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Shoestring Diplomacy: Special Envoys of the President

In the midst of a high-risk foreign policy landscape and failures of interdepartmental coordination, prompt diplomatic negotiations are needed to stay ahead of emerging threats. Special envoys and special agents provide this rapid response tool. They have a forgotten constitutional footing going back to the Founding. We explain the details.

> Among all the instruments available to the President in his conduct of foreign relations, none is more flexible than the use of personal representatives. He is free to employ officials of the government or private citizens. He may give them such rank and title as seem appropriate to the tasks; these designations may be ambassador, commissioner, agent, delegate; or he may assign no title at all. He may send his agents to any place on earth that he thinks desirable and give them instructions either by word of mouth, or in writing, or through the Department of State, or in any other manner that seems to him fitted to the occasion. Some have been exceedingly formal; others completely in formal. Many agents have borne commissions like those of Government officers, ensuring them diplomatic rights, dignities and immunities. Because of these circumstances many have mistakenly considered themselves officers. Others have had mere letters of introduction and have enjoyed no diplomatic privileges. Some have gone with no written credentials whatsoever, their errand described only verbally. Their functions have varied in importance from the trivial to the vital. Their missions may be secret, no one whatever being informed of them. They may be open and accompanied by a blare of publicity. Neither their private character nor public attention affects the position of the representative. The President may meet their expenses and pay them such sums as he regards as reasonable. In this matter there is no check upon him except the availability of funds which has never proved an insoluble problem. In short, he is as nearly completely untrammelled as in any phase of his executive authority.
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> – Henry M. Wriston, *The Special Envoy* (1960)[1]

A persistent subject since the 1970s has been the eclipse of the State Department by the Department of Defense, and the increasing cooptation of diplomatic structures under the Pentagon. Numerous proposals for reform are brought up on a periodic basis, typically to little effect. One particularly astute insider treatment of these issues comes from Foreign Service veteran Laurence Pope's book *The Demilitarization of Diplomacy* (2014)[2].

Pope notes that departmental bloat has considerably increased since Kissinger's term, with the number of deputy secretaries and undersecretaries doubling. Concomitantly there has been a massive proliferation of diplomatic positions devoted to "global affairs" of various sorts not bound to any

1 Henry M. Wriston (1960). The Special Envoy. Foreign Affairs, 38(2), 219–237.
2 Pope, Laurence. The Demilitarization of American Diplomacy: Two Cheers for Striped Pants. Basingstoke: Palgrave Macmillan, 2014.

specific place (such as Global Intergovernmental Affairs; a Global Partnership Initiative; Global Women's Issues; Global Food Security; Global Entrepreneurship, etc.) Many of them produce policy papers, action plans and memos that are little read and soon discarded. In fact, they often cite the research of private NGOs such as Amnesty International and Human Rights Watch rather than relying on any inhouse departmental intelligence. As a consequence of these developments, the layers of internal bookkeeping and middlemen make it cumbersome for the State Department to quickly adapt to current events. Pope describes:

> This is more or less how it works: is there an overnight press report that Afghan officials have been guilty of a massacre? The regional desk in the South Asia Bureau will draft something to the effect that the United States is opposed to massacres, even those committed by our own clients, but this may not be strong enough for the Human Rights bureau. The Office of the Special Representative for Afghanistan and Pakistan will want to massage the text as well. (Created by the late Richard Holbrooke, it has largely supplanted the South Asia Bureau but both offices continue to exist.) Should there be a statement delivered by the Department spokesman at the noon briefing, or only one given in answer to a question? The process may go on endlessly until an official of sufficiently senior rank puts a merciful end to it, or one of the Secretary's personal staff intervenes and authorizes a statement to the effect that "the Secretary has spoken strongly to President Karzai." More likely, a statement from the White House in the name of the National Security Council will have made the State Department's churning irrelevant.

The State Department is thus a secondary player in foreign policy relative to the more centralized nexus between the White House and the DoD (particularly the National Security Council). The Foreign Service itself is highly imbalanced, with a dearth of career diplomats compared to an excess of consuls and public diplomacy officers (the latter handling cultural exchange programs). Senior ambassadors are routinely called out of retirement to go on mission.

