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# AD HOC DIPLOMATS

RYAN M. SCOVILLE<sup>†</sup>

## ABSTRACT

*Article II of the Constitution grants the president power to appoint “Ambassadors” and “other public Ministers” with the advice and consent of the Senate. By all accounts, this language requires Senate confirmation for the appointment of resident ambassadors and other diplomats of similar rank and tenure. Yet these are hardly the only agents of U.S. foreign relations. Ad hoc diplomats—individuals chosen exclusively by the president to complete limited and temporary assignments—play a comparably significant role in addressing international crises, negotiating treaties, and otherwise executing foreign policy.*

*This Article critically examines the appointments process for such irregular agents. An orthodox view holds it permissible for the president to dispatch any ad hoc diplomat without Senate confirmation, but this view does not accord with the original meaning of Article II. Scrutinizing text and an extensive collection of original historical sources, I show that, under a formalist reading of the Constitution, the appointment of most ad hoc diplomats requires the advice and consent of the Senate because these agents are typically “public Ministers” and “Officers of the United States” under the Appointments Clause.*

*The analysis makes several contributions. First, it provides the first thorough account of the original meaning of “public Ministers”—a term that appears several times in the Constitution but lacks precise contours in contemporary scholarship and practice. Second, for formalists, the analysis reorients longstanding debates about the process of treaty-making and empowers the Senate to exert greater influence over a wide variety of presidential initiatives, including communications with North Korea, the renegotiation of trade agreements, the campaign to defeat ISIS, and the stabilization of Ukraine, all of which have relied on the work of ad hoc diplomats. At*

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*a time of trepidation over the nature of U.S. foreign policy, such influence might operate as a stabilizing force. Third, the analysis illuminates rhetorical and doctrinal maneuvers that have facilitated the rise of the modern presidency, including historical revisionism and the marginalization of international law as an input in constitutional interpretation. These maneuvers complicate the political valence of originalism and cast the Justice Department's Office of Legal Counsel (OLC)—a key proponent of the orthodox view—as a motivated expositor of the separation of powers.*

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## INTRODUCTION

Modern presidents rely on two classes of diplomats to conduct foreign relations. One comprises individuals who occupy an office of indefinite duration to handle a diverse range of assignments. The other

consists of those who serve on a temporary basis to accomplish a discrete task. The first class includes a global network of resident ambassadors, ambassadors at large, Foreign Service officers, and others within the State Department and several other federal agencies, while the second involves individuals variously described as special envoys, executive agents, and ad hoc diplomats. Both act for and ultimately take orders from the president. Both can implicate the United States under international principles of state responsibility.<sup>1</sup> Both are entitled to diplomatic immunity under international law.<sup>2</sup> And both carry out similar functions, including negotiating treaties, attending official ceremonies and conferences, mediating foreign conflicts, and otherwise serving as channels of communication on matters of national concern.<sup>3</sup>

Consider a few examples. During World War II, President Roosevelt designated Harry Hopkins, a special envoy, to act as his personal representative in meetings with foreign leaders, report on allied needs for military assistance, and participate in strategic talks at the Tehran Conference of 1943,<sup>4</sup> while in the 1960s, President Kennedy assigned Averell Harriman, an ambassador at large, to act as a roving emissary to Western European capitals, engage in fact-finding, and serve as the U.S. representative to an international conference on the status of Laos.<sup>5</sup> In 1976, President Carter sent Ellsworth Bunker, an ambassador at large, to negotiate the treaties under which the United States eventually ceded control over the Panama Canal,<sup>6</sup> while in 1981,

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1. See Draft Articles on Responsibility of States for Internationally Wrongful Acts art. 4, *in* Rep. of the Int'l Law Comm'n on the Work of Its Fifty-Third Session, U.N. GAOR, 56th Sess., Supp. No. 10, at 26, U.N. Doc. A/56/10 (2001) (providing that a State organ "includes any person or entity which has that status in accordance with the internal law of the State," and that "[t]he conduct of any State organ shall be considered an act of that State under international law").

2. Compare Vienna Convention on Diplomatic Relations art. 31, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (establishing immunity from criminal jurisdiction and most types of civil and administrative jurisdiction for heads of mission and members of a mission's diplomatic staff), with Convention on Special Missions art. 31, Dec. 8, 1969, 1400 U.N.T.S. 231 (providing similar immunities for "representatives of the sending State in the special mission and the members of its diplomatic staff").

3. Compare DENNIS C. JETT, AMERICAN AMBASSADORS: THE PAST, PRESENT, AND FUTURE OF AMERICA'S DIPLOMATS 117–71 (2014) (describing the functions of ambassadors), with HENRY MERRITT WRISTON, EXECUTIVE AGENTS IN AMERICAN FOREIGN RELATIONS 315–824 (1929) (documenting the practices of ad hoc diplomats in early U.S. history).

4. CHRISTOPHER D. O'SULLIVAN, HARRY HOPKINS: FDR'S ENVOY TO CHURCHILL AND STALIN 75–124 (2015).

5. LEE H. BURKE, AMBASSADOR AT LARGE: DIPLOMAT EXTRAORDINARY 61–69 (1972).

6. *Talks Resumed by Bunker Over Panama Canal Issue*, N.Y. TIMES, May 4, 1976, at 8.

President Reagan dispatched Philip Habib, a special envoy, to negotiate an end to the Lebanese Civil War.<sup>7</sup> Decades later, the Obama Administration selected Barbara Weisel, an Assistant U.S. Trade Representative for Southeast Asia and the Pacific, to be its lead interlocutor on the Trans-Pacific Partnership;<sup>8</sup> assigned Todd Stern, a special envoy, to be its chief negotiator on climate change;<sup>9</sup> and appointed Wendy Sherman as Under Secretary of State for Political Affairs,<sup>10</sup> a position in which Sherman led the talks over the Iranian nuclear program.<sup>11</sup> Most recently, Donald Trump has relied upon Jared Kushner, his son-in-law, to facilitate negotiations over peace in the Middle East<sup>12</sup> and tasked both Kushner and Robert Lighthizer, the U.S. Trade Representative, with orchestrating a renegotiation of the North American Free Trade Agreement.<sup>13</sup> In these and other ways, there is substantial functional overlap between the two classes.

The appointments process, however, differs markedly between them. The president appoints “Ambassadors, other public Ministers and Consuls” only “by and with the Advice and Consent of the Senate,”<sup>14</sup> but appoints ad hoc diplomats unilaterally. Thus, according to what has become an orthodox view, the Senate can reject by a simple-majority vote the president’s choices for posts such as

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7. Bernard Gwertzman, *A Special U.S. Envoy Will Go to Mideast*, N.Y. TIMES, May 6, 1981, at A1.

8. *Barbara Weisel*, ROCK CREEK GLOBAL ADVISORS LLC, <http://www.rockcreekadvisors.com/barbara-weisel> [https://perma.cc/BJ43-CSEX].

9. Kate Galbraith, *Clinton Names Climate Envoy*, N.Y. TIMES (Jan. 26, 2009), <https://green.blogs.nytimes.com/2009/01/26/clinton-names-climate-envoy/?mtrref=undefined> [https://perma.cc/4CUN-9L2P].

10. 157 CONG. REC. 13,769 (2011).

11. See Jonathan Landay, Joseph Ax & Bozorgmehr Sharafedin, *As Trump Leaves Iran Deal, Families of Americans Jailed in Iran Urge Talks*, REUTERS (May 9, 2018, 9:47 PM), <https://www.reuters.com/article/us-iran-nuclear-prisoners/as-trump-leaves-iran-deal-families-of-americans-jailed-in-iran-urge-talks-idUSKBN1IB055> [https://perma.cc/KF45-NV6W].

12. See Annie Karni, *Kushner in Middle East for Peace Talks*, POLITICO (Aug. 22, 2017, 8:15 AM), <https://www.politico.com/story/2017/08/22/kushner-in-middle-east-for-peace-talks-241895> [https://perma.cc/JN9N-HUNC].

13. See Don Lee, *Senate Approval of Trump’s Trade Chief Could Speed Up NAFTA Talks*, L.A. TIMES (May 11, 2017, 3:10 PM), <http://www.latimes.com/business/la-fi-trump-trade-lighthizer-20170511-story.html#> [https://perma.cc/3XFV-4CWL]; David Ljunggren & Steve Holland, *How Trump’s Son-in-law Helped Salvage the North American Trade Zone*, REUTERS, (Oct. 1, 2018, 8:13 PM), <https://www.reuters.com/article/us-trade-nafta-kushner-insight/how-trumps-son-in-law-helped-salvage-the-north-american-trade-zone-idUSKCN1MC04M> [https://perma.cc/Z9JL-M5YZ].

14. U.S. CONST., art. II, § 2, cl. 2.

ambassador at large,<sup>15</sup> but plays no part in the appointment of irregular agents.<sup>16</sup> Returning to the examples above, the Senate had a role in the appointments of Harriman, Bunker, Sherman, and Lighthizer, but not Hopkins, Habib, Weisel, Stern, or Kushner. Is this constitutional?

A dearth of scholarship has obscured the significance of the question. In the early twentieth century, ad hoc diplomacy attracted attention from a small number of political scientists led by Henry Wriston, who in 1929 published an eight-hundred-page tome that revealed how early presidents had relied at times upon special envoys instead of resident ambassadors for reasons of secrecy, informality, speed, and aptitude.<sup>17</sup> But much has happened in the past eighty-plus years of U.S. foreign relations, and no other political scientists have followed up with anything more than an occasional collection of anecdotes.<sup>18</sup> This has made it easier for presidents to pursue unilateral appointments without scrutiny.

15. See 22 U.S.C. § 3942(a)(1) (2012) (“The President may, by and with the advice and consent of the Senate, appoint an individual as a chief of mission, as an ambassador at large, as a minister, as a career member of the Senior Foreign Service, or as a Foreign Service officer.”).

16. See Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 100–05 (2007) (suggesting this position).

17. See WRISTON, *supra* note 3; see generally MAURICE WATERS, *THE AD HOC DIPLOMAT: A STUDY IN MUNICIPAL AND INTERNATIONAL LAW* (1963) (surveying the foreign policy practice of presidential reliance on special executive agents in various aspects of foreign affairs); Maurice Waters, *The Ad Hoc Diplomat: A Legal and Historical Analysis*, 6 WAYNE L. REV. 380 (1960) (examining the use of special executive agents and the practice’s legality); Maurice Waters, *Special Diplomatic Agents of the President*, 307 ANNALS AM. ACAD. POL. & SOC. SCI. 124 (1956) (investigating the presidential power to use special executive agents to carry out foreign responsibilities without congressional restrictions) [hereinafter Waters, *Special Diplomatic Agents*]; Henry Merritt Wriston, *American Participation in International Conferences*, 20 AM. J. INT’L L. 33 (1926) (reviewing whether the President may legally send executive agents of any type to international conferences without congressional approval); Henry Merritt Wriston, *Presidential Special Agents in Diplomacy*, 10 AM. POL. SCI. REV. 481 (1916) (assessing the legal and customary justifications for the employment of special executive agents in diplomacy); Henry Merritt Wriston, *The Special Envoy*, 38 FOREIGN AFF. 219 (1960) (evaluating nearly unrestricted presidential use of personal representatives abroad). Additional sources provide more limited treatments. See BURKE, *supra* note 5, at 1–10 (positing “the Ambassador at Large as the personal emissary of the President”); JOSEPH P. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE* 284–89 (1953) (observing that “the President is accorded wide discretion in the selection of persons to aid him in the conduct of foreign relations”); ELMER PLISCHKE, *SUMMIT DIPLOMACY: PERSONAL DIPLOMACY OF THE PRESIDENT OF THE UNITED STATES* 41–51 (1958) (noting the “time-tried aspect of summit diplomacy” in which “the President employs personal diplomatic representatives to keep himself informed and to extend his personal influence and service abroad”).

18. See generally Michael Fullilove, *All the Presidents’ Men: The Role of Special Envoys in U.S. Foreign Policy*, 84 FOREIGN AFF. 13 (2005) (discussing the use of special envoys in the Bill Clinton and George W. Bush administrations).

Legal scholars, meanwhile, have offered little doctrinal clarity or support. The ad hoc diplomat is the Appointments Clause analogue to the so-called “sole executive agreement,” which is formed when the president enters into a commitment with a foreign government without the Senate’s advice and consent or other congressional approval. Both constitute an unenumerated means by which the president independently engages foreign sovereigns. But while sole executive agreements have garnered substantial attention,<sup>19</sup> few have acknowledged unilateral diplomatic appointments, much less analyzed their legality. Some commentators from the early twentieth century asserted the president’s independent power to appoint special envoys under the Article II Vesting Clause,<sup>20</sup> the Treaty Clause,<sup>21</sup> the Take Care Clause,<sup>22</sup> the Commander in Chief Clause,<sup>23</sup> and the alleged inapplicability of the Appointments Clause,<sup>24</sup> but offered only limited explanation. More recently, Saikrishna Prakash and Michael Ramsey at least partly concurred in the orthodox view on originalist grounds, but for them, ad hoc diplomacy was only a small piece of a broader argument about the meaning of the Article II Vesting Clause, rather than a target of sustained analysis.<sup>25</sup>

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19. See generally Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573 (2007) (contending that sole executive agreements must be adopted through either the treaty-making or law-making process and that the Supremacy Clause does not allow the President to override existing law); Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133 (1998) (asserting that while the president may lawfully enter minor executive agreements in foreign affairs, the president must receive some form of congressional approval to enter significant, binding international obligations or to alter domestic law); Ingrid Brunk Wuerth, *The Dangers of Deference: International Claim Settlement by the President*, 44 HARV. INT’L L.J. 1 (2003) (arguing that judicial deference to sole executive agreements permitting the president to terminate domestic litigation without congressional approval undermines the Treaty and Supremacy Clauses).

20. See, e.g., QUINCY WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 333 (1922).

21. BURKE, *supra* note 5, at 6.

22. See, e.g., Waters, *Special Diplomatic Agents*, *supra* note 17, at 125.

23. See, e.g., Francis N. Thorpe, *Is the President of the United States Vested with Authority Under the Constitution to Appoint a Special Diplomatic Agent with Paramount Power Without the Advice and Consent of the Senate?*, 42 AM. L. REG. & REV. 257, 261 (1894).

24. See, e.g., WATERS, *supra* note 17, at 127; see also LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 42 (2d ed. 1996) (“The constitutional requirement of Senate consent was considered inapplicable because these agents, whatever they were called, were not appointed to permanent ‘offices’, did not serve indefinitely, did not have emoluments of office (often not even compensation), or perform duties prescribed by the Constitution or by Congress.”).

25. See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231, 309–11 (2001).

The result is that most contemporary observers and government officials simply assume ad hoc diplomatic appointments of all kinds to be permissible, and think about the constitutionality of international treaties in particular as a simple function of contents and domestic forms of adoption.<sup>26</sup> Thus, some objected to the Trans-Pacific Partnership on the view that it would have delegated to private arbitrators adjudicative tasks that are the prerogative of Article III courts,<sup>27</sup> and the initial debate over the Paris Agreement on Climate Change focused on whether the obligations arising from the treaty are so substantial as to require some form of direct congressional approval.<sup>28</sup> Outside of the treaty context, some have objected, on grounds of both nepotism and competence, to President Trump's decision to task his son-in-law with an assortment of diplomatic assignments in the Middle East.<sup>29</sup> In these and many other cases, it has been taken as given that the unilateral process by which the president appointed the negotiators was constitutional.

There are good reasons, however, to scrutinize such an assumption. The modern executive branch relies upon ad hoc diplomats frequently and to address a multitude of issues. In recent years, presidents and secretaries of state have independently dispatched agents to negotiate treaties such as the Paris Agreement;<sup>30</sup>

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26. See generally David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000) (arguing that federalism does not operate as a limit on the Article II power to make treaties); Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236 (2008) (arguing that congressional-executive agreements are a constitutional alternative to Article II treaties).

27. See Alan Morrison, *Is the Trans-Pacific Partnership Unconstitutional?*, ATLANTIC (June 23, 2015), <https://www.theatlantic.com/politics/archive/2015/06/tpp-isds-constitution/396389> [<https://perma.cc/F6RH-WJYS>].

28. Compare Daniel Bodansky & Peter Spiro, *Executive Agreements Plus*, 49 VAND. J. TRANSNAT'L L. 885, 887, 916–19 (2016) (arguing that the Paris Agreement is constitutional as an “executive agreement-plus,” a category of international agreement “supported but not specifically authorized by congressional action”), with Michael D. Ramsey, *Evading the Treaty Power?: The Constitutionality of Nonbinding Agreements*, 11 FIU L. REV. 371, 384–87 (2016) (tentatively concluding that the Agreement is unconstitutional as “an executive agreement (that is, a binding nontreaty agreement)”).

29. See, e.g., Julie Hirschfeld Davis & Maggie Haberman, *Donald Trump's Son-in-Law, Jared Kushner, Tests Legal Path to White House Job*, N.Y. TIMES (Nov. 17, 2016), <https://www.nytimes.com/2016/11/18/us/politics/donald-trump-administration.html?partner=bloomberg> [<https://perma.cc/BP4A-N63R>] (discussing nepotism objections to Kushner's appointment).

30. See Galbraith, *supra* note 9 (reporting Todd Stern's appointment to lead U.S. negotiations on climate change).



promote peace in Sudan,<sup>31</sup> the Great Lakes region of Africa,<sup>32</sup> Northern Ireland,<sup>33</sup> and the Middle East;<sup>34</sup> advance a settlement on the status of Kosovo;<sup>35</sup> encourage dialogue between the United States and Muslim countries;<sup>36</sup> arrange for the resettlement of detainees held at Guantanamo Bay;<sup>37</sup> and reduce the threat posed by shoulder-launched surface-to-air missiles,<sup>38</sup> among many other reasons. Even under the leadership of former Secretary of State Rex Tillerson, who moved to curtail U.S. reliance on special envoys,<sup>39</sup> the Trump Administration sent agents to renegotiate trade agreements,<sup>40</sup> coordinate the military campaign against the Islamic State,<sup>41</sup> and address issues such as Russian aggression in Ukraine.<sup>42</sup> Further underscoring the significance of the

31. See *Special Envoy Danforth Discusses Back-Channel Talks with Sant'egidio*, Vatican FM, WIKILEAKS (Dec. 27, 2001, 4:05 PM), [https://wikileaks.org/plusd/cables/01VATICAN6604\\_a.html](https://wikileaks.org/plusd/cables/01VATICAN6604_a.html) [<https://perma.cc/5MR6-G7L2>].

32. See *Great Lakes; SE Wolpe's August 28 Consultations with the French*, WIKILEAKS (Sept. 2, 2009, 8:37 AM), [https://wikileaks.org/plusd/cables/09PARIS1198\\_a.html](https://wikileaks.org/plusd/cables/09PARIS1198_a.html) [<https://perma.cc/73XQ-GT4K>].

33. See *Northern Ireland Leaders Thank Special Envoy Dobriansky*, WIKILEAKS (Jan. 13, 2009, 1:12 PM), [https://wikileaks.org/plusd/cables/09BELFAST5\\_a.html](https://wikileaks.org/plusd/cables/09BELFAST5_a.html) [<https://perma.cc/UB9R-FVFU>].

34. See *Special Envoy Mitchell's EU Meetings*, WIKILEAKS (Apr. 27, 2009, 6:02 PM), [https://wikileaks.org/plusd/cables/09BRUSSELS601\\_a.html](https://wikileaks.org/plusd/cables/09BRUSSELS601_a.html) [<https://perma.cc/QF5D-TQ87>].

35. See *Special Envoy Wisner's Visit to Belgrade*, WIKILEAKS (Nov. 2, 2006, 3:50 PM), [https://wikileaks.org/plusd/cables/06BELGRADE1810\\_a.html](https://wikileaks.org/plusd/cables/06BELGRADE1810_a.html) [<https://perma.cc/XHK9-MVM8>].

36. See *Demarche: Announcing the U.S. Special Envoy to the OIC*, WIKILEAKS (Feb. 29, 2008, 12:45 AM), [https://wikileaks.org/plusd/cables/08STATE20672\\_a.html](https://wikileaks.org/plusd/cables/08STATE20672_a.html) [<https://perma.cc/F8JJ-Z3Z2>].

37. See *Guantanamo: Special Envoy Fried and UNHCR on Next Steps for Resettling Detainees*, WIKILEAKS (May 20, 2009, 7:35 AM), [https://wikileaks.org/plusd/cables/09GENEVA383\\_a.html](https://wikileaks.org/plusd/cables/09GENEVA383_a.html) [<https://perma.cc/4TGV-RE8A>].

38. See *Special Envoy for MANPADS – Indonesian Has Questions on Assistance*, WIKILEAKS (Mar. 28, 2008, 10:18 AM), [https://wikileaks.org/plusd/cables/08JAKARTA626\\_a.html](https://wikileaks.org/plusd/cables/08JAKARTA626_a.html) [<https://perma.cc/7K8K-6ART>].

39. See Letter from Rex W. Tillerson, Sec'y of State, to the Hon. Bob Corker, Chairman, Comm. on Foreign Relations, United States Senate, Aug. 28, 2017, <https://www.politico.com/f/?id=0000015e-2b43-db52-a75e-ff7b3bfa0001> [<https://perma.cc/S6D4-SRBZ>] (describing Secretary Tillerson's plan to integrate special envoys and special representatives into the State Department bureaucracy and eliminate those that are no longer useful).

40. See generally *Biographies of Key Officials*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/about-us/biographies-key-officials> [<https://perma.cc/J5ZA-JYZU>] (listing a number of negotiators appointed without the Senate's advice and consent).

41. See *Biography: Brett McGurk, Special Presidential Envoy for the Global Coalition to Defeat ISIS*, U.S. DEP'T OF STATE, <https://www.state.gov/pa/ei/biog/bureau/213058.htm> [<https://perma.cc/LEP3-9XYB>].

42. Josh Rogin, *Inside the Trump Administration's Plans to Restart the Ukraine Peace Process*, WASH. POST (May 28, 2017), <https://www.washingtonpost.com/opinions/global-opinions/inside-the-trump-administrations-plans-to-restart-the-ukraine-peace->

issue, Secretary of State Mike Pompeo has expanded the use of special envoys by dispatching agents to address some of the toughest challenges in U.S. foreign policy, including Iran, North Korea, and Syria.<sup>43</sup>

These appointments typically serve laudable purposes, but good intentions do not necessarily make a practice lawful, and more is at stake than the specific policies that animate each case. The constitutionality of unilateral appointments determines whether the Senate can vet envoys for competency and conflicts of interest. The constitutionality of these appointments also affects the influence of the traditional corps of resident ambassadors and Foreign Service officers. It shapes the Senate's ability to generate public discussion about and express opposition toward executive policies. And in the event of misconduct, it indirectly determines whether ad hoc diplomats are impeachable as "civil Officers of the United States."<sup>44</sup> In short, a constitution that requires Senate confirmation is one that subjects the conduct of foreign relations to greater degrees of transparency, deliberation, consensus building, and public accountability.

The purpose of this Article is to articulate the originalist case for such a requirement.<sup>45</sup> The Appointments Clause provides in part that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law."<sup>46</sup> The text thus suggests that the requirement of advice and consent applies to a wide variety of diplomats—not just ambassadors, but also "other public Ministers."<sup>47</sup> The orthodox view attempts to sidestep this language, asserting that ad hoc agents are not "public Ministers" because they are not formally

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process/2017/05/28/391da144-4234-11e7-8c25-44d09ff5a4a8\_story.html [https://perma.cc/S76F-VNM9].

43. Gardiner Harris, *Special Envoys Were Once Disdained Under Trump. Now They're Popping Up All Over*, N.Y. TIMES (Aug. 23, 2018), <https://www.nytimes.com/2018/08/23/world/asia/pompeo-north-korea-envoy.html> [https://perma.cc/U5HA-X4KC].

44. U.S. CONST., art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

45. I am saving nontextual considerations for a separate, forthcoming article.

46. U.S. CONST., art. II, § 2, cl. 2.

47. *Id.*

accredited to represent the United States<sup>48</sup> and lack tenure of office.<sup>49</sup> As arguments about original meaning, however, these claims miss the mark. Indeed, a wealth of original historical sources show that the founders understood the law of nations as supplying the definition of the term “public Ministers,” that this definition encompassed various types of irregular envoys with statuses and functions equivalent to those of contemporary ad hoc diplomats, and that one who qualified as a public minister for the U.S. government under the law of nations was necessarily a public minister and officer of the United States as a matter of domestic constitutional law.

The issue is not merely of academic interest. In 2017, the Senate briefly considered legislation to radically restrict the scope of the president’s authority to make unilateral appointments.<sup>50</sup> With only limited exceptions, Section 301 of the Department of State Authorities Act, Fiscal Year 2018 would have required the Senate’s advice and consent for the appointment of “any Special Envoy, Special Representative, Special Coordinator, Special Negotiator, Envoy, Representative, Coordinator, or Special Advisor.”<sup>51</sup> This proposal lost momentum after passing the Senate Foreign Relations Committee in September of 2017, but members of Congress could revisit the idea in the future.<sup>52</sup> If and when they do, the constitutionality of unilateral appointments will loom large. In demonstrating that ad hoc diplomats are, as a matter of original meaning, principal officers under the Appointments Clause, the present analysis provides a foundation for statutory intervention.

The Article proceeds as follows. Part I outlines the modern legal position in favor of unilateral diplomatic appointments. Parts II and III present the Article’s centerpiece: an originalist argument that the

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48. Presidential Appointment of Foreign Agents Without the Consent of the Senate, 1 Op. O.L.C. Supp. 457, 457 (1943).

49. See Officers of the United States Within the Meaning of the Appointments Clause, *supra* note 16, at 100–05 (stating the orthodox view).

50. See *All Information (Except Text) for S.1631 - Department of State Authorities Act, Fiscal Year 2018*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/1631/all-info?r=1> [<https://perma.cc/9DVP-TBJG>] (reporting the status of the bill).

51. Department of State Authorities Act, Fiscal Year 2018, S. 1631, 115th Cong. § 301(b) (2017).

52. See Joshua Kurlantzick, *How Will the Midterm Elections Affect U.S. Foreign Policy?*, COUNCIL ON FOREIGN REL.: ASIA UNBOUND (Nov. 7, 2018), <https://www.cfr.org/blog/how-will-midterm-elections-affect-us-foreign-policy> [<https://perma.cc/L5TY-JA9G>] (predicting that House Democrats “likely will try to get the State Department authorization bill passed,” but also suggesting that passage is “a very unlikely prospect”).

president lacks the power to appoint most ad hoc diplomats without the Senate's advice and consent. Part II performs a close reading of the Constitution's text to show that, while substantially indeterminate, the text not only fails to require the orthodox view, but also provides greater support for Senate involvement than executive unilateralism. Part III then analyzes a large compilation of historical sources to recover the original meaning of the Appointments Clause. These sources—which include records from the Constitutional Convention and state ratification debates, an early act of the British Parliament and accompanying judicial precedents, eighteenth-century treatises on diplomacy and international law, transcripts from congressional debates, federal appointment and payroll records, and Founding-era dictionaries—show that the framers treated many ad hoc diplomats, including all of the principal U.S. negotiators of international agreements, as public ministers and officers of the United States for purposes of the Appointments Clause, without regard for tenure, emoluments, or title. Part IV concludes by exploring the significance of the analysis from both formalist and functionalist perspectives.

#### I. THE ORTHODOX DEFENSE OF UNILATERAL APPOINTMENTS

A modern view posits that the president holds power to appoint all ad hoc diplomats without obtaining the Senate's advice and consent.<sup>53</sup> There is no single official source that fully explains or attempts to justify this view, but opinions from the Justice Department's Office of Legal Counsel ("OLC") and a collection of academic writing suggest that it rests on three major claims.

The first is the negative claim that the Appointments Clause does not apply because ad hoc diplomats are neither "Officers of the United States" nor "inferior" officers.<sup>54</sup> In a 2007 opinion, OLC explained that a federal office must (1) be "continuing" and (2) "involve[] a position to which is delegated by legal authority a portion of the sovereign powers of the federal Government."<sup>55</sup> A "continuing" position is "not personal, 'transient,' or 'incidental,'"<sup>56</sup> and one that involves a

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53. In most cases, this view is merely implicit. *See generally, e.g.*, Fullilove, *supra* note 18 (advocating greater presidential reliance on special envoys, without considering whether unilateral appointments are consistent with Article II).

