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ORIGINAL ARTICLE

The Law of Nations in the Diplomacy of the American Revolution

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Abstract

Historians have long known that leaders of the American Revolution looked to the law of nations for insight into the rights and obligations of independent states. In so doing, Americans relied largely on the writings of European legal theorists, such as Hugo Grotius and Emerich de Vattel, whose treatises on the law of nations are regarded today as having laid the foundations of international law. As this article demonstrates, however, early modern statesmen did not base their conduct on such treatises, but on a *customary* law of nations that they derived from precedent and the text of earlier treaties. This article elucidates the distinction between the customary and theoretical branches of the law of nations. It then goes on to examine the law of nations' impact on revolutionary-era diplomacy, drawing particular attention to a series of wartime negotiations over rights to the Mississippi River. As the article shows, most American emissaries lacked experience with the customary laws of diplomacy and struggled to use that law effectively in their negotiations. The most serious consequences were averted due in part to French legal advice, and because one American, John Jay, acquired enough competence in customary law to guide his colleagues toward an effective negotiation of peace.

In an oft-quoted letter from 1775, Benjamin Franklin thanked a friend in Europe for having sent over three copies of Emerich de Vattel's recent treatise, *The Law of Nations* (1758)—one of which Franklin circulated among members of the Continental Congress. "It came to us in good season," Franklin wrote, "when the circumstances of a rising State make it necessary frequently to consult the law of nations." What was this "law of nations" to which Franklin referred, and how was it relevant to the needs of the early United States? Historians generally answer that question by reference to the treatises of European legal theorists such as Vattel (1714–67), Hugo Grotius (1583–1645), or Samuel von Pufendorf (1632–94). Their writings were admired by leaders of the American Revolution, who looked to them for insight into European conceptions of law. Recent scholarship has shown that the law of nations influenced the Declaration of Independence, the United States Constitution, and

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the early federal judiciary. As Alexander Hamilton wrote in 1795: "Ever since we have been an Independent nation, we have appealed to and acted upon the modern law of Nations as understood in Europe."[1]

This essay broadens the inquiry by asking how the law of nations affected the conduct of early American diplomacy. In so doing, it draws needed attention to a facet of the law that has received little attention in the scholarly literature: the *customary* law of nations. The customary law of nations was a body of pragmatic norms and conventions that European statesmen had developed over the course of centuries as a means of resolving conflict in the political or interstate realm. Dating back to the medieval era, it encompassed the laws of war, navigation, commerce, and diplomacy, and derived its authority from precedent and the consent of European sovereigns. The treatises of Vattel and others, by contrast, were academic commentaries on the law that dealt principally with its philosophical foundations. They were widely respected and occasionally consulted, but it was customary law that governed the political arena.[2]

[1] Benjamin Franklin to Alexander Dumas, December 19, 1775, in *The Revolutionary Diplomatic Correspondence of the United States*, ed. Francis Wharton, 6 vols. (Washington, DC: United States Government Printing Office, 1888), 2:64 (hereafter *RDC*). Vattel's treatise was the latest contribution to a genre that dated back to the medieval era. Other writers in the early modern era included: John Selden (1584–1654), Christian Wolff (1679–1754), and Jean Jacques Burlamaqui (1694–1748). For the law of nations in the history of international law see: Wilhelm G. Grewe, *The Epochs of International Law*, trans. Michael Byers (Berlin: Walter de Gruyter, 2000); *The Oxford Handbook of the History of International Law,* eds. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012); and Stephen C. Neff, *Justice Among Nations: A History of International Law* (Cambridge, MA: Harvard University Press, 2014). For the law of nations in the American Revolution see especially, Peter Onuf and Nicholas Onuf, *Federal Union, Modern World: The Law of Nations in an Age of Revolutions: 1776–1814* (Madison: Madison House, 1993); David Armitage, "The Declaration of Independence and International Law," *The William and Mary Quarterly* 59, no. 1 (January 2002): 39–64; David Golove and Daniel Hulsebosch, "A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition," *New York University Law Review* 85 (October 2010): 953–60; and Eliga Gould, *Among the Powers of the Earth: The American Revolution and the Making of a New World Empire* (Cambridge: Harvard University Press, 2012). For the law of nations in the early American judiciary see especially, Edwin Dickinson, "The Law of Nations as Part of the National Law of the United States," *The University of Pennsylvania Law Review* 101 (1952–1953): 26–57; and Stewart Jay, "The Status of the Law of Nations in Early American Law," *Vanderbilt Law Review* 42 (1989): 819–49. Alexander Hamilton, "Defence No. XX," October 23 and 24, 1795, *The Papers of Alexander Hamilton*, ed. Harold C. Syrett, 27 vols. (New York: Columbia University Press, 1973), 19:341. See also J. G. A. Pocock's reference to the founders' "triadic incantations of Grotius, Pufendorf, and Vattel" in, "Political Thought in the English-Speaking Atlantic, 1760–1790, Part I: The Imperial Crisis," in *The Varieties of English Political Thought, 1500–1800*, ed. J. G. A. Pocock (New York: Cambridge University Press, 1993), 282.

[2] Neff writes that, "[I]n Europe, a rich body of state practice arose in international legal affairs to deal with practical problems for which natural law had no ready answers," *Justice Among Nations*, 98; while Randall Lesaffer notes that, "Scholarly doctrine certainly did not constitute the major source of inspiration for the diplomats who negotiated and wrote the peace treaties of the early modern era... who first and foremost relied on older peace instruments." "Alberico Gentili's *ius post bellum* and Early Modern Peace Treaties," in *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*, eds. Benedict Kingsbury and Benjamin Straumann (Oxford: Oxford University Press, 2010), 210–40 at 214.

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There are at least three reasons that the customary law of nations has received little scholarly attention to date. First, it was largely concerned with procedural aspects of statecraft that rarely played a determinative role in political events. Second, although facets of customary law were codified in the text of European treatises, most of it was unwritten and learned through experience, making it difficult to recover apart from a laborious survey of state papers. Finally, it was influenced by power dynamics and political compromise to such an extent that it is of little interest to scholars working on the antecedents of modern international law—especially when compared with the ideals of Vattel and his fellow philosophers.[3]

Yet it was the customary law of nations that undergirded the conduct of early modern statecraft, and its existence raises the question of why the Americans relied on the treatises of Vattel et al. if they carried so little weight in the diplomatic realm. Part of the answer lies in the treatises' legal ideals, which helped the Americans to draft documents like the Declaration of Independence. A weightier reason stems from the revolutionaries' dearth of experience with European diplomacy. When the revolution began in 1775, no one on the American side had ever conducted formal diplomacy—that realm being the exclusive purview of sovereign states. They had negotiated with American Indians and with British officials in a domestic context, and they were expert in commerce and the laws of navigation. But they had never conducted affairs of state. As John Jay wrote in 1787, "Prior to the revolution we had little occasion to enquire or know much about national affairs, for although they existed and were managed, yet they were managed *for* us, but not *by* us."[4]

The Americans looked to the theoretical treatises then, in part to compensate for their lack of diplomatic experience. For reasons already noted, the treatises were of little help in this regard, and Americans struggled throughout the war to use law effectively in their negotiations. In a recent article for the *Journal of the American Republic*, I made this point vis-à-vis the negotiation of the Treaty of Paris (1783)—demonstrating the Americans' propensity for error, while also pointing to John Jay as an exception to the rule and as perhaps the only American of his generation to exhibit competence in the use of customary law. This essay broadens that argument in two respects. It first traces the

[3] Anthony Carty writes, "There is no comprehensive history of the concept of customary international law." "Doctrine versus State Practice," in *The Oxford Handbook*, eds. Bardo Fassbender and Anne Peters, 972–96 at 977. Grewe concurs, writing that "reliable research" on "state practice of the law of nations during the Spanish Age... does not yet exist," *The Epochs of International Law*, 150; Neff adds that the practice of deriving legal principles from earlier treaties and negotiations is "a subject area that has yet to be explored in any detail," *Justice Among Nations*, 191. Randal Lesaffer writes that early modern diplomacy resulted in "political compromises" that made "no allowance for the dictates of justice." "Alberico Gentili's *ius post bellum*," 225.