Many DoD programs overlap or duplicate those of DOS.[3] One example is the "military information support operations" of the Special Operations Command, which carries out similar duties as public diplomacy officers of DOS. Indeed, they are often stationed in embassies to support the latter. AFRICOM's initiatives coincide and conflict with State's Bureau of African Affairs. SOUTHCOM collaborates with USAID, as during the 2010 Haiti earthquake. Vice versa, Foreign Service Officers serve as advisors for unified combatant commands. The Defense Security Cooperation Agency (DSCA) is closely involved with disbursing humanitarian assistance. DoD's geostrategic commitments to counterterrorism aid and drug eradication often clash with the DOS culture focused on human rights and democracy promotion, raising the ire of lawmakers and civil servants alike.

Some commentators have described the interagency rivalries between DoD and DOS as a matter of differing "risk cultures." Bryan Groves puts it this way: *The State operating environment is more global, is at best defensive, and is routinely reactive. State is also comparatively resource poor. Not every post has Marines, a Regional Security Office, or a medical unit. Foreign Service officers (FSO) go to places with endemic disease, absent civil infrastructure, with no health care, where there is no DoD presence, and where tsunamis, earthquakes, floods, and severe environmental hazards occur. DoD has vastly superior resources in personnel, equipment, and budget, and it does a much better job of personnel support when its people are serving in austere environments. A portion of DoD, the combat troops, have traditionally signed on for taking the fight to the adversary; to seek, engage, and destroy at deadly risk to themselves.*[4] Another important difference is that consular privileges and diplomatic immunities are governed by international law, whereas military forces depend on bilateral status of forces agreements that do not carry the same normatively binding force of custom.

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3 "The Defense Department implements programs for the State Department, such as Foreign Military Financing and International Military Education and Training, as well as a limited number of its own capability-building programs, such as Section 1206, which grants the secretary of defense, with secretary of State concurrence, the authority to train and equip foreign militaries to conduct counterterrorism missions or stability operations.

Peacekeeping is one area in which this cooperation is paying off. When our partners share the burden of these missions, conflicts are less likely to spin out of control.

The State Department's Global Peace Operations Initiative (GPOI) is a U.S. government-funded security assistance program intended to enhance international capacity to conduct United Nations and regional peace operations by increasing the number of capable military troops and police available for peacekeeping. GPOI's training and equipping activities are implemented through a partnership between the Departments of State and Defense. In fact, DoD organizations implement nearly half of all GPOI programs, events and activities." (https://www.uso.org/stories/1766-inside-the-relationship-between-dod-and-state)

4 http://thesimonscenter.org/wp-content/uploads/2012/08/IAJ-3-3-pg57-63.pdf

Clashing departmental cultures can, in turn, blow up into bureaucratic resistance whenever there is a concerted executive drive for reform. The Trump administration saw an unprecedentedly high use of the State Department's Dissent Channel. Foreign Service Officers defied orders, gave testimony before House committees during the 2019 impeachment proceedings, and leaked to the press, all in relation to political disagreements.[5]

The so-called "militarization of American diplomacy" and the entanglement between Foggy Bottom and the Pentagon is in many ways the consequence of having to fight non-state actors in ever more distributed environments. Just as warfare is more networked, foreign affairs depend increasingly on permanently standing international conferences, intergovernmental organizations, and other multilateral institutions. It follows that options for reform are as much constrained by international factors themselves as by organizational factors of the relevant departments.

It may be instructive to look for inspiration from 19th century American diplomacy, before the formal separation between the consular and diplomatic services. At the time, many foreign envoys were commercial agents, and the quintessentially civilian endeavor of promoting commerce was a core area of DOS. In 1833, Secretary of State Edward Livingston commented that "...commerce and navigation both require the protecting arm of Government abroad, as well as at home... Where we have treaties, vigilant officers must be ready to see they are faithfully executed. ... wherever we have a commerce worth preserving, we must have agents to protect it."[6] Such missions (and many others) were carried out by means of the *special envoy*, also known as a special agent, executive agent or ad hoc diplomat. These were men appointed as personal representatives of the President to carry out diplomatic tasks on an ad hoc basis without being "public ministers" or Officers of the United States undergoing Senate confirmation.

