

# THE LOGICAL STRUCTURE OF ARTICLE TWO

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Article II of the United States Constitution, the Article that defines the powers of the executive branch, is the Constitution's most inscrutable. Compare Article II to Articles I and III, which define the legislative and judicial branches. Those Articles are informative, logically organized, and seemingly comprehensive. Article II is not. It seems haphazard and disorganized. Sections 2 and 3 of Article II enumerate powers of the presidency, but why are some items in Section 2 and others in Section 3? More worrisome, the lists of powers in these two sections are obviously incomplete. They contain details that seem utterly trivial and they fail to address issues that seem incredibly important. Why?

And most important of all: What is the function of the Vesting Clause, the first sentence of Section 1, sometimes called the Executive Power Clause: "The executive Power shall be vested in a President of the United States of America"?<sup>1</sup> It stands in conspicuous contrast to the first sentence of Article I: "All legislative Powers *herein granted* shall be vested in a Congress of the United States."<sup>2</sup> The legislative branch is vested only with the legislative powers "herein granted," while the executive branch is vested with "the Executive Power," unqualified. Does the executive Vesting Clause merely designate the title of the person holding the presidency, or does it impart certain powers—namely those of an "executive" nature—in that person? If the latter, how do we know what these "executive" powers are, and what relationship there is between these generic "executive" powers and the enumerated executive powers of Sections 2 and 3? The meaning and function of this Clause have bedeviled interpreters from the Neutrality Controversy, when Alexander Hamilton took the latter position,<sup>3</sup> to the *Steel Seizure Case*, when the Supreme Court took the former position,<sup>4</sup> to today, when academics are arrayed on both sides of the controversy.<sup>5</sup>

This study is an attempt to make sense of Article II, including the Vesting Clause—not in terms of any normative or functionalist theory, but simply in light of its text and history. Some readers may be originalists—believing that, to some extent, the words of the Constitution must be read in light of the meaning of those words at the time they were enacted into law. Other readers will adhere to other interpretive approaches. This study is not addressed to one interpretive camp or the other, because it is not an argument about how presidential powers should be interpreted today. It is solely an attempt to understand the text. I do believe, however, that *any* interpretive enterprise must begin by asking where the ideas under consideration come from—even if the interpreter ultimately concludes that something other than the original

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<sup>1</sup> U.S. CONST. art. II, § 1, cl. 1.

<sup>2</sup> U.S. CONST. art. I, § 1, cl. 1 (emphasis added).

<sup>3</sup> See *infra* sections II.I and III.A.

<sup>4</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

<sup>5</sup> See, e.g., A. Michael Froomkin, Note, *In Defense of Administrative Agency Autonomy*, 96 YALE L.J. 787 (1987) (former position); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992). [other sources will be added]

understanding should be controlling. This is my attempt to discover the logic of Article II as it came from the pens of those who wrote it.

A careful study of the drafting history of Articles I and II, the legal background of the ideas expressed, and finally the arrangement of executive powers in Article II, Sections 2 and 3, reveals a careful, even if nonobvious, logic. Executive powers are organized not according to subject matter but according to whether they can be exercised with or without advance legislative authorization, and whether or not they are subject to legislative override or modification. The content derives from the then-accepted list of royal prerogative powers. The framers address each and every royal prerogative power (with one possible exception), assigning some to the Congress, some to the President, and some to the President with qualifications. The framers also altered the scope of some of those powers in light of their intention to create a republic and not an elective monarchy. Understanding the structural logic of Article II greatly eases the task of adjudicating separation of powers disputes between Congress and the President. Considerations of functionality, subsequent history, and modern circumstances may affect that analysis – depending on one’s favored interpretive method – but the textual and structural starting point is far less murky and uncertain than courts and commentators have typically assumed.

Almost two thirds of the words of Article II are found in Section 1, setting forth the qualifications, compensation, oath of office, and selection procedure for the President and Vice President. These were among the most debated features of the entire Constitution at the Philadelphia Convention—second only to the debate over representation of large and small states in the House and Senate. Alas, despite the framers’ attention, the mode of selection they devised was so flawed it has been the subject of five different constitutional amendments, and the electoral college remains one of the most criticized features of the Constitution even now. In this study, I will not discuss the procedures for selection, except insofar as they cast indirect light on the powers of the presidency. Nor will I discuss Section 4, the shortest part of the Article, which sets forth impeachment as the sole mode of removal of the President. That section, too, was debated at some length on the floor of the Convention. This study will focus entirely on the first sentence of Section 1, the so-called Vesting Clause, and Sections 2 and 3, which set forth the President’s powers. Oddly, these sections were scarcely debated at the Convention and were primarily the handiwork of three committees: the Committee of Detail, the Committee on Postponed Matters, and the Committee on Style. These sections are by far the most important for modern separation-of-powers controversies pitting the President against the Congress, and they deserve more attention.

The three parts of this essay will approach the subject in three stages. Part I is historical; it presents the first comprehensive account of the entire drafting history relevant to presidential powers.<sup>6</sup> In a nutshell: on the first day of discussion of the executive branch, James Wilson of

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<sup>6</sup> The most complete previous effort is CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY, 1775–1789*: A

Pennsylvania and John Rutledge of South Carolina declare their intention to create a powerful unitary executive, but not to impart to that executive all the prerogative powers of the Crown. They did not get their way at first; instead the delegates created a unitary executive with only three enumerated powers: to carry into effect laws passed by Congress, to veto legislation subject to override, and to appoint officers other than judges (and later ambassadors and a Treasurer), whose appointments were entrusted to the Senate or the Congress as a whole. In late July, however, as dominant members of the Committee of Detail, Rutledge and Wilson did exactly what they had stated on the first day: they carefully parceled out the prerogatives of the Crown between the President, the Congress, and the President subject to override.

Part II examines each of those prerogative powers. It discusses the historical struggles over each claimed prerogative power, their significance to constitutional structure, and how the Convention dealt with each. For the most part, I will not trouble the reader with parallels to modern controversies. They leap off the page.

Part III turns to the text and organization of Article II, offering a logical explanation for the organization of the powers of the Presidency in Sections 2 and 3, and shows how that logical structure provides a simpler and more satisfactory basis for approaching separation of powers conflicts between Congress and the President than the current approach based on Justice Robert Jackson's celebrated three-part framework in the *Steel Seizure* case. The point is illustrated by applying the approach to an illustrative set of cases.

## I. Drafting History at the Philadelphia Convention

### A. *The Difficulty of the Task: Lack of Models*

John Dickinson famously told his fellow delegates that in drafting the new constitution, “[e]xperience must be our only guide. Reason may mislead us.”<sup>7</sup> Unfortunately, they had no experience of a strong and effective executive other than a monarch. Under the Articles of Confederation, which governed the new United States until adoption of the Constitution in

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STUDY IN CONSTITUTIONAL HISTORY (1922), a monumental work on which subsequent scholars heavily rely. Other useful works to which the author has referred include STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008); Thomas E. Cronin, ed., *Inventing the American Presidency*, ch. 5-9 (1989); ABRAHAM SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER* (1976); Arthur Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 527, 540 (1974); Henry Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1 (1993); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231 (2001); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701; Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259 (2009).

<sup>7</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 278 (photo. reprint 1966) (Max Farrand ed., rev. ed. 1937) [hereinafter FARRAND]. I am well aware of the problematic nature of the notes on the Convention presented in Farrand's collection, see generally MARY SARAH BILDER, *MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION* (2015), but Farrand's edition remains the most familiar and accessible set of records of what took place in Philadelphia. All quotations from Farrand are taken from Madison's Notes unless otherwise indicated.

1788,<sup>8</sup> the national government had no executive branch—only a Congress and a tiny judiciary for maritime cases. That does not mean the Confederation government performed no executive functions. Those executive functions were exercised by Congress, or sometimes by committees of Congress, or by ministers appointed by and accountable to Congress. This system did not work well.<sup>9</sup> By the late 1780s, all seemed to agree that a new Constitution should include an executive. Every plan for constitutional reform, even the most conservative, the New Jersey Plan, called for creation of an executive of some sort, even if not unitary.

Devising an executive, however, was no easy matter. The framers had long experience in colonial legislatures, making it relatively easy for them to draft a practical scheme for the legislative branch. And many of them were lawyers or judges. They knew what a judicial system should look like. But no one in attendance at the Philadelphia Convention—indeed no one anywhere—had experience with a republican executive. As we will discuss in great detail below, British constitutional history featured a series of struggles by whiggish parliamentarians and judges to curtail the powers of an often arbitrary and grasping royal monarch. Americans certainly did not want to replicate that kind of executive (though some privately believed a monarchy might be unavoidable). Colonial governors were even worse; their prerogative powers *vis-à-vis* colonial legislatures were significantly more formidable than those of the King *vis-à-vis* Parliament, and they had frequently abused those powers in their own self-interest. Obviously, colonial governors did not offer an attractive model for a republican executive. State governors after Independence were pitifully weak; Madison called them “little more than Cyphers.”<sup>10</sup> The governors of New York and, to some extent, Massachusetts were exceptions. They were largely independent of the legislature and had significant powers. But even those governorships did not provide a real model for an energetic executive for an entire nation.

To make matters worse, James Madison, the driving intellect behind the Virginia Plan, was a quintessentially legislative personality, and had few ideas about how to construct an executive branch. Just before he left for Philadelphia on April 16, 1787, he wrote a letter to General Washington outlining his thoughts about the new constitution. In that letter, he wrote: “I have scarcely ventured as yet to form my own opinion either of the manner in which [the executive] ought to be constituted or of the authorities with which it ought to be clothed.”<sup>11</sup> The Convention had to construct an executive out of whole cloth, with no attractive precedents and little help from its ablest theorist.

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<sup>8</sup> The Articles were drafted in 1777 and ratified by the necessary unanimous vote of the states in 1781. Even before ratification, they provided the practical basis for American government during the War of Independence.

<sup>9</sup> See THACH, *supra* note 6, at 62-64 (“Everything was confusion, and the confusion was only worse confounded when Congress sought to effect a cure by introducing further complexity.”); Thomas E. Cronin, *The President’s Executive Power*, in *INVENTING THE AMERICAN PRESIDENCY* 180, 182-83 (Thomas E. Cronin ed., 1989).

<sup>10</sup> 2 FARRAND, *supra* note 7, at 35.

<sup>11</sup> 9 THE PAPERS OF JAMES MADISON, CONGRESSIONAL SERIES 385 (Robert A. Rutland & William M. E. Rachal eds., 1975).

## B. *The Virginia Plan, Resolution 7*

When the Constitutional Convention gathered a quorum at the end of May 1787, the Virginia delegation stole a march by presenting a well-thought-through plan, mostly drafted by Madison.<sup>12</sup> The executive power plank of the Virginia Plan, Resolution 7, however, was one of the least well-thought-through parts of the Plan. It read in its entirety:

7. Resd. that a National Executive be instituted; to be chosen by the National Legislature for the term of \_\_\_ years, to receive punctually at stated times, a fixed compensation for the services rendered, in which no increase or diminution shall be made so as to affect the Magistracy, existing at the time of increase or diminution, and to be ineligible a second time; and that besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation.<sup>13</sup>

As can be seen, Resolution 7 did little more than provide that the “National Executive” would be chosen by the legislature, would be paid, and could not be reelected. It left open whether there would be one executive officer or many, the length of the term, and whether there would any mechanism for impeachment and removal. The philosophy behind Resolution 7 was equivocal: the purpose of fixing compensation and forbidding selection for a second term was to render the executive independent of the legislature, and hence capable of checking legislative excess. But Congress had the power to choose “it.” Would such an executive be independent, or not?

Most significantly for our purposes, Resolution 7 vested in the “National Executive” all “Executive rights” that had been vested in Congress under the Articles of Confederation, in addition to “a general authority to execute the National laws.”<sup>14</sup> This wording necessarily presupposed that certain powers are “executive” in nature (and others “legislative” or “judicial”), as opposed to the view that powers take on their coloration as executive, legislative, or judicial according to which branch those powers are located in.<sup>15</sup> Otherwise, there would be no way to tell which powers vested in the Confederation Congress were “executive.” Madison, the presumed author of Resolution 7, confirmed this presupposition by informing the Convention that “certain powers were in their nature Executive.”<sup>16</sup>

In addition, the executive, together with “a convenient number of the National Judiciary,” would be part of a “council of revision,” with authority to review and veto every act of the

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<sup>12</sup> See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 18 (photo. reprint 1966) (Max Farrand ed., rev. ed. 1937) [hereinafter 1 FARRAND].

<sup>13</sup> *Id.* at 21.

<sup>14</sup> 1 FARRAND, *supra* note 12, at 21.

<sup>15</sup> See, for example, Justice Steven’s view rejecting the argument “that the analysis [of whether the Gramm-Rudman-Hollings Act unconstitutionally delegated legislative power] depends on a labeling of the functions assigned to the Comptroller General as ‘executive powers,’” and arguing instead that “the Comptroller General must be characterized as an agent of Congress because of his longstanding statutory responsibilities.” *Bowsher v. Synar*, 478 U.S. 714, 737 (1986) (Stevens, J., concurring in the judgment).

<sup>16</sup> 1 FARRAND, *supra* note 12, at 67.

legislature, including negatives of state laws, subject to override.<sup>17</sup> This merged the ideas of an executive veto and judicial review, which the Convention would later separate.

Resolution 7 came to the floor of the Convention, sitting as a Committee of the Whole, on June 1, 1787—its third day of substantive deliberations. The discussion set the tone of the entire debate over presidential powers. “Mr. Pinkney”—presumably the younger Charles Pinckney rather than his older cousin, General Charles Coatesworth Pinckney<sup>18</sup>—opened the debate. He “was for a vigorous Executive but was afraid the Executive powers of <the existing> Congress might extend to peace & war &c which would render the Executive a Monarchy, of the worst kind, to wit an elective one.”<sup>19</sup>

This remark is striking, because Resolution 7 made no reference to “peace & war.” Why would Pinckney rush to the assumption that “executive” powers necessarily include those powers? Most likely because, under the British Constitution, they were prerogative powers of the Crown. The King had authority, without Parliamentary participation other than through the power of the purse, to make war, to declare war, to conduct war as Commander in Chief, and to make peace.<sup>20</sup> These were among the most important prerogative powers remaining in the Crown as of 1787. Pinckney evidently used the phrase “peace & war &c” as a synecdoche for the totality of the royal prerogative powers. The mere presence of the term “Executive rights” in Resolution 7 invoked the panoply of executive prerogative powers under the British constitution.

That is why Pinckney moved so quickly to his worry that Resolution 7 would “render the Executive [an elective] Monarchy.” His train of thought had three steps: (1) Resolution 7 vests all the executive powers of the nation in the Executive; (2) executive powers include the prerogative powers of the Crown, such as peace and war (and others, hence the “&c”); (3) an executive with the prerogative powers of the British Crown is effectively a monarch (albeit elected). Notably, James Wilson picked up on Pinckney’s line of reasoning, while disagreeing with the second step of his logic: Wilson stated that he “did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers.”<sup>21</sup> Resolution 7 had not used the language of “prerogative,” any more than it had used the language of “peace & war,” but to the ear of a late eighteenth century lawyer in the English tradition, the term “Executive rights” necessarily raised the question whether some, or all, or none, of the prerogative powers of the Crown were included.

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<sup>17</sup> *Id.* at 21.

<sup>18</sup> Usually Madison’s notes refer to Charles Pinckney as “Mr. Pinkney” and his older cousin as “Genl. Pinkney” or “C. C. Pinkney.” Here, the text does not make clear which Pinckney spoke, but context suggests the former.

<sup>19</sup> 1 FARRAND, *supra* note 12, at 64-65 (spelling corrected). The angle brackets (< >) contained in quotations from Farrand identify editorial changes Madison made to his Notes after the fact – often decades after the fact.

<sup>20</sup> See 1 WILLIAM BLACKSTONE, COMMENTARIES \*250, \*257-58 (counting the powers to make war and peace among “a number of authorities and powers; in the exertion whereof consists the executive part of government”); JOSEPH CHITTY, A TREATISE ON THE LAW OF THE PREROGATIVES OF THE CROWN 43-50 (1820).

<sup>21</sup> 1 FARRAND, *supra* note 12, at 65.

### C. Prerogative

What is a “Prerogative” power? “Prerogative” was a formal legal term in the British constitutional lexicon, used by monarchs,<sup>22</sup> judges,<sup>23</sup> Parliamentarians,<sup>24</sup> political theorists,<sup>25</sup> and legal treatise writers<sup>26</sup> alike. It refers to powers exercisable by executives at their unfettered discretion without having to consult or obtain authorization from the legislature in advance. Modern examples of executive prerogative under the Constitution include the veto and the pardon, both of which may be exercised by the President for any reason, do not depend on any delegation by Congress, and may not be regulated by Congress or the courts. Today, the prerogatives of the British Crown must be exercised on advice of the ministers, who themselves are chosen by Parliament. The Queen is now a figurehead. But the prerogative as a legal category remains significant. It refers to those discretionary powers that may be exercised by the ministers (in the name of the Crown) without action by Parliament as a body.<sup>27</sup>

In his *Second Treatise of Government*, well known to the framers, John Locke wrote: “This Power to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it, is that which is called *Prerogative*.”<sup>28</sup> As Sir William Blackstone explained, when the king lawfully rests his orders on a royal prerogative, “the king is, and ought to be absolute; that is, so far absolute, that there is no legal authority that can either delay or resist him. He may reject what bills, may make what treaties, may coin what money, may create what peers, [and] may pardon what offences he pleases.”<sup>29</sup> Over the course of the seventeenth and eighteenth centuries, the scope of prerogative powers were greatly reduced, but Locke teaches that it is not possible to eliminate prerogative altogether:

Many things there are, which the Law can by no means provide for, and those must necessarily be left to the discretion of him, that has the Executive Power in his hands, to be ordered by him, as the publick good and advantage shall require: nay, ‘tis fit that the Laws themselves should in some Cases give way to the Executive Power, or rather to this Fundamental Law of Nature and Government.<sup>30</sup>

No modern Office of Legal Counsel lawyer could put it more advantageously.

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<sup>22</sup> E.g., James II, Declaration of Indulgence 1687, in 8 ENGLISH HISTORICAL DOCUMENTS: 1660–1714, at 395, 396 (Andrew Browning ed., 1966) (asserting the Declaration was issued “by virtue of our royal prerogative”).

<sup>23</sup> [To Come]

<sup>24</sup> [To Come]

<sup>25</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT 374 et seq. (Peter Laslett ed., Cambridge Univ. Press 1988); CATO’S LETTERS No. 15 (Thomas Gordon) (Ronald Hamowy ed., Liberty Fund ed. 1995).

<sup>26</sup> 1 BLACKSTONE, *supra* note 20, at \*239-40; CHITTY, *supra* note 20, at 3-6.

<sup>27</sup> See E.C.S. WADE & G. PHILLIPS, CONSTITUTIONAL LAW 171 (8th ed. 1970) [get modern edition, or more modern source].

<sup>28</sup> LOCKE, *supra* note 25, at 375 (emphasis original).

<sup>29</sup> 1 BLACKSTONE, *supra* note 20, at \*250.

<sup>30</sup> LOCKE, *supra* note 25, at 374-75.

In addition, Locke observes that relations with foreign governments and individuals are “much less capable to be directed by antecedent, standing, positive Laws” and “so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick good.”<sup>31</sup> He calls the management of these foreign relations the “federative Power,”<sup>32</sup> and although he does not use the term “prerogative” in connection with this power, his argument suggests that there necessarily must be more latitude for governance without law—i.e., prerogative—in foreign affairs than in the domestic sphere. This is consistent with Pinckney’s association of “peace & war” with executive prerogative.

The precise contours of prerogative power are contingent on the details of the particular regime, and are often contested. In an *absolute* monarchy, all governmental power is prerogative. A *constitutional* monarchy is one in which prerogative is limited. It is not too much to say that the constitutional history of Britain was a struggle over the reach of royal prerogative. Over the course of the seventeenth and eighteenth centuries, while monarchies in continental Europe became increasingly absolute, Britain moved in the opposite direction. The Stuart kings prior to the Glorious Revolution attempted to assert vast prerogative powers, including the power to legislate through royal proclamation, to tax, and to suspend or dispense with the law. These attempts led first to the violent overthrow and execution of Charles I, and later to the expulsion of James II in the Glorious Revolution. The Petition of Right of 1628 and the Bill of Rights of 1689 greatly curtailed the scope of royal prerogative. Nonetheless, the Hanoverian kings of the eighteenth century continued to enjoy significant prerogative powers, including those of “peace & war.”

