whether and when to seek the nonbinding opinions of his individual deputies.[27]

The breadth of the president's pardon power also elevated the federal chief executive above his state counterparts. In almost every state, the governor's pardon authority was sharply restricted by the constitution itself or else subject to legislative override. Even the strong governor of Massachusetts could pardon only with "the advice" of a legislatively chosen council, and then only after conviction. New York's governor also lacked power to pardon before conviction, and in cases of murder and treason, he could merely suspend a sentence until the legislature met to resolve the matter.[28] Article II handed the president a far mightier pardon pen, authorizing him to single-handedly and conclusively pardon at any time after a crime occurred and thereby spare a man from even having to stand trial. As *The Federalist* No. 74 emphasized, this sweeping power in the right hand at the right time might strengthen national security and save lives by inducing desperate offenders to surrender immediately in exchange for guaranteed mercy. "In seasons of insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth." Because the "loss of a week, a day, an hour, may sometimes be fatal," any "dilatory process of convening the legislature" or a council might "let[] slip the golden opportunity."

In this vivid passage, whose script President Washington would closely follow in dissolving the Whiskey Rebellion of 1794, Hamilton deftly interwove several of the threads that defined America's presidency—the sleeplessness and unity of executive power, the president's unique capacity for quick decisive action, and this officer's special role in handling crises that might threaten the national tranquility or even the national existence.[29]

"Advice and Consent"

After clarifying the scope of various powers vested solely in the president, section 2 proceeded to map out two domains where the chief executive would share power with the Congress, especially the Senate. The "Advice and Consent" of the upper house would be required for any treaty that a president might propose or any major nomination that he might make. In England, the monarch embodied British sovereignty internationally and stood as the fountain of official honor domestically. Thus kings claimed unilateral authority to make treaties, create new executive and judicial offices, and name all officers. Article II broke with this model, giving the

Senate a portion of traditionally executive authority—much as Article I gave the president some legislative power via the veto clause. The lower house would also play a decidedly non-English role in appointments, helping to define "by Law" the precise number of executive and judicial slots to be filled. Though America's executive and legislative branches might generally wield different powers and stand on separate electoral bases, the Constitution obliged them to work together on certain joint tasks. To this extent, separation of powers between branches resembled bicameralism within the legislature. In the making of statutes, treaties, and appointments, the Constitution intertwined branches that it elsewhere separated.

Article I statute-making required either the concurrence of all three of America's permanent elective institutions—House, Senate, and president—or strong supermajorities in both legislative houses to overcome an executive veto. Article II treaty-making sidestepped the House of Representatives—the people's house. To offset this democratic deficit, Article II made a president's approval of a treaty indispensable and required the Senate to agree by a decisive two-to-one margin. In this respect, the Constitution resembled the Articles of Confederation, where nine of thirteen state-chosen delegations sufficed to bind America to a treaty. The old Confederation Congress had often acted as a kind of executive council, and although the new Constitution relocated much of this executive power to the president unilaterally,[30] the document retained a part for the Senate—an improved version of the old Confederation Congress—in the treaty-making process. Composed of statesmen chosen for their wisdom by state legislatures, the Senate could check a hasty or corrupt president and guard against proposals that might result in the imprudent creation of international obligations or the needless displacement of state law.

Nor were the treaty-making rules of Article II the Constitution's only protection against bad treaties. In both the Article VI supremacy clause and the document's general structure, statutes made pursuant to Article I might in some ways be thought to have priority over treaties made under Article II. Certain treaties would have little or no domestic effect unless implemented by a statute that would require House approval. For instance, no mere treaty could appropriate federal funds or create a new federal crime. Only Congress as a whole, including the House, could do these things. For similar reasons, although a treaty might suffice to displace state law as part of the "supreme Law of the Land," its power to repeal any and all prior federal statutes might well be doubted.*

*We shall return to this nice question in Chapter 8.

Conversely, a strong structural and historical case could be made that certain federal actions might well require a treaty in addition to a federal statute. For example, if the central government sought to cede land—especially land within individual states—to a foreign power, a mere statute of cession, without more, might seem inadequately protective of the extraordinary sectional interests at stake. Arguably, a two-thirds vote of a Senate specially structured to safeguard states' rights, along with the absolute agreement of a continentally elected president entrusted with the defense of the whole union, would also be necessary to effect any such cession. More generally, perhaps a statute-supplementing treaty would be necessary whenever a major international agreement threatened to impose drastically unequal effects upon different regions of the country.

