

Pacificus, Helvidius, and the Duel over Executive Power

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25 April 2008

It has been suggested that executive power is viewed with ambivalence in modern government and that “in the American Constitution the office of the executive permits and encourages a continuing dispute about the nature of executive power.”¹ One notable dispute on this matter, which occurred shortly after the ratification of the U.S. Constitution, forcefully displays the ambivalent view toward the American executive. The debate was carried out by two prominent Founders, Alexander Hamilton and James Madison, who just several years prior had joined forces to make the most cogent articulation of the principles and framework of the U.S. Constitution. The occasion for their dispute was President Washington’s Proclamation of 1793 that sought to avoid entangling the newly formed United States in warring Europe. Hamilton, writing as Pacificus, penned a strong defense of the President’s authority to issue such a proclamation, while Madison, at the urging of his close friend and political ally Thomas Jefferson, took up his pen under the pseudonym Helvidius to strike back at what he perceived as the aggrandizement of executive power.

At the broadest level, the debate centered around the Proclamation itself, specifically America’s treaty obligations to France, and the President’s authority to issue it. This, however, led to a more fundamental question on the executive branch’s role and responsibility over foreign affairs. Is the executive to be considered the “sole organ of external relations” and what was the appropriate role of Congress in such matters? For the most part, scholars – those who have

¹ Mansfield, Harvey C. *Taming the Prince: The Ambivalence of Modern Executive Power*. (Baltimore, MD: The Johns Hopkins University Press, 1993), 278.

examined this debate - have tended to focus their attention on the power over foreign relations. Yet, if we continue to peel the layers of the debate, we reach a more fundamental discussion on the nature of executive power in the American Constitutional Framework. The debate shows that Hamilton and Madison came to very different conclusions over the nature of executive power, and what exactly it entailed. To Hamilton in *Pacificus*, executive power was to be broadly conceived and suggests that it was distributed and mixed among two separate but equal branches of the government. Madison, in his *Helvidius*, does not accept the notion of the “mixture” of powers, and contends that the executive is, in fact, subordinate to the Legislature. The result is two fundamentally different characterizations of not only Constitutional framework but of the nature and distribution of power within the American regime. The *Pacificus-Helvidius* debate, thus, reflects the ambivalence of the executive within the American Constitution and as such, provides a lens through which we can continue to understand and interpret our republican framework.

This paper provides an overview of the *Pacificus-Helvidius* debate over the nature of the executive, attempting to show how the this debate provides, as Mortin Frisch suggests, a step towards “completing” the unfinished Constitution of 1789.² In doing so, however, it focuses primarily by detailing Hamilton’s conception of the Presidency as outlined in his *Pacificus* essays. It provides a more circumscribed interpretation of Madison’s *Helvidius* debates, focusing only on his explicit critiques of *Pacificus*’ discussion of executive power. This is done primarily since Hamilton’s argument essentially defined the scope of the debate but also since Madison has suggested, on several occasions, that this was not his best work. This is not to suggest that we cannot learn from Madison, only to be a somewhat circumspect in taking

² Frisch, Morton, “The Significance of the *Pacificus-Helvidius* Debates: Toward the Completion of the American Founding,” in Morton J. Frisch (ed.) *The Pacificus-Helvidius Debates of 1793-1794*. (Indianapolis, IN: Liberty Fund Press, 2007).

Madison's Helvidius to be his most eloquent articulation of his understanding of executive power in the American regime.

This paper uses the question of executive control over foreign affairs to shed light on the fundamental issue of the ambivalent nature of executive power. It argues that Pacificus objects to attempts to shackle the Presidency even in attempts to preserve a state of peace and sets out to expound upon a "broad and comprehensive" articulation of executive power. Helvidius, on the other hand, fears the implications of this "extraordinary doctrine" and seeks to restrict the executive to a confined role of executing and administering laws enacted by the legislature. These essays by these two authors form the basis of schools of thought that have dueled over the proper Presidential prerogatives since the Founding era.

