THE CONSTITUTIONAL ASPECT OF THE DEBATE
OVER JAY'S TREATY

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PREFACE

This study is intended to provide an in-depth account of the constitutional questions debated during the controversy over Jay's Treaty in 1795-1796. The primary objective is to show the significance of this aspect of the struggle over the treaty. The author feels that previous discussions on this formative event in the development of the American party system have tended to overlook the vital role of this split over constitutional interpretation that was involved. The general feeling shared by Federalists and Republicans that the other side were "anarchists" and "monarchists" was greatly enhanced during this debate when each thought that the other sought the destruction of the Constitution. From this, the author would make a further conjecture that this event, by the polarization resulting from its bitter atmosphere, tended to have a stagnating effect on the operation of a mature two-party system. Finally, it will hopefully be shown here that the Federalists considered themselves to be as much "republicans" as the Jeffersonian Republicans.

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CHAPTER I

INTRODUCTION

On March 7, 1796, Representative Edward Livingston of New York introduced the following resolution before Congress:

> Resolved, That the President of the United States be requested to lay before this House a copy of the instructions to the Minister of the United States, who negotiated the Treaty with the King of Great Britain, communicated by his Message of the first of March, together with the correspondence and other documents relative to the said Treaty.[1]

The resolution referred to the treaty negotiated by John Jay with the British, a treaty which was regarded by the more avid opponents of the Washington administration as a betrayal of American national honor by an overbearing President acting in partnership with a corrupt Senate. More, it was seen as an attempt to establish a despotic regime in America. For the next two months one of the most heated battles in American Congressional history occurred, containing intense debates over the powers of the President and the House of Representatives as they stood opposed on the prerogative of treaty-making. While the controversy over Jay's Treaty has been previously cited as the formative event in the development of the American party system, the significance of this conflict over the powers of the opposing branches of the federal government has never been fully acknowledged. Differences over the constitutional questions raised by Jay's Treaty have been mentioned as playing a role in this rift, but the division over foreign relations created by the treaty has previously been considered as the

determining factor. However, an examination of the debates in Congress over Jay's Treaty reveal that even more at issue was the definition of the powers of the President and the Congress as they stood opposed to each other on the creation and adoption of treaties in general.

In an article appearing in the William and Mary Quarterly over two decades ago, Joseph Charles identified the battle over Jay's Treaty as the event which marked the appearance of a mature party system in America. Citing its origins in the fight over Hamilton's fiscal policies during Washington's first administration, this embryonic party system, according to Charles, crystallized in the debates over the adoption of Jay's Treaty. As proof of his claim, Charles included analyses of roll-call votes in Congress which revealed that in 1790, only 42 percent of members of the House voted along party lines, while in the fight over Jay's Treaty, a total of 93 percent voted according to party persuasions. Stating that "the clash of their opposing views gave the most powerful stimulus to party division in this country that it had yet received,"[2] Charles found the source of this polarization in conflicting perceptions of the treaty itself. He believed the Republicans motivated by a desire to block passage of a treaty which sacrificed American national honor to British tyranny, which they believed would lead to the establishment of despotism in America. The Federalists were depicted as attempting to avoid at all costs a war with Great Britain which they felt would lead to the destruction of the American nation.[3]

Charles's ideas were expanded by William N. Chambers in a book published in 1963 entitled Political Parties in a New Nation. Chambers portrayed the Republicans as motivated by a sense of mission to defend the American republic against British tyranny. Depending upon the

rallying of public opinion against the Federalists to establish their position, the Republicans thereby established a more effective party organization at the grass-roots level. According to Chambers, this accounted for the eventual eclipse of the Federalists by the Republicans.[4]

In 1972 Richard Buel's Securing the Revolution: A Study of Ideology in the 1790's appeared. In this book Buel mentioned the significance of the constitutional aspect of the struggle over Jay's Treaty in Congress. He noted the conflict over the roles of the executive and legislative branch in the making of treaties as a facet of the split over the definition of republicanism in America. Still, he placed primary emphasis on the perception of foreign relations implicated in Jay's Treaty as the main element in the argument. Buel believed the Federalists were acting out of an extreme fear of war with Great Britain, hoping that the document would allow the United States to remain in peace long enough to build its economy.

The Republicans, Buel continued, had no fear of war with Great Britain. The power of the federal government, along with the rallying of public spirit that an attack by Britain would create, would unite the American nation into a formidable force which a country that was losing a war with France could not defeat. A war with France was perceived as likely to cause a popular revolt. But the real danger was not from the public. It was from the administration, which by seeking an alignment with the British monarchy appeared to be taking the first step toward establishing a similar form of government in America.

According to Buel, then, both the Federalists and Republicans were "strongly inclined to see the sinister effects of foreign influence in

those who thought differently."[5] By seeking a corrupt alliance with Great Britain, Federalists were perceived as "monarchists." By desiring to be aligned with revolutionary France, Republicans were regarded by their opponents as "anarchists."[6]

Yet there was more behind these charges than attitudes toward foreign policy. The Federalists regarded the Republicans as anarchists also for attempting what they saw as an usurpation of the treaty-making powers of the President by the House of Representatives. The Republicans, likewise, viewed the Federalists as "monarchists" for apparently seeking to allow the President to seize the legislative powers of the House through the misuse of his power to make treaties. Thus the fear that each side sought the destruction of the American republic was based to a considerable extent on a conflict over the interpretations of the power of the President and Congress under the Constitution of the United States.

FOOTNOTES

[1]Annals of Congress (Washington, D. C.: Gales & Seaton, 1855), 4th Congress, 1st Session, 1795-1796, p. 426.

[2]Joseph Charles, "The Jay Treaty: The Origins of the American Party System," William and Mary Quarterly, 3rd series, XII (1955), p. 612.

[3]Ibid., pp. 585, 583, 612-614, 593-594, 600-609.

[4]William N. Chambers, Political Parties in a New Nation (New York: Oxford, 1963), pp. 91, 80, 85-86.

[5]Richard Buel, Securing the Republic: A Study of Ideology in the 1790's (Ithaca: Cornell University Press, 1973), p. 52.

[6]Ibid., pp. 69-70, 66-68, 70-71.

CHAPTER II

THE JAY TREATY

Jay's Treaty was conceived out of a desire to solve two problems plaguing the new American nation: continued attacks upon American shipping by the British fleet; and matters left unsolved by the Peace Treaty of 1783 with the former mother country. Specifically, these problems involved the continued occupation of forts in the Northwest Territory by the British, debts owed by American citizens to British creditors, and compensation to slaveowners who had lost slaves during the Revolutionary War by British capture. The immediate event which brought the situation to a volatile point was the increasing British disregard for American neutral rights at sea following the Orders-in Council of June 8, and November 6, 1793. Conducting an all-out war against revolutionary France, Britain used its control of the seas to block American trade with the French. United States' cargoes of food-stuffs and naval stores bound for France were defined by the Orders-in Council as contraband subject to seizure, and were being confiscated without compensation by His Majesty's Fleet. If this was not enough injury, further insult was supplied by the British resort to the much-resented practice of impressment of American seamen.

When the Third Congress convened in January of 1794, members proposed measures to end this harassment. On January 3, James Madison introduced a set of resolutions aimed at striking a blow against British

commerce in the United States. Calling for higher import duties on the products of nations which had no commercial trade treaty with the United States,[1] Madison's resolutions signaled the appearance of an organized alternative plan to that of the administration. In essense, it marked the beginning of the American political party system.[2]

Measures calling for even stronger action subsequently appeared in the form of military establishment and naval armament bills throughout the next six weeks while Madison's resolutions were vigorously debated. Support for military preparation was bolstered by the news of Indian uprisings on the western frontier, which were presumably stirred up by the British. Separate bills were introduced during the last week of March and first week of April calling for a national embargo, sequestration of American debts to British creditors, and finally, non-intercourse with Great Britain as further deprivations of American commerce mounted. Although the sequestration measure failed, Congress approved and later extended an embargo of one month's duration and also implemented non-intercourse toward Great Britain.[3]

President Washington realized that this action on the part of the House suggested the necessity of strong initiatives of his own. For one thing, this attempt to extend their power of regulating commerce to international relations seemed to constitute an encroachment upon the treaty-making power of the President.[4] It was the conflict over this prerogative that formed the nucleus of the ideological debates over the constitutionality of Jay's Treaty. House Republicans contended that the right of that body to regulate commerce gave it authority to have a voice in the approval of the treaty, since it contained articles relative to American commerce. Washington and the Federalists

maintained that the power of treaties by necessity superseded that of ordinary legislative authority, and that the prerogative of making treaties resided in the executive branch of the government alone, subject to the approval of the Senate only.

It is interesting to note here that both parties seemed to contradict their earlier views concerning construction of the Constitution. The Federalists, who had previously utilized a loose construction of the Constitution in claiming the existence of broad prerogatives given to the federal government, now invoked a strict constructionist posture in defining exactly the powers of the legislative and executive branches. They maintained that the House was attempting to exceed its delegated authority by violating the expressed powers of the President. The Republicans, who had virtually based their existence on a philosophy of limited government clearly defined by the Constitution, contended for a broad interpretation of the powers of the legislative body in asserting its prerogative in all matters that touched upon is implied powers in any form. This was a point of departure for the Federalists and Jeffersonian Republicans from a common source -- a belief in republican government. Differing interpretations of the same ideal led them to opposite conclusions. The Federalists considered themselves to be republicans as much as the Jeffersonians did. To regard the Jeffersonians as the sole spokesmen of republican philosophy in the United States is to accept their side of the argument. Because most people did come to accept their view, the Jeffersonian party eventually prevailed.[5]

Seeking to maintain the prestige of both his office and his country, Washington appointed John Jay as Plenipotentiary Extraordinary

to Great Britain on April 11, 1794, an appointment that the Senate confirmed on April 29. Yet this selection of Jay was not without controversy. Because he was serving as Chief Justice of the Supreme Court at the time, Jay's capacity in this mission was constitutionally suspect. (Article III of the Constitution, which provides for an independent judiciary, was believed by some to be violated here.) This circumstance later gave weight to charges made by the administration's foes that the treaty was the result of a Federalist conspiracy.

Secretary of State Edmund Randolph drew up instructions for Jay on May 6. Containing strong imperatives, Randolph's instructions ordered Jay to push uncompromisingly for recognition of American neutrality and for evacuation of British forts in the Northwest. The Secretary of State believed that the sovereignty of the United States had been violated repeatedly, and he could tolerate no more. The protection of American commerce and compensation for previous violations were given primary emphasis. Randolph stipulated that the settlement of issues left unsolved by the Treaty of 1783 were not in any way to lead to a compromise on American rights at sea:

> Compensation for all the injuries sustained, and captures, will be strenuously pressed by you. . . . but you will consider the inexecution and infraction of the treaty as standing on distinct grounds from the vexations and spoliations: so that no adjustment of the former is to be influenced by the latter.[6]

Randolph instructed Jay to consult with the ministers of Russia, Denmark, and Sweden in London, on the possibility of the United States joining those nations in the Leage of Armed Neutrality if he could not secure recognition of American neutrality on his own. Randolph was convinced that "The principle of armed neutrality would abundantly

cover our neutral rights,"[7] if all other diplomatic overtures failed. Whether or not this threat would have secured American neutral rights was never demonstrated, because Jay failed to mention it to the British Foreign Secretary with whom he negotiated. Even if he had, it would have had little force because Alexander Hamilton had previously informed the British through their American ambassador that the United States had no real intention of joining the League of Armed Neutrality. Samuel Flagg Bemis condemned this action of Hamilton as the main reason for the weakness of Jay's Treaty in obtaining American rights.[8] Others, such as John C. Miller, stated that such a suggestion on the part of Jay in London would have caused the British to send him home.[9]

A commercial trade treaty was suggested as desirable only if neutral rights were secured. Obviously an agreement to conduct trade without recognition of its legality was of questionable value. In addition, Randolph also stipulated that such a commercial pact between America and Britain should contain free trade with reciprocity and the opening of the British West Indies to American ships. By admitting that such liberal concessions were unlikely to be granted by Great Britain, and at the same time maintaining their existence as necessary conditions for a commercial pact, Randolph was in essence expressing the unlikelihood of acquiring a trade treaty. Jay was told quite clearly that "if a treaty cannot be formed upon a basis as advantageous as this, you are not to conduct or sign any such."[10] In closing, Randolph granted Jay a certain amount of discretion in following these guidelines, with the specific exception that "the Government of the United States will not derogate from our treaties and engagements with France."[11] This condition acquired significance in the following year with the dislosures

of Randolph's intrigue with a French agent.

