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THE PACIFICUS-HELVIDIUS DEBATES: A FOUNDING STRUGGLE WITH IMPLICATIONS TODAY

Abstract. The Pacificus-Helvidius debates, the public argument between Alexander Hamilton and James Madison in 1793 over President Washington's Neutrality Proclamation, were a founding struggle that carries implications for today. Far from an isolated instance in American history, the debates are the first of many that address the extent of presidential power in American governance. Hamilton and Madison's strong and weak points are analyzed—within context of their collaboration in *The Federalist*, personal letters, and the theorists important in understanding them—and re-applied to the contemporary debate surrounding the Bush presidency. Overall, Americans need to be cautious against the introduction of an overly powerful executive because, even though government procedure may be more efficient and swift, the possibility arises for unconstitutional precedents to be formed and imprudent actions to be taken. While both of these are, by necessity, permissible outcomes according to the executive power model Pacificus argues, neither is desirable; Helvidius provides the counter to Pacificus that makes the Pacificus-Helvidius debates a complete doctrine for understanding and critiquing executive power in America.

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For my family

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The struggle between Congress and the President to direct the nation is not unique to our time. When Congress appears too strong, or the President appears to overstep constitutional boundaries, many voices are eager to defend the branch they favor. Those willing to debate have yielded perhaps some of the most interesting and productive conversations about the functioning of American government. Often, their arguments are so spirited they elevate the disagreement to the core of American principles and the future of American society.

For example, a *New York Times* editorial published September 15, 2006, (in reference to the Military Commissions Act of 2006) complained that lawmakers, "stampeded by the fear of looking weak on terrorism,…are rushing to pass a bill demanded by the president that would have minimal impact on antiterrorist operations but could cause profound damage to justice and the American way." Two days later, John Yoo, a professor at the University of California Berkeley School of Law and former deputy assistant attorney general, contributed the opposing argument, and applauded the ascendant Bush presidency. He stated, "Congress has for years been avoiding its duty to revamp or repeal outmoded parts of bygone laws in the light of contemporary threats. We have needed energy in the executive branch to fill in that gap. Congress now must act to guide our counterterror policy, but it should not try to micromanage the executive branch, particularly in war, where flexibility of action is paramount."

In the United States, the most significant debate of this kind occurred in 1793 between Alexander Hamilton and James Madison. The Pacificus-Helvidius debates, named for the writers' pseudonyms in the press, provide a glimpse into two Founders' thoughts on congressional and presidential authority, and display the same passionately opposed views as those above.

Here I analyze the Pacificus-Helvidius debates, and argue they form a guide to the proper exercise of executive power that may be re-applied to contemporary issues surrounding the Bush Doctrine and the War on Terror. The analysis requires an understanding of several contexts: the situation in 1793 and other Founding episodes, the thought of Hamilton and Madison outside the debates themselves (from *The Federalist*, personal letters, and to a lesser extent, the theorists important in understanding them), and the modern executive preceding the Bush administration.

I. Overview: The Pacificus-Helvidius Debates as Precedent-Setting

Tradition defines two founding moments in the history of the United States: the signing of the Declaration of Independence in 1776, and the ratification of the Constitution in 1789. Although certainly two critical landmarks, after 1789 the same leaders that produced those two documents began a more-prolonged, but no less important period in the founding—precedent-setting.

Many early precedents were executive in nature, well-known, and uncontroversial: the determination of how presidents would be addressed, Washington's formation of a cabinet, and the unofficial maximum of two four-year terms for a president.

However, the first highly contested precedent came April 22, 1793,[1] when President Washington unilaterally issued a Proclamation declaring neutrality in regard to the war between France and Austria, Prussia, Great Britain and the Netherlands. Leading up to that date, the U.S. was faced with the Neutrality Crisis[2]; there was a clear need for the government to decide a proper course, especially considering the Treaty of Alliance with France dating back to 1778.

[1] Though perhaps debatable whether this was the first highly contested precedent, as a matter of policymaking and functioning of the new government, I firmly believe it is. When the outbreak of war in Europe seemed eminent in 1792, the cabinet discussed what the president's response would be and what his obligations to Congress were, but this was more hypothesizing than precedent-setting. See note 2, 320 and 327-28, for a brief history of the period.
[2] Saikrishna B. Prakesh and Michael D. Ramsey., "The Executive Power over Foreign Affairs," *Yale Law Journal* 111, no. 2 (2001): 297.

After Washington had "declare[d] the disposition of the United States"[3] with the Proclamation, Alexander Hamilton defended it in the press under the pseudonym "Pacificus."

Over a one month period from June 29 to July 27, 1793, Hamilton produced seven lengthy letters in defense of the Proclamation. He argued a wide array of issues: the interests and military capabilities of the U.S., the obligations of the U.S. in regard to the Treaty, and most importantly, the constitutional authority of the President to decide and publicly pronounce the nation's "disposition."

Hardly a week had passed since the appearance of Pacificus when Thomas Jefferson (who recognized the pen name by Hamilton's similar cabinet arguments[4]) wrote to James Madison on July 7, 1793, pressing him:

> Nobody answers him [Hamilton], & his doctrine will therefore be taken for confessed. For god's sake, my dear Sir, take up your pen, select the most striking heresies, and cut him to pieces in the face of the public. There is nobody else who can & will enter the lists with him.[5]

Madison did, albeit reluctantly, citing a lack of information on cabinet meetings and President Washington's opinion of the Pacificus essays, among other things. By the end of July, 1793, he responded saying "I have forced myself into the task of a reply,"[6] which took the form of five essays published from August 24 to September 18, 1793, under the assumed name "Helvidius." Historically, the specific question the debates addressed—the ability of a president to single-handedly declare the state of the nation in foreign affairs—arguably faded in significance when the third Congress convened. In late 1793 Congress formally gave President Washington their blessing: said the Senate, "We deem it [the Proclamation] a measure well-timed and wise,

[3] Alexander Hamilton and James Madison, *The Pacificus-Helvidius Debates of 1793-1794: Toward the Completion of the American Founding*, ed. Morton J. Frisch (Indianapolis: Liberty Fund, 2007), 1.
[4] Thomas Jefferson, Letter to James Madison dated June 29, 1793, in *The Republic of Letters: The Correspondence between Thomas Jefferson and James Madison 1776-1826*, ed. James Morton Smith (New York and London: W.W. Norton & Company, 1995), 791.
[5] Ibid., Letter to James Madison dated July 7, 1793, in *The Republic of Letters,* 792.
[6] James Madison, Letter to Thomas Jefferson dated July 30, 1793, in *The Republic of Letters*, 797.

manifesting a watchful solicitude for the welfare of the nation, and calculated to promote it."[7] They did not raise constitutional concerns, instead giving the Proclamation the force of law with the Neutrality Act of 1794.

Despite the political resolution of the issue and the deferral of Congress to the president, the Pacificus-Helvidius debates provide a unique view into a significant disagreement between two Founders who had famously collaborated in *The Federalist* just five years before. Further, Hamilton and Madison were influenced by the same theorists, held similar conceptions of human nature, and nevertheless, as the debates reveal, differed in their interpretation of an important area of the Constitution. At a time when the infancy of the new nation made every action taken (or not taken) of paramount importance, two of the most important figures in the founding of that nation battled over the extent of executive power in a Constitution for which both served as draftsmen. It would be the first, but certainly not the last, debate over the constitutional extent of presidential power.

And as the first of many, the debates have transcended their specific arguments directed at the Neutrality Proclamation, and should be studied as opposing views on legislative and executive authority in American government. Historically, the decision to go to war or to issue the Neutrality Proclamation matters relatively little. One might play a "what if?" game with history and ask, "what if the U.S. had entered the conflict?"—but such an exercise is rarely productive.

In contrast, Hamilton and Madison's arguments are immortalized in the written word, arguments employed just as easily then as now. The precedent of presidential power in foreign affairs has been set, but the arguments justifying the extent of that power are always open for debate. Just as the *New York Times* editorial board and Yoo clashed over legislative and

[7] The Annals of Congress (December 9, 1793), 18. The House resolution can be found at December 6, 1793, 138.

executive power, so too did Hamilton and Madison. Additionally, considering the often understandable urge to look to the Founders for guidance in American government, the Pacificus-Helvidius debates provide us with exactly that. Importantly, because they present conflicting views, the validity of Hamilton and Madison's arguments must be closely examined if they are to be used as a guide for critiquing the contemporary situation.

Part of the Constitution's genius is its ability to delegate power while leaving its proper exercise ambiguous. Though the ambiguity is retained today, the presidency has taken a more preeminent role in the function of government, a reflection of the strength of Hamilton's arguments, and the reason why executive power is the primary focus of this essay. As an early attempt to clarify what the Constitution left unwritten, the Pacificus-Helvidius debates are a supreme example; as a window to an overlooked founding period, precedent-setting, they are unique, requiring careful examination to understand how they may be used to critique the contemporary situation. At times, executive power does not conform to what Pacificus describes, and while Madison's argument becomes untenable in some of the Helvidius letters, this should neither overshadow his valid (or even prophetic) assertions which, in their counter to Pacificus, make the Pacificus-Helvidius debates a complete doctrine of executive power.