Americans were well aware of these struggles, and determined to reduce or eliminate the role of prerogative. Many of the abuses denounced in the Declaration of Independence involved royal prerogative, and the Virginia Constitution of 1776 stated that the governor “shall not, under any pretence, exercise any power or prerogative, by virtue of any law, statute or custom of England.”<sup>33</sup> John Adams, also in 1776, wrote that Americans aimed to establish governments in which the magistrate had “the whole Executive Power, after divesting it of most of those Badges of Domination call’d Prerogatives.”<sup>34</sup> By the time of the Convention, however, many Americans (often called “high-toned”) had come to the conclusion that weak executives and rampant legislatures were a curse, and ultimately rejected Adams’ simple formulation.

#### *D. The Debate on June 1: Four Views on Executive Power and Prerogative*

James Wilson was the only delegate on June 1 to utter the term “Prerogative” (helpfully capitalized in Madison’s Notes, underscoring that this was a term of art), but every comment

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<sup>31</sup> *Id.* at 366.

<sup>32</sup> *Id.* at 365.

<sup>33</sup> VA. CONST. of June 29, 1776.

<sup>34</sup> Letter from John Adams to William Hooper (Mar. 27, 1776), in 4 THE PAPERS OF JOHN ADAMS 73, 76 (Robert J. Taylor ed., 1979); see Phillip Hamburger, *Vermeule Unbound*, 94 TEX. L. REV. (forthcoming 2016).

made in that initial debate over the scope of executive power can be understood in light of the problem of prerogative. Four views were expressed.

### *1. No Prerogative Powers at All*

Roger Sherman of Connecticut took the view that the executive should have no prerogative powers whatsoever. He “considered the Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect.”<sup>35</sup> The best way to achieve this was to make the executive “appointed by and accountable to” the legislative branch,<sup>36</sup> and “absolutely dependent on that body.”<sup>37</sup> “An independence of the Executive on the supreme Legislative, was in his opinion the very essence of tyranny.”<sup>38</sup> Sherman had learned the lesson of British history well, and knew that unchecked power in the hands of a single person was inconsistent with republican government.

### *2. Plural Executive*

Governor Edmund Randolph of Virginia, the official movant of the Virginia Plan, wanted the executive to be “independent” of the legislative branch, and to exhibit “vigor, despatch & responsibility.”<sup>39</sup> This seems to presuppose some degree of prerogative power: it is hard to see how the executive could—or why it should—be “independent” of the legislative branch if its sole authority is to execute the acts of the legislature. But to avoid the dangers of “monarchy,” the executive power should not be vested in “one man.” “[U]nity in the Executive magistracy” Randolph regarded as “the foetus of monarchy.”<sup>40</sup> He favored a multi-headed executive (like the consulate of ancient Rome or later the Directorate in Republican France), eventually settling on the idea of one co-executive from each of the three regions: East, Middle, and South.<sup>41</sup> Elbridge Gerry of Massachusetts, later joined by Sherman and by Colonel George Mason of Virginia, agreed with Randolph about the dangers of a unitary executive,<sup>42</sup> but favored the solution of attaching to the single executive magistrate a council, as existed in most of the state constitutions, “in order to give weight & inspire confidence.”<sup>43</sup> Interestingly, Randolph, Gerry, and Mason were later to be the only delegates still present at the Convention who refused to sign the Constitution. This is a hint that the executive may have been the most irreconcilable issue at the Convention.

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<sup>35</sup> 1 FARRAND, *supra* note 12, at 65.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 68.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 66.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 66 n.9.

<sup>42</sup> Mason was absent for the vote on June 4 adopting a unitary executive, but he delivered a forceful speech against a unitary executive upon his return. *Id.* at 101-02; *see also* SUPPLEMENT TO MAX FARRAND’S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 49-51 (James Hutson ed. 1987). Sherman spoke against the unitary executive and in favor of a council, on June

<sup>43</sup> 1 FARRAND, *supra* note 12, at 66.

The Convention as a whole, however, decisively favored a unitary executive. On June 2, John Rutledge moved and Charles Pinckney seconded that the executive “consist” of “One person.”<sup>44</sup> After the June 2 motion was postponed, on June 4 Charles Pinckney moved and Wilson seconded that the executive “consist” of “a single person.”<sup>45</sup> That motion carried seven states to three,<sup>46</sup> over the continued opposition of Randolph, Mason, Sherman, and Gerry. The Convention never budged from this significant decision—one of the most important structural features of the American constitutional system.<sup>47</sup>

### 3. Enumeration of Executive Powers

A majority of the delegates on June 1 chose to enumerate the particular powers of the executive. This obviates having to define the general term “executive power.” Pinckney moved, and Randolph seconded, to grant to the executive only the powers “to carry into effect. the national laws” and “to appoint to offices in cases not otherwise provided for.”<sup>48</sup> (The offices otherwise provided for, at this stage, were judgeships.) The motion carried, over Madison’s tepid opposition. This vote reflected an extraordinarily narrow view of executive prerogative. The power to carry the laws into execution is not a prerogative power at all, since it is entirely cabined by law. The power to appoint is an important prerogative power (and note there was no requirement of congressional confirmation), but this version of the constitutional draft denied to the executive the power to appoint judges and, later, ambassadors; the appointment of these officers was lodged in the Senate until September 7.<sup>49</sup> In principle, though, the enumeration view could be much more generous to the executive, because the enumeration of executive powers could be expanded.

Indeed, the following Monday, June 4, the delegates voted to give the executive one additional power, the veto, which they called a “negative.” Significantly, Madison expressly referred to the veto as a “prerogative” power.<sup>50</sup> There was a spirited debate between those who favored an absolute veto, those who favored a veto with an override, and those who opposed the idea of a presidential veto altogether. This was the occasion for Benjamin Franklin’s famous

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<sup>44</sup> *Id.* at 79.

<sup>45</sup> *Id.* at 93 (Journal), 96 (Madison), 105 (Yates). Madison suggests the Pinckney-Wilson motion was a procedural motion to “resume[]” consideration of the previous day’s Rutledge-Pinckney motion, which had been postponed. *Id.* at 96. But whether the June 4 motion sought to resurrect the June 2 motion or introduce a new motion (opting for “single” as opposed to “one”) does not much matter: the three men Rutledge, Pinckney, and Wilson all were leading advocates of the unitary executive. Two of them, Rutledge and Wilson, would serve on the Committee of Detail, which crafted the essential structure of Article II. *See infra* section I.F.2.

<sup>46</sup> 1 FARRAND, *supra* note 12, at 93.

<sup>47</sup> *See* CALABRESI & YOO, *supra* note 6, at 3-8.

<sup>48</sup> 1 FARRAND, *supra* note 12, at 67. The language quoted in text is taken from the revised Virginia Plan. Pinckney’s actual motion was to strike certain language from an earlier motion made by Madison, which is discussed below.

<sup>49</sup> On September 4, the Committee of Postponed Matters proposed shifting the power to appoint judges and ambassadors to the President, with the advice and consent of the Senate. 2 FARRAND, *supra* note 7, at 498-99. The delegates adopted this proposal unanimously on September 7. *Id.* at 533.

<sup>50</sup> 1 FARRAND, *supra* note 12, at 100.

warning: “The first man, put at the helm [of the presidency] will be a good one. No body knows what sort may come afterwards. The Executive will be always increasing here, as elsewhere, till it ends in a monarchy.”<sup>51</sup> The delegates voted for an executive veto with a two-thirds override.<sup>52</sup>

Pierce Butler of South Carolina, an advocate of a strong unitary executive, then moved “that the National Executive have a power to suspend any legislative act for the term of \_\_\_\_.”<sup>53</sup> It is not entirely clear what this meant. It could have been a reference to the purported Suspension Power, which had been asserted by Charles II and James II, and was one of the major grievances leading to the Glorious Revolution.<sup>54</sup> The first provision of the English Bill of Rights of 1689 declared: “That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.”<sup>55</sup> More likely in context, however, it referred to the suspensive veto, under which the executive’s veto of an act of the legislature suspended its authority until and unless the legislature reenacted it. Elbridge Gerry objected to Butler’s motion on the ground that it “might do all the mischief dreaded from the negative of useful laws; without answering the salutary purpose of checking unjust or unwise ones.”<sup>56</sup> The Convention rejected Butler’s motion unanimously.<sup>57</sup>

The addition of the veto was the last change in the enumeration of executive powers until the Committee of Detail. The Virginia Plan, as revised, was approved first on June 13 and then again on June 19, after the Convention’s swift rejection of the New Jersey Plan.<sup>58</sup> The executive plank of the revised Plan, now numbered Resolution 9, read as follows:

Resolved that a National Executive be instituted to consist of a single person, to be chosen by the Natl. Legislature for the term of seven years, with power to carry into execution the national laws, to appoint to offices in cases not otherwise provided for – to be ineligible a second time, & to be removeable on impeachment and conviction of malpractices or neglect of duty – to receive a fixed stipend by which he may be compensated for the devotion of his time to public service to be paid out of the national Treasury.

In addition, Resolution 10 provided:

Resold. that the natl. Executive shall have a right to negative any Legislative Act, which shall not be afterwards passed unless by two thirds of each branch of the National Legislature.

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<sup>51</sup> *Id.* at 103.

<sup>52</sup> *Id.* at 104.

<sup>53</sup> *Id.* at 103.

<sup>54</sup> *See infra* section II.C.

<sup>55</sup> Bill of Rights 1689, 1 W. & M. c. 2.

<sup>56</sup> 1 FARRAND, *supra* note 12, at 104.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 322.

Together, these Resolutions resolved many of the unanswered questions regarding the original Resolution 7: they provided for a unitary executive of “a single person,” set the length of terms, provided for impeachment and removal, and vested in the executive only the specified powers of law execution, appointment to some offices, and a qualified veto.

*4. Some Prerogative Power—Though Not by That Name*

The fourth view eventually carried the day, but not until late July. Under this view, espoused by James Wilson, John Rutledge, and arguably James Madison, the executive is vested with some quantum of unenumerated prerogative power, but the extent of those powers is not congruent with the prerogatives of the British monarch. Wilson was the clearest and most explicit. He moved “that the Executive consist of a single person,”<sup>59</sup> reasoning that a unitary executive would give “most energy dispatch and responsibility to the office,” but he “did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive Powers.”<sup>60</sup> He explained that “the British Model . . . was inapplicable to the situation of this Country; the extent of which was so great, and the manners so republican, that nothing but a great confederated Republic would do for it.”<sup>61</sup>

But if the prerogatives of the British monarch were not a proper guide to defining the executive powers of a republican executive, what should those powers be? This turned out to be a difficult question, even for Wilson, Rutledge, and Madison. Rutledge, who had extensive experience with prerogative powers when he served as temporary “dictator” of South Carolina during the British invasion and occupation,<sup>62</sup> said only that he was for a single executive but “not for giving him the power of war and peace.”<sup>63</sup> (Later, he would oppose giving the President power to appoint judges;<sup>64</sup> this might be rooted in his own experience as a judge in South Carolina.)

Wilson had the most elaborate position. In explaining why he did not consider the royal prerogative powers a proper guide, he pointed out that the king’s prerogatives were not all of an executive nature. “Some of these prerogatives,” he noted, were “Legislative.”<sup>65</sup> Presumably, he was thinking of King George III’s powers to prorogue Parliament and veto bills, which were unquestionably legislative and not executive in nature. He might also have been thinking of the Proclamation Power, the Suspending Power, and the Dispensing Power, which were repudiated by the Petition of Right of 1628 and the Bill of Rights of 1689. “Among others,” Wilson said—meaning royal prerogative powers that were not of a legislative nature—was “that of war &

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<sup>59</sup> *Id.* at 65. Wilson’s motion was seconded by “Mr. C Pinkney,” which, in view of the misgivings just expressed by “Mr. Pinkney,” suggests Charles Coatesworth Pinckney.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 66.

<sup>62</sup> Someone needs to write a serious biography of John Rutledge.

<sup>63</sup> *Id.* at 65.

<sup>64</sup> *Id.* at 119.

<sup>65</sup> *Id.* at 65.

peace &c.”<sup>66</sup> He then concluded that “[t]he only powers he conceived strictly Executive were those of executing the laws, and appointing officers, not <appertaining to and> appointed by the Legislature.”<sup>67</sup> To modern ears, this sounds peculiar. If the powers of “peace & war” were neither legislative nor “strictly Executive,” what were they? Locke suggests one possible answer. As noted earlier, Locke dubbed the powers related to foreign affairs as “federative.”<sup>68</sup> Although executive and federative powers are “distinct in themselves,” for practical reasons they are usually placed in the same hands.<sup>69</sup> For, as Locke explains, both powers “requir[e] the force of the Society for their exercise,” and if they were separated, “the Force of the publick would be under different Commands: which would be apt sometime or other to cause disorder and ruine.”<sup>70</sup> The theory that Wilson was following Locke would make sense of his taxonomy of powers. The power of “peace & war,” being the core of the federative power, is not “strictly” executive in nature; nor is it legislative.

Unfamiliar as this idea may be to most of us today, it had considerable currency at the time of the framing. In *The Federalist*, No. 75, Hamilton wrote:

Though several writers on the subject of government place [the power of making treaties] in the class of executive authorities, yet this is evidently an arbitrary disposition; for if we attend carefully to its operation, it will be found to partake more of the legislative than of the executive character, though it does not seem

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<sup>66</sup> *Id.* at 65-66. Some otherwise careful scholars have misread Wilson’s statement, believing him to have labeled the war power a legislative power. That is not what he said, according to Madison’s notes. After noting that some of the king’s prerogatives were legislative in nature, he said that the powers of war and peace were “among others,” meaning powers that were not legislative. To be sure, Pierce’s notes report that Wilson said that “most writers” considered the power of war to be legislative. There is no way to know which notes are more reliable, but if Pierce is correct, it is difficult to understand the logic of the later debate over the “Declare War” Clause. See *infra* section I.G.2.

<sup>67</sup> *Id.* at 66. Later, Wilson would oppose giving the Senate the power to advise and consent to appointments, describing this as “blending a branch of the Legislature with the Executive.” 2 Farrand, *supra* note 7, at 538. This is fully consistent with his view that the appointment power is “strictly” executive.

<sup>68</sup> LOCKE, *supra* note 25, at 365. A later distinguished commentator explained why the treaty power did not neatly fall into either the legislative or the executive category:

As treaties are declared by the constitution to be the supreme law of the land, and as, by means of them, new relations are formed, and obligations contracted, it might seem to be more consonant to the principles of republican government, to consider the right of concluding specific terms of peace as of legislative jurisdiction. This has generally been the case in free governments. . . . On the other hand, the preliminary negotiations which may be required, the secrecy and despatch proper to take advantage of the sudden and favourable turn of public affairs, seem to render it expedient to place this power in the hands of the executive department. The constitution of the United States has been influenced by the latter, more than by the former considerations, for it has placed this power with the president, under the advice and control of the senate, who are to be considered for this purpose in the light of an executive council.

1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 266-67 (1826). Much the same could be said of declarations of war, which have important legislative effects but also require executive direction.

<sup>69</sup> LOCKE, *supra* note 25, at 366.

<sup>70</sup> *Id.*

strictly to fall within the definition of either of them. The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society; while the execution of the laws, and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate. 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 enactment of new ones; and still less to an exertion of the common strength. . . . The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive. The qualities elsewhere detailed as indispensable in the management of foreign negotiations, point out the Executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.<sup>71</sup>

In this passage, Hamilton does not employ the term “federative power,” which seems unique to Locke,<sup>72</sup> but the essence of what Hamilton describes is the same.

Several decades later, Chancellor James Kent would similarly explain why the treaty power did not neatly fall into either the legislative or the executive category:

As treaties are declared by the constitution to be the supreme law of the land, and as, by means of them, new relations are formed, and obligations contracted, it might seem to be more consonant to the principles of republican government, to consider the right of concluding specific terms of peace as of legislative jurisdiction. This has generally been the case in free governments. . . . On the other hand, the preliminary negotiations which may be required, the secrecy and despatch proper to take advantage of the sudden and favourable turn of public affairs, seem to render it expedient to place this power in the hands of the executive department. The constitution of the United States has been influenced by the latter, more than by the former considerations, for it has placed this power with the president, under the advice and control of the senate, who are to be considered for this purpose in the light of an executive council.<sup>73</sup>

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<sup>71</sup> THE FEDERALIST No. 75, at 449 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classic ed. 1999). Professors Prakash and Ramsey call this explanation “unpersuasive” and “clever” (not a compliment, I think), and read the relevant writers as overwhelmingly of the view that the power to make treaties is executive in nature. Prakash & Ramsey, *supra* note 6, at 291. Certainly, one should read *The Federalist* (and perhaps especially Hamilton’s contributions) with awareness that the authors were advocating for a particular result and not always presenting their genuine opinions, but I see no reason to doubt that Hamilton here was invoking an authentic, though possibly minority, view regarding the mixed nature of the treaty power.

<sup>72</sup> Even Locke was not wedded to the term. LOCKE, *supra* note 25, at 365 (“So the thing be understood, I am indifferent as to the Name.”).

<sup>73</sup> 1 KENT, *supra* note 68, at 266-67.

Much the same could be said of declarations of war, which have important legislative effects but also require executive direction.

Some scholars portray Wilson as stating that the power of peace & war is by nature a *legislative* power.<sup>74</sup> That is not what he said, according to Madison's Notes. He said that the powers of war & peace were "among others," meaning powers *other than* legislative powers. True, Wilson did not include war & peace among the powers he deemed "strictly" executive, but that is not the same as saying he thought these powers legislative. They could be mixed, or "federative." These commentators may have been misled by William Pierce's notes for June 1, which are quite different from Madison's. Pierce reports: "Mr. Wilson said the great qualities in the several parts of the Executive are vigor and dispatch. Making peace and war are generally determined by Writers on the Laws of Nations to be legislative powers."<sup>75</sup> It is unlikely that Wilson said this. Most writers on the relevant principles—Blackstone, Montesquieu, Vattel, DeLolme, Rutherford—classed the power to make treaties and to go to war as executive.<sup>76</sup> Surely Wilson did not state the opposite. Perhaps Pierce misheard him. And in any event, Pierce does not purport to give Wilson's own view on the legislative or executive character of these powers.

Madison jumped into the debate at this point. According to Madison, "certain powers were in their nature Executive, and must be given to that departmt."<sup>77</sup> To his mind, the sensible way to proceed was to define what those inherently executive powers are, and then decide "how far they might be safely entrusted to a single officer." He then moved to amend Resolution 7 to do just that. His amendment struck out the language vesting in the executive all the executive rights of Congress under the Articles, and replaced it with enumerated powers "to carry into effect. the national laws" and "to appoint to offices in cases not otherwise provided for"—the two powers identified by Wilson as "strictly Executive." This part of Madison's motion passed almost unanimously; one state, Connecticut, was divided.

In addition, Madison moved to give the executive the power "to execute such other powers <'not legislative nor judiciary in their nature.'> as may from time to time be delegated by the national Legislature."<sup>78</sup> Madison's motion bears strong similarity to a parallel provision in Jefferson's 1783 Proposed Constitution for Virginia,<sup>79</sup> and may have been derived from it. Denying that the "powers exercised . . . by the crown as of it's prerogative" should "be the standard of what may or may not be deemed the rightful powers of the Governor," Jefferson

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<sup>74</sup>See, e.g., David Gray Adler, *The President's War-Making Power*, in *INVENTING THE AMERICAN PRESIDENCY* 119, 131 (Thomas E. Cronin ed., 1989); Thomas E. Cronin, *The President's Executive Power*, in *INVENTING THE AMERICAN PRESIDENCY* 180, 184 (Thomas E. Cronin ed., 1989); Bestor, *supra* note 6, at 576

<sup>75</sup> 1 FARRAND, *supra* note 12, at 73-74.

<sup>76</sup> For quotations and citations, see Prakash & Ramsey, *supra* note 6, at 268-70.

<sup>77</sup> 1 FARRAND, *supra* note 12, at 67.

<sup>78</sup> *Id.* at 67.