54. U.S. CONST., art. II, § 2, cl. 2.

55. Officers of the United States Within the Meaning of the Appointments Clause, *supra* note 16, at 77.

56. *Id.* at 100.

delegation of sovereign authority will possess “power lawfully conferred by the government to bind third parties, or the government itself, for the public benefit.”<sup>57</sup> OLC’s stance is that ad hoc diplomats are never officers because they fail to qualify under the first of these criteria.<sup>58</sup> Their positions, in other words, are not “continuing” because they are ““summoned into existence only for *specific temporary purposes*.””<sup>59</sup> To justify this conclusion, OLC has cited evidence of original meaning, opinions from prior Attorneys General, and case law, the most important of which is the Supreme Court’s 1867 decision in *United States v. Hartwell*,<sup>60</sup> which did not address diplomatic appointments but stated that “[a]n office is a public station, or employment, conferred by the appointment of government” and “embraces the ideas of tenure, duration, emolument, and duties.”<sup>61</sup> An overwhelming majority of these authorities date back to the eighteenth and nineteenth centuries.

Decades before OLC, political scientist Henry Wriston reached the same conclusion on the basis of original and early historical practice.<sup>62</sup> The essence of his claim was that ad hoc diplomats are not officers because presidents since George Washington have consistently and frequently appointed such agents on their own authority, and because Congress has either acquiesced or opposed the practice on grounds motivated by political disagreement rather than constitutional

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57. *Id.* at 87.

58. In contrast, OLC does not appear to contest that ad hoc diplomats generally satisfy the second criterion. According to the opinion, a position to which is delegated by legal authority a portion of the “sovereign powers of the federal Government” is one conferring powers to “bind[] the government or third parties for the benefit of the public,” including “the authority to represent the United States to foreign nations.” *Id.* at 77. This definition would seem to include most ad hoc diplomats.

59. *Id.* at 103 (quoting EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1789-1948*, at 86 (5th ed. 1984) (emphasis in original)).

60. *United States v. Hartwell*, 73 U.S. 385 (1867).

61. *Id.* at 393; *see also* The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 139 (1996) (citing *Hartwell* as the source of the test for whether a position is an office). The nonoriginalist merits of OLC’s position are also worth considering, particularly in light of the Supreme Court’s recent decision in *Lucia v. SEC*, which addressed the meaning of “Officers of the United States” for purposes of the Appointments Clause. *See generally* *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (holding that Administrative Law Judges at the Securities and Exchange Commission are “Officers of the United States” because they occupy a “continuing” position established by law and “exercise[e] significant authority pursuant to the laws of the United States”). I will address those merits in a separate article.

62. *See generally* WRISTON, *supra* note 3 (concluding, on the basis of historical practice and congressional acquiescence, that ad hoc diplomacy is constitutional).

principle.<sup>63</sup> Wriston's purpose was primarily descriptive, but he clearly saw something pragmatic and salutary in the trends that had developed. Special emissaries offered a calibrated means by which to open relations, communicate with colonial and dependent states, participate in international conferences, interface with unrecognized regimes, and otherwise pursue objectives for which resident diplomats are ill-suited.<sup>64</sup>

Several premises appear to underlie the first major claim. One is that advice and consent are necessary only where an appointee will qualify as both a "public Minister[]" and an "Officer[]" of the United States."<sup>65</sup> Another is that the criteria that determine whether an appointee is a public minister are distinct from those that determine whether she is an officer. Still another is that the Supreme Court's decision in *Hartwell* supplies the proper test for determining officer status.

As explained below,<sup>66</sup> the first of these premises relies on the plain language of the Appointments Clause. It is far from obvious, however, that the others are justified, and for the most part those who espouse the orthodox position do not acknowledge or attempt to justify them. There is no significant scholarly analysis on the meaning of "public Ministers," for example, or whether it is warranted to treat officer status as an independent precondition to the advice-and-consent requirement, rather than as a simple consequence of an appointee's qualification as a public minister. As I will show, this leaves the first major claim vulnerable in ways that the literature has failed to recognize.

The second major claim is that the Appointments Clause is also inapplicable insofar as ad hoc diplomats are neither "Ambassadors" nor "public Ministers."<sup>67</sup> In a 1943 memorandum to the assistant solicitor general, attorney-adviser W.H. Eberly explained that those terms exclude "personal representatives of the President" and instead refer to those who have been "formally accredited to . . . foreign governments as official diplomatic representatives of our government."<sup>68</sup> This position would not excuse the unilateral

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63. *Id.*

64. *Id.* at 315–837.

65. U.S. CONST., art. II, § 2, cl. 2.

66. *See infra* Part II.A.

67. U.S. CONST., art. II, § 2, cl. 2.

68. Presidential Appointment of Foreign Agents Without the Consent of the Senate, *supra*

appointment of treaty negotiators or others who exercise governmental authority, but would exempt certain types of informal, non- or quasi-official appointments from the requirement of advice and consent. As justification, Eberly pointed to influential treatises by Green Haywood Hackworth and John Bassett Moore,<sup>69</sup> the relevant portions of which reported a handful of unilateral appointments from the nineteenth and early twentieth centuries.<sup>70</sup> OLC has never cited the Eberly memorandum in a published opinion, but its central conclusion is likely to continue to reflect the position of the executive branch.<sup>71</sup>

The final major claim is that parts of Article II other than the Appointments Clause supply the president with power to appoint ad hoc diplomats on his own authority. Commentators have identified a number of candidates. Edward Corwin and Quincy Wright emphasized the Article II Vesting Clause.<sup>72</sup> Wriston invoked the Treaty Clause on the view that the power to “make Treaties” implies the power to select and dispatch those who would negotiate them.<sup>73</sup> Maurice Waters pointed to the Take Care Clause.<sup>74</sup> One nineteenth-century commentator highlighted the Commander in Chief Clause, contending that it empowers the president “to send special agents to any part of the world to make investigation . . . touching matters pending, or likely to be pending, between the United States and another country or people.”<sup>75</sup>

OLC has not directly weighed in on the final major claim, but its opinions endorse broad and exclusive executive authority over the conduct of foreign relations, including the selection of those who will represent the United States abroad. In a 2009 opinion reviewing a statute that purported to block the president from using appropriated funds to pay expenses for delegations to any U.N. body chaired by a state sponsor of terrorism, OLC stated that Congress lacks “authority

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note 48, at 457.

69. *Id.* at 457–59.

70. 4 GREEN HAYWOOD HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 412–14 (1942); 4 JOHN BASSETT MOORE, *A DIGEST OF INTERNATIONAL LAW* 452–57 (1906).

71. See Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1481 tbl.1 (2010) (reporting evidence that OLC rarely modifies or overrules prior opinions).

72. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 207 (4th ed. 1957); WRIGHT, *supra* note 20, at 333. As explained earlier, the same appears to be true of Prakash and Ramsey. See *supra* note 25 and accompanying text.

73. WRISTON, *supra* note 3, at 126–27.

74. Waters, *Special Diplomatic Agents*, *supra* note 17, at 125.

75. Thorpe, *supra* note 23, at 261.

to attempt to dictate the modes and means by which the President engages in international diplomacy with foreign countries and through international fora,” and concluded that the statute in question was unconstitutional because it denied the president “the use of his preferred agents.”<sup>76</sup> Two years later, OLC reiterated that the president’s diplomacy power includes “exclusive authority to determine . . . the individuals who will represent the United States” in international negotiations.<sup>77</sup> These opinions cited to virtually every part of Article II that implicates foreign relations and suggest that OLC would affirm the president’s independent authority to appoint all varieties of special envoys on similar grounds.<sup>78</sup> As I will show, such a position is at odds with original meaning.

## II. INSIGHTS FROM TEXT

To evaluate the merits of the orthodox position, I begin by closely scrutinizing the text of Article II, which contains all of the alleged foundations for unilateral appointments. On its own, this text is in many respects indeterminate. But to the extent that it offers any insight at all, the text offers stronger support for the view that unilateral appointments are impermissible.

### A. *The Appointments Clause*

The Appointments Clause states in part that the president “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of

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76. Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act, 33 Op. O.L.C., at 4 (June 1, 2009), <https://www.justice.gov/file/18496/download> [<https://perma.cc/4XW5-ZHWE>].

77. Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(A) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011, 35 Op. O.L.C., at 4 (Sept. 19, 2011), <https://www.justice.gov/file/18346/download> [<https://perma.cc/9MVF-7G4G>] (citation omitted).

78. See Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act, *supra* note 76, at 4; Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(A) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011, *supra* note 77, at 4 & n.1. From the standpoint of a neutral interpreter, the Supreme Court’s recent decision in *Zivotofsky v. Kerry* complicates the matter insofar as it rejected the view that the president has “exclusive authority to conduct diplomatic relations” and “the bulk of foreign-affairs powers.” *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2085–86, 2089 (2015) (internal quotations and citation omitted). It is likely, however, that the executive branch will “read [*Zivotofsky II*] generously in favor of the President in resolving everyday foreign policy disputes between the political branches.” Jack Goldsmith, *Zivotofsky II as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 114 (2015).



the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.”<sup>79</sup> Plainly, there is no plausible argument that ad hoc diplomats qualify as “Judges of the supreme Court.”<sup>80</sup> Nor is there a persuasive argument that they qualify as “Consuls,” who have long executed nondiplomatic functions, such as providing overseas assistance to American citizens, issuing passports, and acting as notaries.<sup>81</sup> Thus, the central question is whether ad hoc diplomats fall into any of the remaining categories: “Ambassadors,” “other public Ministers,” or “other Officers of the United States.”<sup>82</sup> It can be constitutional for the president to proceed without Senate approval only if special envoys are none of these.<sup>83</sup>

A few modest observations at the outset: First, public ministers are those who will carry out international diplomatic functions. The phrase “Ambassadors, other public Ministers and Consuls” implies as much by identifying public ministers as a category that includes “ambassadors,” who, according to contemporary and historical understanding, officially represent the United States in foreign affairs.<sup>84</sup> This limitation is transparent to contemporary readers but nevertheless significant because the term “public minister” has in the past carried an additional meaning that does not concern foreign

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79. U.S. CONST., art. II, § 2, cl. 2.

80. *Id.*

81. See CHARLES STUART KENNEDY, *THE AMERICAN CONSUL: A HISTORY OF THE UNITED STATES CONSULAR SERVICE, 1776–1914*, at 19–28 (1990) (describing the work of early American consuls); see also EMER DE Vattel, *THE LAW OF NATIONS* 229–30, 573–83 (Joseph Chitty ed. & trans., Philadelphia, T. & J.W. Johnson & Co. 1867) (1758) (distinguishing consuls from public ministers and describing their respective functions). For a more recent definition of consular functions, see Vienna Convention on Consular Relations art. 5, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (enumerating consular functions under modern international law).

82. U.S. CONST., art. II, § 2, cl. 2.

83. The Appointments Clause also provides that “Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” *Id.* As explained below, this language is not directly relevant because it is unlikely that a public minister could qualify as an inferior officer. See *infra* note 87 and accompanying text.

84. See, e.g., ABRAHAM DE WICQUEFORT, *THE EMBASSADOR AND HIS FUNCTIONS* 1–6 (Digby trans., London, Bernard Lintott 1716) (discussing the historical functions of ambassadors); AM. ACAD. OF DIPLOMACY, *FIRST LINE OF DEFENSE: AMBASSADORS, EMBASSIES AND AMERICAN INTERESTS ABROAD* 1–14 (Robert V. Keeley ed., 2000) (discussing the modern functions of American ambassadors); see also *Ambassadors and Other Public Ministers of the United States*, 7 Op. Att’y Gen. 186, 186 (1856) (“The expression ‘ambassadors and other public ministers,’ which occurs three times in the Constitution, must be understood as comprehending all officers having diplomatic functions, whatever their title or designation.”).

relations.<sup>85</sup> Second, the public ministers whose appointments require Senate confirmation are those who will be “Officers of the United States.”<sup>86</sup> And third, there are no other restrictions on the objects of the confirmation requirement, the effect being that advice and consent is necessary for the appointment of *all* ambassadors and *all* other public ministers who will be officers of the United States.<sup>87</sup> This conclusion is consistent with the longstanding interpretation of the adjacent reference to “Judges of the supreme Court,” which requires Senate confirmation for the appointment of all U.S. Supreme Court Justices.<sup>88</sup>

More significantly, other references to “public Ministers” suggest that the term includes many ad hoc diplomats. The Article II Reception Clause provides that the president “shall receive

85. Cf. *Public Minister*, OXFORD ENGLISH DICTIONARY ONLINE (3d ed. 2007), <http://www.oed.com.proxy.lib.duke.edu/view/Entry/265959?> [<https://perma.cc/4PP7-GHEN>] (identifying one definition of “public minister” that dates to at least 1564 as “[a] religious official who works in a public capacity”).

86. U.S. CONST., art. II, § 2, cl. 2. It is conceivable that neither “Ambassadors” nor “other public Ministers” are “Officers of the United States” under the Appointments Clause, but this reading seems unlikely, given the Clause’s internal structure. The text enumerates only four specific categories of appointees— “[1] Ambassadors, [2] other public Ministers and [3] Consuls” and “[4] Judges of the supreme Court.” *Id.* Moreover, the text lists those four categories in immediate succession and links the first two by identifying one as a subcategory of the other. *Id.* These conditions seem to limit the plausibility of differential status; if public ministers are not officers, then the same is almost certainly true of ambassadors, and most likely true of consuls and Supreme Court justices as well. Yet this would mean that the phrase “and all other Officers of the United States” appears at the end of a list composed exclusively of non-officers. *See id.* To the modern reader, such phrasing would seem to contradict the implication of the word “other,” which is that at least some of the enumerated categories of appointees are illustrative of “Officers of the United States.” It would be akin to saying something like, “the United States, other Western countries and Japan, South Africa, and all other fruit,” to name just one example. More importantly for present purposes, such an interpretation appears to have been rejected at the Founding. *See, e.g.*, Letter from Charles Thomson to George Washington (May 19, 1789), in 2 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES 335 (Dorothy Twohig ed., 1987) (“It appears that ambassadors, other public minister and consuls, and judges of the Supreme court are on the same footing, that is officers recognised by the Constitution & the existence of whose offices does not depend on, or require a law for their establishment . . .”).

87. The Appointments Clause also states that “Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” U.S. CONST., art. II, § 2, cl. 2. This raises the question of whether it is possible for a public minister to qualify not as a principal officer, but rather as an “inferior Officer[]” to whom the hurdle of advice and consent does not apply. *Id.* The answer seems to be no—the Constitution appears to foreclose such a possibility by referring to public ministers exclusively and without qualification as “Officers of the United States.” *Id.* This language would be strange and misleading if a material portion of those who comprise the category of public ministers qualify as something else entirely.

88. *Id.*

Ambassadors and other public Ministers,”<sup>89</sup> while Article III establishes both that the judicial power shall extend to “all Cases affecting Ambassadors, other public Ministers and Consuls” and that the Supreme Court shall have original jurisdiction in such cases.<sup>90</sup> Given identical terminology and capitalization, along with similar phrasing, it is reasonable to think that these clauses all reflect the same conception of “public Ministers.”<sup>91</sup> Thus, if the term were to exclude all ad hoc diplomats in the context of the Appointments Clause, it should do likewise in the context of the Reception Clause and Article III.

Such an exclusion, however, would seem to demand nonsensical results. With respect to the Reception Clause, it would require either that the president lacks power to receive irregular agents from foreign governments, or that another part of Article II—most likely the Vesting Clause—operates as the source of that power.<sup>92</sup> Given that the president’s reception power is indisputably exclusive of Congress and the judiciary,<sup>93</sup> the first option would mean that no branch of the federal government can lawfully receive irregular diplomatic agents, even though such agents are a longstanding feature of U.S. foreign relations and in many ways functionally identical to resident diplomats.<sup>94</sup> The second option, meanwhile, would require that the source of the power to receive irregular agents either overlaps with the Reception Clause itself or picks up precisely where the Clause leaves off. The overlap scenario would render the Reception Clause superfluous and contradict a general presumption against redundancy.<sup>95</sup> The other scenario is simply counterintuitive, finding

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89. *Id.* art. II, § 3.

90. *Id.* art. III, § 2.

91. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 789, 792–94 (1999) (arguing that “strongly parallel language is a strong (presumptive) argument for parallel interpretation”).

92. See generally Prakash & Ramsey, *supra* note 25 (articulating the Vesting Clause thesis).

93. Congress has permitted over one hundred foreign leaders and dignitaries to deliver official addresses to its membership since 1874, *Foreign Leaders and Dignitaries Who Have Addressed the U.S. Congress: Fast Facts*, U.S. HOUSE OF REPRESENTATIVES OFF. OF THE HISTORIAN, <http://history.house.gov/Institution/Foreign-Leaders/Fast-Facts> [<https://perma.cc/LLQ2-FTGG>], but most view this practice as compatible with the president’s exclusive authority under the Reception Clause because it does not entail a formal acceptance of diplomatic credentials or operate as an official means of recognizing a foreign state or government. Cf. Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 U. RICH. L. REV. 801, 812–16 (2011) (analyzing the meaning of the Reception Clause).

94. See *infra* Part III (discussing historical usage and functions).

95. See Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign*

reception power only by reaching beyond the one part of the Constitution that explicitly addresses reception.

The categorical exclusion of ad hoc diplomats from the concept of public ministers would be equally problematic for Article III, as it would create a significant disparity in treatment for functionally similar foreign agents. On one hand, Article III would be extremely solicitous of foreign diplomats resident in the United States, providing not only a separate head of federal jurisdiction for cases that affect them, but also exclusive and original jurisdiction in the Supreme Court for suits in which they are defendants and concurrent and original jurisdiction in the Supreme Court for suits in which they are plaintiffs.<sup>96</sup> On the other hand, Article III would be entirely indifferent to irregular diplomatic agents, declining to provide both a separate head of federal jurisdiction and a basis for original jurisdiction in the Supreme Court for cases that affect them. This would force ad hoc diplomats to either find a different source of jurisdiction in the lower courts or fend for themselves in state courts. The logic of such differential treatment is hard to imagine, and appears contrary to original intent. In the Virginia ratification debates, for example, Edmund Randolph explained that the purpose of granting federal jurisdiction over cases affecting public ministers was to “perpetuate harmony between [the United States] and foreign powers” and ensure that the federal government “judges how the United States can be most effectually secured and guarded against controversies with foreign nations.”<sup>97</sup> The potential absence of federal jurisdiction over many cases affecting irregular envoys from foreign governments would disserve this purpose.

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*Affairs*, 102 MICH. L. REV. 545, 555 (2004) (making this argument in response to the Vesting Clause thesis).

96. See U.S. CONST., art. III, § 2; Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80 (providing that the Supreme Court shall have original and exclusive jurisdiction over “suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations,” and providing “original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers”); see also *Börs v. Preston*, 111 U.S. 252, 256–57 (1884) (according “great weight” to the Judiciary Act of 1789 as a guide to the meaning of Article III in cases affecting representatives of foreign governments). Since 1978, original jurisdiction in the Supreme Court is available but no longer exclusive, at least as a matter of statutory law, in cases against ambassadors and other public ministers. Diplomatic Relations Act, Pub. L. No. 95-393, § 8(b), 92 Stat. 808, 810 (1978) (codified at 28 U.S.C. § 1251(b)). But needless to say, this reform is not evidence of original meaning.

97. The Debates in the Convention of the Commonwealth of Virginia (June 21, 1788), in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 570 (photo. reprint 1937) (Jonathan Elliot ed., 2d ed. 1836) [hereinafter ELLIOT’S DEBATES].

To be sure, it is possible for a single term to carry more than one meaning within the four corners of the Constitution. In *District of Columbia v. Heller*,<sup>98</sup> for instance, the Supreme Court interpreted “State,” which appears numerous times throughout the structural articles and the Bill of Rights, to mean “polity” in the context of the Second Amendment, even though the word otherwise refers to the fifty states.<sup>99</sup> But the conditions that justified such differentiation do not manifest in relation to “public Ministers.” Unlike “State” and other terms that might reasonably vary in denotation throughout the Constitution, the multiple references to “public Ministers” exhibit remarkable uniformity. They are never accompanied by unique modifiers.<sup>100</sup> They always use the same capitalization. They always appear immediately after “Ambassadors” and typically precede a reference to “Consuls.” These similarities exist, moreover, even though “public Ministers” appears twice in both Article II and Article III. Such conditions strongly suggest that “public Ministers” is a term of art with a distinct and—critically—*singular* meaning. To avoid serious difficulties under the Reception Clause and Article III, this meaning must encompass ad hoc diplomats.

A remaining issue concerns the relationship between public minister status and officer status. There are two possibilities here. One is that “Officers of the United States” circumscribes “public Ministers,” such that advice and consent is necessary only if the nominee would, upon assuming his or her official functions, satisfy criteria that comprise the general category of officers of the United States in addition to separate and independent criteria comprising the specific category of public ministers. Alternatively, it is possible that one who is a public minister—however that term is defined—is necessarily an officer of the United States, such that the general definition of “Officer” supplies no additional limiting conditions. The first view treats officer status as an independent requirement, while the second treats it as a simple consequence. As explained above,<sup>101</sup> the orthodox position favors the former, but that is not obviously correct as a textual matter. Merely identifying public ministers as officers of

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98. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

99. *Id.* at 597.

100. *Cf. id.* (adopting a unique definition of “State” for purposes of the Second Amendment in part because “the other instances of ‘state’ in the Constitution are typically accompanied by modifiers making clear that the reference is to the several States—‘each state,’ ‘several states,’ ‘any state,’ ‘that state,’ ‘particular states,’ ‘one state,’ ‘no state’”).

101. *See supra* Part I.

the United States does not explain what makes them so, and one can easily imagine verbal formulations different from the Appointments Clause that would have offered stronger support.

The Appointments Clause thus presents a problem for the practice of unilateral ad hoc diplomacy. The orthodox view is justifiable on textual grounds only if either of two propositions holds true: (1) the term “public Ministers” excludes all ad hoc diplomats or (2) officer status is a separate and independent requirement, the satisfaction of which hinges on criteria that categorically exclude ad hoc diplomats. The first proposition would have deeply troubling consequences for the Reception Clause and Article III, while the second lacks affirmative support. In fairness, the plain language of the Appointments Clause also fails to provide conclusive evidence that unilateral diplomatic appointments are unlawful. But neither does the text *require* unilateralism, and this is a key insight, not only because it calls into question the legal necessity of contemporary practice, but also because it calls for historical inquiry as a means of understanding the rule. The evidence of original meaning, as I will show in Part III, strongly favors Senate participation.

#### *B. The Rest of Article II*

Of course, the orthodox position does not rely exclusively on the alleged inapplicability of the Appointments Clause; commentators have attempted to identify an affirmative foundation for unilateral diplomatic appointments in the Treaty Clause, the Take Care Clause, the Commander in Chief Clause, the Reception Clause, and the Article II Vesting Clause.<sup>102</sup> Yet these arguments each encounter serious difficulties of their own.

The Treaty Clause is problematic for several reasons. One is that it does not grant the power to make treaties to the president alone. Unlike the Appointments Clause, which explicitly divides the appointment power into distinct stages of nomination followed by advice and consent<sup>103</sup> and allocates control over the first stage exclusively to the president,<sup>104</sup> the Treaty Clause grants no power exclusively to the president—the full power to “make Treaties” exists

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102. See *supra* notes 20–24.

103. U.S. CONST., art. II, § 2, cl. 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls . . .”).

104. *Id.*

only “by and with the Advice and Consent of the Senate.”<sup>105</sup> This is a strange foundation for a power belonging to the president alone. It is also underinclusive, given that treaty negotiations are at most a subset of the broader practice of ad hoc diplomacy.<sup>106</sup>

The Take Care Clause fares no better. In the 1950s, political scientist Maurice Waters argued “that the separation-of-powers concept implies that each branch has an inherent right to appoint its subordinates,” and that “[i]n the case of the executive this right is reinforced by the fact that the appointing power results from the obligation to see that the laws are faithfully executed.”<sup>107</sup> But this proves far too much. If the separation of powers and the Take Care Clause gave the president an inherent right to appoint any subordinates, including all those involved in diplomacy, the Appointments Clause would be a dead letter as to all appointments to offices in the executive branch. In addition, there are many cases where presidents use ad hoc diplomats for purposes other than law execution.<sup>108</sup> When the president dispatches a special envoy to attend an international conference or negotiate an agreement, the agent may act in furtherance of little more than executive policy. The Take Care Clause appears inapplicable in such circumstances.

Next consider the Commander in Chief Clause. One nineteenth-century commentator argued that it empowers the president “to send

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105. *Id.* (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .”).

106. As another argument, some have suggested that, far from authorizing unilateral appointments, the Treaty Clause requires two-thirds approval from the Senate for the appointment of treaty negotiators. *See, e.g.*, 1 ANNALS OF CONG. 719 (1789) (Gales & Seator eds., 1849) (Statement of Rep. Tucker). On this view, the Clause envisions advice and consent as a set of at least two discrete approvals, with one applying to the appointment of the negotiator(s) and another applying later to the completed text, rather than as a single act of comprehensive, ex post endorsement. But there are serious problems with this interpretation. First, it would seem to make it harder to appoint treaty negotiators than Supreme Court Justices, whose appointments require only a simple majority. *See* U.S. CONST., art. II, § 2, cl. 2 (requiring two thirds of Senators present to concur when giving “Advice and Consent” for the president to make a treaty but not when giving “Advice and Consent” for presidential appointments to the Supreme Court). This seems odd in light of the relative significance of the two offices, at least by contemporary standards. Second, it would contradict the Appointments Clause, which requires only a simple majority of the Senate to approve the appointment of treaty negotiators qua “public Ministers.” *See infra* Part III.

107. Waters, *Special Diplomatic Agents*, *supra* note 17, at 125.

108. *Cf.* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (“The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.” (quoting *Myers v. United States*, 272 U.S. 52, 295 (1926) (Holmes, J., dissenting))).

special agents to any part of the world to make investigation . . . touching matters pending, or likely to be pending, between the United States and another country or people.”<sup>109</sup> This position also appears to stretch the text to an implausible breadth. As David Barron and Martin Lederman have argued, the best reading of the Clause treats it as a grant of power to superintend the armed forces and make decisions concerning the conduct of military operations.<sup>110</sup> It appears that most ad hoc diplomats have not been members of the military, and from an organizational perspective, it is doubtful that the president’s position at the pinnacle of the military command structure can justify the unilateral use of diplomatic agents of a nonmartial character.<sup>111</sup>

One might further imagine the Reception Clause as offering support for unilateral appointments by identifying the president as a central actor in the conduct of foreign relations, but again there are major complications: The Clause does not discuss appointments, it provides for a presidential duty rather than a power, and it was famously described by Alexander Hamilton as “more a matter of dignity than of authority” and one “without consequence in the administration of the government.”<sup>112</sup> Even if one reads the Clause generously as a source of executive power to conduct foreign relations, it does not necessarily follow that the president wields independent authority to choose the agents on whom he will rely.

The final asserted basis for unilateral diplomatic appointments is the Article II Vesting Clause. A number of influential commentators have argued that the reference to “executive power” in Article II, Section 1 grants a “residual” foreign affairs power to the president, and that this power includes a subsidiary power to dispatch irregular envoys without the Senate’s advice and consent.<sup>113</sup> The most thorough exposition of this claim relies primarily on eighteenth-century sources

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109. Thorpe, *supra* note 23, at 261.

110. See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb: Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 767–70 (2008).

111. Some special envoys have military backgrounds, but most do not. See, e.g., *US Special Envoy for Countering PKK in Baghdad, Discusses Makhmour Camp Closure*, WIKILEAKS (Oct. 22, 2006, 7:23 AM), <https://wikileaks.org/plusd/cables/06BAGHDAD3957a.html> [https://perma.cc/4MA6-SWFY] (reporting on the work of General Joseph Ralston, U.S. Special Envoy for Countering the Kurdistan Workers Party (PKK), and former Vice Chairman of the Joint Chiefs of Staff).

112. THE FEDERALIST NO. 69, at 420 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

113. E.g., Prakash & Ramsey, *supra* note 25, at 234, 303–04, 309–10.



that appear to have treated foreign affairs as a domain of executive power.<sup>114</sup> The Vesting Clause argument is perhaps the most plausible of the traditional justifications for ad hoc diplomacy, but it, too, founders under scrutiny.

Two problems stand out. One is that, by its own terms, the argument only identifies the source of residual powers that lie beyond the scope of other enumerations.<sup>115</sup> This leaves unanswered the far more targeted question about the meaning of the Appointments Clause, which exhibits the most obvious connection to the issue of special envoys. Put differently, there is no reason even to consider the Vesting Clause if the Appointments Clause addresses the issue of ad hoc appointments. The other problem is that, as demonstrated below,<sup>116</sup> the founders understood many irregular diplomatic agents as public ministers and officers of the United States, and thus as subject to the requirement of Senate confirmation. However broad the president's control over foreign affairs, it is apparent—clear, even—that the founders generally treated this issue as one of shared authority.

