included authority over foreign affairs; that during the Articles era, Congress was understood to enjoy the executive power over foreign affairs; that the Department of Foreign Affairs was regarded as an executive department; and that the Framers and ratifiers recognized that the President would enjoy foreign affairs authorities beyond those specifically enumerated in Article II, Sections 2 and 3. On the other hand, we have explained that under the Constitution, Congress lacks a textual hook upon which it might lay claim to those residual powers over foreign affairs not otherwise granted to the President. Admittedly, Congress enjoys unquestioned foreign affairs authority over discrete foreign affairs matters (war, foreign commerce, marque and reprisal, and the law of nations). But these discrete powers are a far cry from the type of authority that might be thought to invest Congress with a sweeping residual power over foreign affairs. Indeed, during the drafting and ratification phases, no one suggested that Congress would enjoy anything close to plenary authority over foreign affairs as it had under the Articles. Nor did anyone suggest that Congress would enjoy all the foreign affairs authorities not allocated to the President.

In this Part, we test our textual theory (and its nontextual alternatives) against the actual practices of the Founding generation. Because we make a claim about the original understanding, and for reasons of tractability, we focus on Washington's administration. As the reader will learn, the legislative statutes and proceedings and the executive practices highlighted below confirm the textual, structural, and historical claims made earlier.

We next take up the events surrounding the Neutrality Crisis of 1793-1794, in which it appeared that the United States might be drawn into the war between England and France.

E. The President's Power To Establish Foreign Policy

This Section focuses on the formation of United States foreign policy during the Washington Administration. As discussed, by "foreign policy" we mean the ability to publicly pronounce the views and goals of the United States--as Washington himself called it, the "disposition" of the United States [FN412]--on international matters, even though that policy might contradict or go beyond existing laws. [FN413] Our theory of residual executive power over foreign affairs would

give this power to the President, since the determination of foreign policy is an aspect of the traditional executive power not allocated elsewhere by the Constitution. As this Section reveals, [FN414] the events of the Washington Administration--particularly in response to the war between England and France in 1793-1794--confirm this understanding of executive power. [FN415]

***328** 1. The Neutrality Proclamation as Evidence of the President's Power To Set Policy

The outbreak of war between England and France in 1793 precipitated for the United States what became known as the Neutrality Crisis. [FN416] The United States had to decide what attitude to adopt toward the belligerents: a strict neutrality that both in theory and in practice favored neither side, a "benevolent" neutrality that as a practical matter favored France while officially pursuing equal treatment, or open support of France. [FN417]

The ensuing events, although complex in detail, are relatively straightforward on a general level. Washington did not call a special session of Congress, but instead determined on his own authority that the United States should pursue a policy of strict neutrality between England and France. To this end, Washington, with the endorsement of all of his cabinet, [FN418] issued what has come to be known as the "Neutrality Proclamation" (although the Proclamation itself avoided the word "neutrality"), [FN419] and thereby officially declared that the United States would "with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerent powers." [FN420]

Over the following months, Washington developed the Proclamation's practical consequences: (1) No fighting would be permitted in U.S. territory; (2) no privateers or repairing warships would be fitted out in U.S. territory; (3) no U.S. citizens would enlist to fight; and (4) no prizes would ***329** be sold in U.S. territory. [FN421] Washington also refused France's request for advance payment of the U.S. debt to France and rejected any discussions of a further treaty. [FN422] In short, the substance of the policy was that France should receive no U.S. assistance in its conflict with England. [FN423]

Washington's policy was not well received in all quarters, as there was a good bit of pro-French sentiment in the country. Some doubted the Proclamation's propriety on various grounds. [FN424] Hamilton, who had urged strict neutrality in the cabinet meetings, defended it in the popular press using the since-famous pseudonym "Pacificus." [FN425] Although Pacificus's defenses ranged widely, for present purposes, his evaluation of the Proclamation's constitutionality is the most important: Pacificus set out a theory of presidential power essentially equivalent to the one we advocate. Specifically, Hamilton argued that the executive power traditionally included foreign affairs power. The Constitution had given the President the "executive power" by Article II, Section 1, but had also given aspects of the traditional executive power, including war and treaties, to other branches. Because these latter grants were exceptions to the executive power, whatever was not encompassed by them remained with the President. Neither a declaration of war nor treaty-making was implicated by the President's actions, so they were "executive" (and thus presidential) under Article II, Section 1. [FN426]

