

Roger R. Trask Award Lecture, 2014

The Roger R. Trask Award and Fund was established by the SHFG to honor the memory and distinguished career of the late SHFG President and longtime federal history pioneer and mentor Roger R. Trask. The award is presented to persons whose careers and achievements reflect a commitment to, and an understanding of, the unique importance of federal history work and the SHFG's mission. Charlene Bickford directs the First Federal Congress Project at The George Washington University and has served as president of both the SHFG and the Association for Documentary Editing. She delivered the Trask Lecture at the Society's annual conference at the Robert C. Byrd Center for Legislative Studies on April 4, 2014.

Setting Precedent: The First Senate and President Washington Struggle to Define “Advice and Consent”

Charlene Bickford

While I'm quite sure that there are others who have made greater contributions to both the study of federal history and to history in the federal government, it is truly a wonderful and gratifying honor for me to receive this award from the Society for History in the Federal Government (SHFG). I consider the Society, which has played a critically important role in promoting the study of federal government history and providing ways for those engaged in this study to meet, share information, and communicate, to be one of my two primary professional homes. Though my last federal employment was a very brief period working for the National Archives in 1967, my life's professional work has focused upon the history of the federal government's early years. Since the 1979 founding of the ad hoc Emergency Committee to Preserve the National Archives to oppose the dispersal of collections in the National Archives to records centers across the country, I have been part of advocacy movements for the National Archives, the National Historical Publications and Records Commission (NHPRC), the National Endowment for the Humanities (NEH), and other causes of professional interest to federal historians and archivists.



I know that a few people in attendance this evening, including my longtime colleague, ally, and friend—our host Ray Smock—still have fond memories of meetings of the Emergency Committee in Pete Daniel’s Capitol Hill basement apartment planning strategy and calculating ways to get the “big guns” in the history profession on record against dispersal of the records. That particular advocacy effort took place soon after the founding of two organizations that have often provided key leadership on issues of federal history, archives, and publication of the essential documents of our national history over the past three-and-a-half decades—the Society for History in the Federal Government and the Association for Documentary Editing (ADE). Most of the individuals present at those meetings in Pete’s living room went on to become president of the SHFG, and some of us have also led the ADE. During these advocacy efforts, I’ve found that those who best understand the issues of preserving, providing access to, and publishing historical documents are often individuals who work in federal history. I’m proud to have been associated with the SHFG and its members since its founding and believe that the Society’s publications and activities, and the resulting communication and cross-pollination among historians who “do” Federal History, have served an essential purpose.

My life’s work has been focused upon just two years of congressional history. My colleagues at the First Federal Congress Project and I have long understood that though historians are aware of the importance of the United States Congress, most find presidents and presidential administrations to be much more interesting and manageable research topics. Congress is unwieldy and full of individuals with strong personalities and opinions, and as we’ve all heard, observing the legislative process is “like watching sausage being made.” We often see Congress as an institution where parties and issues are too divisive; the legislative process is unbelievably complex; the rules are quite arcane; and frequent gridlock seems to make progress impossible.

Despite the fact that Congress often seems more than a little dysfunctional, as historians we still should find it quite amazing that this bicameral elected legislature has reached the milestone of 225 years—an accomplishment unparalleled in the history of democracies. Our Constitution and the governmental structure that it created have weathered crises, adapted to change, and stood the test of time, and the United States Congress is at the heart of that enduring structure. The Founders saw the legislature as the first branch of government, and its duties and powers are much more clearly and extensively defined in the Constitution than those of the other two branches. It was up to the Congress to do the real work of

fleshing out the governmental structure outlined in the Constitution and ensuring that the new federal institutions met the needs of the nation. Its every action was precedent-setting.