In summary, the text of the Constitution does not support the orthodox view. The Appointments Clause does not define “public Ministers” to categorically exclude irregular diplomatic agents. Nor does it dictate that qualification as an officer of the United States is an independent precondition to the need for Senate confirmation, rather than a consequence of qualification as a public minister. Indeed, cognate language seems to suggest that the term “public Ministers” encompasses many irregular envoys, and it is plausible that qualification as a public minister constitutes an envoy as an officer of the United States. Other provisions in Article II, meanwhile, fail to provide affirmative support for unilateral appointments.

### III. THE ORIGINAL MEANING OF “PUBLIC MINISTERS”

Perhaps because text alone supplies so little support, advocates of the orthodox view have relied in substantial part on evidence of original meaning. Wriston, for example, devoted the first chapter of his book to an analysis of the Constitutional Convention, state ratification

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114. *See id.* at 265–355 (discussing supporting evidence from eighteenth-century political theory, the Continental Congress, the Philadelphia Convention, the ratification debates, and the Washington Administration).

115. *See id.* at 234 (arguing that the source of the president's residual foreign affairs powers is the Vesting Clause).

116. *See infra* Part III.

debates, and early practices of the Washington Administration, concluding that “Washington found a tradition, though not very firmly rooted, of employing private persons for confidential business in foreign affairs,” and that “the matter of instruction and negotiation became more and more exclusively presidential” over time.<sup>117</sup> Given these developments, Wriston found it only natural that “the agents used [for diplomatic matters] became more and more presidential, as well.”<sup>118</sup> Similarly, OLC cited diplomatic practice from the administrations of George Washington and Thomas Jefferson to justify the conclusion that “a position must have continuance or duration” in order to constitute “an office [of the United States]” under the Appointments Clause.<sup>119</sup>

Yet these conclusions either misinterpret or overlook a significant volume of relevant evidence. In this Part, I marshal that evidence to show that, far from favoring unilateral ad hoc diplomacy, the original meaning of the Constitution generally disfavors the practice. Specifically, the framers understood the term “public Minister[]” exclusively by reference to the law of nations, and as denoting any diplomatic agent who officially and publicly represents a sovereign state in foreign affairs, without regard for the duration of the position, emoluments, or title. This definition excluded consuls, diplomatic agents whose official roles were known to receiving governments but hidden from the public at large, and individuals dispatched in wholly unofficial capacities, but it included a wide range of irregular diplomats, such as treaty negotiators, attendees at official ceremonies, many international messengers, and even members of multinational arbitral tribunals. Moreover, the founders viewed Senate confirmation as necessary for the appointment of anyone who satisfied this definition. In doing so, they appear to have operated on the premise that one who qualifies as a public minister for the U.S. government under the law of nations is necessarily a public minister and officer of the United States as a matter of domestic constitutional law.

#### A. *Constitutional Convention and Ratification Debates*

Records from the Constitutional Convention and state ratification debates show that the appointment power was one of considerable

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117. WRISTON, *supra* note 3, at 104–05.

118. *Id.* at 105.

119. Officers of the United States Within the Meaning of the Appointments Clause, *supra* note 16, at 102.

interest and deliberation. The topic arose on multiple occasions, attracted commentary from a diverse cast of participants, and generated divergent proposals. Yet the overwhelming focus of discussion and source of disagreement was simply allocation.<sup>120</sup> James Madison proposed an executive power “to appoint to offices in cases not otherwise provided for.”<sup>121</sup> Alexander Hamilton’s plan granted the executive power over the “appointment of the heads or chief officers of the departments of Finance, War and Foreign Affairs” and power to nominate “all other officers (Ambassadors to foreign Nations included) subject to the approbation or rejection of the Senate.”<sup>122</sup> Charles Pinckney’s draft authorized the Senate alone “to appoint Ambassadors & other Ministers to Foreign nations & Judges of the Supreme Court.”<sup>123</sup>

These diverse proposals reflected a common belief that the locus of the appointment power was an issue of significance, capable of shaping the quality of the appointments themselves, public accountability, federal policymaking, and the relative influence of small and large states. In defending the Convention’s decision to divide the power between the president and the Senate, Hamilton argued that executive control over nominations was optimal because “one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices,” and because “[t]he sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation.”<sup>124</sup> The requirement of Senate advice and consent, meanwhile, “would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.”<sup>125</sup>

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120. See MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 16–29 (2003) (summarizing the drafting process and public discussion of the Appointments Clause at the Constitutional Convention and ratification debates); MICHAEL J. KLARMAN, *THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 221–24 (2016) (discussing various proposals for allocation of the appointment power and corresponding arguments).

121. 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 63 (Max Farrand ed., 1911) (statement of James Madison) [hereinafter *FARRAND’S RECORDS*].

122. 1 *id.* at 292 (statement of Alexander Hamilton).

123. 3 *id.* at 599 (statement of Charles Pinckney).

124. *THE FEDERALIST* NO. 76, *supra* note 112, at 455 (Alexander Hamilton).

125. *Id.* at 457.

The narrower issue of diplomatic appointments garnered far less attention, perhaps, as one historian has argued, because the framers assumed they would be infrequent.<sup>126</sup> But the sources still support a few inferences. First, drafters appear to have believed that the text of the Articles of Confederation, which referred only to the sending of “ambassadors,” had been too limited.<sup>127</sup> A mid-summer report from the Committee of Detail utilized similar language,<sup>128</sup> but later drafts referred to ambassadors “and other public ministers”<sup>129</sup> and, finally, “Ambassadors, other public Ministers and Consuls.”<sup>130</sup> In *The Federalist*, James Madison explained the rationale for this shift, stating that the “power of appointing and receiving ‘other public Ministers and Consuls’ [was] expressly and very properly added to the former provision concerning ambassadors” because “[t]he term ambassador, if taken strictly . . . comprehends the highest grade only of public ministers, and excludes the grades which the United States will be most likely to prefer, where foreign embassies may be necessary.”<sup>131</sup> On this account, ambassadors were understood to be the highest-ranking type of public minister, and one purpose of the Appointments Clause was to clarify the authority of the president and Senate to appoint diplomatic agents of lower status.

Second, some viewed diplomatic appointments in particular as a topic of concern. In 1783, as delegates to the Congress of the Confederation, Daniel Carroll and Hugh Williamson sponsored a motion that “no public minister should be employed by the United States, except on extraordinary occasions,” the justification being that such a measure “would not only be economical, but would withhold our distinguished citizens from the corrupting scenes at foreign courts, and, . . . prevent the residence of foreign ministers in the United States, whose intrigues and examples might be injurious both to the

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126. See FREDERICK W. MARKS III, *INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION* 155, 160 (Scholarly Resources Inc. 1986) (1973) (explaining that “there was a minimum of floor debate on the diplomatic powers” and that delegates to the Convention “assumed that diplomatic negotiations *per se* would be rare, that foreign relations would be commercial in nature, and that treaties would be few”).

127. ARTICLES OF CONFEDERATION of 1781, art. IX (“The United States in Congress assembled, shall have the sole and exclusive right and power . . . of sending and receiving ambassadors . . .”).

128. 2 FARRAND’S RECORDS, *supra* note 121, at 183 (motion of August 6, 1787).

129. 2 *id.* at 383 (motion of August 23, 1787).

130. U.S. CONST. art. II, § 2, cl. 2.

131. THE FEDERALIST NO. 42, *supra* note 112, at 264–65 (James Madison).

government and the people.”<sup>132</sup> Congress adjourned before deciding the motion, but both Carroll and Williamson attended the Constitutional Convention and later campaigned for ratification in their respective home states of Maryland and North Carolina.<sup>133</sup> Their views on constitutional issues, in other words, appear to have been fairly mainstream. Likewise, Elbridge Gerry opposed the Pinckney Plan on the ground that exclusive Senate control over diplomatic appointments would lead to an unwarranted proliferation of agents overseas and undue foreign influence.<sup>134</sup> In his assessment, “few [public ministers] were necessary,” and it was “the opinion of a great many that they ought to be discontinued” in order to control costs and foreclose the reciprocal admission of foreign agents to the United States.<sup>135</sup> Contemporaries such as Francis Dana, Albert Gallatin, George Mason, Charles Pinckney, and Thomas Jefferson seem to have more or less agreed.<sup>136</sup> Their concerns echoed the ideas of the *philosophes*, a group of eighteenth-century public intellectuals who assailed classical diplomacy as a source of duplicity, corruption, secrecy, foreign entanglement, and war.<sup>137</sup> The *philosophes* envisioned

132. Debates in the Congress of the Confederation (May 23, 1783), in 5 ELLIOT’S DEBATES, *supra* note 97, at 90.

133. *The Founding Fathers: Maryland*, NAT’L ARCHIVES, <https://www.archives.gov/founding-docs/founding-fathers-maryland> [https://perma.cc/DK8P-KZGP]; *The Founding Fathers: North Carolina*, NAT’L ARCHIVES, <https://www.archives.gov/founding-docs/founding-fathers-north-carolina> [https://perma.cc/H7XF-4R57].

134. 2 FARRAND’S RECORDS, *supra* note 121, at 285 (statement of Elbridge Gerry).

135. *Id.*

136. See 7 ANNALS OF CONG. 859 (1798) (statement of Rep. Gallatin) (expressing a desire to phase out contacts with European powers over time); 7 *id.* at 866 (1786) (statement of Rep. Pinckney) (“[I]t would appear to be for our interest to have as little political connexion with Europe as possible, and therefore Ministers could be of no use, but might do mischief.”); 1 FARRAND’S RECORDS, *supra* note 121, at 438 (statement of George Mason) (characterizing ambassadorial appointments as sinecures for domestic political allies); Letter from Francis Dana to John Adams (Jan. 30, 1785), in 16 THE ADAMS PAPERS, PAPERS OF JOHN ADAMS: FEBRUARY 1784–MARCH 1785, at 500–05 (Gregg L. Lint et al. eds., 2012) (“[T]here is nothing clearer in my opinion than that our Interests will be more injured by the residence of foreign Ministers among us, than they be promoted by our Ministers abroad. The best way to get rid of the former is not to send out the latter.”); Letter from Thomas Jefferson to William Short on Mr. & Mrs. Merry (Jan. 23, 1804), in 33 THE AMERICAN HISTORICAL REVIEW 833 (1928) (characterizing classical diplomacy as “the pest of peace” and “the workshop in which nearly all the wars of Europe are manufactured”). For a discussion on the various concerns that fueled debate over the maintenance of diplomatic relations, see generally WARREN FREDERICK ILCHMAN, PROFESSIONAL DIPLOMACY IN THE UNITED STATES 1779–1939: A STUDY IN ADMINISTRATIVE HISTORY 18–40 (1961).

137. See FELIX GILBERT, TO THE FAREWELL ADDRESS: IDEAS OF EARLY AMERICAN FOREIGN POLICY 54–66 (1961) (explaining the positions of the *philosophes* on diplomacy and foreign affairs); see also Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV.

a world largely without diplomats, with countries linked by commerce rather than political alliances and the balance of power,<sup>138</sup> and for those who shared this vision,<sup>139</sup> the power to appoint public ministers would be one to wield with caution, if at all.

Finally, the framers appear to have taken for granted the meaning of the term “public minister,” which had been in use for well over a century prior to the adoption of the Constitution, including in America.<sup>140</sup> During the South Carolina ratification debates, for example, Charles Cotesworth Pinckney referred to the diplomatic agents who had served under the Congress of the Confederation as “public ministers.”<sup>141</sup> John Adams and Robert Morris, among others, engaged in similar usage in early correspondence,<sup>142</sup> and many employed the term interchangeably with “ministers.”<sup>143</sup> No one appears to have debated or questioned the term’s meaning.

341, 361–62 (2009) (discussing the Framers’ fear of being corrupted by foreign powers and how this fear inspired the adoption of the Foreign Emoluments Clause). *But see* Seth Barrett Tillman, *Citizens United and the Scope of Professor Teachout’s Anti-Corruption Principle*, 107 NW. U. L. REV. 399, 404–06 (2012) (arguing that Teachout overstates the extent of the original concern for corruption).

138. GILBERT, *supra* note 137, at 62–66.

139. Most historians take the position that the *philosophes* influenced many of the Framers, at least during the early years of the Revolution. *See id.* at 69 (identifying a “close connection between the ideas of the philosophes and American foreign policy” in the early Revolutionary Period); LAWRENCE S. KAPLAN, *COLONIES INTO NATION: AMERICAN DIPLOMACY 1763–1801*, at 93 (1972) (“The appeal of the ideas of Europe’s philosophes was natural for Americans.”). *But see* James H. Hutson, *Intellectual Foundations of Early American Diplomacy*, 1 DIPLOMATIC HISTORY 1, 18 (1977) (arguing that the *philosophes* did not influence the Founders, and that “American leaders operated in foreign politics according to the assumptions of power politics that dominated contemporary European statecraft”).

140. *See Public Minister*, *supra* note 85 (citing a 1624 proclamation from King James I, who discussed “the great privileges, which by the Laws of God and Nations are attributed unto the persons of Ambassadors, Agents, and public Ministers of foreign Princes and States”) (spelling modified from original).

141. The Debates in the Convention of the State of South Carolina (Jan. 16, 1778), in 4 ELLIOT’S DEBATES, *supra* note 97, at 282.

142. *See, e.g.*, Letter from John Adams to Samuel Adams (May 21, 1778), in 2 REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 591–93 (Francis Wharton ed., 1889) (referring to U.S. commissioners in France as “public ministers”); Letter from Robert Morris to Benjamin Franklin (Sept. 30, 1782), in 5 *id.* at 788 (referring to American diplomats in Europe as “our public ministers in Europe”). For other examples, see Letter from Silas Deane to the President of Congress (Sept. 24, 1778), in 2 *id.* at 739–40; Statement of William Paca & William Henry Dayton to Congress (Apr. 30, 1779), as to Arthur Lee, in 3 *id.* at 147; Letter from Francis Dana to Robert Livingston (Sept. 5, 1782), in 5 *id.* at 700.

143. *See, e.g.*, Debates in the Convention of the State of Maryland (Apr. 21, 1788), in 2 ELLIOT’S DEBATES, *supra* note 97, at 550 (reporting a proposed amendment “that no person be exempt from such jurisdiction and trial but ambassadors and ministers privileged by the law of nations”).

But what was that meaning? And more specifically, did it encompass any ad hoc diplomats, or was it confined to those appointed to fill an office that exists indefinitely, such as that of a resident ambassador? The records from the drafting and ratification of the Constitution provide virtually no insight on this central question. In *The Federalist*, Alexander Hamilton argued that original jurisdiction in the Supreme Court is important for cases affecting public ministers because “[p]ublic ministers of every class are the immediate representatives of their sovereigns.”<sup>144</sup> Yet, from this brief statement alone, much remains unclear.

As the following sections will show, other sources are more helpful. In particular, histories of the foreign relations of European states, eighteenth-century treatises on diplomacy and international law, records of official practice, and Founding-era dictionaries together provide persuasive evidence that the framers defined “public Minister[]” by reference to the law of nations, and that this definition included many irregular emissaries. These authorities also suggest an understanding that one who qualified as a public minister for the U.S. government was necessarily an officer of the United States. The result is that the appointment of both resident and many ad hoc diplomats requires the Senate’s advice and consent under the original meaning of the Appointments Clause.

### *B. The Pre-Constitutional Practice of Ad Hoc Diplomacy*

The starting point for the analysis is one of context. Namely, ad hoc diplomacy was far from novel at the time of the Founding; the practice had deep origins in centuries of European politics. In fact, it is common knowledge among historians that ad hoc diplomacy was the *quintessential* mode of contact among European powers prior to the late fifteenth century, when Italian city-states began to popularize the use of permanent embassies and resident agents among rulers of Western Europe.<sup>145</sup> England and France, for example, had no permanent embassies abroad until 1509, having previously relied exclusively on special missions.<sup>146</sup> The use of special envoys reportedly predominated during this early period because sovereigns often lacked sufficient funds to pay for permanent embassies, encountered difficulty

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144. THE FEDERALIST NO. 81, *supra* note 112, at 487 (Alexander Hamilton).

145. See GARRETT MATTINGLY, *RENAISSANCE DIPLOMACY* 55–118 (1955) (discussing the advent of the Italian model).

146. See JEREMY BLACK, *A HISTORY OF DIPLOMACY* 53 (2010).

finding suitable agents, or simply had no need for regular contact with foreign counterparts.<sup>147</sup>

Many, moreover, were slow to adopt the Italian model. As M.S. Anderson has explained, in the early seventeenth century “Europe was still divided between a core of western states, in which permanent diplomatic representation was well rooted and between which diplomatic relations were active and more or less continuous, and a periphery of less developed ones—the Scandinavian countries, Poland, Russia, and in the west Scotland and Portugal—where diplomacy was less important and diplomatic organisation more primitive.”<sup>148</sup> The Papacy restricted its embassies to Catholic courts.<sup>149</sup> Russia had no permanent embassies until 1688.<sup>150</sup> The Ottoman Empire relied exclusively on special missions until 1793, when it dispatched its first resident ambassador to London.<sup>151</sup> In addition, most of the princes who used permanent missions chose not to maintain them in more than a handful of countries.<sup>152</sup> One-sided representation, whereby minor powers established embassies in the capitals of major powers that chose not to reciprocate, was common.<sup>153</sup> These conditions ensured the continuing importance of missions of limited duration and mandate.

English practice generally followed these trends, including the use of special envoys after the normalization of permanent embassies.<sup>154</sup> In 1759, for example, George II dispatched the earl of Kinnoull to apologize for British incursions into Portugal’s territorial waters in the Battle of Lagos.<sup>155</sup> George III sent Major-General William Faucitt to “many German courts with which [England] had no regular diplomatic representation to raise German mercenaries to take part in the [Revolutionary War].”<sup>156</sup> The British also relied on irregular diplomats to secure the use of Swiss troops for military operations.<sup>157</sup> Still other

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147. See *id.* at 47; KEITH HAMILTON & RICHARD LANGHORNE, *THE PRACTICE OF DIPLOMACY: ITS EVOLUTION, THEORY AND ADMINISTRATION* 30 (1995).

148. M.S. ANDERSON, *THE RISE OF MODERN DIPLOMACY 1450–1919*, at 27–28 (1993).

149. *Id.*

150. BLACK, *supra* note 146, at 68.

151. See J.C. Hurewitz, *Ottoman Diplomacy and the European State System*, 15 MIDDLE E. J. 141, 145 (1961).

152. See BLACK, *supra* note 146, at 69.

153. *Id.* at 71.

154. See D.B. HORN, *THE BRITISH DIPLOMATIC SERVICE 1689–1789*, at 21–26 (1961).

155. *Id.*

156. *Id.* at 25–26.

157. See Christopher Storrs, *British Diplomacy in Switzerland (1689–1789) and Eighteenth Century Diplomatic Culture*, 3 ÉTUDES DE LETTRES 1, 7 (2010).



examples include missions to invest German princes with chivalric orders, compliment new leadership, offer condolences, and even conclude a treaty of marriage between George III and the Princess Charlotte of Mecklenburg-Strelitz.<sup>158</sup> Here as elsewhere, this mode of contact was attractive in part because it was less expensive than permanent representation.<sup>159</sup>

Many of the framers are likely to have been familiar with this practice, which formed part of the only diplomatic tradition that was reasonably accessible to them. Benjamin Franklin, who attended the Constitutional Convention as a delegate for Pennsylvania, had acquired years of experience with European diplomacy as a colonial agent for Pennsylvania and as America's leading representative abroad during the Revolution.<sup>160</sup> His background was exceptional among the delegates, but even those without comparable experience had in most cases served in the Continental Congress,<sup>161</sup> where they received a steady stream of news about the latest developments in European politics,<sup>162</sup> including details about diplomatic etiquette,<sup>163</sup> copies of correspondence between foreign sovereigns,<sup>164</sup> and reports on the dispatch of envoys from one court to another.<sup>165</sup> Statements from the Convention and ratification debates further suggest that the participants were often knowledgeable about European politics and diplomatic practices.<sup>166</sup> And this is unsurprising. Given the precarious

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158. HORN, *supra* note 154, at 26.

159. *See id.* at 36.

160. *See* KAPLAN, *supra* note 139, at 14–15.

161. *See Meet the Framers of the Constitution*, NAT'L ARCHIVES, <https://www.archives.gov/founding-docs/founding-fathers> [<https://perma.cc/86TE-57B7>] (listing the delegates to the Convention).

162. *See generally* SAMUEL FLAGG BEMIS, *THE DIPLOMACY OF THE AMERICAN REVOLUTION* (1957) (discussing *inter alia* American attention to European political developments); *see also* Letter from Arthur Lee to the Comm. of Foreign Affairs (Mar. 25, 1779), in 3 *REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES*, *supra* note 142, at 100 (explaining that “it is the regular and usual mode in Europe for one nation to treat with another on public business through the medium of their public ministers”).

163. *See, e.g.*, Letter from John Adams to Robert Livingston (Nov. 8, 1782), in 5 *id.* at 864–66 (discussing the importance of “[r]anks, titles, and etiquettes, and every species of punctilios” in European diplomacy).

164. *E.g.*, Letter from John Adams to the President of Congress (March 29, 1781), in 4 *id.* at 335 (sharing with Congress a memorial presented by a Dutch envoy to the Swedish ambassador in Paris).

165. *See, e.g.*, Letter from John Adams to the President of Congress (Apr. 24, 1780), in 3 *id.* at 626–27 (reporting the use of an envoy extraordinary by the Empress of Russia to the Swedish court).

166. *See, e.g.*, Debates in the Federal Convention (June 28, 1787), in 5 ELLIOT'S DEBATES,

international position of the United States at the time, foreign relations was a matter of national survival.<sup>167</sup>

Even more to the point, the United States had ample experience sending and receiving special emissaries prior to the Convention. On the sending side, Benjamin Franklin and Silas Deane tasked Arthur Lee with traveling to Spain in 1777 to negotiate an alliance and recognition of American independence.<sup>168</sup> Lee failed to obtain either, but managed to secure promises of future aid.<sup>169</sup> Three years later, the Continental Congress appointed John Laurens as an envoy to France “for the special purpose of soliciting . . . the . . . aids requested by Congress, and forwarding them to America without loss of time.”<sup>170</sup> Laurens gained French assurances of naval support and returned home six months later.<sup>171</sup> In 1783, Congress designated John Adams, Benjamin Franklin, and Thomas Jefferson as commissioners to negotiate peace treaties with the Barbary Powers.<sup>172</sup> And in 1786, Congress sent John Lamb, a brigadier general and customs collector from New York, on a special mission to Algiers to secure the release of American hostages.<sup>173</sup>

The founders also had experience receiving ad hoc diplomats. One of the earlier examples came in 1775, when, still uncertain about the wisdom of supporting American independence, the Count of Vergennes sent Achard de Bonvouloir to the United States as a special

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*supra* note 97, at 249–52 (discussing international relations among certain European states); The Debate in the Convention of the State of South Carolina (Jan. 16, 1788), *in* 4 *id.* at 268 (recounting developments at the 1713 Congress of Utrecht); The Debate in the Convention of the State of South Carolina (Jan. 17, 1788), *in* 4 *id.* at 266 (“In England, the ministers proceed with caution in making treaties.”); The Debate in the Convention of the State of Virginia (June 18, 1788), *in* 3 *id.* at 505 (“It is the part of the laws of several Oriental nations to receive no ambassadors, and to burn their prisoners. It is a custom with the grand seignior to receive, but not to send ambassadors. It is a particular custom with him, in time of war with Russia, to put the Russian ambassador in the Seven Towers.”).

167. See generally MARKS, *supra* note 126 (discussing American vulnerabilities under the Articles of Confederation and their role in the adoption of the Constitution).

168. BEMIS, *supra* note 162, at 52–53.

169. *Id.* at 53.

170. 18 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 1130, 1141 (Gaillard Hunt ed., 1910).

171. 1 WILLIAM GRAHAM SUMNER, THE FINANCIER AND THE FINANCES OF THE AMERICAN REVOLUTION 294–301 (1892) (discussing aid that Laurens secured from France); see also 1 REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES, *supra* note 142, at 584–85 (discussing Laurens’s mission to France); GREGORY D. MASSEY, JOHN LAURENS AND THE AMERICAN REVOLUTION 173–94 (2000) (same).

172. MARKS, *supra* note 126, at 38–40.

173. *Id.* at 41–42.

agent to inquire about the seriousness of the movement for independence.<sup>174</sup> Bonvouloir's subsequent report helped persuade the French government to aid the American cause.<sup>175</sup> Notably, his primary contact had been the Committee of Secret Correspondence, the members of which included Benjamin Franklin and John Dickinson, both of whom attended the Constitutional Convention.<sup>176</sup>

Other salient precedents are the British peace commissions of the 1770s. Lord North appointed the members of the first of these, known as the Howe Commission, in 1776 to offer pardons and a resumption of trade in exchange for an end to hostilities and a pledge of allegiance.<sup>177</sup> Acting as spokesmen for Congress, Benjamin Franklin and John Adams rejected the concessions as insufficient.<sup>178</sup> Two years later and with far less leverage, the British sent a second group known as the Carlisle Commission to offer virtually anything Congress might demand other than independence, but the effort again failed, the United States having already secured recognition from the French.<sup>179</sup> In short, ad hoc diplomacy was hardly an unknown or exotic concept to the founders; they knew from experience that it was an important feature of European and transatlantic relations.

### C. *European Usage*

How, then, did contemporaries refer to these kinds of representatives? Europeans consistently identified most of them as public ministers.

Part of the evidence comes from eighteenth-century English case law concerning the Diplomatic Privileges Act of 1708, which Parliament enacted after a famous incident involving the arrest and detention of an indebted Russian ambassador.<sup>180</sup> Peter the Great viewed the arrest as a serious affront and demanded death sentences for the perpetrators, but because the detention had been permissible under English law at the time, the British government was unable to

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174. BEMIS, *supra* note 162, at 22–23; KAPLAN, *supra* note 139, at 88.

175. JONATHAN R. DULL, A DIPLOMATIC HISTORY OF THE AMERICAN REVOLUTION 57–58 (1985).

176. *See id.* at 57; 2 SECRET JOURNALS OF THE CONGRESS OF THE CONFEDERATION 5 (Nov. 29, 1775) (Thomas B. Wait ed., 1820).

177. KAPLAN, *supra* note 139, at 95.

178. *See id.* at 95–96.

179. RICHARD DEAN BURNS, JOSEPH M. SIRACUSA & JASON C. FLANAGAN, AMERICAN FOREIGN RELATIONS SINCE INDEPENDENCE 4 (2013); KAPLAN, *supra* note 139, at 106.

180. JUSTIN MCCARTHY, THE REIGN OF QUEEN ANNE 317–20 (fine paper ed., 1911).

hold anyone accountable.<sup>181</sup> Instead, to mollify the Czar and prevent similar incidents in the future,<sup>182</sup> parliament passed the Diplomatic Privileges Act, providing immunity from arrest and service of process for “the person of any ambassador or other public minister of any foreign prince or state authorized and received as such by her Majesty . . . or the domestic or domestic servant of any such ambassador, or other public minister,” and also designating as “violators of the laws of nations” and subjecting to possible “pains, penalties, and corporal punishment” anyone who infringed this immunity.<sup>183</sup>

Judicial opinions interpreting the Act shed light on eighteenth-century English understandings. Plaintiffs in civil cases often argued that the statute did not apply because the defendant was not a “public minister.” This line of argument required courts to ascertain precisely what constitutes the category, and courts responded by adopting a broad definition that included many ad hoc diplomats. In *Barbuit’s Case*,<sup>184</sup> which contained the most extensive discussion of the issue, the question was whether a Prussian consular agent was a public minister and thus immune from certain civil proceedings.<sup>185</sup> The court concluded that the agent failed to qualify for this status because he was not “intrusted to transact affairs between . . . two crowns,” but instead commissioned to “assist his Prussian Majesty’s subjects . . . in their commerce.”<sup>186</sup> In reaching this decision, the court emphasized that the statutory phrase “ambassadors, or other public ministers” covered both “ministers sent upon extraordinary occasions, which are commonly called ambassadors extraordinary,” and those “who constantly reside” at a foreign embassy.<sup>187</sup> Thus, the consul could have qualified as a minister even if the Prussian government had authorized him only to “transact any one particular thing in that capacity, as every ambassador extraordinary is; or to remove some particular difficulties, which might otherwise occasion war.”<sup>188</sup> The problem was simply that he held not even this limited authority. Other precedents similarly defined “public minister” as one who officially represents a sovereign

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181. *Id.* at 319.

182. *Id.* at 319–20.