Even stated in summary form, the events of 1793 reveal a unilateral presidential power to set foreign policy. Although the United States, in early 1793, plainly needed to formulate some response to the European war, Washington rejected calling Congress into special session. In this he was supported by all of his cabinet (although Jefferson initially noted the objection discussed below), and when Congress ultimately met, it congratulated Washington on his actions without raising any constitutional concerns. Why did Washington, his cabinet, and Congress suppose that the President had this unilateral power to develop U.S. foreign policy? The power is not derivable from presidential powers over the military and foreign ambassadors (since neither were involved), nor did it rest upon any preexisting law. We think that they read the Constitution as we do and believed that the power arose from Washington's executive power.

***330** First, as described above, in the years leading up to 1793 both Congress and the Washington Administration had treated "the executive Power" as encompassing unallocated foreign affairs powers. [FN427] Jefferson, for example, had argued that "the transaction of business with other nations" was an executive power. [FN428] Oliver Ellsworth, speaking in the Senate, said that foreign communication "is positively placed in the hands of the Executive." [FN429] Madison had concluded (according to Washington's notes) that control over diplomats is "Executive and vested in the President by the Constitution." [FN430] This consensus on a foreign affairs component to the President's executive power, in the years from 1789 to 1793, had supported the President's essentially uncontested assertion of foreign affairs power far beyond the narrow grants of Article II, Sections 2 and 3. Locating the power to deal with the 1793 crisis within "the executive Power" fits comfortably with prior interpretations of the Clause.

Second, the leading contemporaneous defense of Washington's Proclamation, that of Hamilton as Pacificus, directly identified Article II, Section 1 as its constitutional basis. [FN431] According to Pacificus, the power to issue the Proclamation fell within the ordinary meaning of "executive power," since the executive power was the "organ of intercourse between the United States and foreign powers." [FN432] Hamilton acknowledged that certain aspects of the traditional executive power were lodged elsewhere or were shared--specifically, appointments, declaration of war, and treaty-making. [FN433] These, he said, were "exceptions and qualifications" to the general grant in Article II, Section 1; "[w]ith these exceptions, the executive power of the United States is completely lodged in the President." [FN434]

***331** Hamilton's view is especially persuasive because it explains a wide range of practices in the Washington Administration--not only the Proclamation, but also Washington's assumption of control over communications with foreign nations, Congress's complete cession of power over the State Department and ambassadors to the President, and the President's other substantive foreign affairs activities, including removal of ambassadors, recognition, and requests for recall of foreign ambassadors. [FN435] (It also reveals the basis of Washington's deference to Congress in areas of Congress's enumerated power, particularly war and foreign commerce. [FN436]) And apparently it was widely accepted at the time, not only because Hamilton was able to persuade Washington and the cabinet of the propriety of the Proclamation, but also because it seemed implicit in other people's thinking about foreign affairs. [FN437]

Third, the only alternative explanation is that Washington simply seized powers not granted to him by the Constitution. [FN438] This seems unlikely given Washington's statements in other contexts of the need to provide careful constitutional precedent and his attention to constitutional limits in other matters. [FN439] Executive usurpation seems especially unlikely since, with exceptions noted below, no one seemed to have serious doubts that Washington had the power to establish a policy of neutrality. [FN440] In particular, no one raised any objections in Congress. When Congress returned to session, it applauded Washington's Proclamation without constitutional reservation. [FN441]

