# James Madison

## *Helvidius* No. 1

## August 24, 1793

*In the wake of Alexander Hamilton's Pacificus essays, Thomas Jefferson wrote to James Madison on July 7, 1793, exhorting him to "take up your pen, select the most striking heresies, and cut [Hamilton] to [pieces] in the face of the public." Madison took up that charge by authoring a series of five essays under the pen name Helvidius. Each essay touched on different aspects of the constitutional question of the executive's authority with respect to matters of foreign policy, war, and peace. Madison's conclusion was that Hamilton's understanding of executive power was not only wrong but also dangerous.*

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

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

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

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

It would be of little use to enter far into the first source of information, not only because our own reason and our own constitution, are the best guides; but because a just analysis and discrimination of the powers of government, according to their executive, legislative and judiciary qualities are not to be expected in the works of the most received jurists, who wrote before a critical attention was paid to those objects, and with their eyes too much on monarchical governments, where all powers are confounded in the sovereignty of the prince . . .

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

execute laws, is to say, that the executive department naturally includes a legislative power. In theory, this is an absurdity—in practice a tyranny.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

There can be no relation worth examining between this power and the general power of making treaties. And instead of being analogous to the power of declaring war, it affords a striking illustration of the incompatibility of the two powers in the same hands. Those who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether *a war ought* to be *commenced, continued,* or *concluded.* They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws.

"He may require the opinion in writing of the principal officers in each of the executive departments upon any subject relating to the duties of their respective offices; and he shall have

power to grant reprieves and pardons for offences against the United States, except in case of impeachment." These powers can have nothing to do with the subject.

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

"He shall take care that the laws shall be faithfully executed and shall commission all officers of the United States." To see the laws faithfully executed constitutes the essence of the executive authority. But what relation has it to the power of making treaties and war, that is, of determining what the *laws shall be*with regard to other nations? No other certainly than what subsists between the powers of executing and enacting laws; no other consequently, than what forbids a coalition of the powers in the same department.

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

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

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

Whence then can the writer have borrowed it?

There is but one answer to this question.

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