[4] American merchants and lawyers were well versed in maritime and commercial law. Military officers had also been exposed to the laws of war during the Seven Years' War. John Jay, "An Address to the People of the State of New-York, On the Subject of the Constitution," in *The Selected Papers of John Jay*, ed. Elizabeth Nuxoll, 7 vols. (Charlottesville: University of Virginia Press, 2010–2021), 4:682 (hereafter *SPJJ*).

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development of the customary and theoretical branches of the law of nations over the course of European history. It then reviews the impact of customary law on a wider range of revolutionary-era negotiations, placing particular emphasis on a Spanish–American dispute over rights to the Mississippi River that also culminated with the Treaty of Paris.[5]

The Law of Nations in Theory and in Practice

The term "law of nations," or *ius gentium* in Latin, first emerged during the era of the Roman Republic, where it referred to laws governing peoples outside the bounds of Roman civil law. During the later imperial era, jurists like Cicero also began to use the term in relation to principles of natural law, such as the duty of good faith, that pertained to all of humanity. This nascent distinction between pragmatic and philosophical facets of the law of nations then carried over into the Middle Ages where the term came to be used in relation to political and military activities such as: "fortification, war, captivity, servitude, postliminy, treaties, armistices, truces, the obligation of not harming ambassadors."[6]

During the Middle Ages, the law of nations did not yet pertain to "states" per se, but rather governed a variety of political actors who operated under the juridical oversight of the Roman Catholic Church. Nor did the law of nations yet constitute a distinct body of law in its own right. It was rather a term used in relation to a variety of norms that were themselves derived from one of the three main bodies of European law: church canon law, Roman civil law, and feudal customary law. Norms that were derived from feudal *customary* law carried the greatest weight in the political realm, while church theologians and other scholars used canon law and civil law to work out the foundations of *theoretical* concepts such as: sovereignty, the sanctity of treaties, and the rights of non-combatants. Church theologians influenced the political realm insofar as church officials relied on their opinions in mediating disputes, yet their reach was limited. As Donald Queller has written, "esteemed theorists, such as Thomas Aquinas and Christine de Pisan simply did not know very much about diplomatic practice," and many of their most famous theories were not reflected in medieval statecraft.[7]

[5] Benjamin C. Lyons, "The Law of Nations and the Negotiation of the Treaty of Paris (1783)," *Journal of the Early Republic* 42 (Summer 2022): 205–25.

[6] For *ius gentium* during the Roman era see Tamar Herzog, *A Short History of European Law: The Last Two and a Half Millennia* (Cambridge, MA: Harvard University Press, 2018), 26–27; and Grewe, *The Epochs of International Law*, 8–9. For Cicero's contribution to the law of nations see Kaius Tuori, "The Reception of Ancient Legal Thought in Early Modern International Law," in *The Oxford Handbook*, eds. Bardo Fassbender and Anne Peters, 1012–33 at 1016–18. Gratian, *The Treatise on Laws, Decretum DD*, trans. Augustine Thompson (Washington, DC: The Catholic University of America Press, 1993), 1–20. Tuori states that Gratian took his definition from Isidore of Seville (560–636), "Reception of Ancient Legal Thought," 1017–18.

[7] Donald Queller, *The Office of Ambassador in the Middle Ages* (Princeton: Princeton University Press, 1967), vii, 11, and 13. For the law of nations during the medieval era see Grewe, *The Epochs of International Law*, 67–69, 93–95, and 103–5; and Garrett Mattingly, *Renaissance Diplomacy*

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The process by which the law of nations became a distinct law of sovereign states began during the sixteenth century. Credit for initiating the shift in the intellectual realm is often given to Francisco de Vitoria (1483–1546). Vitoria was a Dominican priest who was looking for a law that could govern relations between Spain and the indigenous people of the Americas. In his seminal essay, *De Indis* (1532), he invoked Cicero's sense of the law of nations as a universal law of nature, and called upon European sovereigns to obey its dictates. In the decades that followed, other theorists such as Francisco Suárez (1548–1617) and Alberico Gentilli (1552–1608) gave fuller expression to Vitoria's idea, while also popularizing his notion of a law of nations rooted in natural law. Left unanswered, however, was the practical question of how this new conception of the law of nations could be reconciled with the law of nations as it already existed in Europe. I.e., which facets of the extant law of nations met the new criteria?[8]

That question was famously answered by Hugo Grotius in his magnum opus, *On the Law of War and Peace* (1625). Writing in the midst of the Protestant Reformation, Grotius was looking for a non-sectarian basis for the law of nations—free from the influence of theology—to govern a Europe now rent by theological schisms. With that goal in mind, Grotius took Vitoria's concept of a natural law of nations and paired it with a new method for deriving the natural laws of war and diplomacy. Surveying the historic record, Grotius argued that any law held coincidentally by every (or nearly every) state in antiquity was, by implication, a universally binding law of nature. Grotius then put this new method into practice by offering his learned opinion on a

(Baltimore: Penguin Books, 1955), 246–47. For the law of nations as derived from other bodies of European law, see Randall Lesaffer, "Peace Treaties and the Formation of International Law," in *The Oxford Handbook*, eds. Bardo Fassbender and Anne Peters, 71–94 at 74–75. For the contribution of church canonists see Mattingly, *Renaissance Diplomacy*, 19; and Grewe, *The Epochs of International Law*, 83–86. Grewe notes that "[t]he formation and development of rules and norms of the law of nations during the Middle Ages, was mainly a product of the diplomatic and treaty practice of the various temporal and spiritual powers." He adds that, "The customary law of nations found particular expression in the field of maritime law and was impressively codified... [linking the] law of trade and navigation closely with the maritime law of peace and war," *The Epochs of International Law*, 88 and 91. For Europe as a singular body politics, see Robert Jackson, *Sovereignty: Evolution of an Idea* (Cambridge: Polity Press, 2007), 24–55. For ecclesiastical oversight of the political realm, see Grewe, *The Epochs of International Law*, 69 and 72–73. For the distinction between theoretical and customary laws of war, see Grewe, *The Epochs of International Law*, 105–6.

[8] Francisco de Vitoria, "*De Indis* (1538)," in *Francisco de Vitoria: Political Writings*, ed. Anthony Pagden (New York: Cambridge University Press, 1991), 231–92. For the medieval law of nations as applying principally to Europe and only partly to relations with non-European states see Grewe, *The Epochs of International Law*, 150–51; and Heinz Duchhardt, "From the Peace of Westphalia to the Congress of Vienna," in *The Oxford Handbook*, eds. Bardo Fassbender and Anne Peters, 628–52 at 644. Martin Kintzinger states that Vitoria built on Cicero's idea that the law of nations was "given by nature to every human being and all people and nations." "From the Late Middle Ages to the Peace of Westphalia," in *The Oxford Handbook*, eds. Bardo Fassbender and Anne Peters, 607–27 at 619 and 621–22. For Suárez's contribution, see Neff, *Justice Among Nations*, 153–58. For Gentili's, see Grewe, *The Epochs of International Law*, 187–90; and essays in Kingsbury and Straumann, *The Roman Foundations*.