Given this record, one may wonder why the events of 1793 have not been thought probative of the President's residual foreign affairs power. ***332** First, the extent to which the United States faced a critical policy choice may not be fully appreciated. This view, by greatly oversimplifying the choices Washington faced and the amount of discretion he exercised in making them, causes the decisions of 1793 to seem less substantive than they in fact were. Second, although Washington's power was never subject to doubts sufficient to provoke a constitutional crisis, important voices were raised in opposition to the constitutionality of at least parts of his program. In particular, Madison, then a member of Congress, wrote the “Helvidius” essays in response to Hamilton's Pacificus, [FN442] and in the cabinet, Jefferson temporarily opposed portions of the program, in part on constitutional grounds. [FN443] This may have suggested to later generations that the leading Framers were hopelessly divided on the issue, and thus that “original” materials and interpretations cannot give much aid in resolving these questions. [FN444] In the following discussion, we conclude that neither of these objections is persuasive.

2. The Scope of Washington's Neutrality Decision

Given its military weakness, there was little realistic prospect of the United States taking part in the actual fighting of the war. The French were well aware of this and never sought U.S. entry into the war, even if they thought the Treaty of Alliance might in theory oblige America. [FN445] The French did expect that the United States would render substantial nonmilitary assistance (and deny the same assistance to England). Specifically, the French sought to use U.S. territory as a base for fitting out and commissioning privateers, repairing ships, condemning prizes, and enlisting soldiers and sailors to fight the enemies of France. [FN446] The question was whether the United States would permit it.

Neither law nor policy dictated an obvious answer. Nothing in existing U.S. treaties or laws, or in the law of nations or international practice, required neutrality as the Proclamation defined it. Although international law theorists had written somewhat inconclusively on the obligations of neutrals, and U.S. diplomats later claimed that the law of nations required neutrality, in fact, there was ample precedent for what France desired. ***333** European nations frequently followed a policy of “benevolent neutrality” that favored one side in a conflict without engaging in actual hostilities. [FN447]

As a strategic matter, aiding France risked war with England, but many Americans sympathized with France, and in any event refusing assistance to France might cause France to take what it

wanted by force. [FN448] Before Washington announced his policy, local decisionmakers had adopted policies approaching benevolent neutrality. Governor Moultrie of South Carolina, for example, received Genet when the latter landed at Charleston and encouraged the French fitting out of privateers and preliminary organization of an expedition against Spanish Florida. [FN449] Various French sympathizers urged this course at the national level, and the United States might well have proceeded along the path suggested by Moultrie--favoring France without actually entering the war--and hoped that England would not engage the United States in hostilities. [FN450] Even after the Proclamation, the United States might have gone some way in this direction, given the ***334** Proclamation's lack of specificity. [FN451] The core of Washington's policy, however, was not just the Proclamation itself, but the strict interpretation of its requirements; for example, the President specifically declared (contra Moultrie) that French privateers were not to be fitted out, and asked governors such as Moultrie to end their cooperation in such endeavors.

In short, the decision on what (if any) assistance to give France was a serious policy question with enormous implications, and one that might have been decided differently. In deciding this question, Washington and his cabinet believed that the President had the authority to act unilaterally, and they consciously decided that involving Congress was unnecessary. Although U.S. diplomats later claimed that the decision was required by the law of nations, in fact it was, in April 1793, an open question, and a less risk-averse or more pro-French executive (such as Moultrie, or perhaps James Monroe [FN452]) might well have been more willing to risk English displeasure. Obviously the point here is not the correctness of the decision, but its importance--and the fact that (with the qualifications to be discussed below) the President's unilateral approach to the matter was not widely regarded as inappropriate.

3. Dissenting Views

As noted, the most prominent public defense of Washington's actions, by Hamilton as Pacificus, relied squarely on the Executive Power Clause. Curiously, Hamilton's argument has been marginalized. In particular, the importance of Pacificus's textual interpretation is commonly denied or greatly minimized. [FN453] This may have arisen because Hamilton drew an energetic response from Madison as "Helvidius" and because Jefferson had some reservations about the Proclamation. That has suggested to subsequent generations that the Framers' inconsistent views cannot be ***335** much of a guide to the proper interpretation. We strongly disagree, on two counts.