The existence of the special envoy is in large part a fortuitous survival of classical diplomacy prior to the large-scale professionalization of the 20th century spearheaded by the Rogers Act and Foreign Service Act. American consuls in the 19th century were not salaried officials, but were instead remunerated by fees and bounties. Prior to 1856, they were even permitted to engage in private commerce on the job, itself a reflection of the commercial nature of American diplomatic interests then. Consular officials would also provide assistance for citizens on foreign soil out of their own

5 https://www.politico.com/news/2019/10/20/state-department-trump-051564

6 Bingham Duncan (1949). Diplomatic Support of the American Rice Trade, 1835-1845. Agricultural History, 23(2), 92 96.

pocket, rather than from any appropriated fund.[7] This was part of a wider ethos that government service should be held by men of preexisting means, who would not be as strongly tempted by careerist ambitions. Thomas Jefferson, acting as Secretary of State, once curtly dismissed a consul's complaints about pay with the following words: *Those appointments are given to gentlemen who are satisfied to perform their duties in consideration of the respect and accidental advantages they may derive from them. When the consideration ceases to be sufficient, the government cannot insist on a continuance of service because this would found claims which it does not mean to authorize.*[8]

The legitimacy of special envoys has long been upheld as a matter of historical gloss. A minority report of the Senate Foreign Relations Committee in 1887 stated[9]:

> The whole number of persons appointed or recognized [1789-1887] by the President, without the concurrence or advice of the senate, or the express authority of congress, as agents to conduct negotiations and conclude treaties, is four hundred and thirty-eight. Three have been appointed by the secretary of state, and thirty-two have been appointed by the President with the advice and consent of the senate. . . . . An interval of fifty-three years between 1827 and 1880 occurred during which the President did not ask the consent of the senate to any such appointment.. . . . **The constitutional power of the President to select the agents through whom he will conduct such business is not affected by the fact that the senate is or is not in session at the time of such appointment, or while the negotiation is being conducted; or the fact that he may prefer to withold even from the senate, or from other countries the fact that he is treating with a particular power, or on a special subject.**

7 Nicole M. Phelps, 2020. "One Service, Three Systems, Many Empires: The U.S. Consular Service and the Growth of U.S. Global Power, 1789–1924", Crossing Empires: Taking U.S. History into Transimperial Terrain, Kristin L. Hoganson, Jay Sexton

8 Kennedy, Charles Stuart. The American Consul : a History of the United States Consular Service, 1776-1914 / Charles Stuart Kennedy. New York: Greenwood Press, 1990

9 50 Cong., I Sess., Sen. Misc. Docs., II, no. 109, pp. 103-10

Later, in 1893, the majority report of the same committee would reiterate: "There seems to be no reason why the government of the United States cannot, in conducting its diplomatic intercourse with other countries, exercise powers as broad and general or as limited and peculiar, or special, as any other government. In fact, there has been no limit placed upon the use of a power of this kind, except the discretion of the sovereign or ruler of the country."[10]

Special envoys may or may not be delegated with treaty-making powers, but they have been particularly useful when sent on factfinding missions without such powers. In some cases, they may not even be accredited to any sovereign or government, given any distinct rank, or given a formal commission. Such confidential envoys were commonly employed prior to the formation of the modern intelligence community in the 20th century. They were paid out of the so-called "contingency fund" that was subject to the discretionary spending of the President and not open to public review. Besides intelligence of this sort, other uses for special envoys have included missions on whether to formally recognize newly created states; for renewing of ruptured relations; to exchange ratification of treaties (back when communications and transport were more restrictive), and to negotiate during a revolutionary situation when political boundaries are rapidly fluctuating.