<sup>79</sup> Jefferson's Draft of a Constitution for Virginia, in 6 *THE PAPERS OF THOMAS JEFFERSON* 294, 298-99 (Julian P. Boyd ed., 1952).

proposed that the governor be given “those powers only which are necessary to carry into execution the laws, and which are not in their nature [either legislative or] Judiciary.”<sup>80</sup> It then listed a number of prerogative powers which “[w]e do however expressly deny him.”<sup>81</sup> These powers were assigned to the legislature, but were expressly made delegable to the executive.

Madison’s proposal picked up Jefferson’s idea of defining the scope of executive powers negatively, as those “which are not in their nature either legislative or judiciary.” Moreover, Madison adopted Jefferson’s idea of allowing the legislature to delegate additional prerogative powers to the executive, but instead of listing which ones, he made the list open-ended while forbidding the delegation of powers that were legislative or judiciary in their nature.

The last part of Madison’s proposal is revealing for three reasons. First, it shows that Madison regarded it as improper for Congress to delegate non-executive powers to the President. If his language had made it into the Constitution, it would contradict one of the central ideas of the modern administrative state: that the executive branch may exercise delegated powers to make regulations and adjudicate compliance with regulatory schemes. Second, and more pertinent for this study, the amendment shows that Madison regarded governmental powers as being executive, legislative, or judicial “in their nature.” In other words, there is a political science of the matter, under which any particular power, by its nature, falls into one of the three categories. Third, Madison (following Jefferson) must have believed that the categories “legislative” and “judiciary” are clearer by their “nature” than the category “executive.” If this were not so, it would have been simpler to say that the executive may carry out “such other powers of *an executive nature* as may from time to time be delegated by the national legislature.” Madison (following Jefferson) chose to define “executive powers” by process of elimination, as those that are “not Legislative nor Judiciary.” This recapitulates the general problem of Article II: it simply was harder for the framers to grasp and define “executive” powers than it was the powers of the other two branches.<sup>82</sup>

Whatever the meaning of these various terms, they did not survive the debates of June 1. Charles Pinckney moved to strike out the authorization for the executive to carry out such other powers as the legislature might assign, on the ground that it was redundant. If the executive is to carry into effect the national laws, this already encompassed executing powers delegated by Congress. Randolph seconded Pinckney’s motion. Madison weakly defended his motion, saying

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<sup>80</sup> *Id.* at 299.

<sup>81</sup> *Id.* at 299. These were “the praerogative powers of erecting courts, offices, boroughs, corporations, fairs, markets, ports, beacons, lighthouses, and seamarks; of laying embargoes, of establishing precedence, of retaining within the state or recalling to it any citizen thereof, and of making denizens, except so far as he may be authorized from time to time by the legislature to exercise any of these powers.” *Id.*

<sup>82</sup> Madison either changed his mind or had other rhetorical reasons for taking the opposition position in *The Federalist*, where he wrote that “the executive power being restrained with a narrower compass and being more simple in its nature, and the judiciary being described by landmarks still less uncertain,” the legislative branch is more likely to usurp authority. THE FEDERALIST No. 48, at 307 (James Madison) (Clinton Rossiter ed., Signet Classic ed. 1999).

that there was no “inconveniency” in retaining the words, even though they might not be “absolutely necessary,” since “cases might happen in which they might serve to prevent doubts and misconstructions.”<sup>83</sup> This suggests that Madison intuited the possibility of executive powers outside of law execution and appointment and did not wish to preclude them. But in any event, Pinckney’s motion passed and the powers of the executive were confined to those two<sup>84</sup> (plus the veto, which was added the next Monday, and which appears in Article I, not Article II).

Significantly, the decision to strike the language vesting the chief magistrate with the “Executive power” left him with no authority to direct military operations. This lacuna in the plan was not remedied until the Committee of Detail. Even though both the New Jersey and Hamilton Plans gave the chief executive authority to “direct” all military operations, no delegate moved to amend the Virginia Plan to address the issue, or even commented on it. On July 20, a puzzled Dr. James McClurg—not usually an active participant in the deliberations—asked whether the chief executive would have “a military force” at his command.<sup>85</sup> This was the first mention.

It is possible, though, that the June 4 vote silently gave the executive the power he needed to control military operations. Among the “offices . . . not otherwise provided for” and to be filled by the executive were military offices. This is unlikely to have gone unnoticed, since the Articles of Confederation made detailed arrangements for appointment of various kinds of military officers.<sup>86</sup> Under the Convention’s draft, the President could appoint all military officers, without even the need for advice and consent. This power presumably would give him control over their operations. At the time, this attracted no comment, but later in the Convention Roger Sherman objected to the President’s power to appoint “general officers” in times of peace. “If the Executive can model the army,” Sherman warned, “he may set up an absolute Government; taking advantage of the close of a war and an army commanded by his creatures.”<sup>87</sup> He reminded the delegates of James II’s efforts to pack the army with his own supporters as a prelude to suppressing opposition.<sup>88</sup>

John Adams’ simple formulation, that the executive should have all executive powers but no prerogative powers, was thus doubly rejected. The Convention voted to strike from Resolution 7 the language giving the President all executive powers, and gave at least one “strictly executive” power, the power to appoint judges, to the Senate. On the other hand, the executive was vested with one prerogative power that is unquestionably legislative in nature: the veto.<sup>89</sup>

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<sup>83</sup> 1 FARRAND, *supra* note 12, at 67.

<sup>84</sup> *Id.*

<sup>85</sup> 2 FARRAND, *supra* note 7, at 69.

<sup>86</sup> ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4.

<sup>87</sup> 2 FARRAND, *supra* note 7, at 405.

<sup>88</sup> *Id.*

<sup>89</sup> Blackstone attributes the veto to the king’s role as “a constituent part of the supreme legislative power,” rather than as executive power. 1 BLACKSTONE, *supra* note 20, at \*261.

Later in the Convention, the first of these decisions would be reversed, and the President would be vested with the full executive power of the nation, minus certain specific executive powers that were given to Congress.

The Convention never could arrive at a consensus on the mode of selection, length of term, removal, or qualifications. The delegates vacillated between choice by the legislature and by an electoral college, first voting for the former, then the latter, then the former again—with popular election seemingly gaining in support, but never commanding a majority.<sup>90</sup> Ultimately, unable to reach a consensus, the convention sent to the Committee of Detail a resolution providing for selection by the legislature for a single seven-year term without possibility of re-election, subject to removal on impeachment for malpractice or neglect of duty, and vesting the President with only the three enumerated powers of law execution, qualified veto, and appointment of most officers of government.<sup>91</sup>

#### *E. Other Plans*

In this form, the executive power provision (now Resolutions 9 and 10), went to the Committee of Detail. Between June 4 and July 26, when the revised Virginia Plan was committed to the Committee of Detail, the executive provision was not amended. In between, however, the delegates were presented with three alternative plans: the New Jersey Plan, which was debated and rejected, and the Hamilton and Pinckney Plans, which were ignored. Resolution 4 of the New Jersey Plan provided that:

the Executives [plural] besides their general authority to execute the federal acts ought to appoint all federal officers not otherwise provided for, & to direct all military operations; provided that none of the persons composing the federal Executive shall on any occasion take command of any troops, so as personally to conduct any enterprise as General, or in other capacity.<sup>92</sup>

The New Jersey Plan thus rejected the unitary executive, but called for executive powers in most cases identical to those in the revised Virginia Plan, with two exceptions. The New Jersey Plan did not give the executive any power to veto legislation, but it did empower the executive “to direct all military operations.” The Plan sought to prevent the danger of a Caesar or Cromwell by forbidding the executive to command troops in person. The Virginia Plan made no mention of military command, though several delegates assumed military affairs would be conducted by the executive.<sup>93</sup>

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<sup>90</sup> 1 FARRAND, *supra* note 12, at 79-81 (election by national legislature on June 2); 2 FARRAND, *supra* note 7, at 54-58 (appointment by electors chosen by state legislatures); *id.* at 99-101 (appointment by national legislature).

<sup>91</sup> 2 FARRAND, *supra* note 7, at 116.

<sup>92</sup> 1 FARRAND, *supra* note 12, at 244.

<sup>93</sup> *Id.* at 89 (Butler) (“In Military matters [the possibility of internal rivalries among a plural executive] would be particularly mischievous.”); *id.* at 97 (Gerry) (noting a plural executive would be “extremely inconvenient . . . particularly in military matters”)

Hamilton's executive was startlingly more powerful. He proposed that the "Governour" be appointed for life.<sup>94</sup> The Governour would have an absolute veto on all bills passed by Congress, the power of execution of the laws, "the direction of war when authorized or begun," the power of making treaties with the "advice and approbation of the Senate," the sole power of appointment of "the heads or chief officers of the departments of Finance, War and Foreign Affairs," the power of appointment to other offices subject to senatorial "approbation or rejection," and the "power of pardoning all offences except Treason; which he shall not pardon without the approbation of the Senate."<sup>95</sup> In his general remarks, Hamilton commented that "it seemed to be admitted that no good [executive] could be established on Republican principles."<sup>96</sup> Years later, this speech would be wrung around his neck as proof that he favored a British-style monarchy. At the Convention, the speech was admired but disregarded; to the extent it had an impact, it was to make the Virginia Plan look more moderate and thus help to doom the New Jersey Plan, which was a dangerously plausible alternative.

Interestingly, even Hamilton's formidable executive was denied the full federative power. Hamilton gave the Senate "the sole power of declaring war,"<sup>97</sup> leaving to the executive only "the direction of war when authorized or begun."<sup>98</sup> The Governour's appointment of ambassadors (unlike other high officers of state) was subject to senatorial "approbation or rejection," as was the making of treaties.<sup>99</sup> In other words, the Senate had more power with respect to foreign affairs than it did with respect to other aspects of administration. The federative power thus was shared between executive and Senate. The modern notion that Presidents have broad powers to initiate military actions and are the sole organ of the nation in foreign affairs is beyond even Hamilton's vision.

On May 29, the day that Governor Randolph presented the Virginia Plan to the Committee of the Whole, Charles Pinckney also submitted a written plan.<sup>100</sup> It contained a far more elaborate and interesting proposal for the executive:

. . . In the Presidt. the executive Authority of the U. S. shall be vested.

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<sup>94</sup> *Id.* at 292.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 289.

<sup>97</sup> *Id.* at 292.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 16 (Journal); *id.* at 23; *id.* at 27 (Yates' Notes). No copy exists of Pinckney's Plan and its contents have long been a topic of scholarly speculation. Quotations herein from the Plan come from 3 FARRAND, *supra* note 101, at 595-602. Fragments of a document in Wilson's handwriting now thought to have been copied from the Pinckney Plan were among the documents found in Wilson's papers, tucked between Committee of Detail drafts. William Ewald, *The Committee of Detail*, 28 CONST. COMMENTARY 197, 220, 248-49 (2012). Presumably, the Committee referred to these materials in the course of its preparation of a draft of the Constitution. Readers should be aware that the fragments found in Wilson's papers, which were contemporaneous, are not the same as the later-concocted plan Pinckney produced for public consumption in 1818.

It shall be his Duty to inform the Legislature of the condition of United States, so far as may respect his Department—to recommend Matters to their Consideration—to correspond with the Executives of the several States—to attend to the Execution of the Laws of the US—to transact Affairs with the Officers of Government, civil and military—to expedite all such Measures as may be resolved on by the Legislature—to inspect the Departments of foreign Affairs—War—Treasury—Admiralty—to reside where the Legislature shall sit—to commission all Officers, and keep the Great Seal of United States.

He shall, by Virtue of his Office, be Commander in chief of the Land Forces of U. S. and Admiral of their Navy.

He shall have Power to convene the Legislature on extraordinary Occasions—to prorogue them, provided such Prorogation shall not exceed \_\_\_\_ Days in the space of any \_\_\_\_—He may suspend Officers, civil and military.

He shall have a Right to advise with the Heads of the different Departments as his Council.<sup>101</sup>

Pinckney's Plan was never debated and had no influence on the proceedings of the Convention. But the Committee of the Whole included the Plan among the documents to be considered by the Committee of Detail in drawing up a full draft of the Constitution. The product of that Committee seems to have been influenced by Pinckney's draft. I will not analyze the details of the Pinckney Plan at this point, but will refer to it in connection with the Committee of Detail.

On July 19, Gouverneur Morris made an important speech “tak[ing] into one view all that relates to the establishment of the Executive.”<sup>102</sup> Although not formally denominated a “plan,” it was the only systematic explication of the executive to be offered between the debates in early June and submission to the Committee of Detail at the end of July. In form, Morris's speech had to do with selection, duration, and impeachment; he favored popular election, two-year terms with opportunity for reelection, and impeachment only of subordinate officers and not the President.<sup>103</sup> But his positions on those issues were determined by his vision of the presidency itself. While the Convention did not act on Morris's recommendations, we can see that Morris's vision became increasingly influential in the debates toward the end of the Convention.

Morris was one of the few to think about the executive as a branch of government, rather than as a singular office. He was insistent that the executive had to be provided with “sufficient vigor to pervade every part of [the extensive Union].”<sup>104</sup> Without such an executive, he argued,

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<sup>101</sup> 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 606 (photo. reprint 1966) (Max Farrand ed., rev. ed. 1937) [hereinafter 3 FARRAND].

<sup>102</sup> 2 FARRAND, *supra* note 7, at 52.

<sup>103</sup> *Id.* at 53-54.

<sup>104</sup> *Id.* at 52.

republican government could not be adapted to a “large extent of Country.”<sup>105</sup> He understood the executive both as part of the system of checks and balances and as having an independent governing role. “One great object of the Executive is to controul the Legislature,” he said.<sup>106</sup> Much like Madison, Morris warned that “[t]he Legislature will continually seek to aggrandize & perpetuate themselves,” and thus necessitated the check of an independent executive.<sup>107</sup> But unlike Madison, who wished to guard against the eventuality that the legislative would reflect the “leveling spirit” of “those who will labour under all the hardships of life, & secretly sigh for a more equal distribution of its blessings,”<sup>108</sup> Morris worried that the legislative branch would serve the interests of the “Great & the wealthy.”<sup>109</sup> He thus argued that “the Executive Magistrate should be the guardian of the people, even of the lower classes, agst. Legislative tyranny.”<sup>110</sup> This led him to support popular election of the President and to oppose selection by the legislature. “If he is to be the Guardian of the people let him be appointed by the people.”<sup>111</sup>

As to the governing responsibilities of the executive, Morris stated: “It is the duty of the executive to appoint the officers & to command the forces of the Republic: to appoint 1. ministerial officers for the administration of public affairs. 2. Officers for the dispensation of Justice.”<sup>112</sup> He elaborated that “[t]here must be certain great officers of State; a minister of finance, of war, of foreign affairs &c. These he presume[d] will exercise their functions in subordination to the Executive.”<sup>113</sup> At this stage in the proceedings, the executive had not been entrusted with the power to command the military forces of the Republic, nor the power to appoint judges. Moreover, this was the first time in the Convention when any delegate recognized the role of “ministerial officers for the administration of public affairs.” To the extent that delegates spoke of officers working under the President, they envisioned a “council,” which is a check on the executive and a departure from unitariness, rather than officers working “in subordination to the Executive.”<sup>114</sup> Each of these features—commander-in-chief power, appointment of judges, and subordination of ministers to the President—would be adopted later in the Convention. In many respects, our Executive is Morris’s executive. At this stage, however, Morris’s comments excited no response.

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> 1 FARRAND, *supra* note 12, at 422-23.

<sup>109</sup> 2 FARRAND, *supra* note 7, at 52.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 53.

<sup>112</sup> *Id.* at 52.

<sup>113</sup> *Id.* at 53-54.

<sup>114</sup> *See, e.g.,* 1 FARRAND, *supra* note 12, at 110-11 (noting a suggestion that a “council should be formed of the principal officers of the state, I presume of the members of the Treasury Board, the Board of War, the Navy Board, and the Department for Foreign Affairs”).

## *F. The Committee of Detail*

After the big state-little state problem had been hashed out, Elbridge Gerry moved and the delegates unanimously voted “that the proceedings of the Convention for the establishment of a Natl. Govt. (except the part relating to the Executive), be referred to a Committee to prepare & report a Constitution conformable thereto.”<sup>115</sup> The motion omitted the “part relating to the Executive” from the committal in the hope that the Convention would be able to reach agreement on the qualifications and mode of selection of the President. The Convention continued to meet for three more days, unsuccessfully trying to come to agreement on a method for choosing a President. On July 26 they gave up, and temporarily (at least) left those provisions of Resolution 9 unchanged. The Convention then referred the executive provisions to the Committee along with the rest.<sup>116</sup> The language regarding the executive was unchanged from June 4.

### *1. Documents*

We have no records of the deliberations of the Committee of Detail – no direct evidence of how any individual members may have voted or why, or even of the collective rationales for the Committee’s decisions. Many historians of the Convention therefore have brushed quickly past the Committee, treating it as merely as an “interlude” in the Convention’s proceedings.<sup>117</sup> That view cannot be sustained. It was the Committee that devised the principal elements in the constitutional framework for federalism, as well as the executive branch, interstate federalism, the amendment process, and much else. The leading modern historian of the work of the Committee, William Ewald, calls the Committee meetings “arguably the most creative period of constitutional drafting of the entire summer,” and says that “for certain fundamental issues, it was the main event.”<sup>118</sup>

The Committee met for ten days, while the Convention was in recess. Our knowledge of the Committee’s decisionmaking process comes solely from analysis of documents mostly found among James Wilson’s papers. Among them are two complete drafts of a constitution. One, in Edmund Randolph’s handwriting with marginalia and corrections in John Rutledge’s handwriting, largely conforms to the votes of the Convention with respect to the executive. A second, in Wilson’s handwriting, contains major revisions in executive powers, and is the focus of our attention. This is produced as Document IX in Farrand. (An intermediate draft, in Wilson’s handwriting with marginalia and corrections in Rutledge’s handwriting, is missing its middle section, where provisions pertaining to the executive branch would have appeared. Our

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<sup>115</sup> 2 FARRAND, *supra* note 7, at 95. In his diary, Washington wrote that the Committee would “arrange, and draw into method & form the several matters which had been agreed to by the Convention, as a Constitution for the United States.” 3 FARRAND, *supra* note 101, at 65.

<sup>116</sup> 2 FARRAND, *supra* note 7, at 120-21.

<sup>117</sup> See Ewald, *supra* note 101, at 207-09 (noting the scanty treatment of the Committee in major histories of the Convention).

<sup>118</sup> *Id.* at 201.

loss!) The Committee's final product, which was printed in secret (50 copies) and presented to the Convention on August 6, was not much different in substance from Document IX.

## 2. Membership

Three of the five members of the Committee of Detail—Rutledge, Wilson, and Randolph—had actively participated in the June 1 debate over the nature of executive power. The other two members were Nathaniel Gorham and Oliver Ellsworth. Rutledge delivered the Committee's report and is generally assumed to have been the chairman.<sup>119</sup> He brought with him the most extensive executive experience of any delegate, having been perhaps the nation's most effective wartime state governor. He was not a man to give persuasive speeches, but he was uncommonly successful at getting his way. Wilson is often said to have been the Committee's dominant thinker,<sup>120</sup> but the author of the leading modern study of the Committee writes that “on many issues, Wilson, far from being dominant, appears to have been outflanked by Rutledge and the others.”<sup>121</sup>

In any event, Rutledge and Wilson shared many views on the executive. Both had forcefully advocated a unitary executive on June 1. Indeed, it was Wilson who made the first motion on June 1 “that the Executive consist of a single person,” and Rutledge who made a similar motion on June 2 (both seconded by Charles Pinckney).<sup>122</sup> On June 1, Wilson delivered the most thoughtful analysis of the relation between executive power and the prerogative powers of the Crown. Wilson also advocated for an absolute rather than a qualified veto.<sup>123</sup> Both men spoke in favor of an executive with energy and “responsibility.” Both thought it desirable to depart from the British model of royal prerogative—for example, neither wanted the executive to be vested with the powers of “peace & war”—yet neither supported Sherman's effort to eliminate executive prerogative altogether. They disagreed on whether the President should have the power to appoint judges (Wilson was for, and Rutledge against) and on how the President should be chosen (Wilson favored popular election while Rutledge favored legislative selection).