183. 7 Ann. c. 12 (1708) (Eng.) (capitalization and spelling modified from original).

184. *Barbuit’s Case* (1737) 25 Eng. Rep. 777 (Ch.).

185. *Id.* at 777.

186. *Id.* at 778 (emphasis omitted).

187. *Id.* (emphasis omitted).

188. *Id.*

in foreign affairs, without apparent regard for considerations such as duration of service and breadth of responsibility.<sup>189</sup> Courts understood these analyses to reflect the law of nations.<sup>190</sup>

European scholars took the same approach. Perhaps the most influential in the realm of diplomacy studies was Abraham de Wicquefort, a Dutch diplomat who published *The Ambassador and His Functions* in 1681.<sup>191</sup> Translated into English in 1716 and widely viewed at the time as one of the most important works in its field,<sup>192</sup> Wicquefort's treatise set out to classify diplomatic agents, describe their responsibilities, and prescribe how they should conduct themselves.<sup>193</sup> It is a particularly useful indicator of eighteenth-century understandings both because practitioners were familiar with it,<sup>194</sup> and because its approach was explicitly historical and inductive. The goal was to identify the law by reference to state practice rather than by deduction from principle or on the basis of ancient texts.<sup>195</sup>

Wicquefort devoted his entire first chapter to defining and classifying the various types of public ministers in existence at the time. To begin, he explained that the term "public minister" encompassed two classes of actors. The first consisted of the "ambassador"—"a publick minister, dispatch'd by a sovereign prince to some foreign

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189. See, e.g., *Viveash v. Becker* (1814) 105 Eng. Rep. 619, 620 (suggesting that one must represent the sovereign in performing a state function to qualify as a public minister); *Clarke v. Cretico* (1808) 1 Taunt. 106, 106 (explaining that a consul was not a public minister because it was "no part of his office to transact business between . . . two states"). Contemporary English dictionaries adopted similarly expansive definitions of the term "minister," which in context was understood to be a synonym for "public minister." See, e.g., *Minister*, THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (18th ed., 1781) (defining "minister" to mean "any great officer that has the charge of embassies or other concerns of moment").

190. See *Barbuit's Case* 25 Eng. Rep. at 777 (explaining that the Diplomatic Privileges Act is "declaratory of the antient universal *jus gentium*"); *Triquet and Others v. Bath* (1764) 3 Burr. 1478, 1480 ("This privilege of foreign ministers and their domestic servants depends upon the law of nations. The Act of Parliament of 7 Ann. c. 12, is declaratory of it.").

191. WICQUEFORT, *supra* note 84; see also Maurice Keens-Soper, *Francois de Callières and Diplomatic Theory*, 16 HIST. J. 485, 492 (1973) (discussing the publication of Wicquefort's treatise).

192. See generally Keens-Soper, *supra* note 191 (describing the significance of the treatise).

193. See generally WICQUEFORT, *supra* note 84 (discussing the categories and functions of early diplomatic agents).

194. See HORN, *supra* note 154, at 192 (discussing how British diplomats "received a great deal of advice from Wicquefort"); see also GILBERT, *supra* note 137, at 94 (explaining that Wicquefort's treatise was one of "the two most famous books" on the subject of diplomacy in the eighteenth century "and ran through many editions").

195. Cf. Keens-Soper, *supra* note 191, at 494–95 (discussing the importance of Wicquefort's treatise).

potentate or state, there to represent his person, by virtue of a power, letters of credence, or some commission that notifies his character.”<sup>196</sup> The second comprised all other diplomats, including “plenipotentiaries . . . internuncios, envoys, residents, agents, commissioners, the secretaries of embassies, and even the secretaries of ambassadors,”<sup>197</sup> along with “those persons whom princes employ by a verbal order.”<sup>198</sup> Members of this second class held lower rank because, unlike ambassadors, they did not represent the sovereign in “his person.”<sup>199</sup> But what tied the two classes together and distinguished public ministers from other kinds of government officials was that they were charged by a sovereign “with the prosecution or sollicitation of affairs” vis-a-vis a foreign court and “enjoy[ed] the protection of the law of nations in its full extent.”<sup>200</sup>

Wicquefort plainly included a wide variety of ad hoc diplomats within this group. On his account, service on a special mission merely qualified a person as a different type of public minister, rather than as something *other than* a public minister. He acknowledged, for example, that there are both “ambassadors ordinary,” whom he understood to reside at a foreign embassy for a substantial period and represent the sending sovereign in any matters that might arise, and “ambassadors extraordinary,” whom he understood to travel to a foreign court on behalf of a sovereign to complete a discrete task, but he argued that “there is no essential difference between them.”<sup>201</sup> Wicquefort also enumerated some of the purposes for which a ruler might send a public minister to a foreign court: to negotiate, “to be a witness to an oath, for the observation and execution of a treaty of peace, or to represent his prince at the ceremonies of a christening, a marriage, a coronation, or a funeral.”<sup>202</sup> To be clear, these were not simply tasks that the ruler might choose to delegate to a representative already resident abroad, but instead reasons for dispatching a separate public minister

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196. WICQUEFORT, *supra* note 84, at 2 (emphasis omitted) (capitalization modified from original).

197. *Id.* (emphasis omitted) (capitalization modified from original).

198. *Id.* (capitalization modified from original).

199. *Id.* (emphasis omitted) (capitalization modified from original).

200. *Id.* (emphasis omitted) (capitalization modified from original).

201. *Id.* at 4 (emphasis omitted) (capitalization and spelling modified from original); *see also id.* at 8, 10, 22 (implying that ambassadors “ordinary” are those who reside abroad, while ambassadors “extraordinary” are those who travel abroad temporarily and to carry out a limited assignment).

202. *Id.* (capitalization modified from original).

altogether. Wicquefort also wove examples of ad hoc diplomacy into his discussion and explained how this form of contact remained the norm for some states, such as Poland.<sup>203</sup> No one familiar with Wicquefort's treatise could have mistaken his position.

Though he devoted less attention to the matter, François de Callières, a French diplomat who rivaled Wicquefort as the most popular eighteenth-century commentator on diplomatic practice,<sup>204</sup> appears to have concurred. "Publick ministers," he explained, "may be divided into two kinds; the first and second order."<sup>205</sup> "Those of the first order are ambassadors extraordinary, and ambassadors ordinary," while "those of the second order are envoys extraordinary, and residents."<sup>206</sup> Members of these orders excluded diplomats sent by anyone other than a sovereign, such as the "estates of a country, or the magistrates of a town,"<sup>207</sup> but included those sent on a mission of "no great duration"<sup>208</sup> and those given limited assignments, such as attending a peace conference or mediating among warring princes.<sup>209</sup>

Wicquefort and Callières were not breaking new ground in taking this position. In an important 1603 treatise, the French diplomat Jean Hotman had defined "ambassador" to refer to those "who under the assurance of the public faith, authorized by the law of nations, are employed to negotiate with foreign princes or commonwealths the affairs of their masters, and with dignity to represent their persons and greatness during their ambassage."<sup>210</sup> These agents, he explained, are of two types: ambassadors extraordinary and ordinary.<sup>211</sup> The first are sent "for a little time, and for one affair only, as, for renewing some alliance, to swear and ratify a treaty, to congratulate, condole, or to do like office in the behalf of their masters," and "return as soon as that

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203. See *id.* at 3, 6.

204. See THE SEVENTEENTH CENTURY 1600–1715, at 301–20 (Andrew Lossky ed. 1967) (explaining that Callières's book, *The Art of Negotiating With Sovereign Princes*, "enjoyed immediate success, and has been regarded ever since as a classic text on diplomacy"); GILBERT, *supra* note 137, at 94 (describing the books by Wicquefort and Callières as the eighteenth century's "two most famous books" on diplomacy).

205. FRANÇOIS DE CALLIÈRES, *THE ART OF NEGOTIATING WITH SOVEREIGN PRINCES* 63 (3d ed. 1738) (emphasis omitted) (capitalization modified from original).

206. *Id.* (emphasis omitted) (capitalization modified from original).

207. *Id.* at 69, 72 (capitalization modified from original).

208. *Id.* at 216 (capitalization modified from original).

209. *Id.* at 229–30.

210. See JEAN HOTMAN, *THE AMBASSADOR* B2 (James Shawe trans., 1603) (capitalization and spelling modified from original).

211. *Id.* at B2–B3 (capitalization and spelling modified from original).

affair is dispatched.”<sup>212</sup> The second serve “without having any time limited, but at the pleasure of the prince which [s]endeth them.”<sup>213</sup> Writing in 1585, Alberico Gentili had similarly distinguished between these two types, with resident ambassadors—“time ambassadors” in his terminology—being those sent “on no specific or definite business but for a period of time sometimes prescribed, sometimes not, with the understanding that while they are on the embassy they shall be responsible for the negotiation and performance of everything which . . . may happen to be in the interest” of the sending sovereign, and all other ambassadors being “sent on a special occasion, their orders being to return as soon as they have accomplished their mission.”<sup>214</sup>

Later treatises were also consistent with Wicquefort and Callières. Emmerich de Vattel explained in 1758 that the term “public minister” included three distinct orders. The first and highest-ranking were the “*ambassadors*,” who represented princes “not only in their rights and in the transaction of their affairs, but also in their dignity, their greatness, and their pre-eminence.”<sup>215</sup> The second and third consisted of “[e]nvoys” and “*resident[s]*,” respectively.<sup>216</sup> Functionally indistinguishable from one another, these latter orders represented the sovereign prince “in his affairs,” but not “in his dignity.”<sup>217</sup> They could transact and communicate, in other words, but unlike ambassadors were not treated as the sovereign in ceremonial matters. Yet Vattel was not overly concerned with the formalities of rank. In his view, the term “public minister” “denote[d] any person intrusted with the management of *public* affairs, but [was] more particularly understood

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212. *Id.* (capitalization and spelling modified from original).

213. *Id.* at B3.

214. See 2 ALBERICO GENTILI, DE LEGATIONIBUS LIBRI TRES 14 (Gordon J. Laing trans., Oxford University Press 1924) (1585).

215. See VATTEL, *supra* note 81, at 459.

216. *Id.* at 459–60.

217. See *id.* According to Travers Twiss:

Louis XI of France is said to have been the first of the European Sovereigns, who accredited to another Sovereign Power a Public Minister to represent him in the conduct of his affairs only, and not in respect of his personal dignity; and his example led the way to the introduction of two distinct classes of diplomatic Agents, a higher class representing the dignity of the *person* of their Constituent as well as his *affairs*, and a lower class simply representing him in the transaction of his *affairs*.

TRAVERS TWISS, THE LAW OF NATIONS CONSIDERED AS INDEPENDENT POLITICAL Communities 340 (London, Clarendon Press 1884).



to designate one who acts in such capacity at a *foreign court*.”<sup>218</sup> In short, anyone sent by a prince “with credentials and on public business” was a public minister,<sup>219</sup> and this was true even of individuals with nontraditional ranks, such as deputy and commissioner.<sup>220</sup> Vattel did not specifically address the status of ad hoc diplomats, but his capacious definition betrayed little concern for the precise purpose or duration of the mission at hand. The only groups he explicitly excluded were “agents,” whom he defined as those “appointed by princes to transact their private affairs,” and “secret ministers,” whose “character is not public.”<sup>221</sup>

Other writers from the mid- to late eighteenth century also concurred. Although he did not use the term “public minister,” the Dutch jurist Cornelius van Bynkershoek defined “ambassador” as including a nonresident variety. His position was that “[a]mbassadors extraordinary . . . are sent with a commission to transact a particular piece of business, while the instructions of ambassadors in ordinary cover not one thing only but all things.”<sup>222</sup> Citing Wicquefort, he also explained that qualification for the status of ambassador under international law hinged on “the nature of the mandate,” rather than a person’s rank.<sup>223</sup> Years later, the German jurist Georg Friedrich von Martens defined “public minister” to mean “the person whom the sovereign has appointed to superintend his affairs at some foreign court.”<sup>224</sup> Like others, Martens explained that ambassadors were a type of public minister, and that there were both ambassadors ordinary and extraordinary, with the division “serv[ing] originally to distinguish perpetual ambassadors, from such as were sent on some particular business.”<sup>225</sup> By the late 1700s, sovereigns vested even some of their resident diplomats with the title of “ambassador extraordinary” in

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218. VATTEL, *supra* note 81, at 453.

219. *See id.* at 461.

220. *See id.*

221. *See id.* at 461, 485.

222. CORNELIUS VAN BYNKERSHOEK, *DE FORO LEGATORUM LIBER SIGULARIS: A MONOGRAPH ON THE JURISDICTION OVER AMBASSADORS IN BOTH CIVIL AND CRIMINAL CASES* 9 (Gordon J. Laing trans., Oxford, Clarendon Press photo. reprint 1946) (1744).

223. *Id.* at 64 (“[W]hatever title it may have pleased a prince to use in his mandate, it is all the same so far as the right of embassy is concerned.”).

224. *See* GEORG FRIEDRICH VON MARTENS, *SUMMARY OF THE LAW OF NATIONS, FOUNDED ON THE TREATIES AND CUSTOMS OF THE MODERN NATIONS OF EUROPE* 196 (William Cobbett trans., 1795) (capitalization modified from original).

225. *See id.* at 203–04 (capitalization modified from original).

order to convey a heightened sense of dignity, but the prior usage, by which extraordinary meant ad hoc, had not entirely disappeared.<sup>226</sup>

The fundamental consistency among these sources seems significant. Some of the authors were diplomats while others were jurists. In the case of Gentili and Martens they wrote more than two centuries apart from one another. And they had different nationalities. None of them, however, suggested that ad hoc diplomats were categorically or even typically something other than public ministers, or that remuneration, tenure, or any other *Hartwell*-like condition was necessary to qualify as such. To the extent they addressed these issues, they explicitly concluded otherwise.<sup>227</sup>

#### D. American Familiarity with European Usage

The English legal authorities and the European treatises are key pieces of the historical analysis for one simple reason: they were familiar and important to those who drafted and ratified the Constitution. Both Blackstone's *Commentaries* and participants in the ratification debates discussed the incident that led to the Diplomatic Privileges Act of 1708,<sup>228</sup> and Congress used that statute as the model for the Crimes Act of 1790, which employed virtually identical language to prohibit arrest and service of process against "the person of any ambassador or other public minister of any foreign prince or state, authorized and received as such by the President of the United States, or the domestic or domestic servant of any such ambassador or other public minister."<sup>229</sup> An early opinion from U.S. Attorney General William Wirt also mentioned the English statute, along with the decision in *Barbuit's Case*.<sup>230</sup>

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226. *See id.*

227. Originalist analyses of the Constitution often scrutinize the writing of individuals such as William Blackstone and Samuel von Puffendorf, but while some of these other authors discussed rules pertaining to diplomatic immunity, they did not attempt to define "ambassador" or "public minister." *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS 226–30 (1902). I therefore omit them.

228. *See id.* at 247–48; The Debates in the Convention of the Commonwealth of Virginia (June 21, 1788), in 3 ELLIOT'S DEBATES, *supra* note 97, at 503.

229. *See* Act of Apr. 30, 1790, ch. 9, § 25, 1 Stat. 112.

230. *See* U.S. Attorney General, Opinion Letter on Foreign Ministers, Consuls, &c. (Dec. 1, 1820), as reprinted in 1 OFFICIAL OPINIONS OF THE ATTORNEYS GENERAL OF THE UNITED STATES, ADVISING THE PRESIDENT AND HEAD OF DEPARTMENTS IN RELATION TO THEIR OFFICIAL DUTIES 407–09 (Benjamin F. Hall ed., 1852) (1820) (characterizing the pertinent language of the Crimes Act of 1790 as an "exact transcript" of the Diplomatic Privileges Act of 1708 and citing *Barbuit's Case*).

Many of the framers were equally familiar with the leading treatises. Legal scholars have long recognized as much, especially with respect to writers such as Vattel,<sup>231</sup> but what is interesting is that this familiarity extended specifically into writing on matters of diplomacy. For example, it appears that early American diplomats read Vattel's analysis on the definition of "public minister." While serving at the court at St. Petersburg, Francis Dana wrote a letter to Secretary of Foreign Affairs Robert Livingston, querying whether Congress's decision to commission him as a minister plenipotentiary "ha[d] been taken from Vattel's Law of Nations, where he treats of the several orders of public ministers."<sup>232</sup> In Dana's view, the chosen title had failed to serve its purpose insofar as Russia treated ministers plenipotentiary no differently than simple ministers.<sup>233</sup> Vattel's discussion on public ministers also appeared in major news outlets.<sup>234</sup>

Key leaders of the Revolution were also familiar with the major commentators on diplomatic affairs. In 1783, a congressional committee composed of James Madison, Thomas Mifflin, and Hugh Williamson reported a "list of books proper for the use of Congress, and proposed that the secretary should be instructed to procure the same."<sup>235</sup> This list included roughly two dozen works on international law and diplomatic practice—including the treatises by Wicquefort, Callières, Hotman, Gentili, and Bynkershoek<sup>236</sup>—and committee

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231. See generally Brian Richardson, *The Use of Vattel in the American Law of Nations*, 106 AM. J. INT'L L. 547 (2012) (acknowledging the Framers' familiarity with Vattel, but critiquing the tendency to privilege him over other writers of the period).

232. See Letter from Francis Dana to Robert Livingston (Sept. 5, 1782), in 5 THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES, *supra* note 142, at 702.

233. See *id.*

234. See, e.g., *Of the Rights, Privileges, and Immunities of Ambassadors, and Other Public Functionaries (By Vattel)*, NAT'L INTELLIGENCER & WASH. ADVERTISER, Nov. 17, 1809.

235. Debates in the Congress of the Confederation (Jan. 23, 1783), in 5 ELLIOT'S DEBATES, *supra* note 97, at 27.

236. 24 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 170, at 83–84. James Madison compiled a list of books on the topic of diplomacy. 6 THE PAPERS OF JAMES MADISON: 1 JANUARY 1783–30 APRIL 1783, at 62–71 (William T. Hutchinson & William M.E. Rachal eds., 1969) (including the following list of books: FRANÇOIS DE CALLIÈRES, *THE ART OF NEGOTIATING WITH SOVEREIGN PRINCES* (Eng. ed., 1716); CARLO MARIA CARAFA, *L'AMBASCIADORE POLITICO CRISTIANO* (1692); ALBERICO GENTILI, *DE LEGATIONIBUS LIBRI TRES* (1585); JEAN HOTMAN, *DE LA CHARGE ET DIGNITÉ DE L'AMBASSADEUR* (James Shawe trans., 1603); FREDERICK MARSALAER, *LEGATUS* (1618); CARLO PASQUALE, *LEGATUS* (1598); J. DE LA SARRAS DU FRANQUESNAY, *LE MINISTRE PUBLIC DANS LES COURS ETRANGERES &C.* (1731); ANTOINE DE VERA, *EL EMBAXADOR* (1620); and ABRAHAM WICQUEFORT, *THE AMBASSADOR AND HIS FUNCTIONS* (Eng. ed., 1716)). Publication years,

members advocated its acquisition on the view that “Congress should have at all times at command such authors on the law of nations, treaties, negotiations, &c., as would render their proceedings in such cases conformable to propriety.”<sup>237</sup> The proposal was defeated due to concerns about cost,<sup>238</sup> but the list still “represents an educated 18th century view of what the legislator-statesman ought to be reading” and suggests “many of the very books with which Madison”—the list’s primary author—“prepared himself for the ordeal of the Constitutional Convention four years later.”<sup>239</sup> Other references corroborate this view: Chief Justice Oliver Ellsworth cited Wicquefort in an early circuit court opinion addressing the prosecution of a U.S. citizen for violations of the Treaty of Paris.<sup>240</sup> Thomas Jefferson recommended Bynkershoek’s work on ambassadors to James Madison a year after Congress considered the acquisition list,<sup>241</sup> and he included the works of Wicquefort and Callières in his personal library catalogue.<sup>242</sup>

This evidence is in line with other indications that influential revolutionaries made serious efforts to learn European diplomatic protocol. For instance, in 1779, while serving in France, John Adams requested reimbursement after purchasing and studying a “large collection of books on the . . . letters and memoirs of those ambassadors and public ministers who had acquired the fairest fame and had done the greatest services to their countries,”<sup>243</sup> and Congress approved his

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editions, and volumes are in some cases estimates. *Id.* With the exception of the books by Callières, Gentili, Hotman, and Wicquefort, English translations of the listed works do not appear to exist.

237. Debates in the Congress of the Confederation (Jan. 23, 1783), in 5 ELLIOT’S DEBATES, *supra* note 97, at 27.

238. *Id.*

239. Loren Eugene Smith, *The Library List of 1783*, at 4–5 (Jan. 30, 1969) (unpublished Ph.D. dissertation, Claremont Graduate School), [http://scholarship.claremont.edu/cgu\\_etd/87](http://scholarship.claremont.edu/cgu_etd/87) [<http://perma.cc/FKT2-C666>].

240. Williams’ Case, 29 F. Cas. 1330, 1332 (Cir. Ct. D. Conn. 1799).

241. See, e.g., Letter from Thomas Jefferson to James Madison (Feb. 20, 1784), in 21 LETTERS OF DELEGATES TO CONGRESS 369–70 (Paul H. Smith ed., 1994) (“I have had an opportunity here of examining Bynkershoek’s works. There are about a fourth part of them which you would like to have . . . [including] du Juge competent des Ambassadeurs . . .”).

242. See THOMAS JEFFERSON, 1783 CATALOGUE OF BOOKS [circa 1775–1812], at 84–85 (electronic ed. 2003), [https://www.masshist.org/thomasjeffersonpapers/doc?id=catalog1783\\_84](https://www.masshist.org/thomasjeffersonpapers/doc?id=catalog1783_84) [<http://perma.cc/G5EN-DBKA>]. This catalog is “a record of works [Jefferson] already possessed and of others he desired to acquire.” 6 THE PAPERS OF JAMES MADISON, *supra* note 236, at 64.

243. Letter from John Adams to the Treasury Board (Sept. 19, 1779), in 3 REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES, *supra* note 142, at 327.

request.<sup>244</sup> In 1780, Congress's instructions to Francis Dana, the new minister plenipotentiary to St. Petersburg, ordered him to "endeavor to acquire a perfect knowledge of the manners and etiquette of the court at which [he would] reside."<sup>245</sup> American and foreign diplomats in turn educated Congress on the accepted conventions.<sup>246</sup>

The idea that the framers studied these works is also in accord with evidence concerning the execution of American diplomacy, especially toward the later years of the Revolution. Inspired perhaps by the *philosophes*, the first Americans involved in foreign relations "paid little attention to the traditional forms and disregarded well established rules of diplomatic etiquette."<sup>247</sup> Benjamin Franklin thus wore the rustic fur cap of a backwoodsman while serving "among the Powder'd Heads of Paris,"<sup>248</sup> and American envoys self-consciously employed a new language of commerce and trade over political alliance.<sup>249</sup> One might imagine that such practices would have limited the importance of knowledge about European usage. But while they retained a critical instinct toward many practices of the Old World, the framers appear to have conformed in many cases. In 1776, General Washington granted safe conduct passes to the members of the Howe Commission in accordance with European custom.<sup>250</sup> In 1778, after the French sent their first public minister to Philadelphia, Congress followed established etiquette by sending to Paris a single diplomatic agent of equal rank, even though this required dissolving the joint commission of Benjamin Franklin, Arthur Lee, and Silas Deane, who had served in

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244. *Id.* at 329.

245. Instructions to Francis Dana, as Minister Plenipotentiary to the Court at St. Petersburg (Dec. 19 1780), *in* 4 *id.* at 201–03.

246. *See, e.g.*, Letter from John Adams to John Jay (May 13, 1785), *in* 1 DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 497 (Washington, Blair & Rives 1837) (explaining an English custom whereby both public ministers and their families must be introduced to the Queen); Letter from John Adams to Robert Livingston (July 31, 1783), *in* 6 REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES, *supra* note 142, at 621–24 (reporting advice received from the Comte Montagnini de Mirabel, the minister plenipotentiary from the King of Sardinia, who wished to advise Congress on certain matters of protocol, including the need to "be very exact in the etiquette of titles" in correspondence with European leaders); Letter from Silas Deane to the Comm. of Secret Correspondence (Nov. 28, 1776), *in* 2 *id.* at 196 (advising Congress to consider adopting the "long-accustomed form and etiquette" of the Old World in correspondence with European powers).

247. PAUL A. VARG, FOREIGN POLICIES OF THE FOUNDING FATHERS 4 (1963).

248. Letter from Benjamin Franklin to Mrs. Thompson (Feb. 8, 1777), *in* 7 THE WRITINGS OF BENJAMIN FRANKLIN 26 (Albert Henry Smythe ed., 1906).

249. KAPLAN, *supra* note 139, at 93–94.

250. *Id.* at 95.

France since 1776.<sup>251</sup> In 1781, after the British imprisoned the American envoy Henry Laurens in the Tower of London on charges of treason, his son John Laurens reported to Congress that he had “consulted the several ministers at the court of France upon the proper measures to be taken when such a flagrant violation of the laws of nations had been offered in the person of a public minister, and solicited their intervention and assistance.”<sup>252</sup> In 1786, John Jay brushed aside a British consul’s objections to American violations of the Treaty of Paris by pointing out that consuls lacked authority to raise such issues as a matter of international law.<sup>253</sup>

Anyone who paid attention knew that much was at stake in these matters. Adams, for one, warned Congress multiple times of the risks of disregarding diplomatic norms. On one occasion he lectured that an improvement in the position of the United States vis-à-vis Europe would “never be accomplished but by conforming to the usages established in the world.”<sup>254</sup> On another he warned that Americans would “have cause for severe repentance” if they failed to conform,<sup>255</sup> and contemporaries did not have to look far to see that he was probably right.<sup>256</sup> In navigating such issues, familiarity with the likes of Wicquefort and Callières would have been enormously useful, serving as a source of vital insights on European expectations, as a form of

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251. DULL, *supra* note 175, at 100–01.

252. Letter from John Laurens to the President of Congress (Sept. 6, 1781), in 4 REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES, *supra* note 142, at 700.

253. Letter from John Jay to John Temple (Apr. 7, 1786), in 3 REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES, *supra* note 243, at 109; Report of John Jay Relative to Richard Lawrence (May 26, 1788), reprinted in 3 *id.* at 126–27; see also David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, The Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 959 (2010) (discussing this incident).

254. Letter from John Adams to John Jay (Feb. 26, 1786), in 2 REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES, *supra* note 243, at 574.

255. Letter from John Adams to John Jay (Sept. 10, 1787), in 2 *id.* at 802–03.

256. The assault on the French consul Barbé de Marbois in Philadelphia in 1784 provided one salient example. This incident, together with Congress’s feckless response, provoked the fury of the French government, which demanded that American officials treat the offense as a violation of the law of nations and surrender the perpetrator to their custody. G.S. Rowe & Alexander W. Knott, *The Longchamps Affair (1784–86), the Law of Nations, and the Shaping of Early American Foreign Policy*, 10 DIPLOMATIC HISTORY 199, 202 (1986). It also inspired threats that the French, Dutch, Swedish, and Spanish governments would withdraw their legations if the United States failed to cooperate. *Id.* at 203.

leverage in negotiations, and as evidence of belonging to the class of governments from which the United States sought recognition.<sup>257</sup>

*E. The Incorporation of European Usage*

Unsurprisingly, then, there is considerable evidence that the framers were not only familiar with the theory and practice of diplomacy in Europe, and not only conformed in many cases to European custom, but also incorporated into American practice the European and international legal understanding that many ad hoc diplomats are public ministers. Equally important, the framers did not graft onto this understanding any additional domestic criteria in applying the Appointments Clause; they required the Senate's advice and consent for the appointment of anyone who qualified as a public minister for the United States under the law of nations. This conclusion draws support from a variety of angles, including symmetry between the law of nations and the phrasing of the Appointments Clause; official practice during the presidential administrations of George Washington, John Adams, and Thomas Jefferson; debates in Congress; early dictionaries; and the nature of diplomatic assignments in the eighteenth century.

1. *Textual Symmetry.* A close reading of the Appointments Clause presents a puzzle: why would the framers provide for a specific power to appoint ambassadors while separately providing for a more general power to appoint public ministers? In European practice, the term "public minister" had covered a rather extensive hierarchy of ranks, including ambassador, envoy, resident, minister, agent, chargé d'affaires, and secretary of legation, among others.<sup>258</sup> This hierarchy was complex, evolved over time, and varied by court.<sup>259</sup> Yet there was no question, including among the framers, that ambassadors belonged within it.<sup>260</sup> In this context, those who drafted and ratified the Constitution must have understood that retaining a separate reference to ambassadors did nothing to change the scope of the appointment

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257. Cf. SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* 133 (2015) (discussing the importance early American leaders attached to learning and following European diplomatic customs).