Jay arrived in London on June 8, 1794, and held his first session with Lord Grenville, the British Foreign Secretary, a few days later. Negotiations between the diplomats proceeded smoothly, perhaps because Jay retreated considerably from the stern orders which Randolph had given him. What remained unproven was whether these objectives could have been achieved, as the Republicans thought, with a stronger amount of determination on the part of Jay. In a letter to the Secretary of State in July, the envoy explained that although Lord Grenville had taken a conciliatory tone in conducting negotiations, the British Foreign Secretary nonetheless remained firm in his position. From this situation, Jay concluded no grave concessions could be expected. As he saw it, there were simply too many obstacles preventing fulfillment of Randolph's instructions. While he was not totally dismissing the possibility that considerable reconciliation could be achieved, Jay stated that he was, nonetheless, "not sanguine in my expectations."[12] It was his opinion that Britain would not yield to the degree required to provide such satisfaction. The British were not negotiating out of a desire to serve American national interest; they were doing so in order to enhance their own position, just as any country would.

The treaty formally signed by Jay and Lord Grenville on November 19, 1794, revealed a considerable amount of yielding on the American side. The main point which Randolph intended Jay to bargain for, recognition of American neutral rights, was conspicuously missing. No guarantee against impressment was mentioned, and Article 18 even went so far as to enumerate items that would be considered as contraband and subject to British seizure -- in other words, future spoliations were

provided for! Although idemnification was stipulated, it did not justify acquiescence to the violation of national honor. Compensation for previous spoliations was provided for, but was to be adjudicated by a joint commission of both nations. British evacuation of the Northwest forts was included, but with a liberal time allotment of eighteen months. Even more disturbing than this delay was the retention by the British of the rights to continue participation in the fur trade in the area and to navigate the Mississippi River. And Americans had to honor their prewar debts with British creditors, a matter which would be worked out by a joint commission similar to the one settling cases of spoliations.

As compensation for these concessions by the United States, the treaty offered a weak commercial agreement. Trade with the British West Indies was opened by Article 12 to American ships of seventy tons or less -- a condition meaning that nothing bigger than a fishing boat would be allowed to enter -- which in effect rendered it a worthless concession. A one-sided trade agreement between the two nations was included which gave Britain most favored nation status without reciprocity. (British ships were given free trade rights in American ports, while American ships in British ports remained subject to duties.)

A particular stipulation of the trade agreement which caused considerable resentment in the South was the prohibition against the export of American cotton. When Eli Whitney's cotton gin appeared right after the signing of the treaty, a product which promised to become a staple of the southern economy was greatly hindered in its development. Another injury to the South was the failure to secure any compensation

for slaves captured previously by the British. The only advantage on the American side of the trade treaty was the opening of the East Indies to American ships with no restrictions.[13]

Attempting to justify his efforts, Jay wrote approvingly of the treaty in a letter to Oliver Ellsworth on November 19:

> . . . In my opinion we have reason to be satisfied. . . . Further concessions on the part of Great Britain cannot, in my opinion, be attained. The minister flatters himself that this treaty will be very acceptable to our country, and that some of the articles in it will be received as unequivocal proofs of good will.[14]

Anticipating hostility from Randolph, Jay wrote the Secretary of State a letter explaining the treaty point by point, which sounded at times almost apolegetic: "The 12th article . . . affords occasion for several explatory remarks."[15]

Randolph indeed became enraged over the terms of the treaty and ultimately denounced it and its perpetrators. But his denunciation came almost a year later, following the arrival of the treaty in the United States, its approval by the Senate, the mass outrage when the terms became known to the public, and Randolph's resignation at Washington's request.

The document arrived in America in March, 1795. Washington waited until June to call the Senate into special session to ratify, being unimpressed by the treaty. Assembling on June 8, the Senate granted ratification on June 24 by a vote of 20-10, the bare margin necessary for passage. But even this was not accomplished without the striking of Article 12 (the commercial trade agreement which included restricted trade with the West Indies and forbade the export of American cotton).[16] Conducted in closed session, the Senate records contain no lengthy

ideological debate. It would be left to the House of Representatives in the debates of March and April of 1796 to bring forth spirited discussions on the constitutional questions raised by passage of Jay's Treaty.

On June 30, the terms of the treaty became public, one day prior to its official release. Senator Stevens Thomson Mason of Virginia, a staunch Republican foe of the treaty, had given a copy to the editor of the newspaper Aurora which had printed the articles of Jay's Treaty in its June 30 edition. Upon discovering the weak position of the United States, a considerable proportion of the American population became outraged at John Jay and his treaty. Anti-treaty demonstrations were held, Jay was burned in effigy, and mobs roamed the street chanting "Damn John Jay! Damn anyone who won't damn John Jay!"[17] The popular conception of Jay's Treaty was that it was a Federalist plot to sell out the United States to Britain, in order to create a monarchy here. In time, this suspicion would lead to the decline and eventual extinction of the Federalist party on the national level.[18]

Washington, meanwhile, was still unsure whether the treaty merited his signature. He believed that the elimination of Article 12 by the Senate perhaps nullified the entire document. Seeking advice, the first President conferred with his entire Cabinet, and also with the prominent former Cabinet member, Alexander Hamilton. Hamilton, whose letters written under the name "Camillus" would later provide the best ideological defense of Jay's Treaty, gave Washington an unenthusiastic endorsement of the treaty in a reply dated July 9, 1795. A lengthy exposition discussing the pros and cons of each article, Hamilton's response recommended approval of the treaty on the grounds that it was

better than its alternative -- war. Left alone in peace, Hamilton believed that the United States could develop its own economy enough to assert its national prestige abroad.[19] But stable relations abroad were a prerequisite to domestic development. This was the essence of Hamilton's foreign policy, as he had explained some years earlier at the Federal Convention: "No Government could give us tranquillity & happiness at home, which did not possess sufficient strength to make us respectable abroad."[20]

Recommendations of approval were also given by all the Cabinet, except Edmund Randolph. The Secretary of State denounced the agreement as a total sacrifice of American national honor and a submission to British tyranny. He suggested scrapping the treaty and undertaking new negotiations, convinced that the passing of time alone would put the United States in a more favorable bargaining position. Randolph ended with a prophetic warning: "If this order be tolerated while France is understood to labour under a famine, the torrent of invective from France and our own countrymen will be immense."[21]

None of these communiques resolved Washington's dilemma about the treaty. As late as July 22, he expressed the opinion that he did not feel the treaty secured the proper advantages of the country, but that it was better to acquire any agreement rather "than to suffer matters to remain as they are, unsettled."[22] Washington's mind was soon cleared of doubt following disclosure of two significant events. First was the discovery of the new British Order-in-Council of April 25, 1795, which amplified the previous Orders of 1793. Suspecting that this was a British attempt to urge American ratification of the treaty, Washington mistakenly believed that implementation of the treaty would

suspend operation of the new Order-in-Council. In fact it did not, owing to Article 18 which defined contraband and submitted it to seizure by the British.[23] The second event prompting Washington's approval was the revelation of Edmund Randolph's intrigue with a French agent, Fauchet, to influence American officials. Randolph's previous denunciations of the treaty for its injuries to France thus became suspect.

Washington gave his signature to Jay's Treaty on August 14, 1795. On August 18, it was proclaimed the law of the land. The President asked Randolph for his resignation and received it on August 19. This set the stage for the bitter struggle in Congress the following spring.

The discussion in Congress on the terms of the treaty centered around the perception of how much success it achieved in securing the proper advantages by the United States in relation to Great Britain. Accordingly, the Federalists saw it as successful in this endeavor, while the Republicans viewed it as a dismal failure. Madison opened the proceedings with a sharp speech critically analyzing every article. He suggested three criteria to serve as guidelines: how it related to (1) the Peace Treaty of 1783; (2) the law of nations; and (3) the advantages rendered to American commerce. He asserted that the treaty fell woefully short of measuring up to acceptable standards in all three categories. Madison denounced Jay's Treaty as a one-way agreement in Britain's favor in each category. For example, no compensation was made for slaves captured by the British during the Revolutionary War, while Americans were obliged to honor prewar debts to British creditors. Madison found the time allotment of eighteen months given the British to evacuate forts in the Northwest too liberal. What he found even more repugnant was the retention of the right to participate in the fur

trade by the British in this area, for he suspected this would enable them to dominate that trade. In regards to the law of nations, the treaty was a total sacrifice of American national honor in a prostration to British sovereignty. Madison considered the granting of most favored nation status to Great Britain without reciprocity a pitifully poor bargain, while the surrender of American rights by allowing United States cargoes to be seized as contraband embodied a gross violation of the law of nations. He denounced the limited trade with the West Indies provided by Article 12 as rendering the whole treaty worthless by failing to gain the major object for which a commercial agreement with Great Britain was desired -- full trade in the West Indies with reciprocity. Altogether, the treaty should be rejected, and he saw no reason to conclude that this action would result in a war with Great Britain, as claimed by the Federalists in a final argument to persuade Republicans to approve the treaty.[24]

Zephaniah Swift of Connecticut replied to Madison's denunciation of the treaty in a speech which followed the form of his opponent's, with the exception that the conclusions the Federalists drew from analyzing the document were exactly opposite. Swift contended that the provisions of the treaty were adequate when realistically considered in their proper contest. Specifically, he pointed out that the Peace Treaty of 1783 had promised no compensation for Negroes, while the payment of debts to British creditors was a legal obligation under that treaty. In any event, the matter of debts was balanced by a concession in America's favor to surrender the forts in the Northwest. Swift ridiculed the assumption that adequate compensation seizures was not provided for. He praised the joint commission set up by the treaty to

settle these claims as an honorable body, sure to adjudicate claims in an equitable manner. The opening of trade with the East Indies, which the Republicans glossed over in their criticisms, was cited as a major advantage rendered by Jay's Treaty. Going beyond the contention that this privilege offset the disagreeable arrangement with the West Indies, Swift questioned the legality of the American claim to unrestricted trade with these islands. Article 12 was thus defended as just and proper. The failure to secure the right to sequester American debts owed to British creditors was no real loss. Knowing that they were safe from this threat, British creditors would feel more disposed toward extending credit to the United States, a great advantage to this country. Further, he saw no violation of the law of nations in stipulating what articles were to be regarded as contraband, contending that nations held the right to determine that between themselves. In concluding, Swift envisioned terrible calamities (loss of trade, Indian uprisings, increased violations of American commerce, and eventual war with Britain) that would befall the United States if the treaty were rejected. Survival of the republic itself mandated approval of Jay's Treaty.[25]

The Federalists would go on to denounce Republican opposition to Jay's Treaty for the internal disruption they believed it would cause. Indeed, this was stressed more than the international aspect. The Republicans insisted just the opposite: approval of the treaty would result in domestic havoc. Many, such as Edmund Randolph, thought that it would lead to despotism in America.

The former Secretary of State denounced Washington as a tyrant attempting to establish a monarchy. In this regard, Randolph was not

alone. Many saw the President as a corrupt despot who had sold out the country. Others saw him merely as the head of the Federalist party, working for the advancement of that group at the expense of the national interest. The emerging leader of the anti-administration forces, Thomas Jefferson, expressed his opinion in a letter to James Madison on September 21, 1795:

> A bolder party-stroke was never struck. For it certainly is an attempt of a party, which finds they have lost their majority in one branch of the legislature, to make a law by the aid of the other branch & of the executive, under the color of a treaty, which shall bind up the hands of the adverse branch from ever restraining the commerce of their patron nation.[26]

Madison had previously expressed similar opinions in a dispatch to Robert Livingston on August 23, declaring that the whole episode demonstrated that the Federalists were nothing more than "a British party systematically aiming at an exclusive connection with the British government & ready to sacrifice to that object as well the dearest interests of our commerce as the most sacred dictates National Honour."[27] The Federalists were viewed as a group of Anglophiles who wished to draw the United States into partnership with Great Britain to restore monarchy in America. Opponents of Jay's Treaty also found the conception and essence of the treaty itself to be unconstitutional. House Republicans led the fight against Jay's Treaty as a crusade to protect the people's liberties against what they perceived as an effort by the Federalists to establish tyranny in America by transferring the powers of the House to the President.

Both the Federalists and the Republicans adopted their respective stance toward Jay's Treaty largely from a belief that the opposition

would lead to the destruction of the American republic by subverting the Constitution. At the base of this divergence lay essentially differing notions of the concept of republican government.

FOOTNOTES

[1]Annals of Congress, 3rd Congress, 1st Session, 1793-1795, pp. 155-156.

[2]Charles, "Jay Treaty," p. 585.

[3]Annals of Congress, 3rd Congress, 1st Session, 1793-1795, pp. 483-485, 500-501, 411, 529-530, 535, 566, 563, 596-597.

[4]Henry Jones Ford, Washington and His Colleagues: A Chronicle of the Rise and Fall of Federalism (New Haven: Yale University Press, 1921), p. 154.

[5]Robert E. Shalhope, "Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography," William and Mary Quarterly, 3rd series, XXIX (1972), p. 73.