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host of practical questions, such as when a state might lawfully declare war, and how war ought to be conducted once begun.[9]

In the decades that followed, other theorists in northern Europe, including Samuel von Pufendorf (1632–94), Christian Wolff (1679–1754), Jean Jacques Burlamaqui (1694–1748), and Emerich de Vattel (1714–67), built on Grotius's idea, while also modifying his method for deriving the law of nations from the law of nature. By the late eighteenth century, treatises of this kind were embedded in the intellectual life of Europe. They were assigned as works of ethics at colleges and universities. They were cited by English jurists in domestic cases touching on the law of nations. They were also read by some diplomats in northern Europe as part of their training, and were sometimes cited in diplomatic disputes over legal questions such as sovereign rights to the sea. Yet the treatises did *not* become the embodiment of the law of nations as it governed the political realm. Rather, practitioners continued to rely principally on the customary laws that had been developed during the earlier medieval era.[10]

Not only did customary law remain in effect, but over the course of the Renaissance and early modern eras it also began to expand in scope and influence in conjunction with the rise of the nation state. This process of legal development is seldom captured in histories of international law, yet it can be discerned in histories of "diplomatic method," which describe how during

[9] Hugo Grotius, *On the Law of War and Peace*, 3 vols. (Indianapolis: Liberty Fund, 2005). For the political context in which Grotius wrote, see Henk Nellen, *Hugo Grotius: A Lifelong Struggle for Peace in Church and State, 1583–1645* (Leiden: Brill, 2015), which contains a summary of his treatises on 371–75. According to Vattel, Grotius held that, "When a number of persons at different times and in different places maintain the same principle as true," then their "common opinion" can be attributed to "universal consent," such that the principle in question became binding on all nations. Emerich de Vattel, *The Law of Nations or the Principles of Natural Law, Applied to the Conduct and to the Affairs of Nations and of Sovereigns,* trans. Charles G. Fenwick, 3 vols. (Buffalo, NY: William S. Hein & Co., 1995 [1916] [1758]), Book I, "Preface," 4a–5a.

On the question of whether Grotius or Suárez merits the title, "father international law" see James Muldoon's historiographic essay, "The Contribution of Medieval Canon Lawyers to the Formation of International Law," *Traditio* 28 (1972): 483–97. For the European legal and intellectual context in which Vitoria, Grotius, and Suárez were working, see Manlio Bellomo, *The Common Legal Past of Europe, 1000–1800*, trans. Lydia Cochrane (Washington, DC: Catholic University of America Press, 1995); Peter Stein, *Roman Law in European History* (New York: Cambridge University Press, 1999); and Stephan Kuttner, "The Revival of Jurisprudence," in *Renaissance and Renewal in the Twelfth Century*, eds. Robert L. Benson and Giles Constable (Cambridge, MA: Harvard University Press, 1982), 299–323.

[10] See note 2. For the treatises in schools of diplomacy, see William J. Roosen, *The Age of Louis XIV: The Rise of Modern Diplomacy* (Cambridge, MA: Schenkman, 1976), 74–75. For their importance to English jurists, see Chief Justice Mansfield's opinion in *Triquet* v. *Bath* (1764) as discussed in David J. Bederman, *The Classical Foundations of the American Constitution: Prevailing Wisdom* (New York: Cambridge University Press, 2008), 239, with citation to 3 Bur., at 1478, 1481, and 97. The works of Grotius and other Protestant theorists were banned in Spain until the late eighteenth century, see Ignacio de la Rasilla del Moral, *In the Shadow of Vitoria: A History of International Law in Spain* (Leiden: Brill, 2018), 31–32. For the training of a typical minister of state, see the first few chapters of Orville T. Murphy, *Charles Gravier, Comte de Vergennes: French Diplomacy in the Age of Revolution, 1719–1787* (Albany: State University of New York, 1982), 3–76.

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the fifteenth century, city-states on the Italian peninsula began to establish permanent embassies in neighboring courts to monitor political activity. The creation of these embassies gave rise to a host of new norms and protocols, governing matters ranging from: rank and precedence, to privileges and immunities, and the authentication of diplomatic communications.[11]

Over the course of the fifteenth and sixteenth centuries, the new norms and protocols were adopted throughout Europe by monarchs who were also claiming control over defined territorial states. As an expression of their sovereignty, these rulers began to assert an exclusive right to use the customary law of nations and the norms that it prescribed for the diplomatic realm. As this process unfolded, the law of nations came to function as a code of honor, tied to the person of the sovereign, whose character embodied that of the state. At a conceptual level, the law retained its association with universal natural law—an association now strengthened by the treatises of Grotius, Pufendorf, et al. At a practical level, most customary laws were based on precedent, and their binding obligation derived from the principle of *pacta sunt servanda*, or "agreements must be kept." Key facets of customary law were written into the text of major treaties, but the majority of the law remained unwritten and learned through experience.[12]

The Law of Nations in the American Revolution

As noted above, leaders of the American revolution had no experience with formal European diplomacy when war began in 1775, and they struggled at

[11] On the history of diplomatic method, see especially, M. S. Anderson, *The Rise of Modern Diplomacy: 1450–1919* (London: Longman, 1990); *Politics and Diplomacy in Early Modern Italy: The Structure of Diplomatic Practice, 1450–1800*, ed. Daniela Frigo (New York: Cambridge University Press, 2000); Harold Nicolson, *The Evolution of Diplomatic Method* (Westport, CT: Greenwood, 1977 [1954]); and Roosen, *The Age of Louis XIV*. For the increased use of resident ambassadors during the fifteenth century, see Queller, *The Office of the Ambassador*, 76–84; and Nicolson, *The Evolution of Diplomatic Method*, 25–46.

[12] For the dissemination of the new diplomatic methods throughout Europe see William R. Polk, *Neighbors and Strangers: The Fundamentals of Foreign Affairs* (Chicago: University of Chicago, 1997), 253–58; Anderson, *The Rise of Modern Diplomacy*, 40–80; and Lesaffer, "Peace Treaties and the Formation," 78–83. For recent literature on the rise of the nation state see Daniel Philpott, *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (Princeton: Princeton University Press, 2001); and Daniel Nexon, *The Struggle for Power in Early Modern Europe: Religious Conflict, Dynastic Empires, and International Change* (Princeton: Princeton University Press, 2009). On sovereignty see Kintzinger, "From the Late Middle Ages," 627. Neff states that though, "the idea of papal or imperial institutions exercising a permanent oversight or restraint on governments no longer held sway..., natural law... continued to hover above the various independent states... and, at least in principle, to place legal restraints on their actions," *Justice Among Nations*, 140–41. William Roosen writes that in the seventeenth century, one can say either that "the state was the personification of the ruler or that the ruler embodied the state," *The Age of Louis XIV*, 72. For the importance of *pacta sunt servanda*, see Lesaffer, "Peace Treaties and the Formation," 83; and Anthony Carty who cites Emmannuelle Jouannet to the effect that by the eighteenth century, "there was a legal conscience of a fundamental rule of... *pacta sunt servanda*." "Doctrine Versus State Practice," 993.

