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ESSAY

Executive-Congressional Separation of Power During the Presidency of Thomas Jefferson

Gerhard Casper*

In this article, Gerhard Casper characterizes the Jefferson administration as a "testing phase" of separation of power practices that had emerged in the last decade of the eighteenth century. When Jefferson took office in 1801, the question was whether the new president would prove consistent with the views he had espoused when his party was in opposition. President Casper examines the relationship between Congress and the executive under Jefferson to answer this question, weighing the symbolism and practical implications of the plan of the new federal city as well as Jefferson's first annual message to Congress. In addition, the author assesses how Jefferson reacted to situations that tested the separation of power: the conflict with the Barbary Powers at Tripoli, appropriations specificity and deficiency, and the Louisiana Purchase. Ultimately, President Casper observes, the Jefferson administration took separation of power concerns seriously even as it occasionally relied on subsequent congressional ratification of unilateral actions.

I. INTRODUCTION

In the early years of the federal government under the Constitution, there was no consensus about the precise institutional arrangement required to satisfy the separation of powers concept. The Washington and Adams administrations forged precedents for the executive and legislative branches as they grappled with considerations of principle, statecraft, and politics.¹ When Jefferson ascended to the presidency in 1801, the first phase of the formative era ended, and a second phase began, which might best be characterized as a "testing phase." The question was one of continuity with prior practices and whether

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1. See Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 260-61 (1989) (describing the "shaping of governmental structures" during Washington's administration).

the practices of the new administration would be consistent with the views Jeffersonians expressed when in opposition. Further, how would Jefferson react to situations that tested the separation of powers but for which Washington and Adams had set no precedent? In his inaugural address, when Jefferson acknowledged partisanship by denying it—"We are all Republicans, we are all Federalists"²—he glossed over the key question of how to separate the federal powers now that his party controlled both the President's House and Capitol Hill. As in the decades of "divided government" since the Second World War, the meaning of separation of powers differs with the changing nature of congressional majorities.³

Jefferson's battle with the Federalist judiciary is the best known separation of powers issue during his administration.⁴ Yet despite all the clamor about overreaching judges, the judiciary was the least consequential branch during the early years of the American government.⁵ From a pragmatic point of view, John Jay was right when, in 1800, he declined reappointment as chief justice because he thought the bench lacked "energy, weight, and dignity."⁶ The relationship between Congress and the executive was more important because both branches were viewed as "more dangerous" than the judiciary as they grappled with spending, appropriations, and foreign affairs.⁷ These issues dominated the "testing phase" of the separation of powers and forced Jefferson to steer between continuity with Federalist practices and consistency with his own views before he assumed power.

II. JEFFERSON'S CHANGING ROLES: THE CHALLENGE OF CONSISTENCY

On October 1, 1792, nearly ten years before he became President, then-Secretary of State Thomas Jefferson visited President Washington at Mount Vernon. The two men contemplated their future, and Jefferson was especially concerned about executive-congressional separation of power. Jefferson previously had informed the President that he wanted to retire from public life. Washington said that he, too, dreaded a second term. He told Jefferson that

2. Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), in THOMAS JEFFERSON, WRITINGS 492, 493 (Merrill D. Peterson ed., 1984). For a brief summary of the major Republican positions, see ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWERS: THE ORIGINS 68-69 (1976).

3. See DAVID R. MAYHEW, DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946-1990, at 1-6 (1991) (describing the major problems and positions regarding divided government since World War II).

4. See RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 234-42 (1971) (summarizing Jefferson's political battle with the judiciary during his administration); 4 DUMAS MALONE, JEFFERSON AND HIS TIME: JEFFERSON THE PRESIDENT: FIRST TERM, 1801-1805, at 110-30 (1970) (describing Jefferson's struggle against the Judiciary Act of 1801).

5. See Gerhard Casper, *The Judiciary Act of 1789 and Judicial Independence*, in ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789, at 281, 292-95 (Maeva Marcus ed., 1992) (discussing how the Judiciary Act and federalism limited judicial power).

6. Letter from John Jay to John Adams (Jan. 2, 1801), in 4 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 284, 285 (Henry P. Johnston ed., New York, G.P. Putnam's Sons 1893).

7. THE FEDERALIST No. 78, at 227 (Alexander Hamilton) (Roy P. Fairfield ed., 2d ed. 1981) ("[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.").

“[n]obody disliked more the ceremonies of his office, and [that] he had not the least taste or gratification in the execution of it’s [*sic*] functions.”⁸ The Secretary of State, not quite fifty years of age, responded that he “ever preferred the pursuits of private life to those of public, which had nothing in them agreeable to [him].”⁹ In fact, Jefferson seemed to abhor public life so much that he suffered from “disabling headaches lasting two to three weeks that began when he first took public office and that disappeared only when he permanently retired from it.”¹⁰

Jefferson’s desire to resign was probably influenced by the personal animosity between the Secretary of the Treasury, Alexander Hamilton, and himself, especially concerning their differences over the proper scope of executive power. Washington stressed that no one wanted to transform the government into a monarchy, but Jefferson alleged that there was “a numerous sect” who contemplated monarchy and that Hamilton was one of them. Jefferson pointed to a “squadron” in Congress that was ready to do whatever Hamilton asked.¹¹ Jefferson feared this possibility:

That if the equilibrium of the three great bodies Legislative, Executive, & judiciary could be preserved, if the Legislature could be kept independant [*sic*], I should never fear the result of such a government but that I could not but be uneasy when I saw that the Executive had swallowed up the legislative branch.¹²

Jefferson was not alone in his fear of an expanded executive. On March 1, 1798, six years after the Mount Vernon meeting between Jefferson and Washington, Albert Gallatin, then the leader of the Republican opposition in the House of Representatives, echoed Jefferson’s position when he rejected the argument that Congress was constitutionally *required* to finance the diplomats the president considered necessary:

This doctrine [that Congress must finance the president’s program] is as novel as it is absurd. We have always been taught to believe, that, in all mixed Governments, and especially in our own, the different departments mutually operated as checks one upon the other. It is a principle incident to the very nature of those Governments; it is a principle which flows from the distribution and separation of Legislative and Executive powers, by which the same act, in many instances, instead of belonging exclusively to either, falls under the discretionary and partial authority of both; it is a principle of all our State constitutions; it is a principle of the Constitution under which we now act¹³

Gallatin’s discussion of checks and balances identified the separation of power embodied in the United States Constitution as “mixed government,” which had been a commonplace term, especially as applied to the British con-

8. Thomas Jefferson, *Conversations with the President*, in JEFFERSON, WRITINGS, *supra* note 2, at 674, 680 (recounting a conversation of October 1, 1792).

9. *Id.* at 681.

10. JAY FLIEGELMAN, *DECLARING INDEPENDENCE: JEFFERSON, NATURAL LANGUAGE, & THE CULTURE OF PERFORMANCE* 140 (1993).

11. Jefferson, *supra* note 8, at 681-82.

12. *Id.* at 682.

13. 7 ANNALS OF CONG. 1121-22 (1798) (statement of Rep. Gallatin).

stitution.¹⁴ While initially the notion of “mixed government” had referred to the balancing of different social classes and interests, now the challenge faced by the new republic was how to adapt the institutions of mixed government to the doctrine of popular sovereignty.¹⁵ “The issue was no longer the separation of differently based powers, but the separation of power (in the singular) flowing from one source: the people.”¹⁶

In this context, the hallowed concept of mixed government was adapted to the new reality of popular sovereignty through separate branches of public authority. When Jefferson spoke with Washington about the “equilibrium” of legislature, executive, and judiciary, he used a notion that harkened back to the Greek historian Polybius. Polybius argued that the Roman constitution succeeded because it had created a system of government that maintained a state of equilibrium through the principle of counteraction.¹⁷ The principle of counteraction accurately characterizes the Framers’ many and subtle “mixing” decisions in designing the federal Constitution in 1787.¹⁸

As stated above, Jefferson and Gallatin favored legislative over executive power. Indeed, in the “revolution of 1800,”¹⁹ Jefferson believed that he “had saved the country from monarchy and militarism, and brought it back to republican simplicity.”²⁰ In the opening to his first inaugural address, Jefferson pointed to the members of Congress specifically: “To you, then, gentlemen, who are charged with the *sovereign* functions of legislation . . . I look with encouragement for that guidance and support which may enable us to steer with safety the vessel in which we are all embarked amidst the conflicting elements of a troubled world.”²¹

Five years later, however, relations between the President and Congress were not so polite. In fact, Jefferson would be denounced for violating the separation of powers “equilibrium” he championed before his presidency. In 1806, during Jefferson’s second term, John Randolph, initially the administration’s leader in the House of Representatives but now an irreconcilable enemy, criticized a resolution prohibiting the importation of British goods.