[6]American State Papers: Foreign Relations, ed. Walter Lowrie and Matthew St. Clair Clarke (Washington, D. C.: Gales & Seaton, 1833), I, pp. 472-473.

[7]Ibid., p. 473.

[8]Samuel Flagg Bemis, Jay's Treaty: A Study in Commerce and Diplomacy (New York: Macmillan, 1923), pp. 246-248, 269.

[9]John C. Miller, The Federalist Era (New York: Harper & Row, 1963), p. 165.

[10]American State Papers: Foreign Relations, I, p. 473.

[11]Ibid., p. 474.

[12]Ibid., p. 481.

[13]Treaties and Other International Acts of the United States of America, ed., Hunter Miller (Washington, D. C.: U.S. Government Printing Office, 1931), II, pp. 258-259, 249-253, 246-249, 254-255, 257-258.

[14]The Correspondence and Public Papers of John Jay, 1763-1826, ed. Henry P. Johnston (New York: DeCapo, 1971), IV, pp. 132-133.

[15]Ibid., pp. 138-144.

[16]Annals of Congress, 3rd Congress, 1st Session, 1793-1795, pp. 859-863.

[17] Richard Hofstadter, The American Republic (Englewood Cliffs: Prentice Hall, 1970), I, p. 285.

[18] Chambers, Political Parties in a New Nation, p. 86.

[19] The Papers of Alexander Hamilton, ed. Harold C. Syrett (New York: Columbia University Press, 1973), XVIII, pp. 404-454.

[20] The Records of the Federal Convention, ed. Max Farrand (New Haven: Yale University Press, 1966), I, p. 467.

[21] W. C. Ford, "Edmund Randolph and the British Treaty of 1795," American Historical Review, XII, No. 3, pp. 592, 596-597, 599.

[22] The Writings of George Washington, ed. Jared Sparks (Boston: Ferdinand Andrews, 1859), XI, p. 36.

[23] Josiah T. Newcomb, "New Light on Jay's Treaty," American Journal of International Law, XXVIII, Sec. 1, pp. 685, 689.

[24] Annals of Congress, 4th Congress, 1st Session, 1795-1796, pp. 976-987.

[25] Ibid., pp. 1018, 1024.

[26] The Writings of Thomas Jefferson, ed. Andrew A. Lipscomb (Washington, D. C.), pp. 310-311.

[27] The Writings of James Madison, ed. Gaillard Hunt (New York: G. P. Putnam's Sons, 1910), VI, p. 236.

CHAPTER III

AMERICAN REPUBLICANISM

American republicanism had its roots in the dissenting English Whig tradition which developed in the seventeenth century in opposition to the tyranny of the Stuarts. In essence, that philosophy regarded political life as a continual struggle between the people and their rulers. It was the natural inclination of those in power to seek augmentation of their authority by encroachments upon the rights of the people. Therefore the people must always be on guard to protect their rights against the tyranny of their rulers. Since this struggle between rulers and the ruled was a fact of life, the only way a free society could be established was to give power to the people. But even this was not enough. The people could become tyrannical themselves through the abuse of freedom. Wherever power resided there was danger it would be misused. This facet of republican philosophy played an essential role in the development and application of republicanism in America.

Anarchy, the result of unrestrained freedom, was a situation no more desirable than the tyranny of a single despot. To ensure the preservation of popular government the people had to possess a sense of public virtue. Virtue came to be regarded as the cornerstone upon which republican government was founded. When virtue ceased to exist, republics withered and died. Examples of classical antiquity furnished reminders of this fact, the ancient republics of Greece and Rome having

decayed because they had become corrupt.

In the eyes of American colonists, England in the latter half of the eighteenth century appeared to be in the same condition. There, the growth of wealth had given rise to an elite group which used its monetary influence to corrupt the officers of government. This influence resulted in an arbitrary and capricious administration motivated by the consolidation of personal gain. It was as if a conspiracy existed to drain the people of their rights by an elite group attempting to enhance its own position.[1]

Convinced that England was so corrupt as to be beyond hope of reform, colonists decided that the only recourse left for them was to rebel against the mother country. This was not a sudden impulse, but a well-considered plan of action. In a sense, it was justified by the notion that it was England that had broken away from the colonies by violating the constitution. The colonists believed that "they revolted not against the English constitution but on behalf of it."[2]

With this legacy, Americans naturally attempted to establish republican government, believing it to be the only desirable kind.[3] The Revolutionaries recognized that representation was the very foundation of republican government, and that elected representatives must serve the interests of the people. In order for the representatives to remain guardians of the public liberty a bond of interests had to be maintained. Whenever any official became detached from the public interest, the people's rights were subject to his personal disposal. The machinery of election provided the remedy of republican government -- any time a representative betrayed the public trust he could be voted out of office.[4]

This concept of the proper role of the representative antedated the Revolution. Indeed, Americans before 1776 increasingly believed that elected representatives should be guided by the expressed desires of the people themselves. Although some subscribed to Edmund Burke's theory of the representative as a trustee, whereby the legislator followed the discretion of his own conscience rather than the direction of popular opinion, most did not. Whenever the representative removed himself from the desires of the people, the colonists felt that the people's interests were betrayed. This conviction was intended when the British claimed that Parliament "virtually" represented the colonists. In this context Americans overwhelming rejected the corollary of Burke's theory that the representative should act in the interest of the nation as a whole rather than merely as an agent of the particular constituency that elected him. Colonists insisted that if the delegate did not represent his constituency, the people's interests were not served. A representative had to be chosen by the people and remain responsive to their needs and wishes to fulfill his role properly.[5] These conflicting theories of representation played a vital role in the development of the split between the colonies and the mother country. Regarding the directives from London as becoming increasingly hostile to their interests, colonists cited the fact that they chose no members of Parliament as proof that they were not represented in the British government. Thus when Americans broke away from Britain, they were determined to have representatives whom they elected directly and who remained responsive to their will.[6]

This commitment to representation resulted logically from the distrust of the magistrate which had developed under the arbitrary rule of

the royal governors. When Americans went about setting up new state governments after 1776, the executive branch was either severely limited, as in the majority of state constitutions, or nonexistent, as in the national government under the Articles of Confederation. In all but three states, governors were chosen by the legislature, as were the executive councils, which provided a further check on the governors. The governor had no control over legislation; the veto was not provided for. In effect, the executive became a mere figurehead. The result was that the legislature assumed all the practical powers of government.[7]

In the 1780's, this concentration of power in the legislature created its own problems which provided fresh demonstration of the old Whig doctrine that danger of tyranny existed from wherever the base of power resided. Inexperienced legislators passed ill-conceived laws prompting widespread criticism. "The True Republican" in the December 1, 1785, edition of the Boston Independent Chronicle, attributed the fall of the ancient cities of Carthage and Athens to the abuses of their legislatures.[8] Thomas Jefferson after his term as governor of Virginia remarked bitterly that "an elective despotism was not the government we fought for."[9] Accordingly, his draft of a new constitution for Virginia in 1783 included a strong insistence upon the principle of separation of powers, so that one branch would not consolidate all authority in itself.[10] James Madison felt that the stalemate of the 1780's in the Virginia legislature was due largely to the quabbling over local interests which dominated the proceedings of that body. In his "Observations on Jefferson's Draft of a Constitution for Virginia," Madison complained of legislators who "are everywhere observed to lose sight of the

aggregate interests of the community, and even to sacrifice them to the interests or prejudices of their respective constituents."[11] Thus to Madison, it was imperative for the representatives to be guided by a stronger discretion in favor of the interests of the community as a whole, rather than by the mere dictates of the people who elected them. Although drifting toward the "trusteeship" notion of representation, Madison was not suggesting that the representatives should ignore the interests of the people. Rather, it was by rising above this regional particularism that the interests of the people would best be served, for "in general, these local interests are miscalculated."[12]

Madison made even harsher criticisms of the legislature five years later at the Federal Convention: "Experience in all states had evinced a powerful tendency in the legislature to absorb all power in its vortex. This was the real source of danger to the American constitutions."[13] To Madison, the proper remedy which he proposed for the federal government was an independent executive and senate with the powers necessary to offset the usurping tendencies of the legislature. "The most effectual remedy for the local bias is to impress on the minds of the senators an attention to the interests of the whole society by making them the choice of the whole society."[14] In "Observations" he found even his fellow Virginian's new proposals too lacking in the powers granted to the executive and the senate.[15] At the Federal Convention, in The Federalist, and at the Virginia Ratifying Convention, Madison would propose and defend the concept of a powerful executive and senate, particularly the latter. He regarded the Senate as outlined in the Federal Constitution to be a particularly vital element in stabilizing the new government. Seeing its value in providing a check

against the abuses of the legislature, Madison stated that "It doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one, would otherwise be sufficient."[16]

While he believed in an executive with stronger authority than those which existed in the state constitutions, Madison did not share the idea to the extreme that Alexander Hamilton did. At the Federal Convention, Hamilton argued in favor of a president for life, feeling that such an official would prove to be even more judicious in office than one removed by election.[17] Madison, however, expressed an earnest desire to keep the President a limited official. In reply to a proposal to grant broad powers to the executive, he countered that "a definition of their extent would assist the judgment in determining how far they might be safely entrusted to a single officer."[18] The man known as the Father of the Constitution remarked later at the Federal Convention "the utility of annexing the wisdom and weight of the judiciary to the Executive seemed incontestable."[19] And in Federalist 51, he dismissed criticism of the lack of an absolute presidential veto because "on extraordinary occasion, it might be perfidiously abused."[20]

If Hamilton did not get as powerful an executive as he proposed, he seemed at least satisfied with the office the Constitution provided for. Hamilton maintained that the President of the United States would be as much or more of a guardian of the people's liberties as the Congress, since he was chosen by all the people. At the New York Ratifying Convention, he stated that "the President of the United States will be himself the representative of the people." Acting in the best interest of all the people, the President would "be induced to protect

their rights, whenever they are invaded by the other branch."[21] Besides the President, Hamilton saw the Senate as providing a further check on the excesses of the direct representatives of the people. Owing to their larger constituency and indirect election, the Senate would be comprised of trustees who would follow their consciences in deciding in favor of the best interests of the people as a whole, rather than following the dictates of local prejudices. In the New York Convention, Hamilton described his perception of the role of the senator as being "an agent for the union, bound to perform services necessary to the good of the whole, though his state should condemn them."[22]

Remaining loyal to the hallowed Whig belief that the threat of tyranny existed from wherever the source of power resided, Hamilton suggested a remedy for the problem. Yet his remedy, a powerful chief executive, raised the specter of magisterial despotism. This paradox was rationalized by the Federalists, as Gordon Wood explains: "The Federalists, far from seeing themselves as rejecters of populism and the faith of 1776, could now intelligibly picture themselves as the true defenders of the libertarian tradition."[23]

The basis of the Federalist rationale in denying the dangers of a powerful national government was that this new American government, unlike any before, was founded by the people themselves. Any power which this government possessed was granted by permission of the people. It could not do anything which the people did not approve. This was in marked contrast to the government of England and elsewhere. There the power of government was not in the hands of the people but in the rulers. The history of mankind was one of a struggle by the people for liberty from their rulers. In the United States, this struggle was

eliminated. Here the people formed the base of power. This was the source of the Federalist's denial of the necessity of a bill of rights to the Federal Constitution. There was no need to deny government powers which it did not have, since those not expressly granted to it were retained by the people. The only way in which the proposed federal government could swallow the liberties of the people was for them to grant it the authority to do so. And to the Federalists, this danger existed in the form of representatives who would seize upon the popular passions to deceive the people into thinking that they were acting in the best interests of the public, when in reality they were only serving their own personal ends. In an essay entitled "Vices of the Political System of the United States," Madison expressed a fear of the "unenlightened representative . . . , veiling his selfish views under the professions of public good, and varnishing his sophistical arguments with the growing colours of popular eloquence."[24]

The Federal Constitution, then, provided a remedy for this situation by protecting the people against themselves. Again, Wood describes it aptly:

> To the Federalists the greatest dangers to republicanism were flowing not, as the old Whigs had thought, from the rulers or from any distinctive minority in the community, but from the widespread participation of the people in the government . . . . They did not see themselves as repudiating either the Revolution or popular government, but saw themselves as saving both from their excesses.[25]

Federalism was conceived in essence to be republicanism. Popular government was hereby established on a basis that would guarantee its survival.