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times to employ even the most basic elements of the customary law of nations. An early example can be seen in Congress's reception, in July 1778, of Conrad Alexandre Gérard, the first French envoy to the United States. The reception of a diplomatic envoy was a routine event in Europe, marked by ceremonies designed to affirm the dignity of the respective sovereigns. It took Congress weeks to resolve such basic questions as the size of Gérard's party, the posture that he should adopt when giving his opening speech, and whether he should stand or remain seated when listening to the response of the president of Congress—prompting Gérard to report on, "the very confused notions that they have here concerning the honor, dignity and etiquette of a sovereign State."[13]

Although protocols of this kind did not play a major role in statecraft, two aspects of customary law did become significant over the course of the revolution. The first had to do with the methods that European statesmen used to resolve disputes over treaty obligations. As noted earlier, the foundation of customary law in the early modern era was the person of the sovereign, whose reputation for integrity provided security for treaties and other agreements. The frequency with which sovereigns violated such agreements has prompted many scholars to disparage the system, yet it was not without constraining effect. All sovereigns needed the assistance of other states, and a reputation for honesty was the basis on which they could obtain such aid or otherwise influence the course of political events apart from war. As the French foreign minister once wrote to his ambassador in Spain, "Remember, Monsieur... if all this should end through an injustice, the King risks less in suffering it than in doing it. Damage to his interests could be repaired; nothing would repay the loss of his reputation."[14]

It was therefore incumbent upon European ministers of state to protect their sovereign's reputation to the greatest extent possible, and especially whenever circumstances required him or her to breach an agreement. Statesmen accomplished that task through the use of pretexts, or public explanations, by which they justified their policies and conduct. They were aided in their efforts by the fact that the law of nations permitted violations of treaties and other obligations for "good reason." Yet not just any reason

[13] Gérard to Vergennes, August 7, 1778, in *Despatches and Instructions of Conrad Alexandre Gérard: 1778–1780*, ed. John J. Meng (Baltimore: The Johns Hopkins Press, 1939), 202. The Americans had access to bound volumes of European treaties, which contained major points of legal doctrine, but did not explain how to employ law in practice. In 1776, for example, Benjamin Franklin gave John Adams "a printed Volume of Treaties" for use in drafting the "model treaty" with European states. *The Diary and Autobiography of John Adams*, ed. L. H. Butterfield, 4 vols. (Cambridge, MA: Belknap Press of Harvard University Press, 1961), 3:338.

[14] Henri Doniol, ed. *Histoire de la Participation de la France à l'établissement des Étas-Unis d'Amérique: Correspondence Diplomatique et Documents*, 5 vols. (Paris: Imprimerie Nationale, 1886–1892), 4:453. See for example Richard B. Morris's reference to the "pseudo-Machiavellian ethics" of early modern statecraft in James H. Hutson, "The Treaty of Paris and the International State System," in *The Treaty of Paris (1783) in a Changing States System*, ed. Prosser Gifford (Lanham, MD: University Press of America, 1984), 4. Daniela Frigo writes that in the eighteenth century, "the principles of 'distinction' and 'honour'... dominated relations among...European powers," *Politics and Diplomacy*, 21.

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would suffice. The use of pretexts was governed by a shared set of norms, and statesmen were adept at evaluating their counterparts' arguments. They kept records of violations, and retaliated when interests dictated and circumstances permitted. To operate effectively in this realm required knowledge, skill, and experience, as well as keen judgment and a socialized understanding of the law of nations and its underlying principles.[15]

An example can be seen in a dispute that arose between France and Spain in early 1780. The year prior, in April 1779, Louis XVI and Carlos III had signed an agreement known as the Convention of Aranjuez, on the basis of which Spain agreed to enter the war against England as an ally of France—though not of the United States. Carlos III had signed the agreement reluctantly, and only on condition that France agree to an immediate invasion of England, which he hoped would bring the war to a rapid conclusion. The invasion failed and by the fall of 1779, Carlos found himself enmeshed in a costly and protracted war with no clear path to victory. In that context, his ministers began to seek a way out of the Convention of Aranjuez.[16]

The Spanish court was hindered in its efforts by Article III of the Convention, in which the two sovereigns had promised that they would not, "listen to any direct or indirect proposal on the part of the common enemy without communicating it each to the other." Despite that promise, the Spanish council of state voted unanimously in February 1780 to commence peace negotiations with England, *without* informing France. They justified their conduct, and defended the honor of Carlos III, by noting in their minutes that France had done the same thing to Spain at the conclusion of the Seven Years' War (1756–63). In other words, Carlos III was merely evening the score, and not was committing a new breach of faith.[17]

The Spanish council went on to devise a similar pretext that they hoped would relieve Louis XVI of his obligation under the Franco–American treaty of alliance to defend American independence. They suggested to a British agent that if George III would grant the Americans a "vague feudal dependency, like the free Cities of the [Holy Roman] Empire," Spain would adopt a posture of "useful neutrality" toward the war—thus putting pressure on France to sue for peace. They offered to press this compromise on France, by means of "some casuistical formula," as constituting "tacit independence" for the United States,

[15] The notion that treaty obligations could be broken for "good reason" dated back to the Greek and Roman eras. Nicolson, *The Evolution of Diplomatic Method*, 10. Carty notes that many of the philosophical treatises were written to help statesmen "draw a distinction between justifying pretexts of legal arguments and real underlying motives." "Doctrine Versus State Practice," 994.

[16] For the failed invasion of England, see A. Temple Patterson, *The Other Armada: The Franco-Spanish Attempt to Invade Britain in 1779* (Manchester: Manchester University Press, 1960).

[17] An English translation of the Convention of Aranjuez is in Samuel F. Bemis, *The American Secretaries of State and Their Diplomacy* (New York: Alfred A. Knopf, 1927), 1:294–99. Spain's efforts to void the Treaty of Aranjuez are detailed in Samuel F. Bemis, *The Hussey-Cumberland Mission and American Independence: An Essay in the Diplomacy of the American Revolution* (Princeton: Princeton University Press, 1931), 35–40, with primary sources in the appendix. In 1763, the French foreign minister Choiseul negotiated terms of peace with England and then presented Spain with a fait accompli, leaving Carlos III no choice but to sign or continue the war on his own.

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thus enabling all parties to exit the war with dignity. The British cabinet rejected the proposal and nothing came of it, yet the attempt still illustrates the importance of reputation, and the skill that was needed to devise and evaluate legal arguments in that environment.[18]

The second aspect of the law of nations that became consequential during the American Revolution had to do with the law's role in marking the boundary between state and non-state actors in the European political system. As noted above, during the early modern era, the principal monarchs of Europe had begun to establish sovereignty over defined territorial states, and with it an exclusive right to use the customary law of nations. As those states came into being, the forms and procedures that customary law prescribed for the diplomatic realm came to serve as markers of political legitimacy in that only *states* were allowed to use them.[19]

During the American Revolution, the use of these customary forms became a significant point of contention. The Americans sought to strengthen their claim to statehood by employing these forms in a variety of contexts, while the British resisted those efforts and even sought to lure the Americans into using forms that would concede a subordinate status. Of particular importance were the credentials, or letters of authority, that European diplomats exchanged at the start of their negotiations. The credentials were based on formulae dating back to the medieval era, and were examined with minute care, both for accuracy and to ensure that the respective sovereigns were described in language appropriate to their relative dignity or status.[20]

The Americans' inexperience with such matters became apparent during a dispute that arose in the aftermath of the Battle of Saratoga (October 1777). The dispute centered on the convention that the British and American generals had signed at the conclusion of the battle, which established the British terms

[18] In Article VIII of the Franco–American treaty of alliance, the signatories pledged not to "lay down their arms, until the Independence of the united states shall have been formally or tacitly assured," *Treaties and Other International Acts of the United States of America*, ed. Hunter Miller (Washington: United States Government Printing Office, 1931–1948), 2:36–39. Floridablanca's proposal is described in Bemis, *The Hussey-Cumberland Mission*, 28–29.