258. ANDERSON, *supra* note 148, at 84.

259. *Id.*

260. This is apparent from the text of the Appointments Clause, which explicitly identifies ambassador as a subcategory of public minister. U.S. CONST., art. II, § 2. It is also apparent from the major treatises on diplomatic practice. See *supra* Part III.C.

power; a clause that provided only for the appointment of public ministers and consuls would have been functionally identical to the version that emerged from the Convention. Moreover, redundancy aside, the separate reference to ambassadors is surprising in light of an early American aversion to the use of that particular rank of public minister, which, owing to an historical association with European monarchy and ceremonial extravagance, had both political connotations and budgetary implications that were unappealing to many of the Founding era.<sup>261</sup> In short, why would the framers retain functionally redundant language, the apparent effect of which was to emphasize the power to appoint a type of diplomat that many of them viewed with particular disfavor?<sup>262</sup>

There are a few conceivable explanations. One is that the drafters desired to emphasize the sovereign equality of the United States in relation to Europe, and chose to do so by underscoring the nation's right to send diplomats of a rank historically reserved for major powers.<sup>263</sup> On this view, the language of the Appointments Clause may have had an international communicative dimension; the message was that the new republic, like the monarchies of the Old World, possessed international sovereignty in full. Another possibility is that the Clause reflects the lingering influence of the Articles of Confederation, which provided only for the sending and receiving of "ambassadors."<sup>264</sup> On this reading, the separate reference to ambassadors may be an artifact of an undertheorized and incremental revision by which the drafters attached an additional provision for public ministers without considering its relationship to the preexisting language. Still another possibility is that the framers were simply channeling the law of

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261. See, e.g., THE FEDERALIST NO. 42, *supra* note 112, at 265 (James Madison) (discussing grades of public ministers other than ambassadors as those "which the United States will be most likely to prefer"); see also ANDERSON, *supra* note 148, at 82 (explaining that as late as the mid-seventeenth century, "[i]t was still widely accepted that only major rulers (kings and the republic of Venice) could send and receive ambassadors"); WILLIAM BARNES & JOHN HEATH MORGAN, THE FOREIGN SERVICE OF THE UNITED STATES: ORIGINS, DEVELOPMENT, AND FUNCTIONS 146 (1961) ("[T]he rank of ambassador had been regarded as too exalted for the representatives of a democratic nation and was, moreover, identified with the monarchical system to whose trappings and titles the United States had no wish to defer.").

262. In fact, this aversion was so longstanding that the United States did not appoint its first diplomat with the rank of ambassador until 1893. BARNES & MORGAN, *supra* note 261, at 146.

263. Cf. ANDERSON, *supra* note 148, at 59 (discussing how "republics ranked lower than any kind of monarchy" in early European diplomatic protocol).

264. ARTICLES OF CONFEDERATION of 1781, art. IX, § 1.



nations, such that the separate references to ambassadors and public ministers mirrored the doctrinal architecture of the law of diplomacy.

These options are not necessarily incompatible, but the available evidence offers strongest support for the last of the three. While there is substantial evidence of sensitivity to European perceptions of the United States, and of a desire to be perceived as coequal,<sup>265</sup> there is little to show that those sentiments played a role specifically in the drafting of the Appointments Clause. In addition, records from the Constitutional Convention depict the drafting process as generally purposeful and deliberative,<sup>266</sup> and thus cast doubt on the idea that the redundancy is a product of oversight.

Several points, meanwhile, suggest that the phrasing of the Clause reflects the law of nations. First, as shown above, many of the framers were familiar with diplomatic law and viewed its major European expositors as authoritative.<sup>267</sup> Second, the phrasing of the Clause is unmistakably symmetrical to the Diplomatic Privileges Act of 1708 and the writing of early commentators: all of these authorities divided public ministers into the two nonobvious classes of (1) ambassadors and (2) diplomats of every other rank.<sup>268</sup> According to writers such as Wicquefort and Vattel, this scheme reflected an important functional difference: when interfacing with foreign courts, ambassadors were the only public ministers empowered to act and be treated as if they were the very person of the sending sovereign.<sup>269</sup> This difference, though somewhat strange by modern standards, was important in early European diplomacy, when rulers relied upon a baroque system of rank and ceremony to communicate the status of their relations with other courts and resolve conflicts of precedence among foreign emissaries.<sup>270</sup> Finally, early American officials consistently and

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265. See, e.g., MARKS, *supra* note 126, at 96–141.

266. Cf. KLARMAN, *supra* note 120, at 126–256 (recounting the drafting process and accompanying debates). But cf. MARKS, *supra* note 126, at 160 (suggesting that “there was minimum floor debate on the diplomatic powers, and the momentous shift from Senate to president occurred at the very end of the session when tempers were short and patience wearing thin”).

267. See *supra* Part III.D.

268. Compare U.S. CONST., art. II, § 2 (providing for the power to appoint “Ambassadors” and “other public Ministers”), with 7 Ann., c. 12 (1708) (Eng.) (voiding all writs and processes brought against “any Ambassador, or other publick Minister”), CALLIÉRES, *supra* note 205, at 63 (distinguishing ambassadors from all other types of public ministers), and WICQUEFORT, *supra* note 84, at 2 (same).

269. VATTEL, *supra* note 81, at 459; WICQUEFORT, *supra* note 84, at 2.

270. ANDERSON, *supra* note 148, at 56–68.

repeatedly took the position that the law of nations informs the meaning of the Appointments Clause.<sup>271</sup> As James Madison explained, “[t]he case of diplomatic missions belongs to the Law of Nations, and the principles & usages on which that is founded are entitled to a certain influence in expounding the provisions of the Constitution which have relation to such missions.”<sup>272</sup> It would be only natural for the Clause to use the same terminology and phrasing as the law that informed its drafting and application. This law, as I have shown, treated a wide variety of ad hoc diplomats as public ministers.

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271. See, e.g., *United States ex rel. Goodrich v. Guthrie*, 58 U.S. 284, 290–91 (1854) (“All offices under the government of the United States are created, either by the law of nations, such as ambassadors and other public ministers, or by the constitution and the statutes. As to ambassadors and other public ministers, the usage of nations determines the tenure of their commissions to be at the will of the appointing power.”); 7 ANNALS OF CONG. 1170–71 (1798) (statement of Rep. Robert Goodloe Harper) (arguing that the office of public minister is “derived from the law of nations,” rather than from the Constitution); 3 THE HISTORICAL REGISTER OF THE UNITED STATES 223 (1814) (statement of Sen. Outerbridge Horsey) (“The office of a public minister is not an office created by the constitution, nor by any municipal law, but emanates from the law of nations.”); On the Constitutional Power of the President to Originate the Appointment of a Foreign Minister (Mar. 1826), in 4 ELLIOT’S DEBATES, *supra* note 97, at 480–81 (“If an appointment be to an office to be exercised within the limits of the United States or its territories, it must be to one which exists, and has been created by the municipal laws of the United States. If to an office which is to be exercised without the limits of the United States . . . it must be to one which exists, and is recognized by the general principles of international law . . .”); see also Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1, 19 (2006) (stating that terms such as “ambassador” reference “concepts defined by international law and have been understood as inviting consideration of international rules”). This position helps to explain why the Framers permitted the president, with the Senate’s advice and consent, to make diplomatic appointments even where Congress had not created by statute the offices to which the appointments were made. The general understanding appears to have been that these offices required no statutory enactment because they existed by virtue of the law of nations. See WRISTON, *supra* note 3, at 131 (“When the new government under the Constitution was established, Congress took no action and the executive department proceeded to organize a diplomatic and consular service in accord with its own interpretation of the rules of customary international law.”); Nomination of Sitting Member of Congress to be Ambassador to Vietnam, 20 Op. O.L.C. 284, 286–88 (1996) (discussing other early evidence of this view).

272. James Madison, Power of the President to Appoint Public Ministers & Consuls in the Recess of the Senate (undated memorandum), in 9 THE WRITINGS OF JAMES MADISON 91 n.1 (Gaillard Hunt ed., 1910); see also Letter from James Madison to James Monroe (May 6, 1822), *in id.* at 91–93 (“One question is, whether a Public Minister be an officer in the strict constitutional sense . . . . According to my recollection this subject was on some occasion carefully searched into, & it was found that the practice of the Govt. had from the beginning been regulated by the idea that the places or offices of Pub. Ministers & Consuls existed under the law & usages of Nations, and were always open to receive appointments as they might be made by competent authorities.”); Letter from James Monroe to James Madison (May 10, 1822), in 6 THE WRITINGS OF JAMES MONROE 285 (Stanislaus Murray Hamilton ed., 1902) (“Your view of the Constitution, as to the powers of the Executive in the appointment of public Ministers, is in strict accord with my own, and is, as I understand, supported by numerous precedents, under successive administrations.”).

2. *Early Appointments.* On its own, symmetry between the law of nations and the wording of the Constitution leaves plenty of room for uncertainty. But the evidence gets better: the Washington Administration treated most ad hoc diplomats as both public ministers and officers of the United States by regularly seeking the Senate's advice and consent to their appointment. According to a report compiled by the Senate Foreign Relations Committee in 1888 and reproduced with modifications in Table 1, Washington utilized twenty-nine ad hoc diplomats.<sup>273</sup> From these a few trends stand out. First, President Washington sought and obtained the Senate's advice and consent in eighteen of the cases, often even though the Senate had already confirmed the same individual's nomination to a different, but still-ongoing diplomatic appointment. In 1792, for example, Washington sought advice and consent for William Carmichael to negotiate a treaty with Spain.<sup>274</sup> He did this even though the Senate had already confirmed Carmichael to the position of chargé d'affaires at Madrid in 1789, and even though Carmichael continued to occupy that office at the time of his subsequent nomination.<sup>275</sup> From a legal standpoint, this practice is inexplicable unless the Administration understood ad hoc treaty negotiators to be public ministers and officers

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273. S. Exec. Rep. No. 3 app. C (1888), in 8 COMPILATION OF REPORTS OF THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, 1789–1901, First Congress, First Session to Fifty-Sixth Congress, Second Session, Treaties and Legislation Respecting Them 337–62 (1901). The modifications are the additions of the appointments of Benjamin Lincoln, Cyrus Griffin, David Humphreys, Beverly Randolph, Abraham Ogden, Thomas Barclay, Joseph Donaldson, Joel Barlow, Henry Knox, Thomas Fitzsimons, James Innes, Christopher Gore, William Pinckney, Timothy Pickering, and Isaac Smith, all of which were omitted in the original report. I identified these additions by comparing the report to (1) the Senate Executive Journal, (2) Charles Lanman's BIOGRAPHICAL ANNALS OF THE CIVIL GOVERNMENT OF THE UNITED STATES DURING ITS FIRST CENTURY (1876), and (3) Balances Due to and From the United States, Letter from the Acting Secretary of the Treasury, H.R. Exec. Doc. No. 49-363, 49th Cong. (1st Sess. 1886). I relied on these sources because, in aggregate, they seemed likely to identify all ad hoc diplomatic appointments from the Founding: The Senate Executive Journal reports all nominations for which the President sought Senate confirmation. Charles Lanman's publication presents "the names and public services of all those who have, in a prominent manner, been identified with the National and State Governments of the Republic." LANMAN, *supra* note 273, at 3. And the Treasury report, which was produced in response to a House resolution "calling for a report of all balances due to and from the United States, as shown by the books of the offices of the Register and Sixth Auditor of the Treasury Department, from 1789 to 30th of June, 1885," identifies individuals who received financial compensation for various forms of federal service. Balances Due to and From the United States, *supra* note 274, at 1 (internal quotations omitted). In seeking out and reviewing these additional sources, I have made every effort to ensure accuracy, but it is possible that omissions and other inaccuracies remain.

274. S. EXEC. JOURNAL, 2d Cong. (1st Sess. 1792), at 95–96.

275. S. EXEC. JOURNAL, 1st Cong. (1st Sess. 1789), at 33–34.

of the United States.

Second, seven of the remaining eleven cases were recess appointments that do not reveal the Administration's position on unilateral, nonrecess cases. If anything, statements from the Administration suggest that it viewed the appointments as active only until the Senate reconvened. Washington independently appointed John Paul Jones to negotiate with the Dey of Algiers, for instance, but accepted that Jones's commission would continue in force "only till the next session of the Senate."<sup>276</sup> In a similar spirit, the Administration made efforts to ensure that other recess appointees completed their assignments within the time limits of the recess.<sup>277</sup>

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276. Letter from Thomas Jefferson to John Paul Jones (June 1, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON, 1 JUNE–31 DECEMBER 1792, at 3–10 (John Catanzariti ed., 1990).

277. See, e.g., No. 66: Morocco & Algiers (Dec. 16, 1793), reprinted in 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 288 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales and Seaton 1832) (discussing Thomas Barclay's assignment to negotiate with Algiers, and informing him that "it is expected the objects of your mission will be accomplished . . . [b]efore the end of the next session of the Senate").

*Table 1: Ad Hoc Diplomats of the Washington Administration*<sup>278</sup>

| Name              | Appointment Date | Appointment Method | Rank          | Purpose            | Other Office Held |
|-------------------|------------------|--------------------|---------------|--------------------|-------------------|
| Gouverneur Morris | 10/13/1789       | President (recess) | Private agent | Investigation (UK) | None              |

278. Table 1 and the others below exclude five individuals who received ad hoc foreign assignments of a nondiplomatic character. The first is Andrew Ellicott, whom Secretary of State John Jay sent to Canada to ascertain a meridian line. *See* Letter from George Washington to Henry Knox (Sept. 5, 1789), 3 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES, 1 JUNE – SEPTEMBER 1789, at 601–03 n.1 (Dorothy Twohig ed., 1989) (noting that Ellicott was “appointed for the purpose” of determining the meridian line); *see also* Prakash & Ramsey, *supra* note 25, at 299 (discussing this precedent as evidence of an original understanding in favor of executive control over foreign affairs). The remaining four—Samuel Bayard and Nathaniel Higginson in 1794, James Henry in 1805, and Hugh Lennox in 1806—went overseas to assist American merchants who had suffered property loss and impressment at the hands of the British navy. *See* David L. Sterling, *A Federalist Opposes the Jay Treaty: The Letters of Samuel Bayard*, 18 WM. & MARY Q. 408, 408–10 (1961) (describing Bayard’s role as “unofficial spokesman of American merchants whose ships had been confiscated by Great Britain early in the wars of the French Revolution” and recounting Bayard’s efforts to obtain relief for the merchants from British courts); *see also* 5 ANNALS OF CONG. 382–400, 802–20 (1796) (reporting a debate during which members of Congress discussed the work of Bayard and Higginson as nondiplomatic in character); Letter from James Madison to James Henry (Mar. 25, 1805), in 9 THE PAPERS OF JAMES MADISON 171–72 (Mary A. Hackett et al. eds., 2011) (describing Henry’s duties as “altogether confined to the relief of [American] Seamen, who may be left destitute in [Jamaica], or who may be impressed”); Letter from James Madison to Hugh Lennox (Mar. 5, 1806), FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/02-11-02-0260> [<https://perma.cc/DG74-VQ8C>] (describing Lennox’s duties as “altogether confined to the relief of [American] Seamen, who may be left destitute in [Jamaica], or who may be impressed”). Because these five individuals were not public ministers under any fair reading of the law of nations, contemporaries did not view the act of appointing them without Senate confirmation as constitutionally problematic. *See, e.g.*, 5 ANNALS OF CONG. 382–400, 802–20 (1796) (statement of James Madison) (arguing that agents such as Bayard and Higginson “were neither Ambassadors, public Ministers, nor Consuls,” and “would have no rank as public characters, but be mere agents”). Table 1 also excludes an Appendix C entry for Rufus King, who was appointed as minister plenipotentiary to the United Kingdom in 1796. S. EXEC. JOURNAL, 1st Cong. (1st Sess. 1796), at 209. Although President Washington reportedly appointed King to “conclude a treaty of commerce with Great Britain, and to modify or extend Jay’s Treaty,” EXEC. REP. NO. 3 app. C (1888), in 8 COMPILATION OF REPORTS OF THE COMMITTEE ON FOREIGN RELATIONS, *supra* note 273, at 337, the Senate Executive Journal suggests that King served as a resident ambassador to the United Kingdom in pursuing that objective, rather than as an ad hoc agent. S. EXEC. JOURNAL, 1st Cong. (1st Sess. 1796), at 209. I therefore excluded King from the list.

| Name                            | Appointment Date | Appointment Method                | Rank          | Purpose                               | Other Office Held  |
|---------------------------------|------------------|-----------------------------------|---------------|---------------------------------------|--|
| Benjamin Lincoln <sup>279</sup> | 8/21/1789        | President & Senate                | Commissioner  | Treaty negotiation (Southern Indians) | Customs Collector of Port of Boston and Charlestown <sup>280</sup> |
| Cyrus Griffin                   | 8/21/1789        | President & Senate                | Commissioner  | Treaty negotiation (Southern Indians) | None   |
| David Humphreys                 | 8/21/1789        | President & Senate                | Commissioner  | Treaty negotiation (Southern Indians) | None   |
| Henry Knox <sup>281</sup>       | 8/6/1790         | President & Senate                | Not listed    | Treaty negotiation (Creek Indians)    | Secretary of War <sup>282</sup>                                    |
| David Humphreys <sup>283</sup>  | 8/11/1790        | President                         | Private agent | Information delivery (Portugal)       | None   |
| Thomas Barclay <sup>284</sup>   | 5/13/1791        | President (recess) <sup>285</sup> | Consul        | Treaty negotiation (Algiers)          | None   |

279. The 1789 appointments of Benjamin Lincoln, Cyrus Griffin, and David Humphreys are not listed in Appendix C, but are documented at S. EXEC. JOURNAL, 1st Cong. (2d Sess. 1789), at 19.

280. S. EXEC. JOURNAL, 1st Cong. (1st Sess. 1789), at 13.

281. S. EXEC. JOURNAL, 1st Cong. (2d Sess. 1790), at 57.

282. S. EXEC. JOURNAL, 1st Cong. (1st Sess. 1789), at 26.

283. This case was not listed in the Committee's report but is documented at S. EXEC. JOURNAL, 1st Cong. (3d Sess. 1791), at 74–75.

284. No. 66: Morocco & Algiers (Dec. 16, 1793), *reprinted in* 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 277, at 288.

285. The committee's report does not identify recess appointments, so I identified them by reference to a list of the session dates of Congress. *See Dates of Sessions of the Congress*, U.S. SENATE, <http://www.senate.gov/reference/Sessions/sessionDates.htm> [https://perma.cc/XR9M-QM37].

| Name                             | Appointment Date | Appointment Method | Rank                         | Purpose  | Other Office Held  |
|----------------------------------|------------------|--------------------|------------------------------|--|--|
| William Carmichael               | 3/18/1792        | President & Senate | Commissioner plenipotentiary | Treaty negotiation (Spain)                     | Chargé d'affaires in Spain   |
| William Short                    | 3/18/1792        | President & Senate | Commissioner plenipotentiary | Treaty negotiation (Spain)                     | Minister resident in Netherlands                                   |
| John Paul Jones                  | June 1792        | President (recess) | Commissioner                 | Treaty negotiation (Algiers)                   | Navy admiral   |
| Benjamin Lincoln                 | 3/2/1793         | President & Senate | Commissioner                 | Treaty negotiation (Wabash & Illinois Indians) | Customs Collector of Port of Boston and Charlestown <sup>286</sup> |
| Beverly Randolph                 | 3/2/1793         | President & Senate | Commissioner                 | Treaty negotiation (Wabash & Illinois Indians) | None   |
| Timothy Pickering <sup>287</sup> | 3/2/1793         | President & Senate | Commissioner                 | Treaty negotiation (Wabash & Illinois Indians) | Postmaster General <sup>288</sup>                                  |
| David Humphreys                  | 3/21/1793        | President (recess) | Commissioner plenipotentiary | Treaty negotiation (Algiers)                   | Minister resident in Portugal                                      |
| John Jay                         | 4/19/1794        | President & Senate | Envoy extraordinary          | Treaty negotiation (UK)                        | Chief Justice, U.S. Supreme Court                                  |
| William Short                    | 7/11/1794        | President (recess) | Commissioner plenipotentiary | Treaty negotiation (Spain)                     | Minister resident in Spain   |

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286. S. EXEC. JOURNAL, 1st Cong. (1st Sess. 1789), at 13.

287. S. EXEC. JOURNAL, 2d Cong. (3d Sess. 1793), at 135–36.

288. S. EXEC. JOURNAL, 2d Cong. (1st Sess. 1791), at 86, 88.

| Name                            | Appointment Date | Appointment Method                                  | Rank                         | Purpose                                       | Other Office Held                         |
|---------------------------------|------------------|---|------------------------------|---|---|
| Thomas Pinckney                 | 11/24/1794       | President & Senate                                  | Envoy extraordinary          | Treaty negotiation (Spain)                    | Minister plenipotentiary to Great Britain |
| David Humphreys                 | 3/30/1795        | President (recess)                                  | Commissioner plenipotentiary | Treaty negotiation (Barbary Powers)           | Minister resident in Portugal             |
| Joseph Donaldson <sup>289</sup> | 5/21/1795        | Employed by David Humphreys (recess) <sup>290</sup> | Agent                        | Treaty negotiation (Algiers)                  | None                                      |
| Joseph Donaldson <sup>291</sup> | 2/10/1796        | Employed by David Humphreys                         | Agent                        | Treaty negotiation (Tripoli)                  | Consul at Tripoli and Tunis               |
| Joel Barlow <sup>292</sup>      | 2/10/1796        | Employed by David Humphreys                         | Agent                        | Treaty negotiation (Algiers, Tripoli & Tunis) | None                                      |
| Henry Knox <sup>293</sup>       | 4/1/1796         | President & Senate                                  | Commissioner                 | Boundary settlement (UK)                      | None                                      |

289. See Treaty of Peace and Amity, U.S.-Algiers, Sept. 5, 1795, 8 Stat. 133 (describing Donaldson's appointment); see also PETER P. HILL, JOEL BARLOW: AMERICAN DIPLOMAT AND NATION BUILDER 42–46 (2012) (discussing Donaldson's assignment).

290. See No. 109: Algiers (Feb. 15, 1796), reprinted in 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 277, at 528–29.

291. See Treaty of Peace and Friendship, U.S.-Tripoli, Nov. 4, 1796, 18 Stat. 755 (describing the appointment).

292. See *id.* (same); see also HILL, *supra* note 289, at 41–73 (discussing Barlow's assignment).

293. This case was not in the Committee's report but is documented at S. EXEC. JOURNAL, 4th Cong. (1st Sess. 1796), at 204–05. The same is true of the contemporaneous cases of Thomas Fitzsimons, James Innes, Christopher Gore, and William Pinkney. *Id.* These five individuals served as commissioners under Jay's Treaty, which explicitly required that their appointments occur "by and with the advice and consent of the Senate." Treaty of Amity Commerce and Navigation, U.S.-Gr. Brit., arts. 5–7, Nov. 19, 1794, 8 Stat. 116, reprinted in 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES 245, 249 (Hunter Miller ed., 1931).



| Name                             | Appointment Date | Appointment Method | Rank               | Purpose                                | Other Office Held                                       |
|----------------------------------|------------------|--------------------|--------------------|--|---|
| Thomas Fitzsimons                | 4/1/1796         | President & Senate | Commissioner       | Creditor claim settlements (UK)        | None  |
| James Innes                      | 4/1/1796         | President & Senate | Commissioner       | Creditor claim settlements (UK)        | Attorney General of Virginia                            |
| Christopher Gore                 | 4/1/1796         | President & Senate | Commissioner       | Vessel capture settlements (UK)        | None  |
| William Pinckney                 | 4/1/1796         | President & Senate | Commissioner       | Vessel capture settlements (UK)        | None  |
| Timothy Pickering <sup>294</sup> | 5/4/1796         | President          | Secretary of State | Treaty negotiation (UK)                | Secretary of State                                      |
| Abraham Ogden <sup>295</sup>     | 5/18/1796        | President & Senate | Commissioner       | Treaty negotiation (Cohnawaga Indians) | U.S. Attorney for District of New Jersey <sup>296</sup> |
| Isaac Smith <sup>297</sup>       | 3/3/1797         | President & Senate | Commissioner       | Treaty negotiation (Seneca Tribe)      | None  |

This leaves only four cases of executive unilateralism: In 1791, Washington designated David Humphreys to deliver confidential instructions to the American chargé d'affaires at Madrid and a

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294. No. 115: Great Britain (May 5, 1796), *reprinted in* 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 277, at 552.

295. S. EXEC. JOURNAL, 4th Cong. (1st Sess. 1796), at 208.

296. S. EXEC. JOURNAL, 1st Cong. (3d Sess. 1791), at 64–65.

297. S. EXEC. JOURNAL, 4th Cong. (2d Sess. 1797), at 229, 232.

proposal regarding the establishment of diplomatic relations to the prime minister of Portugal.<sup>298</sup> In the mid-1790s, Secretary of State Edmund Randolph authorized David Humphreys to employ consuls Joseph Donaldson and Joel Barlow as treaty negotiators with the Barbary Powers.<sup>299</sup> And in 1796, Washington commissioned Secretary of State Timothy Pickering to negotiate an explanatory article to Jay's Treaty, without first nominating Pickering to serve as a negotiator.<sup>300</sup> These cases complicate the task of ascertaining the official understanding because they seem to depart from the dominant pattern—the Senate was in session in each case, but the president did not seek advice and consent.

The question, then, is whether there is anything about these appointments that might have led the Administration to conclude that Senate confirmation was unnecessary. For two of the cases, the answer seems apparent: First, Humphreys likely did not qualify as a public minister under the law of nations. Unlike many of his contemporaries, he served in secret.<sup>301</sup> Vattel, among others, was clear in suggesting that secret ministers whose diplomatic character was known to the receiving government but hidden from the public at large were not public ministers.<sup>302</sup> Second, because the Senate had already confirmed Pickering to a cabinet-level diplomatic office,<sup>303</sup> there is a fair argument that additional advice and consent was unnecessary. Indeed, it has long been accepted that a separate appointment is unnecessary when *Congress* tasks an incumbent officer with new duties that are

298. S. EXEC. JOURNAL, 1st Cong. (3d Sess. 1791), at 74–75.

299. 6 ANNALS OF CONG. 2235–36 (1797).

300. See No. 115: Great Britain (May 5, 1796), *reprinted in* 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 277, at 552 (entrusting Pickering with the “full power . . . to negotiate and agree” on an explanatory article so as to rectify any misunderstandings about the treaty in an “expedient” manner).

301. S. EXEC. JOURNAL, 1st Cong. (3d Sess. 1791), at 74–75. (describing the mission as “confidential”).

302. VATTEL, *supra* note 81, at 485 (“Sometimes princes send to each other secret ministers, whose character is not public. If a minister of this kind be insulted by a person unacquainted with his character, such insult is no violation of the law of nations.”); *see also* CALLIÈRES, *supra* note 205, at 68 (distinguishing “private [e]nvoys” from public envoys and defining the former as those “who have only private Audiences of the Kings, or other Sovereigns, with whom they treat” (emphasis omitted)); MARTENS, *supra* note 224, at 261 (using the term “secret embassy” to describe the mission of a person sent abroad by a sovereign “to treat in secret of some affair of importance or that requires dispatch, without giving him the quality of minister, or, at least, without permitting him to assume it openly, till the object of his mission is out danger” (capitalization modified from original)).

303. S. EXEC. JOURNAL, 3d Cong. (2d Sess. 1795), at 193.

“germane” to his or her original appointment.<sup>304</sup> The Washington Administration and Senate may have similarly reasoned that there is no need for a separate confirmation process when the *president* assigns to an incumbent diplomat additional duties that are germane to his original post, or to diplomatic service more generally.

The cases of Donaldson and Barlow require more explanation. In 1793, the Washington Administration assigned Humphreys, its acting minister resident in Portugal, to negotiate a peace treaty with Algiers.<sup>305</sup> Humphreys, however, was reluctant to carry out the mission himself, so he requested the appointment of someone else to pursue the negotiations in his stead.<sup>306</sup> The Administration responded not by appointing a new commissioner, but rather by granting Humphreys authority to employ others to act on his behalf.<sup>307</sup> Pursuant to this authorization, Humphreys employed Joseph Donaldson, an obscure official from the Treasury Department, and Joel Barlow, an old friend who had been living in Paris, to negotiate with Algiers.<sup>308</sup> Humphreys also employed Barlow to negotiate treaties with Tripoli and Tunis, and Barlow in turn delegated the negotiations with Tripoli to Richard O’Brien, an American who had previously been held captive at Algiers, and the negotiations with Tunis to a French merchant named Joseph Stephen Famin.<sup>309</sup> Around the same time, the Administration sought and obtained Senate confirmation for the appointment of Donaldson as consul at Tripoli and Tunis, and for the appointment of Barlow as consul general at Algiers.<sup>310</sup> But treaty negotiation is a classic function of public ministers, not consuls, and the Administration did not pursue an appointment of any kind for O’Brien or Famin. How can we reconcile these cases with the rest?