II. Hamilton's Pacificus: The Model of American Executive Power

As previously mentioned, Hamilton's arguments in the Pacificus essays offer a variety of arguments to defend the Proclamation—only the first essay, considered the most controversial, delves significantly into constitutionality. The others are important to analyze, if only briefly, because they offer the complete argument for executive action in the Neutrality Crisis. Overall, this produces a model of executive power which relies on a broad constitutional interpretation

and situational necessity of action, both of which are needed to truly understand modern executive power.

Pacificus II through VII

In Pacificus II, Hamilton challenges the nature of the alliance with France. He cites the second article of the Treaty of Alliance, which defines it as defensive.[8] This allows him to conclude the first point, stating, "France then being on the *offensive* in the war, in which she is engaged, and our alliance being *defensive* only, it follows that the *casus foederis* or condition of our guarantee cannot take place."[9] The reason Hamilton considered it an offensive war carries implications for today. The new French government declared its intention to assist people of other nations in overthrowing their governments and instituting democracy. Hamilton gives a fiery response:

> When a Nation has actually come to a resolution to throw off a yoke, under which it may have groaned, and to assert its liberties—it is justifiable and meritorious in another nation to afford assistance to the one which has been oppressed & is *in the act* of liberating itself; but it is not warrantable for any Nation *beforehand* to hold out a general invitation to insurrection and revolution, by promising to assist *every people* who may *wish* to recover their liberty…[10]

Here, we get a picture of what actions Hamilton deems "justifiable" and "meritorious" for a nation (and thus its executive) and what he calls "not warrantable." In Pacificus III Hamilton elaborates on this realist position, stating that war in Europe is not in the national interest. He calls self-preservation the "first duty of a nation,"[11] and asserts that the war would sincerely endanger America's very existence. Pacificus lays out a broad theory of executive power in Pacificus I, but here is its prudential limit. The Bush administration has, for the most part, used

[8] From the Treaty of Alliance Between the United States and France, 1778: "*Article 2:* The essential and direct End of the present defensive alliance is to maintain effectually the liberty, Sovereignty, and independence absolute and unlimited of the said united States, as well in Matters of Gouvernement as of commerce." (See Avalon Project at Yale Law School, http://www.yale.edu/lawweb/avalon/avalon.htm)
[9] Alexander Hamilton, "Pacificus II," in *The Pacificus-Helvidius Debates*, 21.
[10] Ibid., 22-23.
[11] Ibid., "Pacificus III," 27.

its broad executive power constitutionally, but this does not mean it has done so in a way that is "justifiable," "meritorious," or in the national interest. This is a strange characteristic of executive power that will be explored more thoroughly later.

In the fourth Pacificus essay, Hamilton deftly challenges a major critique of the Proclamation—many Americans at the time felt a deep sense of gratitude toward France immediately following the Revolutionary War, and felt they should reciprocate. "Faith and justice between nations," Hamilton counters, "are virtues of a nature sacred and unequivocal… But the same cannot be said of gratitude."[12] Whereas the opportunity to show gratitude may occur every day between individuals, "among nations they perhaps never occur."[13] Consistent with his realism, interest is the defining motive that explains state action for Hamilton, and in the fifth essay, he ponders the reasons for French assistance during the Revolution. The French were bitter after the loss of many overseas possessions during the Seven Years' War, suffering from a "wounded pride."[14] The Revolution gave them the opportunity to restore their pride and simultaneously rob the British of their American colonies.

Furthermore, Hamilton asserts that King Louis XVI is the one to whom gratitude is owed (if gratitude were the proper term to explain his assistance), not the French nation. "If there was any kindness in the decision" to aid the Americans, Hamilton says, "demanding a return of kindness from us, it was the kindness of Louis the XVI—his heart was the depository of the sentiment."[15] So even if the case for gratitude were accepted, the U.S. was certainly not indebted to the leaders of the French Revolution at the time. Hamilton continues this argument in Pacificus VI, pointing out the differences between 1778 and 1793. Considering all the problems presented in previous essays—the nature of the Treaty of Alliance, the French interest in

[12] Ibid., "Pacificus IV," 32.
[13] Ibid., 33.
[14] Ibid., "Pacificus V," 35.
[15] Ibid., 38.

assisting the U.S., and the fact that it was King Louis XVI's decision—Hamilton points to the "utter disparity between the circumstances of the service *to be rendered*, and of the *service received*."[16]

The seventh letter of Pacificus concludes the series by addressing the final argument of those who opposed the Proclamation, that it was altogether unnecessary, imprudent. The Neutrality Crisis created a very delicate situation internationally, as wartime France vied for U.S. support, and domestically, as some individual citizens gave it. In Hamilton's words, "the policy on the part of the Government of removing all doubt as to its own disposition, and of deciding the condition of the UStates in the view of the parties concerned became obvious and urgent."[17] In an emergency situation, an impending war it could not afford to fight, U.S. inaction was the true imprudence, and Hamilton's realist version of prudence, stemming from a strong executive, could address this. With the Proclamation, Washington quickly satisfied both the main needs of the Crisis—making foreign powers *and* U.S. citizens formally aware of the nation's stance in the war. But, implicit in this is the President's authority to do so, a point Hamilton reiterates at the conclusion of the Pacificus essays. As "The constitutional organ of intercourse between the UStates & foreign Nations—whenever he [the President] speaks to them, it is in that capacity; it is in the name and on behalf of the UStates."[18] It is the sole mention of the presidential constitutional authority outside Pacificus I, and one which presidents have claimed ever since.

Pacificus I: A Defense of Constitutionality

Overall, the Pacificus essays forcefully defend neutrality on a variety of grounds. But, as the main essay on the president's constitutional authority in foreign affairs, Pacificus I stands out

[16] Ibid., "Pacificus VI," 44.
[17] Ibid., "Pacificus VII," 49.
[18] Ibid., 52.

among the seven—the most direct, controversial, and lasting in its influence as an interpretation of the Constitution.

After a short introduction to the Proclamation and the points he will cover later, Hamilton immediately turns to the branches of government and their function. Assuming that a government should be able to accomplish any end,[19] he tries to find the branch given the means for the "preservation of peace."[20] In Hamilton's view, it cannot belong to the legislative branch, which is "charged neither with *making* nor *interpreting* Treaties," meaning it is "not naturally that Organ of Government which is to pronounce the existing condition of the Nation."[21] Likewise, it cannot belong to the judicial branch, which is charged with interpreting the law in specific cases brought before it. By the process of elimination, the power to declare the existing state of the nation, according to Hamilton, belongs to the executive branch.

However, this logic depends on an interpretation of Article I (outlining Congress's power) and Article II (outlining the president's) of the Constitution. Hamilton does this, citing Section 1 of the latter: "The executive Power shall be vested in the President of the United States of America." Though subtle, this is quite a different choice of words than Article I, Section 1, which states: "All legislative Powers *herein granted* shall be vested in a Congress of the United States" (emphasis mine). Hamilton asserts that whereas congressional power is strictly enumerated in the Constitution, presidential power is a broad grant of executive power. He concludes, in his own words: "The general doctrine of our constitution is, that the EXECUTIVE POWER of the Nation is vested in the President; subject only to the *exceptions* and *qu<a>lifications* which are expressed in the instrument."[22] These "exceptions" and

[19] Harvey Mansfield, *Taming the Prince: The Ambivalence of Modern Executive Power* (Baltimore: Johns Hopkins UP, 1993), 276.
[20] Ibid., "Pacificus I," 11.
[21] Ibid.
[22] Ibid., "Pacificus I," 13. Bracketed material in Hamilton's quotations is from the newspaper version of the essay, according to the Columbia University Press edition of *The Papers of Alexander Hamilton*. The Morton Frisch

"qualifications" are the Senate's power to appoint officers and make treaties, and the Congress's power to declare war. Beyond these, however, "the EXECUTIVE POWER of the Union is completely lodged in the President"[23]—it is a grand interpretation of power stemming from flexibility in the Constitution.

Moving forward Hamilton addresses the specifics of the congressional war power, one of the exceptions of the general grant of executive power. From the Congress's right to declare war, he infers the opposite belongs to the president—"to preserve Peace till war is declared."[24] To do this, the executive must be able to judge how to interpret treaties and how to faithfully enforce the law so as not to provoke war with foreign nations. This power to judge is an implicit part of Article II, Section 3, giving the president the right to receive ambassadors (the mode of U.S. recognition of foreign governments). Madison specifically counters this argument, though not effectively, in Helvidius III, to be covered later.

However, in the extension of his argument, Hamilton also makes an ineffective claim. The Proclamation, he states, "serves as an example of the right of the Executive, in certain cases, to determine the condition of the Nation, though it may consequentially affect the proper or improper of the Power of the Legislature to declare war."[25] Madison rightly identifies the implications of this statement, warning against the dangers of "executive aggrandizement" in war that have certainly proved prophetic. Again, the rebuttal to Hamilton's claims will be addressed later as part of Madison's complete response.

Theoretical Underpinnings to Hamilton's Pacificus

It is important to understand the theoretical basis for Hamilton's interpretation of executive power, and helpful in this will be John Locke and Charles de Secondat, baron de

edition retains them as well.
[23] Ibid.
[24] Ibid.
[25] Ibid., 15.