First, although it is true that Madison, and to some extent Jefferson, disputed parts of Hamilton's assertions, the scope of the disagreement was much narrower than is often supposed. As set forth below, much of the debate turned on the (fairly academic) question of whether the President could by his declaration bind Congress's subsequent ability to decide to enter the war. [FN454] This core aspect of the debate did not contest the essential proposition that the Vesting Clause gave the President all the foreign affairs power not given elsewhere; rather it was a narrow debate about the extent of the war power. Second, to the extent Madison disputed the theory of residual executive powers, his thinking is too unsystematic to provide a dependable refutation.

Madison is a more complicated case. Many have noted that Helvidius is ultimately unpersuasive

without fully explaining why. One obvious reason is that it was unpersuasive at the time: As Professor Sofaer notes, "[t]he ***336** theory advocated by Madison in 1793 as to appropriate roles of the President and Congress had been rejected in practice even before his Helvidius papers saw the light of day." [FN458] Ultimately Congress, when it reconvened, praised the President for his actions [FN459] and passed a Neutrality Act in conformity with the Proclamation and its later elaboration. [FN460] We think, however, that there is a stronger reason: Madison's views, at least to the extent that he rejected the executive power theory, are essentially incoherent.

Madison as Helvidius did not argue directly against residual executive power over foreign affairs, and it takes some study to trace how that topic entered his discussion. Hamilton's Pacificus had overreached in at least one respect, in claiming that the Proclamation was intended to "make known to the Powers at war . . . that [the United States] is . . . under no obligations of treaty to become an associate in the war with either." [FN461] This was, in fact, not what Washington intended: At Jefferson's urging, Washington had specifically deferred interpretation of the 1778 Treaty. [FN462] But Hamilton's claim raised a constitutional question about the ability of Congress to later decide that the treaty required entry into the war. Madison seized upon this as Hamilton's most vulnerable point, and made it the centerpiece of his attack. As Madison summarized,

> The substance of the first piece [of Pacificus] . . . [is] . . . 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. [FN463] In response, Madison adopted Jefferson's argument that such an interpretation of the treaty was part of the war power, and thus a power of Congress. Here he did not quarrel with Hamilton in theory, for Hamilton agreed that the war power lay exclusively with Congress. The scope of the war power became the critical issue.

Hamilton had argued that because the war power was originally an executive power that had been given to Congress by the Constitution, the ***337** grant should be construed strictly. [FN464] Madison objected, arguing that the war power (and treaty-making power) was not truly executive in substance but was only treated so, incorrectly, by the English Constitution and by political theorists. Thus, the U.S. Constitution put the war power where it belonged, in the legislature, and as a result the scope of the power should be construed broadly, not strictly. [FN465]

So far, Madison had not said anything inconsistent with the residual executive power theory. Madison and Hamilton agreed that war- and treaty-making were executive powers under the English Constitution and in the theories of Locke and Montesquieu, but that the Constitutional Convention thought that such an arrangement gave too much power to the executive and hence limited them or conveyed them elsewhere. That is wholly consistent with our theory. We are not immediately concerned with how broadly the war power should be construed, although we do not think--and we do not think Madison meant--that the war power could be construed to cover all foreign affairs powers. Madison was making the much narrower claim that to the extent there was a question whether the United States was bound to go to war, that was a question for Congress, which seems

to us a plausible interpretation of the war power. [FN466]

In the heat of argument, however, Madison made what we regard as an indefensible claim. Madison wanted to show that the war power was not naturally an executive power, and thus the war power of Congress should be construed broadly instead of strictly. Among other arguments in this direction, Madison attempted a comprehensive definition of executive power: "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." [FN467] Taken at face value, this claim squarely rejects our theory of residual executive power, since it would read the Executive Power Clause as only conveying the power of law enforcement. [FN468]