This paper begins with a brief overview of the place of the Pacificus-Helvidius debates within American Constitutional discourse as well as the significance of this debate to understanding our Constitution. It follows with an interpretation of Pacificus, focusing mostly on his first essay, which discusses the question of executive authority. That is followed by a discussion of Madison's reply to specific aspects of Hamilton's argument. The paper concludes with some preliminary thoughts on relevance of these essays to current debates over Presidential powers.

Pacificus, Helvidius, and the American Constitution

The Pacificus-Helvidius debate has occupied an inconsistent place in our Constitutional discourse – it is referenced heavily by few and underappreciated or outright neglected by many. Those who have referenced often cite quotes from the debate to support arguments, running the risk of not fully appreciating the whole argument put forward by the authors. That this debate

does not occupy a more prominent place in Constitutional scholarship is surprising since, after all, it provides us with a comparative interpretation of the thoughts of two of the most profound and influential American Founders. This debate, as Morton Frisch suggests, offers a significant contribution towards “completing the unfinished Constitution,” and, in particular, addressing the disquieting question of executive power within American republican framework. That we have two of the most prominent founders squaring off over such fundamental questions of Constitutional interpretation, however, could be a contributing factor in the relative underutilization of this debate. Many scholars, in other words, are uneasy taking sides in a dispute between two key architects of the Constitution. As Jack Rakove suggests, “it is a bit awkward to find these two luminaries disagreeing so sharply on so important and profound an issue as the nature of executive power under the Constitution.”³

This potential awkwardness, however, has not prevented scholars from choosing sides. Martin Flaherty, for example, contends that Hamilton “was the most staunchly pro-executive of all the Founders,” and that in the *Pacificus* essays, he introduced an exaggerated understanding of executive power that was not part of “the common understanding in the eighteenth century.”⁴ Rakove, moreover, accuses Hamilton of introducing a novel, and shameless, attempt at executive aggrandizement, and finds Madison’s effort to be one of preventing a dangerous departure from the true meaning of the Constitution. He writes, “on the merits of the underlying claims about the nature and extent of the constitutional authority, it was Madison who was far more faithful to the original meaning, intention, and understanding of the Constitution, and Hamilton who was

³ Rakove, Jack. “Taking the Prerogative out of the Presidency: An Originalist Perspective.” *Presidential Studies Quarterly*. Vol 37, No 1 (2007), 87.

⁴ Flaherty, Martin. “The Most Dangerous Branch Abroad.” *Harvard Journal of Law and Public Policy*. Vol. 30 No. 1, 168-169.

engaged in a brazen act of interpretive *innovatio*.”⁵ David Nichols, on the other hand, argues that Hamilton’s argument that the President’s authority over foreign affairs is rooted in a broader conception of executive power stays true to the genius of the American Constitution’s placement of the executive on an equal footing with the Legislature. Madison’s theory of legislative superiority, he claims, “ironically fails to appreciate the scope of the Constitutional Convention.”⁶

Such disputes have left many students of the Constitution with the choice of ignoring the debate – often chalking it up to partisan bickering, as Madison himself later claimed – or cherry picking quotes from the essays to support a specific view of executive power.⁷ This has served to understate the potential contribution that the Pacificus-Helvidius debate offers to question regarding executive power. In a most notable case, Supreme Court Justice Robert Jackson, in his majority opinion for the *Steel Seizure Case* (1953), conceded that, “A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.” He cited Pacificus and Helvidius as the first example in his footnote. That this debate, therefore, can offer us a deeper understanding of the nature of executive power, and has the potential to shed light on perennial questions of Constitutional interpretation, merits it a closer look.

⁵ Rakove, 96.

⁶ Nichols, p. 127

⁷ Two notable exceptions to the discussions of the Pacificus-Helvidius debate are Harvey Mansfield’s cogent discussion of this debate in his *Taming the Prince* and William Casto’s “Pacificus & Helvidius Reconsidered” in the *Northern Kentucky Law Review* (2001).