Anti-Federalist critics of the Constitution were not persuaded by this logic. To them, the Constitution seemed to create a government

dangerously centralized in the hands of powerful officials. Richard Henry Lee attempted to inform his fellow citizens of this danger in the "Letters of a Federal Farmer" which explained his reasons for not accepting the Federal Constitution. Lee, who had been invited to attend the Convention and declined the offer, saw the Federalists themselves as acting upon the popular feelings of the time to further their own ends. To Lee "this very abuse of power in the legislature, . . . has furnished aristocratical men with those very means, with which, in great measure, they are rapidly effecting their favourite object."[26]

To the Anti-Federalists, the American people were presented with a chance to establish a free society and were here throwing the opportunity away if the Federal Constitution were adopted. There was no reason to believe that this system would produce leaders who would respect the rights of the people. Rulers, elected or otherwise, naturally tended toward the aggrandizement of power. At the Virginia Ratifying Convention, Patrick Henry dismissed as an illusion the notion that the people remained the repository of power after turning it over to powerful officials:

> They say that every thing that is not given is retained. The reverse of the proposition is true by implication . . . . Implication, in England, has been a source of dissension. There has been a war of implication between the king and people. . . . The people insisted their rights were implied; the monarch denied the doctrine.[27]

Anti-Federalists were appalled by the powerful President and Senate provided for in the Constitution, because this was so contradictory to the Whig distrust of magistrates. Although the legislature itself was not above reproach, it nonetheless was the people's check on the abuses of the superior branches. It was from these that the greatest danger of tyranny existed, not from the popular branch, as the

Federalists claimed. Richard Henry Lee found if violative of the "fundamental truth" of the concept of balanced government that "in the new constitution, the president and senate have all the executive and two-thirds of the legislative [powers]."[28] These officials were seen as posing the greatest threat to the preservation of liberty; such unlimited authority concentrated in this elite cadre provided the framework for an aristocratic despotism. At the Virginia Convention, Patrick Henry declared that "Your president may easily become king." He found the Senate so constructed that a "very small minority, may continue forever unchangeable this government."[29]

Nor was Henry alone. Several other prominent residents of the Old Dominion thundered against the Federal Constitution with matching eloquence. George Mason, who served as a delegate to both the Federal Convention and the Virginia Ratifying Convention, wrote a brief but brilliant denunciation of the proposed Constitution entitled simply "Objections to the Federal Constitution." Edmund Randolph, who served as a delegate to the Federal Convention also, and was Secretary of State when Jay's Treaty was made, wrote a harsh letter denouncing the Federal Constitution. In general, both of these expressed a strong fear of the powerful President and Senate which the Constitution provided for.[30]

One aspect of the powers granted these offices which was particularly feared was the extensive treaty-making power they were given. This was seen as providing a blueprint for the usurpation of all the powers of government by the President and Senate. These aristocratic elements could manipulate the government to suit their personal ends under the guise of pursuing the national interest. "By declaring all

treaties supreme laws of the land," George Mason declared, "the executive and the Senate have, in many cases, an exclusive power of legislation." Mason felt that this could have been avoided, however, "by proper distinctions with respect to treaties, and requiring the assent of the House of Representatives, where it could be done with safety."[31]

Madison had expressed a similar desire for a legislative check on treaties at the Federal Convention, although he distinguished between different kinds of treaties. Madison suggested "allowing the President & Senate to make Treaties eventual and of alliance for limited terms -- and requiring the concurrence of the whole Legislature in other Treaties."[32] Later on at the Convention, he again expressed a strong desire to keep the President a limited official, especially in regard to making treaties. Presenting a motion to allow authorization of treaties of peace by the concurrence of the two-thirds of the Senate alone, Madison explained that "the President would necessarily derive so much power and importance from a state of war that he might be tempted, if authorized, to impede a treaty of peace."[33] Yet at the Virginia Convention, he attempted to refute Mason's charges by defending the placement of treaty-making powers in the Senate and President. To Madison, the Constitution did not leave the President with unlimited discretion in the power of making treaties, for "were the President to commit anything so atrocious, . . . he would be impeached."[34] Through the power of impeachment, the House had an ultimate check on the treaty-making power.

Yet it was not just the power of the President and Senate to make treaties that bothered the Anti-Federalists; it was the force which the treaties themselves held under the Constitution. To them the words in

the Constitution declaring that treaties would be the "supreme law of the land" meant that treaties would be placed above all other legal authority in the country, including the Constitution itself. A treaty could thus be used not only to usurp the power of the legislature by superseding its previous enactments but also to destroy the whole government as provided for in the Constitution. By allowing an independent President and Senate to create treaties which knew no legal bounds, unthinkable horrors became imaginable. A delegate at the North Carolina Ratifying Convention expressed the fear that "by the power of making treaties, they might make a treaty engaging with a foreign power to adopt the Roman Catholic religion in the United States."[35]

Madison thus felt pressed at the Virginia Convention to assert the propriety of establishing treaties as the supreme law of the land. He contended that unless this was so, they were meaningless. A treaty by nature must have the authority to supersede legislation which stood in its way. An ordinary legislative act which conflicted with the terms of a constitutionally-made treaty was therefore nullified, "for where there is a power for any practical purpose, it must supersede what may oppose it, or else it can be no power."[36] In substantiating this point, Madison turned to an unexpected reference -- the English government. Quoting Blackstone's Commentaries, Madison cited the recognition of treaties made by the king as supreme law. This was claimed as proof that "if they are to have any efficacy, they must be the law of the land: they are so in every country."[37]

Yet this did not mean that the treaty-making power was unlimited in England or elsewhere. Reading further into Blackstone, Madison observed that there was a check on this authority of the king which was

vested in Parliament:

> And yet, lest this plentitude of authority should be abused to the detriment of the public, the constitution (as was hinted before) hath here interposed a check, by the means of parliamentary impeachment, for the punishment of such ministers as from criminal motives advise or conclude any treaty which shall afterwards be judged to derogate from the honor and interest of the nation.[38]

The obvious parallel Madison drew from this was that the power of impeachment vested in the House of Representatives provided a safeguard against the President and Senate from making treaties which violated the Constitution.[39]

The irony of using the king of England, from whose tyranny Americans had revolted, as a precedent for establishing an American chief executive was noted by Patrick Henry. Making reference to the comparison, Henry remarked "I will have no objection to this, if you make your president a king."[40] To Henry, the President provided for in the Federal Constitution was even more absolute in his authority to make treaties than was the king of England. The Anti-Federalist thought that a proper reading of Blackstone would "prove in a thousand instances, that, if the king of England attempted to take away the rights of individuals, the law would stand against him."[41] Yet no similar check could be found in the proposed Constitution. Saying that he had looked for such, Henry reported that his searches had been in vain.[42]

Nine years later, this unsolved dispute over the treaty-making power of the President and Senate and the role of the House in relation to them would explode over Jay's Treaty. The Republican opposition to Jay's Treaty revealed them as the successors of the Anti-Federalists. Indeed, the crux of their argument in claiming the right of the House to subject treaties to its approval was the distrust of the President

and Senate which had characterized Anti-Federalist opposition to the Constitution. Behind this was the belief that the House was the guardian of the people's liberties against the aristocratic upper branches of the government. An interesting addition to the Republican camp was James Madison, the man who had played such an instrumental role in the formation of the powerful federal government less than a decade earlier. Although he had previously viewed the people and their representatives as the greatest threat to the preservation of liberty,[43] Madison now saw the presidential office he helped create as posing that threat.

The Federalists wasted no time in charging Madison with betraying his own principles. Madison's reply to this charge was that his principles were now being twisted by unscrupulous men and carried to extremes he had never advocated. He contended that he was remaining loyal to his earlier Federalist statements in the face of their distortion. This was partly true, in that Madison had suggested the possibility of a legislative check on the treaty-making power of the President at the Federal Convention. But when he stated during the debates over Jay's Treaty in Congress that he believed the force of ordinary legislation to be equal to that of treaties, Madison flatly contradicted his earlier contention at the Virginia Convention that treaties were to be regarded as the supreme law of the land.

The battle over Jay's Treaty saw Alexander Hamilton arise as the ideological champion of Federalism. Hamilton remained true to the doctrine that the popular branch of government posed the greatest threat to liberty. The preservation of the republic depended upon shielding it from the frenzy of popular passions. The people, who did not always know what was in their best interest, needed the protection

of a strong President and Senate to reach decisions which would be in their true best interest. The uproar over a treaty the public did not properly understand would be used to the advantage of self-seeking representatives, unless the integrity of the upper branches of government was respected. Tyranny of the mob was as destrustive, of republican government, or more so, than aristocracy. And at that moment, Hamilton regarded the former as presenting the clearer danger. The popular element of the government had to be stopped from exceeding its constitutional authority, or the republic was doomed. Thus Hamilton embarked on a serious effort to persuade Republican members of the House of Representatives not to interfere with the treaty-making power of the President.

FOOTNOTES

[1]Bernard Bailyn, The Ideological Origins of the American Revolution (Cambridge: Harvard University Press, 1967), pp. 173, 183, 198, 201; H. Trevor Colbourn, The Lamp of Experience: Whig History and the Intellectual Origins of the American Revolution (Chapel Hill: University of North Carolina Press, 1965), pp. 67, 98; Gordon Wood, The Creation of the American Republic, 1776-1787 (Chapel Hill: University of North Carolina Press, 1969), pp. 18, 22, 23, 24, 34, 32, 40, 51.

[2]Wood, The Creation of the American Republic, 1776-1787, p. 10.

[3]Cecelia M. Kenyon, "Radicalism and Republicanism in the American Revolution: An Old Fashioned Interpretation," William and Mary Quarterly, 3rd series, XIX (1962), pp. 166-167.

[4]Richard Buel, "Democracy and the American Revolution: A Frame of Reference," William and Mary Quarterly, 3rd series, XXI (1964), pp. 176-177, 182-184, 186; Wood, The Creation of the American Republic, 1776-1787, pp. 27, 28.

[5]Bailyn, The Ideological Origins of the American Revolution, pp. 162-171; Heinz Eulau, John C. Wahlke, William Buchanan and Leroy C. Ferguson, "The Role of the Representative: Some Empirical Observations on the Theory of Edmund Burke," American Political Science Review, VIII, part 2 (September, 1951), pp. 744, 748-750.

[6]Wood, The Creation of the American Republic, 1776-1787, pp. 163, 173, 174-176, 188, 193, 195.

[7]Ibid., pp. 135-142.

[8]Boston Independent Chronicle, December 1, 1785.

[9]Thomas Jefferson, Notes on the State of Virginia, ed. William Peden (Chapel Hill: University of North Carolina Press, 1955), p. 210.

[10]The Papers of Thomas Jefferson, ed. Julian Boyd (Princeton: Princeton University Press, 1950), VI, p. 281.

[11]Ibid., p. 308.

[12]Ibid.

[13]The Records of the Federal Convention, ed. Max Farrand (New Haven: Yale University Press, 1966), II, p. 74.

[14]Jefferson Papers, VI, p. 309.

[15]Ibid., pp. 311-312.

[16]Alexander Hamilton, John Jay, and James Madison, The Federalist, ed. Jacob E. Cooke (Middletown: Wesleyan Press, 1961), p. 418.

[17]Records of the Federal Convention, I, p. 290.

[18]Ibid., p. 67.

[19]Ibid., p. 139.

[20]The Federalist, p. 350.

[21]Debates in the Several State Conventions on the Adoption of the Federal Constitution, ed. Jonathan Elliot (Philadelphia: J. B. Lippincott, 1937), II, p. 253.

[22]The Papers of Alexander Hamilton, ed. Harold C. Syrett (New York: Columbia University Press, 1973), V, p. 85.

[23]Wood, The Creation of the American Republic, 1776-1787, p. 524.

[24]The Writings of James Madison, ed. Gaillard Hunt (New York: G. P. Putnam's Sons, 1910), II, p. 366.

[25]Wood, The Creation of the American Republic, 1776-1787, p. 517.

[26]"Letters of a Federal Farmer," in Pamphlets on the Constitution of the United States of America, ed. Paul L. Ford (New York: DeCapo, 1968), p. 283.

[27]Elliot's Debates, III, pp. 149-150.

[28]The Letters of Richard Henry Lee, ed. James Ballagh (New York: Macmillan, 1914), II, p. 451.

[29]Elliot's Debates, III, pp. 149-150.

[30]Pamphlets on the Constitution of the United States, pp. 275, 298-299, 312, 329-332.

[31]Ibid., p. 331.

[32]Records of the Federal Convention, II, pp. 392, 394.

[33]Ibid., p. 540.

[34]Elliot's Debates, III, p. 500.

[35]Ibid., IV, pp. 191-192, 195.

[36]Ibid., III, p. 515.

[37]Ibid., p. 501.

[38]Sir William Blackstone, Commentaries on the Laws of England (Philadelphia: J. B. Lippincott and Co., 1857), I, Book I, pp. 192-193.

[39]Elliot's Debates, III, pp. 501, 516.

[40]Ibid., p. 503.

[41]Ibid., p. 513.

[42]Ibid.

[43]Records of the Federal Convention, II, p. 94.