But Madison's position is riddled with difficulties. First, Madison himself had, in less partisan moments, acknowledged that the President had ***338** powers beyond law enforcement, including the power to control diplomatic officers. [FN469] Further, essentially everyone at the time accepted the idea that the President had power over communication with foreign governments and control of the U.S. diplomatic corps. [FN470] If Madison stuck to his claim that the President had only law enforcement power plus the specific grants of Article II, Sections 2 and 3, where did he think the President found communicative and diplomatic powers? And once he found a source for these powers, how would he be able to explain why that source did not also give the President policymaking authority? Madison did not grapple with these problems. Second, Madison failed to recognize that some of the foreign affairs powers he would deny the President would be difficult to locate in Congress. Madison said, for example, that refusal to receive an ambassador should be made by Congress and not the President. [FN471] But pursuant to what congressional power? Madison suggested that the war power might serve this purpose since, he said implausibly, failure to receive an ambassador might lead to war. This is an extraordinary stretch, and even that argument would not work in all circumstances. In particular, if the power to communicate with foreign nations was not an executive power, presumably Congress must have held it. Yet Congress lacks such a specific enumerated power, and although the war power might stretch to cover some communications, surely it cannot stretch to cover all of them. Again, Madison did not address these problems.

We believe Madison had not carefully considered the implications of his claim. In context, that is not surprising. It was not the central point of the Helvidius essays, which concerned the power of the President to interpret treaty obligations relating to war. Madison never denied the power of the President to communicate, or even the power of the President to formulate substantive foreign policy not immediately connected to war. He was not thinking systematically about the whole of foreign affairs power, but was merely searching for an additional argument to deploy against Hamilton. His immediate point--that the President cannot bind congressional war power by an interpretation of a treaty--was distinct from his attack on the residual power over foreign affairs. His wider claim that the President exercises no power other than in pursuance of a law or an Article II, Section 2 or 3 power is demonstrably wrong in practice and incoherent in theory. We think it should be regarded as an overstatement in ***339** support of a cause, not as a systematic interpretation worked out after careful reflection. If posterity is to ignore or downplay Pacificus's claims, it should not do so based on the supposed strength of Helvidius's arguments. Helvidius was no match for Pacificus.

F. Presidential Lawmaking Power over Foreign Affairs

Washington encountered only scattered opposition to his announcement of neutrality, but he had more difficulty enforcing it. Historians of the period comment in strong terms on the problems of enforcement, which were primarily due to the fact that the Proclamation had no statutory law behind it. [FN477] Washington's enforcement efforts show that although he had some powers unilaterally to implement foreign policy, there was an important limit on executive power over foreign affairs as originally understood: It did not have the force of law. [FN478]

In attempting to enforce the Neutrality Proclamation, Washington relied principally on four methods. First, the administration apparently thought the Proclamation's goals could be achieved by diplomatic appeals to Genet and the French diplomatic agents acting at his direction: If Genet could be persuaded to stop arming privateers, refitting ships, and recruiting U.S. citizens to fight for France, many of the potential difficulties with England could be avoided. As a result, much of the "enforcement" activity of the Washington Administration involved diplomatic pressure on Genet, and Washington seemed genuinely shocked when Genet refused to comply with ***341** administration requests. [FN479] Matters came to a head in June 1793, when Genet directed the refitting of a captured ship, the Little Sarah, in Philadelphia harbor. Despite a direct request from the administration that the Little Sarah not leave port, Genet permitted the ship (renamed the Petite Democrate) to sail as a privateer in July. [FN480] By mid-summer 1793, the strategy of diplomatic pressure in ruins, Washington began the process of requesting Genet's recall, and directly threatened to revoke (and in at least one case actually did revoke) the authority of French consuls who did not abide by the President's neutrality directives. [FN481] Washington and the cabinet plainly believed the President had the unilateral power to conduct this diplomatic campaign, but the stubbornness and ideological commitment of Genet prevented it from having its intended effect.

