FILE COPY

In the

Supreme Court of the United States

October Term, 1971

No. 55, Original

Richard Eugene Webb, A citizen of Ohio

Plaintiff

v.

William J. Porter, as Ambassador
and Chief of the United States Delegation
to the Paris Peace Talks

MOTION FOR LEAVE TO FILE COMPLAINT
AND
COMPLAINT

Richard Eugene Webb
1612 Andover Road
Upper Arlington, Ohio 43212

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No. . . . . , Original

Richard Eugene Webb, Plaintiff

v.

William J. Porter

MOTION FOR LEAVE TO FILE COMPLAINT

I respectfully ask leave of the Court to file the attached complaint against William J. Porter, the person who has been appointed by President Richard M. Nixon on July 28, 1971, to serve as the chief negotiator for the United States at the Paris Peace Talks.

Richard E. Webb,
a Citizen of Ohio at
1612 Andover Road,
Upper Arlington, Ohio 43212

February 19, 1972

In the

Supreme Court of the United States

October Term, 1971

No. . . . . , Original

Richard Eugene Webb, Plaintiff

v.

William J. Porter

COMPLAINT

Richard Eugene Webb, plaintiff, alleges for its cause of action as follows:

I

The said defendant has been appointed by President Richard M. Nixon on July 28, 1971 to head the United States delegation at the Paris Peace Talks with the rank of Ambassador. The official function of the said defendant is to conduct the negotiations on behalf of the United States in an effort to form a peace treaty with several governments in Indochina and, thereby, end the present war in Indochina in which the United States is involved.

II

The said defendant is a public Minister, since he is representing the United States.

III

The said defendant has *not* been appointed to the said ministership by and with the advice and consent of the Senate in accordance with Article II, Section 2 of the Constitution of the United States.

IV

The said ministership is not an "inferior" office which the President alone can fill pursuant to a Law of Congress and of Article II, Section 2 of the Constitution.

V

The said defendant has no legal authority to act as a public Minister for the United States because the Constitution (Article II, Section 2) declares that public Ministers of the United States *shall* be appointed by and with the advice and consent of the Senate, and because the Tenth Amendment of the Constitution declares that the "powers not delegated to the United States by the Constitution . . . are reserved . . . to the people." The commissioning of the said defendant for the said ministership is, therefore, an act in violation of the Constitution.

VI

The safety of myself and of my two sons, Richard Spencer and Eugene Paul, who are five and two years of age, respectively, and who are under my guardianship, depends on foreign affairs being conducted in a lawful, Constitutional manner, since the Constitution was established by the People to, in part, secure the Blessings of Liberty and promote the general Welfare. The said unconstitutional ministership detracts the said safety and, thereby, does wrong.

VII

The life or liberty of myself, and the said sons, cannot be deprived "without due process of law." (Fifth Amendment of the Constitution). Inasmuch as a peace treaty has not been achieved at the Paris Peace Talks, and inasmuch as the said war has been raging for about twenty years, the chances are *real* that I and/or my sons will be killed in that war, or in a larger war that grows from the present war. That is, the said unlawful ministership produces the danger of setting in motion events which could not be stopped that will deprive me and /or my sons of life or liberty through war. Since a life deprived cannot be restored, the unlawful ministership conferred to the said defendant, and the carrying out of the duties that go along with it, represent a process by which the life and liberty of my sons and myself are being deprived without due process of law and, thereby, do wrong.

VIII

Inasmuch as the Judges on the Supreme Court are bound to support the Constitution (Article VI of the Constitution), rather than an unconstitutional delegation of authority, I request that the Supreme Court order William J. Porter to cease performing his role at the Paris Peace Talks, until such time as he may be appointed by and with the advice and consent of the Senate, and that he be ordered to return to the President or otherwise destroy whatever commission he presently holds respecting the Paris Peace Talks, in order that I may obtain relief.

IX

This suit is not an attempt to impeach an officer of the United States as defined in Article I, Section 3 of the Constitution; nor is it an attempt to ask the Supreme

Court to convict an officer. The purpose of this suit is to deny the said defendant an unlawful office.