The use of special envoys reached a peak in the first half of the 20th century, with Woodrow Wilson and Franklin Delano Roosevelt employing them extensively. Two such envoys acquired particular historical notoriety: Colonel House in service of Wilson, and Harry Hopkins in service of FDR. Ironically, this may have arisen due to an attempt by Congress to unduly restrict the President's powers in directing foreign affairs. The Deficiency Appropriation Act of 1913 contained the infamous provision: "Hereafter the Executive shall not extend or accept any invitation to participate in any international congress, conference, or like event, without first having specific authority of law to do so." The provision was de facto treated as null and void from its inception, and the executive consistently construed the statute so as to sever it.[11] Nevertheless it acted as a political obstacle, and the contemporary diplomatic historian Henry Wriston considered said provision to be a major impetus for the increasing reliance on sole executive agreements over formal treaties.[12]

10 53 Cong., II Sess., Sen. Report no. 227, p. 25

11 "The Department has consistently acted in accordance with this view, and delegates have been sent to international conferences from time to time without prior authorization of Congress, notwithstanding the provision of law which I have quoted." (Secretary of State Henry L. Stimson, April 25, 1929: https://history.state.gov/historicaldocuments/frus1929v01/d293)

12 "The act has also affected the method of our diplomacy. One of the motives for the informal methods which have become so commonis to avoid legislative interference. As executive agreements avoided the necessity of going to the Senate for approval, so "unofficial observers" and "personal representatives of the President" may be sent to conferences and to some of the commissions without Congressional authorization. There are of course other reasons for the use of observers, arising out of the nature of the subject, the character of the conference, or the membership of the

An important distinction for understanding special envoys is between *office* and *rank*. Presidential agents are not necessarily Officers of the United States, and the use of a certain title like "ambassador" does not by itself make the agent so entitled an officer. All offices are employments, but not all employments are offices. The duties of an officer must be continuing and permanent, whereas those of an agent or employee are ad hoc and temporary – they are only *pro tempore* aids to the President in the performance of his executive functions. The use of a particular rank is, in of itself and without additional authority, only a term of honor. There is also a misconception that a commission containing the President's signature and the Great Seal of the United States makes its bearer an officer. The former only denotes personal authorization by the President, and the latter authenticates said authorization.[13]

Senator James George clearly outlined the office-rank distinction in the 58th United States Congress. The former has to do with term and tenure, not any specific duty[14]:

> The President may appoint persons called envoys, ministers, ambassadors, commissioners, or charges d'affaires, or whatever you may be pleased to call them, for the specific purpose of making a treaty. It has been conceded that he may make the appointment during the session of the Senate and without submitting to the Senate the name of the person so appointed." In the same way the President may appoint agents for other duties. Whatever the duties or the title, they are immaterial. "The true rule is, that in the sense of that clause of the Constitution which requires appointments to office to be made by and with the advice and consent of the Senate, an appointment or employment to do a particular thing, or specific things, is without constitutional tenure and is not an office. This idea is plain in the Constitution." The idea is plain because "in every instance in which an office is established the tenure or term of the estate of the Officer in the office is invariably fixed, either by express words or by an implication clear and indisputable. The Constitution ... refers alone to appointments of officers whose terms or tenure of office are determined by afflux of time ...

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group; but when all is said and done, one of the principal motives for informal and unofficial representation is to keep for the executive a freehand as against the legislature." (Henry M. Wriston (1926). American Participation in International Conferences. The American Journal of International Law, 20(1), 45.)

13 See the discussion in: The Ad Hoc Diplomat: A Study in Municipal and International Law. By Maurice Waters. The Hague: Martinus Nijhoff, 1963.

14 Ibid. Congressional Record, 58th Cong., 2nd Sess., XXVI, 3133-34

A vivid illustration of the *personal* nature of such agents can be seen in the typical *letters of instruction* given to ambassadors and envoys. As to their legal authority: “Presidents provide their primary directives in a Letter of Instruction to each COM [Chief of Mission], setting out each COM's role and responsibilities as the President's *personal* representative at each U.S. mission abroad. Although the State Department stresses the distinction between the constitutional and legislative sources of COM authority, the Letter of Instruction and Section 207 of FSA 1980 contain similar language on the central points of COM authority.”[15] A typical letter of instruction contains such words as “As my representative, you, along with the Secretary of State, share with me my constitutional responsibility for the conduct of our relations with … I charge you to exercise full responsibility for the direction, coordination, and supervision of all Executive branch U.S. offices and personnel… I am committed to a lean personnel profile overseas for reasons of foreign policy, security, and economy. Thus, it is my policy that overseas staffing be tied directly to the accomplishment of specific national goals, and reduced whenever and wherever possible.”[16]