At the First Federal Congress Project (FFCP) we've had the privilege of concentrating on a Congress that had an important and full agenda and managed to accomplish most of the items on its to-do list. We don't hesitate to proclaim that much of its legislative output served to flesh out the Federal Constitution and that the First Federal Congress can be called a virtual "second sitting" of the Constitutional Convention. A list of just some of its most important accomplishments is impressive. It determined the sources of federal revenue and created systems for collecting it; established the first three executive departments (war, state, and treasury); laid out the structure, jurisdiction, and procedures of the new federal court system; and created procedures for copyrights, patents, naturalization of citizens, taking the census, and other federal government functions. And it muted the opposition to the strong federal government outlined by the U.S. Constitution by proposing the amendments that would become known as the Bill of Rights. Most importantly, through the Compromise of 1790 it tackled and resolved the two most difficult and divisive issues that the new nation faced: funding the Revolutionary War debts of both the nation and the states and determining where both the temporary and the permanent seats of the federal government would be located.

The FFCP staff has as its primary goal the editing and publication of the complete official and unofficial record of this productive body in the *Documentary History of the First Federal Congress, 1789–1791 (DHFFC)*. The edition can be seen as three series: eight volumes of official records, six volumes of debates, and eight volumes of correspondence. Twenty volumes of the *DHFFC* have been published by the Johns Hopkins University Press; volume 21 is at the press; and the final volume will be submitted later this year. The project is sponsored and partially funded by The George Washington University and has received steady support from the National Historical Publications and Records Commission, which actually started the project in the National Archives. The National Endowment for the Humanities and the William Nelson Cromwell Foundation also have been consistent funders. It has been our amazing good fortune to work on a project launched in the era of comprehensive editions. Our mission is to locate, collect, edit, and publish, or use in some way, every surviving official or unofficial document that relates to the history of what we are convinced was the most important and productive Congress in U.S. history. We find it almost incredible that so many original

unofficial documents, particularly the personal letters to and from members, have survived and are available in archives and manuscript collections. A recent thorough final search employing WorldCat and ArchivesGrid turned up less than 100 letters, written to or from members of the FFC, that we were previously unaware of—most of them deposited at repositories by descendants—since our previous “final” search. This relatively low number confirms the thoroughness of our document searches done before the advent of electronic cataloging. We have also built relationships with private collectors and manuscript dealers, several of whom have become friends of the project, sharing and allowing publication of their documents. Though previously unknown letters and other documents do turn up, we are quite confident that we have collected close to 100 percent of the documents known to be extant.

Though publishing books probably sounds a bit archaic in today’s electronic world, we think that the value added in our volumes—from the “calendars” in the legislative histories to the hundreds of biographical gazetteer entries to the incredibly detailed indexes—makes them accessible on an entirely different level than most electronic products, particularly if one has access to the entire edition and can take full advantage of the organizational structure that we have created. The official records reveal that Senate Secretary Samuel A. Otis, like longtime Secretary of the Continental and Confederation Congresses Charles Thomson before him, preserved every scrap of paper. One only needs to spend some time with the original Senate draft of the Judiciary Act of 1789 to understand how valuable the retention of these records was for reconstructing legislative histories. For example, we can tell that the Senate-appointed “grand” committee, composed of a senator from each state, assigned a three-member subcommittee to draft the bill and that the subcommittee members each drafted sections on a different topic: structure, jurisdiction, or procedures. Handwriting on the draft revealed which Senators were on the subcommittee and what their assigned topic was. The draft has numerous changes written in the margins or on pasted on slips of paper. Often there is additional material under the slips.¹

If the first Clerk of the House, John Beckley, had been the kind of record keeper that Otis was, we would know much more about legislative history, particularly because most First Federal Congress bills originated in the House. Unfortunately

¹ For the legislative history of this act (Judiciary Act [S-1]), see *Documentary History of the First Federal Congress, 1789–1791* (Johns Hopkins University Press, Baltimore) (hereinafter *DHFFC*), vol. V, *Legislative Histories: Funding Act through Militia Bill*, 1150–1212.