Randolph was a different fish. He vociferously opposed to a unitary executive, but his views on what powers should be vested in the executive branch are unknown. The office of governor of Virginia, which Randolph held at the time of the Convention, was exceptionally weak—a factor that could have cut either way in his thinking. Randolph claimed to agree with the need for executive independence and affirmed that the “great requisites for the Executive department” were “vigor, despatch & responsibility,” but he fervently supported a three-headed

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<sup>119</sup> *Id.* at 230-31; *but see id.* at 249 (noting that it is not even clear that there was a chairman).

<sup>120</sup> Irving Brant, Madison's biographer, said the Committee “might be called a committee of Wilson and four others.” IRVING BRANT, *JAMES MADISON: FATHER OF THE CONSTITUTION* 111 (1950). *See also* Nicholas Pedersen, Note, *The Lost Founder: James Wilson in American Memory*, 22 *YALE J.L. & HUMAN.* 257 (2010).

<sup>121</sup> Ewald, *supra* note 101, at 218.

<sup>122</sup> 1 FARRAND, *supra* note 12, at 88. On June 4, the motion was made by Pinckney and seconded by Wilson, and approved, seven states to three. *Id.* at 96-97.

<sup>123</sup> *Id.* at 100; 2 FARRAND, *supra* note 7, at 300-01.

executive instead of a unitary one<sup>124</sup> and favored election by the legislature.<sup>125</sup> Madison's notes of the June 1 debate hint that the disagreement between Randolph and his future co-committee members may have gotten personal. Rutledge, in his imperious manner,<sup>126</sup> proclaimed the reasons "to be so obvious & conclusive in favor of one [i.e., a single-headed executive] that no member would oppose the motion."<sup>127</sup> In the next sentence, Madison tells us "Mr. Randolph opposed it with great earnestness."<sup>128</sup> The next day, Wilson led off the debate with a response to Randolph.<sup>129</sup> Notwithstanding this memorable clash, there is no evidence that on the Committee of Detail Randolph resisted the efforts of Rutledge and Wilson to create an executive with some, but not all, of the prerogatives of the Crown.

Gorham had been Chairman of the Committee of the Whole during the executive power debate of June 1 to June 4, and therefore lacked opportunity to express any opinions on the nature of the executive. But his general temper was that of a moderate Hamiltonian, and he thus would be expected to support a strong executive. In fact, he was the first to propose executive appointment of judges with the advice and consent of the Senate—commenting that that "mode had been long practised" in his home state of Massachusetts.<sup>130</sup> Ellsworth had not participated in the June 1 debate, and was later to become a staunch Federalist (and third Chief Justice of the United States). But at the Convention, more often than not, he was allied with Sherman, the Convention's most consistent foe of a powerful executive. So far as can be discerned from the records of the Committee, neither Gorham nor Ellsworth contributed much of substance.

### 3. Innovations

On a range of issues, the Committee did not hesitate to exceed the instructions of the Convention. It added many provisions not considered by the Convention, effectively doubling the length of the working document. It even adopted provisions *inconsistent* with the votes of the Convention. For the most notorious example, the Convention had rejected Rutledge's July 16 motion to appoint a committee to enumerate the powers of Congress, preferring instead a general description of the criteria for those powers.<sup>131</sup> Now, the Committee of Detail, with Rutledge as chairman, proceeded to do precisely what the Convention had voted against allowing a committee to do: it enumerated and thus constrained Congress's powers. The Committee, not the Convention, was the creative power behind our federalist system.

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<sup>124</sup> 1 FARRAND, *supra* note 12, at 66, 88; *see supra* section I.D.2.

<sup>125</sup> 2 FARRAND, *supra* note 7, at 55.

<sup>126</sup> Louis Otto, the French chargé d'affaires, described Rutledge as "the most proud and most imperious [man] in the United States." JOSEPH C. MORTON, *SHAPERS OF THE GREAT DEBATE AT THE CONSTITUTIONAL CONVENTION OF 1787: A BIOGRAPHICAL DICTIONARY* 268 (2006). [get original source]

<sup>127</sup> 1 FARRAND, *supra* note 12, at 88.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 96.

<sup>130</sup> 2 FARRAND, *supra* note 7, at 41.

<sup>131</sup> *Id.* at 17.

The Committee’s reformation of the executive power was almost as audacious. As noted above, on June 1 the Convention voted almost unanimously to strike the Clause vesting the President with the “executive power” of the Confederation Congress. Instead, the Convention chose to enumerate only three presidential powers: law execution, appointment to offices other than judges, and a qualified veto. Undeterred, the Committee of Detail reinstated a vesting clause at least as broad as the original Resolution 7: “The Executive Power of the United States shall be vested in a single person.”<sup>132</sup> To the extent that there are powers of the United States of an executive nature that the Articles Congress did not possess, the Committee of Detail draft is even broader than the language voted down on June 1. So much for preparing a draft “conformable” to the Convention’s decisions.

Having vested “the Executive Power” in a unitary President, the Committee then created a new section containing a list of specific powers and duties.<sup>133</sup> These listed powers were constitutionally vested in the President and thus untouchable by Congress—in marked contrast to Madison’s June 1 proposal to give Congress authority to determine what powers “not Legislative nor Judiciary in their nature” the President should enjoy in addition to law execution and some appointments. This guaranteed a powerful executive independent of the legislature, and was a decisive rejection of Roger Sherman’s view of the “the Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect.”<sup>134</sup>

It is striking that, while the Convention devoted endless hours to fruitless debate over how to select a President, while making no alterations in executive powers after June 4, the Committee did little with the selection issue while completely reforming the structure and content of executive powers. The Committee’s priorities were evidently different from the Convention’s, and the Committee did not hesitate to follow its own.

#### 4. *Appointments*

As we have seen, Wilson regarded the power of appointment as one of only two “strictly Executive” functions. His fellow Committee members evidently did not view it that way. The Committee divided the appointment power and allocated it to different institutions in line with its division of the substantive responsibilities entailed.<sup>135</sup> It gave the Senate power to appoint ambassadors as well as to make treaties, which made the Senate the principal repository of the foreign affairs power—though the President’s enumerated power to “receive ambassadors” gave him at least a share of this responsibility. Under the travel and communications technology of the day, the identity of ambassadors was far more important than it now is, because ambassadors in distant places frequently had to use their own judgment, and for important negotiations often

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<sup>132</sup> *Id.* at 185.

<sup>133</sup> The specifics will be examined in detail *infra* section I.F.8.

<sup>134</sup> 1 FARRAND, *supra* note 12, at 65. Sai Prakash stresses the importance of this change in Prakash, *supra* note 6, at 717-18.

<sup>135</sup> This is powerful evidence that the third Committee of Detail draft, which was in Wilson’s handwriting, was not

were given plenipotentiary power, meaning the authority to sign agreements on behalf of the nation. The choice of one ambassador over another was tantamount to the choice of one policy over another.<sup>136</sup> The replacement of Gouverneur Morris by James Monroe as minister to France, for example, tilted from hostility to sympathy for the revolutionary regime in Paris.

The Committee gave Congress as a whole the power to appoint a Treasurer,<sup>137</sup> which was consistent with the idea that the power of the purse—the power to tax and spend—was a quintessentially legislative authority.

The Senate was also empowered to appoint the “Judges of the supreme Court.”<sup>138</sup> This cannot have been because judicial power was legislative or senatorial in its nature. More likely it was a reaction to the notorious practice of the Stuart kings of “packing the bench” with pliant judges to secure favorable rulings.<sup>139</sup> On this issue, the Committee members were divided. In earlier debates, Wilson favored executive appointment and Gorham favored executive appointment with advice and consent, Rutledge and Randolph favored appointment by the Senate, and Ellsworth favored appointment by the Senate subject to presidential veto, with the possibility of override by two-thirds of the Senate.<sup>140</sup> Given this degree of internal disagreement, it is possible the Committee uncharacteristically deferred to the prior votes of the Convention on this issue.

The Committee did, however, reduce the *scope* of the Senate’s judicial appointment power. Just a few days before committal to the Committee, the Convention had reaffirmed senatorial appointment of all judges, rejecting executive appointment by six states to two and executive appointment with advice and consent by an equally divided vote of four to four.<sup>141</sup> The first internal draft, in Randolph’s handwriting, conformed to that decision.<sup>142</sup> However, the final draft, in Wilson’s handwriting, gave the Senate only the power to name “the Judges of the Supreme (national) Court,” leaving the appointment of lower court judges to the President alone.<sup>143</sup> We do not know anything about the change, and at no point in the proceedings of the Convention was there any discussion of the possibility that lower court judges and Supreme Court judges be named in separate ways. Perhaps this was hashed out in the missing middle

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Wilson’s handiwork—at least not in all respects.

<sup>136</sup> British diplomatic history was replete with examples. *See, e.g.,* [XXX]

<sup>137</sup> 2 FARRAND, *supra* note 7, at 182.

<sup>138</sup> *Id.* at 183.

<sup>139</sup> FREDERICK ANDREW Inderwick, *THE KING’S PEACE: A HISTORICAL SKETCH OF THE ENGLISH LAW COURTS 191-92*, 213 (1895) (noting this practice of the Stuart kings “reduced the position of the Bench to almost its lowest degradation”).

<sup>140</sup> *See* 1 FARRAND, *supra* note 12, at 119 (Wilson); *id.* (Rutledge); 2 Farrand, *supra* note 7, at 41 (Wilson); *id.* at 43 (Randolph); *id.* at 41, 44 (Gorham); *id.* at 81 (Ellsworth).

<sup>141</sup> 2 Farrand, at 44 (July 18).

<sup>142</sup> 2 FARRAND, *supra* note 7, at 146.

<sup>143</sup> *Id.* at 169, 172.

draft. Perhaps it was a compromise. Perhaps the Committee members assumed (incorrectly)<sup>144</sup> that since Congress had discretion whether to establish lower courts Congress would also decide by whom they would be appointed. I might suggest that Wilson slipped in the change, since the draft was in his handwriting. But it would be uncharacteristic for eagle-eyed Rutledge, who made extensive corrections to both Randolph's and Wilson's drafts, to miss it.

The Committee of Detail made no change in the Convention's decision of June 4 to vest the President with power to appoint all other officers, without any requirement of advice and consent, in keeping with the Convention's apparent preference for a unitary executive in areas other than foreign affairs and finance.<sup>145</sup> There was no discernible overall trend in favor of greater or lesser presidential appointment power. Rather, the appointment power followed substantive power, and was not treated as an object in itself.

### 5. Law Execution

The Convention draft committed to the Committee had given the President "power to carry into execution the national Laws." The first internal draft, in Randolph's handwriting, repeated this language.<sup>146</sup> The second internal draft is missing the relevant pages, so we do not know what it contained on this point. The third internal draft, in Wilson's handwriting, began the executive power section (section 12) with a vesting clause: "The Executive Power of the United States shall be vested in a single Person."<sup>147</sup> In the second paragraph (mostly devoted to the President's duties, but with a sprinkling of discretionary powers related to the legislature), the draft provided: "He shall take Care to the best of his Ability, that the Laws of the United States be faithfully executed." Rutledge struck out most of these words and wrote in, "It shall be his duty to provide for the due & faithful exec—of the Laws of the United States to the best of his ability." The final report of the Committee, presented on August 6, provided: "he shall take care that the laws of the United States be duly and faithfully executed."<sup>148</sup>

This changed law execution in two important ways. First, it transformed law execution into a duty instead of a power. It is obvious from the drafting that the term "shall," which usually but not invariably imparts a mandatory duty, was meant that way: Rutledge's draft, like the Pinckney Plan from which it borrowed,<sup>149</sup> actually used the term "Duty."<sup>150</sup> Second, it adopted a

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<sup>144</sup> The President was given power to appoint officers "not otherwise provided for by this Constitution." *Id.* at 171. Congress had no authority to vest appointments elsewhere.

<sup>145</sup> The President's appointment power was thus increased in one respect (lower court judges), and abridged in another (the Treasurer).

<sup>146</sup> *Id.* at 145.

<sup>147</sup> *Id.* at 171. All quotes from this draft are on pages 171-72 and will not be separately footnoted.

<sup>148</sup> *Id.* at 185.

<sup>149</sup> The Pinckney Plan divided executive functions into duties and powers. It gave the President the "Duty" to inform Congress of the "condition" of the nation and to make recommendations, to correspond with state executives, to "attend to the Execution of the Laws of the U S," to "transact Affairs" with the officers of the government, to "expedite all such Measures as may be resolved on by the Legislature," to "inspect" the great departments, to reside where the legislature sits, to commission "all Officers," and to keep the Great Seal. The Plan made the President

passive construction to describe law execution (that the laws “be faithfully executed”), which indicates the expectation that the President would oversee the execution of the law by others, rather than do it personally. This change was certainly deliberate. The Pinckney Plan had required the President “to attend to the Execution of the Laws of the U S.”<sup>151</sup> This verb, “to attend to,” was standard language indicating the primary responsibility of an officer over particular subject areas.<sup>152</sup> The Committee’s passive “take care” formulation was more convoluted, and would not have been substituted for the straightforward Pinckney language unless there was a reason. The institutional implications of these terminological innovations will be examined below.<sup>153</sup>

#### 6. *Federative Powers*

The Committee’s allocation of the foreign affairs powers is particularly noteworthy. On June 1, concern over the powers of “peace & war” had touched off the debate over whether the executive would effectively be a monarchy. At that time, Rutledge, Wilson, and Madison all opposed giving the executive “the power of war and peace,” leading the Convention to adopt the narrow enumeration of executive powers already discussed. Nothing more on the subject was said for a month and a half. Now, with Rutledge and Wilson on the Committee of Detail, the Committee assigned almost all the foreign affairs powers to Congress or to the Senate. The Senate was given the power to make treaties with no executive involvement and no possibility of executive veto,<sup>154</sup> and to appoint ambassadors.<sup>155</sup> Neither of those senatorial powers had been voted by the Convention; they were the Committee’s innovations. Together, they were understood by delegates to entail the power of “managing our foreign affairs.”<sup>156</sup> The only foreign affairs power assigned to the President was the power to “receive Ambassadors,” discussed below. It may (or may not) be significant that the Committee changed the wording of the senatorial power from “send Ambassadors” to “appoint Ambassadors.” There is no extrinsic evidence regarding the purpose of this change, but as a textual matter it may have given the President a check on the Senate’s power. One can imagine an appointed and commissioned ambassador cooling his heels, waiting for a recalcitrant President to send him. At most, though, this would be a check; the President was given no power to pursue his own foreign policy.

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commander-in-chief “by Virtue of his Office,” and gave him the power to convene Congress on extraordinary occasions, to prorogue Congress for limited periods, and to “suspend Officers, civil and military.” 3 FARRAND, *supra* note 101, at 606. The Committee did not adopt Pinckney’s principle of organization, but it did make law execution a duty.

<sup>150</sup> 2 FARRAND, *supra* note 7, at 158 (“It shall be his Duty . . . to attend to the Execution of the Laws of the U. S.”).

<sup>151</sup> 3 FARRAND, *supra* note 101, at 606.

<sup>152</sup> For example, see the Morris-Pinckney proposal of August 20. 2 FARRAND, *supra* note 7, at 342-44.

<sup>153</sup> See *infra* section II.F.

<sup>154</sup> 2 FARRAND, *supra* note 7, at 183. An earlier draft within the Committee explicitly used the term “to make treaties of peace.” *Id.* at 143.

<sup>155</sup> *Id.* at 183. An earlier draft within the Committee explicitly used the term “to send” ambassadors. *Id.* at 169.

<sup>156</sup> *Id.* at 235 (Mr. Pinckney).

Congress as a whole was entrusted with the power to “make war,” along with the related powers “[t]o raise armies; [t]o build and equip fleets; [and] [t]o call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions.”<sup>157</sup> In addition to being vested with the “Executive Power,” the President was named “commander in chief of the Army and Navy of the United States, and of the Militia of the several States.”<sup>158</sup> There was no definition of the powers associated with that title, either in the Committee’s draft or in the final Constitution. But apparently commander-in-chief title did not entail the power to decide whether to go to war, or to determine the size or composition of the armed forces.

The Committee neglected to address the power to issue letters of marque and reprisal. These grant permission to a private person to attach and seize the property of a foreign national, to redress attacks or wrongs that the other nation had refused to remedy. Blackstone said that letters of marque and reprisal result in “an incomplete state of hostilities,” short of a declaration of war, and explained that this “prerogative” is “plainly derived from” the power to make war.<sup>159</sup> Perhaps the Committee thought it unnecessary to make separate provision for letters of marque and reprisal because these were encompassed in the larger category of making war. Perhaps the Committee did not expressly allocate this power because under British practice, statutes directed the ministers of the crown to issue the letters “upon due demand,” which implies that the letters had ceased to be, in reality, a prerogative but instead were ministerial powers regulated by law. Or perhaps this is the rare instance where the Committee fell asleep at the switch, and failed to deal with an important royal prerogative, other than to deny it to the states. Whatever the reason, the day after the Convention debated and altered the power to make war, Gerry suggested that provision be made for letters of marque, “which he thought not included in the power of war.”<sup>160</sup> After referral to a committee, the Convention unanimously granted this power to Congress.

Thus, despite Locke’s argument that the federative powers normally should be vested in the executive,<sup>161</sup> the Committee went the other way: the only federative powers vested in the President were the power to “receive”—but not to send—ambassadors, and to act as commander in chief of the army, navy, and militia.<sup>162</sup>

### *7. Other Prerogative Powers*

Finally, the Committee vested a number of other royal prerogative powers in Congress rather than the executive:

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<sup>157</sup> *Id.* at 182.

<sup>158</sup> *Id.* at 185.

<sup>159</sup> 1 BLACKSTONE, *supra* note 20, at \*258.

<sup>160</sup> 2 Farrand, *supra* note 7, at 326.

<sup>161</sup> *See supra* section I.C.

<sup>162</sup> The latter power first appeared in Rutledge’s handwriting annotating the first (Randolph) draft. Ewald, *supra* note 101, at 277. As governor of South Carolina during the British invasion and occupation, Rutledge directed the military effort. *See generally* RICHARD BARRY, MR. RUTLEDGE OF SOUTH CAROLINA (1942).

To establish an uniform rule of naturalization throughout the United States;  
To coin money;  
To regulate the value of foreign coin;  
To fix the standard of weights and measures.<sup>163</sup>

With minor alterations, these choices were all approved by the Convention, and constitute the fundamental structure of Article II. In a sense, the Committee returned (consciously or not) to the model of Jefferson's 1783 Proposed Constitution for Virginia.<sup>164</sup> Like Jefferson, the Committee vested all executive power in the President, and then excluded specific prerogative powers it did not wish him to have, giving them instead to the legislature or to no one.

#### *8. Enumerations of Power*

The Committee's treatment of the enumeration of powers for the executive and legislative branches is highly suggestive. In both contexts, it departed from the decisions made by the Convention, but it did so in seemingly inconsistent ways. On the one hand, the Committee jettisoned the Convention's general authorization for Congress to "legislate in all cases for the general interests of the Union" in favor of a specific and exclusive enumeration of legislative powers. On the other hand, the Committee augmented what had been a narrow and exclusive enumeration of executive powers in favor of a general grant of "the Executive Power of the United States" to the President—albeit with numerous qualifications and exceptions. This had to be deliberate. The Committee would not have moved in opposite directions for the two branches—from description to enumeration for the legislature and from enumeration to qualified description for the executive—by happenstance. The most likely explanation is that the Committee, like Jefferson and Madison, regarded legislative and judiciary powers as more susceptible to precise definition than executive powers.<sup>165</sup>

#### *G. Debate on the Committee of Detail Draft*

The Convention proceeded to debate the Committee of Detail draft, clause by clause, during much of August. There remained great dissensus over the mode of selection of the President. That issue occupied many days of debate, which this study will not address. The basic structure of the powers of the presidency as set forth by the Committee of Detail went unquestioned, but there were debates about some important specifics.

#### *1. Power of Appointment*

No one doubted the importance of the appointment power. As Hugh Williamson of North Carolina commented, citing Montesquieu, "an officer is the officer of those who appoint him."<sup>166</sup> But the delegates were all over the map regarding where it should be vested. John Dickinson urged that "the great appointments [apparently a reference to the Ministers of the major

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<sup>163</sup> 2 FARRAND, *supra* note 7, at 182.

<sup>164</sup> See *supra* section I.D.4.

<sup>165</sup> See *supra* section I.D.4.