Pacificus: A Broad and Comprehensive Interpretation of Executive Power

In the months following President Washington's issuance of the Proclamation that declared that the United States would not be an active party in the war emerging in Europe, several writers took to the papers to condemn the President's decision. These writings ranged from French sympathizers suggesting that the U.S. was breaking its obligations with that country to those who claimed that President Washington was overstepping his Constitutional authority. The essays of *Veritas*, who accused Washington of exerting monarchical powers, in particular, caught the eye of Alexander Hamilton, a close confidante of President Washington and serving as his Treasury Secretary. Hamilton, in response, wrote seven *Pacificus* essays appearing in June and July 1793, to dispel what he saw as erroneous and dangerous accusations against President Washington's decision, specifically, and to defend what he saw as the rightful institutional powers of the Presidency.

Hamilton found the protests against the President's Proclamation to have implications well beyond the current crisis to include diminishing the role of the executive cornerstone of the new nation's Constitutional Framework. Writing under the name *Pacificus*, meaning "maker of the peace," He feared that protests against the President's attempts to maintain a "state of peace" and prevent the nation from becoming entangled in a bloody European war would have severe ramifications should the President need to exercise his Constitutional powers for something much more ambitious. In other words, if such protests against a seemingly passive executive action such as issuing a proclamation to keep the U.S. out of war went unanswered, the executive branch would be hemmed in and unable to live up to its ability to exert the energy necessary for "good government."

Hamilton's seven *Pacificus* essays address the key criticisms of the Washington Administration's issuance of the Proclamation.⁸ They are, *Pacificus* writes,

- That the Proclamation was without authority
- That it was contrary to our treaties with France
- That it was contrary to the gratitude, which is due from this to that country: for the succours rendered us in our own Revolution.
- That it was out of time & unnecessary.⁹

His first essay, and the one on which this paper primarily will focus, addresses the first objection, and in doing so, provides "broad and comprehensive grounds" from which to understand the authority and role of the executive branch of government.¹⁰ Prior to discussing in detail the first *Pacificus* essay on executive power, it is worth summarizing the other six essays. Numbers II and III address the second listed objection." *Pacificus* finds this to be the "principal objection" to the proclamation, a noteworthy description, since he himself does not begin this series of essays by addressing that subject but instead leads off with a discussion of the President's Constitutional authority to issue the Proclamation, thus showing his true concern.

In Essays II-III, *Pacificus* references Burlamaqui, Vattel, and other writers of the law of nations, to show why the United States is not obliged to support the new government of France's offensive wars against her neighbors. Defensive war, or a war in which France was attacked, would perhaps require assistance but not when France is the aggressor. Essays IV-VI focus on the issue of the gratitude the United States owes to France, and to the cause of liberty more broadly. Suggesting that "preservation" is the first law of nations, *Pacificus* contends that the United States cannot afford to support France at the expense of its own safety. Moreover, he

⁸All quotations from the *Pacificus* and *Helvidius* essays are taken from Morton J. Frisch (ed.) *The Pacificus-Helvidius Debates of 1793-1794*. (Indianapolis, IN: Liberty Fund Press, 2007). Specific page numbers refer to this edition of the essays.

⁹ *Ibid*, 9.

¹⁰ *Ibid*, 12.

suggests that if gratitude is owed to France, it belongs to her former, and now decapitated, King Louis XVI, for he was the supporter of the Americans during their struggle with Great Britain. The final *Pacificus* essay addresses the timeliness of the Proclamation, but also notably discusses the President as the spokesman for the whole nation, an issue we will take up in more depth.

Pacificus' first essay demonstrates that his main concern centers on the nature of the executive in the American regime. He suggests in his opening line that the recent protestations of the President's Proclamation are not only "very dangerous to the peace" but also "very unfriendly to the constitution of the UStates," since "more was in view than merely a free discussion of an important public measure."¹¹ The "more in view" is the proper understanding of the powers and authority of the President, and hence, the future character of the American republic. He finds it his "duty" – along with other well-wishers of the Constitution – to defend the President's Proclamation not just to prevent American entanglement into a European War but to defend the executive and help explain its true and proper character within the American Constitutional framework.

Pacificus' discussion of executive power in this first essay follows along three lines: 1) That the "Vesting Clause" of the Constitution vests the President with all executive powers, excepting only those that are articulated in the Documents; 2) That even those executive powers which are excepted from the general grant of powers to the President should be thought of as "concurrent" between the legislative and executive branches; and 3) That the President's national character make him not only the "organ of intercourse" with foreign governments but also make him the nation's spokesman, and the truly national branch of the republic.