14. See Casper, *supra* note 1, at 214-15 (describing several mixed-government models that existed prior to American independence).

15. See WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 259-62 (Rita Kimber & Robert Kimber trans., 1980) (tracking the ultimately unsuccessful movement for a “simple” form of government).

16. Casper, *supra* note 1, at 216.

17. See POLYBIUS, *THE RISE OF THE ROMAN EMPIRE* 317-18 (Ian Scott-Kilvert trans., 1979) (“[T]he whole situation remains in equilibrium since any aggressive impulse is checked, and each estate is apprehensive from the outset of censure from the others.”).

18. See Casper, *supra* note 1, at 222-24 (describing the “mixing” decisions on the method of presidential selection and the assignment of the appointment power).

19. Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), in 10 *THE WRITINGS OF THOMAS JEFFERSON* 140, 140 (Paul Leicester Ford ed., New York, G.P. Putnam’s Sons 1899) (referring to the election of 1800, in which the President’s party gained control of the executive and legislative branches).

20. 1 SAMUEL ELIOT MORISON, HENRY STEELE COMMAGER & WILLIAM E. LEUCHTENBURG, *THE GROWTH OF THE AMERICAN REPUBLIC* 331 (7th ed. 1980).

21. Jefferson, *supra* note 2, at 492 (emphasis added).

I have before protested, and I again protest against secret, irresponsible, overruling influence. The first question I asked when I saw the gentleman's resolution, was, "Is this a measure of the Cabinet?" Not of an open declared Cabinet; but, of an invisible, inscrutable, unconstitutional Cabinet, without responsibility, unknown to the Constitution. I speak of back-stairs influence—of men who bring messages to this House, which, although they do not appear on the Journals, govern its decisions.²²

Randolph aimed his harangue at Jefferson and his Secretary of State, James Madison, to whom Randolph referred collectively as the "Executive" who "will lord it over you."²³ In short, Randolph accused Jefferson of violating the very separation of powers principles that Jefferson had once accused Hamilton of trampling. Assuming Randolph were correct, Jefferson's divergence from his earlier principles may be seen as yet another example of power's ability to corrupt. However, Randolph's accusation was too simple, because the forces that influenced Jefferson were subtle and complex. Barren assertions about the separation of power, its players, and the forces that influenced them fail to capture the complexity of the debate.²⁴ It is to this complexity that I now turn.

III. SYMBOLS OF THE SEPARATION OF POWER

A. *The Federal City*

The Jefferson administration was the first to start out in the new "federal city," designed by French-born engineer Major Pierre C. L'Enfant, and the city's layout influenced the separation of power between the branches. Although never realized fully, L'Enfant's plan physically separated the branches of government and thus, intentionally or not, geographically expressed a political concept. The Congress and the President's House were about a mile apart—"a separation so great," architectural critic John Reps writes, "that the reciprocal relationship is almost lost."²⁵ The "Judiciary Court" was apparently to have its own building between the Capitol and the Executive Mansion.²⁶ The most prominent feature of L'Enfant's design was Capitol Hill—"a pedestal waiting for a superstructure."²⁷ From there a broad avenue (now the Mall) was to lead to the Executive Mansion. As Professor James Sterling Young notes:

Not only distance but formality and visibility were apparently considered appropriate for the relations between Congress and the President, access being provided by a broad avenue suitable for communication of a ceremonial nature. "No message to nor from the President is to be made," L'Enfant explained, "without a sort of decorum."²⁸

22. 15 ANNALS OF CONG. 561 (1806) (statement of Rep. Randolph).

23. *Id.*

24. Casper, *supra* note 1, at 211.

25. JOHN W. REPS, MONUMENTAL WASHINGTON: THE PLANNING AND DEVELOPMENT OF THE CAPITAL CENTER 22 (1967).

26. *Id.* at 20.

27. Report from Major Pierre L'Enfant to President George Washington (June 22, 1791), in L'ENFANT AND WASHINGTON 55, 55 (Elizabeth S. Kite ed., 1929), *quoted in* REPS, *supra* note 25, at 16.

28. JAMES STERLING YOUNG, THE WASHINGTON COMMUNITY 1800-1802, at 6 (1966).

It is ironic that a scheme which seemed faithfully to interpret the organizing principles of a constitutional government²⁹ actually replicated the baroque design motifs “originally conceived to magnify the glories of despotic kings.”³⁰ L’Enfant grew up in Versailles, and his plan for Washington was remarkably parallel to that embodying Louis XIV’s absolutism: The Capitol building corresponds to the palace, the President’s House to the Trianon, and the Mall to the axes of the canals at Versailles.³¹

Nonetheless, only the Capitol itself and the Executive Mansion reflected L’Enfant’s original concept. The Supreme Court remained provisionally housed in the Capitol well into the twentieth century, and the Mall took the place of L’Enfant’s great ceremonial street. However, for many years, the physical separation of the executive and legislature was even more extreme than L’Enfant envisaged. Pennsylvania Avenue was no more than a mud road, arduous to traverse, leading through a swamp. “Considering the difficulties of transportation,” historian Dumas Malone comments, “it was a long mile between Capitol Hill and the President’s House, around which the chief departmental offices were clustered. There could be no doubt that the legislative and executive branches were separate.”³²

B. *Jefferson’s First Annual Message: A Change in Convention*

L’Enfant’s notion of ceremonial decorum fell victim not only to the mud, but also to Jefferson’s desire to change the manner in which the president and Congress interacted. Immediately following the formation of the federal government in 1789, Washington, Adams, and others were particularly concerned with the nature of physical interaction between Congress and the executive branch. They saw this concern as significant in separation of power terms.³³ How should messages be given? Which communications should be oral, and which should be in writing? Many worried about the president’s undue influence on the legislature. Others disagreed about how much monarchical symbolism should be adopted to a republican nation. As President of the Senate, John Adams fought for “dignified and respectable government,” and hoped that President Washington would be treated in a regal fashion.³⁴

Each year, starting in 1789, Washington and Adams addressed Congress in person; in response, members of Congress traveled to the President’s House, where they gave a formal answer to the issues raised by the President’s address.

29. *See id.* at 8 (“[The precepts of the L’Enfant plan] are renderings, in a different language, of the constitutional prescriptions for the structure and functions of the national government.”).

30. REPS, *supra* note 25, at 21.

31. *See* Memorandum from Paul Turner, Professor, Stanford University Art Department, to Gerhard Casper, President, Stanford University (Jan. 5, 1994) (on file with *Stanford Law Review*).

32. 4 MALONE, *supra* note 4, at 91.

33. *See* Casper, *supra* note 1, at 224-33 (describing four interactions between the executive and legislative branches between 1789 and 1792); *see also* Journal of William Maclay (April 30, 1789), in THE JOURNAL OF WILLIAM MACLAY 6-9 (Albert & Charles Boni 1927) (1890) (illustrating the debates over form and etiquette circling around Washington’s first inauguration).

34. *Journal* of William Maclay (May 1, 1789), in THE JOURNAL OF WILLIAM MACLAY, *supra* note 33, at 9, 10, *quoted in* Casper, *supra* note 1, at 225.

However, Jefferson decided not to follow these precedents. Instead, he sent annual written messages to which no answer was due.³⁵ The following letter accompanied Jefferson's first annual message to Congress:

SIR: The circumstances under which we find ourselves placed rendering inconvenient the mode heretofore practiced of making by personal address the first communication between the legislative and executive branches, I have adopted that by message, as used on all subsequent occasions through the session. In doing this, I have had principal regard to the convenience of the legislature, to the economy of their time, to their relief from the embarrassment of immediate answers on subjects not yet fully before them, and to the benefits thence resulting to the public affairs.³⁶

This seemingly minor procedural change raises a number of interesting substantive issues. Jefferson mentioned both the legislators' convenience (if he does not go, they also do not have to traverse the swamps) and the "embarrassment" inherent in a formal response, itself a relic of the British monarchy. However, his letter to Benjamin Rush gave a more political explanation:

By sending a message, instead of making a speech at the opening of the session, I have prevented the bloody conflict to which the making [of] an answer would have committed them. They consequently were able to set into real business at once, without losing 10 or 12 days in combating an answer.³⁷

Thus, the President apparently used the written message because he thought it minimized potential conflict with the legislature.

While Jefferson's reform certainly accorded with his own sense of republican simplicity, it also was responsive to the legislature. In the spring of 1801, North Carolina representative Nathaniel Macon, who later that year would be elected Speaker of the House, requested that Jefferson communicate with Congress through letter, not speech.³⁸ Likewise, Republican representative Michael Leib of Pennsylvania warmly greeted Jefferson's new style of communication:

All the pomp and pageantry, which once dishonored our republican institutions are buried in the tomb of the Capulets. Instead of an address to both houses of Congress made by a President, who was drawn to the Capitol by six horses, and followed by the creatures of his nostrils, and gaped at by a wondering multitude, we had a message delivered by his private Secretary, containing every thing necessary for a great and good man to say, and every thing which embraced the benefit and comfort of the people.³⁹

35. This practice continued until Woodrow Wilson abandoned it in 1913. See THOMAS A. BAILEY & DAVID M. KENNEDY, *THE AMERICAN PAGEANT: A HISTORY OF THE REPUBLIC* 168 (7th ed. 1983).