Second, Washington appealed to the state governors to suppress nonneutral activity in their states. [FN482] In part, this arose from necessity: The federal government simply did not have the manpower to accomplish this directly. Moreover, as indicated, some state governors such as Moultrie followed a policy of benevolent neutrality, and--as with Genet--Washington thought a presidential appeal would be sufficient. To some extent the appeal was successful: Moultrie and others changed their public position and issued their own proclamations against nonneutral activity, and some governors instituted affirmative actions to suppress that activity. [FN483] For various reasons, however, state enforcement also proved insufficient. [FN484]

As state governors proved unable or unwilling to handle the matter, Washington moved to engage federal officers in preventative measures. Washington and his cabinet evidently believed that the executive could use force against foreign vessels violating executive directives. In connection with the Little Sarah incident in July 1793, for example, the cabinet (in ***342** Washington's absence) considered using military force to stop the refitted privateer from leaving port. Concerned over provoking war with France, the cabinet was unable to reach a decision before the Little Sarah sailed, but all the cabinet members who considered the matter appeared to believe that the executive branch did have the constitutional authority to use force against the French vessel. [FN485] Following the Little Sarah debacle, Washington moved to involve the federal collectors of customs, the principal

federal officers in the port cities, in efforts to prevent refitting privateers and related activities by force. In August, Washington, with the advice of his cabinet, issued a set of directives, styled "deductions from the laws of neutrality," embodying his neutrality policy, and he transmitted them to the state governors and to the federal collectors of customs. [FN486] The intent was that the collectors, who had broad discretion in admitting and clearing ships, would be able to detain or refuse entry to ships violating Washington's policies. [FN487]

Fourth, and crucial for our discussion, Washington's administration directed prosecutions against U.S. citizens violating neutrality. [FN488] The best-known involved Gideon Henfield, who enlisted on a French privateer (an act proscribed by the Proclamation). [FN489] But unlike the activities described above, the Henfield prosecution and others like it were from the beginning plagued with doubts as to the President's constitutional authority; ultimately, the prosecutions proved unsuccessful until 1794, when Congress by statute criminalized nonneutral behavior. This sequence confirms our view that executive foreign policy, standing alone, lacked the force of law.

***343** Most importantly, although the legal authority for the prosecutions was contested, no one in the Washington Administration or the courts pointed to the Proclamation as a possible source of legal authority. The Proclamation itself did not appear to claim legal force of its own; rather, Washington said that he would "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." [FN490] Jefferson's official communication to the U.S. Attorney in Philadelphia directing prosecutions made no mention of the Proclamation, stating only that "certain citizens of the United States, have engaged in committing depredations on the property and commerce of some of the nations at peace with the United States" and directing the attorney to "take such measures for apprehending and prosecuting them as shall be according to law." [FN491] Washington was sufficiently worried, though, that he requested an opinion from Attorney General Edmund Randolph. Like Jefferson, Randolph did not say the Proclamation was law, but relied instead on treaties and the common law of disturbing the peace. [FN492]

The court proceedings against Henfield took a similar course. Prosecutors adduced treaties, the law of nations and common law--but not the Proclamation-- as the source of the law that Henfield violated. [FN493] In its charge to the jury, the court did not rely upon the Proclamation as a source of law. Instead, it cited the law of nations, as part of the common law, [FN494] ***344** and U.S. treaties, made the supreme law of the land through Article VI of the Constitution. [FN495] But opponents of the prosecution argued that it essentially rested on the Proclamation alone and opposed it on that ground. Articles in the popular press, for example, said that the prosecution "was trying to give a proclamation the force of a law" [FN496] and asked rhetorically, "Were the American people already prepared to give to a proclamation the force of a legislative act, and to subject themselves to the will of the Executive?" [FN497]

Despite overwhelming evidence of Henfield's "guilt," the jury refused to convict. The jury's problem, historians generally agree, was that although Henfield had violated the Proclamation, there was no law making his conduct criminal. [FN498] The opposition papers chided Washington for "having attempted a measure which the laws would not justify." [FN499] The ***345** failure of what

the administration saw as a test case caused great concern in the cabinet, which considered calling Congress into special session to pass neutrality laws. [FN500] Washington rejected this expedient, but once Congress reconvened he requested an act "to extend the legal code and the jurisdiction of the Courts of the United States to many cases which, although dependent on principles already recognized, demand some further provisions." [FN501] In response, Congress passed what has become known as the Neutrality Act, endorsing the positions the administration had taken. [FN502]