Montesquieu—both addressed by Madison in Helvidius—and Hamilton's writing in *The Federalist*. To begin, Locke's *Second Treatise on Civil Government* gives a detailed description of divided government based on legislative, executive, and federative powers. The legislative and executive functions are as they are generally recognized today (in a strict sense, the legislative makes the laws, the executive enforces them). But the federative power is distinct from these, containing "the power of war and peace, leagues and alliances, and all the transactions, with all persons and communities without the common-wealth."[26] Although the federative is separate from the executive, Locke says they are "almost always united."[27]

As the executive takes on the tasks of the federative, a clearer and grander vision of executive power takes form. According to Locke, "the good of the society requires" that the executive take on more responsibility, the legislature "not being able to foresee, and provide by laws, for all that may be useful to the community…"[28] So the executive assumes what Locke calls prerogative, which gives it the freedom "to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it."[29] This is a highly responsive, necessary power for government that complements the "*perpetual execution*"[30] of the executive: "for since in some governments the lawmaking power is not always in being, and is usually too numerous, and so too slow, for the dispatch requisite to execution."[31] Overall, this is fitting with Pacificus on two main counts: first, Hamilton assumes that government should be able to accomplish its ends (most importantly, preservation) and the situation in 1793 dictated

[26] Locke, John. *Second Treatise of Civil Government* (Indianapolis and Cambridge: Hackett Publishing Company, 1980), §146, 76.
[27] Ibid., §147, 77.
[28] Ibid., §159, 83.
[29] Ibid., §160, 84.
[30] See ibid., §144, 76: "But because the Laws, that are at once, and in a short time made, have a constant and lasting force, and need a *perpetual execution*, or an attendance thereunto: Therefore 'tis necessary there should be a *power always in being*, which should see to the *execution* of the laws that are made, and remain in force."
[31] Ibid.

Washington unilaterally declare the state of the nation; second, Hamilton articulates a broad approach to executive power that should not be confined to strict enumeration given the language of Article II, Section 1 of the Constitution. Both of these are consistent with Locke's prerogative.

As the first theorist to place this expanded, flexible executive within a constitutional framework, Locke is highly influential. However, his terminology would not always persist—later theorists started to phase out the term "federative," to a point where executive power meant what Locke once qualified as executive and federative powers. Montesquieu, for example, wrote some 60 years after the publication of Locke's *Second Treatise* that the person charged with the executive power dually executes existing laws, and "makes peace or war, sends or receives embassies, establishes security, and prevents invasions."[32] While the Framers of the Constitution (particularly Madison) relied on Montesquieu's elaborate depiction of the separation of powers and checks and balances to preserve liberty, obviously the Constitution gives the legislature, not the executive, the power to declare war, and this distinction is a position Hamilton defended. However, because Hamilton qualifies Congress's war power as one of the "exceptions and qualifications" of executive power, he is largely consistent with Montesquieu's theory of executive power.

In *The Federalist*, Hamilton gives his own view of the executive, although without the advantage of developing his theory around a specific policy proposal as he did in the Pacificus essays. Instead, he is defending the Constitution, a yet untested system of government, and this forces him to be more theoretical, which provides insight for the purpose of understanding his view of the executive. "Energy in the executive is the leading character in the definition of good government,"[33] Hamilton famously asserted. Consistent with his view in Pacificus and with

[32] Montesquieu, Charles de Secondat, baron de, *The Spirit of the Laws*, trans. Anne M. Cohler et al (Cambridge, Cambridge UP, 1989), 157.
[33] Hamilton, *Federalist* 70, 374.

Locke's prerogative, this energy serves a distinct purpose: "It is essential to the protection of the community against foreign attacks: It is not less essential to the steady administration of the laws, to the protection of protection of property…to the security of liberty against enterprises and assaults of ambition, of faction and of anarchy."[34] Of course, the executive is defined by swift action, meaning it is best embodied in a single person. Further, "Decision, activity, secrecy, and dispatch,"[35] are needed for the accomplishment of executive prerogatives, and are more characteristic of one person than many. Though Locke and Montesquieu clearly form the theoretical basis for Hamilton's arguments, Hamilton's vision of a strong executive did not begin with Pacificus but five years earlier in *The Federalist*. His argument for a strong executive that prudently uses his energy for the end of good government and the protection of the community is one which will carry implications for today.

III. Madison's Response: An Intricate Argument of Constitutionality and Caution

In contrast to Hamilton's Pacificus, who explored a breadth of topics to defend the Proclamation, all five Helvidius essays concentrate on the issue of constitutionality. As a rebuttal, countering the strong claims of Hamilton on the grant of executive power in Article II, Section 1, Madison's response is more intricate, involving a qualification of highly influential liberal theorists, a maneuver of contemporary difficulties, and several arguments weak and strong.

Theoretical Challenges: Qualifying the Influence of Locke and Montesquieu

In order for Madison to advance his core assertions on executive power, he must first specifically question the breadth of Locke and Montesquieu's influence. Although Locke and Montesquieu remain central figures in liberal theory today, their ideas are bound to assumptions

[34] Ibid., 374.
[35] Ibid., 375.

about the executive with which Madison would have been uncomfortable. Thus, though he cannot deny the influence of these men on him on constitutional government, the rule of law, and separation of powers, he is free to question their vision of the executive within these frames. With Hamilton as Locke and Montesquieu's successor, the Helvidius essays attempt to lay out a theory of executive function in American government that is distinct from the traditional liberal approach.

Madison begins forcefully, declaring both Locke and Montesquieu suffer "the same disadvantage, of having written before [the principals of liberty and the structure of government] were illuminated by the events and discussions which distinguish a very recent period."[36] With this statement, though it may seem rash, Madison simply attempts to set apart his time and his theory, and show them as part of a more perfect theory of government. Locke and Montesquieu's theories, on the other hand, are distorted by their relation to the government of England at the time (Locke's citizenship and Montesquieu's "admiration bordering on idolatry,"[37] in Madison's words). Thus, in Madison's view, Locke's conceptions of the federative, hardly ever separate from the executive, and executive prerogative are skewed by the monarchy under which he lived.

Madison on Montesquieu at this point deserves further investigation, as it may appear contradictory to his earlier statements about the "celebrated Montesquieu" in *Federalist* 47. That essay is the first of five in which Madison defends the separation of powers of the new Constitution. He turns to Montesquieu as the "oracle who is always consulted and cited on this subject…recommending it most effectually to the attention of mankind."[38] He cites extensively from Montesquieu's *The Spirit of the Laws*:

[36] James Madison, "Helvidius I," in *The Pacificus-Helvidius Debates*, 58.
[37] Ibid.
[38] Madison, *Federalist* 47, ed. J.R. Pole (Indianapolis and Cambridge: Hackett Publishing Company, 2005), 262.

> "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws, to *execute* them in a tyrannical manner." Again "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*."[39]

Certainly Madison looked to Montesquieu's theory on the separation of powers in writing his defense of it in *The Federalist*. But this does not subvert his remarks in Helvidius I—Madison's position here is more complex.

In Helvidius, Madison qualifies Montesquieu's "admiration bordering on idolatry," saying that he "has rather distinguished himself by enforcing the reasons and the importance of avoiding a confusion of the several powers of government, than by enumerating and defining the powers which belong to each particular class."[40] This is the essence of Madison's disagreement with Hamilton—which powers of government belong where, and how does this apply to Washington's action issuing a Proclamation of Neutrality?

Even in his five essay tract on the separation of powers in *The Federalist*, Madison does not specifically assert the extent of each branch's power beyond the guidelines stated in the Constitution. After deliberating whether checks on breaches of the separation of powers should come from the "only legitimate fountain of power,"[41] the people, Madison argues that these checks must be built into the internal structure of the republic: "Ambition must be made to counteract ambition."[42] Ironically, Madison warned against the "impetuous vortex"[43] of legislative power, and thus sought to fortify the executive.

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[39] Ibid., 264.
[40] Madison, "Helvidius I," in *The Pacificus-Helvidius Debates*, 58.
[41] Madison, *Federalist* 49, 273.
[42] Ibid., *Federalist* 51, 281.
[43] Ibid., *Federalist* 48, 268.

The Proclamation, and the Pacificus essays defending it, forced Madison to rethink this assessment—the unassuming Proclamation may have unintended and dangerous consequences, in Madison's view, that could create a vortex of power around the presidency. Thus, Madison had to more clearly enumerate the powers of both Congress and the president, and in doing so, he had to reconcile his views with the brunt of liberal theory. He agreed with Locke and Montesquieu on the basic tenets of liberalism, but intended to distinguish himself from their strong views of executive power, fitting that power into the Constitution as he thought prudent.

Those who favor the classical liberal view of executive power, or perhaps do not understand Madison's strict construction of the executive, tend to chafe at the Helvidius essays from early on. At their harshest, some commentators have asserted that "Madison's views, to the extent that he rejected the executive power theory, are essentially incoherent."[44] As mentioned, Madison needed to address the theories of executive power given by his predecessors and defended by Hamilton, in order to articulate his own theory. But to broadly renounce his entire dissertation on executive power, if only because he more strictly defines the executive, is inexcusable. He makes strong arguments and weak arguments within this framework of a less powerful executive, but he does not make "incoherent" arguments. Madison saw a dangerously close connection between British monarchy and the theory of Locke and Montesquieu (and Hamilton, by association, as will be demonstrated later), which is why he understandably sought to limit the theory of executive power these men put forth.