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304. See *Shoemaker v. United States*, 147 U.S. 282, 301 (1893) (“[W]e do not think that, because additional duties, germane to the offices already held by them, were devolved upon them by the act, it was necessary that they should be again appointed by the President and confirmed by the Senate.”); see also *Weiss v. United States*, 510 U.S. 163, 174–75 (1994) (applying this test).

305. Frank E. Ross, *The Mission of Joseph Donaldson, Jr., to Algiers, 1795–97*, 7 J. MOD. HIST. 422, 422 (1935).

306. The primary reason appears to have been concern about his personal safety. HILL, *supra* note 289, at 37.

307. No. 109: Algiers (Feb. 15, 1796), reprinted in 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 277, at 528–29.

308. HILL, *supra* note 289, at 29–50.

309. *Id.* at 51–73; RICHARD B. PARKER, UNCLE SAM IN BARBARY: A DIPLOMATIC HISTORY 133–34 (2004).

310. S. EXEC. JOURNAL, 4th Cong. (Special Sess. 1795), at 179–80; S. EXEC. JOURNAL, 4th Cong. (2d Sess. 1797), at 288.

There are a few possibilities. Part of the answer seems to be that the irregularities were just that—irregular, rather than evidence of a constitutional norm. Additionally, it does not appear that the Administration specifically authorized Barlow's decision to rely upon O'Brien and Famin.<sup>311</sup> To that extent, Barlow's action warrants little if any weight as evidence of a broader understanding. Finally, the Administration may have viewed Senate advice and consent to the consular appointments as a sufficient substitute for advice and consent to ministerial appointments. Both, after all, are procedurally identical in giving the Senate an opportunity to vet nominees and comment on their proposed assignments. In this sense, the cases of Donaldson and Barlow do not demonstrate an early norm of executive unilateralism. The Administration may have reasoned that, by designating these agents as consuls, it could avoid signaling a normalization of relations with the Barbary Powers while also respecting the Senate's role in foreign-affairs appointments.

In any event, Washington's immediate successors followed the broader pattern that he established. As shown in Table 2, John Adams typically sought and obtained Senate confirmation for the sixteen ad hoc diplomats that he appointed.<sup>312</sup> The minority of cases in which he acted on his own involved either a recess appointment or an individual who was already serving abroad as a public minister.<sup>313</sup> As shown in Table 3, the same is true of Thomas Jefferson, who adhered to the established pattern up through his last relevant appointment in 1806,<sup>314</sup> the sole exception being the 1804 appointments of Daniel Smith and Return Meigs as commissioners to negotiate a treaty of cession with the Cherokee Indians,<sup>315</sup> which I address below.

Many of these were high-profile cases. John Jay was serving as an envoy extraordinary when he negotiated with Great Britain to

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311. See PARKER, *supra* note 309, at 148–51.

312. This table is based on the Senate Foreign Relations Committee's 1888 report. See S. EXEC. REP. NO. 3 app. C (1888), in 8 COMPILATION OF REPORTS OF THE COMMITTEE ON FOREIGN RELATIONS, *supra* note 273, at 337–38.

313. See *id.* (identifying the other offices held by appointed diplomats).

314. See *id.* at 338 (identifying diplomats appointed during Adams's term); see also Letter from William Pinkney to Thomas Jefferson (Mar. 13, 1806), FOUNDERS ONLINE, <http://founders.archives.gov/documents/Jefferson/99-01-02-3410> [<https://perma.cc/RW2X-3XSH>] (discussing the assignment).

315. See No. 109: Cherokees and Others (Dec. 23, 1805), *reprinted in* 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS 699 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales & Seaton 1832) (discussing the appointments of Smith and Meigs).

conclude the treaty that came to bear his name.<sup>316</sup> Ad hoc appointments during the Adams Administration included Charles C. Pinckney, John Marshall, and Elbridge Gerry, whose joint commission to negotiate with the French culminated in the notorious XYZ Affair.<sup>317</sup> And Thomas Jefferson nominated Robert Livingston and James Monroe to negotiate the Louisiana Purchase.<sup>318</sup> From a legal perspective, this is sensible only if such individuals were understood as both public ministers and officers of the United States under the Appointments Clause.<sup>319</sup>

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316. See S. EXEC. JOURNAL, 3d Cong. (2d Sess. 1794), at 152 (recording Senate approval of Jay's appointment as envoy extraordinary).

317. See No. 139: France (Apr. 3, 1798), *reprinted in* 2 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 277, at 153.

318. See S. EXEC. JOURNAL, 9th Cong. (1st Sess. 1805), at 36–38.

319. The evidence also suggests a different way to think about the Senate's original role in treaty-making. There is a common narrative that although President Washington initially obtained advice and consent by consulting the Senate on treaty content both prior to and after negotiations, he quickly abandoned this practice and adopted the now-familiar approach whereby the president seeks advice and consent only after the negotiations are complete. Jean Galbraith has shown that this narrative overstates the speed with which the Washington Administration moved away from the practice of prenegotiation advice and consent. See Jean Galbraith, *Prospective Advice and Consent*, 37 YALE J. INT'L L. 247, 258–59 (2012). Yet it also overstates its case by overlooking how Presidents Washington, Adams, and Jefferson consistently sought advice and consent in appointing treaty negotiators. This practice gave the Senate an additional opportunity to influence how and even whether planned negotiations should proceed.

Table 2: *Ad Hoc Diplomats of the Adams Administration*

| Name                             | Appointment Date | Appointment Method | Rank   | Purpose                     | Other Office Held                         |
|----------------------------------|------------------|--------------------|--|-----------------------------|---|
| Charles C. Pinckney              | 6/22/1797        | President & Senate | Envoy extraordinary & minister plenipotentiary | Treaty negotiation (France) | None <sup>320</sup>                       |
| John Marshall                    | 6/22/1797        | President & Senate | Envoy extraordinary & minister plenipotentiary | Treaty negotiation (France) | None                                      |
| Elbridge Gerry                   | 6/22/1797        | President & Senate | Envoy extraordinary & minister plenipotentiary | Treaty negotiation (France) | None                                      |
| Rufus King                       | 1/3/1798         | President          | Minister plenipotentiary                       | Treaty negotiation (UK)     | Minister plenipotentiary to Great Britain |
| John Quincy Adams <sup>321</sup> | 3/14/1798        | President & Senate | Commissioner                                   | Treaty negotiation (Sweden) | Minister plenipotentiary to Prussia       |

320. Appendix C seems to suggest that Charles Pinckney, John Marshall, and Elbridge Gerry jointly and severally held the office of envoy extraordinary and minister plenipotentiary to France prior to and at the time of an additional set of ad hoc appointments in June of 1797. EXEC. REP. NO. 3 app. C (1888), in 8 COMPILATION OF REPORTS OF THE COMMITTEE ON FOREIGN RELATIONS, *supra* note 273, at 337. This is either an error or ambiguous drafting. The Senate Executive Journal shows that President Washington appointed Pinckney as minister plenipotentiary to France, with the advice and consent of the Senate, in late December of 1796. S. EXEC. JOURNAL, 4th Cong. (2d Sess. 1796), at 217. But the Journal does not identify Pinckney as an “envoy extraordinary” in this initial appointment, *id.*, and the appointment appears to have terminated in February of 1797—roughly four months prior to Pinckney’s ad hoc appointment to serve alongside John Marshall and Elbridge Gerry. See John LaFayette Brittain, *Two Recently Discovered Letters of Charles Cotesworth Pinckney: Another Glimpse into the Mind of an Eighteenth Century Man of Affairs*, 76 S. CAR. HIST. MAG. 12, 13 (1975) (discussing Pinckney’s departure from France in February 1797). In addition, the Journal contains no record of diplomatic appointments for John Marshall or Elbridge Gerry that predate the ad hoc appointments of June 1797. I have modified Table 2 accordingly.

321. It appears that the President obtained the Senate’s advice and consent to this appointment, but only after issuing full powers for Adams to negotiate. *Compare* No. 155: Prussia (Dec. 6, 1799), reprinted in 2 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 277, at 250 (explaining, in an instruction dated July 15, 1797, that “full powers are herewith transmitted” for Adams to negotiate with Sweden) with S. EXEC. JOURNAL, 5th Cong. (2d Sess. 1798), at 265–66 (reporting that the Senate confirmed Adams on March 14, 1798).

| Name                               | Appointment Date          | Appointment Method | Rank   | Purpose                                    | Other Office Held                         |
|------------------------------------|---------------------------|--------------------|--|--|---|
| Richard O'Brien                    | 12/18/1798 <sup>322</sup> | President          | Commissioner                                   | Treaty negotiation (Tunis)                 | Consul general at Algiers                 |
| William Eaton                      | 12/18/1798 <sup>323</sup> | President          | Commissioner                                   | Treaty negotiation (Tunis)                 | Consul at Tunis                           |
| James L. Cathcart                  | 12/18/1798 <sup>324</sup> | President          | Commissioner                                   | Treaty negotiation (Tunis)                 | Consul at Tripoli                         |
| Rufus King                         | 2/7/1799                  | President & Senate | Minister plenipotentiary                       | Treaty negotiation (Russia)                | Minister plenipotentiary to Great Britain |
| William Smith <sup>325</sup>       | 2/9/1799                  | President & Senate | Envoy extraordinary & minister plenipotentiary | Treaty negotiation (Sublime Ottoman Porte) | Minister plenipotentiary to Portugal      |
| Oliver Ellsworth                   | 2/27/1799 <sup>326</sup>  | President & Senate | Envoy extraordinary & minister plenipotentiary | Treaty negotiation (France)                | Chief Justice of U.S. Supreme Court       |
| Patrick Henry                      | 2/27/1799                 | President & Senate | Envoy extraordinary & minister plenipotentiary | Treaty negotiation (France)                | None                                      |
| William Vans Murray <sup>327</sup> | 2/27/1799                 | President & Senate | Envoy extraordinary & minister plenipotentiary | Treaty negotiation (France)                | Minister resident in Netherlands          |

322. See LANMAN, *supra* note 273, at 610–11 (reporting this appointment).

323. See *id.* (reporting this appointment).

324. See *id.* (reporting this appointment).

325. S. EXEC. JOURNAL, 5th Cong. (3d Sess. 1799), at 311–12.

326. Appendix C reports that the appointment occurred on February 26, 1799, but the Senate Executive Journal makes clear that it occurred on February 27th. S. EXEC. JOURNAL, 5th Cong. (3d Sess. 1799), at 318.

327. This negotiation concerned the settlement of a claim against the Netherlands for the

| Name             | Appointment Date | Appointment Method                | Rank   | Purpose                     | Other Office Held                         |
|------------------|------------------|-----------------------------------|--|-----------------------------|---|
| William R. Davie | 6/1/1799         | President (recess) <sup>328</sup> | Envoy extraordinary & minister plenipotentiary | Treaty negotiation (France) | Governor of North Carolina                |
| William R. Davie | 12/10/1799       | President & Senate                | Envoy extraordinary & minister plenipotentiary | Treaty negotiation (France) | Brigadier General <sup>329</sup>          |
| Rufus King       | 12/31/1799       | President                         | Minister plenipotentiary                       | Treaty negotiation (UK)     | Minister plenipotentiary to Great Britain |

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unlawful seizure of an American ship and culminated in the nation's first sole executive agreement. *See* Letter from Maarten van der Goes to William Vans Murray (Dec. 7, 1799), *reprinted in* 5 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 1075–78 (Hunter Miller ed., 1937). This suggests an understanding that the Senate confirmation requirement was not limited to Article II treaties.

328. S. EXEC. JOURNAL, 6th Cong. (1st Sess. 1799), at 325–26.

329. S. EXEC. JOURNAL, 5th Cong. (2d Sess. 1798), at 292.



Table 3: *Ad Hoc Diplomats of the Jefferson Administration*<sup>330</sup>

| Name                            | Appointment Date | Appointment Method | Rank                                     | Purpose                          | Other Office Held                                |
|---------------------------------|------------------|--------------------|--|----------------------------------|--|
| John Taylor <sup>331</sup>      | 3/11/1802        | President & Senate | Commissioner                             | Treaty negotiation (Six Nations) | None   |
| Rufus King                      | 6/10/1802        | President (recess) | Minister plenipotentiary                 | Treaty negotiation (UK)          | Minister plenipotentiary to Great Britain        |
| James Monroe                    | 1/12/1803        | President & Senate | Minister extraordinary & plenipotentiary | Treaty negotiation (Spain)       | None   |
| Charles Pinckney <sup>332</sup> | 1/12/1803        | President & Senate | Minister plenipotentiary                 | Treaty negotiation (Spain)       | Minister plenipotentiary to Spain <sup>333</sup> |
| Robert Livingston               | 1/12/1803        | President & Senate | Minister plenipotentiary                 | Treaty negotiation (France)      | Minister plenipotentiary to France               |
| James Monroe <sup>334</sup>     | 1/12/1803        | President & Senate | Minister extraordinary & plenipotentiary | Treaty negotiation (France)      | None   |
| Rufus King                      | 1/25/1803        | President & Senate | Commissioner <sup>335</sup>              | Treaty negotiation (UK)          | Minister plenipotentiary to Great Britain        |

330. As with Tables 1 and 2, I have resolved any discrepancies between Appendix C and the Senate Executive Journal in favor of the latter, given that Journal entries were created closer in time to the relevant appointments.

331. S. EXEC. JOURNAL, 7th Cong. (1st Sess. 1802), at 408–09.

332. S. EXEC. JOURNAL, 7th Cong. (2d Sess. 1803), at 432, 436.

333. S. EXEC. JOURNAL, 7th Cong. (1st Sess. 1802), at 404.

334. S. EXEC. JOURNAL, 7th Cong. (2d Sess. 1803), at 431.

335. Appendix C suggests that King was appointed as a minister plenipotentiary, but the Senate Executive Journal shows that he was appointed as a commissioner. *See* S. EXEC. JOURNAL, 7th Cong. (2d Sess. 1803), at 432, 437.

| Name                        | Appointment Date | Appointment Method                | Rank   | Purpose                               | Other Office Held                         |
|-----------------------------|------------------|-----------------------------------|--|---------------------------------------|---|
| Tobias Lear <sup>336</sup>  | 11/18/1803       | President & Senate <sup>337</sup> | Commissioner                                 | Treaty negotiation (Tripoli)          | Consul-general for Algiers                |
| Daniel Smith <sup>338</sup> | 4/4/1804         | President                         | Commissioner                                 | Treaty negotiation (Cherokee Indians) | None                                      |
| Return Meigs                | 4/4/1804         | President                         | Commissioner                                 | Treaty negotiation (Cherokee Indians) | None                                      |
| James Monroe                | 10/14/1804       | President (recess) <sup>339</sup> | Minister extraordinary & plenipotentiary     | Treaty negotiation (Spain)            | Minister plenipotentiary to Great Britain |
| John Armstrong              | 3/17/1806        | President & Senate                | Commissioner plenipotentiary & extraordinary | Treaty negotiation (Spain)            | Minister plenipotentiary to France        |
| James Bowdoin               | 3/17/1806        | President & Senate                | Commissioner plenipotentiary & extraordinary | Treaty negotiation (Spain)            | Minister plenipotentiary to Spain         |
| James Monroe                | 4/21/1806        | President & Senate                | Commissioner plenipotentiary & extraordinary | Treaty negotiation (UK)               | Minister plenipotentiary to Great Britain |
| William Pinkney             | 4/21/1806        | President & Senate                | Commissioner plenipotentiary & extraordinary | Treaty negotiation (UK)               | Maryland Attorney General <sup>340</sup>  |

336. LANMAN, *supra* note 273, at 610.

337. S. EXEC. JOURNAL, 8th Cong. (1st Sess. 1803), at 452–53, 455.

338. The appointments of Smith and Meigs were omitted from the 1888 report.

339. Jefferson sought and obtained Senate confirmation for Monroe's appointment once the Senate reconvened a few weeks later. S. EXEC. JOURNAL, 8th Cong. (2d Sess. 1804), at 471–74.

340. Appendix C seems to suggest that the ad hoc appointments of James Monroe and

Two official opinions from members of Washington's cabinet also touched upon the issue of diplomatic appointments. Though their relevance is more attenuated, these opinions are compatible with the dominant pattern. First, in 1790, as Congress debated legislation to fund the American diplomatic corps, Washington asked Jefferson for his views on whether it would be permissible for the legislation to dictate the ranks and destinations of those who would serve abroad.<sup>341</sup> Jefferson responded that such provisions would be invalid. Because the Constitution assigns to the president power over the "transaction of business with foreign nations," Congress has no authority to make decisions about where to send diplomats or the rank with which to send them.<sup>342</sup> Jefferson acknowledged that Article II gives the Senate a role in the making of treaties and appointments, but argued that such powers "are to be construed strictly."<sup>343</sup> One might interpret such language as evidence that Jefferson would have strictly construed the term "public Ministers" in the Appointments Clause to exclude all ad hoc diplomats, thus denying the Senate's power to confirm them.<sup>344</sup> This, however, assumes there was sufficient uncertainty about the status of ad hoc diplomats to render such a construction plausible. The evidence discussed above suggests otherwise. Jefferson's opinion, moreover, used the seemingly expansive term "foreign Agent" as the equivalent of "ambassadors[,] other public ministers[,] and consuls,"<sup>345</sup> and in doing so left open the possibility that the Appointments Clause

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William Pinkney occurred during the recess of the Senate, and that both individuals were at the time already serving as minister plenipotentiary to the United Kingdom. EXEC. REP. NO. 3 app. C (1888), in 8 COMPILATION OF REPORTS OF THE COMMITTEE ON FOREIGN RELATIONS, *supra* note 273, at 338. The Senate Executive Journal, however, suggests that this is substantially incorrect. While the Journal makes clear that James Monroe was minister plenipotentiary to the United Kingdom at the time of his additional appointment, S. EXEC. JOURNAL, 9th Cong. (1st Sess. 1806), at 35, William Pinkney did not become minister plenipotentiary to the United Kingdom until 1808, S. EXEC. JOURNAL, 10th Cong. (1st Sess. 1808), at 71. In addition, the Journal shows that the Senate confirmed both nominations. S. EXEC. JOURNAL, 9th Cong. (1st Sess. 1806), at 35.

341. See Prakash & Ramsey, *supra* note 25, at 305–06 (discussing these events).

342. Jefferson's Opinion on the Powers of the Senate Respecting Diplomatic Appointments (Apr. 24, 1790), in 16 THE PAPERS OF THOMAS JEFFERSON, 30 NOVEMBER 1789 TO 4 JULY 1790, at 378–82 (Julian P. Boyd ed., 1961).

343. *Id.*

344. Cf. Prakash & Ramsey, *supra* note 25, at 309–10 (suggesting this interpretation).

345. Jefferson's Opinion on the Powers of the Senate Respecting Diplomatic Appointments, *supra* note 342, at 378–79 ("The Constitution . . . gives the *nomination* of the foreign Agent to the President, the *appointment* to him and the Senate jointly, the *commissioning* to the President.").

requires Senate confirmation for a wide variety of foreign representatives.

Second, Attorney General William Bradford touched upon the meaning of public ministers in a 1794 opinion addressing whether rioting outside the house of the British consul in Norfolk, Virginia violated the Crimes Act of 1790 as a form of “violence to the person of an ambassador or other public minister.”<sup>346</sup> According to Bradford, the riot was not an offence within the meaning of the statute. A consul, he explained, “is not considered [a public minister] by the writers on the law of nations, because he is not in any degree invested with the representative character; and it has, more than once, been judicially determined that he is not entitled to the privileges attached to the person of every public minister.”<sup>347</sup> Thus, the statutory meaning of “public minister” was a matter of international law, which defined the term to refer to agents who represent the prince vis-à-vis foreign actors (principally sovereign states). This definition would seem to include many irregular envoys, who represented the president in matters ranging from treaty negotiations to official ceremonies. Clearly, Bradford’s opinion interpreted a statute rather than the Constitution, but there is no evidence that the framers envisioned a different approach to the Appointments Clause, which used the same terminology, and as shown above, officials argued consistently that the constitutional meaning of “public Ministers” hinges on the law of nations.<sup>348</sup>

3. *Debates in Congress.* Early members of the House of Representatives generally agreed that the appointment of ad hoc diplomats, at least in the form of treaty negotiators, requires Senate confirmation. For instance, in a 1789 debate over a bill providing for the compensation of commissioners to negotiate a peace treaty with the Creek Indians, participants uniformly endorsed the view that advice and consent was necessary for the appointment of the commissioners *qua* negotiators.<sup>349</sup> According to Representative Theodore Sedgwick, “no one ever doubted but the President, by and with the advice and consent of the Senate, could employ what and as

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346. Respect Due to Consuls, 1 Op. Att’y Gen. 41, 42 (1794) (emphasis omitted) (quoting An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 28, 1 Stat. 112, 118 (1790)).

347. *Id.*

348. *See supra* notes 271–72 (citing examples).

349. *See* 1 ANNALS OF CONG. 716–30 (1789) (Joseph Gales ed., 1834) (recording the debate).

many negotiators as he pleased.”<sup>350</sup> Representative Michael Stone concurred: “There was no doubt entertained that the President, with the Senate, might appoint the commissioners, and empower them to negotiate.”<sup>351</sup> Legislators expressed these views even though the appointments in question were “a mere temporary expedient.”<sup>352</sup> Other members of Congress took the same position months later in a debate over a bill to authorize the creation of a contingent fund for foreign relations.<sup>353</sup>

In a more subtle way, the same understanding also surfaced in an important debate over the implementation of Jay’s Treaty. In March of 1796, Representative Edward Livingston proposed a resolution

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350. *Id.* at 717.

351. *Id.*

352. *Id.* at 721.

353. See 12 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: 4 MARCH 1789–3 MARCH 1791, at 77 (Helen E. Veit et al. eds., 1994) (statement of Rep. Laurance) (arguing that “there was a constitutional necessity that the president, by and with the consent of the senate, should appoint all the officers employed in foreign negotiations; the same necessity existed with respect to making treaties”); *id.* at 79 (statement of Rep. Sherman) (“The establishment of every treaty requires the voice of the senate, as does the appointment of every officer for conducting the business; these two objects are expressly provided for in the constitution, and they lead me to believe, that the two bodies ought to act jointly in every transaction which respects the business of negotiation with foreign powers.”). During this debate, Representative William L. Smith made an observation that has attracted the attention of modern legal scholars. According to Smith:

Many officers may be established in the diplomatique line, without being concerned in making treaties: A minister may reside twenty years in France without being employed in the formation of any treaty whatever. A treaty may be negotiated without the intervention of any person in such a character; or a person may be employed distinct from him, as was the case in the late commercial treaty between France and Great Britain.

*Id.* at 79–80. Saikrishna Prakash and Michael Ramsey interpret this statement as evidence of an original understanding that the president holds power to appoint “special envoys not confirmed by the Senate.” Prakash & Ramsey, *supra* note 25, at 304. I disagree insofar as they use the term “special envoys” to include anyone who would have qualified as a public minister under the law of nations. My view is that when Representative Smith stated that a “treaty may be negotiated without the intervention of any person in *such a character*,” he was referring to the specific character of a resident diplomat rather than the more general character of a public minister, and was thus making the point that nonresident ministers can negotiate treaties, just like their resident counterparts. From such a position, it does not follow that he believed in an independent presidential power to *appoint* nonresident ministers as negotiators. This interpretation better aligns with the overwhelming weight of the evidence, including the statements of other members of Congress and the practice whereby early presidents consistently sought advice and consent for the appointment of negotiators. See *supra* Tables 1–3; see also Powers of the Executive, 1 U.S. Op. Att’y Gen. 65, 65–66 (1796) (concluding that the “President alone, and without the advice of the Senate, cannot appoint a commissioner to hold or make a treaty with an Indian tribe” because the authority of the United States “cannot be bestowed on any person but by the President, with the advice of the Senate”).

requesting that the President provide “a copy of the instructions to the Minister of the United States, who negotiated the Treaty . . . together with the correspondence and other documents relative to the said Treaty.”<sup>354</sup> Livingston and other Democratic-Republicans supported this measure as a means of obtaining information that would help the House to evaluate the treaty’s constitutionality, decide on the manner of legislative implementation, and interpret unclear terms.<sup>355</sup> They also argued repeatedly that access to the records would facilitate a determination on whether John Jay might have violated his negotiating instructions, received improper gifts, or otherwise acted in a way that would warrant impeachment.<sup>356</sup> In making these arguments, the legislators clearly assumed that Jay qualified as a public minister and officer of the United States in his capacity as special envoy and negotiator: The resolution itself described Jay as a “Minister,”<sup>357</sup> and participants uniformly referred to him as an “officer.”<sup>358</sup> Moreover, given the language of the Constitution, which provides only for the impeachment of the “President, Vice President, and all civil Officers of the United States,” the suggestion of even the mere possibility of impeaching Jay qua negotiator necessarily relied on the premise that he was an officer in that role.<sup>359</sup> Over the course of an entire month of discussion, opponents denounced the resolution repeatedly and on a variety of grounds, including by arguing that there was no apparent reason to believe that Jay had engaged in conduct that might warrant impeachment.<sup>360</sup> Not a single person, however, questioned that Jay qualified as a public minister and officer, or that impeachment was a theoretical option, even if unwarranted on the facts.<sup>361</sup> Immediately after the resolution passed, President Washington declined to provide the requested documents, but not because he understood the Constitution to preclude the impeachment of a special envoy as a type of non-officer.<sup>362</sup> Instead, he emphasized simply that the resolution had failed to identify impeachment as its purpose.<sup>363</sup>

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354. 5 ANNALS OF CONG. 426 (1796).

355. See, e.g., *id.* at 426–27, 436, 448 (statements of Reps. Livingston, Gallatin, and Harper).

356. *Id.* at 427, 444, 446–47, 501, 556–57, 575, 601, 629.

357. *Id.* at 426.

358. See, e.g., *id.* at 427, 444 (statements of Reps. Livingston and Nicholas).

359. U.S. CONST. art. II, § 4.

360. See, e.g., 5 ANNALS OF CONG. 646 (1796) (statement of Rep. Williams).

361. *Id.* at 760.

362. *Id.*

363. *Id.*

One can only imagine that legislators operated on a similar understanding when they passed the Crimes Act of 1790. As explained above, this statute prohibited arrest and service of process against “the person of any Ambassador or other public minister of any foreign Prince or State authorised and received as such by the President of the United States, or domestic or domestic servant of any such Ambassador or other public minister.”<sup>364</sup> Thus, if contemporaries generally understood the term “public ministers” to exclude all special envoys, the statute would have criminalized acts against resident ministers—along with their servants—while categorically failing to prohibit acts against special envoys. Such an interpretation seems tenuous at best. There was “little reported debate” on the Act,<sup>365</sup> but there is no apparent reason to believe that its drafters desired such differential treatment. Because both categories of diplomats were protected by the law of nations, and because acts against either could easily complicate foreign relations,<sup>366</sup> the most sensible conclusion is that legislators understood the statutory protection as applicable to resident and irregular envoys alike.

To be clear, Congress did not view involvement in work of an international character as independently sufficient to qualify an individual as a public minister, and this was true even when the work was to be performed at the arrangement of the U.S. government. Most legislators appear to have been comfortable with the idea that something more was necessary to trigger the requirement of advice and consent. This much was apparent in early 1796, when the House of Representatives debated a bill authorizing the appointment of agents to travel abroad and provide relief and protection to American sailors who had been seized on the high seas.<sup>367</sup> The task of these agents was threefold:

[1] to inquire into the situation of such American citizens or others, sailing, conformably to the law of nations, under the protection of the American flag, as have been, or may hereafter be impressed or detained by any foreign power; [2] to endeavor, by all legal means, to obtain the release of such American citizens or others, as aforesaid; [and 3] to render an account of all impressments and detentions

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364. Act of Apr. 30, 1790, ch. 9, § 25, 1 Stat. 112 (spelling modified from original).