At the Founding, the paradigm case of sectional disparity involved the Mississippi River, whose mouth was controlled by Spain. Seeking to exploit America's extreme weakness under the Articles of Confederation, Spanish negotiators in the mid-1780s had offered the United States special trade concessions in exchange for a temporary American renunciation of the right of free navigation along the Mississippi—a deal that might have benefited certain Eastern interests but would have devastated the trans-Appalachian West.[31] In the shadow of these recent and highly controversial negotiations, leading Federalists repeatedly assured skeptics that the supermajoritarian safeguards of the Article II treaty process would protect regional minorities, thereby implying that in certain regionally divisive contexts, a simple federal statute of cession would not suffice.[32]

More so than ordinary statutes, treaties would be subject to the vicissitudes of international politics. In the event of a treaty partner's breach or collapse, or an executive-branch renegotiation with the partner, a president might act to abrogate or suspend a federal treaty in a way that he could not ordinarily overturn a federal statute. The power to put aside a treaty in such situations plausibly fell within the residuum of "executive Power" vested solely in the president by the opening words of Article II and unqualified by the shared rules of treaty-making set forth later in section 2. By its terms, section 2 simply did not apply to treaty abrogations or to other closely related aspects of foreign policy—treaty negotiations, recognitions of foreign regimes, presidential proclamations, informal agreements between presidents and foreign leaders, and so on—encompassed by the general grant of executive power to the president.[33]

The actual practice of treaty abrogation over the centuries has varied. Sometimes treaties have been superseded by statutes, sometimes by joint action of the president and Senate, and at other times by the president

alone.[34] Although America's first treaty abrogation, in 1798, occurred by way of a congressional statute declaring that France had repeatedly breached her treaties with America and pursued a pattern of "predatory violence" against the United States, this statutory pronouncement verged on a declaration of limited war.[35] A congressional declaration (signed by the president) may have been the most appropriate way to process this particular treaty abrogation, but this action did not establish a firm precedent demanding similar statutory action in all future cases of treaty abrogation. Indeed, both Hamilton and Jefferson viewed certain abrogations as wholly executive in nature.[36] Above and beyond whatever powers of abrogation and suspension a president might properly wield, he also enjoyed the power to interpret treaties in the first instance, with American judges often disposed to give decisive weight to his interpretation. Washington's emphatic Neutrality Proclamation of 1793 exemplified this important power, as Hamilton famously explained in an essay penned under the pseudonym "Pacificus."[37]

A president could also unilaterally prevent a potential treaty from ever becoming the law of the land by refusing to negotiate with a given foreign regime, by declining to submit an inchoate treaty to the Senate, or even by deciding not to formally finalize a treaty after the Senate had given its advice and consent. The very word "Advice" reflected the fact that the president, and not the Senate, would have the final, definitive move. In the first major international agreement under the new Constitution, Washington decided to sign off on the Jay Treaty in August 1795 only after weeks of executive deliberation following the Senate's vote of advice and consent. Beginning with this episode, the Senate has claimed the right to propose amendments to a treaty negotiated by the executive branch; any such amendments have required the assent of both the president and America's treaty partner.[38]

Similar rules applied to the appointment of leading executive and judicial officers, the other domain subject to senatorial advice and consent.[39] Here, too, the Constitution obliged the president and the Senate to work together; the need to secure the approval of a separate branch would serve to deter a president from making corrupt or unwise proposals. Unlike treaties, appointments would themselves have no direct impact on domestic or international law; thus, a simple majority of the Senate would suffice to confirm nominees, in contrast to the two-thirds needed for treaty ratification. In appointments, as with treaties, the Senate could say no to what the president proposed but could not compel the president to say yes to the Senate's first choice. Just as a president could refuse to formally ratify a

treaty after it won the Senate's consent, so he might decline to commission an officer who survived the confirmation ordeal.

Also, a president retained broad power to unilaterally remove a high-level executive-branch appointee gone sour, much as he could in certain instances unilaterally abrogate a treaty gone bad. The Senate's advice-and-consent function applied to the making of treaties and appointments, but not to their breaking. Instead, the president's general residuum of "executive Power," along with his responsibility to ensure that the laws were being faithfully executed by his deputies, empowered him to remove heads of executive departments—men who answered to him under the section 2 opinions clause and whose legislatively created posts had no fixed terms.

So argued Representative Madison and other supporters of President Washington when the cabinet-removal issue arose early in the First Congress, which in its famous Decision of 1789 bowed to the views of the administration. As Washington saw the matter, executive underlings properly answered to him. "The impossibility that one man should be able to perform all the great business of the State, I take to have been the reason for instituting the great Departments, and appointing officers therein, to *assist* the supreme Magistrate in discharging the duties of *his* trust." Consistent with this understanding, Congress created the first cabinet departments via statutory language designed to concede the president's inherent and unilateral power to remove cabinet heads at will. As Madison explained,

> It is evidently the intention of the constitution, that the first Magistrate should be responsible for the executive department....
>
> The constitution affirms, that the executive power shall be vested in the President. Are there exceptions to this proposition? Yes, there are. The constitution says, that in appointing to office, the Senate shall be associated with the President. . . . Have we a right to extend this exception? I believe not. If the constitution has invested all executive power in the President, . . . the Legislature has no right to diminish or modify his executive authority.
>
> The question now resolves itself into this, Is the power of displacing [removing], an executive power? I conceive that if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws.