<sup>166</sup> 2 FARRAND, *supra* note 7, at 530.

departments] should be made by the Legislature.”<sup>167</sup> Gouverneur Morris and James Wilson objected to the provisions vesting powers of appointment in the Senate, on the ground that the Senate would be prone to “cabal” and lacked “responsibility”—which meant accountability to the public.<sup>168</sup> (Recall that on June 1 Wilson had said that appointments and law execution were the only powers that were “strictly Executive.”<sup>169</sup>) Roger Sherman argued that executive appointment of some officers would not be “proper,” giving as an example the appointment of military officers in times of peace.<sup>170</sup> Randolph and Dickinson, supported by the vote of three states, favored referral of some appointments to state governors.<sup>171</sup> George Read’s motion to strike out the clause empowering Congress to appoint a Treasurer lost narrowly, 6-4, because of the close relation between the Treasurer’s function and Congress’s power of the purse.<sup>172</sup> (This vote was reversed in the final week of the Convention.<sup>173</sup>) On August 23 or 25 (the Journal and Madison’s Notes differ), the Convention unanimously broadened the Senate’s power of appointing ambassadors to include “other public ministers,” meaning diplomats.<sup>174</sup> The title “ambassador” was not used by American diplomats until 1893; prior to that they were called “ministers” or “ministers plenipotentiary.”<sup>175</sup>

A small but important change was made on motion by Madison: to refer to “offices” rather than “officers,” “in order to obviate doubts that he might appoint officers without a previous creation of the offices by the Legislature.”<sup>176</sup> In Britain, the Crown could create as well as appoint to offices, and this was a major source of the Walpolian “corruption” that had enabled the ministry to subvert the power of the Commons.

## 2. *Peace and War*

The Committee of Detail had given Congress the power to make war and the Senate the power of making treaties and appointing ambassadors.<sup>177</sup> In a fascinating and enigmatic debate on August 17, the Convention narrowed Congress’s war power by substituting “to declare war” for “to make war.”<sup>178</sup> Not only is this important in itself—the implications will be discussed in more detail below<sup>179</sup>—but it casts light on the structural logic of Article II. Because war is naturally an executive power, as Charles Pinckney recognized in the first comment in the first

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<sup>167</sup> *Id.* at 329.

<sup>168</sup> *Id.* at 389.

<sup>169</sup> *See supra* section I.D.4.

<sup>170</sup> 2 FARRAND, *supra* note 7, at 405.

<sup>171</sup> *Id.* at 405-06, 418-19.

<sup>172</sup> *Id.* at 314-15.

<sup>173</sup> *Id.* at 614.

<sup>174</sup> *Id.* at 383, 419.

<sup>175</sup> *Who Were the First U.S. Ambassadors?*, OFFICE OF THE HISTORIAN, U.S. DEP’T OF STATE, <https://history.state.gov/about/faq/who-were-first-ambassadors>.

<sup>176</sup> 2 FARRAND, *supra* note 7, at 405.

<sup>177</sup> *Id.* at 182, 183.

<sup>178</sup> *Id.* at 318-19.

<sup>179</sup> *See infra* section II.G.2.

day of debate over the executive, any diminution in express congressional power has the effect of augmenting executive power.

On August 23, the Convention debated the special powers of the Senate. The underlying theory of the Senate was something of a muddle, and perhaps it should be no surprise that these special powers would all be eliminated. Some delegates regarded the Senate as a select, quasi-aristocratic body, virtually a privy council to the President. Others regarded it as the representative body of the state governments, where small states and large had equal votes. Both theories led to difficulties. By early September, Wilson was warning that the plan as a whole had “a dangerous tendency to aristocracy” because of the excessive powers of the Senate.<sup>180</sup> Other delegates agreed.

Madison mounted an attack on the provision empowering the Senate alone to make treaties. Interestingly, however, he did not base his argument on the executive nature of the treaty-making power. Rather, he said that the President should be made “an agent” along with the Senate in making treaties, because “the Senate represented the States alone.”<sup>181</sup> His logic seemed to be that the Senate, appointed by state legislatures, would be prone to pursuing the parochial interests of their states, and that a representative of the whole nation should be involved. He did not propose transferring the treaty power to the executive, but only making the President “an agent in Treaties.” We should not read too much into this brief statement, but Madison’s choice of the term “agent” suggests that he envisioned the President’s role as subordinate; presumably, the principal of the agent was the Senate. Gouverneur Morris likewise criticized the treaty provision, but from the opposite direction. He questioned whether the Senate should be involved in treaty-making at all, but in the meantime moved that treaties could not be binding unless “ratified by a law,” meaning an act of both houses of Congress, signed by the President.<sup>182</sup> Other delegates questioned how it would work if one body, the Senate, sent an emissary abroad with instructions about negotiating a treaty, but a second body, the House, had power to decide whether to ratify. How could other nations have confidence that our emissaries spoke for the ratifying authority?<sup>183</sup> Randolph observed that “almost every speaker” had objected to giving the Senate the treaty power. Madison “hinted for consideration” that treaties of different sorts could be made in different ways – some by the Senate and President, some by Congress as a whole. The whole matter was then referred to a committee. The seeds of discontent with vesting the treaty power in the Senate had been sown.

### *3. Administrative Organization*

Few delegates had given much thought to the internal workings of the administration. The Committee of Detail draft did not address intra-executive branch organization other than to say

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<sup>180</sup> 2 FARRAND, *supra* note 7, at 522.

<sup>181</sup> *Id.* at 392.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 392 (Gorham), 393 (Johnson).

that the President had power to “inspect” the Departments of Foreign Affairs, War, Treasury, and Admiralty, and the power to “suspend”—but apparently not remove—“civil and military” officers.<sup>184</sup> Those provisions suggested that the administration would be under the loose supervision, but not the full control, of the President.

On August 20, Gouverneur Morris and Charles Pinckney submitted an elaborate proposal for the creation of five executive departments, headed by secretaries appointed by the President without senatorial involvement or approval, and serving at his pleasure.<sup>185</sup> In addition to advising the President, each secretary had duties of two types, administrative and legislative. Each would “superintend” or “attend to” his particular area of responsibility, and each would “recommend” “plans,” “measures,” or “establishments,” presumably to Congress, to promote those objects. The five secretaries, plus the Chief Justice, would compose a “Council of State,” which would “assist the President in conducting the Public affairs.”<sup>186</sup> The President was empowered to obtain advice from each of secretaries on matters within his jurisdiction, or from the Council, but he was not bound by that advice: “The President *may* from time to time submit any matter to the discussion of the Council of State, and he *may* require the written opinions of any one or more of the members: But he *shall* in all cases exercise his own judgment, and either Conform to such opinions or not as he may think proper.”<sup>187</sup> This was the real importance of the proposal: it constituted a rejection of the model of a council to advise and restrain the executive magistrate, which existed in almost all of the states<sup>188</sup> and which Mason, Gerry, and others had favored. The Morris-Pinckney proposal made the council subordinate to the President, who was entirely free to reject its advice. The council would not be a check on the executive, but his instrument for the formation and effectuation of policy.

The “written opinion” provision of this proposal, which is the forerunner of Article II’s Opinions in Writing Clause, was the lynchpin of the President’s exercise of supervisory authority over these officers. Without it, he might have no way to monitor the activities of the departments until they had taken final action, when it might be too late. With it, he could find out what the departments intended to do and reach his own judgment. The proposal stated that “every officer abovementioned shall be responsible for his opinion on the affairs relating to his particular Department.”<sup>189</sup> The term “responsible” in the parlance of the day meant accountable to another authority, in other words, liable for the consequences. The officers all served “during pleasure” of the President.<sup>190</sup> It follows that the officer was “responsible” *to the President* for his opinions relating to his department, since the President is the one with the right to know what those

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<sup>184</sup> *Id.* at 158.

<sup>185</sup> *Id.* at 342-43.

<sup>186</sup> *Id.* at 342.

<sup>187</sup> *Id.* at 343-44 (emphases added).

<sup>188</sup> Check this – it may be all.

<sup>189</sup> 2 FARRAND, *supra* note 7, at 344.

<sup>190</sup> *Id.* at 342-43.

opinions are and the one with the right to fire or retain him. The officers also were subject to impeachment and removal “for neglect of duty malversation, or corruption,” making them secondarily responsible to Congress, but not on grounds of mere disagreement over policy.<sup>191</sup> This aspect of the proposal mimicked the British system in which the king’s ministers could be impeached and removed by Parliament but were immediately responsible only to the monarch, who could cashier them at will.

At the request of Morris and Pinckney, the proposal was referred to the Committee of Detail. The Committee reported a truncated version of the motion on August 22, which omitted the administrative powers of the secretaries as well as the written opinions provision. It also vested Congress with the power to decide which departments to establish.<sup>192</sup> According to the Journal, the Convention voted 5-4 to postpone consideration of this report until the delegates had copies.<sup>193</sup> Neither Morris’s motion nor the Committee’s report on it was ever mentioned again. Arguably, however, the Morris-Pinckney proposal survived inferentially in such provisions as the Take Care Clause, the Opinions in Writing Clause, and the Appointments Clause, which will be considered in more detail below. Although the Constitution did not incorporate Morris’s proposal for executive departments, the final product was entirely consistent with it, and it seems likely that Morris’s proposal shaped the framers’ vision of how the executive branch would actually operate.

#### *H. Two More Committees*

On August 31, the Convention voted to refer unresolved issues to a committee made up of one member from each of the states remaining in attendance. Called the “Committee of Postponed Matters” or sometimes the “Committee of Eleven,” it was chaired by David Brearly of New Jersey, and reported on September 4. Gouverneur Morris was a member. Wilson, Rutledge, Madison, Gorham, Ellsworth, and Pinckney, who had been the leading figures in formation of the presidency to that point, were not.<sup>194</sup> The executive branch was prominent among the unresolved issues. Issues included how to elect the President, whether he should be eligible for reelection, the respective powers of Senate and President over foreign affairs and the appointment of judges, the question of an executive council, impeachment, and presidential succession.

The Committee scrapped legislative selection in favor of an electoral college. This rendered the President independent of Congress, and was a step in the direction of popular election. More importantly for our purposes, the Committee shifted all three of the special powers of the Senate to the President, making them subject to senatorial advice and consent.<sup>195</sup>

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<sup>191</sup> *Id.* at 344.

<sup>192</sup> *Id.* at 367.

<sup>193</sup> *Id.* at 368.

<sup>194</sup> *Id.* at 481.

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These were the powers to appoint judges, to appoint ambassadors, and to make treaties. Treaties were to require two-thirds concurrence.<sup>196</sup> It is commonly thought that shifts in opinion about the power of the Senate were due to the Connecticut Compromise – that big-state delegates lost faith in the Senate when they would no longer control it. It is puzzling, from that view, that the biggest diminution in senatorial power came at the hands of a committee chaired by David Brearly of New Jersey, a leader of the small state movement. I believe that distrust of the Senate had more to do with fear that it would be controlled by the states than with its principle of representation.

The requirement of advice and consent converts the appointment and treaty-making powers into *qualified* prerogatives: the executive does not require prior authorization by the legislative branch, but instead subsequent approval by a select body. Wilson strongly protested giving the Senate a veto on appointments within the executive branch. “Good laws are of no effect without a good Executive; and there can be no good Executive without a responsible appointment of officers to execute,” he said. “Responsibility is in a manner destroyed by such an agency of the Senate.”<sup>197</sup> But Gouverneur Morris, who agreed with Wilson that senatorial advice and consent to the appointment power was ill-advised, frankly stated that “the weight of sentiment in the House, was opposed to the exercise of it by the President alone.”<sup>198</sup>

The drafters’ use of the term “advice and consent” for the Senate’s role is sometimes misunderstood. The most prominent use of that term in British and colonial practice was in reference to the requirement of privy council approval of executive action. The Act of Settlement of 1701 provided that with respect to all matters “which are properly cognizable in the Privy Council,” resolutions “taken thereupon shall be signed by such of the Privy Council as shall advise and consent to the same.”<sup>199</sup> Closer to home, colonial governors were instructed that they could exercise certain especially important discretionary powers only “with the advice and consent” of their colonial Council<sup>165</sup>—usually made of up leading citizens of the colony. In effect, nominations and treaties were being treated as executive actions subject to privy council approval, with the Senate playing the role of privy council. It is revealing that Wilson, a separation of powers purist who disliked the Senate in its configuration after the Connecticut Compromise, stated that he would rather see the creation of a real privy council to advise the President on appointments, than to subject appointments to senatorial advice and consent.<sup>200</sup>

Attempts to read the term as involving two separate functions, “advice” and “consent,”<sup>201</sup> are ahistorical. The early Senate did not give advice before the action and consent afterward. It

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<sup>196</sup> *Id.* at 495.

<sup>197</sup> *Id.* at 538-39.

<sup>198</sup> *Id.* at 524.

<sup>199</sup> Act of Settlement 1701, 12 & 13 Will. 3 c. 2, in 8 ENGLISH HISTORICAL DOCUMENTS: 1660–1714, at 129, 396 (Andrew Browning ed., 1966). This was soon repealed.

<sup>165</sup> 1 ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS 1670-1776, at 45, 46, 82, 88 (L. Larabee, ed. 1935).

<sup>200</sup> 2 FARRAND, *supra* note 7, at 539.

<sup>201</sup> *See, e.g.,* Bestor, *supra* note 6, at 540.

passed a single resolution giving its advice and consent to nominations and treaties after they were made.<sup>202</sup> While it may be politically prudent for the President to seek senatorial input in advance of making nominations or negotiating treaties, this is not mandatory. Indeed, it is not even clear how the advice of the Senate as a body would be expressed (as opposed to the informal advice of individual senators). The language of the Appointments Clause makes especially clear that advance consultation is not part of the process: “the President shall nominate, and by and with the Advice and Consent of the Senate, shall appoint.” Nomination comes first; advice & consent comes only after nomination. The language of the Treaty Clause is not so clear as to whether advice and consent precedes or follows the making of a treaty, but because the term “advice and consent” is used in both Clauses, we may infer that it means the same for treaties as for appointments. Washington once attempted to obtain the Senate’s advice in advance of negotiating a treaty by going to the Senate chamber in person and engaging the senators in discussion, but the effort was unsuccessful, and he never tried that again.<sup>203</sup> He never formally consulted the Senate in advance of appointments.<sup>204</sup>

To be sure, the term “advice and consent” was also used in the seventeenth and eighteenth centuries as one of the alternative formulas for the enactment of ordinary legislation by the legislative branch as a whole.<sup>205</sup> The formula was as follows: “Be it enacted by the King’s most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority thereof . . .” The drafters did not use the term this way. The only use of the term “advice and consent” is with reference to the Senate alone. Ordinary legislation is referred to as a “bill.”<sup>206</sup>

This combination of changes would effectively put an end to senatorial control over foreign affairs, reducing it to the role of a check on the executive. The proposed transfer of the treaty power to the President stimulated a discussion of the power “to make peace.” Madison made two proposals: first, to allow ratification of treaties of peace with the concurrence of only a majority; second, to allow the Senate with a two-thirds vote to make treaties of peace without the President’s concurrence.<sup>207</sup> He feared that the President “would necessarily derive so much power and importance from a state of war that he might be tempted, if authorized, to impede a treaty of peace.”<sup>208</sup> Others disagreed, principally because treaties of peace often involve

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<sup>202</sup> See *infra* notes 425-426.

<sup>203</sup> See DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801*, at 23-26 (1997).

<sup>204</sup> *Id.* at 24-25.

<sup>205</sup> See GEORGE OSBORNE SAYLES, *THE KING’S PARLIAMENT OF ENGLAND* 106-07 (1975). Note that under this formula, the law is “enacted” by the king, having obtained the “advice and consent” of the two houses of Parliament. This treats the king as the lawmaker, and Parliament as his advisers, much like a privy council. *House of Lords, POLITICS.CO.UK*, <http://bit.ly/2de9HFE>. It is obvious why this was not an attractive formula for the enactment of laws by the Congress under the Constitution—but it was an accurate depiction of the appointment and treaty powers.

<sup>206</sup> U.S. CONST. art. I, § 7.

<sup>207</sup> 2 FARRAND, *supra* note 7, at 540.

<sup>208</sup> *Id.*

regionally sensitive issues, such as “fisheries, territory &c.”<sup>209</sup> The delegates were all too aware of the ferocious split over the Jay-Gardoqui Treaty, which pitted the western-southern interest in free navigation of the Mississippi against the northeastern interest in fisheries. Morris supported Madison on the ground that if a majority of the Senate favored peace, it was better to allow that body to end the war by means of treaty than to use “the more disagreeable mode, of negating the supplies for the war.”<sup>210</sup> Vietnam would be the test of that. Sherman and Morris then plumped for requiring legislative rather than just senatorial approval for treaties, but this did not command support. In the end, the Convention settled on a two-thirds vote of the Senate to approve all treaties.

The Committee also gave the Vice President a power (or is it a duty?) to serve as ex officio President of the Senate.<sup>211</sup> This was widely recognized as violating the separation of powers, but as Sherman remarked, “If the vice-President were not to be President of the Senate, he would be without employment.”<sup>212</sup> This would be one of the eleven grounds future Vice President Elbridge Gerry gave for refusing to support the Constitution.<sup>213</sup>

On September 7, George Mason made one final effort to restore the idea of a Council of State in lieu of the presidentialist administration championed by Morris. He warned, colorfully, that “in rejecting a Council to the President we were about to try an experiment on which the most despotic Governments had never ventured—The Grand Signor himself had his Divan.”<sup>214</sup> He proposed a Council with two members from each of the three regions, to be appointed by either the legislature or the Senate. Franklin, Dickinson, and Madison supported his effort, and Wilson, surprisingly, said he preferred it to giving the Senate power over appointments.<sup>215</sup> Morris opposed. His stated reason was that the Council would deflect accountability from the President rather than control him. Mason’s motion lost, 3-8, and the Convention then adopted the Opinions in Writing Clause instead. Morris’s view of an executive administration made up of officers who “will exercise their functions in subordination to the Executive”<sup>216</sup> had prevailed, with the single exception that the Senate would advise and consent to their appointments.

On September 8, the Convention committed the plan to yet another committee, denominated the Committee of Style, to prepare a final draft. The members were G. Morris, Madison, Hamilton, Johnson of Connecticut, and King.<sup>217</sup> Obviously, these men were neither geographically nor ideologically representative, which suggests they really were intended to

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<sup>209</sup> *Id.* at 541 (Gerry).

<sup>210</sup> *Id.* at 548.

<sup>211</sup> *Id.* at 538.

<sup>212</sup> *Id.* at 537.

<sup>213</sup> *Id.* at 633.

<sup>214</sup> *Id.* at 541.

<sup>215</sup> *Id.* at 542.

<sup>216</sup> *Id.* at 54.

<sup>217</sup> *Id.* at 553.

attend to “style” rather than substance. There is reason to believe the work was entrusted to Morris.<sup>218</sup>

The Committee of Style neither added nor subtracted new powers, but it completely reordered and reorganized Article II. One may say the Committee of Detail created the substance, and the Committee of Style the organization, of Article II. Probably its most significant contribution to the structure of the executive branch was a subtle rephrasing of the Vesting Clauses of Articles I and II. In the Committee of Detail draft, these clauses were as follows:

Article III. The legislative power shall be vested in a Congress . . . .

Article X, Sec. 1. The Executive power of the United States shall be vested in a single person.

Article XI, Sec. 1. The Judicial Power of the United States both in law and equity shall be vested in one Supreme Court, and in such inferior Courts . . . .<sup>219</sup>

In the Committee of Style draft, which is also our Constitution, these clauses were as follows:

Article I, Sec. 1. All legislative powers *herein granted* shall be vested in a Congress of the United States.

Article II, Sec. 1. The executive power shall be vested in a president of the United States of America.

Article III, Sec. 1. The judicial power of the United States, both in law and equity, shall be vested in one supreme court, and in such inferior courts . . . .<sup>220</sup>

The added words “herein granted” underscored that the powers of Congress were those enumerated elsewhere in the document. Congress thus has *no* unenumerated powers (though the Necessary & Proper Clause imparts powers incidental to the enumerated powers). The lack of similar words in Article II suggested that the executive possesses *all* powers of an executive nature pertaining to the national government, except insofar as any of those powers are allocated to Congress, or any of those powers are limited by the qualifications and conditions of Article II.