both the pattern of what survived in House records and later reports by Beckley's assistants reveal that Beckley had an established policy of destroying or disposing of a document for which a later version existed. Beckley served as House Clerk during two different periods for a total of almost 14 years. Thus history was deprived of most of the important early records of the House that document the legislative process long before the British burned Washington during the War of 1812.²

For this essay on early Senate-Executive relations I relied upon several volumes of the *DHFFC*, including the *Senate Executive Journal and Related Documents* (vol. 2) and volumes covering the correspondence of the FFC's First Session (vols. 15–17). Volume 9, *The Diary of William Maclay and Notes of Other Senators*, which presents an annotated edition of one of the most important documents of American political history, is an essential resource for the first Senate, which met in secret. Those volumes and two from the *Presidential Series* of the *Papers of George Washington* made it possible to quite easily pull together all the existing official and unofficial evidence. That documentary evidence reveals the stories of the rocky start of the constitutionally established “advice and consent” relationship between the Senate and President Washington and the precedents that were established during those early days.

Setting the Precedent of Advice and Consent on Nominations

So let's go back 225 years to the first week of April 1789 when the First Federal Congress finally achieved a quorum and settled down to accomplishing the precedent-setting work of fleshing out the new federal government outlined in the Constitution, as well as addressing the critically important, but divisive issues that had challenged the Confederation Congress. The House began working on April 1, and the Senate finally achieved a quorum with the arrival of Senator Richard Henry Lee of Virginia on April 6.

Not surprisingly the House quickly focused its attention on the imperative need to raise revenue for the operations of the Federal Government. That body turned first to legislation laying duties on imported goods, as well as taxing the tonnage of ships that imported those goods. This new revenue system would need to be administered in every U.S. port through which imported goods passed, and by July 31 the Congress had passed, and the president had signed, “An Act to regulate the collection of the

² For more on John Beckley's record keeping practices see *DHFFC*, vol. III, *Journal of the House of Representatives*, pp. vii–xiv.

duties imposed on goods, wares, and merchandizes imported into the United States.”³ The Collection Act authorized the creation of a relatively small bureaucracy. Ports of entry and of delivery were established, and revenue officers were authorized. Thus our federal customs system, patterned after what had been practiced in individual states, was born, and it was time to appoint revenue officers to administer it.

These days, when the U.S. Senate is about to consider a potentially controversial presidential nomination for a federal office requiring its advice and consent, we will sometimes hear a news report that mentions the tradition of Senatorial courtesy that dates back to 1789. The name that comes immediately to my mind when I hear one of these reports is Benjamin Fishbourn. Though the Senators present during the executive session of August 5, 1789, could not have realized its long-term importance, their rejection of Washington’s nomination of Fishbourn to be the Naval Officer at the port of Savannah, Georgia, set an enduring precedent. The story of Fishbourn’s nomination and the reaction to it illustrates how the puzzle pieces of the official records and unofficial documents can be put together to understand an important moment in Senate-Executive relations.

The president had been working on his list of nominations for the offices authorized before the Collection Act passed Congress for his signature, and on August 3 he conveyed this list to the Senate. This is the point when Benjamin Fishbourn enters the picture as the president’s nominee for Naval Officer at the port of Savannah. Like most Americans, Fishbourn, who held this position under the state government, had assumed that Washington would be elected president. Thus, in September 1788, he made a preemptive appeal to Washington for nomination to the federal position, almost a year before it was even established. Though Fishbourn’s letter has not been located, Washington’s December 23, 1788, response recognized his distinguished career in the Revolutionary War, including serving four years as an aide-de-camp to General Anthony Wayne, without making any commitment to nominate him.⁴

In May 1789 General Wayne himself wrote Washington requesting that Fishbourn be continued in his Savannah position, and in hindsight his words might

³ For the legislative history of this act (Collection Act [HR-11]), see *DHFFC*, vol. IV: *Legislative Histories: Amendments to the Constitution through Foreign Officers Bill*, pp. 309–76.