Towards the end of his first essay, *Pacificus* suggests that he could have made the case that the President had the Constitutional authority to issue the Proclamation solely on the "take

¹¹ *Ibid*, 8-9.

care that the laws be faithfully executed” clause. After all, the President was merely restating that the nation was not at war, and that the laws governing our state of peace would continue to be enforced. However, he “thought it advisable to vindicate the President on this broad and comprehensive ground,” referring to his understanding that the President’s authority in this specific matter flowed from a general grant of executive power to that office.

Pacificus’ argument for the “broad and comprehensive grounds” for understanding executive power hinges on the opening line of Article II of the U.S. Constitution, which he quotes in central paragraph of his first essay (paragraph 24 of 47). He writes, “The second Article of the Constitution of the UStates, section 1st, establishes this general proposition, That ‘The Executive Power shall be vested in a President of the United States of America.’” Pacificus goes on to say that while the succeeding lines “define” specific executive powers (e.g., the Commander in Chief clause), they should not be seen as derogating from the “general grant” of executive power provided in the opening clause. The subsequent clauses only serve to “specify and regulate the principal powers” within the Constitution’s broader grant of executive power. This is the crux of the debate between Pacificus and his critics, including James Madison writing as Helvidius.

As a point of comparison to strengthen his interpretation of Article II, Pacificus refers to “the different mode of expression employed in the constitution in regard to the two powers of the Legislative and the Executive.” Article I of the Constitution, which he also quotes, reads “All Legislative powers herein granted shall be vested in the Congress of the UStates.” The “powers herein granted” statement, accordingly, qualifies and restricts the powers of the Congress to those subsequently listed. Article II, Pacificus implies, does not contain the “herein granted” clause, thus suggesting that the President has a broader grant of executive power.

This is a noteworthy interpretation, for it depends on a last minute change to the wording of the Constitution made by the Committee on Style at the Constitutional Convention of 1787. As historian Charles Thach has noted in his classic history of the origins of the Presidency, the Committee on Style, which comprised both Hamilton and Madison along with several other members of the Convention, reworded Article II vesting clause to be different from that of Article I. Gouvenour Morris, who was primarily responsible for this wording change, inserted what Thach refers to as a “joker,” or a change of words – to no one’s objections - that later would lead to serious controversy among those trying to uncover the original intent of the Constitution.¹² Article I, by contrast, states that the legislative power, “herein granted” to the Congress suggests that the Congress is restricted to the exercise of the legislative powers enumerated in Article I, and not vested with a broad grant as in Article II. Hamilton, in his *Pacificus* essays, makes the most of this wording change since if he, and future generations, are to have any guide, it must come from the only agreeable standard of judgment: the written Constitution.

Yet, *Pacificus* is careful to explain that this general vesting clause is not without limits. After all, unlimited executive power in the hands of one person would smell of monarchy, a recent charge against the President, which Hamilton set out to prove erroneous. Thus he suggests that while we should understand that the Constitution vests the President with the executive power, it is to “interpreted in conformity to the other parts <of> the constitution and to the principles of free government.” Hamilton’s *Pacificus* at once acknowledges the “broad and comprehensive grounds” of executive power and tries to explain the tools for keeping that power in check. The burden is on citizens and leaders alike to remain mindful and vigilant of the

¹²Thach, Jr., Charles C. *The Creation of the Presidency 1775-1789: A Study in Constitutional History.* (Baltimore, MD: The Johns Hopkins Press, 1969.)

“principles of free government” and to rely on our written Constitution to bound the executive power and prevent its abuse.

The other parts of the Constitution, to which Pacificus refers specifically, are those that make exceptions and qualifications to the general grant of executive power to the Presidency. The Constitution, he argues, provides the Congress with some specific powers that are by their nature executive, namely the power to declare war, make treaties, and approve Presidential appointments. These, accordingly, are to be discerned as executive powers granted by exception to the Legislature and not to the President. They are not to be understood as legislative powers. This is the second line of argument Hamilton’s Pacificus offers.