36. Letter Accompanying President Thomas Jefferson's First Annual Message to Congress (Dec. 8, 1801), in 8 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 19, at 108, 108 n.1.

37. Letter from Thomas Jefferson to Dr. Benjamin Rush (Dec. 20, 1801), in 8 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 19, at 126, 127-28.

38. Letter from Nathaniel Macon to Thomas Jefferson (Apr. 20, 1801), *microformed on 23 Presidential Papers Microfilm: Thomas Jefferson Papers 19198* (Library of Congress), *quoted in* NOBLE E. CUNNINGHAM JR., *THE PROCESS OF GOVERNMENT UNDER JEFFERSON* 25 (1978).

39. CUNNINGHAM, *supra* note 38, at 26 (quoting Letter from Michael Leib to Lydia Leib (Dec. 9, 1801) (on file with Leib-Harrison Family Papers, Miscellaneous Collection, Historical Society of Pennsylvania)).

By forgoing the theatrics of the presidential address, Jefferson incidentally avoided the personal embarrassment of suffering his notorious stage fright.⁴⁰ Jefferson was “an anxious orator,”⁴¹ guttural and inarticulate, whose first inaugural address was delivered “at such a whisper that most in attendance could not hear a word he said.”⁴²

Some may view Jefferson’s move away from theatrical politics as an appropriate deference to the legislature. For example, the Georgia Constitution of 1777 explicitly *required* that all communications between the executive and legislative bodies be in writing.⁴³ But others would argue that Jefferson’s choice made him no more republican than Washington and Adams’ method made them monarchist. As Professor Jay Fliegelman suggests, although labeled a “monarchist” by Jeffersonians, John Adams could argue that he was the better “republican”:

Adams asserted that in “point of republicanism” the essential difference between Adams and Jefferson was “the difference between speeches and [written] messages. I was a monarchist because I thought a speech more manly, more respectful to Congress and the nation. Jefferson . . . preferred messages.” In implying the ontological superiority of the oral over the written, Adams asserted his priority over Jefferson. For Adams presidential addresses did not revisit the stagecraft of monarchy, but opened a dialogue with Congress.⁴⁴

In short, the enigmatic aspects of Jefferson pose a puzzle. Did he choose the written form out of concern for proper equilibrium between the branches, or was there another reason? Alexander Hamilton reviewed Jefferson’s message for the *New-York Evening Post*, and left that question “to the conjectures of the curious.”⁴⁵ Hamilton wondered whether Jefferson’s decision to transmit a message instead of delivering a speech “has proceeded from pride or from humility, from a temperate love of reform, or from a wild spirit of innovation.”⁴⁶ It probably proceeded from a “temperate love of reform” that was aligned with his self-interested desire to avoid public speaking.

Jefferson’s first annual message to Congress raised two issues directly pertaining to executive-congressional relations: (1) war power and (2) spending power. Both of these issues, together with a third—the president’s power to

40. See FLIEGELMAN, *supra* note 10, at 38-39 (describing an example of Jefferson’s anxiety over public speaking).

41. *Id.* at 4.

42. *Id.* at 5.

43. GA. CONST. of 1777 art. XXXII, *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 777, 782 (Francis Newton Thorpe ed., 1909) [hereinafter THE FEDERAL AND STATE CONSTITUTIONS].

44. FLIEGELMAN, *supra* note 10, at 93-94 (quoting Letter from John Adams to Benjamin Rush (Dec. 25, 1811), in THE SPUR OF FAME: DIALOGUES OF JOHN ADAMS AND BENJAMIN RUSH, 1805-1813, at 201, 201-02 (John A. Schutz & Douglass Adair eds., 1966)) (alterations in FLIEGELMAN).

45. Alexander Hamilton, *The Examination* No. 1, NEW-YORK EVENING POST, Dec. 17, 1801, *reprinted in* 25 THE PAPERS OF ALEXANDER HAMILTON 444, 453 (Harold C. Syrett ed., 1977) (work widely attributed to Alexander Hamilton, though signed with pen name Lucius Crassus).

46. *Id.*

make treaties—tested the notion of separation of power during Jefferson’s presidency.

IV. THE WAR POWER: THE CONFLICT AT TRIPOLI

Beginning in 1784, the Barbary Powers occupied American foreign policy for about thirty years.⁴⁷ Like many European powers, the United States dealt with the Mediterranean pirates by paying ransom and tribute to the Ottoman regencies of Algiers, Tunis, and Tripoli. By the turn of the century, the Bey of Tripoli had become publicly dissatisfied with the size of his share of the payment and declared war. Even before this news reached the United States, Jefferson and his cabinet had dispatched a squadron of four vessels to the Mediterranean in response to earlier threats.⁴⁸ At the time, Congress was not in session: After Jefferson’s inauguration on March 4, 1801, the Seventh Congress did not assemble until December, when, in Jefferson’s words, “our winter campaign” began.⁴⁹

In his first annual message, on December 8, 1801, Jefferson reported on the clash between the American schooner *Enterprise* and a Tripolitan cruiser. After a brief battle, the *Enterprise* captured, disarmed, and released the enemy vessel and all of her crew. No lives were lost.⁵⁰ Jefferson told Congress:

Unauthorized by the constitution, without the sanction of Congress, to go out beyond the line of defence, the vessel being disabled from committing further hostilities, was liberated with its crew. The legislature will doubtless consider whether, by authorizing measures of offence, also, they will place our force on an equal footing with that of its adversaries. I communicate all material information on this subject, that in the exercise of the important function considered by the constitution to the legislature exclusively, their judgment may form itself on a knowledge and consideration of every circumstance of weight.⁵¹

Jefferson thus gave a surprisingly narrow construction of his power to seize an enemy ship and its crew—without congressional “sanction,” the president could not act. In a meeting of May 15, 1801, all members of the cabinet, except Attorney General Levi Lincoln, took the opposite position.⁵² Jefferson’s remarks also contrasted with his administration’s orders to Commodore Dale, allowing the Navy to destroy ships if the enemy declared war or committed hostilities.⁵³ As it turned out, the Bey of Tripoli had declared war on May 14. After Jefferson learned about Tripoli’s declaration of war, he wrote Madison:

47. See Casper, *supra* note 1, at 242-57 (discussing the Washington administration’s handling of the political crisis and accompanying constitutional questions). See generally GARDNER W. ALLEN, *OUR NAVY AND THE BARBARY CORSAIRS* (1965) (tracing the history of the relations between the United States and the Barbary Powers from 1783 through 1817).

48. 4 MALONE, *supra* note 4, at 97-98.

49. Letter from Thomas Jefferson to Dr. Benjamin Rush, *supra* note 37, at 127 (referring to the relationship between the executive and legislative branches).

50. 4 MALONE, *supra* note 4, at 98.

51. Thomas Jefferson, First Annual Message (Dec. 8, 1801), in 8 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 19, at 108, 118.

52. See CUNNINGHAM, *supra* note 38, at 48-49.

53. SOFAER, *supra* note 2, at 209-10 (citing Order from Samuel Smith, for the Acting Secretary of the Navy, to Captain Richard Dale (May 20, 1801), in 1 *NAVAL DOCUMENTS RELATED TO THE UNITED*

“What a pity [Commodore Dale] did not know of the [declaration of] war, that he might have taken their admiral and his ship.”⁵⁴ This suggests a legal position different from the one advanced in Jefferson’s message to Congress in December, where he seemed to say that no offensive action could be taken—even if war had been declared against the United States—without the express sanction of Congress.