⁴ George Washington to Benjamin Fishbourn, December 23, 1788, *Papers of George Washington: Presidential Series* (University of Virginia Press, Charlottesville) (hereinafter *PGW*) vol. 1 (September 1788–March 1789), pp. 198–99.

have been a warning to Washington of problems to come. Wayne stated that Fishbourn replaced Ruben Wilkinson, who was “suspended for *mal practice*,” but that Wilkinson planned to appear at the federal seat of government to seek the appointment and would “very probably be recommended by a Mr. *Gunn*, who now holds a seat in the Senate ‘thro’ the *intrigues etc.* of Mr. Wilkinson.”⁵ We have found no evidence that Wilkinson actually appeared in New York City during the First Congress. Nevertheless, Senator James Gunn of Georgia is the other individual whose name will always be linked with Fishbourn’s and the origins of Senatorial courtesy.

Before continuing this story, some relevant procedural background should be provided. First, the Senate at this time held both its legislative and executive sessions in secret. The bare bones legislative journal was printed at the end of each session, but the journal wherein executive business was recorded remained secret for decades after the end of this Congress. That journal tells us that on June 18, before considering the nomination of William Short to replace Thomas Jefferson as U.S. Minister at the Court of France, the Senate had established a rule “that the consent of the Senate to the President’s Nomination of Officers be given by ballot.”⁶

Immediately after the nominations for revenue officers were received on August 3, a senator moved to reconsider this rule, but this motion was disagreed to. A motion to “wait on the President of the United States, and confer with him on the mode of communication proper to be pursued between him and the Senate on the formation of Treaties and making appointments” was then introduced and postponed to August 4. Then another motion, this one “to dispense with balloting upon the present occasion, and to consider the Nominations before the Senate *viva voce*” failed. Once all the evidence of the Fishbourn story is pieced together, it becomes clear that these motions almost certainly were attempts by Senator Gunn to either avoid or conceal the action that he intended to take on the nomination. Following these motions on rules, the Senate agreed to “proceed by ballot, a Caveat being assented to, that it should not be considered as a precedent.”⁷

During the balloting on August 3 and 4, all of the President’s nominees were considered and approved except for those of Georgia, which were postponed.

⁵ Anthony Wayne to George Washington, May 10, 1789, *PGW*, vol. 2 (April–June 1789), pp. 261–63.

⁶ *DHFFC*, vol. II, *Senate Executive Journal and Related Documents* (hereinafter *DHFFC*, II), p. 9.

⁷ *DHFFC*, II, p. 17.

On August 4, the Senate approved the Georgia officers except Fishbourn, whose nomination was postponed. The following day the Senate rejected the Fishbourn nomination, and Senate Secretary Samuel A. Otis was directed to lay a “certified Copy of the proceedings before the President of the United States.”⁸ None of the official records reveal either the reason for Fishbourn’s rejection or exactly what happened next. They do tell us that following the Fishbourn vote, a motion “That it is the opinion of the Senate that their advice and consent to the appointment of officers should be given in the presence of the President” was postponed until the next day. On August 6 the resolution proposed on August 3 to appoint a committee to confer with the President on the subject of executive communications was agreed to, and Senators Ralph Izard of South Carolina, Rufus King of New York, and Charles Carroll of Maryland were appointed.⁹

A letter from the President in which he nominates Lachlan McIntosh as the Savannah Naval Officer appears in the *Senate Executive Journal* for August 7. In this communication, Washington also appeals to the Senate to consult him in cases where the “propriety of Nominations” appears questionable to them in order to allow him to provide the background information that caused him to make the nomination. Washington concludes by defending his nomination of Fishbourn. He relates Fishbourn’s military service, calling his behavior at the battle of Stoney Point “active and brave,” and discusses all the positions of Georgia government service to which Fishbourn had been appointed or elected. In his concluding sentence, Washington uses and underlines the word *confidence* four times in stressing the good opinions militia officers, Georgia freemen, and the Georgia Assembly and its Council must have had of Fishbourn in appointing him to several positions of trust. An August 10 motion to commit this message was postponed until after the report by the committee on executive communications, and Fishbourn’s name doesn’t appear again in the official record.¹⁰

It is to the unofficial records that we must turn to flesh out this story. Historians who study the first Senate rely upon Senator William Maclay’s diary for both insider information about and insights into the actions of this formative body. As the editors of “Maclay’s Diary,” which makes up most of volume 9 of the *Documentary History of the First Federal Congress*, have stated, Maclay’s “caustic, sometimes witty, and generally accurate self-analytical diary stands just behind

⁸ *DHFFC*, II, pp. 22–24.