[19] For sovereigns' exclusive jurisdiction over the conduct of war and diplomacy see Duchhardt, "From the Peace of Westphalia," 634 and 652. See also Lesaffer's statement that, after the seventeenth century, "no regular peace treaties between princes and rebels and can be found, except those ending in the successful secession of the rebels." "Peace Treaties," 81. "States" and "sovereigns" were generally synonymous in this era, though a small number of princes were regarded as sovereigns despite the fact that their territories were not large enough to constitute states. Frigo writes that a defining attribute of states was the acquisition of a "monopoly over foreign policy." *Politics and Diplomacy*, 7. See also, J. Craig Barker, "The Theory and Practice of Diplomatic Law in the Renaissance and Classical Periods," *Diplomacy and Statecraft* 6, no. 3 (1995): 593–615.

[20] Garret Mattingly states that the most important customary laws were those pertaining to, "the recognition and status of diplomatic principles, the behavior and immunities of diplomatic agents, and the negotiations, validity and observance of diplomatic agreements," *Renaissance Diplomacy*, 18–20. Queller, *The Office of the Ambassador*, 117, describes a credential from the thirteenth century that is remarkably similar to the credentials used by British emissaries in 1782, as published in *John Jay, The Winning of the Peace: Unpublished Papers, 1780–1784*, ed. Richard B. Morris (New York: Harper & Row, 1980), 360–62.

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of surrender. As was customary, the British general, John Burgoyne, had pledged that his soldiers would not take up arms against the United States for the duration of the war, while the Americans had promised to release Burgoyne's army as soon as conveniently possible. Conventions of this kind were not terribly durable, and it sometimes happened that one party would later accuse the other of having violated a provision of the convention, and use the violation as a pretext for voiding the entire agreement. The Americans were therefore concerned when, in December 1777, Burgoyne published an open letter accusing them of having "broken faith" by failing to provide his officers with adequate accommodations.[21]

Congress met in January 1778 to consider the matter. After some deliberation they determined that Burgoyne's word of honor no longer offered sufficient security. His army would have to remain in captivity until the British government had ratified the convention. In April 1778, the British government sent a peace commission to North America. The commissioners' primary task was to forestall the effects of the Franco–American treaty of alliance, which had been signed in February of that year, but they also carried credentials that purportedly authorized them to ratify the convention of Saratoga. The commissioners reached New York in June. Shortly thereafter they sent copies of their credentials to Congress and asked for a response.[22]

The members of Congress were in the process of drafting a reply when Conrad Gérard arrived in Philadelphia. The Americans briefed him on the matter and asked for his advice. Gérard immediately noted problems with the British credentials that the Americans had overlooked. First, the credentials had been signed by Parliament rather than by George III, who "by his prerogative and by the constitution," had an exclusive right "to negotiate" with other states. More significantly, the credentials were drafted in a style suitable for *domestic* transactions rather than those between independent states. For the Americans to proceed on the basis of such letters, Gérard declared, or "under any other titles than those that *the law of nations* and the usage of sovereign Powers admitted... would be to permit a shameful mark of Subordination." The Americans, he concluded, should not even dignify the commissioners' letter with a response.[23]

[21] See committee report in *Journals of the Continental Congress, 1774–1789*, ed. Worthington Ford (Washington, DC: United States Government Printing Office, 1904–1937), 10:29–35 (hereafter *JCC*). A committee report states that, "the declaration of Lieutenant General Burgoyne, 'that the public faith is broke,' is of itself sufficient to justify Congress in taking every measure for securing the performance of the convention, which the law of nations, in consequence of this conduct, will justify," *JCC*, 10:30. For additional context, see Janet Beroth, "The Convention of Saratoga," *The Quarterly Journal of the New York State Historical Association* 8, no. 3 (July 1927): 257–80. The risk in this case was even greater since the laws of England held that the king was not obligated "to adhere to treaties made with rebels." See Gérard to Vergennes, September 1, 1778, in Meng, *Despatches and Instructions*, 250.

[22] Congress based its decision on "the practice of British officers in similar cases" and the "judgment of the most approved writers," thus demonstrating their familiarity with British military history and the writings of European theorists, *JCC*, 10:30–31. The limits of their knowledge, however, soon became apparent.

[23] Gérard to Vergennes, August 16, 1778, in Meng, *Despatches and Instructions*, 226. Gérard to Vergennes, September 1, 1778, in Meng, *Despatches and Instructions*, 249–51, emphasis added. "[I]n

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Gérard's advice had three practical effects. It saved the Americans from conceding a subordinate status. It frustrated British efforts to negotiate peace with the Americans by foreclosing the only method of negotiation (domestic) that George III would accept. Finally, it sealed the fate of Burgoyne's army. Although precedents had been established during the Dutch War for Independence that a sovereign's ratification of a military commission did *not* constitute a definitive recognition of statehood, Gérard correctly predicted that George III would be unwilling to endorse even a "tacit" recognition of American independence.[24]

The Mississippi Border Dispute

French legal advice was a boon to the United States when French and American interests aligned. It became problematic, however, when their interests diverged. Among the most serious points of divergence was the American claim to a western border on the Mississippi River. The Americans generally regarded the United States as the natural heir to all British territory west of the Allegheny Mountains. From a legal perspective, they based that claim on charters that the British crown had granted them during the seventeenth century—several of which had no western limits, the size of North America being unknown at the time. Although limits were later established in 1763, when George III ceded the lands west of the Mississippi River to Spain and then forbade his American subjects from settling west of the Alleghenies, the vision of westward expansion was already embedded in the Americans' minds.[25]

The revolutionaries had raised this issue with Vergennes prior to the signing of the Franco–American treaty alliance. At the time, Vergennes had accepted the Mississippi border, "as adjusting the matter properly." Once the

all transactions between independent Nations," Gérard also averred, it was "necessary first to examine the power of the one in whose name negotiations were conducted as well as the Nature and form of the power of those who represented to negotiate and conclude." Gérard to Vergennes, August 16, 1778, in Meng, *Despatches and Instructions*, 226.

[24] Gérard to Vergennes, August 16, 1778, in Meng, *Despatches and Instructions*, 226. In the same letter, Gérard added that if Burgoyne's soldiers had destroyed their ammunition boxes, as the Americans alleged, then "the law of nations would be satisfied in holding captive the soldiers who had violated their agreement," 226. For precedents established during the Dutch War for Independence, see Grewe, *The Epochs of International Law*, 184–85. P. J. Marshall writes that, "[I]t was official [British] policy, for as long as it was practical to do so, to deny recognition to the United States." *The Making and Unmaking of Empires: Britain, India, and America, c. 1750–1783* (New York: Oxford University Press, 2005), 356.