CHAPTER IV

PERCEPTIONS OF THE TREATY-MAKING POWER OF THE PRESIDENT AND SENATE

Alexander Hamilton began discussion of the constitutionality of Jay's Treaty in a series of essays under the name "Camillus" in 1795-1796. Hamilton defended the treaty from every angle, but numbers thirty-six, thirty-seven, and thirty-eight spoke directly to constitutionality. In number thirty-six, Hamilton stated the basis for claiming treaties were superior to ordinary legislation: (1) the relationship between the authorities and subjects in each; and (2) the binding force of each upon the contracting parties. As to the first of these, Hamilton argued that the authority of legislation affected only the subjects within a nation, extending no further than that. Treaties, on the other hand, were compacts between sovereign nations as a whole. Acting in spheres outside ordinary law, treaty-power was therefore a separate and absolute authority.

> The means which the power of legislation employs are laws which it enjoys, the subject upon which it acts is the Nation of whom it is, the persons and property within the jurisdiction of that Nation. The means which the Power of Treaty employs, are contracts with other nations, who may or may not enter into them, the subject upon which it acts is the nations contracting and those persons and things of each to which the contract relates. <u>Though a Treaty may effect what a law can, yet a law cannot effect what a Treaty may.</u>[1]

Thus a treaty dealing with relations with a foreign power was beyond the scope of legislation. Once formed, a treaty was a solemn

agreement between nations. "The legislature may relate our own Trade but Treaty only can regulate the mutual Trade between our own and another country."[2] Being a power separate from the authority of the legislature, it was naturally placed in a different branch of the government.

> This is proved in two ways 1that while the Constitution declares that all the legislative powers which it grants shall be vested in Congress, it vests the power of making Treaties in the President with the consent of the Senate 2that the same article by which it is declared that the Executive Power shall be vested in a President and in which sundry executive powers are detailed, gives the Power to make Treaties to the President with the auxiliary agency of the Senate.[3]

In reply to Hamilton, former Representative Alexander Dallas of Pennsylvania attacked the constitutionality of Jay's Treaty in an exposition entitled <u>Features of Mr. Jay's Treaty</u>. In direct contrast to Hamilton, Dallas claimed that "the legislative power is, . . . of superior importance and rank to the treaty-making power." Stating that a nation "may carry on its external commerce without the aid of the treaty-making power," Dallas thought a nation could not "manage its domestic concerns without the aid of the legislative power."[4] He declared bluntly that the "British Treaty and the Constitution are at war with each other,"[5] because of the usurpation of the legislative powers of Congress by the President and Senate in Jay's Treaty. Dallas warned that if one branch of government was allowed to seize the authority of another, the result would be the "effectual subversion" of the Constitution.[6]

Besides mentioning the threat to Congress' power to regulate commerce, which formed the backbone of the Republican assaults upon Jay's Treaty in Congress, Dallas drew attention to several other points where

the treaty stood in a dubious relationship to the Constitution. Article 18, which defined cargoes of American foodstuffs and naval stores bound for France as contraband and liable to British seizure, was condemned as a violation of Congress' power to define and punish piracies and felonies committed on the high seas and offenses against the law of nations.[7]

In the most telling part of his essay, Dallas inquired whether the joint claims courts created by Jay's Treaty were in congruence with the constitutionally delegated authority of Congress to create tribunals inferior to the Supreme Court. If by treaty, the President and Senate could create such bodies in partnership with the British monarchy, would not the British perhaps someday be allowed to create, by treaty, tribunals of their own judges in America? What would prevent the President and Senate from engaging by treaty, into an alliance with Great Britain to wage war upon France? If the other branches of government were ever allowed to seize any of the legislative prerogatives of Congress through the power of treaties, what would prevent them from eventually seizing all authority of Congress?[8] This line of reasoning became, as will be seen, an essential element of the Republican argument against Jay's Treaty in Congress.

In addition to foreshadowing the outline of the Republican attack on the treaty, Dallas' exposition suggested also the motivation of that resistance: "an indispensable duty to controvert and resist . . . . this unqualified claim to onmipotence."[9] If this was not done, the Constitution would be destroyed, and thus the government of the United States "transformed through the medium of the treaty-making power, from a republic to an oligarchy."[10] Indeed, Alexander Dallas' Feature of

Mr. Jay's Treaty contained the body of the Republican opposition to Jay's Treaty as well as brilliant arguments of his own.

The battle over Jay's Treaty in Congress occurred in two phases in March and April, 1796. The first of these was initiated March 7 by the introduction of Edward Livingston's resolution demanding the surrender of executive papers relative to the treaty to the House of Representatives. In the second phase from April 13 to 30 Congress debated the issue of whether to appropriate funds to carry the treaty into effect. Essentially, the debate over Livingston's resolution centered around perceptions of the treaty-making power of the President, while the battle over appropriation involved the act of defining the power and nature of the House of Representatives. To be resolved in both was the form that republican government would take in America under the Federal Constitution.

The debates in Congress over Jay's Treaty began on March 7, 1796, when Edward Livingston presented his resolution before Congress. Describing the House as "the guardians of their country's rights," Livingston defined the motive behind his resolution as "a firm conviction that the House were vested with a discretionary power of carrying the Treaty into effect, or refusing it their sanction."[11] Going further, the Republican from New York suggested two firm constitutional grounds on which his proposal stood: (1) the superintending power which the House had over all officers of government; and (2) the right to give or refuse its sanction to the Treaty in those points where it interfered with the legislative power.[12] These statements revealed the Anti-Federalist heritage of the Republican opposition to Jay's Treaty. The Republicans were hereby asserting that Anti-Federalist criticisms

should guide the government in interpreting the Constitution. The Anti-Federalists aversion to the authority of the President and Senate in making treaties was now claimed as being a condition the people had imposed when they gave their approval to the Federal Constitution.

By the "superintending power which the House had over all officers of Government,"[13] Livingston referred to the power of impeachment granted the House by Article I, Section 5 of the Constitution. Although the resolution did not actually call for impeachment, it was implied that such proceedings would perhaps become desirable after the papers were exposed to the House. Having seen the instructions to Jay while serving as chairman of a committee which inquired into cases of impressment, Livingston indicated that the discrepancy between those instructions and the terms of the treaty suggested a possibility of misconduct. Stating that "it evidently tended to the substitution of a foreign power, in lieu of the popular branch," Livingston regarded Jay's Treaty as replete "with the most serious evils."[14]

The Federalists attacked what they sensed as an ambiguity in this part of the resolution. If the Republicans desired impeachment, they should have said so clearly. If the constitutionality of the treaty was suspect, then one should refer to the Constitution itself to clarify the issue. Such a comparison suggested no illegality to them.[15] Besides presenting a danger to the Constitution by exceeding the delegated authority of the House of Representatives, Livingston's resolution also threatened the international position of the United States. If other nations could not negotiate in secrecy with our government, they would be most reluctant to do so. No nation would want to deal with a regime which exposed private papers to the public. Samuel Lyman of

Massachusetts claimed that this "principle of the law of nations was no less than the law of self preservation," and the consequence of breaking it "would be pernicious and destructive."[16]

If the Federalists adhered to Hamilton's remark at the Federal Convention that "no Government could give us tranquillity & happiness at home, which did not possess sufficient stability and strength to make us respectable abroad,"[17] the Republicans seemed motivated by Madison's statement at the Virginia Convention that "if we be free and happy at home, we shall be respectable abroad."[18] And the Republicans were currently anything but happy.

Denying the danger and illegality of summoning executive papers before the House, Republicans cited previous precedents for such action: Secretary of State Jefferson's submission of communications to the British minister in 1793, the examination of the President's papers relating to the Neutrality Act of 1793, and most importantly, instructions to the minister who negotiated a treaty with certain Indian tribes in 1792.[19] The last incident was contended to provide the legal precedent whereby the President might obey the request. Stating that "the discretion of the House of Representatives as to commerce with foreign nations, stood precisely on the same footing with that which they ought to exercise in regulating intercourse with the Indian tribes," Livingston was of the opinion that "when the President recognized their right to deliberate in one case, he virtually did it in the other."[20]

The Federalists retorted that there was a difference between treaties with Indian tribes and with foreign nations, but the Republicans dismissed the distinction, steadfastly insisting upon their right

to deliberate on the matter. Viewing themselves as the special guardians of the people's liberties, Republican members of the House claimed that the people had intended for them to serve as such when the Constitution was approved. William Lyman declared bluntly that "the House had the fullest right to the possession of any papers in the Executive department; they were constituted the special guardians of the people for that purpose."[21]

The Federalists consistently supported Hamilton's theory of the President as being as much a representative of the people as the Congress. The people had declared their faith in this principle when they adopted the Constitution. Indeed, by declaring itself the sole repository of the people's rights, the House actually infringed upon those rights by violating the will of the people embodied in the Constitution. Unlimited action on the part of the House would create, rather than prevent, despotism. In language similar to Jefferson's earlier comment on the Virginia legislature that "173 despots would surely be as oppressive as one,"[22] South Carolina Federalist Robert Goodloe Harper remarked:

> If the constitution was infringed, whether by the House or the other departments, the rights, the sovereignty of the people were equally trampled on, and it would be no consolation to them that it was done by one hundred and five men, rather than by thirty, or rather than by one.[23]

Asserted with equal zeal was the contention that the power of making treaties resided in the President and Senate alone. The party which had been characterized previously by a broad interpretation of the powers of the federal government embodied in the Constitution was now putting forth a strict construction of the Constitution. Whereas the Federalists had earlier asserted that the Constitution implied broad

prerogatives of governmental authority, they now employed a literal interpretation of the Constitution to prove that the treaty-making power was the sole prerogative of the President with the check of the Senate. A direct reference to Article II, Section 2, revealed that the President "shall have Power, by and with the Advice and Consent of the Senate to make Treaties."[24] There was no mention here in the Constitution of the House having any agency in the creation and adoption of treaties, so how could the Republicans claim there was such? Isaac Smith felt that if the framers of the Constitution had "intended that House should have had an agency in the making of Treaties, they would have said so in express terms."[25] He found nothing in the constitution that allowed the House of Representatives to check the passage of treaties. Massachusetts Federalist Theophilus Bradbury contended that the phrase "treaties made under the authority of the United States shall be the supreme law of the land,"[26] meant that treaties made by the President with the advice and consent of the Senate were the law of the land. Therefore, Republicans, by claiming a right which the House of Representatives did not possess, were threatening the Constitution by attempting to exceed the delegated powers of the House.

The Republicans did not believe they were exceeding their constitutional authority, however. Albert Gallatin stated explicitly that the House had a right to see the papers because the treaty "operates on the objects specifically delegated to the Legislature."[27] Those objects were the power to regulate commerce granted to Congress by Article I, Section 8, of the Constitution. The Constitution would be violated if Congress were not allowed to exercise its proper authority. The President and Senate would be the ones destroying the Constitution by

exceeding their delegated powers. Yet the Republicans feared more than just the actions of the President and Senate.

This particular point of the controversy also involved the force of treaties themselves. What was the precise meaning of the words "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land?"[28] To the Federalists, "supreme law of the land" meant that treaties were superior to ordinary legislative acts. Madison himself had defended this doctrine eloquently at the Virginia Convention.[29] Now, however, the former Federalist spokesman qualified his earlier statements. Refusing to retreat from his earlier postulation that the power of treaties exceeded that of ordinary legislation, Madison attacked the issue from the other side, declaring that in no way were treaties to be regarded as supreme over the Constitution itself.[30] This had not been contended by the Federalists in the battle over Jay's Treaty, yet it appeared to Madison that they implied as much in seeking unchecked approval of a treaty which to him was constitutionally suspect.

Choosing a middle ground, Madison attempted to show that the power of treaties and power of legislation were necessarily cooperative. Although they might naturally conflict, each must be reconciled with the other to preserve harmony and balance in the federal system.[31] Madison felt the Federalists were attempting to carry his earlier ideas to an extreme he had never advocated. As he viewed the crux of their position:

> It was to be decided whether the general power of making Treaties supersedes the powers of the House of Representatives, . . . , so as to take to the Executive all deliberate will, and leave the House only an executive and ministerial instrumental agency.[32]

Conciliation between the opposing branches would provide for the preservation of the Constitution. If the legislature conceded its power to regulate commerce to the President and Senate through the form of treaties, might not the latter use such articles to seize other legislative powers? If the present claims of the supremacy of treaties were acknowledged, would this not allow the President through the agency of treaties to involve the country in foreign alliances and declarations of war? Obviously, something so repugnant to the Constitution had to be stopped.

Other Republicans went beyond Madison's middle position that the legislative and treaty powers were co-equal. To them treaties were inferior to acts of the legislature. Livingston contended that a literal interpretation of the Constitution proved this assumption. Quoting the exact words "the Constitution, the laws made in pursuance thereof, and treaties made under the authority of the United States, shall be the supreme law of the land," Livingston concluded that "the order in which this enumeration was made was descriptive of the relative authority of each."[33]

Besides in the very words of the Constitution itself, Republicans found that the essence of the charter implied that the power of legislation exceeded that of treaties. Republicans believed that if a conflict erupted between opposing branches of government, the popular branch must triumph to prevent a victory of despotism. "The reason why a law should repeal a treaty, is because the law is an expression of the will of the nation."[34] Here again the old Anti-Federalist notion cropped up: the representatives of the people should serve as guardians of liberty against the encroachments of the superior branches.