While Madison and Jefferson may have decried Pacificus’ interpretation of the Constitution as “heresies,” a closer look shows that his ideas did not depart significantly from the earlier interpretation offered by *The Federalist* (commonly referred to as *The Federalist Papers*.) Pacificus’ discussion of the executive vesting clause and the exceptions thereof, while much more poignant, is not inconsistent with what was described by Hamilton writing as Publius (along with Madison and John Jay) just a few years earlier. In Federalist 69, for instance, Publius writes that in reading the plan of the Convention, “The first thing which strikes our attention is that the executive authority, with few exceptions, is to be vested in a single magistrate.” That Publius found the vesting clause and its few exceptions to “strike our attention” suggests that Pacificus’ return to this discussion is not such a bold introduction of novel ideas.

In describing the exceptions – the war power, the treaty-making power, and the appointment power – as inherently executive in nature, Pacificus again does not depart significantly from the characterization of these powers provided in *The Federalist*. With respect

to the treaty power, Publius suggests that it is neither properly executive nor legislative in nature, thereby providing all the more reason for it to be shared between the two branches of government. The appointment and war powers, however, are characterized as executive powers being shared concurrently between the President and Senate. Publius characterizes the appointment power of government as inherently executive since it relates to the “steady administration of government,” a critical executive responsibility. Moreover, the powers associated with war – declaring and making – are also associated with the “energetic executive” responsibility to secure and defend the nation from danger, foreign and internal. Publius, moreover, only disassociates the power to declare and make war when he compares the U.S. Presidency to the King of England. The latter, he suggests, has authority over both, while the U.S. Constitution wisely divides the power to declare and make war between the legislative and executive branches. He does not distinguish them as two separate powers, one executive and one legislative in nature, rather he describes them as one power exercised by a king in one country being assigned to two separate branches in the United States. In the *Federalist*, Publius Thus, for Pacificus to say that these powers are inherently executive, and only by exception have they been granted to the legislative branch, does stray from the characterization offered by *The Federalist* several years prior.¹³

Although Publius describes the Constitutional framework conceptually, Pacificus uses the issuance of the President’s Neutrality Proclamation to demonstrate how the dynamic interaction of two branches sharing the “Executive Power” should operate within that framework. This theory of concurrent power, which is defined in *The Federalist*, is elaborated upon by Pacificus. He argues that the concurrent power provides the President with the responsibility to “shape” and “influence” the Legislature’s exercise of its “strictly defined” powers that are executive in nature.

¹³ *Federalist* 75.

For the executive, according to Pacificus, is responsible for executing both the law of nations and the municipal law, and since the former is not easily discernible, and that the first principle of international relations is self-preservation, the executive has wide latitude to interpret treaties and other international obligations to ensure the peace and tranquility of the United States. Therefore, the executive can, and should accordingly, use his Constitutional authorities to influence the Senate in the cases of declaring war, ratifying treaties, and approving appointments. Pacificus, thus, describes the executive as an equal branch of government actively undertaking measures, within its Constitutional boundaries, to shape the outcome of the legislative branches' decisions. He is clear that the authority to declare war is the responsibility of the Congress but does not say that the President cannot undertake actions that would shape international events that could influence the Senate's war-declaring authority. The executive, in other words, is not merely executing the laws legislated by Congress but shaping their decisions through its own Constitutional authorities for the good of the nation. This, by definition, is an energetic executive.

Although this paper has focused on Pacificus' first essay and the discussion of executive power therein, his final essay also sheds light on this issue.¹⁴ Much like Publius a half decade prior, Pacificus articulates the differences between the King of England and the U.S. President. When the King speaks, he speaks for himself, for he is the sovereign of the nation. However, when the President speaks, he speaks on behalf of the nation, or more specifically, the citizens, for they are sovereign. He is not a monarch but a nationally elected figure, representing all of the nation's citizens. Pacificus, therefore, is reiterating the notion that the strength of the American executive flows from it being a national institution – the only leadership position to be elected by the entire nation. Hence, the executive branch is equal in power, and serves as a national check

¹⁴ Pacificus VII, 52.

against the other branches, which are federal in character. This is an important distinction, for it not only demonstrates the intermixture of executive power in different branches but also the mixture of the “partly federal, partly national” character of the American regime.