⁹ *DHFFC*, II, p. 24.

¹⁰ *DHFFC*, II, pp. 24–26.

James Madison's notes from the Federal Convention as the most important journal in American political history." We count on Maclay to reveal much that went on behind the closed doors of the Senate. At the same time we must constantly be wary of his biases, particularly as he becomes more and more disillusioned with the Federalists' agenda in the Second and Third Sessions.¹¹

Unfortunately Maclay was on leave at, or travel to and from, his home north of Harrisburg, Pennsylvania, from July 20 through August 15, and thus he was not present to provide us with a firsthand account of what happened on the day that Fishbourn's nomination was rejected. Nevertheless, he does report on his August 16 conversation with Senator Izard after his return to New York. Izard related that the "President shewed great want of temper, when one of his nominations was rejected." Izard, who chaired the committee on executive communications, also reported to Maclay that the president told the committee he had consulted members of the House on the subject of nominations but that "he had not acted so with the Senators, as they would have an Opportunity, of giving their advice & consent afterwards." It seems clear from both what Izard reported to Maclay and the letter that the president sent the Senate that Washington thought that the word "advice" implied an in-person dialogue with the Senate when doing executive business.¹²

While Maclay's report on the conversation with Izard is the only contemporary evidence that we have that Washington reacted with anger to Fishbourn's rejection, fortunately we do have a later and more revealing account of the incident. In an unsigned letter of March 12, 1818, to Joseph Gales, Jr., and William Seaton, the publishers of the *National Intelligencer*, Benjamin Lincoln Lear, the son of Washington's longtime personal secretary Tobias Lear, related what we believe to be his father's version of what happened when the president learned of the vote on Fishbourn. Lear was apparently trying to set the record straight after Gales and Seaton published a different version of the story. Though Lear's letter states that he believed that it was the nomination for "Collector of the Port of Charleston" that was rejected, it is clear that he is discussing the Fishbourn vote. He reports that as soon as Washington learned of the Senate's August 5 action, he "immediately repaired to the Senate Chambers and entered to the astonishment of everyone." Vice President John Adams gave up his chair for the president, who sat

¹¹ For more on the diary kept by Senator Maclay, see the introduction to *DHFFC*, vol. IX, *The Diary of Senator William Maclay and Other Notes on Senate Debates* (1989) (hereinafter *DHFFC*, IX).

¹² *DHFFC*, IX, p. 121.

and then said that he had come to ask the Senate's reasons for rejecting Fishbourn. Lear continues:

After many minutes of embarrassing silence, Genl. Gunn rose and said, that as he had been the person who had first objected to the nomination, & had probably been the cause of his rejection, it was perhaps his office to speak on this occasion. That his personal respect for the character of General Washington was such that he would inform him of his grounds for recommending this rejection, (and he did so), but that he would have it distinctly understood to be the sense of the Senate, that no explanation of their motives or proceedings was ever due or would ever be given to any President of the United States.