Alexander Hamilton published a lengthy critique of the Tripoli passage in the President’s first annual message. Ever critical of the President, Hamilton purported to be “anxious for the safety of our Government,” and said that

we are presented with one of the most singular paradoxes, ever advanced by a man claiming the character of a statesman. When analyzed, it amounts to nothing less than this, that *between* two nations there may exist a state of complete war on the one side—of peace on the other.⁵⁵

Among the cabinet members, Secretary of the Treasury Gallatin was the most adamant in expressing his belief that it was not necessary “to obtain a legislative sanction” to use force, explaining:

[W]henver war does exist, whether by the declaration of the United States or by the declaration or act of a foreign nation, I think that the Executive has a right, and is in duty bound, to apply the public force which he may have the means legally to employ, in the most effective manner to annoy the enemy.⁵⁶

When Jefferson drafted his second annual address, Gallatin expressed this position and convinced the President to omit language that suggested that congressional authority was required for the executive branch to act offensively in case of war declared or waged against the United States by other Barbary Powers.⁵⁷ He wrote Jefferson:

It is true that the message of last year adopted a different construction of the Constitution; but how that took place I do not recollect. The instructions given to the commanders to release the crews of captured vessels were merely because we did not know what to do with them⁵⁸

Abraham Sofaer speculates that because Jefferson wanted to share responsibility with Congress for conducting the war, he took the position that he could not act in any way militarily without Congress’ explicit approval.⁵⁹ Sofaer’s theory seems plausible, since Congress eventually did grant the President authority “to cause to be done all such . . . acts of precaution or hostility as the

STATES WARS WITH THE BARBARY POWERS: NAVAL OPERATIONS INCLUDING DIPLOMATIC BACKGROUND FROM 1785 THROUGH 1801, at 465 (U.S. Navy Department ed., 1939).

54. Letter from Thomas Jefferson to James Madison, Secretary of State (Sept. 12, 1801), in 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 19, at 93, 94.

55. Hamilton, *supra* note 45, at 454-55.

56. Notes on President’s Message from Albert Gallatin to Thomas Jefferson (Dec. 1802), in 1 THE WRITINGS OF ALBERT GALLATIN 104, 105 (Henry Adams ed., Philadelphia, J.B. Lippincott & Co. 1879) [hereinafter Gallatin, Notes on President’s Message].

57. CUNNINGHAM, *supra* note 38, at 49-50.

58. Gallatin, Notes on President’s Message, *supra* note 56, at 105-6.

59. SOFAER, *supra* note 2, at 214.

state of war will justify.”⁶⁰ However, despite the theory’s apparent plausibility, the matter is somewhat more complicated.

Jefferson came to the Tripoli issue with considerable prior experience from his days as Secretary of State. His willingness to send the Navy to protect American commerce in the Mediterranean, even though he lacked express legislative authority,⁶¹ clearly manifested his readiness to take forceful action when he thought necessary. On the other hand, his overall deference to Congress is quite consistent with positions he and President Washington took on relations with the Barbary Powers. The Washington administration generally provided Congress with the necessary information for making a decision, and did not question the legislature’s responsibility for making the choices.⁶²

In a 1790 report to Congress on Mediterranean trade, Secretary Jefferson said: “*Upon the whole, it rests with Congress to decide between war, tribute, and ransom, as the means of re-establishing our Mediterranean commerce. If war, they will consider how far our own resources shall be called forth . . .*”⁶³ Thus while Jefferson did not hesitate to act without congressional approval when necessary, he nevertheless preferred a mandate from those “charged with the sovereign functions of legislation.”⁶⁴ Since Congress would eventually pay for the military action, they should decide which resources to commit, not just as a matter of prudence, but as a matter of the constitutional allocation of powers “[u]pon the whole.”⁶⁵ In fact, Jefferson even advised President Washington to consult both the Senate *and* the House over the 1792 Algerian treaty negotiations because the House would be responsible for appropriating money for ransom and tribute.⁶⁶

When he himself had become president, Jefferson continued to act with considerable circumspection on matters of war and peace. For instance, his pursuit of the eventually successful war with Tripoli was authorized by legislation of February 6, 1802.⁶⁷ Even Abraham Sofaer, who believes that Jefferson abandoned “Republican ideology” towards the end of his presidency, admits that “Jefferson had prior congressional approval for virtually all the broad objectives he sought.”⁶⁸ The fact of the matter is that the “embarrassment” Jefferson suffered on account of being charged with inconsistency⁶⁹ resulted at

60. Act of Feb. 6, 1802, ch. 4, 2 Stat. 129, 130 (1802), *quoted in* SOAFER, *supra* note 2, at 215.

61. *See* SOAFER, *supra* note 2, at 210.

62. *See* Casper, *supra* note 1, at 244-47 (detailing then-Secretary of State Jefferson’s reports to the House and Senate).

63. 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 105, 105 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, D.C., Gales & Seaton 1832) (emphasis added).

64. Jefferson, *supra* note 2, at 492.

65. Casper, *supra* note 1, at 245 (quoting 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 63, at 105).

66. *See id.* at 247-48.

67. *See* note 60 *supra* and accompanying text.

68. SOAFER, *supra* note 2, at 225.

69. *See id.* at 226 (arguing that if Jefferson had been more like Hamilton or Gallatin, “he would have been able to carry out most if not all his plans without constitutional inconsistency and embarrassment”).

least partially from the exacting standards he had pronounced. The controversy over appropriations specificity provides a prime illustration.

V. THE SPENDING POWER: SPECIFICITY AND DEFICIENCY OF APPROPRIATIONS

A. *Specificity*

The second major issue in the “testing phase” of the separation of powers was appropriations specificity. Since the legislature allocates power by appropriating money, its control largely depends on the specificity of its appropriations.⁷⁰ As the head of the executive branch, Jefferson advanced truly extraordinary proposals.

In our care . . . of the public contributions intrusted [*sic*] to our direction, it would be prudent to multiply barriers against their dissipation, by appropriating specific sums to every specific purpose susceptible of definition; by disallowing applications of money varying from the appropriation in object, or transcending it in amount; by reducing the undefined field of contingencies, and thereby circumscribing discretionary powers over money; and by bringing back to a single department all accountabilities for money where the examination may be prompt, efficacious, and uniform.⁷¹

In short, Jefferson recommended curtailing the executive’s discretion to spend and called on the legislature to be more specific in its appropriations.

The President’s recommendation had been originally urged on him by Gallatin, who headed the Treasury from 1801 to 1814.⁷² In keeping with Jefferson’s custom of inviting his cabinet members to comment on drafts of his annual messages,⁷³ Gallatin raised the issue of appropriations specificity on the draft of Jefferson’s first annual message. Gallatin told the President:

There is but one subject not mentioned in the message which I feel extremely anxious to see recommended. It is, generally, that Congress should adopt such measures as will effectually guard against misapplication of public moneys The great characteristic, the flagrant vice, of the late Administration has been total disregard of laws, and application of public moneys by the Departments to objects for which they were not appropriated.⁷⁴

Jefferson carefully incorporated Gallatin’s suggestions.

Gallatin had begun to address these issues shortly after his election to the House of Representatives and after he had succeeded in establishing a Committee on Ways and Means. He dealt with the matter in an important speech in

70. See Gerhard Casper, *Appropriations of Power*, 13 U. ARK. LITTLE ROCK L.J. 1, 17-20 (1990) (discussing the contours of the appropriations specificity issue during the early history of the Republic).

71. Jefferson, *supra* note 51, at 120-21.

72. For a summary of Gallatin’s career, see Henry Steele Commager, *Gallatin, Albert*, in 6 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 549 (Edwin R.A. Seligman ed., 1931). “Gallatin displayed moderation, industry, eloquence, integrity, a genius for administration and finance, a painstaking attention to detail, a mastery of parliamentary tactics, an enlightened humanitarianism and a broad and farsighted conception of democracy.” *Id.* at 549.

73. CUNNINGHAM, *supra* note 38, at 79.

74. Gallatin, Notes on President’s Message, *supra* note 56, at 68.

1797 and had fleeting success in getting Congress to tighten the statutory appropriations formulas in the 1797 civil and military appropriations bills. As leader of the Republican opposition, Gallatin undoubtedly was influenced by considerations of partisanship as he did battle over the power to disburse funds. However, as his 1801 initiative shows, he also genuinely desired to implement the rule of law in the area of government spending.⁷⁵

Not surprisingly, Hamilton regarded Jefferson's recommendations on appropriations specificity as a "deliberate design in the present Chief Magistrate to arraign the former administrations."⁷⁶ Taking the view of an older and wiser statesman, he called the recommendations "crude and chimerical"⁷⁷ and predicted that Jefferson's suggestions would be "impracticable and injurious; especially in seasons and in situations, when the public service demands activity and exertion."⁷⁸

Gallatin, on the other hand, believed he could combine the rule of law in government expenditures with practical concerns. He acknowledged that, in the past, under the construction given the Army and Navy appropriations act by the Treasury, "it seems to have been generally understood, that the whole of the monies . . . were to be considered as making but one general appropriation for each of those two objects."⁷⁹ In an 1802 response to a House Committee on Investigation, Gallatin declared the "most apparent defects in the present arrangements" to be "a want of specification in the several appropriations, defined by law with such precision, as not to leave it in the power of the secretary of the treasury, to affix an arbitrary construction, and to blend together objects which might be kept distinct, without any inconvenience."⁸⁰ Gallatin was also concerned about the relative lack of accountability on the part of the War and Navy Secretaries for monies drawn from the Treasury.⁸¹

Among the remedies he proposed was "that it be enacted, by a general law, that every distinct sum, appropriated by any law, for an object distinctly specified in the law, shall be applicable only to that object." However, far from being "impractical," Gallatin went on to say: "[A]s laws can be executed only so far as they are practicable, and unavoidable deviations will promote a general relaxation, it will be expedient, in the several appropriations laws, especially for the navy and war Departments, not to subdivide the appropriations, beyond what is substantially useful and necessary."⁸²

75. See Casper, *supra* note 1, at 16-18 (describing Gallatin's attempts to achieve greater appropriations specificity during the end of the Federalist period).