Madison’s Helvidian Critique

Prior to Hamilton’s *Pacificus* essays appearing in the *Philadelphia Gazette*, James Madison, at that point a Congressman from Virginia, wrote to his friend Secretary of State Thomas Jefferson to express concern with President Washington’s issuance of the Proclamation. He felt that the President had overstepped his boundaries, and was not the “competent authority” to make a determination as to whether or not the United States would participate in a foreign war. Madison, therefore, had envisioned potentially dangerous implications of President Washington’s decision to issue the 1793 Proclamation. In a letter to Thomas Jefferson, dated 13 June 1793 (prior to the *Pacificus* essays), Madison expressed concern that the President in issuing the Proclamation had taken “an assumption of prerogatives not clearly found in the Constitution & having the appearance of being copied from a Monarchical model.”¹⁵ Therefore, even without *Pacificus*’ controversial defense of the President, Madison clearly felt uncomfortable with the President’s position.

Whatever unease Madison had with the President’s Proclamation only grew worse when he began writing his *Helvidius* essays in response to Hamilton’s *Pacificus*. Madison claimed the writing of the essays to be the “most grating experience of my life,” and constantly complained that he was too busy, too hurried, and without the proper research materials to respond to *Pacificus*. But his friend, Secretary of State Thomas Jefferson pressed him into service, sending him two letters begging Madison to respond to Hamilton’s “heresies.” Jefferson, in his attempt

¹⁵ James Madison, “Letter to Thomas Jefferson,” 13 June 1793 in *The Papers of James Madison*, 28-30

to sway Madison, suggested that “No one answers him, & his doctrine will therefore be taken as confessed. For god’s sake, my dear Sir, take up your pen, select the most striking heresies, and cut him to pieces in the face of the public.”¹⁶ Madison reluctantly agreed to do so but asked Jefferson to edit his papers substantially; Jefferson made a few minor changes. Unlike Hamilton who publicly boasted of his Pacificus essays, Madison also went to great lengths to conceal his attachment to the Helvidius essays. Also, Madison would suggest on several occasions later in his life that he was not particularly proud of these essays; Hamilton, on the other hand, insisted that Pacificus essays be included in the first publication of *The Federalist* since his Pacificus essays, “according to his friends,” represented his finest achievement not to mention he felt that they had shed significant light on obscured Constitutional issues.

Madison chose the pseudonym Helvidius, after Helvidius Priscus, a 1st Century Roman politician known for his strong support of republicanism and for challenging the Emperor’s claim to certain powers. The name suggests Madison saw his own intent in a similar light. Madison’s Helvidius did not directly dispute Pacificus’ suggestion that executive power is vested generally in the President rather he took issue with the characterization of executive power more broadly. Helvidius, in particular, disputes Pacificus’ suggestion that certain powers are held concurrently and that any kind of mixture between the executive and Legislature would be contrary to the Constitution.

Helvidius reasons that Pacificus’ source for such “vicious” doctrines can only be the *royal prerogatives in the British Government*, and discussions of these prerogatives by British commentators.¹⁷ Pacificus, according to Helvidius’ critique, is injecting the British monarchy in to the American regime. In Britain, the monarchy as the sole executive, exercises the right to

¹⁶ Thomas Jefferson, “Letter to James Madison, 7 July 1793.” Ibid, 43-46.

¹⁷ Helvidius I, 63.

make war and peace, consulting no one in the process. This critique appears to be overstated and unfortunately conflates two issues: the characterization of power and who has the responsibility for exercising it under the American Constitution. That is, Hamilton's discussion in *Pacificus* describes that general characteristics of the power, and where it has historically been assigned (e.g., the King of England) but his argument shows that a virtue of the American system is that this power is shared so as to have more accountability and control.