Richard Eugene Webb,
A citizen of Ohio at
1612 Andover Road,
Upper Arlington, Ohio 43212

In the

Supreme Court of the United States

October Term, 1971

No. . . . . , Original

Richard Eugene Webb, Plaintiff

v.

William J. Porter

BRIEF IN SUPPORT OF MOTION

JURISDICTION

Because the complaint is against a public Minister, Ambassador William J. Porter, the Supreme Court shall have original jurisdiction. Article III, Section 2, Clause 2 declares:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.

STATEMENT

The purpose of this litigation is to seek to deny William J. Porter his present ministership for the Paris Peace Talks on the grounds that the said office has not been con-

stitutionally conferred, since Mr. Porter has not been appointed by and with the advice and consent of the Senate.

The Constitution was established especially for the safety of the People. By revoking Mr. Porter's present ministership, President Nixon will be forced to follow the established Constitutional procedures in his efforts to form a peace treaty with North Vietnam and the National Liberation Front of South Vietnam, and, thereby, ensure the safety of the plaintiff and his sons relative to the protracted war in Indochina and the possibility for outgrowth of nuclear war with Russia and China, who are assisting North Vietnam.

ARGUMENT

I. *Appointments: Constitutional Requirements*

Regarding the appointments of Ambassadors and other public Ministers of the United States, the Constitution declares in express terms:

> "he [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[1]

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[1]U.S. Constitution, Article II, Section 2.

This directive precludes any inherent presidential power to appoint public Ministers without the advice and consent of the Senate. The Tenth Amendment of the Constitution ensures against the assumption by the President of such inherent powers by declaring:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

II. *Porter's Appointment: Violates the Constitution*

Despite the express requirements of the Constitution, President Richard M. Nixon on July 28, 1971 has appointed, without the Senate's advice and consent, Mr. William J. Porter to head the United States' delegation at the Paris Peace Talks in an effort to form a Vietnam peace treaty and, thereby, end the Indochina War.[2] In his role Mr. Porter is serving as a public Minister of the United States, as the term "public Minister" was explained in *The Federalist* (No. 81): "Public ministers of every class are the immediate representatives of their sovereigns." Indeed, Mr. Porter bears the Constitutional title of Ambassador,[3] a title emphasized expressly in Article II, Section 2 of the Constitution as requiring the advice and consent of the Senate for appointment.

The previous chief negotiator for the United States at the Paris Peace Talks, Mr. David Bruce, was also ap-

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[2]Weekly Compilation of Presidential Documents, Vol. 7, No. 31, August 2, 1971, p. 1092.

[3]Id. See also, PRESS [RELEASE] DEPARTMENT OF STATE, November 4, 1971, No. 254-A.

pointed without the advice and consent of the Senate, and also held the rank of "Ambassador" for that appointment.[4] In the case of Mr. Bruce, the Department of State has contended, however, that "our negotiator at the Paris peace talks is, of course, appointed with the advice and consent of the Senate."[5] The Department of State was evidently referring to Mr. Bruce's earlier appointments, confirmed by the Senate, as Ambassador to the Federal Republic of Germany in 1957 and as Ambassador to the United Kingdom in 1961. Thus, the Department of State in effect has asserted that once a person is appointed, by and with the advice and consent of the Senate, to an ambassadorship of definite scope, that person may be assigned to another ambassadorship outside the scope of the previous appointment without Senate confirmation. Let us examine the validity of this assertion.

The Constitution does not expressly limit the scope of a "public Minister," except that he shall not be a member of Congress, nor appointed an Elector (Art. I, Sec. 6 and Art. II, Sec. 1). The scope of an appointment of a public Minister relative to foreign affairs can only be limited to that which the Senate previously consented. In the case of Mr. Porter the Senate consented *only* to his then current appointment as "Ambassador Extraordinary and Plenipotentiary of the United States of America to the Republic

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[4]Committee Print (92 d Congress, 1st Session): The Senate Role in Foreign Affairs Appointments (A study of the provisions of the Constitution and law requiring confirmation of nomination in the foreign relations field), prepared for the use of Committee on Foreign Relations, United States Senate, by the Foreign Affairs Division, Congressional Research Service, Library of Congress, August 1971, pp., III, 3, 30, and 31.