Lear also reports that he was told that when Washington returned from the Senate Chamber he “expressed great regret for having gone there.”¹³

Though we don't have much documentary evidence for exactly why Gunn vetoed Fishbourn's nomination, here is some background. Gunn and Fishbourn had been fellow officers during the Revolutionary War, and Fishbourn had attempted to deliver Gunn's challenge to a duel to General Nathanael Greene in 1785. Greene had declined this challenge. An undated letter from Fishbourn to an unknown recipient describes an affair of honor between Fishbourn and Gunn. According to the letter, this duel was stopped by the “*Interference of the seconds.*” Clearly there was bad blood between the two men, though they probably had been friends at one time.¹⁴

The first nearly contemporary indication that we have found of Senator Gunn's involvement in the rejection is an August 10 “Letter from New York” to Fishbourn, which appeared in the August 27 *Georgia Gazette*. The author reports that even though Fishbourn was “*warmly supported by Mr. Robert Morris [of Pennsylvania], who is your friend indeed,*” he was strongly opposed by Gunn and William Few, the other senator from Georgia, and states the following:

They were frequently called upon by your friends in the Senate for their reasons: Gunn urged nothing of any consequence but personal invective and abuse. The President, Gen. Washington, was so particular as to give his reasons

¹³ *DHFFC*, vol. XVI, *Correspondence: First Session: June–August 1789* (hereinafter *DHFFC*, XVI), pp. 1239–40.

¹⁴ For more on this, see *DHFFC*, XVI, p. 1240, where an undated letter from Fishbourn (ALS, Miscellaneous Collection, MiU-C) is quoted.

to the Senate for nominating you, all of which were honorable. . . . Gunn and Few have gained nothing by this maneuver, and I am happy to say their conduct will have no weight with your friends in depreciating your *responsibility* or *integrity*, for you are far better known than either of them on the broad basis of publick transactions during the revolution.¹⁵

A few days after this letter was published General Wayne wrote to South Carolina Representative Aedanus Burke stating that Gunn had prevented his “former aid” from “being Elected to Office, by an illiberal attack upon his Character, which will be made to appear false, Malignant and invidious” and asks him to put a certificate signed by “Gentlemen of Distinction at Savannah” before the senators.¹⁶

Fishbourn actually made his way from Georgia to New York City to defend his reputation and appeal for reconsideration. Samuel Otis wrote to Senate President Pro Tempore John Langdon on September 20, 1789, after Langdon had returned to New Hampshire but before the end of the Senate’s First Session, that he heard that “Fishbourn is come to fight himself into character” and continues as follows:

Now I do not think a Senator obliged to fight in doors & out too, At least not unless he has double pay, as the Speaker has, or at least more than six Dollars. If however *our Gun* should go off, it appears to me it will be a two & forty—So Mr. F. may well take care of his head at the same time that he is defending his reputation.¹⁷

By September 25 Fishbourn wrote to Washington from New York’s City Tavern seeking his “approbation of my having sufficiently done away any prejudices, you may have imbibed in consequence of the representations having been made against me in the Senate.” He asked the President for some indication that he will be returning to Georgia with “the sanction as well as the good wishes of his Excellency the President of the United States.” Having been embarrassed by the Fishbourn incident, Washington directed William Jackson, one of his secretaries, to write to Fishbourn and inform him that when he nominated him he was “ignorant of the charges” existing against him. And that “not having, since that

¹⁵ *DHFFC*, XVI, pp. 1286–87.

¹⁶ *DHFFC*, XVI, pp. 1431–32. The certificate mentioned by Wayne has not been located.

¹⁷ *DHFFC*, XVII, *Correspondence: First Session: September–November 1789*, p. 1588, letter courtesy of the Portsmouth Historical Society, Portsmouth, New Hampshire.

time, had any other exhibit of the facts that were alledged in the Senate than what is stated in the certificates which have been published by you, he does not consider himself competent to give any opinion on the subject.”¹⁸

Despite Fishbourn’s and Wayne’s appeals and Washington’s anger, Gunn had prevailed. Though it may not have been recognized as precedent-setting at the time, Senator Gunn’s objection to Fishbourn, together with the Senate’s reaction to his objection, established the precedent of Senatorial courtesy that we know today.¹⁹