[25] See Paul W. Mapp, *The Elusive West and the Contest for Empire, 1713–1763* (Chapel Hill: University of North Carolina Press, 2011); Thomas P. Abernethy, *Western Lands and the American Revolution* (New York: Russell & Russell, 1959 [1937]); and Paul C. Phillips, *The West in the Diplomacy of the American Revolution* (New York: Russell & Russell, 1913). See also, Clarence W. Alvord, "The Genesis of the Proclamation of 1763," *Historical Collections of the Michigan Pioneer and Historical Society* 36 (1908): 20–52. The scope of the American vision can be seen in the Mitchell map of 1755, in which the states of Virginia, Georgia, and the Carolinas are depicted as extending indefinitely into the interior.

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terms of the treaty were worked out, however, he came to see the issue in a different light with respect to French legal obligations. The crux of the matter lay in Article XI of the treaty, in which Louis XVI had guaranteed to the United States "thair Possessions, and the additions or conquests that their Confedération may obtain during the war." Was the trans-Appalachian west a current "Possession" of the United States—in which case France was contractually obligated to perpetuate the war in support of the American claim; or was it a potential "addition or conquest"—in which case France's obligations would only come into effect if the United States acquired the region through war or diplomacy?[26]

Over the course of 1778, it became clear that Vergennes favored the latter interpretation. For one thing, French finances were in a precarious position, and he knew that Louis XVI could not afford to perpetuate war in support of objectives that were ancillary to American independence. By the fall of 1778, it had also become evident that France needed to take into consideration the strategic interests of Spain. Spain was France's principal ally in Europe and, as noted earlier, Carlos III was initially reluctant to enter the war. In the months leading up to his eventual decision to do so, Vergennes had been actively seeking to entice Carlos III with offers such as the potential acquisition of Florida or Gibraltar.[27]

At some point in 1778, Vergennes learned that Carlos also desired exclusive navigation rights on the Mississippi River, which he viewed as an effective means of hindering American commerce and discouraging the westward expansion of the United States. Vergennes could not satisfy Carlos's desire without the Americans' consent and so he decided to broach the topic with Congress. On October 26, 1778, he wrote to Gérard, asking him to ascertain the Americans' position vis-à-vis the trans-Appalachian west. Did Congress view the region as an essential objective—without which they would never agree to peace? Or might they be willing to cede some of their claims to enable a rapid end to the conflict? If he found that the Americans held to the former view, Gérard was instructed to "prepare them... with prudence and moderation" for the possibility that they might need to soften their position in order to facilitate Spain's entry into the war.[28]

Gérard received his instructions in December and promptly broached the subject in an after-dinner conversation with leading members of Congress. Brushing aside the legal ambiguities of the question, he framed the issue

[26] Arthur Lee's diary entry of December 12, 1777 in Richard Henry Lee, *Life of Arthur Lee*, 2 vols. (Freeport, NY: Books for Libraries Press, 1969 [1829]), 1:361. Miller, *Treaties and Other International Acts*, 40, emphasis added.

[27] For France's dependence on Spain to achieve naval parity with Britain, see Jonathan R. Dull, *The French Navy and American Independence: A Study of Arms and Diplomacy, 1774–1787* (Princeton: Princeton University Press, 1975). For the process by which Spain was brought into the war as an ally of France, see Murphy, *Charles Gravier, Comte de Vergennes*, 261–79.

[28] For Spain's interests in the Mississippi River, see Gérard to Vergennes, July 25, 1778, in Meng, *Despatches and Instructions*, 185–89. Vergennes to Gérard, October 26, 1778, in Meng, *Despatches and Instructions*, 359–60.

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squarely in terms of the Americans' national honor. "[A]ll Europe," he declared, "suspected them of having inherited the invasive and unruly spirit of their ancestors." He urged them to deal preemptively with that problem by drawing "a permanent line of separation between Spain's possessions and their own." In no better way, he argued, could they "convince the universe of their justice and pacific system," and "establish their character," while also restraining "the ambition of their posterity."[29]

A few weeks later, at a special session convened on February 16, Gérard made a similar argument before the entire Congress. The war, he argued, "had but one sole fundamental and essential object, that of the independence of the States." Louis XVI, "had no ambitions of Conquest" while Carlos III sought only "to administer well the states that Heaven had given him." It was to that end alone, Gérard continued, and "to secure his borders and prevent all trouble with his neighbors," that the Spanish king desired "the Exclusive Navigation of the Mississippi." Moreover, Gérard warned, England would "be revolted" if the Americans should instead demand, "without title or right, concessions other than the integral parts of their States."[30]

When the members of Congress did not immediately yield to these arguments, Gérard shifted his rhetorical focus to the honor and character of Louis XVI. The French king, he averred, had struggled before agreeing to the alliance, to "convince himself of the justice of the American cause." What would he think now if he heard that the United States "demanded possessions to which [they] had no rights?" Making his "lamentations full of feeling," Gérard warned of the consequences that would befall the new nation if they should lose "all character" so early in their existence, and give "to their reputation a strong tint of ambition and avidity."[31]

A majority of Congress understood their interest in the Mississippi well enough to resist Gérard's rhetoric; yet they struggled to defend their position with language or principles that aligned with European sensibilities. In early April, a group of representatives met privately with Gérard to ask for his help in resolving a related dispute over American claims to the Newfoundland fisheries. "The majority of them," they told Gérard, "were ignorant of the most basic elements [of the issue]." They "begged [him] to instruct them on the true principles of the matter, of the usages and rules established between the Powers of Europe, i.e. of the real situation of things." Gérard was only too happy to oblige, doing so again in a way that favored French interests.[32]

[29] Gérard to Vergennes, December 12, 1778, in Meng, *Despatches and Instructions*, 420; and Gérard to Vergennes, December 22, 1778, in Meng, *Despatches and Instructions*, 433.

[30] Gérard to Vergennes, February 17, 1779, in Meng, *Despatches and Instructions*, 526–29.

[31] Gérard to Vergennes, March 3, 1779, in Meng, *Despatches and Instructions*, 550. Gérard to Vergennes, May 21, 1779 in Meng, *Despatches and Instructions*, 673, emphasis added.

[32] Gérard to Vergennes, April 4, 1779, in Meng, *Despatches and Instructions*, 595. In May, Gérard drafted a lengthy memo on the subject in which he paused at one point to ask the Americans how Spain could be expected to accept arguments, "as contrary to its interests and to its tranquility as it is contrary to *the Law of reason and of Nations*?" (emphasis added). For the debate within

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The debate over the Mississippi continued until August, when Congress finally voted to make the Mississippi border a sine qua non of peace, while also sending emissaries to Europe to resolve the dispute directly with the relevant courts. John Adams was appointed United States' Commissioner of Peace, and tasked with representing the United States at any future negotiations with Great Britain. John Jay was chosen as American minister to Spain, and sent to Madrid with instructions to seek Spanish recognition of American independence, a loan, and resolution of the dispute over the Mississippi.[33]

American Emissaries Abroad

If the Americans' dearth of experience with customary law was consequential in Congress, it became all the more so in Europe where Adams and Jay had to act without the advice and support of their peers. Adams had the greater difficulty of the two. Within months of his arrival in Paris, he so thoroughly offended Vergennes that he undermined his standing in France, and with it the authority of the larger American diplomatic corps. The precipitating issue was a set of ancillary instructions that Congress had given Adams, to negotiate a treaty of commerce with Great Britain *after* peace had been established. Adams wanted to publish those credentials immediately on arrival in Europe, arguing that Great Britain would view the Americans' willingness to discuss commerce as a gesture of good will. Vergennes urged Adams to wait, noting that peace negotiations were not remotely likely at the time. Adams complied at first; but as time passed, he grew impatient. In July, he reopened the issue, writing a series of lengthy letters to Vergennes in support of his proposition, while also advising the French court on how its navy might better support the American cause.[34]

Adams was well intentioned. Yet he was also heedless of European protocol and the broader political, military, and financial context in which Vergennes was operating. In late July, Vergennes sent Adams a point-by-point rebuttal, educating him on basic elements of European diplomacy. A treaty of commerce, he wrote, "must be founded on confidence and a union equivalent to an alliance… [and] can only be made between independent nations. To propose such a treaty in the midst of war, and at a time when England showed not the least inclination to recognize American independence, would convey weakness and desperation." Moreover, it would also lend "credit to the opinion,

Congress, see Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (Baltimore: Johns Hopkins University Press, 1979), 243–63.