[5]Letter from Michael Collins, Assistant Secretary for Public Affairs, Department of State, Washington, D.C., sent on the request of President Nixon to Richard E. Webb, dated October 1, 1970.

of Korea."[6] Therefore, it cannot be claimed that Mr. Porter's past Senate confirmation as Ambassador applies to his present appointment as the chief U.S. negotiator at the Paris Peace Talks. President John Adams was confronted with an identical situation of wanting to use a properly appointed minister for a new, unrelated task; but he did not circumvent the Senate. On February 6, 1799 he sent the following message to the Senate:

> "In consequence of intimations from the Court of Russia, to our Minister Plenipotentiary at the Court of Great Britain, of the desire of that power to have a treaty of amity and commerce with the United States, and that the negotiation might be concluded in London:
>
> I nominate Rufus King, our Minister Plenipotentiary at the Court of Great Britain, to be Minister Plenipotentiary, for the special purpose of negotiating with any Minister of equal rank and powers, a treaty of amity and commerce between the United States and the emporer of all the Russias."[7]

III. *President Nixon Violates the Treaty-Making Power*

Mr. Porter's role at the Paris Peace Talks is to negotiate a treaty of peace with several governments of Indochina.[8] Therefore, the treaty-making power of the Con-

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[6]Congressional Record, June 8, 1967, S. 15303. Mr. Porter was currently serving his ambassadorship to Korea when he was assigned to the Paris Peace Talks. (Weekly Compilations, supra footnote 2) It is of interest to note that before his Korean appointment, Mr. Porter was appointed "Deputy Ambassador to Viet-Nam" on September 4, 1965, but again without the advice and consent of the Senate. (Weekly Compilation of Presidential Documents, Vol. I, No. 7, September 13, 1965, p. 209-210.)

[7]Senate Executive Journal, Vol. I, p. 310.

[8]Congressional Record, October 8, 1970, S. 17453-17454.

stitution is involved in his appointment as well as the appointment power itself. Article II, Section 2 states:

> "He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur;".

Senator Rufus King in 1818 stated:

> "To make a treaty includes all the proceedings by which it is made and the advice and consent of the Senate being necessary in the making of treaties, must necessarily be so, touching the measures employed in making the same. The Constitution does not say that treaties shall be concluded, but that they shall be made, by and with the advice and consent of the Senate: none therefore can be made without such advice and consent; and the objections against the agency of the Senate in making treaties, or in advising the President to make the same, cannot be sustained, but by giving to the Constitution an interpretation different from the obvious and most salutary meaning."[9]

King's remarks were given in support of a proposed Senate resolution (submitted by Senator Burrill) that was objected to because it allegedly interfered with the President's power to negotiate. However, the Senate approved the Burrill resolution, thereby sanctioning King's argument.[10] (King was a delegate to the Federal Constitutional

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[9]Annals of Congress, 15th Cong., 1st Sess. 106-107.

[10]Richard E. Webb, Treaty-Making and the President's Obligation to Seek the Advice and Consent of the Senate with Special Reference to the Vietnam Peace Negotiations, Ohio State Law Journal, Summer, 1970, Vol. 31, No. 3.

Convention of 1787 and a member of its Committee of Eleven that drafted the existing treaty-making clause.) The meaning understood by King was that which was explained to the people before they adopted the Constitution by John Jay in *The Federalist:* "the President must, in forming them [treaties], act by the advice and consent of the Senate, . . ."[11] Theophilus Parsons, in the Massachusetts Convention that ratified the Constitution, stated how the Senate in both of its capacities would be checked under the Constitution:

> "When the Senate act as legislators, they are controllable at all times by the [House of] representatives; and in their executive capacity, in making treaties and conducting the national negotiations, the consent of two thirds is necessary."[12]

Hence, treaties are *made* by first *forming* them through *negotiations,* and then by *concluding* them. Therefore, the President's power to conduct treaty negotiations depends on the advice and consent of the Senate.