Interestingly, Madison expressed concerns about the paragraph mentioning Locke and Montesquieu in a letter to Thomas Jefferson only twelve days before the publication of Helvidius I. Apparently thinking it altogether unnecessary to his overall argument, Madison worried about distracting from the main topics and "turning the controversy too much into the wilderness of

[44] Prakash, et al, "The Executive Power over Foreign Affairs," 336.

books."[45] Madison may have been weary because the Helvidius essays were, essentially, a constitutional defense—as such, mentions of political theorists (with whom his newspaper audience may or may not have been familiar) are unnecessary. However, for our time, the theoretical confrontation between Madison and his predecessors is invaluable—it clarifies his entire theoretical motivation for argument. Though it would be impossible for Madison to deny Locke and Montesquieu's influence on his thinking (*Federalist* 47 proves that much), Madison sought to qualify their notions of executive power with the Helvidius essays, and separate his thought from theirs.

Contemporary Challenges to the Response

In addition to the theoretical challenges to the Helvidius essays, Madison also faced extraordinary contemporary obstacles from the start of the project. For instance, it is important to remember that not just any president, but the Father of His Country, President George Washington had issued the Proclamation, which, as Congress agreed in its next session (after Madison's writing), was the right course—the United States was in no position to compete militarily with the powers allied against France. On top of this, Edmond-Charles Genet, the new French minister to the United States, had irritated those on both sides of the neutrality issue in his attempt to recruit American privateers to the French cause. Thus, as James Morton Smith, a scholar on Madison and Jefferson, remarked:

> Madison had to walk a political tightrope, forcefully questioning the constitutionality of declaring neutrality by executive proclamation while affirming loyalty to the popular president and prudently avoiding any discussion of the merits of neutrality. At the same time, he had to reject Genet's shenanigans while pressing for American support of the French Revolution.[46]

[45] Madison, Letter to Jefferson dated August 12, 1793, in *The Republic of Letters*, 808.
[46] James Morton Smith, *The Republic of Letters*, vol. 2 (New York and London: W.W. Norton & Company), 755.

In their letters, Jefferson had warned Madison about these difficulties during the latter's writing of Helvidius, so certainly both men were aware of the situation.[47]

To an extent, however, the fine line between the intent of President Washington and the claims of Hamilton in Pacificus may have provided a buffer from the difficult contemporary circumstances. This is clarified in Madison's close correspondence with Jefferson—the latter, as Secretary of State, revealed some (but not what he thought "behind the curtain"[48]) of this information from cabinet meetings. "The President thought it expedient," Jefferson explained, "by way of Proclamation, to remind our fellow citizens that we were in a state of peace with all the belligerent powers."[49] With this in mind, Jefferson took care that the Proclamation did not contain the word "neutrality" (hence "disposition" was used) because he thought declaring neutrality to be outside presidential constitutional authority. When Genet began stirring up public sentiment toward the French cause, the Proclamation gained additional importance, giving the country an official stance and its citizens a proper guide—"but H[amilton] had other views. The instrument was badly drawn, and made the P[resident] go out of his line to declare things which, tho' true, it was not exactly his province to declare."[50]

Madison's theory at its thinnest, which I call untenable, is not properly called incoherent when the challenges of his circumstance are clarified. Rather it is simply a view of executive power that limited the president's broad powers with Congress's enumerated powers. Hamilton's claims had overstepped this strict definition of executive authority (even those Washington had intended), extrapolating his model of executive power from a carefully calculated action. This obviously presented a dilemma to those favoring a less powerful executive, of which Madison and Jefferson were an integral part. The Helvidius essays can be seen as Madison's articulation

[47] Thomas Jefferson, Letter to Madison dated August 11, 1793, in *The Republic of Letters*, 803.
[48] Jefferson, Letter to Madison dated August 3, 1793, in *The Republic of Letters*, 798.
[49] Ibid., Letter to Madison dated August 11, 1793, in *The Republic of Letters*, 801.
[50] Ibid., 802.

on executive power to counter what he identifies as the monarchizing tendency of Hamilton's; however, in doing so, Helvidius so strictly interprets the Constitution and Congress's power that it denies the advantages of Hamilton's realist prudence, and thus becomes untenable. While this characterizes Madison's weak points, his strict construction and understanding of government produces a constitutional prudence, which resonates in importance for today's controversy.

Madison's Weak Arguments

The first instance in Madison's argument that presents a problem is his characterization of Hamilton's argument. This is not a particularly strong or weak point, but rather, in my view, represents a general misstep. Madison calls Hamilton's view of executive power "extraordinary,"[51] and a "new and aspiring doctrine."[52] While it may be useful in his essays as a rebuttal, casting himself in the right and Hamilton as an outsider, Madison here is, frankly, wrong. The theory of executive power is not one that Hamilton invented or discovered—by the time of his writing it had roots going back two and a half centuries to the early sixteenth century, when Machiavelli wrote *The Prince*. In that sense, Pacificus is neither new, nor extraordinary.

On the aspiration of Hamilton's theory, Madison implies that one of the main goals of the Helvidius essays will be to question the right of the executive to act on decisions of war and treaty-making. To do this, Madison takes a stance on the natural powers of the legislative and executive branches. His limited scope is inherently weak: "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 laws to be executed."[53]

In a literal sense, Madison is correct in this assertion—an executive executes the law. But what this actually accomplishes is an overly strict construction of executive power. In Lockean

[51] Madison, "Helvidius I," in *The Pacificus-Helvidius Debates*, 57.
[52] Madison, "Helvidius IV," in *The Pacificus-Helvidius Debates*, 84.
[53] Madison, "Helvidius I," in *The Pacificus-Helvidius Debates*, 59.

theory (which I will use as a guide for liberal theory, and by extension, Madison's theory), the state of nature "has a law of nature to govern it."[54] Because the state of nature is one of "perfect freedom"[55] and equality, "the *execution* of the law of nature is…put into every man's hands, whereby every one has a right to punish the transgressors of that law to such a degree, as may hinder its violation."[56] Harvey Mansfield explains, "When each person consents to form a government, he executes the law of nature that requires him to seek his own preservation and that of the rest of mankind"[57]—the theoretical underpinning to executive prerogative. The character of the executive is the same in the government—executing the law, but also charged with preserving the community, which is something beyond strict execution. And this something is what Mansfield describes as "executive ambivalence," the strong informal executive (using prerogative, which is sometimes counter to the law, and not equal to law enforcement) breaks from the weak formal executive of "executing laws that others create." Madison's interpretation, failing to capture this dynamic, [58] does not persuade.

While there is no discrepancy between the views of Madison and Locke on the society based on the rule of law and the sovereignty of the legislature, Madison departs too sharply from Locke on executive prerogative, and the proper definition of executive power. The major caveat for Madison is that he is not philosophizing on liberalism or constitutionalism broadly; rather, his task is specific, to interpret the American Constitution and the roles assigned to the president and the Congress therein.

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[54] Locke, *Second Treatise of Government*, §6, 9.
[55] Ibid., §4, 8.
[56] Ibid., §7, 9.
[57] Mansfield, *Taming the Prince*, 189.
[58] Interestingly, Madison placed a footnote in Helvidius I after declaring that Locke and Montesquieu were skewed by the English government both exemplified in their theory. On Locke, Madison refers to Chapter XIV of the *Second Treatise*, stating "*The chapter on prerogatives, shews how much the reason of the philosopher was clouded by the royalism of the Englishman.*"

However, after extending his initial arguments on the nature of executive and legislative power, Madison makes his third important weak claim, that the president should not, in the fulfillment of his duties, do anything that impinges Congress's power to declare war. This is Madison's counter to one of the more bold claims of Hamilton, who states that "The Legislature is free to perform its own duties according to its own sense of them—though the Executive in the exercise of its constitutional powers, may establish an antecedent state of things which ought to weigh in the legislative decisions."[59] For Madison, who sees the war power as one of the most deliberative, important powers given to Congress, this raises a dangerous issue. It would, in his view, give the executive a hand in a power that was supposed to be placed exclusively in the legislature, the organ of national will.

But here, he magnifies the scope of the war power to the point of ridiculousness: even something like the President's authority to receive ambassadors "might have the consequence of deciding on the validity of revolutions in favor of liberty, 'of putting the United States in a condition to become an associate in war,' nay 'of laying the *Legislature* under an *obligation* of *declaring* war'…"[60] The "vortex" of congressional power Madison commented on in *The Federalist* supposedly also included the right to refuse ambassadors—a narrow line of argument considering the President's constitutional authority to receive them. To back the claim, Madison effectively cites from Hamilton's own *Federalist* essay, in which he says of the President's right to receive ambassadors "is more a matter of dignity than of authority. It is a circumstance, that will be without consequence in the administration of the government…"[61] This is a clear contradiction in Hamilton's thought, as he claims the presidential authority to create an "antecedent state of things" in Pacificus I. However this does not dissuade the reader from the

[59] Hamilton, "Pacificus I," in *The Pacificus-Helvidius Debates*, 15.
[60] Madison, "Helvidius III," in *The Pacificus-Helvidius Debates*, 76.
[61] Hamilton, *Federalist* 69, 371.

awkward defense Madison gives here. Although it may have been debatable in 1793 when precedents were not yet fully formed, "When [President Theodore] Roosevelt received the emissary of the embryo republic of Panama a hundred and ten years later no one could question his constitutional authority."[62] The practice of recognizing foreign governments through reception of their ambassadors has been decidedly against Madison, despite his concerns that this might hinder Congress's ability to declare war.