[33] Congress's resolution is in *RDC*, 3:293–95. For the election of Adams and Jay, see *RDC*, 3:337.

[34] For Adams's and Vergennes's correspondence on these matters in February and March 1780, see Butterfield, *The Diary and Autobiography of John Adams*, 4:243–54. For their later correspondence of July 1780, see *Papers of John Adams*, ed. Gregg L. Lint, 20 vols. (Cambridge, MA: Harvard University Press, 1977–), 10:1–58. To be fair, Vergennes had kept the Americans in the dark with respect to the condition of French finances and the broader diplomatic landscape in Europe. If Adams had been more fully informed of the challenges that Vergennes faced at the time, he might have adopted a more conciliatory tone. For a broader analysis of Adams's conduct, see editorial note in Lint, *Papers of John Adams*, 9:516–20.

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which all Europe entertains... that the United States incline towards a defection [from France.]" When Adams still persisted in his position, Vergennes cut off their correspondence and instructed his minister in Philadelphia to put Congress "in a position to judge whether Mr. Adams is endowed with a character that renders him appropriate to the important task with which Congress has charged him."[35]

The dispute was not strictly legal in nature, yet it was related to the law of nations insofar as that law was embedded in a set of socialized standards of statehood. As David Golove and Daniel Hulsebosch have noted, there was a performative aspect to early modern statecraft in that ministers of state worked incessantly to uphold the honor and dignity of their sovereign and of the state that they represented. The ceremonial conventions of early modern diplomacy contributed to that end, while also stabilizing an otherwise treacherous environment by demonstrating the participants' willingness and capacity to follow the established rules. By displaying his inability, or disinclination, to follow such norms, Adams not only undermined Vergennes's confidence in his reliability, he also fueled perceptions that the United States did not yet merit the status of an independent state.[36]

The most consequential effect of Adams's conduct was that it prompted Congress to place the negotiation of peace under the control of the French court. In the spring of 1781, Congress appointed four new peace commissioners to serve alongside Adams. The new commissioners were Benjamin Franklin, John Jay, Henry Laurens, and Thomas Jefferson—though Jefferson declined to serve. More significantly, Congress required all of the commissioners to submit to the advice and consent of the French court when negotiating peace with Great Britain. As the instructions put it, you are to "make the most candid and confidential communications upon all subjects to the ministers of our generous ally, the King of France; to undertake nothing in the negociations for peace or truce without their knowledge and concurrence; and ultimately to govern yourselves by their advice and opinion."[37]

The instructions represented a major abrogation of American sovereignty, and the United States' interests might have suffered during the negotiation of peace if the effects of those orders were not subsequently mitigated by

[35] A translation of Vergennes's letter is in Lint, *Papers of John Adams*, 10:37–42. To the Chevalier de la Luzerne, August 7, 1780, in *The Emerging Nation*, ed. Mary A. Giunta, 3 vols. (Washington, DC: NHPRC, 1996), 1:98–99. Luzerne replaced Gérard as French minister to the United States in the fall of 1779.

[36] See David Golove and Daniel Hulsebosch's observation that there was a performative aspect to early modern statecraft. "A Civilized Nation," 943. In their Declaration of Independence Congress had averred: "That these United Colonies are, and of Right ought to be Free and Independent States... [and as such] have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do."

[37] For the commissioners, see Thomas Rodney to Caesar Rodney, June 14, 1781, in *Letters of Delegates to Congress, 1774–1789*, ed. Paul H. Smith, 26 vols. (Washington, DC: Library of Congress, 1976–2000), 17:320–21. Congress's instructions of June 15, 1781 are in *RDC*, 4:504–5. Laurens was captured by the British en route to Europe and imprisoned.

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John Jay. At the outset of the war, Jay had no more experience with European diplomacy than his peers; yet during his first 2 years in Europe, from 1780 to 1782, he had endured perhaps the most difficult American negotiation of the war. While Jay was en route to Spain, Congress had undermined his mission by drawing funds on his account prematurely, in anticipation of his having secured a loan or subsidy from the Spanish court. The resulting debts gave Spain leverage in the ensuing negotiations over the Mississippi, and it was only with much tenacity and finesse that Jay left Spain, two years later, with the debts paid, and American claims to the Mississippi intact.[38]

Jay's experience in Spain gave him unusual insight into the way that Europeans used customary law and rhetoric in pursuit of strategic interests. Because of that experience, and perhaps also because of his temperament, Jay took a different approach to diplomacy than Adams had in France. He was at pains to adhere to European protocol, yet also intensely jealous of the United States' prerogatives as a sovereign state. The latter disposition became evident in Jay's reaction to Congress's aforementioned instructions to the commissioners of peace. While Adams and Franklin accepted Congress's orders without question, Jay protested them, going so far as to ask that Congress rescind his commission. He found it difficult, he wrote, to "reconcile myself to the idea of the Sovereign Independent States of America submitting in the persons of their Ministers to be absolutely governed by the Advice and Opinions of the Servants of another Sovereign, especially in a case of such national importance." He asked that Congress, "take an early opportunity of relieving me from [this] station."[39]

Congress did not act on Jay's request and so his commission was still in effect when Franklin wrote, in the spring of 1782, to ask that Jay come to Paris and assist with the negotiation of peace—Adams being occupied at the time in the Netherlands. On arrival, Jay took a leading role in three decisions that nullified Congress's orders and established American control over the negotiations. The first decision came in July, when the British cabinet sent letters of authorization to one of its emissaries in Paris, empowering him to begin peace negotiations with, "the Colonies or Plantations of New Hampshire, Massachusetts...," rather than with "the United States of America." Vergennes advised the Americans to accept the document as written, arguing that "names signified little" in European diplomacy. Franklin would have accepted that advice, but Jay refused, insisting that the British treat with the United States as a sovereign state.[40]

[38] For Jay's work in Spain, see Benjamin C. Lyons, "The Law of Nations in John Jay's Negotiations with Spain, 1780–1782," in *Spain and the American Revolution*, eds. Gabriel Paquette and Gonzalo Quintero Saravia (New York: Routledge, 2019), 147–58.

[39] Jay to the President of Congress, September 20, 1781, in *SPJJ*, 2:561–62. For Adams's response to the orders, see John Adams to the President of Congress, October 15, 1781, in Lint, *Papers of John Adams*, 12:16. For Franklin's response, see From Benjamin Franklin to Samuel Huntington, September 13, 1781, in *The Papers of Benjamin Franklin*, ed. Barbara B. Oberg, 39 vols. (New Haven: Yale University Press, 1999), 35:475.