The meaning of the Article III Vesting Clause would constitute a study in itself, and is far beyond the scope of this one. But in a nutshell, it seems to me that the Vesting Clause of Article III, Section 1, combined with the specification of cases and controversies in Section 2, leaves the *powers* of the federal courts unenumerated but the *occasions for the exercise of those powers* limited to the cases and controversies enumerated in Section 2. For example, the text leaves unanswered whether courts have such powers as the writs of mandamus against executive officers, the power to establish rules of procedure, the power to prosecute contempts, or the power to appoint legal defenders. But it specifies the reach of diversity jurisdiction, federal question jurisdiction, and the like.

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<sup>218</sup> THACH, *supra* note 6, at 138; Bestor, *supra* note 6, at 660 n.495.

<sup>219</sup> 2 FARRAND, *supra* note 7, at 565, 572, 575.

<sup>220</sup> *Id.* at 590, 597, 600.

The Committee of Style also reordered the enumerated executive powers, in ways that are sometimes hard to fathom. For example, the Committee of Detail draft had located the power to appoint and the duty to commission officers together in a single sentence. The Committee of Style draft separated them by a paragraph, and put them in separate sections. Why? The Committee of Style also reorganized executive powers into two sections, Article II, Section 2 and Article II, Section 3. Why? The possible logic of this organization is the subject of Part III of this study.

One might dismiss the puzzles of Article II as products of a hurried summer under less than ideal drafting conditions. But when the pen was in the hands of men like Wilson, Rutledge, and Morris, who were masters of the craft of language and government, the default position is that the puzzles have answers.

## II. Allocating Prerogative Powers

Now that we know the history of Article II we can turn to its logic. The leading players—the Committee of Detail, the Committee of Postponed Matters, and the Committee of Style—left no explanations about why they did what they did. We must infer rationale from actions rather than words. What follows are inferences from the product of their labors, together with the few explicit statements from Madison, Wilson, Rutledge, and Morris about their theories of executive power, already quoted. These inferences are not definitive proofs. My claim is only that this interpretation fits the evidence, and that no other explanation seems to do so as well.

My thesis is that the relevant framers thought about the executive branch in light of the established list of royal prerogatives—both those formerly claimed by the monarch but repudiated by statutes or judicial decisions, and those still possessed by George III. With almost no exceptions, the Constitution explicitly addresses all prerogative powers, giving some to the President, some to the Congress, and some to the President with qualifications, and denying some to the federal government altogether. Often the Constitution uses the same legal terms of art used by Blackstone and others to describe the royal prerogatives, and where it departs from that terminology, there was a reason to do so. To make sense of Article II as it was written, we must understand prerogative as it existed (or formerly existed, or was contested) in British law as of 1787 and retrace the logic of the framers about how the new republican executive magistrate would differ.

As discussed above, “prerogative” powers are executive powers neither created by nor regulated by law.<sup>221</sup> They are powers the executive can employ without first consulting or getting authorization from the legislative branch. Although the legislature can respond to the exercise of prerogative—for example, by cutting off funds for a war or impeaching a minister—prerogative

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<sup>221</sup> See LOCKE, *supra* note 25, at 375 (“This Power to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it, is that which is called *Prerogative*.”); *supra* section I.C.

is not bound by common or statutory law. In a rule-of-law society like late eighteenth century America, prerogative was viewed with deep suspicion. But if Locke is right, a certain degree of prerogative, in some areas, perhaps especially in the context of external relations (“peace & war”), is indispensable.

The drafters of the Constitution were well versed in British constitutional history, at least in the narrative of whiggish history, which featured a long series of struggles between the Crown’s assertions of prerogative power and the attempts by Parliament and common lawyers to subject royal power to law and hence to the control of Parliament. The records of the Convention contain countless references to episodes and tropes from this history. Unchecked royal power was seen as the enemy to the liberties of the people. As Madison wrote in 1800, the “danger of encroachments on the rights of the people” in Britain were “understood to be confined to the executive magistrate,” and “all the ramparts for protecting the rights of the people—such as their Magna Charta, their Bill of Rights, &c.—are . . . reared . . . against the royal prerogative.”<sup>222</sup> American constitutionalism, as Madison explained it, was different: it aspired to make “laws paramount to prerogative” and “constitutions paramount to laws.”<sup>223</sup>

From Magna Charta through the Civil War and the Glorious Revolution, the king’s most dramatic claims to absolute authority—to impose taxes and laws without parliamentary approval, and to imprison or seize property without due process—were defeated after titanic struggle. But royal power was on the march again at the time of the American founding. George III was attempting to revive royal authority that his less ambitious great-grandfather and grandfather had allowed to slip into parliamentary hands. The eighteenth century monarch continued to have important prerogative powers, such as the powers of peace and war; to command army, navy, and militia; to appoint and remove officers; to create peerages and other offices and name people to them; to head the church by law established; to coin money and grant charters of incorporation and sometimes monopoly privileges; to declare embargoes, to pardon, to veto, and to prorogue Parliament—to list some of the more important. The constitutional framers had no doubt that they should deny to the republican executive the prerogative powers that had been wrested from the Stuart kings, but it was harder to decide what to do about the surviving eighteenth century prerogative powers. To understand executive power under Article II, we need to reconstruct the history of each of those prerogative powers.<sup>224</sup>

#### A. Finance

The most important governmental powers related to finance are the powers to tax, to spend, and to borrow. All were exclusively vested in Parliament by the end of the seventeenth

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<sup>222</sup> James Madison, Report on the Virginia Resolutions (1800), in *THE WRITINGS OF JAMES MADISON* 341, 386 (Gaillard Hunt ed., 1900).

<sup>223</sup> *Id.* at 387.

<sup>224</sup> My principal sources for the law of prerogative are *BLACKSTONE’S COMMENTARIES*, published between 1766 and 1869, and *JOSEPH CHITTY, A TREATISE ON THE LAW OF THE PREROGATIVES OF THE CROWN*, published in 1820.

century. They were absolutely central to the boundary between legislative and executive power—as the framers of the U.S. Constitution understood. Parliament’s exclusive power over taxation was its primordial source of leverage over the king. Nothing was more fundamental to Britain’s development into a constitutional monarchy. Once Parliament could decide whether or not to tax, it was but a small step to deciding what the revenues generated from such a tax could be used for, and but another step to controlling national policy.

The power to tax was hugely controversial, both at the Constitutional Convention and during the ratification debates. But those arguments concerned federalism rather than separation of powers. It was essentially undisputed that the executive would be denied any prerogative powers to tax, spend, or borrow. The disputed issue was whether the new national government would be given unlimited powers in these respects, or whether the states would enjoy some degree of check. My focus here is on the separation of powers dimension.

As early as Magna Charta, “common consent of the kingdom” was required for major taxes. But the Crown did not depend on taxation for most of its revenues. The expenses of state, including the royal household, the civil administration and war, could with frugality be met through such means as revenues from Crown lands (which made up roughly half of government revenues at the beginning of the Stuart period), surviving feudal incidents, long-established taxes such as customs duties, which were customarily granted for the life of the monarch, and loans on the personal credit of the king, for which the Crown was not answerable to Parliament.<sup>225</sup> Only in the event of extraordinary expenditures—usually for a war—did the Crown need to consult the legislative branch.<sup>226</sup> Kings could go for long periods of time without the need to summon the Lords and Commons.

Advocates of the New Jersey Plan attempted to replicate this system, with the national government playing the role of the king and the states playing the role of Parliament. That Plan granted the national government a large permanent source of revenue, namely the taxation of imports (called “the impost”) and certain excise taxes. These were expected to suffice for the ordinary operations of government. When it needed more revenue—most likely for war—the national government would have to ask the states for supplemental contributions. The intended effect was to use the states as a check against foreign adventurism or other ambitious folly. In the end, under this Plan, if the states failed to cough up the money, Congress was empowered to collect it directly, but this could happen only after serious national debate in state legislative chambers. The analogy to the early modern English system is obvious. Needless to say, the New Jersey Plan was not adopted. Chastened by the failure of states to pay their quota of contributions for national government under the Articles of Confederation, the nationalists who dominated the

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<sup>225</sup> See Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 MICH. L. REV. 1207, 1217-18 (2009); Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutional Governing Public Choice in Seventeenth-Century England*, 49 J. OF ECON. HIST. 803, 809 (1989).

<sup>226</sup> See Figley & Tidmarsh, *supra* note 225, at 1219-20.

Convention made sure that the states could not serve as checks. They relied, instead, on the checks and balances of legislative and executive separation.

By the time of Henry VIII, royal and governmental expenses chronically outstripped traditional Crown revenues.<sup>227</sup> Monarchs exacerbated their long-term fiscal difficulties by selling off their largest capital asset, the Crown lands, and spending the proceeds. By the 1640s these were mostly depleted.<sup>228</sup> The Stuart kings had two choices, both of them unpleasant: they could go to Parliament to request new taxes to meet the need, and be forced to make concessions and listen to Parliament's views on policy, or they could raise money through extra-statutory means, risking popular unrest and parliamentary resistance. (Of course, they could have economized on the household and stopped fighting wars on the continent or with Scotland, but that did not seem to occur to them.) They mostly attempted the second course, and met with disaster.

Unable to openly impose new taxes on the British people, the seventeenth century Stuart kings used more devious ways to raise new revenues, often stretching old precedents. They imposed new customs duties on foreigners, created and sold monopoly privileges, peerages and other honors and benefits, engaged in prosecutions to extort unreasonable fines, revived old feudal incidents, and mulcted the church.<sup>229</sup> Most famously, they demanded forced loans, at unfavorable terms that often were not honored. Charles II packed the courts to uphold the practice in the *Five Knights Case*,<sup>230</sup> which prompted an "immediate outcry of protest"<sup>231</sup> and stiffened the spine of Parliament to enact the Petition of Right in 1628. Drafted by Sir Edward Coke, the former Chief Justice of the King's Bench who had been fired by James I for asserting the primacy of common law over royal edict, the Petition of Right is regarded as the "second great fundamental compact between the Crown and the [English] Nation," after Magna Carta.<sup>232</sup> The Petition of Right provided that "no Man hereafter be compelled to make or yield any Gift, Loan, Benevolence, Tax or such like Charge, without Common Consent by Act of Parliament."<sup>233</sup>

Charles I's next sally was to proclaim a tax called "ship-money." Ship-money was a hoary precedent that Elizabeth I used to finance much of the English fleet that battled the Spanish Armada in 1588.<sup>234</sup> In accordance with precedent, Elizabeth limited her demands to residents of coastal towns (on the theory that coastal residents disproportionately benefit from naval security),

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<sup>227</sup> North & Weingast, *supra* note 225, at 809.

<sup>228</sup> Instead of using the vast wealth seized from the monasteries to enrich the royal endowment, Henry VIII spent it all, and more. His daughter Elizabeth was forced to sell a quarter of the Crown lands to defend the nation from the Spanish menace. James I sold another quarter, and his son Charles I disposed of the rest. *See id.*

<sup>229</sup> *Id.* at 810-12.

<sup>230</sup> *See Darnel's Case* (1627), 3 How. St. Tr. 1 (KB).

<sup>231</sup> *Boumediene v. Bush*, 553 U.S. 723, 742 (2008).

<sup>232</sup> THOMAS PITT TASWELL-LANGMEAD, *ENGLISH CONSTITUTIONAL HISTORY FROM THE TEUTONIC CONQUEST TO THE PRESENT TIME* 430 (Philip A. Ashworth ed., 6th ed. 1905).

<sup>233</sup> The Petition of Right 1628, 3 Car. 1 c. 1, § 10.

<sup>234</sup> *See D.L. Keir, The Case of Ship Money*, 52 L.Q. REV. 546, 551 (1936).

and the emergency was so clear that the tax was successfully implemented. Charles I dramatically expanded this claim of prerogative power: he sought to impose a ship-money tax on the entire nation for purposes of funding an unpopular land war on the Continent. Charles I's hand-picked judges ruled 7-5 in his favor and held that (1) the king had absolute power to defend the nation, and (2) where Parliament fails to act, the king can (or must) act unilaterally.<sup>235</sup> In response, Parliament voted to abolish the king's prerogative courts, Star Chamber and the Court of High Commission, and impeached the seven judges who sided with the king.<sup>236</sup> The House of Lords, in its judicial capacity, reversed the judgment upholding the tax. Within a decade, the king and Parliament would field armies to fight a civil war, the monarchy would be temporarily overthrown, and Charles himself would lose his head.

The Restoration monarchs, Charles II and James II, continued to seek ways to evade Parliament's power over revenues. Accordingly, as part of the constitutional settlement of the Glorious Revolution, the fourth article of the Bill of Rights of 1689 conclusively stated "That levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal."<sup>237</sup> The principle that taxes may be imposed only by the representatives of the people is the bedrock of British constitutionalism—and it would be even more central to the American patriots who justified their war of independence on the cry of "no taxation without representation."

Even after post-Restoration Stuart monarchs gave up the pretension to prerogative taxation, Parliament still did not have the full power of the purse. Although Parliament controlled taxation and hence the amount of funds available to the Crown, "the disbursement of revenue was still within the domain of Prerogative."<sup>238</sup> Moreover, the Crown still had independent sources of revenue not under parliamentary control, and could borrow money on the king's own authority and credit. This was to cease in the decade following the Glorious Revolution. William III needed large sums of money for his wars against Catholic France, and was willing, in return, to accede to greater parliamentary control over public finance. In the 1690s, therefore, Parliament forced the Crown to merge public and private sources of revenue into a single budget that was controlled and audited by Parliament. Moreover, it chartered the Bank of England, with the exclusive privilege of lending to the Crown, and prohibited the Bank from making such loans without parliamentary approval.<sup>239</sup> This had the salutary, but perhaps unanticipated, effect of converting the debt from a personal liability of the monarch, subject to manipulation and repudiation, to a national debt supported by the full faith and credit of the nation. In 1702,

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<sup>235</sup> See *Hampden's Case* (1637), 3 How. St. Tr. 825, 1065-1243 (Exch. Cham.).

<sup>236</sup> Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 275 (2009); Keir, *supra* note 234, at 547; see *The Habeas Corpus Act 1640*, 16 Car. 1 c. 10; *THE STUART CONSTITUTION 1603-1688: DOCUMENTS AND COMMENTARY* 105-06 (J. P. Kenyon ed., 2d ed. 1986).

<sup>237</sup> *Bill of Rights 1689*, 1 W. & M. c. 2.

<sup>238</sup> DAVID LINDSAY KEIR, *THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485*, at 236 (8th ed. 1966).

<sup>239</sup> North & Weingast, *supra* note 225, at 821.

Parliament prohibited the Crown from alienating crown property for longer than the life of the king or queen, which forever ended the practice of borrowing on the royal credit.<sup>240</sup> Parliament also eliminated the old taxes that had previously been sources of royal fiscal independence and subjected all expenditures to appropriation and audit.<sup>241</sup> It was not until 1782, however—five years before the Constitutional Convention—that the King lost his prerogative to determine how the “civil list,” the domestic governmental budget, would be spent.<sup>242</sup> From that point forward, the Crown could not spend without appropriation by parliament.

The Committee of Detail entrenched each of these settlements in the Constitution. The first two clauses of Article I, Section 8, gave the powers to tax and borrow to Congress (not the executive),<sup>243</sup> and Article I, Section 9 states that “No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”<sup>244</sup> Thus, the prerogative powers to tax, to borrow, and to spend were denied to the executive and vested in Congress.<sup>245</sup> Congress not only controls how much revenue to raise and how, but what to spend it on, and under what conditions.

One important prerogative power relating to finance survived the Glorious Revolution and was vested in George III at the time of the Convention: the power to coin money and regulate its value. Minting more money and debauching its value is a time-honored and usually pernicious way for debtor nations to get out from under their sovereign debt. Henry VIII had used this power to devastating effect, creating economic havoc.<sup>246</sup> To prevent similar shenanigans, the Committee of Detail assigned this prerogative power to Congress, no doubt believing it was less likely that the more transparent and representative Congress would engage in inflationary practices than the secretive and war-oriented executive. In the eighteenth century, however, the true currency of the United Kingdom was the paper notes issued by the Bank of England, a privately-owned institution. Much the same would be true in the United States after establishment of the Bank of the United States, but it is not likely that framers other than Hamilton and possibly the Morrisises understood that. The power to coin money lost most of its significance when coins did. (Under the original constitution, there was no paper money, at least not as legal tender.)

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<sup>240</sup> Figley & Tidmarsh, *supra* note 225, at 1235-36.

<sup>241</sup> *Id.* at 1224-25, 1229.

<sup>242</sup> See 1 BLACKSTONE, *supra* note 20, at \*334-35 (discussing the importance of the king’s discretionary control of the civil list); Figley & Tidmarsh, *supra* note 225, at 1229 (describing the decision in 1782 to eliminate the king’s control of the civil list).

<sup>243</sup> U.S. CONST. art. I, § 8, cl. 1-2.

<sup>244</sup> U.S. CONST. art. I, § 9, cl. 7.

<sup>245</sup> David Engdahl has made an elaborate argument that Congress’s power to spend is found in its Article IV power to “dispose of . . . the Territory or other Property belonging to the United States.” David E. Engdahl, *The Basis of the Spending Power*, 18 SEATTLE U. L. REV. 215, 216 (1995). There is no evidence any framer thought this.

<sup>246</sup> The value of the currency fell by X%, virtually wiping out the capital assets of investors. See FEDERICK C. DIETZ, ENGLISH GOVERNMENT FINANCE, 1485-1558, at 154-57 (1920); CHRISTOPHER CHALLIS, THE TUDOR COINAGE XX (1978); John Munro, *The Coinages and Monetary Policies of Henry VIII (r. 1509-1547): Contrasts Between Defensive and Aggressive Debasements* (Univ. of Toronto Dep’t of Econ., Working Paper No. 417, 2010).

For similar reasons, the Convention assigned to Congress the power—really, the duty—to pay the debts of the United States. Article I, Section 8 empowers Congress to lay and collect taxes “to pay the Debts . . . of the United States.”<sup>247</sup> This is framed as a power. Article VI provides that “All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.”<sup>248</sup> This is framed as a duty—though perhaps not an absolute duty, depending on the legal terms of the debt incurred under the Articles. On receiving word of this provision in the financial markets in Amsterdam, the value of American debt instruments immediately rose by X percent.<sup>249</sup> This institutional arrangement makes default, debt repudiation, and debt reduction through inflation less likely because the legislature, unlike the executive, represents the nation’s creditors: its banks and wealthy citizens. As long as political power is held by the creditor class, one can expect a policy of reliable debt repayment, which in turn will enable the government to borrow at close to a risk-free interest rate.<sup>250</sup> This was a principal objective of Hamilton’s economic program, which was enabled by the Constitution.

In two minor respects, Congress under the Constitution was given less fiscal power than the eighteenth-century Parliament. Parliament in the 1690s assumed the power to audit the revenues and expenditures of the government, which undergirds its power of the purse. Article I, Section Nine similarly calls for such an audit (“a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time”),<sup>251</sup> but does not specify who has authority to conduct it. Presumably, this would have been the task of the congressionally-appointed Treasurer, but when the congressional power to appoint the Treasurer was dropped in the final weeks of the Convention,<sup>252</sup> this authority either devolved to the executive or became ambiguous. This is one of the few examples of a parliamentary fiscal power that was not assigned to Congress, and quite possibly it was inadvertent.

The eighteenth-century Crown also enjoyed an important fiscal power by virtue of a Standing Order adopted by the House of Commons in 1713: what we would today call an executive budget. Under this standing order Parliament could never vote appropriations in excess of sums requested by the Crown (effectively, the ministry).<sup>253</sup> Many state constitutions give this power to the governor, in the interest of fiscal restraint. Under the Constitution, by contrast, the

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<sup>247</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>248</sup> U.S. CONST. art. VI, cl. 1.

<sup>249</sup> Michael W. McConnell, *What Would Hamilton Do?*, 35 HARV. J. L. & POL’Y 259, 277-78 (2012).

<sup>250</sup> JAMES MACDONALD, A FREE NATION DEEP IN DEBT: THE FINANCIAL ROOTS OF DEMOCRACY 6-7 (2003).

<sup>251</sup> U.S. CONST. art. I, § 9, cl. 7.

<sup>252</sup> 2 FARRAND, *supra* note 7, at 614.

<sup>253</sup> KEIR, *supra* note 238, at 297; PAUL EINZIG, THE CONTROL OF THE PURSE: PROGRESS AND DECLINE OF PARLIAMENT’S FINANCIAL CONTROL 122-23, 125-27 (1959). St. George Tucker mentions this in his American edition of Blackstone. See 1 BLACKSTONE’S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA, app. at 324 (St. George Tucker ed., Lawbook Exchange, Ltd. 1996) (1803).