In keeping with this early understanding, John Adams dismissed Secretary of State Timothy Pickering in 1800 without asking the Senate's permission even though it was in session.[40]

The president's plenary power to remove heads of executive depart-

ments who served without term and answered to him under the opinions clause did not necessarily imply the same sweeping authority to remove all lower-ranking officials within executive departments, especially if Congress chose to give such officials fixed terms of office or some other statutory insulation. In general, Article II structured an executive-branch chain of command in which significant policy decisions rendered by lower-ranking officers had to be subject to presidential oversight and countermand,[41] but Congress might properly vest authority over truly technical issues of fact in experts immune from presidential reversal or reprisal. In no case, however, could Congress itself or the Senate in particular directly appoint such officers, or share in whatever removal power might remain in cases of malfeasance (apart from the Congress's power to impeach, and to legislate subject to presidential presentment).

Textually, Article II treated high-level executive and judicial appointments alike, yet Senate practice quickly distinguished between them, giving the president more leeway in choosing his executive deputies. By 1830, the Senate had defeated three Supreme Court nominations—the first in 1795, when it rejected John Rutledge, whom Washington had named to replace John Jay as chief justice—but had yet to turn down any of the much larger number of cabinet candidates.[42] This pattern made structural sense. Cabinet officials were part of the president's branch—secretaries who existed largely to help him carry out his responsibilities and answered directly to him under the opinions clause. A president could closely monitor these men and remove them at will; and no newly elected president would be saddled with his predecessor's picks unless he so chose. Article III judges would be independent officers in a separate branch that emphatically did not answer to the president. Nor could they be removed by him or by a new administration. For these lifetime posts, more Senate scrutiny was appropriate.

Heightened scrutiny was also appropriate in appointments implicating "family connection," as Hamilton/Publius explained in *The Federalist* No. 76. Although Washington never nominated even distant relatives, John Adams raised republican eyebrows when he proposed John Quincy as minister to Prussia. Superbly qualified for the position, young Adams eventually won Senate approval. When President Adams later nominated his son-in-law, William Stephens Smith, to various posts, senators closely reviewed the matter, rejecting Smith for one position and approving him for others.[43]

Although senators would have broad discretion to say no in the confirmation process, the president would enjoy several structural advantages

in the foreseeable give-and-take. A presidential nomination would define the agenda, forcing the Senate to consider not merely an abstract ideology but a flesh-and-blood person, with friends and feelings. Even if senators preferred someone else, they could not guarantee that the president would ever propose that person; indeed, senators who sank the president's first choice might face a worse (to them) candidate the next time around. Different senators might be at cross-purposes, making it difficult for the body to speak with one voice, as could the president. (Partially counterbalancing this dynamic, the Senate from its earliest days has tended to give special deference to the views of the two senators from the nominee's home state.)[44] When senators left for home, the president would stay put and could make interim recess appointments ensconcing his men in office, temporarily. The president's sweeping right to remove executive subordinates enabled him to expand various appointment opportunities at will, while the Senate lacked symmetric removal power. Congress by statute might even eliminate the Senate confirmation process in cases of "inferior Officers," who could be directly appointed by their respective superiors—courts, cabinet heads, and the president himself.[45]

Overall, Article II's vesting of such broad appointment and removal power in one man contrasted sharply with most state constitutions, which located far more power in the legislature or some subset thereof, and with the Articles of Confederation, which had vested these personnel decisions in a multimember, quasi-executive proto-Senate.

"as he shall judge necessary"

Article II concluded its roster of specific presidential powers and duties with language authorizing the chief executive to inform Congress periodically of the state of the union and recommend any measures he judged fitting; to convene Congress in emergencies; to receive foreign diplomats; to "take Care that the Laws be faithfully executed"; and to commission all executive and judicial officers. This catalogue of responsibilities envisioned the president as a generalist focused on the big picture. While Congress would enact statutes and courts would decide cases one at a time, the president would oversee the enforcement of *all* the laws at once—a sweeping mandate that invited him to ponder legal patterns in the largest sense and inevitably conferred some discretion on him in defining his enforcement philosophy and priorities. So, too, the president's responsibility to mull the state of the union as a whole and to offer any recommendation that he should "judge necessary and expedient" underscored the breadth