Madison's Strong Arguments

While parts of Madison's Helvidius essays do present problems, I have argued here that this does not diminish them as a whole—indeed Madison makes several strong points that ought to weigh heavily in the contemporary debate. What makes these points strong, in general, are a constitutional prudence that cautions against too much power (crucially tying this, as Hamilton failed to in Pacificus, to human fallibility), and a deep understanding of government that stresses how war empowers the executive and how separation of powers is meant to check this.

The effect of war, "the true nurse of executive aggrandizement"[63] according to Madison, on presidential power is especially important in the contemporary situation. James M. Lindsay, who has written extensively on international affairs, describes how wartime and threats to security tend to increase the power of the presidency. However, though presidents may be able to act more swiftly than Congress, "presidents and their advisors are not infallible."[64] In wartime presidents tend to overreach (and Congress tends to defer) and sometimes make poor decisions such as President Johnson's decision to escalate of the Vietnam War in 1965, or possibly President Bush's to begin the Iraq War post-9/11. Considering three factors—the number of wars over the course of U.S. history, the need for presidential efficiency and swiftness of action as

[62] Quincy Wright, "The Control of Foreign Relations," in *The American Political Science Review* 15.1 (1921): 5.
[63] Madison, "Helvidius IV," 87.
[64] James M. Lindsay, "From Deference to Activism and Back Again: Congress and the Politics of American Foreign Policy," 194.

Hamilton claims, and the public's "acquiescence" to new doctrines as Madison presumes—the modern presidency is more powerful than ever before. The consequence, Helvidius warns, is potentially more executive blunders that damage U.S. interests and constitutional violations that damage U.S. government. Overall, the issue of war highlights Madison's strong arguments, urging considerations of human nature and executive aggrandizement, and offering separation of powers and "watchfulness" to counter these.

Madison's first strong argument precludes his claim that congressional authority to declare war constitutes a right to recognize new governments. This weak claim, and its extension that the president can take absolutely no action which might influence the war declaring power, comes from a much sounder argument. Essential to Madison's thinking is the reasonable assumption that declaring war includes the right to judge whether the nation should be put in a state of war, or not. This addresses Hamilton's claim that presidents may exercise a considerable amount of judgment in foreign affairs: "however true it may be," Hamilton asserts in Pacificus I, "that the right of the Legislature to declare war includes the right of judging whether the Nation be under obligations to make War or not—it will not follow that the Executive is in any case excluded from a similar right of Judgment, in the execution of its own functions."[65]

Countering this, Madison assumes that the power to declare war includes all the powers leading up to war—the sole power to judge being one of them. Above all, Hamilton's argument raises issues: "If the legislature and executive have both a right to judge of the obligations to make war or not," Madison says, "it must sometimes happen, though not at present, that they will judge differently."[66] This is an essential argument for Madison that re-asserts congressional authority in foreign affairs through the war powers clause, one of the most explicit in the

[65] Hamilton, "Pacificus I," in *The Pacificus-Helvidius Debates*, 13.
[66] Madison, "Helvidius II," in *The Pacificus-Helvidius Debates*, 69.

Constitution. Hamilton (in Madison's view), had attempted to dull Congress's war power, claiming the President takes the opposite, to declare and preserve peace until war is made. Further, Hamilton claimed presidents "may establish an antecedent state of things which ought to weigh in the legislative decisions."[67]

Remember that Washington had taken pains, as Jefferson confirmed to Madison, not to declare neutrality precisely for this reason, so as not to usurp congressional power. Nonetheless, granting the right to judge, and by extension to declare neutrality, gives the executive a clear advantage—especially considering the unity of the executive, which Hamilton defends in *The Federalist*, and how war tends to empower the executive, which Madison points out in Helvidius. Today the direction of foreign policy is a presidential prerogative, and while this is the most prudent in practice (certainly it would be imprudent for either of the large chambers of Congress to manage foreign policy), constitutionally it is a double-edged sword as presidents are free to make imprudent decisions or take unconstitutional action. The including Iraq in the War on Terror is the primary example of executive imprudence contemporarily. Having not explicitly declared war and now judging differently than the president, Congress is for better or worse powerless to end it.[68]

From Madison's minute, but effective, discussion of the separation of powers relating to war, we are led to his broader assertion on the "great principle in free governments"[69]: "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*."[70] To Madison this is analogous to the separation between the power to command the army and to fund those armies, the power to

[67] Hamilton, Pacificus I," in *The Pacificus-Helvidius Debates*, 15.
[68] Of course, if an anti-war coalition formed a two-thirds supermajority, Congress could end funding for the war, and override the president's veto. But this is a highly improbable scenario.
[69] Madison, "Helvidius I," in *The Pacificus-Helvidius Debates*, 62.
[70] Ibid.

execute the law and the power to make those laws. Because it focuses on the proper function of good government, Madison's counter to Hamilton is stronger here—there is practical reason for these powers to be separated, rather than the narrowly defined "natural" powers of the branches.

In fact, Madison's argument explaining the intricacies of this separation is highly complex. Coming as part of his defense of the Constitution in *Federalist* 51, Madison states: "But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others."[71] So Madison's goal was drafting a constitution that provided structure *and* personal motivation in government to secure the separation of powers. While, as previously mentioned, he does not delve into the specific powers of each branch, he cites the constitutional means: the legislature is divided into two branches, elected to different term lengths from different constituencies; the fortified executive is given the qualified negative, or veto, to safeguard against imprudent laws. Another check, Congress may impeach presidents and other civil servants for "Treason, Bribery, and other high Crimes and Misdemeanors" (Article II, Section 4), although it is conceivable that executive prerogative, if it works (and serves to protect the nation and liberty, even if it is unconstitutional) would not be impeachable. Though not specifically mentioning foreign affairs, Congress's war power or executive prerogative, Madison presents a complex argument for a complex Constitution—one designed for the preservation of the American republic.

Complementing his stance in *Federalist* 51, at the end of Helvidius I Madison narrows the argument from the broad strokes of separation of powers to the specific power of treaty-making. To do this, he quotes a large passage of *Federalist* 75, where Hamilton had asserted that treaty-making "will be found to partake more of the legislative than of the executive character,

[71] Ibid., *Federalist* 51, 281.

though it does not seem strictly to fall within the definition of either of them."[72] It is a subtle, but important contradiction between Hamilton's argument as Publius and Pacificus—as the former admitting to the complicated nature of treaty-making power, as the latter claiming it as an exception from the general grant of executive power. Again, this allows Madison to reclaim important measures of congressional authority in the Constitution.

The trouble for Pacificus continues when compared to another argument from *Federalist* 75, which Madison quotes in Helvidius IV. Hamilton expresses concern about human nature and the treaty-making power: "An ambitious man," he says, "might make his own aggrandizement, by the aid of a foreign power, the price of his treachery to his constituents. The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests…which concern its intercourse with the rest of the world to the sole disposal of a magistrate."[73] The structure of government and the personal motives arising from it, Madison might add, would check this from happening. Although Pacificus never advocates that the president take on all powers of foreign relations, he never strongly qualifies this power beyond the constitutional "exceptions" taken from it and the realist prudence limiting it. Instead of the more carefully defined argument of *The Federalist Papers*, Pacificus begs for an interpretation of the Constitution that recognizes Congress's power more fully and an understanding of the executive that realizes its shortcomings. While they collaborated seamlessly in *The Federalist*, Hamilton's Pacificus was such an unapologetic expression of a robust executive that it concerned Madison.

This concern leads Madison to accuse Hamilton of something which we might not even think of today, but which is, technically, correct. As the heir of a strong executive power theory,

[72] Hamilton, *Federalist* 75, 399.
[73] Ibid., 400. Quoted by Madison in "Helvidius IV," 88.

Hamilton falls closer in line with Locke and Montesquieu's ideas of executive power. Questioning where Hamilton's thought might have its roots, Madison finds it here, and accuses him of being a monarchist: "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*."[74]

Polemic and hasty as Madison's words may sound, they must be contextualized—the doctrine of Pacificus, in Madison's view, would move the American government toward that of the British monarchy it had just fought. Mansfield explains Madison's logic: "Locke never says that his executive is the English king, but he makes it clear that the English monarchy is…*the* example, the model."[75] Hamilton had been consistently Lockean in his view of executive prerogative in foreign affairs—making the connection, Madison calls this what it is, British. This would have also appealed to Madison's readers at the time (while today it may appear excessive). Instead of excessive, we can interpret this as Madison's concerning for the fate of the new republic—he knows the threats to liberty that can arise when executive prerogative is uncontrolled (taxation without representation, for example). An unchecked executive is sometimes contrary to good government, forming a central piece of Helvidius's counter to Pacificus.