President can propose a budget, but Congress is free to appropriate more than the President asks (and frequently does so). Because the executive budget power was a creation of Parliament, it was not regarded as a prerogative power, and may for that reason have escaped the notice of the Committee of Detail.

### *B. Executive Lawmaking: The Proclamation Power*

Medieval legal theory did not distinguish between the power to make law and the royal power to execute it. All law was in a sense the king's law. Parliament was merely his council. When Parliament enacted a law, it did so in the form of a petition to the king to promulgate it, which he could either do, or not. Lawmaking was a royal prerogative. By early modern times, however, this identification of law with royal power was contested. When Henry VIII formally asserted a royal proclamation power, there were legal doubts.<sup>254</sup> Parliament, under royal control, passed the Statute of Proclamations, giving legal effect to the king's proclamations as "though they were made by act of parliament."<sup>255</sup> Armed with the Statute of Proclamations and Parliament's affirmation of his royal prerogative, Henry asserted authority over a wide range of matters that previously had been subject to statute, such as "murder, robbery, forgery, perjury, debt, seduction, abduction of heiresses, unjust imprisonment, aiding to escape from justice, refusal of a husband to consort with and maintain his wife, assault, forcible entry, seizure of foreigners' vessels and goods, libel against the government, breaking of contracts, . . . killing of deer, enclosure of common land, right to pasture, questions of land title, jointure, right to goods of felons, etc."<sup>256</sup> Henry's hand-picked Court of Star Chamber was given jurisdiction to prosecute "offenses against proclamations."<sup>257</sup>

This combination of law making, enforcement, and judging in essentially the same hands led, predictably, to oppression and abuse. After Henry VIII died in 1547, Parliament immediately repealed the Act of Proclamations.<sup>258</sup> The act "lived on, however, as a memorable warning against legal authorization for [executive] prerogative or administrative power."<sup>259</sup> Memory of the Proclamation Power and the Court of Star Chamber was fundamental to the founders' commitment to separation of powers.<sup>260</sup>

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<sup>254</sup> See PHILLIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 36 & n.7 (2014) (describing Henry's issuance of proclamations and noting that "the judges warned him that [the practice] might not be lawful").

<sup>255</sup> Proclamation by the Crown Act 1539, 31 Hen. 8 c. 8.

<sup>256</sup> CORA L. SCOFIELD, A STUDY OF THE COURT OF STAR CHAMBER 29 (1900).

<sup>257</sup> *Id.*

<sup>258</sup> 1 Edw. 6 c. 12. [I'm not sure this is right; I'm having trouble finding the citation for the Act that actually repealed the Statute of Proclamations. One source gives this statute as the one repealing. See TUDOR RULE AND REVOLUTION: ESSAYS FOR G. R. HELTON FROM HIS AMERICAN FRIENDS 239 n.7 (Delloyd J. Guth & John W. McKenna eds., 1982).]

<sup>259</sup> HAMBURGER, *supra* note 254, at 38.

<sup>260</sup> See, e.g., THE FEDERALIST No. 47, at 298 (James Madison) (Clinton Rossiter ed., Signet Classic ed. 1999) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny.").

The first Stuart king, James I, armed with the newly minted theory of the divine right of kings,<sup>261</sup> reopened the argument about the proclamation power. In 1610, to provoke a test case, James issued a royal proclamation prohibiting “new buildings in and about London” and “the making of starch of wheat.”<sup>262</sup> Lord Ellesmere, the royalist jurist, argued that the courts should “maintain the power and prerogative of the King,” and that “in cases in which there is no authority and precedent,” the judges should “leave it to the King to order in it, according to his wisdom.”<sup>263</sup> Under this view, the king could not violate the law—he could not act *contra legem*—but he could add to the law, by creating new offenses and making illicit what previously had been licit. Chief Justice Coke, whose whiggish constitutionalism later informed the views of American framers, held that the King could not lawfully “change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament.”<sup>264</sup> Lord Coke concluded that “the law of England is divided into three parts, common law, statute law, and custom; but the King’s proclamation is none of them.”<sup>265</sup>

Just ten years before the Declaration of Independence, even a well-meaning royal proclamation set off a firestorm, leading to a statutory repudiation of the Proclamation Power. A severe grain shortage gripped Britain during a forty-day period when Parliament was not in session. To mitigate the risk of starvation, King George III imposed an embargo on the exportation of grain, claiming that the Crown has authority “to take upon itself whatever the safety of the state may require, during the recess of parliament.” When Parliament reconvened, the Whig opposition denounced the royal order on the ground that the prerogative to proclaim new law was tyrannical. The ministry defended the measure as “at most but a forty days tyranny,” justified by public necessity and emergency. The opposition responded that if such a royal prerogative were legitimated, “you cannot be sure of either liberty or law for forty minutes.”<sup>266</sup> In the end, Parliament enacted a statute declaring that an order in council imposing a new legal obligation on private citizens “could not be justified by law.”<sup>267</sup> At the same time, the statute indemnified the officers who had carried it out on the ground that the measure had been “so necessary for the safety and preservation of his Majesty’s subjects that it ought to be justified by

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<sup>261</sup> See PAULINE CROFT, KING JAMES 132 (2003). James himself published a treatise on the divine right of kings. See JAMES I, *The Trew Law of Free Monarchies*, in THE POLITICAL WORKS OF JAMES I, at 53 (Charles Howard McIlwain ed., 1918) (1616). In his view, kings are unrestrained by law; their authority comes from God, and therefore, the king is accountable only to God—never to man or law. See *id.* at 68 (“[B]etwixt the king and his people, God is doubtless the only Iudge . . .”).

<sup>262</sup> Case of Proclamations (1610), 77 Eng. Rep. 1352, 1352, 12 Co. Rep. 74, 74.

<sup>263</sup> 77 Eng. Rep. at 1353, 12 Co. Rep. at 74; cf. *The Steel Seizure Case*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring in the judgment) (describing the “zone of twilight”).

<sup>264</sup> 77 Eng. Rep. at 1353, 12 Co. Rep. at 75.

<sup>265</sup> 77 Eng. Rep. at 1354, 12 Co. Rep. at 75.

<sup>266</sup> See “*But a Forty Days’ Tyranny*”: A Reflection on Executive Authority in 18<sup>th</sup>-century British Constitutionalism, <http://taylorstoermer.com/tag/british-history-2/> (July 25, 2013).

<sup>267</sup> Indemnity Act 1766, 7 G. 3 c. 7; see CHITTY, *supra* note 20, at 164

Act of Parliament.”<sup>268</sup> Thus, even at times of undoubted emergency, and even for a brief period of time when Parliament is not in session, the executive as of 1766 lacked the prerogative to make new law.

This did not mean that the monarch could not issue proclamations, or that proclamations had no legal consequence. It meant only that the king could not create new legal obligations, binding on the people, without Parliament. Blackstone observed that, as “executive magistrate,” the monarch has authority to issue proclamations that serve to “enforce the execution” of the laws, because “the manner, time, and circumstances of putting the laws in execution must frequently be left” to the magistrate entrusted with law execution.<sup>269</sup> In modern administrative parlance, the executive could issue interpretative regulations or guidance declaring its view of the meaning of ambiguous statutes, but no power to issue legislative rules with the force of law, in the absence of legislative authorization.

The drafters of the Constitution gave no handle for assertion of a prerogative in the executive to make new law. The authority to make laws they vested in Congress.<sup>270</sup> They gave the President the power to recommend legislation and to veto (considered below), but no power to make law on his own authority. Under the precedents of the day, no one would have regarded the Proclamation Power as an aspect of “executive power.” Tellingly, when Washington issued his famous Neutrality Proclamation, which among other things warned Americans that they would be “liable to punishment or forfeiture” if they engaged in acts like privateering against the French, prosecutions were brought and defended under the common law, treaties, and the law of nations—never citing the Proclamation itself as a source of legal authority for legal action.<sup>271</sup> When that did not work because a jury rejected the idea that the common law covered the matter, Washington asked Congress to “extend the legal code” by legislation, which it did.<sup>272</sup>

This has been a fundamental principle of American constitutionalism ever since. In *The Steel Seizure Case*, the Supreme Court’s most foundational separation of powers decision, the Court held that the President cannot make law; the legislative power is reserved exclusively to Congress.<sup>273</sup> An executive order—the modern equivalent of a proclamation—cannot change the law or affect legal rights.<sup>274</sup> Moreover, the Due Process Clause makes clear that no one may be

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<sup>268</sup> *Id.*

<sup>269</sup> 1 BLACKSTONE, *supra* note 20, at \*270.

<sup>270</sup> Professor Reinstein calls the Proclamation Power one of the few “missing prerogatives,” meaning a prerogative not expressly addressed by the Constitution. REINSTEIN, *supra* note 236, at 276-77. I do not agree. To the extent the Proclamation Power was a power to make new law, the first sentence of Article I vests it in Congress.

<sup>271</sup> Neutrality Proclamation, April 22, 1793, in 12 THE PAPERS OF GEORGE WASHINGTON 472, 473 (Christine Sternberg Patrick & John C. Pingeiro eds., 2005); *Henfield’s Case*, 11 Fed. Cas. 1099 (Cir. Ct. D. Pa. 1793); Edmund Randolph, Opinion of the Attorney General to the Secretary of States (May 30, 1793).

<sup>272</sup> Letter to the United States and House of Representatives, December 3, 1793, in 12 THE PAPERS OF GEORGE WASHINGTON 472, 473 (Christine Sternberg Patrick & John C. Pingeiro eds., 2005); .

<sup>273</sup> 343 U.S. at 587-88.

<sup>274</sup> For the most thorough explanation of this principle, see Henry P. Monaghan, *The Protective Power of the*

punished or required to act except in accordance with “law.”<sup>275</sup> “Law” includes statutes, treaties, and the Constitution itself, but not presidential proclamations.<sup>276</sup> As the Supreme Court has stated: “the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law.”<sup>277</sup>

### C. *The Prerogative to Suspend or Dispense With Statutory Law*

A third set of disputes over prerogative involved the assertion by British kings, especially Charles II and James II, of the so-called Suspending and Dispensing Powers: the power to suspend the legal force of a law, and the power to grant dispensations or indulgences permitting people or corporations to act in ways that would otherwise be unlawful, notwithstanding (“*non obstante*”) the law. The precise line between these closely related prerogative powers is sometimes difficult to discern, but in general “[t]he power to suspend a law was the power to set aside the operation of a statute for a time. It did not mean, technically, the power to repeal it. The power to dispense with a law meant the power to grant permission to an individual or a corporation to disobey a statute.”<sup>278</sup> Or as another scholar explains it:

A dispensation was in brief a “license to transgress” a statute law, a royal warrant excepting certain persons from “the Obligation of a Law,” a permission to act statute notwithstanding, *non obstante*, granted to an individual or, on occasion, to a corporation, at the discretion of the crown. . . . [U]nlike a pardon, a grant of dispensation did not simply exempt the transgressor from penalty after an act; it made the act or “thing prohibited lawful to be done by him who hath it.” Unlike a suspension, it did not abrogate the statute itself; it only excepted those who had been granted it from the obligation of obedience.<sup>279</sup>

Like many of the prerogatives stretched by the post-Restoration Stuarts, the Dispensing Power had some basis in precedent.<sup>280</sup> The monarch had long been understood to have some repository of inherent power to respond to emergencies and to prevent injustices in particular cases, especially when Parliament was not in session.<sup>281</sup> In particular, a king could grant limited dispensations from statutes in the face of “emergent inconveniences.”<sup>282</sup> Charles and James

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*Presidency*, 93 COLUM. L. REV. 1, 9-11 (1993).

<sup>275</sup> See Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1677-80 (2012).

<sup>276</sup> U.S. CONST. art. VI, cl. 2.

<sup>277</sup> *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 9 (1936).

<sup>278</sup> LOIS G. SCHWOERER, *THE DECLARATION OF RIGHTS, 1689*, at 59-60 (1981); accord CHRISTOPHER N. MAY, *PRESIDENTIAL DEFIANCE OF “UNCONSTITUTIONAL” LAWS* 4-5 (1998).

<sup>279</sup> Carolyn A. Edie, *Tactics and Strategies: Parliament’s Attack Upon the Royal Dispensing Power 1597-1689*, at 29 AM. J. LEGAL HIST. 197, 198-99 (1985).

<sup>280</sup> See *id.* at 200-09. TIM HARRIS, *REVOLUTION: THE GREAT CRISIS OF THE BRITISH MONARCHY, 1685-1720*, at 337-40 (2007).

<sup>281</sup> Edie, *supra* note 279, at 203.

<sup>282</sup> *Thomas v. Sorrel* (1673), 84 Eng. Rep. 689, 689, 3 Keble 223, 224 (Rainsford, J.); see also *The Case of Monopolies* (1591), 77 Eng. Rep. 1260, 1265-66, 11 Co. Rep. 84b, 88a (Coke, C.J.); Lucius Wilmerding, Jr., *The*

would stretch the principle, however, by suspending and granting dispensations from laws in the absence of any emergency or special circumstance, simply because they did not agree that the laws served the national interest.

The principal flashpoint in the Restoration-era struggles over the suspension and dispensing powers was the question of religion. Charles II secretly and James II openly professed the Roman Catholic faith, which was awkward given that the king was supreme head of the “church by law established,” the Church of England. In then-recent memory, radical Protestants had overthrown the government in the English Civil War, and real or imagined “Popish Plots” were thought an ever-present danger to political stability.<sup>283</sup> On March 15, 1672, Charles II issued a Declaration of Indulgence, unilaterally suspending the penal laws against Catholics and Protestant nonconformists.<sup>284</sup> Speaking in the royal first person plural, the King decreed: “We do . . . declare our will and pleasure to be that the execution of all and all manner of penal laws in matters ecclesiastical, against whatsoever sort of nonconformists or recusants, be immediately suspended, and they are hereby suspended.”<sup>285</sup> Charles II’s unilateralism enraged Parliament, which forced the king to rescind the declaration. On his accession to the throne in 1685, James II reopened the issue. Not trusting Protestant militias and local gentry for protection against rebellion, he attempted to create a standing army under the control of Catholic officers, and to put Catholic peers in key positions in the Privy Council and the government. To achieve this end, he granted “dispensations” from the Test Act, which barred Catholics and other dissenters from offices of state.<sup>286</sup> A parliamentary address responded that the Test Act “can no way be taken off but by an act of parliament.”<sup>287</sup> James then disbanded the Parliament, fired judges he expected to be uncooperative, and arranged a test case before a hand-picked panel of twelve judges.<sup>288</sup> With one dissent, the court concluded “that the Kings of England were absolute Sovereigns; that the laws were the King’s laws; that the King had a power to dispense with any of the laws of Government as he saw necessity for it; [and] that he was the sole judge of that necessity.”<sup>289</sup> Emboldened by *Godden*, James II suspended the ecclesiastical laws by issuing his own Declaration of Indulgence.<sup>290</sup> Adding insult to injury, he required all Anglican clergy to read it

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*President and the Law*, 67 POL. SCI. Q. 321, 322-23 (1952).

<sup>283</sup> See, e.g., JOHN POLLOCK, *THE POPISH PLOT: A STUDY IN THE HISTORY OF THE REIGN OF CHARLES II* (1903).

<sup>284</sup> See, e.g., Corporation Act 1661, 13 Car. 2 st. 2 c. 1 (requiring certain officials to profess faith in the Church of England and renounce Catholicism).

<sup>285</sup> Charles II, Declaration of Indulgence 1672, in 8 ENGLISH HISTORICAL DOCUMENTS: 1660–1714, at 387 (Andrew Browning ed., 1966).

<sup>286</sup> See Alfred F. Havighurst, *James II and the Twelve Men in Scarlet*, 69 L. Q. REV. 522, 529-33 (1953).

<sup>287</sup> SCHWOERER, *supra* note 278, at 63 (quoting 8 ANCHITELL GREY, DEBATES IN THE HOUSE OF COMMONS, FROM THE YEAR 1667 TO THE YEAR 1694, at 362 (1769)).

<sup>288</sup> *Godden v. Hales* (1686), 89 Eng. Rep. 1050, 2 Show. K.B. 475.

<sup>289</sup> 89 Eng. Rep. at 1051, 2 Show. K.B. at 478.

<sup>290</sup> James II, Declaration of Indulgence 1687, in 8 ENGLISH HISTORICAL DOCUMENTS: 1660–1714, at 395, 396-97 (Andrew Browning ed., 1966). It declared:

aloud from their pulpits.<sup>291</sup> The famed “Seven Bishops”—the Archbishop of Canterbury and six others—petitioned the king to withdraw the order, disputing its legality. James charged the bishops with seditious libel—the alleged libel being that the bishops falsely denied the king’s power to suspend the Test Act and to grant dispensations from it.<sup>292</sup> Remarkably, the King’s Bench split 2-2.

The most ardent defender of the bishops was Justice John Powell. In explaining his vote against the king and the exercise of his dispensing power, Justice Powell observed:

Gentlemen, I do not remember, in any case in all our law (and I have taken some pains upon this occasion to look into it), that there is any such power in the king, and the case must turn upon that. In short, if there be no such dispensing power in the king, then that can be no libel which they presented to the king, which says, that the declaration, being founded upon such a pretended power, is illegal.

Now, gentlemen, this is a dispensation with a witness; it amounts to an abrogation and utter repeal of all the laws; for I can see no difference, nor know of none in law, between the king’s power to dispense with laws ecclesiastical, and his power to dispense with any other laws whatsoever. If this be once allowed of, there will need no parliament; all the legislature will be in the king, which is a thing worth considering, and I leave the issue to God and your consciences.<sup>293</sup>

With that spirited indictment of the king’s dispensing power, the court sent the case to a jury. The jury, in turn, acquitted the bishops. “When the verdict ‘Not Guilty’ was announced, there were several great shouts in the hall and as news of the acquittal spread into London and beyond, so did the shouting and huzzas.”<sup>294</sup>

Public jubilation over the bishops’ acquittal quickly turned into anger against James II and his executive overreach. “The charge had been one of libel, but the verdict was against the

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that from henceforth the execution of all and all manner of penal laws in matters ecclesiastical . . . be immediately suspended; and the further execution of the said penal laws and every of them is hereby suspended.

...  
[W]e do hereby further declare, that it is our royal will and pleasure that the oaths commonly called the oaths of supremacy and allegiance, and also the several tests and declarations mentioned in the [Test Acts] shall not at any time hereafter be required to be taken, declared or subscribed by any person or persons whatsoever, who is or shall be employed in any office or place of trust, either civil or military, under us or in our government. And we do further declare it to be our pleasure and intention from time to time hereafter, to grant our royal dispensations under our great seal to all our loving subjects so to be employed, who shall not take the said oaths, or subscribe or declare the said tests or declarations, in the abovementioned Acts and every of them.

<sup>291</sup> See 1 A BIBLIOGRAPHY OF ROYAL PROCLAMATIONS OF THE TUDOR AND STUART SOVEREIGNS AND OF OTHERS PUBLISHED UNDER AUTHORITY 1495-1714, at 468 no. 3869 (R. Steele ed., 1910).

<sup>292</sup> Case of the Seven Bishops (1688), 12 How. St. Tr. 183.

<sup>293</sup> *Id.* at 427.