76. Alexander Hamilton, *The Examination* No. 11, *NEW-YORK EVENING POST*, Feb. 3, 1802, reprinted in 25 *THE PAPERS OF ALEXANDER HAMILTON*, *supra* note 45, at 514, 514.

77. *Id.*

78. *Id.* at 516.

79. Communication from the Secretary of the Treasury to the Chairman of the Committee, Appointed to Investigate the State of the Treasury In Answer to the Enquiries Made by the Committee 8 (Washington, D.C., William Duane 1802), *microprinted on* Early American Imprints, 2d Series, Shaw-Shoemaker Bibliography, 1801-1819, No. 3264 (American Antiquarian Society) [hereinafter Communication from the Secretary of the Treasury] (copy on file with the *Stanford Law Review*).

80. *Id.* at 18.

81. *Id.*

82. *Id.* at 19.

As it turned out, the issue was difficult, if not intractable, even for an administration bent on a fairly strict construction of the constitutional allocation of power over money. As early as April 1802, a bill was reported that meant to ensure control over expenditures. The bill provided that "every distinct sum of money . . . which by any law [is] appropriated for an object distinctly specified, shall be applicable only to such object."⁸³

Although Congress did not enact the 1802 bill, it did change the appropriations formulas in the 1802 appropriation acts and thus renewed the reforms that Gallatin had first pursued in 1797. While previous language seemed to appropriate lump sums for the Army and for the Navy, the new enacting clauses⁸⁴ forewent the mention of an aggregate sum and used the formula: "the following sums be, and the same hereby are *respectively* appropriated."⁸⁵ The innovation lies in the use of the plural "sums" instead of the singular "sum" and in the addition of the modifier "respectively."

Thus, while, for instance, the Military Appropriations Act of 1801 read "the sum of two millions, ninety-three thousand and one dollars, be and *is hereby appropriated*,"⁸⁶ the 1802 legislation employed the language: "That for defraying the several expenses in the military establishment . . . the following sums be, and the same are *respectively* appropriated . . ."⁸⁷ There were a few vagaries in the process, but by 1804, all general appropriations acts used this new approach. The military appropriation was much less specific than the civil side. But Gallatin preferred this bow to expediency and to his colleagues in the cabinet over a de facto relaxation that might have followed from attempting the impossible with stricter changes. In his view, the disregard of appropriation laws that was generally accepted in prior administrations had placed the executive branch above the law.

The size and specificity of contingency appropriations presented another area of contention. Gallatin fought against lump sum payments, especially with

83. House Bill of Apr. 8, 1802, 7th Cong., 1st Sess. § 1 (1802), *microformed on 7th Cong. 1801-1803, 1st Sess. & 2nd Sess.* (Library of Congress) (emphasis added); cf. CUNNINGHAM, *supra* note 38, at 115 (stating that, while the itemization was not noticeably greater, members of the House viewed it as a departure from previous practice). The bill is an example of "framework legislation," which is "[b]oth declaratory and regulatory in nature." Framework legislation, unlike ordinary legislation, regulates congressional and executive branch decisionmaking. See Gerhard Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 482 (1976) (discussing how to enforce constitutional constraints on executive actions in foreign and defense policy). Contemporary examples include the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified in scattered sections of various titles of U.S.C.) (establishing new procedures for Congress to control impoundment of funds by the executive branch), and the War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (1988)) (creating procedures for the president and Congress to use the armed forces).

84. The term "enacting clause" refers to the formulaic language used in appropriations bills to introduce each individual appropriation; thus an enacting clause may be used to indicate the specificity with which an appropriation is intended to be employed. See LEONARD D. WHITE, *THE JEFFERSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1801-1829*, at 112 (1956) ("The Federalists used language which made the items less than obligatory; the Republicans preferred, and for a short interval imposed, language which was intended to make the items binding.").

85. Act of May 1, 1802, ch. 46, § 1, 2 Stat. 183, 183 (1802) (emphasis added).

86. Act of March 2, 1801, ch. 18, § 1, 2 Stat. 108, 109 (1801) (emphasis added).

87. Act of May 1, 1802, ch. 18, § 1, 2 Stat. at 183 (emphasis added).

Navy Secretary Samuel Smith. In an 1803 letter to Jefferson, Gallatin strenuously objected to Navy requests for contingencies, and expressed the need for consistency with the positions their party expressed while in opposition: "I hope that you will pardon my stating my opinion on that subject, when you recollect with what zeal and perseverance I opposed for a number of years, whilst in Congress, similar loose demands for money"88

The matter was ironic in that the Federalists in Congress continued to adhere to Hamiltonian notions of flexibility and actively supported greater spending discretion for a Republican president. For example, in April 1806, David Williams, a newly elected Republican congressman from South Carolina, wanted to itemize lump sums of more than \$400,000 for "repair of vessels, store rent, pay of armorers, freight, and other contingent expenses" because he opposed "the system" by which appropriations were made.⁸⁹ Congressman Samuel Dana, a leading Federalist from Connecticut, said that the proposed amendment was "warranted by the former usage of the House" and by Jefferson's first annual message.⁹⁰ Dana felt that Williams' remarks forced before the House one underlying question: "Will you [the House] adhere to specific appropriations, or will you abandon them?"⁹¹ However, Dana went on to say that he did not favor specific appropriations for the Navy or Army.⁹² Apparently, most of the House felt the same way—Williams' motion lost 32-51.⁹³

B. *Deficiency*

A corollary to specificity was deficiency: What should happen when specific appropriations were insufficient to cover necessary expenditures? This, too, could be the subject of controversy between the branches. When, in 1806, Republican congressman Crowinshield moved to continue the so-called Mediterranean Fund for three years, John Randolph opposed the motion.⁹⁴ Randolph argued that the House would lose control over expenditures if the resolution passed, since they would not be able to revoke the grant without Senate approval. He added:

It is true that we have some check in making appropriations; but appropriations have become a matter of form, or less than the shadow of a shade, a mere cobweb of defence against expenditures. You have fixed limits, but the expenditure exceeds the appropriation; and those who disburse the money, are like a

88. Letter from Albert Gallatin to Thomas Jefferson (Jan. 18, 1803), in 1 *THE WRITINGS OF ALBERT GALLATIN*, *supra* note 56, at 117.

89. 15 *ANNALS OF CONG.* 1019-20 (1806) (statement of Rep. Williams).

90. *Id.* at 1020 (statement of Rep. Dana).

91. *Id.*

92. *Id.*

93. *Id.* at 1021.

94. As Republican leader in the House and as chairman of Ways and Means, Randolph had administered congressional control of appropriations with a measure of flexibility. But he broke with the administration over the Yazoo affair and other matters and became its leading critic on issues of adherence to appropriations. See HENRY ADAMS, *JOHN RANDOLPH* 122-53 (Boston, Houghton, Mifflin and Company 1898); WHITE, *supra* note 84, at 33-34.

saucy boy who knows that his grandfather will gratify him, and over-runs the sum allowed him at pleasure. As to appropriations I have no faith in them.⁹⁵

One year later, in 1807, Randolph cast the President as one such “saucy boy,” seizing yet another opportunity to criticize extraordinary expenditures made without prior congressional approval. After the *Chesapeake* affair, in which the British attacked an American warship thought to harbor British deserters, Jefferson believed it necessary to prepare for possible war with England. He authorized the military to purchase supplies in excess of appropriations. Instead of convening Congress early, he gambled on subsequent congressional approval—not a particularly risky gamble, given that the whole country was in an anti-British frenzy.⁹⁶ Ironically, perhaps the most succinct statement of a rationale for Jefferson’s approach can be found in a letter Hamilton had written eight years earlier to then Secretary of War McHenry: “[C]onfidence must sometimes be reposed in an after Legislative sanction and Provision.”⁹⁷

C. Adherence to General Principles

These matters were considered to involve the constitutional structure rather than mere politics. Such a view gains strong support from the fact that in the very last days of the Jefferson administration, Congress finally enacted the framework legislation on appropriations that Gallatin had sought at the outset. In both the Senate and the House, new allegations had been made about illegal disbursements on the military side of government.⁹⁸ By as early as 1802 (after the changes in the enacting clauses of the appropriations acts), Gallatin had begun to demand that warrants from the War and Navy Departments detail the specific appropriations against which they were drawn.⁹⁹ He proposed to Campbell, the chairman of Ways and Means, that law should require that “all contracts drawn by the Secretaries of War and of the Navy . . . should specify the particular appropriation to which the same should be charged.”¹⁰⁰ He made additional suggestions for tightening accountability overall. He also referred Campbell to the more general recommendations he had made in March of 1802.¹⁰¹

95. 15 ANNALS OF CONG. 1063 (1806) (statement of Rep. Randolph).