365. David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791*, 61 U. CHI. L. REV. 775, 828 (1994).

366. See *supra* Part III.A.

367. 5 ANNALS OF CONG. 802–21 (1796).

whatever, from American vessels, to the executive of the United States.<sup>368</sup>

Given these purposes, a number of legislators opposed the bill on the view that the agents would be public ministers whose appointments required Senate advice and consent but not statutory authorization.<sup>369</sup> The majority, however, rejected this position. As James Madison explained, “the agents proposed to be appointed in th[e] bill were neither Ambassadors, public Ministers, nor Consuls.”<sup>370</sup> The majority concurred in light of the nondiplomatic nature of the mission.<sup>371</sup> Representative William Giles, for example, emphasized that the agents were not public ministers because “[t]hey would not have the smallest relation to foreign Powers; they would be appointed to attend to their own citizens, and the only thing in which they could have any resemblance to Ministers was their residence in a foreign country.”<sup>372</sup> Operating on this premise, the House passed the bill creating the offices in question.<sup>373</sup>

4. *Early Dictionaries.* Early American dictionaries suggest that popular usage approximated the official understanding. None of these particular sources appear to have included a separate entry for “public minister,” but they identified one meaning of “minister” as the functional equivalent and did so in a way that seemed to include a wide variety of actors.<sup>374</sup> For instance, William Perry’s *Royal Standard English Dictionary* defined “minister” simply to be “an agent from a foreign power.”<sup>375</sup> More precisely, Noah Webster’s *American Dictionary of the English Language* defined “minister” to mean “[a] delegate; an ambassador; the representative of a sovereign at a foreign court; usually such as is resident at a foreign court, but not restricted to such.”<sup>376</sup> This source is particularly noteworthy because the Supreme

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368. An Act for the Relief and Protection of American Seamen, ch. 36, § 1, 1 Stat. 477 (1796).

369. See, e.g., 4 ANNALS OF CONG. 815, 817–18 (1796) (statements of Reps. Sitgreaves, Murray, and Sedgwick).

370. *Id.* at 813.

371. See *id.* at 802–21 (reporting the debate).

372. *Id.* at 819; see also *id.* at 817, 820 (statements of Reps. Nicholas and Gallatin).

373. *Id.* at 820.

374. I limit the discussion to the two American dictionaries that are available online and discussed in Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 GEO. WASH. L. REV. 358, 386, 389–90 (2014).

375. *Minister*, THE ROYAL STANDARD ENGLISH DICTIONARY (Worcester 1st Am. ed., 1788).

376. *Minister*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).



Court has cited it on a number of occasions as evidence of original meaning,<sup>377</sup> and because its definition of “minister” explicitly included nonresident diplomats.<sup>378</sup> Insofar as nonresident service equated with ad hoc diplomacy, Webster’s dictionary corroborates the view that, as a matter of popular understanding, there was no necessary durational component to the office of public minister.

5. *Additional Context.* Finally, several background conditions suggest that the framers would have viewed many unilateral appointments as problematic. One is the nature of diplomatic representation in the eighteenth century. Every indication is that both resident and irregular representatives were known to wield significant power. As many of the foregoing examples illustrate, they negotiated treaties, mediated weighty matters of war and peace, and interfaced with foreign heads of state. Predating both summit diplomacy and international news media, they served as critical sources of information for their sending governments.<sup>379</sup> Predating the rise of diplomacy as a profession in the United States,<sup>380</sup> their appointments were viewed at times in political and sectional terms.<sup>381</sup> Moreover, given the state of transatlantic communication in the late eighteenth century, when it

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377. See, e.g., *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2561 (2014) (citing the *American Dictionary of the English Language* in interpreting the Appointments Clause); see also Maggs, *supra* note 374 at 389–90 (discussing the *American Dictionary of the English Language* as potential evidence of original meaning).

378. *Minister*, *supra* note 376.

379. Cf. JENNIFER MORI, *THE CULTURE OF DIPLOMACY: BRITAIN IN EUROPE, C. 1750–1830*, at 120–21 (2010) (discussing how the rise of ministerial diplomacy in the early nineteenth century marginalized envoys by limiting their autonomous powers to make policy and their opportunities to interface with heads of state).

380. BLACK, *supra* note 146, at 130 (explaining that the American diplomatic service “retained a relatively amateurish approach until the reforms of the 1940s”).

381. The most salient example at the Founding was John Jay’s appointment to negotiate a treaty with Spain in 1786. Sectional interests in the negotiations diverged sharply, with northern states hoping to secure trade liberalization and southern states hoping to obtain a promise of freedom of navigation on the Mississippi River. KLARMAN, *supra* note 120, at 48–69. After encountering Spanish intransigence on the latter issue, Jay advocated for Congress to abandon an instruction to insist upon freedom of navigation, and focus instead on obtaining a commercial agreement. *Id.* at 56–58. This outraged southern leaders, who accused Jay—a New Yorker—of sectional bias and proposed that the negotiation take place in Europe, “where they anticipated that Jefferson, the minister to France, would do a better job than Jay of protecting southern interests.” *Id.* at 65; see also GILBERT, *supra* note 137 at 80 (recounting how the Confederation Congress appointed multiple agents to “a single diplomatic mission, in order to reflect the differing opinions in Congress”); KAPLAN, *supra* note 139 at 123–25, 207–08 (discussing the political orientations of early diplomats such as John Adams, Thomas Pinckney, and Thomas Jefferson, and the influence of those orientations on their work).

took weeks to transmit instructions, they were forced at times to make important and controversial decisions without official guidance.<sup>382</sup> Diplomats of all varieties thus played a critical role in the execution and even the development of foreign policy. This context makes it harder to imagine the framers dividing the power to appoint all resident diplomats while granting to the president alone the equally significant and in many ways functionally identical power to appoint all special envoys. Such differential treatment would have likely been viewed as arbitrary, given the significance of many ad hoc assignments and the purposes of the Appointments Clause.

Another condition is the nature of early consular work. Duties included reporting political and commercial intelligence to the Secretary of State, notifying U.S. merchants of the advent of war, receiving protests on maritime matters, helping to settle the estates of Americans who died abroad, and assisting stranded or shipwrecked vessels and their crews.<sup>383</sup> It is difficult to imagine why the framers would have cared to subject the appointments of these officers to a requirement of Senate confirmation, but not the appointments of special envoys responsible for such consequential tasks as negotiating treaties and communicating with heads of state. Counter-intuitively, the orthodox view has the framers categorically subjecting some mundane appointments to shared authority while permitting the president alone to make many appointments of great significance.<sup>384</sup>

Lastly, consider again the original trepidation over foreign relations. As explained earlier,<sup>385</sup> some of the most influential framers viewed diplomatic relations as a risky endeavor and something to be undertaken with great care, if not avoided altogether.<sup>386</sup> It seems

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382. BLACK, *supra* note 146, at 97, 120; LEONARD D. WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY* 128–30 (1948).

383. See Letter XLI—Circular to Consuls (Aug. 26, 1790), in 17 *THE PAPERS OF THOMAS JEFFERSON*, 6 JULY – 3 NOV. 1790, at 423–25 (Julian P. Boyd ed., 1965) (discussing consular duties); see also An Act Concerning Consuls and Vice-Consuls, §§ 2–7, 1 Stat. 254, 255–56 (1792) (same).

384. As Jennifer Mascott has shown, there is substantial evidence that the original understanding of “Officers of the United States” also extended to positions with even less responsibility than consuls, such as account-keeping clerks, certain personnel tasked with customs enforcement, lieutenants in the military, and interpreters. See generally Jennifer L. Mascott, *Who are “Officers of the United States”?*, 70 *STAN. L. REV.* 443 (2018). This understanding would seem to render unilateral diplomatic appointments even more problematic, given the importance of the work in question.

385. See *supra* Part III.A.

386. This sentiment was influential—even if less than universally held—throughout the Founding era. For example, in early 1798, members of Congress engaged in an extended debate

plausible and even likely that those who held this concern would have preferred to subject diplomatic appointments of all kinds to the shared authority of the president and the Senate. To permit the president to make unilateral appointments of the ad hoc variety would have been to remove a significant procedural restraint on the risk of entanglement with European and other powers.

*F. Responding to the Orthodox View*

For the most part, analyses in favor of unilateral ad hoc diplomacy simply ignore the evidence presented above. Even while arguing in part on the basis of original meaning, neither OLC nor commentators have acknowledged the significance of the Diplomatic Privileges Act of 1708, *Barbuit's Case*, writers such as Wicquefort, early dictionaries, the pattern whereby presidents submitted most special diplomatic appointments to the Senate, or the background conditions that would have made this pattern normatively attractive. The evidence cited in favor of unilateral appointments is incomplete at best.

That evidence, moreover, is problematic even on its own terms. Consider this: In 1789, President Washington designated Gouverneur Morris to undertake a mission to London, where Morris was to inquire informally about British intentions to comply with certain provisions of the Treaty of Paris, the possibility of negotiating a treaty of commerce, and the future commissioning of a resident minister to the United States.<sup>387</sup> OLC characterizes this appointment as evidence of an early understanding that an office is a position with continuance or duration.<sup>388</sup> Yet that interpretation disregards the majority of cases in which Washington sought advice and consent for the appointment of

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over a proposed measure to reduce appropriations for the salaries of certain American diplomats. See 7 ANNALS OF CONG. 848–945, 1083–1216 (1798); 8 ANNALS OF CONG. 1217–34 (1798). One of the primary questions was whether it was constitutional for the House of Representatives to utilize its appropriations power to control the president's ability to dispatch public ministers. While the participants disagreed on the resolution of this question, several congressmen on both sides concurred that maintaining diplomatic relations with European powers was generally dangerous and less than ideal. A number opined that the United States would be better off without any public ministers. See, e.g., 7 ANNALS OF CONG. 851–53, 886, 906, 916–18, 930, 933, 1088 (1798).

387. See Officers of the United States Within the Meaning of the Appointments Clause, *supra* note 16, at 102; 1 JARED SPARKS, THE LIFE OF GOUVERNEUR MORRIS 339–47 (Boston, Gray & Bowen 1832) (describing the mission in detail).

388. Officers of the United States Within the Meaning of the Appointments Clause, *supra* note 16, at 102.

ad hoc negotiators.<sup>389</sup> The conclusion that better aligns with early practice is that Washington appointed Morris on his own authority because Morris was not understood to be a public minister. In describing the mission, the President emphasized that Morris would proceed as a “private Agent” rather than in a public capacity to reduce the “risk of humiliation for the administration if the British refused to negotiate.”<sup>390</sup> As explained above, a number of influential commentators took the position that such agents were not public ministers insofar as their diplomatic character was hidden from the public at large.<sup>391</sup>

As “[t]he most prominent early example” in favor of its position, OLC also has highlighted a statement in which Alexander Hamilton argued that the President held independent power to appoint commissioners to resolve claims under the Treaty of Paris.<sup>392</sup> According to Hamilton, the Appointments Clause did not apply to the commissioners because they were “not in a strict sense officers,” but rather “*arbitrators*” between the United States and Great Britain.<sup>393</sup> Yet OLC omitted a critical fact: President Washington sought and obtained Senate confirmation for the treaty commissioners only two months after Hamilton had argued against it.<sup>394</sup> Hamilton’s argument did not prevail.

It is possible, of course, that Washington submitted these nominations merely as a political courtesy, but the more sensible explanation seems to be that the Administration viewed Senate confirmation as constitutionally required. This interpretation is consistent with the broader confirmation trends identified above, and with evidence that commissioners under the Treaty of Paris understood

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389. See *supra* Table 1.

390. Letter from George Washington to Gouverneur Morris (Oct. 13, 1789), in 4 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, SEPTEMBER 1789–JANUARY 1790, at 179–83 n.1 (Dorothy Twohig ed., 1993).

391. See *supra* note 306 and accompanying text (citing sources).

392. Officers of the United States Within the Meaning of the Appointments Clause, *supra* note 16, at 103.

393. *Id.* (quoting Alexander Hamilton, *The Defence No. XXXVII* (Jan. 6, 1796), in 20 THE PAPERS OF ALEXANDER HAMILTON 20 (Harold C. Syrett ed., 1974)); see also The Constitutional Separation of Powers Between the President and Congress, *supra* note 61, at 146 & n.67 (citing Hamilton’s statement as the principal example of a “long historical pedigree” for the notion that “members of multinational or international entities who are not appointed to represent the United States” need not be confirmed by the Senate, “[a]t least where th[ose] entities are created on an ad hoc or temporary basis”).

394. S. EXEC. JOURNAL, 4th Cong. (2d Sess. 1796), at 204.

themselves as public ministers. Shortly after Christopher Gore and William Pinkney arrived in London to arbitrate claims in 1796, the British government ordered one of them to pay import duties on certain items.<sup>395</sup> The law of nations clearly exempted public ministers from payment, but the British government asserted that the commissioners failed to qualify for the exemption because they “ha[d] no letters of Credence to His Majesty, and ha[d] not been received by His Majesty with the formalities usually practised on the reception of foreign public Ministers.”<sup>396</sup> On this view, Gore and Pinkney were present merely “in the character of American citizens, resident in [Great Britain] under the protection of the American Minister, though invested by the United States with the character of Commissioners for a special purpose, under the stipulations in the [Treaty of Paris].”<sup>397</sup>

Gore and Pinkney disagreed. In a detailed response that cited international legal authorities such as Wicquefort and Vattel, the commissioners argued that they were entitled to the duties exemption because a person may be “a public minister, under whatever name, title, or style he may be authorized and commissioned, altho’ he have no letters of credence to the sovereign, or be not received by him, with any particular formalities.”<sup>398</sup> To qualify, one needed only “a letter of credence, a power, or some commission from the sovereign of a country”; “acknowledg[ment] and allow[ance] by the sovereign of the country to which he was sent in the character communicated by his commission”; and an entrustment “to transact public affairs or business between nation and nation.”<sup>399</sup> Gore and Pinkney ultimately acquiesced to the British demand, but only for the sake of relations, and without retreating in principle from their original legal position.<sup>400</sup>

OLC has further relied upon President Jefferson’s unilateral appointment of Daniel Smith as evidence that a diplomatic position “must have continuance or duration” in order to qualify as an office.<sup>401</sup>

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395. 1 JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 345 (Washington, Government Printing Office 1898).

396. Report by the Queen’s Advocate and the Law Officers of the Crown (Dec. 22, 1796), in FULL POWERS AND RATIFICATION: A STUDY IN THE DEVELOPMENT OF TREATY-MAKING PROCEDURE 178 (J. Mervyn Jones ed., 1946).

397. *Id.*

398. 1 MOORE, *supra* note 395, at 348 (quoting from the response).

399. *Id.* This is John Bassett Moore’s paraphrase of the contents of the response, a copy of which I was unable to locate.

400. *Id.*

401. See Officers of the United States Within the Meaning of the Appointments Clause, *supra*

According to OLC, Smith's appointment was a "striking" case because he was a U.S. Senator who "did not vacate his seat" prior to acting as a treaty commissioner.<sup>402</sup> On this account, Smith's dual position as a Senator and commissioner demonstrates that the position of treaty commissioner did not qualify its occupant as an "Officer of the United States," for if it had, Senator Smith would have violated the Incompatibility Clause, which provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."<sup>403</sup>

The problem with this treatment is that it frames as representative a case that was instead aberrational. Smith's appointment was directly contrary to the practice of President Washington, who sought and obtained Senate confirmation for the appointment of Isaac Smith to negotiate a treaty with the Seneca Tribe in 1797.<sup>404</sup> The appointment also contradicted an official opinion from Washington's Attorney General, Charles Lee, who explained that "the President alone, and without the advice of the Senate, cannot appoint a commissioner to hold or make a treaty with an Indian tribe."<sup>405</sup> It contradicted the views of members of the First Congress.<sup>406</sup> And it was squarely at odds with the dominant practice of President Adams and President Jefferson himself, who sought advice and consent for treaty negotiators on virtually every occasion.<sup>407</sup> The best reading of the evidence in context is that Smith's position as a commissioner made him a public minister and officer of the United States, and that President Jefferson acted in contravention of precedent by making the appointment on his own authority.

It is unclear why no one objected. Chronology, however, seems to explain why no one objected specifically on the grounds of the Incompatibility Clause. President Jefferson commissioned Smith in late April 1804,<sup>408</sup> and Smith concluded the negotiations on one of

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note 16, at 102.

402. *Id.*

403. U.S. CONST. art. I, § 6, cl. 2; *see also generally* Seth Barrett Tillman, *Originalism & the Scope of the Constitution's Disqualification Clause*, 33 QUINNIPIAC L. REV. 59 (2014) (arguing that "Office under the United States," as used in the Incompatibility Clause, encompasses "Officers of the United States," as used in the Appointments Clause, and covers appointed officers in the executive branch).

404. S. EXEC. JOURNAL, 4th Cong. (2d Sess. 1797), at 229.

405. Powers of the Executive, *supra* note 353, at 65.

406. *See supra* Part III.E.3.

407. *See supra* Tables 1–3.

408. *See Papers of Gen. Daniel Smith*, 6 AM. HIST. MAG. 213, 233 (1901); *see also* No. 109:

three treaties with the Cherokees in October of the same year.<sup>409</sup> Both of these developments preceded Smith's election as a Senator in late 1804.<sup>410</sup> To be sure, Smith negotiated the two remaining treaties in October 1805,<sup>411</sup> several months after the commencement of his term as a Senator, which began on March 4, 1805,<sup>412</sup> but Congress did not convene until December of 1805, over a month after he completed the negotiations.<sup>413</sup> Given these circumstances, it is plausible that no one even noticed the problem. I came across no evidence that members of Congress or the Administration anticipated Smith's election at the time of his original appointment as commissioner, or that he missed any votes or hearings as a Senator because of the earlier assignment.

Advocates of the orthodox view seem to have misinterpreted other evidence, as well. In an undated memorandum, James Madison explained that "[t]he place of a foreign Minister or Consul is not an *office* in the constitutional sense of the term," as it is "not created by the Constitution" and "is not created by a law authorized by the Constitution," but is instead "created by the Law of Nations."<sup>414</sup> Wriston construed this statement as suggesting that all diplomatic agents—whether resident or ad hoc—are non-officers and thus exempt from the Appointments Clause.<sup>415</sup> But that was almost certainly not the point. Madison clearly understood that a public minister *is* an officer

Cherokees and Others (Dec. 23, 1805), *reprinted in* 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 315, at 699 (describing Smith's assignment).

409. See Carolyn Thomas Foreman, *The Lost Cherokee Treaty*, 33 CHRON. OF OKLA. 238, 238 (1955) (recounting the chronology of the negotiations).

410. See BEN PERLEY POORE, THE POLITICAL REGISTER AND CONGRESSIONAL DIRECTORY: A STATISTICAL RECORD OF THE FEDERAL OFFICIALS, LEGISLATIVE, EXECUTIVE, AND JUDICIAL, OF THE UNITED STATES OF AMERICA, 1776–1878, at 29 (Boston, Houghton, Osgood & Co. 1878).

411. No. 108: Wyandots and Others, *reprinted in* 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 315, at 698.

412. *Smith, Daniel, (1748-1818)*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., 1774–PRESENT, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=S000524> [<https://perma.cc/PY84-9GCB>].

413. Compare No. 108: Wyandots and Others, *reprinted in* 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 315, at 698 (reporting a treaty-conclusion date of October 27, 1805), with *Dates of Sessions of the Congress*, *supra* note 285 (reporting that the first session of the Ninth Congress commenced on December 2, 1805).

414. Power of the President to Appoint Public Ministers & Consuls in the Recess of the Senate, *supra* note 272, at 91 n.1.

415. WRISTON, *supra* note 3, at 159 (responding to Madison's assertion: "but it is not true that diplomatic officials are not officers in the strict constitutional sense. Article II, Section 2, of the Constitution calls them officers, and differentiates them from others which are to be established by law").

whose appointment requires advice and consent; the Constitution says so explicitly.<sup>416</sup> In writing that the place of a public minister or consul is “not an *office* in the constitutional sense of the term,” Madison more likely meant simply that the Constitution does not supply the criteria by which to determine whether diplomatic agents qualify as officers for purposes of the Appointments Clause. Those criteria depend instead upon the definition of “public minister” under the law of nations.<sup>417</sup> Under this reasoning, the eventual *Hartwell* line of cases and OLC opinions that defined “officers of the United States” by reference to purely domestic legal considerations such as “continuation” are irrelevant, even if applicable in other contexts.

Of course, the executive branch has also characterized the Appointments Clause as at least partly inapplicable on the view that many ad hoc diplomats are not “public Ministers,” who must be “formally accredited to . . . foreign governments as official diplomatic representatives of our government,” but rather “personal representatives of the President.”<sup>418</sup> The 1943 memorandum that appears to stand as the only official, public explanation of this position, however, does not purport to rely on original meaning,<sup>419</sup> and would have encountered difficulty if it had: Wicquefort explained that credentials are, while generally required, unnecessary where a receiving sovereign acknowledges an agent as a public minister,<sup>420</sup> and the Washington Administration appears to have internalized this position.<sup>421</sup> Moreover, the 1943 memorandum does not purport to justify the unilateral appointment of ad hoc diplomats who wield transactional authority as U.S. officials.<sup>422</sup>

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416. U.S. CONST. art. II, § 2.

417. Power of the President to Appoint Public Ministers & Consuls in the Recess of the Senate, *supra* note 272, at 91 n.1.

418. Presidential Appointment of Foreign Agents Without the Consent of the Senate, *supra* note 48, at 457.

419. *See id.*

420. WICQUEFORT, *supra* note 84, at 2 (explaining that the class of “public minister” includes “those Persons whom Princes employ by a verbal Order; provided that he, with whom they are to negotiate, acknowledges ‘em in that Quality, and gives them a Credit which he would not give to another without Letters”).

421. *See supra* Part III.E.2.

422. Presidential Appointment of Foreign Agents Without the Consent of the Senate, *supra* note 48, at 457 (acknowledging that the terms “Ambassadors” and “other public Ministers” refer to those who have been “formally accredited to . . . foreign governments as official diplomatic representatives of our government”).



*G. Questions of Scope*

Even accepting that advice and consent is generally required for the appointment of irregular diplomatic agents, the historical record leaves uncertainty regarding that requirement's precise contours. Three issues stand out.

First, there is a marginal uncertainty of *breadth*: what types of diplomatic functions trigger the status of public minister? Substantial evidence suggests that treaty negotiation and other types of official, public, and intergovernmental representation qualify regardless of duration, but there is no evidence on ad hoc representation vis-à-vis international organizations, which simply did not exist in the eighteenth century.

Second, there is a marginal uncertainty of *depth*: how far down an organizational chart does the status of public minister extend? In terms of rank, special envoys and lead negotiators qualify, given their close comparability in status to those who received Senate confirmation during early presidential administrations,<sup>423</sup> but modern diplomacy tends to rely on personnel with much greater diversity of ranks and titles. Whereas John Jay single-handedly represented the United States in negotiating with the British in 1794,<sup>424</sup> a modern trade negotiation, to name just one example, might entail diplomatic communications by not only the U.S. Trade Representative, but also one or more Deputy U.S. Trade Representatives, the Chief of Staff, the Senior Advisor, the General Counsel, and various Associate General Counsels in the Office of the U.S. Trade Representative.<sup>425</sup> The proper treatment of these and other modern titles is not self-evident under an originalist framework.

Finally, there is a marginal uncertainty of *frequency*: if the president seeks to rely upon an individual to conduct separate negotiations with multiple foreign governments over a period of months or years, how often, if ever, must he go back to the Senate for fresh advice and consent? Returning to the example of trade, must Donald Trump obtain Senate confirmation for Robert Lighthizer and his deputies in advance of each new trade negotiation, or is a single appointment sufficient? In combination, these questions create the

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423. See *supra* Tables 1–3.

424. SAMUEL FLAGG BEMIS, *JAY'S TREATY: A STUDY IN COMMERCE AND DIPLOMACY* 203, 232–51 (1923).

425. See *Biographies of Key Officials*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/about-us/biographies-key-officials> [<https://perma.cc/ZL2H-4PHQ>].

possibility of substantial variation in the ambit of the Appointments Clause, even if one operates within originalist parameters.

On these issues, the case for broader Senate involvement relies more heavily on interpretive judgment and translation, but is far from implausible. Begin with breadth. Because the early evidence is largely silent on the issue of representation vis-à-vis international organizations, it is fair to question whether the original understanding of the Appointments Clause can encompass ad hoc diplomacy involving the United Nations, the International Criminal Court, or other, similar organizations. If it does not, then advice and consent is necessary at most for appointments involving representation to foreign states.

Yet the condition of the evidence is most likely a result of the absence of multilateral institutions at the time of the Founding, rather than a specific intent for public ministerial functions to exclude anything other than bilateral, international diplomacy. Indeed, in the case that most closely approximated contemporary appointments to international organizations—the appointment of claim commissioners under the Treaty of Paris—the Washington Administration sought and obtained the Senate’s advice and consent.<sup>426</sup> Some disagreed that the commissioners were public ministers, but this view did not prevail within the Administration,<sup>427</sup> and context suggests a potential explanation: Insofar as he delimited the functions of public ministers by reference to the character of the foreign audience or receiving entity, Wicquefort did so in broad terms. Most notably, he explained that although “Sovereigns send their Embassadors only to Sovereigns,” they can also send ambassadors to “Assemblies compos’d of several representing Ministers.”<sup>428</sup> While superficially contradictory, Wicquefort treated these ideas as consistent on the view that ambassadors sent to multilateral assemblies “are in reality sent to the Sovereigns” represented by those in attendance.<sup>429</sup>

The practice for public ministers below the rank of ambassador was even more permissive: “Sovereigns send Ministers sometimes to those Places where their Interest requires it, notwithstanding there is no Sovereign there for them to consider.”<sup>430</sup> Thus, to name just one

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426. *See supra* Part III.E.2.

427. *Id.*

428. WICQUEFORT, *supra* note 84, at 45 (emphasis omitted).

429. *Id.* (emphasis omitted)

430. *Id.*

example, “France . . . had a Resident [public minister] at Hamburg, not for any Affairs it had to adjust with the Magistrate, nor to facilitate the Correspondence it had with Sweden, but upon other particular Considerations.”<sup>431</sup> An approach that emphasizes this evidence would honor Founding-era concerns about foreign entanglement by erecting a broader barrier against executive unilateralism, without regard for the organizational character of the recipient. It would also explain why the Washington Administration repeatedly sought Senate confirmation in appointing individuals to negotiate treaties with native tribes that many regarded as inferior to sovereign states.<sup>432</sup>

Next consider the issue of depth. Because early administrations sought advice and consent only for principal negotiators, it is questionable whether positions of lesser authority also qualify as public ministers as a matter of original meaning. Yet there are several reasons to believe they can: Wicquefort opined that the term “public ministers” encompassed a diversity of actors, including “plenipotentiaries . . . internuncios, envoys, residents, agents, commissioners, the secretaries of embassies, and *even the secretaries of ambassadors*.”<sup>433</sup> The framers, moreover, chose to require Senate confirmation for the appointment of consuls, who exercised relatively limited authority.<sup>434</sup> And to the extent that early presidential administrations deployed teams of negotiators, they regularly sought and obtained advice and consent separately for each and every negotiator, even though some inevitably played less significant roles than others.<sup>435</sup> Together, this evidence suggests that the status of public minister extends below the ranks of chief negotiators and other top-level envoys.

Now consider the issue of frequency. During early administrations, it was uncommon for the president to rely upon a single appointee to negotiate multiple, separate agreements with different foreign governments, and to that extent, it was also uncommon for the president to seek fresh advice and consent in advance of a current appointee’s negotiation of a new agreement.<sup>436</sup> In part for this reason, Michael Ramsey has argued that transaction-

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431. *Id.* (emphasis omitted); *see also id.* at 45–46 (citing other examples).

432. *See, e.g.,* *Johnson v. M’Intosh*, 21 U.S. 543, 567–68 (1823) (acknowledging the view that native tribes are less than fully sovereign and citing to supporting authority).

433. *Id.* at 2 (emphasis altered and added) (capitalization modified from original).

434. *See* U.S. CONST. art. II, § 2.

435. *See supra* Tables 1–3.

436. *Id.*

specific appointments are unnecessary to honor the original understanding.<sup>437</sup> In his view, it is sufficient for the president to make a single appointment conferring general powers of negotiation.<sup>438</sup>

Ramsey's position is not unreasonable, but seems to overlook relevant considerations. One is that an approach that permits general powers of negotiation is harder to justify in view of historical constraints on states' discretion to ratify agreements. Several leading writers on the law of nations held that treaty signature triggers an obligation to ratify as long as the negotiator followed his instructions in drafting the text.<sup>439</sup> This principle operated in considerable tension with Article II's provision for Senate advice and consent in the making of treaties, which is meaningful only if discretionary, but there is evidence that early U.S. officials were familiar with and at times invoked the principle anyway.<sup>440</sup> If that evidence reflects a broader Founding-era acknowledgement of the obligation to ratify—either as a binding rule of international law or as a moral precept by which to satisfy the expectations of European governments—then it is at least plausible that the founders perceived meaningful Senate involvement at the front end of the adoption process as the *best* opportunity for Congress to shape U.S. treaty obligations. It is precisely that involvement, however, that the conferral of general negotiating authority would render less frequent. To be sure, it is possible that the founders would have nevertheless accepted such a practice, but doing so would have further marginalized a Senate that already faced considerable international constraints on its discretion to advise and consent to ratification.