Edward Livingston challenged his Federalist counterparts:

> Inquire whether there is more danger in trusting the Representatives of the people with a check on all Treaties relating to those objects which are specifically vested in them by the Constitution, than in making those Representatives subservient to the will of twenty-one men, who may be leagued with a foreign power?[35]

The Federalists adhered to Madison's assertions of 1788 that a treaty must in essence supersede the authority of ordinary legislative acts in order to have any real meaning. If treaties could not "touch the laws of the Legislature," these could hardly be formed, for "in the exercise of this power, it will unavoidably happen that the laws of the Legislature are sometimes infracted."[36] But what assumptions did the Federalists have about the nature of treaties that led them to consider such articles as superior to legislative enactments?

The source of this claim was the "Camillus" essays by Hamilton. In a near paraphrase of the New Yorker, Isaac Smith of New Hampshire declared that "treaties do what laws cannot do, but in order to do this, they must extend to some things which laws can regulate."[37] Ezekiel Gilbert of New York made the Hamiltonian observation that "the acts of this organ of the will of the nation become obligatory upon the nation . . . , so as to repeal any law of the Legislature repugnant to this sovereign will of the nation."[38] Zephiniah Swift gave the most eloquent statement of the Hamiltonian position in Congress. Stressing the moral obligation of honoring the national faith, Swift contended that treaties created a situation whereby the national faith was pledged, and consequently it was "the absolute duty to make the appropriations to carry it into effect." How could any honorable body of men claim that "after a debt or contract was entered into, that they should consider

the propriety of discharging the obligations?"[39]

Treaties were thus depicted as sacred compacts which pledged the national faith. Federalists could point to chapter fifteen of the second book of Vattel's Law of Nations to show that treaties were a sacred act of faith between nations, the abrogation of which constituted a violation of international law:

> The faith of treaties, that firm and sincere resolution, that invariable constancy in fulfilling engagements, of which declaration is made in a treaty, is then holy and sacred between the nations whose safety and repose it secures: . . . He who violates treaties, violates at the same time the law of nations.[40]

Once a treaty was made, it was the obligation of Congress to enact legislation necessary to carry the treaty into effect. To refuse to do so would be tantamount to saying that the word of the United States was not trustworthy. Such action would be most injurious to the country, for what nation would want to enter into agreements with another which did not honor its word? This fear reflected the concern of Hamilton and the Federalists about the necessity of establishing international prestige for the fledgling American nation. If that respect were not secured, the hopes for survival for the young republic seemed dim.[41] Republican opposition to Jay's Treaty at this critical juncture would naturally lead to a weakened international position for the United States. Indeed, from the perspective of the Federalists, the Republicans threatened the very existence of the nation.

The only instance in which the Federalists could concede the right to reject a treaty was when it was unconstitutional. In that case the treaty would by itself be void and therefore no longer binding upon the nation. Either a treaty was constitutional and therefore binding, or

unconstitutional and not obligatory. The House of Representatives had no role in determining the constitutionality of a treaty; its function was to act as a co-operative agent in the adoption of such agreements.

Thus Jay's Treaty might be rejected if it were unconstitutional, but the Federalists did not believe it was. To the contrary, they contended it was a valid compact formed by the President with the advice and consent of the Senate, containing no stipulations contrary to the Constitution. Therefore, it was the duty of Congress to carry Jay's Treaty into effect. However, most Republicans, Albert Gallatin in particular, did not see it this way.

On March 24, Albert Gallatin delivered the most brilliant speech from the entire Republican delegation, perhaps the best speech given by either side during the course of the seven weeks when Jay's Treaty was debated. Gallatin eloquently defended all of the arguments Republicans gave for subjecting the treaty to House approval while simultaneously dismissing the contentions of the Federalists. Gallatin drew upon three sources to back his position: the law of nations, the precedent of the Articles of Confederation, and the Constitution itself. Expanding upon each, the Pennsylvanian argued convincingly that the legislative body had a right to exercise a check on treaties which dealt with matters in its power. If this right were denied, the separation of powers provided for in the Constitution would be destroyed.

Gallatin opened his attack with an appeal to the Constitution, employing a curious combination of both strict and loose construction. In essence, he interpreted the powers of the President and Senate to be strictly defined and limited by the Constitution; while he viewed the power of the House of Representatives in a broad fashion. "The clauses

which vest certain specific legislative powers in Congress are positive, and indeed, far better defined than that which gives the power of making Treaties to the President and Senate." "Nor," he declared "does the clause which declares laws and Treaties the supreme law of the land, decide in favor of either, and say which shall be paramount."[42]

This latter statement was the foundation of Gallatin's argument. He insisted that the legislative power was equal to the treaty power, which the Federalists claimed to be superior. Knowing that he could not persuade them with an appeal to the Constitution, Gallatin next turned to the law of nations, where he found it was the universal practice in limited governments that the legislature served as a check on the treaty-making power of the executive when the treaties it made would deal with matters which were ordinarily the prerogative of the legislative body.[43] Quoting book IV, chapter 2, of Vattel's Law of Nations, Gallatin read the following passage:

> The Kings of England conclude Treaties of Peace and Alliance, but by these Treaties they cannot alienate any of the possessions of the Crown without the consent of Parliament; neither can they, without the concurrence of the same body, raise any money in the Kingdom. Therefore, when they negotiate any Treaty of subsidies, it is their constant rule to communicate the Treaty to the Parliament, that they may be certain of its concurrence to make good such engagements.[44]

He next turned to the Articles of Confederation for a precedent in claiming the right of the legislature to subject treaties to its approval. In this reference, the right of the old state legislatures to exercise such authority under the Articles was adduced as proof that this principle was firmly established in the American concept of government. The Articles stated explicitly that "The United States, in Congress assembled, shall have the sole and exclusive right and power of

determining on peace, of entering into Treaties and Alliances, provided that no Treaty of Commerce shall be made whereby the Legislative power of the respective states shall be restrained."[45]

Gallatin referred to the Treaty of Peace with Great Britain as an example where the sovereignty of the state legislatures was recognized as superior to that of Congress when a treaty infringed upon the authority of the legislature. Specifically, this involved the restriction for British estates in America confiscated during the Revolutionary War. Reading from a letter to the British commissioner written by John Adams, Benjamin Franklin, and John Jay, Gallatin stated "as this is a matter evidently appertaining to the internal polity of the separate States, the Congress, by the nature of our Constitution, have no authority to interfere with it."[46] He contended that this was "a full acknowledgement of the doctrine he was supporting, that the nature of the Constitution limited the Treaty making power although there was no express proviso to that effect."[47]

Thus, while the Constitution did not explicitly state the right of the House to subject treaties to its approval, Gallatin regarded it implied in the essence of the document, since this was such an essential principle of limited government. To refuse to recognize this right of the House would be to deny the will of the people, who had themselves framed the Constitution with this idea in mind. Gallatin found it a "truly novel doctrine in America, that those immediate Representatives were bound by the mandates of the Executive;" which if accepted "would destroy the liberties of the people of the United States."[48]

If the President and Senate were allowed to seize the delegated authority of Congress to regulate commerce through a treaty, would it

not be long before the same two branches would in like fashion acquire the powers to declare war, raise and support armies, and raise money for such expenditures? Gallatin saw no reason to assume that such extreme encroachments on the legislative authority of Congress by the President and Senate would not occur if the principle granting such usurpation was ever acknowledged on any ground. The Federalist demands, if conceded to, would amount to the reduction of the House of Representatives to a mere advisory body with no real authority. By so doing, the will of the people would be violated, and the stage set for a tyranny to emerge in the form of an unchecked executive operating in conspiracy with a small group of collaborators removed from the people. Gallatin was incensed at the idea that this was the desire of the people. He insisted that the American people never intended "to invest an unlimited, and uncontrolled power over the purse and the sword in the President and Senate."[49]

In concluding his argument, Gallatin stated precisely that what he was contending for was merely the right of the House to be an equal branch of the government. He was not suggesting that the legislative prerogative was superior to that of the other authorities established by the Constitution. Legislation was no more superior to treaties than treaties were to legislation. Thus when the two prerogatives clashed, some form of compromise must be worked out between the two opposing authorities to preserve the Constitution by retaining balance in the government. When a treaty contained provisions which regulated the commerce of the United States, that treaty must be submitted to Congress for its approval in order to uphold its authority to regulate commerce as explicitly defined in the Constitution. He did not feel that the

House had an expressed authority to check the passage of all treaties, but only those which dealt with the exclusive powers of the House. Gallatin conceded that in regard to treaties which did not trespass upon the prerogatives of the House "the power of the Executive remained entire."[50]

Apparently, Gallatin's words were agreeable to a majority of the House of Representatives. Following a few comments in rebuttal by several Federalists, a roll-call vote was taken on Livingston's resolution. It passed by the impressive margin of 61 to 38.[51]

The following day the resolution was presented to the President, and five days later, March 30, he sent a reply to Congress. In that message, Washington denied the request to furnish papers relevant to Jay's Treaty to Congress, seeing no moral or legal obligation to do so. He stated that he was withholding nothing necessary to determine the advisability of the treaty and also stressed the necessity of secrecy in negotiations. Admitting that the one exception which would warrant such a surrender was impeachment, Washington noted such procedure was not called for in the resolution. The President defended the constitutionality of his action by depicting himself as a qualified interpreter of the Constitution by virtue of having been present at the Convention which framed it. In his opinion, Jay's Treaty had been formed in accordance with the proper procedures for making treaties as outlined in the Constitution. To Washington, this meant the President acting with the advice and consent of the Senate exclusively. When his signature was affixed to the treaty, it became obligatory upon the nation. The Congress had no legal authority to subject the treaty to its scrutiny. To do so would violate the Constitution by exceeding its delegated

authority. Therefore, Washington felt obliged to conclude that "a just regard to the Constitution and to the duty of my office, under all circumstances of this case, forbids a compliance with your request."[52]

This prompted North Carolina Republican Thomas Blount to present a motion calling for a debate on Washington's message before the House of Representatives. He intended to show that the House sought no extension of its constitutionally delegated authority as the President claimed. Gallatin thought such a debate was necessary for the House to determine whether it would act further on the matter. Fearful of the consequences which would result from this, Federalists argued that the House had no legal recourse but to lay the issue to rest. However a majority of the Representatives did not see it that way, as Blount's motion was approved by a vote of 55 to 37.[53]

Federalist Aaron Kitchell responded to Blount's motion with a resolution which denied the right of the House to exercise authority in the ratification of treaties; upon it no action was taken. After a five day hiatus, another vote was taken on Blount's motion, which passed again by a margin of 57 to 36. Blount then presented a new resolution which stated: (1) that the House had the right to deliberate on the execution of a treaty which dealt with powers delegated to the body; and (2) that the House did not have to state its reasons for demanding the papers of the executive.[54]

On April 7, final votes were taken on both Livingston's and Blount's resolutions. The first passed by a margin of 54 to 37, while the latter cleared with a 57 to 35 vote of approval.[55]

Although further demand for the surrender of papers was dropped, the contention of the House to subject Jay's Treaty to its approval

was not. The votes on Livingston's and Blount's resolutions obviously revealed that a majority of members of the House felt it was their constitutional prerogative to exercise a legislative check on the passage of treaties. Thus the upcoming battle over appropriations would be a heated one.

FOOTNOTES

[1] The Papers of Alexander Hamilton, ed. Harold C. Syrett (New York: Columbia University Press, 1973), XX, p. 18, emphasis added.

[2] Ibid., p. 9.

[3] Ibid.

[4] Alexander Dallas, Features of Mr. Jay's Treaty (Philadelphia: Carey, 1795), Evans, Early American Imprints, #28257, p. 39.

[5] Ibid., p. 26.

[6] Ibid., p. 27.

[7] Ibid., pp. 34-35.

[8] Ibid., pp. 28-29.

[9] Ibid., p. 29.

[10] Ibid., p. 36.

[11] Annals of Congress (Washington, D. C.: Gales & Seaton, 1855), 4th Congress, 1st Session, 1795-1796, p. 427.

[12] Ibid., p. 629.

[13] Ibid., p. 427.

[14] Ibid., pp. 630, 631.

[15] Ibid., pp. 427, 429-430, 438-439, 452-454, 684.

[16] Ibid., p. 532.

[17] Records of the Federal Convention, ed. Max Farrand (New Haven: Yale University Press, 1966), I, p. 467.

[18] Debates in the Several State Conventions on the Adoption of the Federal Constitution, ed. Jonathan Elliot (Philadelphia: J. B. Lippincott, 1937), III, p. 135.

