Several pieces with the signature of PACIFICUS were lately published, which have been read with singular pleasure and applause, by the foreigners and degenerate citizens among us, who hate our republican government, and the French revolution...

The basis of the reasoning is, we perceive, the extraordinary doctrine, that the powers of making war and treaties, are in their nature executive; and therefore comprehended in the general grant of executive power, where not specially and strictly excepted out of the grant.

Let us examine this doctrine; and that we may avoid the possibility of mistating the writer, it shall be laid down in his own words: a precaution the more necessary, as scarce any thing else could outweigh the improbability, that so extravagant a tenet should be hazarded, at so early a day, in the face of the public.

His words are—“Two of these (exceptions and qualifications to the executive powers) have been already noticed—the participation of the Senate in the appointment of officers, and the making of treaties. A third remains to be mentioned—the right of the legislature to declare war, and grant letters of marque and reprisal.”

Again—”It deserves to be remarked, that as the participation of the Senate in the making treaties, and the power of the legislature to declare war, are exceptions out of the general executive power, vested in the President, they are to be construed strictly, and ought to be extended no farther than is essential to their execution.”

If there be any countenance to these positions, it must be found either 1st, in the writers, of authority, on public law; or 2d, in the quality and operation of the powers to make war and treaties; or 3d, in the constitution of the United States.

It would be of little use to enter far into the first source of information, not only because our own reason and our own constitution, are the best guides; but because a just analysis and discrimination of the powers of government, according to their executive, legislative and judiciary qualities are not to be expected in the works of the most received jurists, who wrote before a critical attention was paid to those objects, and with their eyes too much on monarchical governments, where all powers are confounded in the sovereignty of the prince. It will be found however, I believe, that all of them, particularly Wolfius,
Chapter 1

Burlamaqui and Vattel, speak of the powers to declare war, to conclude peace, and to form alliances, as among the highest acts of the sovereignty; of which the legislative power must at least be an integral and preeminent part...

If we consult for a moment, the nature and operation of the two powers to declare war and make treaties, it will be impossible not to see that they can never fall within a proper definition of executive powers. The natural province of the executive magistrate is to execute laws, as that of the legislature is to make laws. All his acts therefore, properly executive, must presuppose the existence of the laws to be executed. A treaty is not an execution of laws: it does not presuppose the existence of laws. It is, on the contrary, to have itself the force of a law, and to be carried into execution, like all other laws, by the executive magistrate. To say then that the power of making treaties which are confessedly laws, belongs naturally to the department which is to execute laws, is to say, that the executive department naturally includes a legislative power. In theory, this is an absurdity—in practice a tyranny.

The power to declare war is subject to similar reasoning. A declaration that there shall be war, is not an execution of laws: it does not suppose preexisting laws to be executed: it is not in any respect, an act merely executive. It is, on the contrary, one of the most deliberative acts that can be performed; and when performed, has the effect of repealing all the laws operating in a state of peace...

Although the executive may be a convenient organ of preliminary communications with foreign governments, on the subjects of treaty or war; and the proper agent for carrying into execution the final determinations of the competent authority; yet it can have no pretensions from the nature of the powers in question compared with the nature of the executive trust, to that essential agency which gives validity to such determinations.

It must be further evident that, if these powers be not in their nature purely legislative, they partake so much more of that, than of any other quality, that under a constitution leaving them to result to their most natural department, the legislature would be without a rival in its claim...

It remains to be enquired whether there be anything in the constitution itself which shews that the powers of making war and peace are considered as of an executive nature, and as comprehended within a general grant of executive power.

It will not be pretended that this appears from any direct position to be found in the instrument...

Does the doctrine then result from the actual distribution of powers among the
several branches of the government? Or from any fair analogy between the powers of war and treaty and the enumerated powers vested in the executive alone?...

In the general distribution of powers, we find that of declaring war expressly vested in the Congress...

[The] constitution cannot be supposed to have placed either any power legislative in its nature, entirely among executive powers, or any power executive in its nature, entirely among legislative powers, without charging the constitution, with that kind of intermixture and consolidation of different powers, which would violate a fundamental principle in the organization of free governments...

The power of treaties is vested jointly in the President and in the Senate, which is a branch of the legislature...

[T]reaties when formed according to the constitutional mode, are confessedly to have the force and operation of laws, and are to be a rule for the courts in controversies between man and man, as much as any other laws. They are even emphatically declared by the constitution to be “the supreme law of the land.”...