96. See Casper, *supra* note 70, at 21-23 (arguing that anti-British sentiment was so strong that Congress might have pushed Jefferson to take stronger action than he was willing to engage in).

97. Letter from Alexander Hamilton to James McHenry (Nov. 12, 1799), in 24 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 45, at 30, 31.

98. See 19 ANNALS OF CONG. 347-52, 1330-31 (1809) (recounting House and Senate inquiries regarding allegedly improper military disbursements).

99. See CUNNINGHAM, *supra* note 38, at 115-17 (describing Gallatin’s requests for warrants to specify the purpose of expenditures and the Secretary of the Navy’s responses).

100. Letter from Albert Gallatin to Representative G.W. Campbell (Feb. 4, 1809), *microformed on The Papers of Albert Gallatin*, Roll 18, RG56 (Rhistoric Publications).

101. *Id.* For Gallatin’s earlier recommendations, see Communication from the Secretary of the Treasury, *supra* note 79, at 18-21.

At the time Gallatin proposed these changes, Congress was preoccupied with repeal of the Embargo Act, Jefferson's greatest foreign policy failure.¹⁰² Yet Congress found time to implement Gallatin's request and, furthermore, finally to enact the framework provisions that Gallatin had proposed in the first year following "the revolution of 1800."¹⁰³ These provisions, described as "regulations to guard the expenditures of the public money,"¹⁰⁴ amended a statute that regulated the Treasury, War, and Navy Departments.¹⁰⁵ The 1809 statute, passed in the evening hours of the last day of the session, provided that "the sums appropriated by law for each branch of expenditure in the several departments shall be *solely* applied to the objects for which they are respectively appropriated."¹⁰⁶ The legislation, however, conferred authority on the president to shift funds within departments during the recess of Congress "if in his opinion necessary."¹⁰⁷

This latter provision is particularly interesting, since it made an effort to subject even emergencies, such as the *Chesapeake* confrontation, to the rule of law, by *granting* the executive explicit *legislative authority* to deviate from the specificity of appropriations. Notwithstanding that the Jeffersonians had been through eight years of "seasons and . . . situations" that had demanded "activity and exertion," the Jeffersonians continued to believe that "[t]he exigencies of the public service" could be attained within a framework of general rules.¹⁰⁸

This emphasis on rules, present even at the end of Jefferson's presidency, had been the target of Hamilton's criticism from the beginning. In his comprehensive critique of Jefferson's first annual message of 1801, Hamilton had written eloquently on appropriations specificity:

It is certainly possible to do too much as well as too little; to embarrass, if not defeat the good which may be done, by attempting more than is practicable; or to overbalance that good by evils accruing from an excess of regulation. Men of business know this to be the case in the ordinary affairs of life: how much more must it be so, in the extensive and complicated concerns of an Empire? To reach and not to pass the salutary medium is the province of sound judgment: To miss the point will ever be the lot of those who, enveloped all their lives in the mists of theory, are constantly seeking for an ideal perfection which never was and never will be attainable in reality. It is about this medium, not about general principles, that those in power in our government have differed¹⁰⁹

What Hamilton did not understand was that his dispute with Gallatin was not over "ideal perfection" against "sound judgment" but over the extent to which

102. Act of Dec. 22, 1807, ch. 5, 2 Stat. 451 (1807) (laying an embargo on all foreign goods), repealed by Act of March 1, 1809, ch. 24, § 19, 2 Stat. 528, 533 (1809).

103. See Communication from the Secretary of the Treasury, *supra* note 79, at 18; see also text accompanying notes 72-83 *supra*.

104. 19 ANNALS OF CONG. 1554 (1809) (statement of Rep. Alston).

105. Act of March 3, 1809, ch. 28, § 1, 2 Stat. 535, 535 (1809) (regulating the Treasury, Navy, and War Departments).

106. *Id.* (emphasis added).

107. *Id.*

108. Hamilton, *supra* note 76, at 516-17.

109. *Id.* at 514-15.

sound judgment normally depended on adherence to general principles. Neither Gallatin nor Jefferson himself got lost “in the mists of theory” when it came to governing. Indeed, Jefferson demonstrated his capacity to be at Hamilton’s “salutary medium” in handling an “extensive and complicated concern [] of an Empire,” namely, the Louisiana Purchase.¹¹⁰

VI. THE TREATY POWER: THE LOUISIANA PURCHASE

Most discussion of the Louisiana Purchase focuses on whether Jefferson had the constitutional power to acquire territory without a constitutional amendment.¹¹¹ Indeed, Jefferson’s reputation as president was tempered by his willingness to overcome his constitutional scruples and follow Madison, who had no qualms about expansion and the means of achieving it.¹¹² But the Louisiana Purchase also tested separation of powers precedents. That is, the tangle of principle, serendipity, and pragmatism that the Purchase represented involved various aspects of the separation of powers.

In his second annual message, given in December 1802, Jefferson referred to Louisiana in a single short paragraph: “The cession of the Spanish province of Louisiana to France . . . will, if carried into effect, make a change in the aspect of our foreign relations which will doubtless have just weight in any deliberations of the legislature connected with that subject.”¹¹³ The legislature indeed deliberated immediately, but on a matter Jefferson had failed to mention: Spain’s closing of the Port of New Orleans to American ships two months earlier. The House asked the President for papers regarding Spain’s action¹¹⁴ and engaged in lengthy debate on whether it had the authority, under constitutional separation of powers, to ask for diplomatic exchanges and whether it would be expedient to do so.¹¹⁵

At the same time it was debating its role in foreign relations, the House expressed sycophantic tendencies in a “sense of the House” resolution passed in support of the right of navigation and commerce on the Mississippi River. The deferential resolution included a statement that the House was “relying, with perfect confidence, on the vigilance and wisdom of the Executive.”¹¹⁶ A

110. See 4 MALONE, *supra* note 4, at 102 (“[I]f [Jefferson] sounded to Hamilton like a visionary theorist, he was to act like a pragmatist at certain crucial points in his administration In purchasing Louisiana he wisely veered from his customary financial procedure, though he did not abandon his financial objective.”).

111. See, e.g., CUNNINGHAM, *supra* note 38, at 58 (analyzing Jefferson’s 1803 decision not to seek a constitutional amendment for incorporation of Louisiana as “evidence of Jefferson’s willingness to abandon his out-of-power principles of strict construction”); 1 MORISON ET. AL., *supra* note 20, at 340 (stating that the Louisiana Purchase “put a severe strain on the Constitution,” but that fears of losing the opportunity made pursuing an amendment impossible).

112. My understanding of Madison in this regard has been influenced by James Patrick O’Rourke, James Madison and the Extending Republic, 1780-1820 (1991) (unpublished A.B. honors thesis, Harvard University, on file with *Stanford Law Review*).

113. Thomas Jefferson, Second Annual Message (Dec. 15, 1802), in 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 19, at 181, 183.

114. 12 ANNALS OF CONG. 280-81 (1802) (House Resolution).

115. *Id.* at 314-23, 325-39.

116. *Id.* at 340 (House Resolution).

motion to strike these words lost by a vote of 30-53,¹¹⁷ inspiring Representative Dana to decry a few days later, “What! ‘relying with perfect confidence in the Executive’—is this the language of the Constitution, as it respects any man?”¹¹⁸ Congress provided the President with a substantial degree of latitude. It appropriated \$2 million for the vague purpose of defraying “expenses which may be incurred in relation to the intercourse between the United States and foreign nations . . . to be applied under the direction of the President of the United States.”¹¹⁹ The appropriation was intended to enable the President to negotiate the purchase of New Orleans and the Floridas with France and Spain.¹²⁰ Interestingly, while the Constitution provides that only the Senate may “advise” on treaties, this legislation provided some measure of prior approval by the House based on its appropriations power.¹²¹ Reflecting this idea, the members of the House committee assigned to the matter of New Orleans and the Floridas remarked that they had “no information before them, to ascertain the amount for which the purchase can be made,” but that they hoped \$2 million would be reasonable.¹²²

Both houses discussed and passed the appropriation in secret sessions.¹²³ Indeed, secret expenditures for vaguely stated purposes and secret communications had been part of government practice since the First Congress of the United States.¹²⁴ The Framers assumed, as indicated by the Journal Secrecy Clause of the Constitution,¹²⁵ that the American people would sometimes benefit from secrecy.¹²⁶ Embracing this notion during the Louisiana negotiations, Jefferson supposedly told Senator Plumer, a Federalist from New Hampshire, that “[a] great point [had now been] gained; a new precedent established in our government—the passage of an important law by Congress, in *secret session*.”¹²⁷

While the details of the Louisiana negotiations following Congress’ \$2 million appropriation fall outside the scope of this essay,¹²⁸ a few points are relevant to the separation of federal powers. James Monroe, the special envoy who joined Minister to France Robert Livingston in France to negotiate with the French government, arrived in Paris on April 12, 1803, one day after Charles

117. *Id.*

118. *Id.* at 359 (statement of Rep. Dana).