[19] Annals of Congress, 4th Congress, 1st Session, 1795-1796, pp. 601, 622, 636.

[20]Ibid., p. 637.

[21]Ibid., p. 601.

[22]Thomas Jefferson, Notes on the State of Virginia, ed. William Peden (Chapel Hill: University of North Carolina Press, 1955), p. 120.

[23]Annals of Congress, 4th Congress, 1st Session, 1795-1796, pp. 463-464.

[24]The Constitution of the United States of America, Article II, Section 2.

[25]Annals of Congress, 4th Congress, 1st Session, 1795-1796, p. 626.

[26]Ibid., p. 549.

[27]Ibid., p. 465.

[28]The Constitution of the United States of America, Article VI.

[29]Elliot's Debates, III, pp. 501, 515.

[30]Annals of Congress, 4th Congress, 1st Session, 1795-1796, p. 488.

[31]Ibid., pp. 489-490.

[32]Ibid., pp. 437-438.

[33]Ibid., p. 632.

[34]Ibid., p. 507.

[35]Ibid., p. 632.

[36]Ibid., p. 477.

[37]Ibid., p. 596.

[38]Ibid., p. 680.

[39]Ibid., p. 1017.

[40]M de Vattel, The Law of Nations (New York: Samuel Campbell, 1796), Book II, Chapter 15, p. 295.

[41]Gerald Stourzh, Alexander Hamilton and the Idea of Republican Government (Stanford: Stanford University Press, 1970), pp. 127, 130-131, 134, 137, 171, 195-196.

[42]Annals of Congress, 4th Congress, 1st Session, 1795-1796, p. 726.

[43]Ibid., p. 727.

[44]Ibid., p. 728; Vattel, The Law of Nations, 1795-1796, Book IV, Chapter 2, p. 498.

[45]Annals of Congress, 4th Congress, 1st Session, 1795-1796, p. 730.

[46]Ibid., pp. 731-732.

[47]Ibid., p. 732.

[48]Ibid., p. 738.

[49]Ibid., pp. 740-741.

[50]Ibid., p. 744.

[51]Ibid., p. 759.

[52]Ibid., pp. 760-762.

[53]Ibid., pp. 763-764, 768.

[54]Ibid., pp. 769, 771.

[55]Ibid., p. 782.

CHAPTER V

DEFINING THE ROLE OF THE LEGISLATURE IN A REPUBLICAN GOVERNMENT

On April 13, less than a week after Livingston's and Blount's resolutions were adopted by the House of Representatives, Jay's Treaty came up for debate over appropriation. Whether or not the House had the authority to intervene on the passage of certain treaties, the exclusive power of Congress over money matters provided them with the opportunity to do so. If they did not agree appropriate money to carry Jay's Treaty into effect it would be rendered inoperable. With a majority of the House obviously of the opinion that it could scrutinize the treaty, the Federalists felt compelled to convince their colleagues of the moral obligation to grant appropriation. Thus the same notions of treaties as sacred compacts and the necessity of the cooperation of the House were stressed again, even though these arguments had earlier failed to convince the Republicans. The Federalists relied heavily on a literal interpretation of the Constitution to convince their opponents that they were legally and morally bound to grant the funds necessary to carry Jay's Treaty into effect.

This provided the point of departure for the Republicans. To them, Jay's Treaty was unconstitutional because it infringed upon the power of the House of Representatives. Therefore they saw no moral or legal duty to carry it into effect, but rather the obligation to block

its passage. However, enough Republicans eventually became persuaded to change their minds to enable appropriation for Jay's Treaty to pass by a very small margin. Whether these defections were inspired by the eloquent oratory of Fisher Amers, as some have contended, or by the threat of Federalist rejection of Pinckney's Treaty with Spain, which the Republicans desired, these crossovers did not include any of the champions of the Republican position: Gallatin, Madison, Livingston, Blount, and others. The opposition leadership continued their strenuous resistance to the administration.

Theodore Sedgwick of Massachusetts initiated the conflict over appropriation by introducing the following resolution:

> Resolved, That provisions ought to be made by law for carrying into effect, with good faith, the Treaties lately concluded between the Dey and Regency of Algiers, the King of Great Britain, the King of Spain and certain Indian tribes Northwest of the Ohio.[1]

The wording of that resolution revealed the intentions of its Federalist author: to attempt to "sneak" passage of Jay's Treaty through Congress by tying it to other treaties which the majority of the House wished to see enacted. Presumably the desire to secure passage of the Spanish Treaty in particular would outweigh repugnance to Jay's Treaty. Sedgwick's ploy was quickly denounced by the Republicans. Gallatin rose to state that since the House had already declared its right to deliberate on treaties, it followed that each was to be discussed separately.[2]

The next day Pennsylvanian Samuel Maclay presented a resolution countering Sedgwick's motion, which called for the withholding by the House of measures necessary for carrying the treaty with Great Britain into effect. Maclay found the treaty unacceptable on two grounds: (1) the inadequacy of the terms themselves; and (2) the infringement upon

the legislative authority of the House of Representatives by the President and Senate which the treaty embodied. Not only was it necessary for the House to protect its own existence but also to honor "those special duties in which they stood related to the people as their Representatives."[3] To Maclay, these duties included "to guard against the encroachments which might be made by the Executive on the rights of the people."[4] Following this, Sedgwick's resolution was voted on and turned down, 55 to 37. To the Republicans' way of thinking, not only did the House have the right and duty as representatives of the people to subject Jay's Treaty to their scrutiny, but they also viewed the treaty as unconstitutional because it infringed upon the legislative authority of Congress. Therefore, there was no way they could approve the appropriation of funds to carry it into effect. To do so would constitute political suicide on the part of the House. And this of course would violate their specially entrusted responsibility as guardians of the people's liberties.

Outside the halls of Congress, newspapers carried on the spirited controversy. Containing a full account of the debates in the House the Federalist Gazette of the United States in Philadelphia ran a series of commentaries on the proceedings under the title "Communications." In these, the Republicans were attacked as "Jacobins" who sought to create anarchy in the United States by destroying the Constitution. Declaring that the President "has a sacred duty to discharge as well as the House of Representatives," the author of "Communications" asserted that the "treaty-making, or treaty power of the House of Representatives is not believed in even by the Jacobins."[5] Thus the Republicans were denounced as hypocrites in claiming to uphold the will of the people in

defense of the Constitution. Besides knowing that they were actually violating the Constitution, Republicans were acting against the real desires of the people themselves. By the Constitution, it was asserted, the people had placed their trust in the President to make treaties. The Republican denial of this presented the threat that the "tree of liberty . . . is now in danger of being strip'd of its leaves, and of having its vital sap sucked out by the canker-worms."[6]

The Republican position was presented with equal vehemence in the Boston Gazette. In a series of letters entitled "From the Aurora -- To The People," the claim was made in line with Alexander Dallas' essay that "it is easy to repel first usurpations; but nothing short of a revolution can restore a Constitution to its pristine purity, after it has been repeatedly assailed." Since Jay's Treaty could not become operative until money was appropriated by the House, and since it trespassed upon their delegated powers, Aurora hoped that "they can, and I trust will, declare it an unconstitutional act."

The power to regulate commerce, to establish a uniform rule of naturalization, and to define and punish piracy were all Congressional powers that were infringed upon by the President through Jay's Treaty. "The Aurora" presented the question as "whether the Constitution was made for the amusement and gratification of the Executive, or whether it was constituted for the security and happiness of the people."[7] Thus for the House to sit back and allow the President to seize its powers would not only destroy the Constitution but in so doing violate the sacred trust of the people. Could the House of Representatives, "consistently with the duty they owe themselves as well as their constituents, surrender them into the hands of the executive?"[8]

This facet of the argument essentially amounted to a divergence of opinion over the role of the representative. Subscribing to the delegate theory, Republicans felt their duty was to carry out the expressed desires of the people. Several representatives accordingly brought public petitions before the House which urged members of that body to block passage of Jay's Treaty. To the Republicans, their duty as the people's representatives mandated an exercise of legislative discretion on the despicable bargain. Virginian William Branch Giles, commenting on the vast numbers of petitions he had received on the subject, remarked that "from these petitions it will be found that the people had recognized the power of the House to interfere, and begged them not to abandon their rights."[9]

The Federalists, adhering to the trustee notion of representation, rejected this role of serving as a sounding board of the popular passions. Indeed, this was contrary to their basic philosophy of government. The essence of the Federalist creed was that the people did not always know what was best for them. It was the duty of elected officials to act in the real interests of the people, and not merely echo the sentiments of the popular opinion. Judicious action on the part of responsible representatives was the only way effective popular government could exist. If the capricious whims of the populace became the formulator of policy, tyranny of the mob, or anarchy, would result. The Federalists saw themselves as protecting the people's liberties by doing what was best for the people, whether they recognized it or not.

The Federalists also rejected the notion that the House had a special role as the guardians of the people's liberties. To them, the President and Senate were intended to be guarantors of the rights of

the people as much or more than the House of Representatives. Isaac Smith of New Hampshire suggested that the more frequent election of the members of the House provided for in the Constitution proved that the people were more suspicious of the representatives than of the President and Senate.[10] Again making a literal reference to the Constitution, Federalists claimed that the people "had given power to the President and Senate to make Treaties, which if not complied with, would be to oppose their will."[11] Thus the Federalists attempted to picture themselves as upholding the will of the people by respecting the boundaries which the Constitution had prescribed for the House of Representatives.

This line of reasoning was based on two assumptions: (1) that the people had an actual voice in the framing of the Constitution, and (2) that these same people actually regarded the President and Senate as the guarantors of their liberty. The Federalists resolved the first assumption by pointing out that the Constitution had been adopted by state ratifying conventions attended by elected delegates. This of course rested upon the assumption that these delegates acted according to the desires of the people who chose them. Once this notion was accepted, it was easy to uphold the second assumption: that the people regarded the President and Senate as guarantors of their liberties. The powers which the people supposedly granted to the executive and superior house of Congress in the Constitution proved this to the Federalists. Thus they charged the Republicans with violating this will and trust of the people by usurping the treaty-making power of the President given him by the people.

The Republicans hardly viewed the President as much of a guardian

of the people's rights. They contended that neither did the people, no matter what the Federalists suggested the adoption of the Constitution meant. Madison read proposed amendments from the state ratifying conventions of New York, Virginia, and North Carolina which suggested to him that the people intended for the House to have a check on the passage of treaties when the Constitution was adopted. Thus to the Republicans, the people gave their assent to the Constitution with the understanding that such a limit on the power of the President would be established. Madison further contended that this had been his own conception of the treaty-making power of the President at the Federal Convention, thereby justifying his reluctance to recognize the necessity of amendments at the Virginia Ratifying Convention.[12]

If the Federalists' conception of the Constitution prohibited them from acknowledging this, perhaps an appeal to another reference would make the point. As Madison had turned to the example of England at the Virginia Convention to show the efficacy of declaring treaties as the supreme law of the land,[13] Republicans now turned to the former mother country to assert the legal propriety for the legislature to subject treaties to its scrutiny.

It might seem paradoxical that the opponents of Jay's Treaty, who criticized the document by calling it a corrupt alliance with the despised British monarchy, would turn to that very nation as providing a foundation for their argument. Yet this was done, with the inference that even as debased a government as Britain's provided such a check on the power of executive, thereby making their charge against the Federalists even more severe. The Federalists, in this view, were thus seen as perpetrating a tyranny even worse than that which existed in

England. Representative John Page set forth the Republican view that the Federalist interpretation of the treaty-making power of the President assumed the American Chief Executive had even greater prerogative than the English king:

> If this be true, sir, we find that, although the British King, from whose tyranny we revolted, cannot force upon his subjects against the will of their Representatives, a Treaty, which, it is acknowledged, too, he has a right to make, the PRESIDENT OF THE UNITED STATES can, by his Proclamation, force upon the people who are his constituents, a Treaty which their direct Representatives wish to suspend, alter, or annul.[14]

The severity of the Republican charge was revealed by their use of the word "even" in drawing parallels with the British example. Certain that "In all limited Governments, the Treaty power is subject to the limitations of the Constitution," Richard Brent asserted that "the practice of this principle may be found even in the British Government."[15] Was it to be accepted, Gallatin asked, that "the House of Representatives of the United States . . . shall be ranked below the British House of Commons?"[16]

The Republicans dismissed Blackstone's denial of the right of Parliament to subject treaties to their approval. Although Blackstone himself suggested that ultimate legislative check on this prerogative of the king lay in the authority of Parliament to impeach,[17] the Republicans were not satisfied with this. Livingston found other legal treatises besides the Commentaries, which certified the right of Parliament to subject treaties to their approval.[18] Gallatin read from one of them, Anderson's History of Commerce, which described the annulment by Parliament of two articles of a commercial treaty with France in 1665 which had caused considerable damage to the commerce of England.[19]

Thus the Republicans invoked English precedent in support of their argument.