As a result, it seems clear that few people thought the President could, as a general matter, create legal obligations through his constitutional foreign affairs powers. Despite the prominence of the Proclamation, in enforcing neutrality Washington and his subordinates always claimed to be enforcing something else--common law, treaty law, or the law of nations--and not the Proclamation itself. These claims were not very convincing, and the objection laid against the prosecutions was that no law forbade the activities in question. Washington, it was said, was trying to give the Proclamation the force of law, a position thought self-evidently indefensible.

G. Congressional Foreign Affairs Powers

In this Section, we focus on the exercise of foreign affairs powers by Congress during the Washington Administration. We find that the practice conforms to our theory of executive foreign affairs powers. As discussed, our theory denies Congress a general power over foreign affairs, but posits two broad sources of congressional authority over foreign affairs matters. First, Congress has powers specifically granted to it by the Constitution's text (plus the additional authority ancillary to these powers provided by the Necessary and Proper Clause). These powers are exercised independently of the President (subject, of course, to the veto). Second, Congress has derivative powers--that is, Congress can legislate to carry into execution presidential foreign affairs powers. These powers must be exercised in coordination with the President.

2. Derivative Powers of Congress

Events of the late eighteenth century also confirm an understanding that Congress had a derivative power to legislate in support of presidential powers over foreign affairs. Consider, for example, the issuance of passports. No federal statute conveyed to the President a general authority to issue passports during Washington's administration (or indeed at any time prior to 1856). [FN528] Although passport power does not seem to be granted ***351** by anything in Article II, Sections 2 and 3, the Washington Administration issued passports without anyone raising any question as to its constitutional authority to do so. [FN529] This further confirms our theory of residual executive power over foreign affairs, as the passport power would easily be encompassed by the residual power, and we think it likely that this is how the Washington Administration and its contemporaries understood it.

Although Congress did not give general passport authority to the President, it did legislate in support of the President's independent passport power. Specifically, in 1790 Congress passed a statute that, among other things, provided penalties for forgery of a U.S. passport. [FN530] This sequence of events fits perfectly with our understanding of the respective roles of Congress and the

President in foreign affairs. Although issuance of passports was an executive function, the President alone could not decree criminal penalties for forgery of a passport, since the President lacked lawmaking authority. [FN531] Congress, however, could do that, even though it lacked an enumerated power to issue passports in the first instance, since it had the power to pass laws in support of other powers granted by the Constitution. [FN532] As a result, the 1790 Passport Act suffered no constitutional infirmity. [FN533]

***352** A similar event occurred shortly after the close of the Washington Administration, which we find worthy of mention. During the Adams Administration, in the course of the hostilities between the United States and France, a private U.S. citizen, George Logan, on his own initiative went to France to try to negotiate a resolution. [FN534] Fearing interference with U.S. diplomacy from such missions, Congress enacted a law prohibiting, in effect, private diplomacy. Specifically, the Logan Act prohibited U.S. citizens from corresponding with a foreign government in an attempt either to influence the measures of a foreign government or to defeat the measures of the U.S. government. [FN535] The Act also prohibited any person in the United States from assisting in such correspondence and thus covered foreign diplomats that might aid U.S. citizens in conducting a private intercourse with foreign nations. [FN536]

Like the 1790 Passport Act, the Logan Act is very difficult to place within Congress's specific enumerated powers. However, no one suggested that Congress might lack power to enact it, and the reason seems evident. Diplomacy is a residual executive power, and the Logan Act is a law necessary and proper to protect that power. The context of the law makes clear that this is how Congress viewed the Act, and explains why there was no question of its constitutionality. Indeed, in introducing the legislation one representative said that it criminalized actions threatening "the destruction of the Executive power of the Government." [FN537] In short, it has long been understood that Congress has a power to legislate in support of ***353** the President's residual foreign affairs powers in areas where Congress does not have an independent enumerated power. [FN538]