Given that special envoys have been consistently used since Washington, the question rises as to the precise source of their constitutional authority. Due to the obscurity of this area, not much has been said about it. Given that they are not public ministers but carry out similar duties, their authority does not strictly derive from the Appointments Clause. Some commentators like Ryan M. Scoville have therefore declared them presumptively unconstitutional, but long and uninterrupted historical practice rules out this option. Others, like Quincy Wright, justified it as an inherent power of the executive branch in line with cases such as *In re Neagle*, but that domain of jurisprudence has also seen little study. But there is another and much more fascinating argument for the legality of special envoys, one frequently invoked in the early years of the republic before falling out of favor: that the president’s right to use private agents derives from the *law of nations.*[17]

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15 U.S. Diplomatic Missions: Background and Issues on Chief of Mission (COM) Authority. Weed, Matthew. Serafino, Nina. 2014.

16 https://2009-2017.state.gov/documents/organization/28466.pdf

17 “Madison specifically addressed himself to this issue. He asserted that "diplomatic functionaries" are not "officers in the constitutional sense because, ... the position of foreign ministers or consuls ... is not created by the constitution, . .. by the law authorized by the constitution, ... [nor] by the President and Senate who are to fill, not create offices. . .. The place of a foreign minister or consul is to be viewed as created by the Law of Nations, to which the United States as an independent nation, is a party."

Senator O. Horsey took a similar view in a debate in 1814. He found the source of the office of minister in international law. "It is an office without limitation as to number, or duration of tenure, with regard to which neither the Constitution or [sic] laws have prescribed the duties .... In short it is an office not created by the Constitution, nor by any municipal law, but emanates from the law of nations and is common to all civilized governments.”

(cited in Maurice Waters’ “The Ad Hoc Diplomat,” 1963, p.11).

The law of nations (ius gentium), today generally known as customary international law, is famously incorporated into the enumerated powers of Congress under Article I, Section 8: *To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.* This passage has rarely been litigated upon, and it remains an obscure subject of occasional debate, but a dominant view in early American history is that the law of nations was incorporated into the law of the land. The predominant authorities for the law of nations in the 18th century were Emer de Vattel, Cornelius van Bynkershoek and Jean-Jacques Burlamaqui.

Alexander Hamilton, writing under the pseudonym Camillus in 1795, unequivocally espoused this view: *The common law of England which was & is in force in each of these states adopts the law of Nations, the positive equally with the natural, as a part of itself.... Ever since we have been an Independent nation we have appealed to and acted upon the modern law of Nations as understood in Europe. Various resolutions of Congress during our Revolution-the correspondence of executive officers-the decisions of our Courts of Admiralty, all recognised this standard.. .. Executive and legislative acts and the proceedings of our Courts under the presentgovernment speak a similar language. The President's Proclamation of Neutrality refers expressly to the modern law of Nations.. . 'Tis indubitable that the customary law of European Nations is a part of the common law and by adoption that of the U[nited] States.*[18]

James Madison, writing in Helvidius No. 1, states that the power to make treaties is neither legislative nor executive: *The power of making treaties is plainly neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the enaction of new ones, and still less to an exertion of the common strength. Its objects are contracts with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong properly neither to the legislative nor to the executive.*[19] The reference to "obligations of good faith" and the evocation of inter-sovereign relations clearly suggest he is thinking of the law of nations.

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18 A. HAMILTON, To Defence No. XX (Oct. 23-24, 1795), in 19 PAPERS OF A. HAMILTON, supra note 33, at 341-42 (H. Syrett ed. 1973).