Recall the before-mentioned nomination message concerning Rufus King. It specifically stated the purpose of the appointment; i.e., to negotiate a treaty. Similarly, President Washington nominated for Senate confirmation John Jay as "Envoy Extraordinary" for the specific task of negotiating a "friendly adjustment of our complaints" against Great Britain and thereby to "cultivate peace."[13]

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[11]The Federalist, No. 64.

[12]Jonathon Elliot, Ed., The Debates in the Several State Conventions on the Adoption of the Federal Constitution . . ., Vol. II, p. 92. Philadelphia – J. B. Lippincott, 1937.

[13]R. E. Webb, supra footnote 10.

It was the practice of Presidents George Washington and John Adams to nominate ministers for stated purposes of negotiating treaties, and thereby seek the Senate's advice and consent to begin making a treaty.[14] But such has not been done by President Nixon in regards to Mr. Porter. The precedents cited above, which conform to the meaning of the treaty-making power that was conveyed to the people by Jay and Parsons before the Constitution was ratified, demonstrate clearly that in the case of treaty negotiations the message containing the nomination of the ministers who will negotiate should also define the purpose of the nomination. The past appointment of Mr. Porter as Ambassador to South Korea contained no reference whatsoever to forming a peace treaty with governments of Indochina; and, therefore, it confers no power to President Nixon to negotiate an Indochina peace treaty.

Furthermore, the President has announced his opposition to the latest expression of the Senate regarding the negotiating policy that ought to be adopted by the United States.[15] Therefore, the President is *not* acting in accordance *with* the advice and consent of the Senate; and, thus, he has no Constitutional power whatsoever to be conducting the peace treaty negotiations. (The issue raised by the Plaintiff in this Complaint has also been raised in the Senate as recently as July 26, 1971 with the introduction by Senator Vance Hartke of Senate Resolution No. 156 — Resolution Affirming the Constitutional Prerogatives

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[14]See Senate Executive Journal, Vol. I.

[15]See Title VI, Termination of Hostilities in Indochina, Public Law 92-156, November 17, 1971; Congressional Record, November 11, 1971, S. 18298; Weekly Compilation of Presidential Documents, Vol. 7, No. 47: Nov. 17, Presidential Statement, p. 1531; and Remarks by Senator Church, November 17, 1971, in the Senate, Congressional Record, S. 18874.

of the Senate with Respect to the Foreign Relations of the United States.[16])

IV. *Plaintiff's Research of the Treaty-Making and Appointment Powers of the Constitution.*

The plaintiff has published a detailed article on the treaty-making power in the Ohio State Law Journal.[17] Among other things, this article refutes the basis for the dictum on the treaty making power given by Supreme Court Justice George Sutherland in the U.S. v. Curtiss-Wright Case.[18] Justice Sutherland asserted:

> "He [the President] *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."[19]

For his basis Sutherland quoted John Marshall: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations;" and then quoted from an 1816 Senate Foreign Relations Committee Report:

> ". . . He [the President] manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what

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[16]Senate Resolution 156 — Submission of a Resolution Relating to Foreign Relations of the United States (Referred to the Committee on Foreign Relations), Senator Vance Hartke, with comments by Senator J. William Fulbright, Congressional Record, July 26, 1971, S. 12059-12075.

[17]R. E. Webb, supra footnote 10. Also printed in Cong. Rec. supra note 16.

[18]299 U.S. 304 (1936).

[19]Id., p. 319.

> subjects negotiations may be urged with the greatest prospect of success . . . They think the interference of the Senate in the direction of foreign negotiations . . . impair the best security for the national safety . . ."