Unchecked, or dangerous, executive prerogatives, flawed human nature which might exploit these prerogatives, and the ability of war to empower the executive are balanced by a government that separates the powers of government. Thus, strong executives are not inherently bad, Madison would say, but they are susceptible to imprudent decisions unless sufficient government checks this.

[74] Madison, "Helvidius I," 63.
[75] Mansfield, *Taming the Prince*, 191.

The argument against the unchecked executive and the need for prudence are exemplified in a letter Jefferson wrote Madison on the subject. Having suggested a congressional bill or advisory board for the executive to help in decisions of neutrality and war, Jefferson was shocked at Attorney General Edmund Randolph's response, that it should be annexed to his office. Jefferson remarked, "In plain language this would be to make him the sole arbiter of the line of conduct for the US. [*sic*] towards foreign nations."[76] A more dynamic, necessary approach, in Madison's view of the Constitution, would put all questions of war in Congress's hands, and all maters of conducting it in the president's.

Madison saw Hamilton's broad Pacificus arguments for a broad executive as "dangerous in practice,"[77] which would consequentially threaten the interests of the nation and the integrity of the Constitution. He powerfully connects the need for prudence to the feat his generation has accomplished, and the history of government and corruption:

> …however the consequences flowing from such premises [Hamilton's], may be disavowed at this time or by this individual, we are to regard it as morally certain, …as the doctrines make their way into the creed of the government, and the acquiescence of the public, every power that can be deduced from them, will be deduced and exercised sooner or later by those who may have an interest in so doing. The character of human nature gives salutary warning to every sober and reflecting mind. And the history of government, in all its forms and in every period of time, ratifies the danger. A people therefore, who are so happy as to possess the inestimable blessing of a free and defined constitution, cannot be too watchful against the introduction, nor too critical in tracing the consequences, of new principles and new constructions, that may remove the landmarks of power.[78]

This is Madison at his best, forcefully advising the people to be on guard, not to acquiesce when interpretations of the Constitution might seek to uproot it. The heart of the argument is based on the need for prudent exercise of power, the belief that human beings will exploit power for their

[76] Jefferson, Letter to Madison dated August 11, 1793, in *The Republic of Letters*, 805.
[77] Ibid.
[78] Madison, "Helvidius IV," in *The Pacificus-Helvidius Debates* pg 85.

own self interest, and that, considering both of these, executive power must be checked—not only by the system of separation of powers, but also by the people themselves.

Today, centuries since the debate about Washington's Neutrality Proclamation, Congress scrambles to retain the semblance of the power to declare war, which has gone unexercised since 1941. The power of the purse has tried to act as a surrogate, but having not declared war, it has proven difficult for a Congress to formally end a conflict solely through funding—a willing president (or a two-thirds majority in both chambers of Congress) is also required. Once, when Congress did use the purse to end the guerrilla warfare in Nicaragua in the mid-1980s, the executive branch found new sources of income by selling arms to Iran and receiving contributions from foreign governments. While history has strayed far from the realities with which Helvidius dealt, the strong arguments persevere, ready to critique these incidents and to serve as a guide for the future.

Pacificus agues for a broad executive bound only by national interest and realist prudence, making the warning of Helvidius on human nature and unchecked executive power a necessity. As Madison pointed out, this was not impossible for Hamilton, who wrote more cautiously of the executive in *The Federalist*. Certainly, presidents must be able to have the breadth of action to even defy law and the Constitution if an emergency situation dictates it. This is the strength that would allow the new nation to endure. But Helvidius counters strength with prudence, reminding us that governments with a strong executive are not always democratic—checking executive power to allow American democracy to endure is the end of the separation of powers. Individually, Madison urges us to trace the consequences of "new landmarks of power." The warning against acquiescence is by far greatest lesson taken from Helvidius; by issuing it, he compels not only his contemporaries or even future generations of Americans, but all citizens of

all times living under democracy to challenge the actions of their government. And although Helvidius does not present exclusively strong arguments, his strict doctrine of the weak executive is useful as a complement to Pacificus, making the Pacificus-Helvidius debates a more complete doctrine of executive power.

IV. The Pacificus-Helvidius Debates as a Critique of the Contemporary Situation

The complexity of the contemporary issues surrounding executive power in foreign relations overshadows the simplicity of Hamilton and Madison's time. Although they derived several complex arguments, many of which are still used today, neither could have foreseen the how the subject would evolve and align according to the politics of the day. In theory, Madison favored the sovereignty of the legislature, the organ of the national will, as the supreme branch. In practice, the executive has taken the more preeminent role in the federal government, especially in the direction of foreign policy. This fact has denied influence to Madison's weaker arguments and affirmed Hamilton's stronger, better arguments.

As history has sided with him, Hamilton's Pacificus has become the model of how executive power functions. In keeping with the pragmatism of the expanded executive (rooted in Article II, Section 1 of the Constitution), Pacificus does not focus solely on constitutional concerns, but develops several reasons to defend the Proclamation. Swift action in the national interest and the development of U.S. policy as the situation dictates define the executive, and reveal Hamilton's realist prudence—national interest the situation at hand limit flexibility of action. Nonetheless, the counter arguments of Helvidius—the need for prudent governance, the importance of separation of powers between legislative and executive on purse and sword, and a warning against the introduction of new doctrines in light of human nature—must be remembered to check Pacificus for when the executive acts imprudently or unconstitutionally.

Together, with the form of Pacificus the model and Helvidius the check, the Pacificus-Helvidius debates serve as a resounding guide for the proper exercise of executive power. The contemporary situation and its policies—the War on Terror and the Bush Doctrine—will be critiqued using the debates, and for context a brief history will be given on the conclusion of the Founding and the latter half of the 20th century.

Executive Power: A Struggle at the Founding and in the Modern Era

The Pacificus-Helvidius debates represent just one moment in the struggle to define executive power, and just one moment in the extended Founding period. The Founding generation wrestled with the issue for at least twenty-five years after the Constitution's ratification, and this deserves discussion as it will illuminate some crucial points. The history of executive power in the modern era, which I define as the last sixty-six years since Congress declared war in 1941, will also be discussed to give context to the actions of the current administration.

In the years following the Pacificus-Helvidius debates, Madison and Jefferson fretted over President John Adams' handling of the XYZ Affair, Hamilton offered harsh words for President Jefferson on the emerging Barbary Wars, and President Madison displayed the consequences of a weak executive with his lack of leadership leading up to the War of 1812. In 1798, Madison remained consistent, reiterating his position from Helvidius IV about the actions of Adams: "The constitution supposes, what the History of all Govts demonstrates, that the Ex[ecutive] is the branch of power most interested in war, and most prone to it."[79] Madison still concluded weakly that the power to declare war is placed expressly and exclusively in the legislature, to a point where it limits executive action. In 1801, Hamilton fittingly criticized Jefferson's weak presidential approach on the Tripoli pirates. Because another nation had already

[79] Madison, Letter to Thomas Jefferson dated April 2, 1798, in *The Republic of Letters*, 1032.

declared war on the United States, or at least was acting as such, the United States "are then by the very fact, already *at war*, and any declaration on the part of Congress is nugatory: it is at least unnecessary."[80] Again, as in the Pacificus-Helvidius debates, Hamilton presents the more compelling argument consistent with his pragmatism over Madison's strict constitutionalism. This general framework has, ironically, been used by historians to critique the presidency of Madison himself—his lack of leadership preparing for the War of 1812 is considered one of the greatest blunders of American presidential history. Hamilton's argument for a flexible, pragmatic executive (the necessity of action in threatening situations), coupled with Pacificus as the model executive, was a lasting precedent from the Founding period, and will conveniently help explain American foreign policy in the modern era.

After World War II, the onset of the Cold War favored presidential flexibility of action that trumped Congress's constitutional right to declare war—with a constant foe represented by the Soviet Union, there was little need for Congress to declare war in each individual conflict. However, throughout the Cold War, there were instances when the consequences of this were tangible, the Pacificus model construed and executive power abused—presidential wars bypassed Congress completely, carried on too long, or became corrupt.

President Harry Truman set the precedent of going to war without congressional approval in 1950—he deployed forces to Korea defending a United Nations Security Council mandate to North Korea, ordering them not to cross the 38th parallel.[81] This prudent exercise of power was followed by President Lyndon B. Johnson's escalation of the Vietnam War from 1965 to 1968. The consequences of that war (namely tens of thousands of American casualties) and its major blunders (American mismanagement of the war and lack of knowledge about the enemy) have

[80] Hamilton, "The Examination, No. 1," in *The Papers of Alexander Hamilton*, Harold C. Syrett et al., eds, Vol. 25 (New York and London: Columbia UP, 1979), 456.
[81] Louis Fisher, "Presidential Wars," in *The Domestic Sources of American Foreign Policy*, Wittkopf and McCormick, eds., 159-160.

led most to regard Vietnam as an imprudent executive act. The presidency of Ronald Reagan also faced challenges as accusations built in 1987 that the executive branch unconstitutionally raised funds to continue guerilla warfare in Nicaragua by selling weapons to Iran through Israel.[82] The resulting Iran-Contra scandal is a poignant example in American history when Madison's "great principle of free governments"—the separation of powers which bars the branch conducting a war from judging when a war should be "*commenced*, *continued*, or *concluded*"[83]—broke down. But such is the consequence of the president's overwhelming ability to make foreign policy and of the Congress's deferral of the right to declare war—the president's flexibility of action sometimes leads to mistakes and threats to the separation of powers.