119. *Id.* at 374 (report of the committee charged with evaluating the proposed appropriation).

120. *Id.* at 373-74.

121. *See id.* at 374 (implying prior approval by comparing the resolution “authorizing” the President to borrow \$2 million to the “similar course” of appropriation “prior to” negotiations with Algiers).

122. *Id.*

123. The Senate vote was a narrow 14-12. *See id.* at 104.

124. *See Casper, supra* note 1, at 245-55 (recounting secret discussions between the Washington administration and Congress during negotiations to free American hostages in Algiers).

125. U.S. CONST. art. I, § 5, cl. 3 (“Each House shall keep a Journal . . . [and] publish the same, excepting such Parts as may in their Judgment require Secrecy . . .”).

126. *See Gerhard Casper, Comment: Government Secrecy and the Constitution*, 74 CAL. L. REV. 923, 924-25 (1986) (defending the need for confidentiality and outlining its constitutional support).

127. WILLIAM PLUMER JUNIOR, LIFE OF WILLIAM PLUMER 255-56 (Boston, Phillips, Sampson and Company 1857), *quoted in* EVERETT SOMERVILLE BROWN, THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE: 1803-1812, at 13 (1920).

128. For a comprehensive account, see 4 MALONE, *supra* note 4, at 284-332.

Talleyrand, the French foreign minister, had asked Livingston whether the United States would buy all of Louisiana. Irving Brant has argued that the French first offered Louisiana to the United States negotiators because of an April 7 London *Times* account of the saber-rattling actions of the United States Senate.¹²⁹ Apparently, through this newspaper, Napoleon had learned that on February 25, the Senate had unanimously authorized the President “whenever he shall judge it expedient . . . to take effectual measures” to arm 80,000 militia and to make other preparations for war with France.¹³⁰ On April 30, 1803, the parties signed a treaty in Paris for the American purchase of Louisiana on May 2. The final purchase price was \$15 million. On June 25, Secretary of State Madison, by this time aware of France’s interest in selling all of Louisiana, but unaware that a treaty had already been signed, advised Monroe not to worry about the lack of prior approval:

The dawn of your negotiations has given much pleasure and much expectation. . . . The purchase of the country beyond the Mississippi was not contemplated in your powers because it was not deemed at this time within the frame of probability. . . . It is presumed that the defect will not be permitted either by yourself or by the French government to embarrass, much less suspend, your negotiations on the enlarged scale.¹³¹

Jefferson did not learn of the treaty until July 3, 1803, and the *National Intelligencer* published the news on Independence Day.¹³² The official papers arrived in the United States on July 14. Since the treaty required the exchange of ratifications within six months of its April 30 date, the President convened Congress three weeks early, on October 17, in order to meet the October 30 deadline.¹³³ In his third annual message, the President of the United States suggested to Congress that it had “sanction[ed]” the acquisition of New Orleans “and of other possessions in that quarter” when it passed the “provisional appropriation of two millions of dollars.”¹³⁴ Then, applying strict procedure, Jefferson explained that once the treaty documents “have received the constitutional sanction of the senate, they will without delay be communicated to the representatives also, for the exercise of their functions . . . within the powers vested by the constitution in Congress.”¹³⁵

The Senate consented to the treaty on October 20, and the next day the exchange of ratifications created a binding treaty obligation between the United States and France before any action by the House. On October 22, Jefferson sent the treaty conventions to the House “for consideration in your Legislative capacity,”¹³⁶ but excluded the diplomatic documents he had provided to the

129. IRVING BRANT, *JAMES MADISON: SECRETARY OF STATE 1800-1809*, at 126 (1953).

130. 12 *ANNALS OF CONG.* 255 (1802) (Senate Resolution); see BRANT, *supra* note 129, at 126.

131. BRANT, *supra* note 129, at 132.

132. 4 MALONE, *supra* note 4, at 284 (quoting Letter from James Madison to James Monroe (May 31, 1803)).

133. 4 *id.* at 302.

134. Thomas Jefferson, Third Annual Message (Oct. 17, 1803), in 8 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 19, at 266, 268.

135. *Id.* at 269.

136. 13 *ANNALS OF CONG.* 382 (1803) (message of President Jefferson).

Senate. Two days later, this omission sparked a sideshow that challenged Jefferson's commitment to consistency and adherence to precedent.

Seven years earlier, in March 1796, President Washington had refused to provide the Representatives of the Fourth Congress with the Jay Treaty papers.¹³⁷ Washington had justified his refusal by invoking the constitutional separation of powers, which gave the House no role in the treaty-making process. At that time, the Republican minority in the House favored the resolution calling for the papers.¹³⁸ Similarly, Federalist congressman from Connecticut Roger Griswold now requested that Jefferson provide treaty documents to establish whether France had effectively acquired title from Spain before transferring such title to the United States.¹³⁹

In turn, John Smilie, a Republican from Pennsylvania, noted that Griswold had been on the other side of the issue in the Jay Treaty case, when he had opposed the House's request for documents.¹⁴⁰ Smilie himself had served in the Third but not the Fourth Congress, and now suggested that Representatives who had agreed with Washington on the Jay Treaty should be bound by their original position: "Not that I approve it, or am governed by it; though it ought, in my opinion, to be a rule on this occasion to those who coincided with him."¹⁴¹

This appeal to consistency could, of course, apply with equal force to the Republicans. Indeed, the House Republican leader, John Randolph, who had not been a member of the Fourth Congress, objected to Griswold's motion on the ground that delay would jeopardize the best interests of the union. Randolph made a lame attempt to distinguish the Republicans' earlier position by contrasting "the public abhorrence" of the Jay Treaty to "the acclamations of the nation" hailing the Louisiana treaty.¹⁴² The appeal to consistency must have convinced some Republicans, since the Griswold motion lost by the narrow margin of two votes, 57-59,¹⁴³ even though there were 103 Republicans in the House, versus only thirty-nine Federalists.¹⁴⁴

As historian Dumas Malone has suggested, the defeat of the Griswold resolution enabled Jefferson to avoid the embarrassment of refusing the request¹⁴⁵ because, as Secretary of State, Jefferson had earlier favored a liberal interpreta-

137. John Jay negotiated a treaty with Great Britain whereby, in exchange for restrictions on American commerce, the British promised to withdraw from the western posts and to maintain peace. President Washington kept the treaty secret for three months prior to sending it, and the pertinent documents, to a special session of the Senate. Six months later, when the treaty had been ratified and the House convened, the President officially informed the House of the treaty and requested funds to pay the arbitral commissions. The House, critical of the treaty, requested a copy of all the documents sent to the Senate: Washington refused. SOAFER, *supra* note 2, at 85-86; Casper, *supra* note 1, at 258-60.

138. 5 ANNALS OF CONG. 759-62 (1796).

139. 13 ANNALS OF CONG. 385 (1803) (statement of Rep. Griswold).

140. *Id.* at 392 (statement of Rep. Smilie).

141. *Id.*

142. *Id.* at 338-39 (statement of Rep. Randolph).

143. *Id.* at 419; see 4 MALONE, *supra* note 4, at 327 ("The size of the affirmative vote may have reflected the desire of the Republicans not to be adjudged inconsistent with their past; it certainly indicated no widespread hostility to the purchase . . .").