John Marshall made the "sole organ" statement as a member of the House of Representatives in a debate over whether President Adams could legally extradite a British subject under an extradition treaty *already in force* without going through the courts.[20] Marshall was not asserting the relationship between the President and the Senate in treaty negotiations, but rather between the President and the courts in the execution of a treaty already made.

As for the 1816 Committee Report, the Senate rejected that opinion in 1818 when it passed the Burrill resolution (mentioned earlier in this brief), and again on January 5, 1820 with the passage of a resolution to involve itself in negotiations,[21] to which President Monroe replied:

> "In compliance with the resolution of the Senate, of the 5th instant, the enclosed papers are transmitted to them *in confidence*, and contain all the information in possession of the Executive, respecting the progress of the negotiation with the British government, . . ."[22]

As for who "manages our concerns with foreign nations," that 1816 Committee opinion stands in conflict with what Alexander Hamilton told the New York Convention that ratified the Constitution:

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[20]Annals of Cong., 6th Cong. 613.

[21]Senate Exec. Jour., III, 187.

[22]Id., 189.

"They [the Senate], together with the President, are to manage all our concerns with foreign nations."[23]

The plaintiff is also finishing an addendum to the said law journal article (now in draft form). This addendum and the law journal article cover the subject matter thoroughly and contain the basis for the Complaint. The addendum has particular emphasis at meeting every claim of an early, contrary precedent which have been supplied by those who have argued that the Constitution contains "inherent powers" for the President to send persons abroad to engage in foreign negotiations without the Senate's advice and consent. The addendum shows that most such claims are unfounded.

For example, Corwin asserted President Washington sent Governeur Morris to Great Britain to make a treaty without the Senate's advice and consent.[24] Yet, Washington was acting by the Senate's advice of March 24, 1790.[25] Also, Corwin asserted that "Colonel David Humphreys was sent to Madrid and Lisbon on a similar mission."[26] However, Humphreys' real mission was merely to carry instructions to our Charge' des affairs at Madrid and to arrange an exchange of ministers with Portugal, afterwhich the Senate confirmed Humphreys as Minister Resident at Lisbon upon his nomination.[27]

However, there does appear to be two instances of appointments without Senate consent made by George

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[23]Elliot's Debates, supra footnote 12, p. 306.

[24]E. S. Corwin, *President: Office and Powers*, pp. 251-253.

[25]Sen. Exec. Jour., I, 36-38, 78.

[26]E. S. Corwin, supra note 24.

[27]Sen. Exec. Jour., I, 74, 75.

Washington to form treaties with the Barbary States;[28] although, it might be argued that Washington was at least executing a May 7, 1784 resolution adopted by the Continental Congress to form such treaties,[29] and, thus, was abiding by Article VI of the Constitution which declares:

> "All . . . Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation."

However, except for these two instances, Washington obtained the advice and consent of the Senate for the great many other appointments he made. It may be that the Barbary precedents will be given much weight within the Executive Branch. To do so, however, would make a mockery of the written Constitution, since the government would be inferring authority, not from the people, but from their own practices.

Another example of the findings included in the addendum is as follows: The doctrine of inherent presidential powers in foreign affairs began to assert itself with President Madison when he appointed, during a recess of the Senate, Albert Gallatin and others "to negotiate and sign a treaty of peace with Great Britain" in order to end the War of 1812. On May 31, 1813 after the Senate convened in regular session, President Madison nominated the same persons to the same offices.[30] Because these were

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[28]Congressional Debates, Vol. 7, 21st Congress, 2nd Session, 1830-31, February 23, 1831, p. 255. Also, Ray W. Irwin, The Diplomatic Relations of the United States with the Barbary Powers, 1776-1816, The Univ. of North Carolina Press, 1931, p. 82, in conjunction with Sen. Exec. Jour., Vol. I.

[29]Ray W. Irwin, supra footnote 28, p. 27.