Helvidius also critiques the description of executive and legislative powers offered by John Locke and Montesquieu as "clouded" and "warped" by royalism and the Government of England, respectively. Locke described the Treaty-Making power as not wholly executive and not wholly legislative but a "federative" power, most closely associated with the executive. Madison in Helvidius dismisses Locke's association of the federative power with the executive and his suggestion that the federative power is "hardly to be separated into distinct hands" as having been unduly influenced by his living under the British monarchy. Helvidius goes so far as to suggest, "Had he not lived under a monarchy, in which these powers were united; or had he written by the lamp which truth now presents to lawgivers, the last observation would probably never have dropt from his pen."¹⁸ He then writes that he wishes to "quit a field of research which is more likely to perplex than to decide." Yet this "field of research" of exploring and explaining the nature of the powers in question (e.g., the powers of war and peace) is what requires exposition. For to allow such a fundamental disagreement over the nature and responsibility of such powers results in a dispute over the underlying principles of the American Constitution.¹⁹

¹⁸ *Ibid*, 58-59.

¹⁹ Interestingly, in Helvidius I, Madison quotes *Federalist 75* at length to critique Hamilton's contention in *Pacificus* that the treaty-making power is executive in nature. However, *Federalist 75*, in the tradition of Locke, suggests that the power is neither legislative nor executive but better described as "federative."

Helvidius' critique of Pacificus' characterization of power to make treaties as executive in nature but which the Constitution makes an "exception" and provisions a role for the legislature, leads him to describe why he finds this power to be legislative in nature. Although he reasonably argues that treaties have the effect of laws, leads him to conclude: "To say then that the power of making treaties which are confessedly laws, belongs naturally to the department which is to execute laws, is to say, that the executive department naturally includes a legislative power. In theory, this is an absurdity – in practice a tyranny."²⁰ Yet the Constitution does grant the President a role in "to make Treaties" with the advice and consent of the Senate. Thus, Helvidius' critique of Pacificus' notion of concurrent powers, and powers being excepted out of a general grant of power, is not consistent with the Constitution. In other words, even if we accept Helvidius' characterization of the treaty-making power as legislative in nature, the Constitution clearly grants both the President and the Senate a role, suggesting some kind of concurrent or shared power. Helvidius downplays this by suggesting that the executive only has a role limited to making "initial contacts" with foreign governments and that the real power rests in the Senate. However, he does not explain the wording of Article II of the Constitution, which clearly grants the President the "power to make treaties" with the "advice and consent of the Senate."

Helvidius extrapolates Pacificus' discussion of the treaty-making power into a warning against the possible Presidential usurpation of the power to declare war.²¹ Helvidius fears that the implications of Pacificus' interpretation and analysis of the executive "vesting clause" and "concurrent powers" logically would lead to a distorted understanding of the power to "declare

Locke, as suggested earlier, claims that the federative power usually goes together with the executive. Therefore, Madison's use of Federalist 75 at the end of his first Helvidius essay not strong unless one accepts his assumption that Locke was "clouded" by his loyalty to the British crown. Ibid, 64.

²⁰ Ibid, 58-60.

²¹ Ibid, 59, 68-71.

war.” The Constitution clearly articulates that the Legislature shall have the power to declare war. However, Pacificus’ description of the President’s authority to interpret treaties and the nation’s obligations to them places the so-called “War Power,” to some extent, in the hands of the Presidency. Although the 1793 Proclamation intended to maintain U.S. neutrality in a European war, Pacificus’ reasoning could lead, under different circumstances, the President to create the conditions for U.S. entry into a war. For if the President interprets a treaty in a different manner that, for all intents and purposes, makes the United States a hostile enemy of a foreign government, what choice does the President leave the Legislature? In such circumstances, Congress’ power over war effectively could be curtailed to rubber stamping the President’s bellicose activities abroad.

Pacificus does not offer any analysis to show how his understanding of the President’s authority to “shape” and “influence” the legislative process could limit the Congress’ power over war and peace. Yet, Pacificus’ articulation of the “concurrent” and “intermixed” nature of power in the American regime as well as his recognition that the President does not, in fact, have unlimited powers, allows a logical extrapolation of how he may have responded. The Congress maintains several instruments, notably the power of impeachment, the power to raise and maintain a military, and the power of the purse, all of which give the legislative a strong hand in preventing an aggressive President from influencing events in a direction not desired by the majority of the people’s representatives. That Pacificus did not offer this suggestion should not be surprising since, after all, his main concern legislative encroachment on the Presidency, and thus sought to defend the latter against the former. Helvidius saw the reverse and feared that the logical extension of Pacificus’ arguments would only serve to aggrandize the President at the expense of the Congress. Yet Helvidius does raise, with much merit, the possible dangers of

Pacificus' thought. The possibility of the President having undue influence over the declaration of war would undermine fundamental principles of the Constitution, and very well threaten America's republican regime.