19 ""Helvidius" Number 1, [24 August] 1793," Founders Online, National Archives, https://founders.archives.gov/documents/Madison/01-15-02-0056. [Original source: The Papers of James Madison, vol. 15, 24 March 1793–20 April 1795, ed. Thomas A. Mason, Robert A. Rutland, and Jeanne K. Sisson. Charlottesville: University Press of Virginia, 1985, pp. 66–74.]

Justice Wilson declared in *Ware v. Hylten* (1796) that "when the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."

Justice Story, in the case of *Brown v. United States* (1814), even argued that the President's constitutional war powers, modulo legitimate statutory limitations, ultimately derive from the law of nations: *There is no act of the legislature defining the powers, objects or mode of warfare; by what rule, then, must he be governed?* ***I think the only rational answer is by the law of nations as applied to a state of war.*** *Whatever act is legitimate, whatever act is approved by the law, or hostilities among civilized nations, such he may, in his discretion, adopt and exercise; for with him the sovereignty of the nation rests as to the execution of the laws. If any of such acts are disapproved by the legislature, it is in their power to narrow and limit the extent to which the rights of war shall be exercised; but until such limit is assigned, the executive must have all the right of modern warfare vested in him, to be exercised in his sound discretion.*

Perhaps the most notable case involving a federal court interpreting the law of nations is *Henfield's Case* of 1793, involving the defendant Gideon Henfield, who had seized a British vessel as prize while acting as a privateer for the French government. The ensuing diplomatic crisis came shortly after the United States issued its Neutrality Proclamation in the ongoing French revolutionary wars. The proclamation committed the United States to prosecuting any of its citizens which aided and abetted hostilities on behalf of any of the belligerent powers. Henfield's Case was unique since the defendant had not violated any federal statute, treaty or even committed any typical common law crime. Instead, Henfield was prosecuted for violating the law of nations, which the court interpreted as being incorporated into federal law. The case docket stated: *Though there may have been no exercise of the power conferred upon congress by the constitution "to define and punish offenses against the law of nations," the federal judiciary has jurisdiction of an offense against the law of nations, and may proceed to punish the offender according to the forms of the common law; and it seems that the federal courts have common-law cognizance of offenses against the sovereignty of the United States.*

It is therefore an interesting proposition that the Framers and early statesmen of the republic would have acknowledged a pre-constitutional basis to foreign recognition and public diplomacy, such powers being *exercised* by the executive but not *as* executive powers stricto sensu. While it would have been quite normal for an 18th century English common lawyer to affirm a pre-positive natural law grounding to politics, such a conception obviously no longer holds sway. Yet various institutions,

such as the special envoy, survive in continuous usage from this common law past. Neither can such a view be so trivially dismissed in the present, for just as the judiciary invokes inherent powers on a wide variety of procedural matters, the existence of inherent executive powers under international law has two advantageous qualities: for one, it shows that the Constitution did establish a state within a wider European community of nations with all the concomitant legal implications, and secondly it is a much more elegant explanation for various exercises of executive authority that are otherwise vaguely shoehorned within protean interpretations of the Take Care Clause, Commander-in-Chief Clause, and suchlike.

A path forward for American diplomacy may then involve a "deprofessionalization" of the diplomatic corps and the more prominent use of special agents, especially people from commercial and business backgrounds with wide-ranging personal networks. This would reduce the *esprit de corps* created by complicated systems of merit-based promotion, examination and rotation that end up creating guild-like structures of entrenchment. It would be simpler budgetarily, much as various agencies already have self-funding authority out of user fees. The relative informality of special agents may even be beneficial to the extent that they can leverage their personal charisma instead of immediately being seen as representatives of an "imperial" power, a common view in the public imagination that carries some costs of diplomatic credibility. It would also permit a tighter interaction between the President and his Secretary of State, restoring some prominence to the latter and thus magnifying the State Department's bargaining power vis-a-vis the DoD, as well as simplifying a lot of the administrative complexity caused by the proliferation of undersecretaries and assistant secretaries. Rather than bemoaning the pre-modern residues of the United States' diplomatic infrastructure, these links to 18th century cabinet diplomacy should be leveraged in a world no longer defined by pure bilateralism between states, but also by global administrative law and intergovernmental organizations.