While Vietnam and Iran-Contra are the most notorious instances of imprudent and unconstitutional executives,[84] President George H.W. Bush's Persian Gulf War and President Bill Clinton's Kosovo War followed Truman's example, and did not seek congressional consent at first. They relied mainly on international institutions such as the U.N. Security Council (in the Persian Gulf) and international organizations such as the North Atlantic Treaty Organization (in the Balkans). Both of these two uses of force were short-lived, highly popular campaigns that did not result in large numbers of U.S. casualties, as in Vietnam, or a fundamental breakdown of the separation of powers, as in Iran-Contra. Instead, they were consistent with the Pacificus model of executive power, without urging the Helvidius warning against excessive, imprudent power.

The Bush Presidency and Critique

President George W. Bush inherited the executive legacy of his modern predecessors with a unique situation: the national tragedy of September 11 at the beginning of his presidency

[82] For a detailed history of the Iran-Contra scandal, see Peter Kornbluh and Michael Byrne, eds., *The Iran-Contra Scandal* (New York: W.W. Norton & Company, 1993).
[83] Madison, "Helvidius II," 62.
[84] Watergate is not included in this list, nor in this essay. It was largely a series of presidential actions that violated statutory law and concluded with President Nixon's obstruction of justice and resignation. Although certainly an example of improper executive action, Watergate is also one in which the separation of powers functioned to halt it.

prompted an expanded executive, and the ensuing Bush Doctrine and War on Terror were broad new policy prescriptions this expanded executive could use to deal with the threat. How the Bush Doctrine and the War on Terror fit within the Pacificus model, how they delve into unconstitutionality, and how they have been executed imprudently will be the focus here.

After the terrorist attacks of September 11, 2001, President Bush was largely unchallenged in the arena of foreign policy. Speaking to the nation that night, Bush began the War on Terror, stating firmly "We will make no distinction between the terrorists who committed these acts, and those who harbor them," asking the nation's allies to "stand together to win the war against terrorism."[85] This would form the basis of what would eventually be called the Bush Doctrine, forming an integral part of the National Security Strategy of the United States in the years following.[86]

The Doctrine reacted to the events of September 11, declaring a state of war, and it is important to remember that Hamilton condones this without congressional approval—being in a state of war, it is unnecessary for Congress to declare it. But America's enemy is terrorism generally, terrorists specifically. This means Bush was put in a difficult situation—to executive the War on Terror, he would use traditional, precedented means to fight an untraditional enemy.

To protect the nation from foreign attacks, as Pacificus condones, Bush used the expanded executive to pave the way for War on Terror. The CIA was almost immediately operational in Afghanistan after September 11 before American troops were officially sent in, as PBS Frontline reported in 2006.[87] Bush relied heavily on the precedents set by the previous two administrations; in Iraq, he used U.N. Security Council Resolution 1441 to justify military

[85] President George W. Bush, "Statement by the President in His Address to the Nation," September 11, 2001, www.whitehouse.gov.
[86] See "The National Security Strategy of the United States of America," March 2006, http://www.whitehouse.gov/nsc/.
[87] *PBS Frontline*, "The Dark Side," June 20, 2006, www.pbs.org.

action, gathered an international coalition to back the U.S., and authorized his use of force as Commander-in-Chief through Congress.

Bush also used what could be considered precedented, acceptable means of unconstitutional executive prerogative— Bush's use of warrantless wiretapping, for instance, is apparently justifiable as a means to the end of American security. The establishment of military tribunals for enemy combatants captured in the War on Terror is another example, modeled on President Franklin Delano Roosevelt's action in WWII and precedented in President Abraham Lincoln's suspension of habeas corpus during the Civil War. But within the framework of the Pacificus-Helvidius debates, justifiable and precedented are not always synonymous with proper, and the improper uses of prerogative that distinguish warrantless wiretapping and military tribunals will form the basis of the critique of constitutionality. Similarly, although Bush went through the usual channels to back his legitimacy to invade Iraq, this does not mean he passes the Pacificus-Helvidius test of prudence. How a faulty intelligence process led to a faulty justification for war and how this led to a decline of U.S. credibility and security will form the basis of the critique from prudence.

Critique of Constitutionality. For the most part, Bush's use of executive power has been within acceptable limits. However, as the Pacificus-Helvidius debates show, executives can use power unconstitutionally if the situation dictates (Pacificus), but this is given a sharp critique in the strict constitutionalism (Helvidius). Unconstitutional uses of executive prerogative are perhaps the most dangerous because they threaten to create precedents that may "remove the landmarks of power,"[88] according to Helvidius. President Bush's actions—wiretapping American phone calls internationally without warrants and establishing military tribunals to try enemy combatants—present a fine line of legitimate power. Both were instances in which he acted

[88] Madison, "Helvidius IV," 86.

outside the law, and the U.S. District Court in Detroit (on wiretaps) and the Supreme Court (on military tribunals) rejected the arguments for prerogative in each case.

In *American Civil Liberties Union, et al. v. National Security Agency, et al.*, the ACLU defended the right of "U.S. persons" to have constitutionally protected communication, meaning the NSA could not wiretap without a warrant. The decision of Judge Anna Diggs Taylor of the U.S. District Court claimed the wiretapping program had violated the Foreign Intelligence Surveillance Act (FISA), and the First and Fourth Amendments of the Constitution. Because the wiretapping was done without warrants, there could be no judicial check to establish probable cause, Diggs Taylor wrote. She appealed to the Founding in a voice similar to Madison's warning and concern for separation of powers: "It was never the intent of the Framers to give the President such unfettered control, particularly where his actions blatantly disregard the parameters clearly enumerated in the Bill of Rights. The three separate branches of government were developed as a check and balance for one another."[89] On the case, Senator Charles Schumer of New York echoed the thought that the executive, charged with security and protection, still has a constitutional limit. "The bottom line," he said, "is that most Americans fundamentally believe that you can give the president all the tools he needs to protect us and at the same time uphold the rule of law."[90] Nearly half a year after the July 6, 2006 decision, Congress passed the Protect America Act of 2007, which established a long list of stipulations for gathering foreign intelligence and procedures for court review and approval of government surveillance.[91]

On the issue of military tribunals, in *Hamdan v. Rumsfeld, et al.* the Supreme Court decided 5-3 that the Bush administration had gone beyond the bounds of executive power in the

[89] The Honorable Anna Diggs Taylor, United States Court of Appeals (6th Circuit), *ACLU et al. v. NSA et al.*, Case No. 06-CV-10204, July 6, 2007.
[90] Senator Charles Schumer, quoted by Eric Lichtblau, "Bush Predicts Appeals Court Will Lift Ban on Wiretaps," *The New York Times*, August 19, 2006.
[91] See the Protect America Act of 2007 (S. 1927), January 4, 2007.

detention of enemy combatants at Guantanamo Bay, Cuba. Bush relied on the precedent of *Ex Parte Quirin*, a Supreme Court decision from 1942 that approved and rejected parts of the Roosevelt administration's independent handling of secret military tribunals that tried and executed eight Germans.[92] The Court ruled that the president exceeded the precedents of *Quirin*, and acted unconstitutionally in attempting to try a prisoner in a military court that had no authorization from Congress. Writing the opinion of the Court, Justice John Paul Stevens asserted that "no more robust model of executive power exists" than *Quirin*, which "represents the high-water mark of military power to try enemy combatants for war crimes."[93] Justice Anthony Kennedy concurred, and wrote about the separation of powers, clearly evoking the danger at hand: "Trial by military commission raises separation of powers concerns of the highest order. Located within a single branch, these courts carry the risk that offenses will be defined, prosecuted, and adjudicated by executive officials without independent review."[94] Finally, Justice Stephen Breyer concluded logically that the president simply needed to return to Congress for authorization, which Bush did in late September 2006, and with this conclusion, he wrote an argument that resonates strongly with the Pacificus-Helvidius debates. Executive power is broad, expanding at times of emergency as it did in the Bush presidency, but relying on democratic processes otherwise:

> Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same.[95]

[92] For an analysis of the *Ex parte Quirin* trail, see Louis Fisher, "Military Tribunals: The *Quirin* Precedent," *Congressional Research Service Report for Congress*, March 26, 2002.
[93] *Hamdan v. Rumsfeld, et al.*, 548 U.S. 33 (2006).
[94] Ibid., 548 U.S. 2 (2006).
[95] Ibid., 548 U.S. 1 (2006).

Although largely consistent with the arguments presented in both courts on wiretapping and military tribunals, the Pacificus-Helvidius critique is slightly nuanced. It is granted that the president took action in a time of war that is outside the law (again, a precedented example of his prerogative); however, considering the president's assertion that the War on Terror will not end with his administration, that it may in fact be a generational conflict,[96] it was absolutely essential for his actions to come under judicial scrutiny and to be given legitimacy by Congress (which it did with the Military Commissions Act of 2006[97]).