On the Issue of Treaties

The Fishbourn case was only act one of the Senate and president’s struggle to define exactly how what the Constitution calls “advice and consent” should be carried out. Act two came later in the First Session of the First Congress when President Washington made his first attempt to consult the Senate on treaty negotiations. That story begins with the August 6 Senate resolution, passed after the president’s visit to the Senate on the Fishbourn issue, appointing a committee to meet with the president on the “mode of communication proper to be pursued” between him and the Senate when conducting executive business. The scheduled meeting between Washington and the committee occurred on August 8, and the president’s notes on what he told the Senators have survived. Not surprisingly, they make clear that the Fishbourn incident had convinced Washington that presidential attendance at the Senate’s consideration of nominations would be unwise. He comes down on the side of written communications:

It could be no pleasing thing, I conceive, for the President on the one hand to be present and hear the propriety of his nominations questioned—nor for the Senate on the other hand to be under the smallest restraint by his presence from the fullest and freest enquiry into the character of the Person nominated.

Washington’s final words on this issue provide a summary: “For as the President has a right to nominate without giving reasons, so has the Senate a right to dissent without giving theirs.”²⁰

¹⁸ *PGW*, vol. 4, p. 81.

¹⁹ This is the tacit agreement among senators not to vote for any presidential nominee who is opposed by senators from the nominee’s home state.

²⁰ For all the documentation of the discussion between the Senate committee and the president on communications while doing executive business, including the committee report quoted below and Washington’s notes, see *DHFFC*, vol. VIII, *Petition Histories and Non Legislative Documents* (hereinafter *DHFFC*, VIII), pp. 755–59. The quotes here come from page 757.

On the issue of consultation on treaties, the president expressed his clear opinion that “oral communications seem indispensably necessary” in matters concerning treaties and the appointment of ministers to foreign nations. He believed they would probably require much discussion and that having this discussion through written messages would be both tedious and unsatisfactory. The notes also state questions about the position of the vice president as the presiding officer of the Senate and whether or not he should give up his chair, and they expressed the concern that the president of the United States would be placed in an awkward position. Protocol seemed to be paramount in his mind. Washington expressed his assumption that when buildings were constructed for the government in the future, an executive chamber would be provided.²¹

As was his habit during the early part of the First Congress, Washington also consulted Representative James Madison, providing him with a summary of his meeting with the Senate committee and his thoughts on the issue of executive communications and whether or not communications should be oral. He sought Madison’s advice on the matter, saying that he was “willing to pursue that line of conduct which shall appear to be most conducive to the public good,” though his own “inclination . . . would not be gratified by personal nominations.”²² No written response from Madison has been located, but it is very likely that Madison chose to discuss this matter with the President in person.

The committee’s August 20 report recommended a flexible protocol for Senate-Executive communications, and also expressed the opinion of both the president and the Senate that the proper manner of carrying out the constitutionally directed practice of advice and consent might “be changed by experience.” In particular, it made provision for consultation either in the Senate Chamber or at the president’s residence, but it also anticipated that a special room might be provided for this purpose in any building constructed to house the Congress. The committee left the method of communication open, to be determined on a case-by-case basis, and recommended that the Senate “accommodate their Rules to the uncertainty of the particular mode and place.” Surprisingly, the report agreed to by the Senate did describe procedures for presidential attendance at the consideration of nominations, even after the experience with Fishbourn’s nomination. The concluding paragraph brings to mind earlier motions to avoid a ballot on executive issues. It reads as follows:

²¹ *DHFFC*, VIII, pp. 756–58.

²² *DHFFC*, XVI, pp. 1273–74.