144. CUNNINGHAM, *supra* note 38, at 274.

145. 4 MALONE, *supra* note 4, at 327.

tion of the role of the House in foreign affairs.¹⁴⁶ Actually, even in the case of Louisiana, it appears that Jefferson had originally intended to present the treaty before both houses simultaneously in order to avoid delay. However, Madison and Gallatin both objected to the President's scheme on constitutional grounds. In comments on Jefferson's third annual message, Gallatin wrote, "The House of Representatives neither can nor ought to act on the treaty until after it is a treaty . . ." ¹⁴⁷ Madison stated even more directly, "[T]he theory of our constitution does not seem to have [provided for] the influence of deliberations . . . of the [House] of [Representatives] on a Treaty depending in the Senate."¹⁴⁸

After the ratification of the Louisiana Purchase, the House considered a Senate bill on October 27 to authorize the President "to take possession of and occupy the territories ceded by France to the United States."¹⁴⁹ The bill placed all military, civil, and judicial powers in the new territories under the direction of the President "until Congress shall have made provision for the temporary government of the said Territories."¹⁵⁰ John Randolph, still the Republican leader, spoke first and objected, on separation of powers grounds, to the delegation as too sweeping in duration.¹⁵¹ He stressed that if the bill were adopted, the executive branch could prevent the repeal of the delegation through the veto power and a small minority of either house. Therefore, Randolph proposed an amendment to terminate the delegation of power at "the expiration of the present session of Congress," unless Congress made earlier "provision for the temporary government."¹⁵² Roger Griswold found Randolph's compromise insufficient: "[W]e are about [to] mak[e] the President the legislator, the judge, and the executive of this territory. I do not . . . understand that, according to the Constitution, we have a right to make him legislator, judge, and executive, in any territory belonging to the United States."¹⁵³

It is interesting to note that Congress debated Griswold's objection at some length. Some Federalists had fun at Republican expense. Thus, Federalist representative Manasseh Cutler thought that the President had been "made as despotic as the Grand Turk."¹⁵⁴ Senator Plumer observed wryly, "Had such a bill been passed by federalists, the Democrats would have denounced it as *monarchal*; but when enacted by the *exclusive friends* of the people, it is pure *republican*."

146. See Casper, *supra* note 1, at 259 (stating that Jefferson had told Madison at the time of the Jay Treaty controversy that he favored "inclusion of both branches of the legislature in the Algiers agreements").

147. Remarks on President's Message from Albert Gallatin to Thomas Jefferson (Oct. 4, 1803), in 1 THE WRITINGS OF ALBERT GALLATIN, *supra* note 56, at 156, 156.

148. Jefferson, *supra* note 134, at 266 n.1 (Madison's notes of October 1, 1803, on a draft of Jefferson's message).

149. 13 ANNALS OF CONG. 487 (1803) (quoting the Senate bill).

150. *Id.* at 498 (quoting the Senate bill).

151. *Id.* (statement of Rep. Randolph).

152. *Id.*

153. *Id.* at 500 (statement of Rep. Griswold).

154. Letter from Rev. Manasseh Cutler to Rev. Dr. Dana (Nov. 30, 1803), in 2 LIFE, JOURNALS AND CORRESPONDENCE OF REV. MANASSEH CUTLER, LL.D. 147, 148 (William Parker Cutler & Julia Perkins Cutler eds., Cincinnati, Robert Clarke & Co. 1888), *quoted in* BROWN, *supra* note 127, at 89.

canism.”¹⁵⁵ However, the other participants did not appear to view the issue in a primarily partisan manner. A freshman Republican from Virginia, John Jackson, summed up the concerns in view of congressional separation of powers precedent. For members of any congressional majority, Jackson’s caution and rationale sound all too legitimate. As Jackson explained:

When I recur to the Constitution, I find that though it does not expressly say, the Legislative, Executive, and Judicial powers shall be distinct, as some constitutions lately formed do, yet it amounts in fact to the same thing, by delegating special powers exclusively to particular departments. I believe also the President to be inimical to the extension of Executive power. I am not afraid of delegating such power, if not inconsistent with the Constitution, because I have so much confidence in the President, as to be convinced that he would not abuse it. But I believe principle ought, under all circumstances, to be respected; and under present circumstances, though we may have a President so congenial to our wishes. What, if hereafter we should deem it important to oppose the delegation of such power? gentlemen, in favor of such a delegation will say, here is a precedent set by yourselves, and thus preclude us, on the score of consistency, from opposing the measure.¹⁵⁶

In the end, the Senate only amended the bill, as suggested by John Randolph, and passed it after adding new language. This language subjected executive power to a different kind of restraint; it clarified that the purpose of the delegation of power to the President was to maintain and protect “the inhabitants of Louisiana in the full enjoyment of their liberty, property, and religion.”¹⁵⁷

While Representative Jackson worried about principle, precedent, and consistency in separation of powers practice, Jefferson worried about constitutional construction and the will of the people. By the fall of 1803, Jefferson wanted a constitutional amendment in order to legitimate the Louisiana Purchase. He wrote to Wilson Cary Nicholas: “I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a construction which would make our powers boundless. Our peculiar security is in possession of a written Constitution. Let us not make it a blank paper by construction.”¹⁵⁸

Earlier, in the summer of 1803, the President had been struck by the “scrape” in which he found himself regarding Louisiana. Jefferson was concerned that he had exceeded his authority as the people’s “servant” when he acquired Louisiana without specific constitutional authority.¹⁵⁹ In a remarkable letter to John Breckenridge, dated August 12, 1803, from Monticello, Jefferson discussed his uneasy resolution of the dilemma:

155. WILLIAM PLUMER’S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE 1803-1807, at 27 (Everett Somerville Brown ed., 1923), *quoted in* BROWN, *supra* note 127, at 89.

156. 13 ANNALS OF CONG. 511 (1803) (statement of Rep. Jackson).

157. *Id.* at 545 (Senate Resolution).

158. Thomas Jefferson, Drafts of an Amendment to the Constitution (July 1803), in 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 19, at 241, 247 n.1 (quoting Letter from Thomas Jefferson to Wilson Cary Nicholas (Sept. 7, 1803)).

159. *Id.* at 244 n.1 (quoting Letter from Thomas Jefferson to John C. Breckenridge (Aug. 12, 1803)).

The Executive in seizing the fugitive occurrence which so much advances the good of their country, have [*sic*] done an act beyond the Constitution. The Legislature in casting behind them metaphysical subtleties, and risking themselves like faithful servants, must ratify & pay for it, and throw themselves on their country for doing for them unauthorized what we know they would have done for themselves had they been in a situation to do it.¹⁶⁰

After Jefferson left public service, he stated more bluntly than others dared, "To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means."¹⁶¹

VII. CONCLUSION

Was fortuity turning Jefferson into a "monarch" after all? Hardly, although Jefferson feared that perception and he exaggerated the differences between "the monarchist" Hamilton and himself. As Jefferson's decisions in Tripoli and spending appropriations have shown, there can be little question that, on the whole, Jefferson strove to abide by the letter and spirit of the Constitution. He was the most forceful chief executive to date; yet he also worried about his accountability to the people. He considered himself their agent, and it was that agency relationship—rather than a false confidence in Hamiltonian "sound judgment"—that afforded Jefferson the hope of "indemnity," of an ultimate vindication for legal trespasses. Jefferson interpreted that agency relationship according to the written "instructions" of the Constitution. However, occasionally, as during the Louisiana Purchase, he saw his role like

the case of a guardian, investing the money of his ward in purchasing an important adjacent territory; & saying to him when of age, I did this for your good; I pretend to no right to bind you: you may disavow me, and I must get out of the scrape as I can: I thought it my duty to risk myself for you.¹⁶²

This analogy of the guardian was rather maladroit. After all, the president, the Congress, and the judiciary are not guardians of a minor, but the agents of a sovereign.¹⁶³ But then Jefferson's reference to guardianship may have been no more than an expression of his lifelong ambivalence about the pursuits and burdens of public life that he felt "had nothing in them agreeable."¹⁶⁴

160. *Id.*

161. Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), in 9 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 19, at 279, 279.

162. Jefferson, Drafts of an Amendment, *supra* note 158, at 244 n.1 (quoting Letter from Thomas Jefferson to John C. Breckenridge, *supra* note 159).

163. The 1780 Constitution of Massachusetts had stated this principle: "All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them." MASS. CONST. of 1780 art. V, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 43, at 1888, 1890.

164. Jefferson, *supra* note 8, at 681 (recounting a conversation with Washington of October 1, 1792); *see also* Letter from Thomas Jefferson to James Monroe (May 20, 1782) in JEFFERSON, WRITINGS, *supra* note 2, at 777, 777-80 (expressing Jefferson's distaste for public life); text accompanying notes 8-10 *supra*.

When Jefferson finally escaped from “the scrape” of public office in 1809, he expressed his hope that, on the whole, the people had approved of him as their agent. During his last days in office, he wrote Dupont de Nemours: “Never did a prisoner, released from his chains, feel such relief as I shall on shaking off the shackles of power. . . . I thank God for the opportunity of retiring from [political passions] without censure, and carrying with me the most consoling proofs of public approbation.”¹⁶⁵ The “shackles of power” that Jefferson shook off were not the chains imposed by constitutional constraints, such as those incident to the separation of powers; rather, to his mind, it was power itself that had chained him. “Mr.” Jefferson did indeed, as a president should, think of himself as an agent rather than a principal.

165. Letter from Thomas Jefferson to P.S. Dupont de Nemours (Mar. 2, 1809), in JEFFERSON, WRITINGS, *supra* note 2, at 1203, 1203.