Justice Breyer rightly made this distinction in executive power: there may be a War on Terror generally and the Iraq War specifically, but it is not a time of emergency that requires unlawful or unconstitutional executive prerogatives as it was immediately following September 11. This means the president could now rely on traditional democratic processes, judicial review, congressional lawmaking and oversight, to legitimize his actions—as they were carried out recently, his actions in wiretapping and detaining enemy combatants did not have the force of Pacificus's executive model behind them. From the perspective of Helvidius, if Congress had not been compelled to modernize the Foreign Intelligence Surveillance Act (FISA) and officially establish courts for the trial of enemy combatants, new "landmarks of power" may have been instituted which would upset the separation of powers, creating a broader, illegitimate executive.

Critique from Prudence. Not all scrutiny of executive action may come from constitutional concerns—if Hamilton asserts that "energy in the executive is a leading character

[96] In a speech on March 19, 2004, President Bush said, "The war on terror is not a figure of speech. It is an inescapable calling of our generation." Available www.whitehouse.gov.

[97] Although Congress did place military tribunals under the code of law with the Military Commissions Act of 2006, that bill has undergone intense scrutiny for its passages giving the executive branch almost complete authority over the administration of the trials (beyond what is stated in that law). Most important is this clause: "No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights" (§948b, g. HR 6166). While this is a sign of imprudence, the Supreme Court has the authority to rule other parts of the law unconstitutional, which would serve as the final check in American government. For the purposes of this essay, the matter has been resolved between the president and Congress, and this at least allows for appeals to the Constitution before the Supreme Court, rather than leaving the matter to the secrecy of the executive.

in the definition of good government," and that energy is charged with the protection of the community and liberty, then it is plausible energy could be wielded poorly and not accomplish these ends. Executive power is broad, as the Pacificus model demonstrates, but it must be prudent, as both Pacificus and Helvidius stipulate. In other words, the executive must not only work within its broad grant of power, it must work well to produce good government. The example of Vietnam was used earlier to demonstrate this—here the Bush administration's decision to include Iraq in the War on Terror is critiqued on the same grounds.

Bush argued for the invasion of Iraq with two key claims: Saddam Hussein was complicit in the terror attacks of September 11, and he possessed or sought to possess weapons of mass destruction (WMDs). Only half a year after the March 2003 invasion, Bush admitted the first point was false, saying "We have no evidence that Saddam Hussein was involved in the September 11 attacks"[98] ; the second point was invalidated in a report to Congress by Charles Duelfer, advisor to the director of central intelligence on Iraq weapons, on October 6, 2004.[99] Certainly executives are not expected to be perfect—Hamilton and Madison's view of flawed human nature would affirm this—but the disproval of these particular justifications for war are dangerously imprudent.

By linking Hussein with September 11 in the lead up to the war, Bush carefully maneuvered his actions within the realm of international law, specifically Chapter VII, Article 51 of the United Nations Charter that allows the unilateral use of force if its purpose is self-defense.[100] When evidence for this fell through, so did much of the U.S. façade of legitimacy—Secretary General of the U.N. Kofi Annan asserted, "From our point of view and the U.N.

[98] *BBC News*, "Bush rejects Saddam 9/11 link," September 18, 2003, http://news.bbc.co.uk.
[99] *CNN News*, "Report: No WMD Stockpiles in Iraq," October 7, 2004, www.cnn.com.
[100] Ronald C. Kramer and Raymond J. Michalowski, "War Aggression and State Crime," *Centre for Crime and Justice Studies* 45 (2005): 449. The U.N. Charter can be found at www.un.org.

charter point of view, it was illegal."[101] Ohio State University Professor of Law Mary Ellen O'Connell claimed the administration's case for war had "virtually no support in the wider international legal community."[102] As a caveat, this says nothing of the much more important domestic legality of Bush's decision, and on this point Bush acted within the Pacificus executive power model. In the international arena, the U.S. acts with hegemonic status, and is not bound to the loose system of norms and institutions that govern international proceedings. Still the erosion of good will in U.S. action creates new problems for U.S. security as the nation fights terrorism, which is cause of concern for Hamilton's realist prudence.

The loss of an important argument for war, the connection between Hussein and September 11, threatens U.S. security more broadly by creating an aura of acceptability for pre-emptive war. "If America creates a precedent through its practice [of pre-emptive war]," O'Connell went on to assert, "that precedent will be available, like a loaded gun, for other states to use as well."[103] Overly cautious as this might sound, if it holds true, then Bush's plan in the War on Terror to include Iraq could harm U.S. interests and security in the long run, and this would signify a precedent-setting impudent executive action of which Helvidius warns.

How Iraq was included in the War on Terror reveals the final critique from prudence. Ordinarily intelligence gathering undergoes a vigorous vetting process that prevents the multitude of raw field information from directly influencing policymakers and their decisions.[104] But according to Kenneth Pollack, former National Security Council expert on Iraq, the administration "dismantle[d] the existing filtering process that for fifty years had been preventing

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[101] Lynch, "US, Allies Dispute Annan on Iraq War," *The Washington Post*, Sept. 17.
[102] Mary Ellen O'Connell, "The Legal Case Against the Global War on Terror," *Case Western Reserve Journal of International Law*, 36, nos. 2 and 3 (2004): 350.
[103] O'Connell, "The Myth of Preemptive Self-Defense," *The American Society of International Law* (August 2002):19.
[104] For the traditional intelligence cycle see, Jerel A. Rosati, *The Politics of United States Foreign Policy*, 3rd ed. (Belmont, CA: Wadsworth, 2004), 198.

the policymakers from getting bad information."[105] He elaborates on what happened: "They always had information to back up their public claims, but it was often bad information…they were forcing the intelligence community to defend its good information and good analysis so aggressively that the intelligence analysts didn't have the time or the energy to go after the bad information."[106] It is the executive's responsibility to make important decisions on behalf of the interests and safety of the nation, and here it is unclear whether Bush managed his government in a way that provided him the best information to make the most informed decisions. Certainly this failure is an example of imprudent executive action.

The proper use of executive power throughout U.S. history, prudent or imprudent, is difficult to recognize before the end of a presidency—it takes time to determine if a president's actions worked, accomplished its goals (and were therefore prudent), or if these set new, harmful precedents or hurt the national interest (and were therefore imprudent). History has clearly sided with Washington's decision to issue the Neutrality Proclamation, and though not with Madison's Helvidius, his essays still serve as a constitutional check and warning for Hamilton's Pacificus model of executive power. Both faced the difficulty, as I do now, of writing and judging the actions of a sitting president. I have tried to present arguments that may withstand the test of time, but history may still vindicate the tools Bush used to execute the War on Terror and his inclusion of the Iraq War in that struggle. October and November 2007 have witnessed fewer U.S. troop and Iraqi civilian casualties—perhaps a minor victory for Bush's resilience through the troop buildup of early 2007 and a defeat for the largely symbolic congressional votes to end the war. Only years later will historians be able to assess the current president with all the facts,

[105] Quoted in Seymour Hersh, "The Stovepipe," *The New Yorker*, October 27, 2003, www.newyorker.com.
[106] Ibid.

but the standard for their assessment will have its roots in Pacificus and Helvidius—on how the president used his power, whether it was constitutional, and whether it was prudent.

V. Conclusion

I have analyzed the Pacificus-Helvidius debates and brought them from an isolated instance in American history, the Neutrality Proclamation of 1793, to the contemporary debate over executive power. Far from being outmoded views from the 18th century, together Pacificus and Helvidius provide a complete doctrine for understanding and critiquing executive power in America.

The modern executive is ambivalent in nature—the Constitution gives it the flexibility, unity, and Hamiltonian "energy" to act swiftly in the national interest, but the limits placed on this power are endlessly debatable. Where Pacificus contributed the model of broad executive power, Helvidius provided the constant reminder that human nature is power-loving, and self-interested rather than community-interested. Our human nature, Madison claims passionately, is the reason government exists in the first place: "If men were angels, no government would be necessary,"[107] he asserts in *Federalist* 51, defending an intricate system of separation of powers and checks and balances meant to instill an ambition for the common good and achieve a prudent, lasting democracy. Executive power, broad as it should or should not be, is still subject to fallibility—the reminder of caution from Helvidius.

Americans today struggle with executive power just as Hamilton and Madison did. The September 11 attacks were the first on continental American soil since Madison was president; because of this and the untraditional War on Terror in response, the executive became more powerful to address 21st century security concerns. The necessity of the executive urges an

[107] Madison, *Federalist* 51, 281.

appreciation of Pacificus in such a time, but even more so of Helvidius. Variations on the model of Pacificus can be seen across each administration, and especially in the case of President Bush, the situation dictated that the executive become stronger to confront new enemies. As practical application, Pacificus represents the metamorphic character of the executive—always responsive, and limited in that sense by the situation. Helvidius is timeless as an advisor to the people: we "cannot be too watchful against the introduction, nor too critical in tracing the consequences, of new principles and new constructions, that may remove the landmarks of power."[108] To do that honorably and fairly, with an understanding of what is necessary according to Pacificus and what is prudent according to our own judgment, is what this essay and all debates on executive power hope to do.

[108] Madison, "Helvidius IV," 85.

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