That all questions shall be put by the President of the Senate, either in the presence, or absence of the President of the United States; and the Senators shall signify their assent, or dissent, by answering viva voce ay, or no.²³

The first test of the agreed-upon protocol for Senate-president communications on a treaty came two days later on August 22 when Washington, accompanied by Secretary of War Henry Knox, came to the Senate Chamber to report on the situation with the Southern Indians—the Cherokees, Chickasaws, Choctaws, and Creeks. This extensive report also posed a series of complex questions for the Senate on how to deal with these Indian Nations. It also sought specific instructions on how the commissioners sent to treat with each of the four Nations should negotiate, what conditions should be set, and how much money should be appropriated for the process.²⁴

It being August, the windows of the chamber were open, and Senator Maclay reports that the noise from the carriages outside was so loud that he “could tell it was something about Indians, but not master one Sentence of it.” When Washington was through reading, Senator Robert Morris of Pennsylvania rose and asked that the President’s message be read again because he had been unable to hear. This second reading was barely completed when John Adams, presiding over the Senate as he did every day of this Congress, started to call for a vote on the first question that had been posed. This action was met with silence. Maclay reports that Morris whispered “we’ll see who breaks the silence first.” Eventually Maclay stood to state that what had been read “appears to have for its basis Sundry Treaties and public Transactions between the southern Indians and the United States and the states of Georgia, North and South Carolina.” He contended that since the business was new to the Senate and important, that body needed to be better informed, and then called for a reading of all the treaties and other documents mentioned in the statements made by the president. He reports that “I cast my Eye at the President of the United States. I saw he wore an aspect of Stern displeasure.” Eventually Morris, seconded by Gunn, moved to commit the matter. Though there were objections raised by some Senators, including Pierce Butler of South Carolina, who contended that the Senate was acting as an executive council and such councils didn’t have committees. Maclay reports that he made a statement supporting the commitment and arguing that no time would be lost because the committee could report on Monday.

²³ *DHFFC*, VIII, pp. 758–59.

²⁴ For this presidential message, see *DHFFC*, II, pp. 31–34.

What Maclay reports as happening next clearly indicates that the procedures governing Senate-executive communications had still not been resolved to the president's satisfaction:

As I sat down the President of the U.S. started up in a Violent fret. *This defeats every purpose of my coming here*, were the first words that he said. He then went on that he had brought his Secretary at War with him to give every necessary information that the Secretary knew all about the business.

The president contended that he didn't object to postponing, but he couldn't understand the move for commitment and complained that this could cause an unnecessary delay. He stated that he would return at 10 a.m. on Monday the 24th and then withdrew. Maclay editorializes that the withdrawal was made with a discontented air and "had it been any other than the Man who I wish to regard as the first Character in World, I would have said 'with sullen dignity.'" He concludes that the "President wishes to tread on the Necks of the Senate."²⁵

Despite the fact that protocol had supposedly been established for executive business, it is obvious that this first attempt at consultation with the Senate did not go smoothly. Questions and requests for more information from the senators, as well as their opposition to immediately responding to the questions that Washington posed irritated him greatly. Of course he was accustomed to giving orders both to his officers in the Continental Army and those who worked on his plantation. Perhaps this incident with the Senate brought back his memories of the frustrations he experienced dealing with the Continental Congress as commander-in-chief of the army during the Revolutionary War.

It was a more controlled and compromising George Washington who returned to the Senate on August 24 to resume work on the questions relating to negotiations with the Southern Indians. The Senate passed through its consideration of the issues, with the president and Knox providing additional information and responding to the senators' questions. Nevertheless Maclay could not resist questioning a provision by which the federal government would guarantee a promised payment if the state of Georgia failed to make the payment. His fellow senators were silent on this issue, and the exchange with the president on the Southern Indians ended with an agreement to allow up to \$20,000 to be spent

²⁵ For Maclay's complete account of this meeting, see *DHFFC*, IX, pp. 128–31. All quotes in this paragraph are from this source.

in negotiations with the Creeks. The issues regarding the treaty negotiations were resolved, and the president and the Senate had taken the first steps toward establishing protocols for executive business.²⁶

During the August 24 debate Senator Maclay was called out of the Senate Chamber to see Washington's aide, Colonel David Humphreys. He was puzzled by this request, but found that Humphreys was there to invite him to dinner with the president at his residence. Even this ever-suspicious Senator saw himself as honored, and George Washington had proved that he understood that diplomacy on several fronts would serve him well.

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