The problem with this line of argument was that there was no single, coherent, written English constitution. The body of English law had evolved from a set of precedents and which by their very nature were often contradictory and incompatible. This uncertainty of interpretation should not have existed in America because of our written Constitution. Here the issue could be resolved merely by turning to our sacred charter, which defined exactly the powers of each branch of government. The Republicans therefore invoked that section granting Congress the power of appropriating money to carry treaties into effect. What more proof was needed, they asked, of the authority of Congress to subject treaties to its approval? It would be ridiculous to deny the legitimate exercise of power by one branch of government by attempting to depict such as an usurpation of its delegated authority when that authority was provided for. As the Republicans saw it, the Federalists were attempting to usurp the power of the House by seeking to transfer its legislative functions to the President. Since this did not even occur in a system that had no clear barrier against it, how could anyone claim a legal ground for such action in a country where a written charter prohibited it? James Holland of North Carolina noted the irony of the situation in his remark that "by giving uncontrollable power to twenty Senators and the President, our government will be in practice what the English Government is in theory."[20]

The Federalists were quick to react to this charge. Remarking upon the irony of the Republicans' use of Great Britain as a model, John Williams replied "though his colleagues presented Great Britain as

being in chains, yet he was drawing precedents from their Government."[21] At this point the Federalists began an elaborate discussion of the differences between the British government and that of America under the Constitution. The two were described as differing fundamentally due to the nature of authority in each. In the British government, all power once resided in the king, who ruled his subjects in autocratic fashion. Parliament arose as the result of a desire to limit the king's absolute authority. Any liberties the people enjoyed had been wrested from the king as concessions. This in essence was the Whig interpretation of history -- the continual struggle between rulers and the ruled.

But in America, things were different, according to the Federalists. Here the government established under our written Constitution was an act of the people themselves. In the independent American nation, a society existed where sovereignty actually resided in the people. According to the Federalist argument, these American people came together and formed their own government under the Federal Constitution. Any power which this government had was granted by the people themselves. Any power not explicitly granted to the government by the people was therefore retained by the people. Consequently the American people had no reason to fear their elected officials as British citizens did their king. The President was a representative of the people, chosen by them, and subject to their removal. Vermont Federalist Daniel Buck stated it perfectly:

> The first principle of the American Government, is that nothing is surrendered, but all retained by the people; . . . and it is agreed by everyone that the Constitution of the United States is the expression of the sovereign will of the people reduced to writing and now before us . . . . our President stands as a subordinate officer or agent of the people.[22]

For this reason there was no need for Congress to resist the President as Parliament resisted the king. Owing to the difference in the nature of power of the chief executives of each country, that of the legislative bodies was different also. Parliament stood in an adversary relationship to the king because of that body's struggle for power against the magistrate. It was necessary for Parliament to be arbitrary, for its very survival depended on such a position. And, because of this posture of Parliament, it possessed the tendency to be as tyrannical as the king himself. Always seeking to expand its power, Parliament knew no limits. Thus the British people, of whom only a tiny fraction were even represented in Parliament, were hereby crushed between the arbitrary pretensions of both king and Parliament, with no real safeguard of their liberty.

In America, Congress enjoyed obvious rights and privileges which Parliament did not. For example, in Britain, "the Commons are called by the King, and . . . if refractory, . . . can be dissolved, . . . Here the President cannot dissolve Congress."[23] The American government, founded by the people, consisted of representatives chosen by the people to carry out their will. Besides this essential difference, the Federalists argued that Parliament rarely opposed the king on treaties as the Republicans now suggested Congress should oppose the President. Uriah Tracy of Connecticut searched through the records and found no instance of Parliament denying approval to a treaty made unconditionally since 1648. South Carolina Federalist Robert Goodloe Harper "challenged them to produce one (instance) in which Parliament has refused to execute a Treaty, their consent which was not made a condition in the treaty itself.[24] One treaty was rejected conditionally, the

Treaty of Utrecht. The right of rejection was based on the treaty itself, not on the body of English law.

Federalists were apprehensive of their position to the closing of the debate. They felt something had to be done to persuade those who doubted the propriety of appropriation to change their minds. To that effect, Fisher Ames delivered an emotional speech on April 28 depicting the worst horrors imaginable if the treaty were not carried into effect. Ames opened his address with a plea for the members of Congress to appeal to their reason in guiding them in this decision, denouncing the popular passions which had given rise to the wild accusations made against the treaty. The criticisms against the President and Senate were especially unfair, he thought. Where was it stated in the Constitution that the House of Representatives had a special authority above the other branches of government? The treaty-making power was vested solely in the President with the check of the Senate; the House was given no role in the process. A treaty, once made and ratified by the President and Senate, was a sacred compact binding the faith of the nation. The House could do nothing to make it valid or invalid. All they could do was either honor the pledge of the nation or break it. The latter course would be a violation of the law of nations, from which dire consequences could be expected.

But was this treaty before the House so injurious to the national interest to render it void in itself? Ames concluded it was not. Nor were the majority of citizens opposed to its passage, as its critics claimed. These dissidents were dismissed as a noisy minority. The Massachusetts Federalist was of the opinion that some people in this country would denounce any treaty with Great Britain simply because it

was with Great Britain. And in relation to that nation being alluded to as a reference for the right of the legislature to intervene in the passage of treaties, he found almost no instance of it there for the entire previous century.

Making a rousing appeal to patriotism, Ames glorified the building of national prestige by upholding the law of nations. Peace and prosperity would follow in the wake of approval. But if the treaty were rejected by a House exercising a prerogative which it did not legally possess, the ruin of the nation could be expected. Besides destroying our own republican institutions, such action would lead to strife abroad, resulting in loss of commerce and eventual conflict. The security of the nation, both within and without, was endangered by a rejection of Jay's Treaty.[25] With this, Ames laid his case to rest.

Whether or not this was the determining factor in persuading some Republicans to vote for Jay's Treaty, a number did so when a resolution for carrying it into effect was presented the following day. Yet this was not a wholehearted endorsement of Jay's Treaty. Gabriel Christie of Maryland explained that "though he thought the Treaty a bad one, his constituents were desirous it should be carried into effect, and he found himself bound to lay aside his own opinion, and act according to their will."[26] Even at that, the vote produced a deadlock, with 49 in favor and 49 opposed.[27]

The next and final day in the battle over Jay's Treaty, April 30, Massachusetts Republican Henry Dearborn attempted to break the tie by attaching a prefix to the resolution for carrying the treaty into effect which would allow those who were not really pleased with it to vote for it anyway. Specifically Dearborn's amendment stated that

although the treaty was "highly objectionable" on several points, the fact that the bulk of it would expire two years after the cessation of the present war would allow those not pleased to vote for it, since it could eventually be replaced by a new agreement.[28]

But instead of bringing harmony, Dearborn's amendment brought only further discord to the House. The Federalists refused to concede that they were doing something wrong which they felt was right. After debate, Dearborn's amendment was defeated by the bare margin of 50 to 49. Then the final vote was taken on the resolution "that it is expedient to make the necessary appropriations for carrying the Treaty with Great Britain into effect," which passed by the thin margin of 51 to 48.[29]

Thus Jay's Treaty became operative. But the division and ill-will which it had created in its passage were not to subside. Throughout the remainder of the decade, Federalists and Republicans would view each other as "anarchists" and "monarchists". This came largely from a belief by both that the other had sought the destruction of the Constitution in their posture toward Jay's Treaty.

FOOTNOTES

[1]*Annals of Congress* (Washington, D. C.: Gales & Seaton, 1835), 4th Congress, 1st Session, 1795-1796, p. 940.

[2]Ibid., p. 942.

[3]Ibid., pp. 970-971.

[4]Ibid., p. 974.

[5]Philadelphia *Gazette of the United States*, March 29, 1796.

[6]Ibid., March 28, 1796.

[7]*Boston Gazette*, March 21, 1796.

[8]Ibid., March 28, 1796.

[9]*Annals of Congress*, 4th Congress, 1st Session, 1795-1796, p. 503.

[10]Ibid., p. 627.

[11]Ibid., p. 643.

[12]Ibid., pp. 772-779.

[13]*Debates in the Several State Conventions on the Adoption of the Federal Constitution*, ed. Jonathan Elliot (Philadelphia: J. B. Lippincott, 1937), III, p. 501.

[14]*Annals of Congress*, 4th Congress, 1st Session, 1795-1796, p. 563.

[15]Ibid., p. 576. Emphasis added.

[16]Ibid., p. 972.

[17]Sir William Blackstone, *Commentaries on the Laws of England* (Philadelphia: J. B. Lippincott, 1857), I, Book I, pp. 192-193.

[18]*Annals of Congress*, 4th Congress, 1st Session, 1795-1796, p. 633.

[19]Ibid., pp. 470-471.

[20]Ibid., p. 543.

[21]Ibid., p. 560.

[22]Ibid., p. 709.

[23]Ibid., p. 694.

[24]Ibid., p. 752.

[25]Ibid., pp. 1239-1243, 1255, 1250-1251, 1244-1245, 1247-1249, 1254, 1256-1257, 1261-1263.

[26]Ibid., p. 1280.

[27]Ibid.

[28]Ibid., p. 1282.

[29]Ibid., pp. 1291-1292.

CHAPTER VI

CONCLUSION

By overlooking the Constitutional aspect of the battle over Jay's Treaty, most literature on this formative event in American political history has given an incomplete view of the ideological split between Federalists and Republicans. Republicans perceived Jay's Treaty as the transferral of the legislative authority of Congress to the President, which would lead to the establishment of tyranny as much as an alliance with Great Britain. On the other hand, the Federalists held the usurpation of executive powers by the House of Representatives as anarchical as an identification with revolutionary France. Thus, each side saw passage or rejection of Jay's Treaty leading to the immediate destruction of republicanism in America by destroying the Constitution.

Previously, scholars have assumed that the Federalists viewed rejection of the treaty as the first step toward dissolution of the federal government, while Republicans regarded its passage as opening the door to the creation of a monarchy in America. It is more correct to say that each side in the conflict saw either the passage or rejection of the treaty as actually destroying republicanism in America rather than merely leading to its destruction. An alignment with France would pave the way for "Jacobinism" in America; the usurping of the Constitutional authority of the President by the popular branch at the urgings of the "mob" would be its immediate triumph. Federalists

abhorred the public rallies against Jay's Treaty as the example of American Jacobinism. If popular passions could determine the fate of major policy, then the representative government established by the Constitution was rendered inoperable. Rule of the mob would be established, and republicanism would vanish. On the other hand, Republicans viewed an alignment with Britain as the inception of a monarchy in America; the seizure of the legislative functions of Congress by the President was its creation. If the Chief Executive could assume the prerogatives of the body which formed a check on his power, he would have the unlimited authority of a monarch. Tyranny would thus be established in America at the demise of republicanism.

The position of the Republican party in the 1790's does much in itself to indicate the importance of the Constitutional question to the anti-administration forces in particular. As Jefferson stated in a letter of April, 1796, "against us are the Executive, the Judiciary, two out of three branches of the Legislature."[1] The House of Representatives was the only branch of the federal government where the Republicans enjoyed a majority. If they failed to assert the power of that body to check the policies of the Federalist administration, that party would be given virtual freedom to establish a model of the British system in the United States. The Republican party was the final barrier against the creation of tyranny in America.

Republicans therefore acted out of more than a petty sense of partisan politics. While attempting to protect the Republican party, they were at the same time acting to save popular government in America. They saw the fate of republicanism as dependent upon the Republican party. This was due to their sincere belief that the Federalists were,

in Jefferson's words, "an Anglican monarchical aristocratical party, . . . whose avowed object is to draw over us the substance, as they have already done the form, of the British government."[2]

Federalists naturally held equally sinister views of Jefferson and his party. The supporters of Jay's Treaty both in and out of Congress made reference to their opponents as "Jacobins." Jefferson was thus seen as a demagogue who would stir up the popular frenzy, thereby leading a triumph of the mob over order. The survival of the federal republic therefore depended upon passage of Jay's Treaty.

Both sides in this struggle thus doubted the patriotism of the other. Federalists and Republicans each believed that the other sought the destruction of the republic. This amounted essentially to a continuation of the old "conspiracy theory" that a group of malevolent conspirators existed which sought the destruction of the people's liberties. This accounted for the rigid polarization of the 1790's and the violent political atmosphere that accompanied it. Eventually, this served to hinder, rather than promote, the development of a viable two party system. The stagnation of the Adams' administration became a virtual paralysis of American democracy in 1798 over the situation created by the Alien and Sedition Acts. The battle over Jay's Treaty in 1796 set the stage for this occurrence.

FOOTNOTES

[1]*The Life and Selected Writings of Thomas Jefferson*, ed. Adrienne Koch and William Peden (New York: Random House, 1944), p. 537.

[2]Ibid., p. 532.

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