“He shall take care that the laws shall be faithfully executed and shall commission all officers of the United States.” To see the laws faithfully executed constitutes the essence of the executive authority. But what relation has it to the power of making treaties and war, that is, of determining what the laws shall be with regard to other nations? No other certainly than what subsists between the powers of executing and enacting laws...

Thus it appears that by whatever standard we try this doctrine, it must be condemned as no less vicious in theory than it would be dangerous in practice. It is countenanced neither by the writers on law; nor by the nature of the powers themselves; nor by any general arrangements or particular expressions, or plausible analogies, to be found in the constitution...

I shall content myself with an extract from a work which entered into a systematic explanation and defence of the constitution, and to which there has frequently been ascribed some influence in conciliating the public assent to the government in the form proposed...The passage relates to the power of making treaties; that of declaring war, being arranged with such obvious propriety among the legislative powers, as to be passed over without particular discussion...

“Tho’ several writers on the subject of government place that power (of making treaties) in the class of Executive authorities, yet this is evidently an arbitrary disposition. For if we attend carefully, to its operation, it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them...” [Federalist No. 75]
1. George Washington
Helvidius Essays

It will not fail to be remarked on this commentary, that whatever doubts may be
started as to the correctness of its reasoning against the legislative nature of the
power to make treaties: it is clear, consistent and confident, in deciding that the
power is plainly and evidently not an executive power.

HELVIDIUS.

Helvidius No. 2
31 August 1793

...The declaring of war is expressly made a legislative function. The judging
of the obligations to make war, is admitted to be included as a legislative
function...And no other department can be in the execution of its proper
functions, if it should undertake to decide such a question...

The power to judge of the causes of war as involved in the power to declare war,
is expressly vested where all other legislative powers are vested, that is, in the
Congress of the United States. It is consequently determined by the constitution
to be a Legislative power. Now omitting the enquiry here in what respects a
compound power may be partly legislative, and partly executive, and accordingly
vested partly in the one, and partly in the other department, or jointly in both;
a remark used on another occasion is equally conclusive on this, that the same
power, cannot belong in the whole, to both departments, or be properly so
vested as to operate separately in each. Still more evident is it, that the same
specific function or act, cannot possibly belong to the two departments and be
separately exerciseable by each...

If the legislature and executive have both a right to judge of the obligations to
make war or not, it must sometimes happen, though not at present, that they will
judge differently. The executive may proceed to consider the question to-day,
may determine that the United States are not bound to take part in a war, and
in the execution of its functions proclaim that determination to all the world.
To-morrow, the legislature may follow in the consideration of the same subject,
may determine that the obligations impose war on the United States, and in
the execution of its functions, enter into a constitutional declaration, expressly
contradicting the constitutional proclamation.

In what light does this present the constitution to the people who established
it? In what light would it present to the world, a nation, thus speaking, thro’ two
different organs, equally constitutional and authentic, two opposite languages,
on the same subject and under the same existing circumstances?...

HELVIDIUS.
…The other of the two arguments reduces itself into the following form: The Executive has the right to receive public Ministers; this right includes the right of deciding, in the case of a revolution, whether the new government sending the Minister, ought to be recognized or not; and this again, the right to give or refuse operation to pre-existing treaties.

The power of the Legislature to declare war and judge of the causes for declaring it, is one of the most express and explicit parts of the Constitution. To endeavor to abridge or effect it by strained inferences, and by hypothetical or singular occurrences, naturally warns the reader of some lurking fallacy...

The words of the Constitution are “he (the President) shall receive Ambassadors, other public Ministers and Consuls.”… [L]ittle if any thing more was intended by the clause, than to provide for a particular mode of communication, almost grown into a right among modern nations; by pointing out the department of the government, most proper for the ceremony of admitting public Ministers, of examining their credentials, and of authenticating their title to the privileges annexed to their character by the law of nations. This being the apparent design of the Constitution, it would be highly improper to magnify the function into an important prerogative, even where no rights of other departments could be affected by it...

[H]ow does it follow from the function to receive Ambassadors and other public Ministers that so consequential a prerogative may be exercised by the Executive? When a foreign Minister presents himself, two questions immediately arise: Are his credentials from the existing and acting government of his country? Are they properly authenticated? These questions belong of necessity to the Executive; but they involve no cognizance of the question, whether those exercising the government have the right along with the possession. This belongs to the nation, and to the nation alone, on whom the government operates. The questions before the Executive are merely questions of fact...

For allowing it to be, as contended, that a suspension of treaties might happen from a consequential operation of a right to receive public ministers, which is an express right vested by the constitution; it could be no proof, that the same or a similar effect could be produced by the direct operation of a constructive power...

HELVIDIUS.