[30]Sen. Exec. Jour., Vol. II, 346.

original appointments, Madison contended in effect that the Constitutional provision for filling up vacancies during a Senate recess[31] implies the power to make *original* appointments during a recess, and even to form treaties, without the advice and consent of the Senate; and in case their mission were not completed by the end of the next Senate session, they would need to be nominated, or else their commission would expire at the end of the session. This action by Madison caused a vigorous and thorough debate in the Senate, which was initiated by Senator Gore's resolution in 1814 protesting the recess appointments.[32] Although, consideration of Gore's resolution was postponed, a similar protest led by Senator Tazewell occurred in 1831 over original appointments made during a Senate recess by President Andrew Jackson to negotiate a treaty with Turkey. In this 1831 debate the Senate faced the issue squarely when considering a bill for compensating the appointees for their services. The Senate passed an amendment that withheld approval of these recess appointments.[33]

In the earlier 1814 Senate debate on Gore's resolution, opponents alleged that there was a precedent for Madison's recess appointments in President John Adams' appointment of his son, John Q. Adams, to negotiate a renewal of a treaty with Sweden.[34] John Adams informed

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[31]Article II, Section 2, Clause 3 of the Constitution states: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

[32]Sen. Exec. Jour., Vol. II, 415 and Annals of Congress, 13th Cong., 1813-1814, 651-759.

[33]Congressional Debates, supra footnote 28, pp. 214-310.

[34]Annals, supra footnote 32, p. 720.

the Senate on March 17, 1798 that he commissioned his son during a Senate recess.[35] But in fact, the commissioning document[36] is dated June 1, 1797, *when the Senate was in session.* (President Adams concealed the Sweden mission from the Senate.) Furthermore, that session was a special session convened by President John Adams to ask the Senate's advice and consent to send ministers "to negotiate with the French Republic, to . . . adjust all differences, by a treaty."[37] Therefore, the *true* precedent established by John Adams is to *convene* the Senate if, during a recess, there is a need to make an original appointment for the purpose of entering into a treaty negotiation.

As another example from the before-mentioned addendum, let us examine the remarks by the members of the House of Representatives in the First Congress under the Constitution to determine the meaning of the appointment power in connection with treaty-making that was asserted at that time. Since these members were fresh from the debates on the ratification of the Constitution, their view of the appointment power has special significance. The following quotations are from the deliberations on the "Foreign Intercourse Bill,"[38] starting with Mr. Lawrence:

> "there was a Constitutional necessity that the President, by and with the consent of the Senate, should appoint *all* the officers employed in foreign negotia-

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[35]Sen. Exec. Jour., Vol. I, 265.

[36]Microfilm of the Adams Papers, Adams Manuscript Trust, Massachusetts Historical Society, No. 384, April-June, 1797.

[37]Sen. Exec. Jour., I, 241.

[38]Annals of Congress, 1st Cong., January 1790, pp. 933, 1061-1092.

tions; the same necessity existed with respect to making treaties;" [Emphasis added.]

and Mr. Sherman, who also was a member of the Constitutional Convention:

> "The establishment of every treaty requires the voice of the Senate, as does the appointment of every officer for conducting the business. These two objects are expressly provided for in the Constitution, and they lead me to believe that the two bodies [President and Senate] ought to act jointly in every transaction with foreign powers."

These statements were echoed by others and were not disputed during the discussions on the bill.

V. *The Federalist: Appointment Power and Checks and Balances.*

Alexander Hamilton devoted several essays in *The Federalist* to explain the appointing power to the public;[39] and he never once hinted that the President has any sole appointing power inherent in his office. In fact he explicitly rejected the contention "that the President ought solely to have been authorized to make the appointments under the federal government." In another place in the essays he made reference to the appointment of treaty negotiators:

> "The persons, therefore, to whose immediate management these different matters are committed [of which the 'actual conduct of foreign negotiations' was cited by Hamilton as one] ought to be considered as the assistants or deputies of the Chief Magistrate, and on this account they ought to derive their offices

[39]Nos. 72, 75, 76 and 77.

> from his appointment, *at least from his nomination,* and ought to be subject to his superintendence." [Emphasis added.]