[40] For the diplomatic context that guided Vergennes's approach to the negotiations see Murphy, *Charles Gravier, Comte de Vergennes*, 382–94. A detailed analysis of these negotiations can be found in

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Jay's stance mattered, for the exchange of diplomatic credentials in Europe not only certified the statehood of the respective parties, but also implicated the honor of the respective sovereigns, thereby putting the negotiations on the record. If the Americans had accepted the British credentials as written, they would have admitted the "shameful mark of Subordination" to which Gérard alluded in his earlier advice to Congress. Moreover, the pending negotiations with Great Britain would have been illegitimate and subject to repudiation. Had the tide of war shifted in Britain's favor, George III could have rescinded any offers made by that point without loss of honor. The risk mattered little to Vergennes, who was committed principally to the cause of American independence, but it was important to the Americans who had other issues to resolve with Great Britain—including the western borders of the United States.[41]

In August, Jay used a similar dispute over diplomatic credentials to evade Spanish and French pressure to compromise on the Mississippi border. When Jay left Spain in May, the Spanish Prime Minister had instructed his ambassador to France, the Conde de Aranda, to continue negotiations with Jay in Paris. Floridablanca did not, however, provide Aranda with official letters of authorization, as he was not yet willing to acknowledge American statehood. In early August, Aranda held an informal conference with Jay, during which the two men discussed the western border of the United States. Jay claimed the Mississippi while Aranda proposed a line east of the river. Near the end of the conference, Jay presented Aranda with a copy of his credentials, but found that Aranda did not reciprocate.[42]

Shortly thereafter, Jay met with Vergennes's secretary, Rayneval, who indicated that the French court supported Aranda's proposal for a border east of the Mississippi. Perceiving the weakness of his position, Jay moved to end the negotiations, pointing to Aranda's lack of credentials as a basis for doing so. When Rayneval argued that Jay should proceed on the basis of Aranda's character as a Spanish nobleman, Jay responded that to negotiate on that ground would leave Spain, "at liberty to disavow all his proceedings in such business." When Aranda noted that Jay had already commenced negotiations with the Spanish Prime Minister in Madrid, without an exchange of credentials, Jay responded simply but correctly that the Prime Minister had

Lyons, "The Law of Nations and the Negotiation of the Treaty of Paris." Vergennes gave this advice in part because he wanted the Americans to make progress in their negotiations without receiving an acknowledgment of independence that would enable them to drop out of the war before Spain had achieved its objectives. Gerald Stourzh writes that, "Franklin never did care much for legal arguments in international relations." "Firmness with regard to substance and more carelessness than might possibly be warranted with regard to legally confirmed rights thus distinguishes Franklin's demeanor." *Benjamin Franklin and American Foreign Policy* (Chicago: University of Chicago Press, 1954), 219–20.

[41] See Lyons, "The Law of Nations and the Negotiation of the Treaty of Paris," 13, for an example of how promises made without a proper exchange of credentials could be repudiated. Among the issues that the United States needed to resolve with Great Britain were the status of American loyalists, pre-war commercial debts, and rights to the Newfoundland fisheries.

[42] See "To the Secretary for Foreign Affairs," November 17, 1782, in *SPJJ*: 3:237–41.

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been authorized *ex officio* to negotiate, such that an exchange of credentials was not needed in that case. On that basis, the negotiations came to close.[43]

Jay made his third decision in September, shortly after learning that Rayneval had departed suddenly for England. Fearing that Rayneval had been sent to undermine Jay's position on both the British letters of authorization and the Mississippi border, Jay sent his own secret emissary to London, instructing him (1) to inform the British cabinet that peace negotiations with the United States would never begin without a valid exchange of diplomatic credentials, (by which Britain would have to concede the issue of American independence); (2) to argue that it was in Britain's interest to take that step decisively, so as to promote confidence between the two nations; and (3) to advance arguments in favor of an American border on the Mississippi and other related issues. As an added inducement, Jay instructed his emissary to assure the British cabinet that the United States would *not* submit to French interpretations of its obligations vis-à-vis the Franco–American treaty of alliance.[44]

Jay's final point was made necessary by Articles II and VIII of the Franco–American treaty of alliance, in which the parties had agreed that "the essential and direct End" of the alliance was "to maintain effectually, the liberty, Sovereignty, and independence" of the United States; and that "Neither of the two Parties shall conclude either Truce or Peace with Great Britain, without the formal consent of the other first obtain'd." Vergennes's policy, in the fall of 1782, was to delay British acknowledgment of American independence in order to keep the United States in the war, thus giving Spain time to achieve a separate set of territorial objectives. In that context, Jay was assuring the British cabinet that the Americans would decide for themselves whether France had grounds for withholding its consent to peace under the terms of Article VIII, if the United States received an acknowledgment of their independence from Great Britain that fulfilled the terms of Article II.[45]

The British cabinet yielded to Jay's suggestion and empowered their emissary in Paris to negotiate with the "United States of America"—the first time that George III had used that title in official correspondence. The negotiations began in early October. By the end of November, the two parties had agreed to terms of peace that were widely regarded as favorable to the United States, including a western border on the Mississippi River. Jay's conduct was regarded by some Americans as a betrayal of France, yet he did not violate the terms of

[43] See "Aranda's Notes on Negotiations with John Jay," in *SPJJ*, 3:78–87; and Jay to Aranda, September 10, 1782, in *SPJJ*, 3:114. In a memo written over the summer of 1782, a member of the French foreign ministry stated that deficiencies in diplomatic credentials were a valid reason to reject negotiations, "if one did not wish to [negotiate]." Giunta, *The Emerging Nation*, 1:473–75.

[44] Jay to the Secretary for Foreign Affairs, November 17, 1782, in *SPJJ*, 3:242–45. According to Jay's report, he instructed his emissary to inform the British cabinet that, "though we were determined faithfully to fulfil our Treaty and Engagements with [France], *yet it was a different thing to be guided by their or our Construction of it*" (emphasis in the original), 244. For evidence that Jay's suspicions were legitimate, see the editorial note, "The Rayneval and Vaughan Missions to England," in *SPJJ*, 3:95–99.

[45] Miller, *Treaties and Other International Acts*, 2:38–39.

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the alliance, nor did the United States drop out of the war prematurely. The Anglo–American agreement was preliminary in nature, and contingent on France reaching its own terms of peace with Britain, which it did shortly thereafter. In the definitive treaties that were signed the following year, France achieved nearly all of its strategic objectives for the war.[46]

The essence of Jay's posture toward the customary laws of diplomacy was expressed in a draft letter to Vergennes, that he wrote in September 1782 but never sent. "When the United States became one of the Nations of the Earth," Jay wrote, "they publish[d] the Stile or name by which they were to be known & called, and as on the one Hand they became subject to the Law of Nations, so on the other they have a Right to claim and enjoy its Protection & all the Priviledges it affords." The rights and privileges that Jay claimed in these negotiations were so commonplace in Europe as to scarcely merit attention. In the context of a war for independence, they took on much greater importance, giving us a chance to witness the role of customary law in early modern statecraft, and to appreciate Jay's status as perhaps the only American of his generation to use that law effectively in the diplomatic realm.[47]

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[46] The Spanish court had also hoped to recover Gibraltar from England, but gave up that objective once the American preliminaries were signed, knowing that France no longer had grounds for requiring the United States to remain in the war.

[47] Jay to Vergennes, c. September 11, 1782 (unsent), in *SPJJ*, 3:123. To put it another way, Jay was upholding the Americans' assertion in the Declaration of Independence that, "as Free and Independent States," the United States had "full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do."

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