In addition, a requirement of transaction-specific advice and consent would seem to better serve the original purposes of the Appointments Clause.<sup>441</sup> Professor Ramsey's argument seems to suggest that a single act of advice and consent could suffice regardless of the number, content, importance, and foreseeability of the agreements the appointee might negotiate, and regardless of the

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437. Michael Ramsey, *Ryan Scoville on Renegotiating NAFTA*, ORIGINALISM BLOG (May 2, 2017), <http://originalismblog.typepad.com/the-originalism-blog/2017/05/ryan-scoville-on-renegotiating-naftamichael-ramsey.html> [https://perma.cc/F9HS-NNYG].

438. *Id.*

439. See John Eugene Harley, *The Obligation to Ratify Treaties*, 13 AM. J. INT'L L. 389, 392, 398–400 (1919) (summarizing the views of early commentators).

440. See *id.*

441. See *supra* Part III.E.1 (discussing evidence of the Appointments Clause's original purpose).

succession of foreign governments with which the appointee negotiates and the domestic and international implications of those negotiations. But this would make it much harder for the Senate to vet nominees for competency. It would also complicate the task of policing for conflicts of interest. And it would limit opportunities for public debate over important questions of foreign policy.

Unsurprisingly, then, an approach that permits general advice and consent does not appear to be the original model. In the late eighteenth century, the president did not nominate and the Senate did not approve the appointment of any individual to exercise roving, general authority to negotiate treaties. Instead, the Senate approved the designation of each negotiator shortly prior to each new negotiation.<sup>442</sup> Moreover, the Senate did this even when it had already confirmed the same individual to a different but ongoing diplomatic appointment.<sup>443</sup> This approach enabled Senators to advise and consent to the appointments in an informed manner, with a specific negotiation in mind. True, the Constitution does not specifically say that such case-by-case approval is necessary, and the mere existence of a pattern of early practice does not necessarily mean that the founders understood it as constitutionally required. But this practice was not merely occasional. It was the custom throughout the administrations of Washington, Adams, and Jefferson, and it manifested in relation to over two dozen international negotiations.<sup>444</sup> It is hardly a stretch to imagine that the practice would have acquired a certain normative gravity in these circumstances, such that departures would have been viewed with suspicion and even opposed on constitutional grounds.

In summary, there is ample reason to believe that the dominant narrative about the original understanding of ad hoc diplomacy is incorrect. A substantial collection of evidence—virtually all of it ignored by those who espouse the orthodox view—suggests three essential conclusions: First, the framers generally understood the term “public Ministers,” as used in the Appointments Clause, exclusively by reference to the law of nations. Second, the law of nations defined public ministers to include both resident and various types of irregular diplomats. Most clearly, public ministers included the chief negotiators of international agreements and any others who officially and publicly represented the sovereign abroad, regardless of the duration of the

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442. See *supra* Tables 1–3 and accompanying text.

443. See *supra* Part III.E.2.

444. See *supra* Tables 1–3.

position or the precise nature of the diplomatic assignment, whether that be transmitting or collecting information or merely attending a ceremony. Third, the framers generally understood qualification as a public minister under the law of nations as independently productive of the status of “Officer of the United States,” and thus as triggering the requirement of advice and consent. A nominee’s qualification for officer status, in other words, was not an analytically separate precondition to the need for Senate confirmation, but rather a simple consequence of qualification as a public minister for the U.S. government as a matter of international law. While there are uncertainties on the margins, the constitutional argument against much of the contemporary practice seems strong from an originalist perspective.

#### IV. IMPLICATIONS

For nearly a century, scholars have taken it as given that the Constitution empowers the president to dispatch all ad hoc diplomats without the Senate’s advice and consent. OLC has also adopted this position in recent years, relying in substantial part on evidence from the Founding. The text of the Constitution, however, does not support unilateral appointments, and an abundance of previously overlooked evidence of original meaning squarely contradicts much of the orthodox view.

These conclusions accentuate what was already a yawning chasm between original and modern practice in treaty making. At the Founding, it is now apparent, the dominant model was for the president to seek advice and consent in appointing the negotiators, actively consult with the Senate during the course of negotiations, and then submit the finalized text for approval by two-thirds of the Senate, which would in turn deliberate, possibly at length, on whether to grant that approval.<sup>445</sup> In contrast, consider the process involved in the ill-fated Trans-Pacific Partnership: President Obama independently appointed all of the negotiators,<sup>446</sup> strictly limited the ability of

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445. See generally Cory Adkins & David Singh Grewal, *Two Views of International Trade in the Constitutional Order*, 94 TEX. L. REV. 1495 (2016) (discussing the significance of some of the procedural differences between original and contemporary practice).

446. See *Consultation With Stakeholders: An Integral Part of the Process*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/sites/default/files/TPP-Lead-Negotiators-2014.pdf> [<https://perma.cc/3N9D-4XNJ>] (listing the members of the U.S. negotiating team for the Trans-Pacific Partnership).

members of Congress to even *look* at early drafts,<sup>447</sup> and had planned to submit the finalized text as a congressional-executive agreement that requires only simple majorities of each house rather than two-thirds of the Senate.<sup>448</sup> Moreover, because Congress gave the president trade promotion authority with respect to the TPP, legislators would have had only a limited window within which to consider adoption and would have lacked any ability to make amendments.<sup>449</sup> For better or worse, this is—from start to finish—a significant departure from original design.<sup>450</sup>

#### A. *Implications for Formalists*

Of course, the significance of this analysis depends heavily on one's preferred approach to constitutional interpretation. For those who give exclusive or primary weight to text, the analysis suggests that a salient feature of contemporary U.S. foreign relations is generally unconstitutional, and that, rather than act alone, the president must obtain Senate approval in appointing anyone who would qualify as a public minister under the historical law of nations. This includes the principal negotiators of international agreements and likely includes all other agents who officially and publicly interface with foreign sovereigns on behalf of the United States, regardless of the duration of their position, emoluments, or other *Hartwell*-esque criteria. From such a perspective it follows that presidents have acted unlawfully by independently appointing special envoys to work with foreign governments on issues ranging from the resettlement of Guantanamo detainees to Eurasian energy and peace in the Middle East.<sup>451</sup> This perspective also dictates that the method by which President Obama appointed the primary negotiators of the Trans-Pacific Partnership, the Paris Agreement on Climate Change, and numerous other treaties is

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447. Alleen Brown, *You Can't Read the TPP, But These Huge Corporations Can*, INTERCEPT (May 12, 2015, 1:36 PM), <https://theintercept.com/2015/05/12/cant-read-tpp-heres-huge-corporations-can> [https://perma.cc/6PGY-LA7M].

448. Paul Lewis, *Barack Obama Given 'Fast-Track' Authority Over Trade Deal Negotiations*, GUARDIAN (June 24, 2015, 6:27 PM), <https://www.theguardian.com/us-news/2015/jun/24/barack-obama-fast-track-trade-deal-tpp-senate> [https://perma.cc/VLM4-JVFA].

449. *Id.*

450. The same is true of the equally ill-fated Paris Agreement on Climate Change, which President Obama negotiated and adopted without congressional approval. Dave Boyer, *Obama, Chinese President Ratify Climate-Change Agreement*, WASH. TIMES (Sept. 3, 2016), <https://www.washingtontimes.com/news/2016/sep/3/obama-xi-ratify-climate-change-agreement> [https://perma.cc/NDV6-K6E4].

451. See *supra* notes 30–43 (documenting cases).

unconstitutional, and that President Trump has violated the Appointments Clause by independently designating agents to renegotiate the North American Free Trade Agreement, orchestrate the campaign to defeat ISIS, communicate with North Korea, pursue a settlement between Israel and Palestine, or work toward the stabilization of Ukraine.

It bears emphasis that, from an originalist perspective, the advice-and-consent requirement applies to the principal U.S. negotiators of an international agreement regardless of the domestic process by which the United States adopts the agreement itself. U.S. foreign relations law has traditionally subdivided the instruments that qualify as treaties under international law into three categories<sup>452</sup>: (1) Article II treaties that require advice and consent from two-thirds of Senators present,<sup>453</sup> (2) congressional-executive agreements that require simple-majority approval from both houses of Congress, and (3) sole executive agreements that require no congressional approval.<sup>454</sup> The original meaning of “public Ministers,” however, does not recognize these distinctions.<sup>455</sup> By seeking and obtaining Senate confirmation in appointing the negotiators of both Article II treaties and sole executive agreements, early presidents implied that the primary negotiator of an international agreement will qualify for the statuses of public minister and officer of the United States regardless of the agreement’s classification under domestic law.<sup>456</sup> From this perspective, the legislative branch is currently underinvolved in the adoption of all

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452. See Vienna Convention on the Law of Treaties art. 2(1)(a), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (defining “treaty” as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”); Bodansky & Spiro, *supra* note 28, at 892–93 (discussing the traditional, domestic-law classifications of U.S. treaties).

453. U.S. CONST. art. II, § 2.

454. Daniel Bodansky and Peter Spiro recently argued that there is a fourth, previously unrecognized category of “executive agreements+,” which they define as agreements that “are supported but not specifically authorized by congressional action.” Bodansky & Spiro, *supra* note 28, at 887. Because the definition of “public Ministers” does not depend on the domestic process by which the sovereign eventually adopts an agreement, it is likely that the requirement of Senate confirmation would also apply to the principal U.S. negotiators of this additional category of agreements.

455. See *supra* Part III.C (discussing the definition of “public Ministers” in the early treatises).

456. See *supra* Tables 1–3 and note 309 (reporting that early presidents regularly sought and obtained Senate advice and consent for the appointment of Article II treaty negotiators, and for the appointment of William Vans Murray, who negotiated the first sole executive agreement in 1799).



types of international agreements, not just Article II treaties, and there is no such thing as a “sole” executive agreement because the Senate must always be involved, at a minimum, in the appointment of those who would serve as its principal negotiators.

The formalist critique of unilateral appointments also offers fresh insights on interim obligations. As a matter of international law, the president’s unilateral act of signing an ex post congressional-executive agreement or an Article II treaty triggers an obligation for the United States to “refrain from acts which would defeat [the agreement’s] object and purpose.”<sup>457</sup> This obligation continues “until [the United States] shall have made its intention clear not to become a party,”<sup>458</sup> or until the agreement’s entry into force, at which point the United States assumes a more extensive obligation of performance in good faith.<sup>459</sup> The precise nature of the interim obligation is a subject of disagreement,<sup>460</sup> but the doctrine has been invoked to justify a broad range of policies<sup>461</sup> and likely requires at least that the United States refrain from “actions that would substantially undermine the ability of the parties to comply with, or benefit from, the treaty after ratification.”<sup>462</sup>

Some commentators have suggested that this doctrine, particularly in its more robust iterations, is constitutionally problematic insofar as it empowers the president to assume certain types of treaty obligations without any form of congressional approval.<sup>463</sup> The Appointments Clause complicates this analysis. On

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457. Vienna Convention on the Law of Treaties, *supra* note 452, at art. 18; *see also*, *Frequently Asked Questions: Vienna Convention on the Law of Treaties*, U.S. DEP’T OF ST., <https://www.state.gov/s/l/treaty/faqs/70139.htm> [<https://perma.cc/TA4X-3QKT>] (explaining that although the Senate has not provided advice and consent to the Vienna Convention, the United States “considers many of the provisions of the . . . Convention . . . to constitute customary international law on the law of treaties”).

458. *Id.* art. 18(a).

459. *Id.* art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).

460. *See, e.g.*, Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT’L L. 171, 173 (2003) (“As a matter of international law, core treaty obligations attach . . . upon signature of the treaty.”); *see also generally* Jan Klabbbers, *How to Defeat a Treaty’s Object and Purpose Pending Entry into Force: Toward Manifest Intent*, 34 VAND. J. TRANSNAT’L L. 283 (2001) (discussing divergent interpretations of the doctrine and proposing a separate test).

461. *See* Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT’L L.J. 307, 315–16 (2007) (discussing recent invocations of the doctrine).

462. *Id.* at 308.

463. *Id.* at 309 (arguing that “broad obligations arising from signature are in tension with the U.S. constitutional process for making treaties”); David H. Moore, *The President’s*

one hand, it accentuates the claim of executive unilateralism by revealing that presidents often bypass the Senate in appointing those who will shape the text of the agreement that the president will sign, and in turn the interim obligations that flow from signature. On the other hand, it suggests a plausible remedy: simple-majority advice and consent. By obtaining Senate approval for the appointment of an agreement's chief negotiators, the president might effectively rebut claims that interim obligations are unconstitutional as unilaterally assumed. After all, no Senator who votes in favor of such an appointment could plausibly disclaim the foreseeability of interim obligations pending entry into force, and the bare requirement of simple-majority approval from one house is plausibly commensurate to the limited nature of the obligations themselves.

To be clear, none of this is necessarily to say that unilateral appointments are categorically undesirable, or that any of the specific policies that animate each case of ad hoc diplomacy are ill-advised. Indeed, there are good arguments that special envoys generally do important work, that the Trans-Pacific Partnership would have been net-beneficial for the United States, that the Paris Agreement remains an important part of the effort to mitigate climate change, and that the United States would benefit if Congress had fewer rather than more tools for obstructing the president's conduct of foreign affairs. It is conceivable, moreover, that an originalist approach to diplomatic appointments would incentivize the president to circumvent the Senate by making a larger portion of ad hoc appointments secret, thereby precluding agents from qualifying as "public Ministers" even under the original meaning of the term.<sup>464</sup> This would likely interfere with congressional involvement in foreign policy even more than the orthodox view by not only depriving the Senate of the opportunity to advise and consent to nominations, but also complicating congressional oversight of active agents. But normative considerations are not relevant to the present analysis. The point is simply that the practice of appointing ad hoc diplomats without the Senate's advice and consent is, for better or worse, at odds with the Constitution's text and, for those who prioritize text, unconstitutional.

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*Unconstitutional Treaty-making*, 59 UCLA L. REV. 598, 613–32 (2012) (arguing that interim obligations are unconstitutional regardless of the breadth of the doctrine).

464. See *supra* note 302 (identifying sources that exempted secret actors from the category of "public minister").

Nor is this to say that extant treaties are invalid if they were negotiated by unilaterally appointed agents. The Supremacy Clause provides that treaties are the supreme law of the land only when made “under the Authority of the United States.”<sup>465</sup> In 1796, Attorney General Charles Lee explained that this phrase refers to “the constitutional authority of the United States, which . . . cannot be bestowed on any person but by the President, with the advice of the Senate.”<sup>466</sup> From this position it would seem to follow that treaties negotiated by individuals appointed without the Senate’s advice and consent are *not* made under the authority of the United States, and are thus ineligible for the status of supreme federal law. Yet the Supreme Court would likely shy away from such a destabilizing outcome for at least two reasons. The first is procedural: from an accountability standpoint, one might fairly conclude that the president’s signature and the Senate’s advice and consent expunge any constitutional defect emanating from the appointment of the negotiators. The second reason is precedential: In *Buckley v. Valeo*,<sup>467</sup> the Court invalidated part of the Federal Election Campaign Act of 1971 as establishing an unconstitutional method of appointment for members of the Federal Election Commission, but then accorded “*de facto* validity” to the members’ past acts.<sup>468</sup> In *Ryder v. United States*,<sup>469</sup> the Court suggested that a similar result might pertain in other cases where necessary to avoid “grave disruption or inequity.”<sup>470</sup> One can only imagine that this would apply to unconfirmed diplomatic appointments, the unconstitutionality of which would otherwise render invalid scores of international agreements.<sup>471</sup>

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465. U.S. CONST. art. VI, cl. 2.

466. Powers of the Executive, *supra* note 353, at 66.

467. *Buckley v. Valeo*, 424 U.S. 1 (1976).

468. *Id.* at 142.

469. *Ryder v. United States*, 515 U.S. 177 (1995).

470. *Id.* at 185.

471. The constitutional infirmity of the agreements would likely fail to render them invalid as a matter of international law. Under the Vienna Convention on the Law of Treaties, “[a] person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty” if he or she “produces appropriate full powers” or “[i]t appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.” Vienna Convention on the Law of Treaties, *supra* note 452, at art. 7(1). Past negotiators of now-operative agreements undoubtedly qualified as representing the United States under this language. Moreover, “[a] State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental

For an originalist, the analysis does, however, suggest avenues by which Congress might attempt to reclaim influence over the future conduct of foreign affairs. First, where the president proposes to appoint irregular agents, the Senate might insist upon advice and consent as an opportunity to publicly debate executive policies and, if necessary, reject ad hoc appointments as a way of complicating and discouraging those initiatives that appear fundamentally unsound. In this regard, Section 301 of the Department of State Authorities Act, Fiscal Year 2018 is well grounded.<sup>472</sup> In proposing to require the Senate's advice and consent for the appointment of "any Special Envoy, Special Representative, Special Coordinator, Special Negotiator, Envoy, Representative, Coordinator, or Special Advisor,"<sup>473</sup> the bill would merely resuscitate original practice. If the president were to reject such an initiative, Congress might respond by factoring that maneuver into its decisions on whether and how to cooperate on related matters, including, in the event of a treaty or other international agreement, the question of whether to approve any resulting text.

Second, and more coercively, Congress might refuse to appropriate funds for the compensation of envoys appointed without advice and consent. "[I]t has long been established that the spending power may not be deployed to invade core Presidential prerogatives in the conduct of diplomacy,"<sup>474</sup> but the foregoing analysis shows that, at least for an originalist, unilateral appointments are typically not an executive prerogative.

Third, in extreme cases, the House and Senate might impeach, convict, remove, and disqualify from holding future office any ad hoc diplomat who commits "Treason, Bribery, or other high Crimes and

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importance." *Id.* art. 46(1). The Appointments Clause is almost certainly an "internal law of fundamental importance," but there is a strong argument that the violation is not "manifest," given the ubiquity of unilateral appointments by modern presidents. *Cf.* Jan Klabbers, *The Validity and Invalidity of Treaties*, in *THE OXFORD GUIDE TO TREATIES* 561–64 (Duncan B. Hollis ed., 2012) (explaining Article 46 in relation to "manifest" treaty violations). Thus, the disruption associated with a declaration of unconstitutionality would likely stem from the practical necessity to terminate or withdraw from operative treaties in order to resolve the contradiction between their domestic and international validity, rather than from an automatic invalidation of those treaties as a matter of international law. But either way, the damage to U.S. foreign relations would be incalculable.

472. S. 1631, 115th Cong. § 301 (2017).

473. *Id.*

474. Section 609 of the FY 1996 Omnibus Appropriations Act, 20 U.S. Op. O.L.C. 189, 197 (1996).

Misdemeanors.”<sup>475</sup> Because impeachment is available only against the “President, Vice President and all civil Officers of the United States,”<sup>476</sup> the modern view has had the effect of immunizing ad hoc diplomats from accountability as non-officers. The original understanding, in contrast, would create the possibility of impeachment by categorizing ad hoc diplomats as both public ministers and officers of the United States. Under this approach, Congress might consider the impeachment of Jared Kushner for allegedly engaging in improper communications with Russia,<sup>477</sup> just as the Fourth Congress considered the impeachment of John Jay for alleged improprieties in the negotiation of Jay’s Treaty.<sup>478</sup>

These measures would not be without functional logic. As shown above,<sup>479</sup> the unilateral method of appointment exacerbates other forms of executive unilateralism. It makes possible “sole” executive agreements in the fullest sense. It enables the president to assume interim obligations with respect to treaties regardless of congressional support. It eliminates many opportunities for Congress to scrutinize, debate, and influence U.S. policy on topics ranging from arms control to negotiations between Israel and Palestine. As a result, foreign policy is less deliberative, less subject to compromise, and more vulnerable to significant shifts based on the preferences of the White House. Many have been comfortable with this state of affairs because they have trusted, at least in basic terms, the character and judgment of most of the individuals who have occupied the office of president, but that trust is now in question.<sup>480</sup> By insisting upon a return to the original practice, the Senate might mitigate the contemporary dangers of executive independence in foreign affairs.

Revitalizing the Appointments Clause would also make it harder for the president to pursue the most extremely unqualified or otherwise controversial appointments. Presidents face political

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475. U.S. CONST. art. II, § 4.

476. *Id.*

477. See Ryan Goodman, *Can Jared Kushner Be Impeached?*, JUST SECURITY (July 24, 2017), <https://www.justsecurity.org/43463/jared-kushner-impeached> [https://perma.cc/6MRK-CUSS].

478. See *supra* Part III.E.3.

479. See *supra* Part IV.

480. See Frank Newport, *Americans Evaluate Trump’s Character Across 13 Dimensions*, GALLUP (June 25, 2018), <https://news.gallup.com/poll/235907/americans-evaluate-trump-character-across-dimensions.aspx> [https://perma.cc/EK9A-5G7Y] (reporting that no more than 37% of Americans hold favorable views of President Trump’s honesty and trustworthiness, likability, admirability, skill at choosing advisers and cabinet officers, and ability to work well with both parties).

incentives to make wise choices regardless of Senate involvement, and yet, there is no guarantee that the current president or future presidents will operate on informed, common conceptions of competence or propriety. President Trump, after all, has independently chosen his son-in-law, a real estate developer with zero experience in international relations, to serve as one of his principal representatives in the Middle East.<sup>481</sup> If unilateral appointments are permissible, there are no formal checks to preclude similar appointments in the future. Admittedly, the Senate rarely turns down unqualified nominees for diplomatic posts even when it has the opportunity,<sup>482</sup> but senators have used the confirmation power to reject some of the most grossly unqualified nominees and encourage the withdrawal of others.<sup>483</sup> Moreover, the mere possibility of Senate opposition plausibly strengthens the president's incentive to avoid controversial picks. A return to original practice would ensure that these checks also operate with respect to many ad hoc appointees, and thus encourage selections that satisfy generally accepted standards of merit and facilitate an effective foreign policy.

### *B. Implications for Everyone Else*

For those who reject the relevance of original meaning, the implications are quite different. Insofar as modern customary practice and other related considerations are significant, the analysis does not resolve the question of constitutionality in any ultimate sense. Yet it is still consequential for several reasons. One is that it shifts the burden of persuasion to those who espouse the orthodox view. As Curtis Bradley and Trevor Morrison have explained, there is typically an inverse relationship between, on one hand, the clarity of the Constitution's text and, on the other hand, the ability of nontextual

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481. Amir Tibon, *Trump Reportedly Confirms Kushner to Serve as Mideast Peace Broker*, HAARETZ (Jan. 16, 2017, 4:17 PM), <https://www.haaretz.com/israel-news/trump-reportedly-confirms-kushner-to-serve-as-mideast-peace-broker-1.5486300> [<https://perma.cc/QEC8-DZQQ>].

482. See, e.g., Josh Rogin, *Another Obama Fundraiser Turns Out to be a Bad Ambassador*, FOREIGN POLICY (Feb. 23, 2012, 5:56 PM), <http://foreignpolicy.com/2012/02/23/another-obama-fundraiser-turns-out-to-be-a-bad-ambassador> [<https://perma.cc/EY9E-ERWC>] (discussing the poor performance of Nicole Avant, a political fundraiser whom the Senate confirmed as ambassador to the Bahamas).

483. See, e.g., Paul Richter, *Obama Donor George Tsunis Ends His Nomination as Norway Ambassador*, L.A. TIMES (Dec. 13, 2014, 7:51 PM), <http://www.latimes.com/world/europe/la-fg-norway-ambassador-nominee-withdraws-20141213-story.html> [<https://perma.cc/DT48-UF38>] (reporting that George Tsunis withdrew his nomination after a poor performance at his confirmation hearing provoked a political backlash).

considerations to dictate legality; “[t]he more an interpreter deems . . . evidence like the text and original understanding to be clear, the less likely the interpreter is to credit [nontextual arguments] that point[] in a different direction.”<sup>484</sup> On this view, the textual case against unilateral appointments means, at a minimum, that the argument in favor of the practice will be harder to sustain. The question is not whether the Senate is justified in inserting itself into the matter of irregular diplomatic appointments, but whether the president is justified in rejecting the original model of shared governance by acting alone.

The analysis also helps to further elucidate the original relationship between the Constitution and international law. Some recent Justices have expressed an aversion to the use of international law as an input in constitutional interpretation, at least in certain areas such as the Eighth Amendment.<sup>485</sup> The historical sources, however, show that the framers had no such aversion with respect to the Appointments Clause. Intriguingly, this means that international law, at least in appointments, should be *most* relevant to those who have otherwise expressed the strongest objections to its relevance, and perhaps *least* relevant to those who have otherwise embraced its utilization.

The analysis also enriches current understanding of the way in which international norms have shaped the separation of powers. Jean Galbraith has demonstrated that the law of nations strengthened the president vis-à-vis Congress in areas such as recognition, war powers, and treaty making.<sup>486</sup> Under the Appointments Clause, however, the original effect of the law of nations was precisely the opposite—the empowerment of the Senate at the expense of the president. On this account, it is the gradual domestication of the meaning of “public Ministers,” accomplished through a subtle grafting of *Hartwell’s* conception of “officer,” that has liberated modern presidents from the

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484. Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 430 (2012).

485. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 622–28 (2005) (Scalia, J., dissenting). But see *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2085–86 (2015) (relying in part on international law to determine the scope of the president’s power to recognize foreign borders); Ingrid Wuerth, *International Decision, Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, *United States Supreme Court, June 8, 2015*, 109 AM. J. INT’L L. 636, 638–40 (2015) (discussing the use of international law in *Zivotofsky* by both the majority and the dissent).

486. See generally Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987 (2013).

need for advice and consent with respect to many ad hoc diplomats. This suggests a more complicated story about the rise of executive power, with international law serving less as a reliable causative force than as an occasional tool of convenience, to be deployed by the president when helpful but otherwise disregarded.

Finally, the early evidence regarding special envoys sheds light on the utility of history in the ongoing contest between the political branches for control over foreign relations. By citing to Founding-era sources, OLC's 2007 opinion on the Appointments Clause strongly suggests that modern custom reflects the original meaning of the Constitution.<sup>487</sup> Yet such a position, as I hope to have shown, is extremely difficult to square with the weight of the evidence. This not only raises questions about OLC's objectivity,<sup>488</sup> it also raises the possibility that the executive branch deploys revisionism as a device by which to normalize and legitimate historically aberrational features of the status quo. By reconfiguring the past—by “inventing tradition”—OLC is able to create the appearance of historical continuity and thus tap into the Founding as an added source of authority.<sup>489</sup> Together with justiciability and remedial doctrines that complicate private efforts to enforce the separation of powers,<sup>490</sup> and structural conditions that disadvantage Congress in horizontal struggles with the executive branch,<sup>491</sup> such revisionism plausibly operates as a material sociological contributor to executive primacy.

## CONCLUSION

The presidency's ascent to dominance in foreign affairs has relied in part on a pervasive belief in the basic competence and character of

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487. Officers of the United States Within the Meaning of the Appointments Clause, *supra* note 16, at 100–05.

488. Cf. Trevor W. Morrison, *Libya, “Hostilities,” the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62, 63 (2011) (“[I]n spite of episodes like the notorious ‘torture memos,’ OLC has earned a well-deserved reputation for providing credible, authoritative, thorough and objective legal analysis.”).

489. Cf. Eric Hobsbawm, *Introduction: Inventing Traditions*, in *THE INVENTION OF TRADITION 1* (Eric Hobsbawm & Terence Ranger eds., 1983) (“‘Invented tradition’ is taken to mean a set of practices . . . which seek to inculcate certain values and norms of behaviour by repetition, which automatically implies continuity with the past. In fact, where possible, they normally attempt to establish continuity with a suitable historic past.”).

490. See Kent Barnett, *Standing for (and up to) Separation of Powers*, 91 IND. L.J. 665, 676–85 (2016).

491. See Bradley & Morrison, *supra* note 484, at 438–47 (arguing that Congress is poorly suited to defend its institutional prerogatives from encroachment by the executive branch).



the individual who rises to occupy the nation's highest office. That belief now appears less pervasive than at any time since the 1970s, if not earlier. In this state of affairs, the questions of whether and how to pull back from executive hegemony acquire new relevance, and their resolution may carry serious implications for the nature of U.S. engagement with the world. The foregoing analysis suggests that a revitalized Appointments Clause might serve as one useful mechanism by which to reign in the executive and restore the separation of powers.