In sum, Madison's Helvidius essays raise some of the potential implications of Hamilton's reasoning in his Pacificus essays. Yet in criticizing Pacificus, the Helvidius essays raise questions that are left unanswered. For instance, if Pacificus is incorrect in his suggestion of concurrent powers, then how does Helvidius help us understand why certain powers, such as treaty-making and appointments, offer a shared role to two branches? Moreover, in challenging Pacificus' by characterizing certain powers as legislative vice executive in nature, how are we to understand why the Constitution grants the executive at least some responsibility over them. Even if we accept the characterization of these powers in Helvidius, we are left with additional questions regarding the interpretation of the Constitution.

Preliminary Conclusions

The primary intent of this paper is to offer an initial interpretation of an important debate between two of the most prominent American Founders in attempt to illuminate how they understood the Constitution. The weight given in current debates to how the Constitution was understood originally by those who framed it, this paper also can inform current debates over the extent and character of executive power. For instance, it has become widely accepted that the twentieth century has given rise to a modern Presidency that has become imperial in its control over matters pertaining to war. The historian Arthur Schlesinger, in the midst of the Vietnam War and the Watergate scandal, penned *The Imperial Presidency*, which has become a standard text in recent discussions of Presidential power over foreign affairs. Schlesinger argued that the

Presidency in the 20th century had usurped powers Constitutionally granted to the Congress, and as a result placed the American republic in a precarious position that departed significantly from intention of the American Founders. The executive branch, accordingly, had used its influence and accumulation of powers to gain control over foreign affairs, engage the U.S. in conflicts around the world, and place Congress in a position to simply fund the President's foreign endeavors without much oversight and control.

Yet when an examination of Pacificus essays shows that Hamilton interpreted the Constitution to grant the President many of the prerogatives, responsibilities, and roles that Schlesinger critiqued as "imperial." Pacificus saw the President as the "organ of intercourse" with foreign nations, that it held "concurrent powers" with the Legislature, and argued that the President had the power to "shape" and "influence" the legislative agenda with respect to war and peace. Therefore, based on this preliminary analysis of Hamilton's thinking in the Pacificus essays, has the Presidency become imperial or is it merely exercising the powers that Hamilton understood it to have originally? Similarly, if we accept Madison's understanding of the powers of the Presidency, as articulated in the Helvidius essays, how are we to contend with an institution that clearly exercises powers and takes on responsibilities that are clearly beyond the scope of what Helvidius assigns? Who is to be the judge of the President's exercise of powers, and what instruments can be used to curtail them? If one accepts Helvidius' critique of Pacificus, perhaps the more appropriate question is why Presidents apparently have gone beyond Madison's description of their powers, and what implications that has for the endurance of the Constitution?

Although this debate informs such issues, at its core it highlights a more central theme in the study of government: the ambivalence of the executive. In defense of the Constitution,

Publius put forth the notion that “energy in the executive is the leading cause of good government.” At one point and at some level, Hamilton and Madison agreed to that proposition. Yet it did not take long for them to disagree over how the executive branch should exercise such energy, and this debate continues to the present. Their disagreement, however, went even deeper to the basic understanding of how to define executive power, and how to characterize it within the American regime. Their disagreement suggests that even those luminaries who played a substantial role in designing, defending, and implementing the Constitution, viewed the document in different ways, suggesting that the prospect for consensus in current debates over executive power is unrealistic. Such disagreements are more likely attributed to the ambivalent nature of executive power, especially within republican government. For executive power simultaneously presents hope and danger to the perpetuity of republican government. By presenting two different interpretations of the American Constitutional framework, the Pacificus-Helvidius debate provides an important guide to help us understand and view our current debates over the nature and scope of executive power.