In saying that the U.S. negotiators ought to derive their offices from no less than a previous nomination by the President, Hamilton meant, of course, nominations submitted to the Senate; for he wrote:

> "The President is 'to *nominate,* and, by and with the advice and consent of the Senate, to appoint ambassador, other public ministers . . .' "
> [Emphasis is his.]

Finally, leaving no room for a sole appointment power, Hamilton stated: "no man could be appointed, but upon his previous nomination . . ."

As to the Senate's influence in the appointments, Hamilton explained that "If by influencing the President be meant *restraining* him, this is precisely what must have been intended." Here Hamilton spoke to a fundamental characteristic of the Constitution; i.e., the provision for checks on each of the three branches of government. James Madison in The Federalist[40] explained the general provision of checks and balances in the Constitution:

> "[the] policy of supplying by opposite and rival interests . . . [is] particularly displayed in all the subordinate distributions of power; where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other."

Such was explained in the State Conventions that ratified the Constitution. For example, James Bowdoin

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[40]No. 51.

stated in the Massachusetts Convention:

> "The powers of government are separated in all, and mutually check each other. These are laid down, as fundamental principles, in the federal Constitution."[41]

As asserted earlier, President Nixon is acting without the Senate's consent in regard to the negotiations being conducted at the Paris Peace Talks. Having thus denied the right of the Senate to exercise joint control with the President in the formation of a Vietnam peace treaty, the Senate is left with only one means to resist this encroachment upon its powers – i.e., its control over the appointment of the ministers who are to conduct the negotiations. James Madison in *The Federalist*[42] explained that:

> "the great security [provided by the Constitution] against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."

The Constitutional means available to the Senate to resist encroachment by the President, in forming of treaties without the advice and consent of the Senate, is its power over the appointments of the ministers sent to negotiate.

VI. *Usurpation Detracts the Plaintiff's and His Children's Safety*

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[41]Elliot's Debates, supra note 12, Vol. II, 127.

[42]No. 51.

The unconstitutional ministership conferred to Mr. Porter detracts the safety of the plaintiff, and his two sons, since it is an act of usurpation. By violating the Constitution the President is ignoring the purposes for which it was established, as stated in the preamble (namely, to "insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty"). Thus, President Nixon and Mr. Porter are denying the People that instrument for their safety.

Inasmuch as the People have not granted the President the constitutional authority to appoint Mr. Porter to conduct the negotiations without the advice and consent of the Senate, it ought to be assumed that the People still believe their safety depends on treaty negotiations being conducted with the advice and consent of the Senate, two thirds of the Senators present concurring. The Vietnam negotiations are extremely serious matters, especially so in this nuclear age[43] when we consider that two nuclear powers, Russia and China, are assisting North Vietnam.[44]. This, and the fact that the war in Indochina has been raging for nearly twenty years, justify the claim that the unlawful ministership produces the danger of setting in motion events which could not be stopped that will deprive the plaintiff or his sons of their life or liberty through war.

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[43]President Nixon's Third Annual Message to Congress on Foreign Affairs: "United States Foreign Policy for the 1970's: The Emerging Structure of Peace.," February 9, 1971.

[44]Sir Robert Thompson, No Exit From Vietnam, 1969, David McKay Co., pp. 27, 51, 54, 59, 70, 94, 113 and 141.

VII. *Conclusion*

The issue in this Complaint is simply this: whether the present appointment of William J. Porter as the chief United States negotiator at the Paris Peace Talks is unconstitutional and, therefore, invalid. He has been appointed without the advice and consent of the Senate to negotiate a peace treaty with the participating governments at the said Talks, despite the fact that he enjoys the rank of Ambassador. Therefore, the plaintiff contends that Mr. Porter's commission is unconstitutional and should be revoked. To concede that the President is vested with an inherent power to appoint a person to negotiate with representatives of foreign governments without the sanction of the Senate is to deny the Senate the means to exercise its check on the President's conduct of those foreign affairs which are most important to our nation — the making of treaties, which is to say, the making of peace.

Richard Eugene Webb,
a Citizen of Ohio at
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