<sup>294</sup> Edie, *supra* note 279, at 229 (internal quotation marks omitted).

prerogative.”<sup>295</sup> Leading citizens invited the husband of James’s eldest daughter, William of Orange, to depose James II and assume the English throne as co-monarch with his wife.<sup>296</sup> William issued a public Declaration of Reasons in support of his move against James. Chief among those reasons was his predecessor's exercises of the dispensing power:

[James II’s evil Counsellors] with some plausible Pretexts, did invent and set on foot the King’s dispensing Power; by virtue of which they pretend, that, according to Law, he can suspend and dispence with the Execution of the Laws, that have been enacted by the Authority of the King and Parliament, for the Security and Happiness of the Subject; and so have rendered those Laws of no Effect: Though there is nothing more certain, than that, as no Laws can be made but by the joint Concurrence of King and Parliament, so likewise Laws so enacted, which secure the publick Peace and Safety of the Nation, and the Lives and Liberties of every Subject in it, cannot be repealed or suspended but by the same Authority.<sup>297</sup>

The next year, in 1689, Parliament set out to draft the English Bill of Rights. It started by abolishing the suspending and dispensing powers.<sup>298</sup> Sir Henry Capel explained on the floor of the House of Commons: “We know the king has prerogatives, but to say, ‘he has a Dispensing Power,’ is to say, ‘there is no law.’”<sup>299</sup> Sir William Williams agreed: “Is any thing more pernicious than the Dispensing Power? There is the end of all the legislative power, gone and lost.”<sup>300</sup>

The Glorious Revolution produced two different parliamentary lists of rights: The Declaration of Rights of February 12, 1689, and the Bill of Rights of December 16, 1689. The former was an assertion of already-established rights and the latter also contained changes to constitutional practice, which required the assent of King William as well as of Parliament to take effect.<sup>301</sup> The authors of these documents evidently believed the Suspending Power wholly unlawful, but the Dispensing Power merely misused. Both the Declaration and the Bill gave first priority to the Suspending/Dispensing issue. The first declaration of the Bill of Rights reads:

That the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal;

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<sup>295</sup> *Id.*

<sup>296</sup> See CORINNE COMSTOCK WESTON & JANELLE RENFROW GREENBERG, SUBJECTS AND SOVEREIGNS: THE GRAND CONTROVERSY OVER LEGAL SOVEREIGNTY IN STUART ENGLAND 231-57 (1981); Carolyn A. Edie, *Revolution and the Rule of Law: The End of the Dispensing Power, 1689*, 10 EIGHTEENTH-CENTURY STUD. 434, 440 (1977).

<sup>297</sup> 10 JOURNAL OF THE HOUSE OF COMMONS, 1688-1693, at 1 (1802).

<sup>298</sup> See Edie, *supra* note 279, at 440-42.

<sup>299</sup> 5 COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND 262 (William Cobbett & John Wright eds., 1809).

<sup>300</sup> *Id.* at 263

<sup>301</sup> HARRIS *supra* note [X], at 333-34, 347, 349-50. The Convention in Scotland adopted two similar documents, varying in details, entitled the Claim of Right and the Articles of Grievances. *Id.* at 395-404. These English and Scottish documents likely served as the model for the unique instrument passed by the New York Ratifying Convention on July 26, 1788. It contained both a list of constitutional principles the New York ratifiers thought

The second declaration reads:

That the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal. . .

The Bill of Rights placed a future limitation on the Dispensing Power, providing that the Power could be used in the future only with respect to statutes specifically including a provision allowing for it.<sup>302</sup> This eliminates the Dispensing Power as a prerogative; it becomes nothing more than a delegated power to make exceptions when the legislature allows.

It became a basic tenet of British legal thought that the suspending and dispensing powers were inconsistent with the rule of law and subversive of the balanced constitution. Blackstone, the constitutional framers' leading authority on British law, wrote that "the suspending or dispensing with laws by regal authority, without consent of parliament, is illegal."<sup>303</sup> The eminent jurist Lord Mansfield, similarly, stated that "I can never conceive the prerogative to include a power of any sort to suspend or dispense with laws."<sup>304</sup> That is so, Mansfield explained, because "the duty of [the executive branch] is to see the execution of the laws, which can never be done by dispensing with or suspending them."<sup>305</sup>

Americans were well aware of these controversies and of this resolution. Three early state constitutions repudiated the Dispensing and Suspending Powers in so many words.<sup>306</sup> The language adopted to describe the presidential function of law execution precluded any power to dispense with or suspend the law (outside of the pardon power), at least with respect to laws conceded to be constitutional. The extent of presidential power to disregard – and thus dispense with – laws he reasonably believes to be unconstitutional, raises entirely different questions and is beyond the scope of this study.

The initial proposal, Resolution 7 of the Virginia Plan, gave the national executive "a general authority to execute the National laws."<sup>307</sup> Because it was framed as an "authority" and not a duty, the language was not inconsistent with an invocation of the Dispensing and

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inherent in the Constitution and a list of proposed amendments.

<sup>302</sup> *Id.* at 350.

<sup>303</sup> 1 BLACKSTONE, *supra* note 20, at \*186.

<sup>304</sup> 16 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND 267 (John Wright ed., 1813). Cobbett states that "This Speech was supposed to be penned by lord Mansfield, but was, in fact, written by Mr. Macintosh, assisted by lord Temple and lord Lyttleton." *Id.* at 251.

<sup>305</sup> *Id.*

<sup>306</sup> Section 7 of the Virginia Declaration of Rights (1776) provided "[t]hat all power of suspending laws, or the execution of laws, by any authority without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised." 4 THE FOUNDERS' CONSTITUTION 123 (Philip B. Kurland & Ralph Lerner eds., 1987). Section 7 of the Delaware Declaration of Rights and Fundamental Rules (1776) said "[t]hat no Power of suspending Laws, or the Execution of Laws, ought to be exercised unless by the Legislature." *Id.* at 124. And Chapter 1, Article 17 of the Vermont Constitution (1786) declared that "[t]he power of suspending laws, or the execution of laws, ought never to be exercised, but by the Legislature, or by authority derived from it, to be exercised in such particular cases only as the Legislature shall expressly provide for." *Id.*

<sup>307</sup> 1 FARRAND, *supra* note 12, at 21.

Suspending Powers. Presumably, the President could exercise this “authority,” or not, just as he may exercise the authority to veto, to pardon, or to recommend legislation. On June 1, however, the Convention modified the language significantly, now imparting the power “to carry into execution the national Laws.”<sup>308</sup> This was still worded as a power rather than a duty, but the power is only to carry the laws into execution, not to suspend or dispense with them.<sup>309</sup> This language was adopted by the Convention and eventually committed to the Committee of Detail.

The Committee’s first internal draft—the one in Randolph’s handwriting—carried forward the same language. It was only in the Committee’s third internal draft—the one in Wilson’s handwriting—that significant changes were made. This draft both added an executive Vesting Clause and also reworded the law execution power as a duty, borrowing language from the Pennsylvania and New York constitutions: “He shall take Care to the best of his Ability, that the Laws of the United States be faithfully executed.”<sup>310</sup> This language had not been considered, let alone adopted, by the Convention before the Committee chose to substitute it for the June 1 formulation. Various possible implications of the “take Care” wording will be discussed below.<sup>311</sup> For now, the significance is that the President has the duty, not just the authority, to carry the laws of the nation into execution. As Sai Prakash has pointed out,<sup>312</sup> there is no smoking gun connecting the language of the Take Care Clause to repudiation of the asserted prerogatives of suspending or dispensing with the laws. No one at the Convention said the reason for the clause’s wording is to preclude the possibility that an executive might assert the powers to suspend or dispense with the laws. However, it would be hard to imagine language that would preclude those prerogatives more effectively. Given that the Committee explicitly dealt with almost all the royal prerogatives, and especially the notorious prerogatives that had animated the overthrow of Charles I and James II, it is reasonable to infer that the Take Care Clause was intended and understood to do exactly that.<sup>313</sup> In its only opinion squarely addressing the Take Care Clause, the Supreme Court so held. Andrew Jackson had asserted that the Take Care Clause gives the President discretion not to execute a law passed by Congress. The Court stated:

It was urged at the bar, that the postmaster general was alone subject to the direction and control of the President, with respect to the execution of the duty

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<sup>308</sup> *Id.* at 67.

<sup>309</sup> The structure is parallel to that of the Necessary and Proper Clause.

<sup>310</sup> *Id.* at 171. Handwritten emendations by Rutledge struck that language in favor of: “It shall be his duty to provide for the due & faithful exec — of the Laws of the United States.”

<sup>311</sup> See *infra* section II.F.

<sup>312</sup> Prakash, *supra* note 6, at 778.

<sup>313</sup> This seems to be the consensus of most, but not all, scholars. See MAY, *supra* note 278, at 16 n.58 (collecting the “[m]any scholars [who] have agreed that the Take Care Clause was meant to deny the president a suspending or dispensing power”). So far as I know, no scholar believes the President has an implied Suspending or Dispensing Power, though some may think that prosecutorial discretion comes close to, or is hard to distinguish from, these prerogatives. See Zachary S. Price, *Law Enforcement as Political Question*, 91 NOTRE DAME L. REV. 1571 (2016); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2014).

imposed upon him by this law, and this right of the President is claimed, as growing out of the obligation imposed upon him by the constitution, to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a dispensing power, which has no countenance for its support in any part of the constitution; and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the President with a power entirely to control the legislation of congress, and paralyze the administration of justice.

To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.<sup>314</sup>

In sum, the President—like the post-Glorious Revolution monarch—has neither the power to make law nor the power to repeal or ignore law. However, one last prerogative power, the pardon power, may seem a bit at odds with the framers’ rejection of the suspending and dispensing powers. The king had an absolute prerogative to pardon persons accused or convicted of crime. This power was retained in the presidency, essentially in the same language as in Blackstone.<sup>315</sup> Because the power is plenary, it can be used even when a pardon would undermine the faithful execution of the laws. It is not, however, tantamount to a suspending or dispensing power. Unlike the suspending power, a pardon leaves the underlying law in force. And unlike the dispensing power, a pardon cannot give prospective rights to violate the law. The pardon operates only retrospectively, by lifting all the penalties for violation.

Moreover, the Article II pardon power contains two limitations not found in the British royal equivalent. First, in a bow to federalism, the President’s pardon power was confined to “Offenses against the United States.” Most criminal convictions in the United States are under state law. Second, the pardon power does not extend to “Cases of Impeachment.” This was probably an unnecessary limitation, since impeachment is not a criminal proceeding, but it shows the framers’ concern that the President not be able to shield his minions from congressional retribution. The latter had been a question mark under British constitutional practice.<sup>316</sup>

#### *D. Powers with Respect to the Legislature*

The king had extensive powers with which to control the legislative branch. He could decide when and whether to call a Parliament; he could prorogue Parliament, preventing it from meeting; and he could dismiss Parliament, displacing all the members of the House of Commons

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<sup>314</sup> *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 612-13 (1838).

<sup>315</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>316</sup> See 4 WILLIAM BLACKSTONE, COMMENTARIES \*399-400 (noting “a restriction of a peculiar nature” with respect to pardons “in case of parliamentary impeachments,” which permitted the King to pardon *after* impeachment, but not *before* to bar “so as to impede the inquiry”).

and requiring them to stand for election.<sup>317</sup> Unless he had a need for funds, he could rule without Parliament. If he came into political conflict with a particular parliament, he could get rid of it; if members were compliant, he could keep them in power for years. Charles I dismissed the Short Parliament after a single fractious meeting; Charles II kept the Cavalier Parliament in place for almost eighteen years. By the mid-eighteenth century, these powers over the timing of elections and sittings were largely unnecessary because of the “influence” the Crown cultivated through its control of patronage, discussed below. Even as a formal matter, these powers over the timing of elections and sittings of Parliament were curbed by the Triennial Acts, which required elections at least every three years (later replaced by the Septennial Act, lengthening the maximum period between elections to seven), and the Militia Act, which by requiring annual reauthorization of funding for the military guaranteed sittings at least once a year.<sup>318</sup> But colonial governors exercised parallel prerogatives with a vengeance. The Declaration of Independence condemned the practice: “He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people. He has refused for a long time, after such dissolutions, to cause others to be elected . . . .”<sup>319</sup> (The “He” in these condemnations refers to the king, to whom were attributed the actions of royal governors.)

The king also, at least in theory, had an absolute veto over all legislation.<sup>320</sup> No monarch had used the veto in Parliament since Queen Anne, but both colonial governors and the Board of Trade “negatived” the bills of colonial legislatures with some frequency—also a grievance raised by the Declaration of Independence. In addition, the king had the persuasive power to address the Parliament at the beginning of the session with proposals for legislative action. In Scotland, the king had even more power over the Parliament. A select committee, the Lords of the Articles, appointed by the king, controlled the legislative agenda, much like the House Rules Committee does our House of Representatives.

The framers adopted some of these prerogative powers and not others. The President was stripped of all powers with respect to timing of legislative sessions and the timing and conduct of elections. Some of these issues were fixed by the Constitution itself: Article I sets fixed terms of legislative office and provides that Congress must meet annually on a specified date. The two houses decide when to adjourn. The President’s sole power over the timing of congressional sessions is to call special sessions “on extraordinary occasions” and to adjourn Congress if the two houses cannot agree on a date for adjournment.

But one of the principal functions of the executive, in the Madisonian vision, was to check the excesses and improvident acts of the legislature. Between the first wave of hyper-

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<sup>317</sup> See generally CHITTY, *supra* note 20, at 67-75 (discussing “the Prerogative with respect to the Houses of Parliament”).

<sup>318</sup> Triennial Act 1641, 16 Car. 1 c. 1; Septennial Act 1716, 1 Geo. 1 St. 2 c. 38; Militia Act 1745, 19 Geo. 2 c. 2.

<sup>319</sup> THE DECLARATION OF INDEPENDENCE para. 7-8 (U.S. 1776).

<sup>320</sup> CHITTY, *supra* note 20, at 74-75.

whiggish state constitutions in 1776 and the Convention’s meeting in 1787, many Americans had come to recognize the need for checks on the “excesses of democracy,”<sup>321</sup> what Madison would later call “republican remed[ies] for the diseases most incident to republican government.”<sup>322</sup> Among these were longer terms, larger districts, bicameral legislatures, independent executives, the veto, independent judiciaries, and bills of rights. Toward this end, the Convention on June 4 voted to give the President a veto on all legislation, subject to override by vote of two thirds of both houses. The veto is an extraordinarily potent political power, enabling the President to block legislation – even legislation designed to curb his own power – with the support of as few as a third of one of the branches. Even so, Hamilton and others<sup>323</sup> thought the presidential veto should be made absolute, and Madison feared the President would be too timid to exercise it on his own.

This embrace of a presidential veto power reflected a remarkable shift in American opinion. Probably because of the venality and abuse of the veto by colonial governors—of which Franklin reminded his fellow delegates at length<sup>324</sup>—none of the early state constitutions, save Massachusetts, gave their governors any veto at all. At the Convention, however, support for at least a qualified veto was overwhelming: eight states in favor and only two opposed.

The veto was the first example at the Convention of giving the President a royal prerogative qualified by the possibility of override. In this sense, the framers may have thought they were giving their new republican executive magistrate less power than the king. But in practice, as Hamilton mentioned, the “King of G. B. had not exerted his negative since the [Glorious] Revolution”<sup>325</sup>—or, more accurately, since 1707.<sup>326</sup> It was thought that a royal veto would foster a constitutional crisis. It is possible that a qualified veto is politically more useful than an absolute veto, precisely because it is perceived as an aspect of ordinary legislative give-and-take rather than the imposition of monarchical will.

The Convention also retained the king’s prerogative of addressing the legislative branch and proposing a legislative agenda: what the British called “the King’s Speech” and we call the “State of the Union.” Under British constitutional theory, Parliament could meet only if summoned by the king, and the king opened each session (usually in person) with a speech explaining the purposes for which they were called, to which Parliament would respond with a written answer. This exchange set the legislative agenda for the session.<sup>327</sup> The speech thus had its roots in a prerogative power of the Crown, which the President does not have—the

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<sup>321</sup> 1 FARRAND, *supra* note 12, at 48 (Gerry) (“The evils we experience flow from the excess of democracy.”).

<sup>322</sup> THE FEDERALIST No. 10, at 79 (James Madison) (Clinton Rossiter ed., Signet Classic ed. 1999).

<sup>323</sup> According to King’s Notes, on June 4 Wilson, Hamilton, and King supported an absolute veto. 1 FARRAND, *supra* note 12, at 107-08. In August, Gouverneur Morris and George Read pushed unsuccessfully to make the veto absolute. 2 FARRAND, *supra* note 7, at 200.

<sup>324</sup> 1 FARRAND, *supra* note 12, at 98-99 (June 4).

<sup>325</sup> *Id.* at 98 (June 4).

<sup>326</sup> See Robert J. Spitzer, *The President’s Veto Power*, in CRONIN, *supra* note 6, at 157.

<sup>327</sup> See 1 MICHAEL MACDONAGH, THE PAGEANT OF PARLIAMENT 201 (1921).

prerogative to summon Parliament—but the speech itself was not generally listed as among the royal “prerogatives,” at least not by Blackstone or Chitty. Nonetheless, the combination of the power to propose a legislative agenda and to veto legislation gives the President a potentially dominating role in national legislative affairs. Instead of a king armed with the bulk of the sovereign power, but checked by a legislature, the Constitution established an executive with few prerogative powers, but unprecedented political weight.

The unique power to propose a legislative agenda stimulated little debate either at the Convention or during ratification. *The Federalist* commented that “no objection has been made to this class of authorities; nor could they possibly admit of any.”<sup>328</sup> But this *should* be surprising. These powers cannot possibly be regarded as executive in nature. They are unmistakably legislative. They are among the most conspicuous of the Constitution’s deviations from the theory of separation of powers.

The idea of a presidential power to give information and recommendations to Congress first appeared in the Committee of Detail. It had not previously been broached at the Convention, though it had antecedents in both the New York and Pennsylvania constitutions,<sup>329</sup> as well as British practice. Randolph did not include anything of the sort in his first draft within the committee (Farrand’s Document IV), but it was added to that document in Rutledge’s handwriting: “[the executive] shall propose to the Legisle. from Time to Time by Speech or Messg such Meas as concern this Union.”<sup>330</sup> The third internal version, in Wilson’s handwriting (Farrand’s Document IX), originally provided: “He shall from Time to Time give information of the State of the Nation to the Legislature; he may recommend Matters to their Consideration.”<sup>331</sup> In Rutledge’s handwriting on Wilson’s draft, the Committee amended this to read: “He shall from Time to Time give information to the Legislature of the State of the Union; he may recommend such measures as he shall judge nesy. & expedt. to their Consideration.”<sup>332</sup> This shows that in at least two different meetings, the Committee of Detail discussed the Clause and tinkered with its language. The wording was carefully considered.

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<sup>328</sup> THE FEDERALIST No. 77, at 462 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classic ed. 1999).

<sup>329</sup> N.Y. CONST. of 1777 art. 19; PA. CONST. of 1776 § 20 (providing that the president and his council “are to . . . prepare such business as may appear to them necessary to lay before the general assembly”); *see also* N.C. CONST. of 1776 art. 19 (providing that the Governor “shall have the power to . . . *apply* for such sums of money as shall be voted by the general assembly”). Some states created an executive council that was authorized to advise on legislation. *See* GA. CONST. of 1777 art. 20. Others authorized the legislature to obtain records of the council’s advice to the executive. *See* N.C. CONST. of 1776 art. 14; S.C. CONST. of 1778 art. 9. Most states permitted the executive to convene the legislative bodies in times of emergency, but made no mention of an executive power to address the bodies once convened. *See, e.g.,* VA. CONST. of 1776; DEL. CONST. of 1776 art. 10.

<sup>330</sup> 2 FARRAND, *supra* note 7, at 145. Recall that this does not necessarily mean the Clause was Rutledge’s idea; he could have been chairing a meeting of the committee and recording its collective decisions by making deletions and additions on Randolph’s draft.

<sup>331</sup> *Id.* at 171.

<sup>332</sup> *Id.*

When the proposal reached the Convention floor, Gouverneur Morris moved to substitute an “and” for the semi-colon, emphasizing that the power to recommend measures, like the power to impart information to Congress, is a “duty.” The motion was adopted.<sup>333</sup> Morris explained that the change was needed to “prevent umbrage or cavil at his doing it.”<sup>334</sup> This suggests he knew that executive recommendations might be regarded as an invasion of the legislative role as the initiator of all laws. The Clauses engendered no other debate or discussion.

The Convention thus converted a royal power into a presidential duty, but it is a peculiar kind of duty. The President must present information of the state of the union and must make recommendations for legislative action, but he is the judge of when and how often to do this (“from time to time”) and is vested with power to judge what measures to recommend (those “he shall judge necessary and expedient”). This looks more like a discretionary power, or at least a privilege, than a duty.<sup>335</sup> But it is a privilege with the formal trappings of a duty. If Morris’s explanation can be attributed to the drafters as a whole, these functions were framed as duties in order to make their exercise more palatable. By describing these informational and recommendatory functions as a duty, the Constitution gives them the appearance of a service to Congress rather than a prerogative of the executive magistrate. That feels more democratic.

The Committee of Detail also robbed the parliamentary practice of regal overtones by allowing the executive address “from time to time” rather than making it mark the start of each legislative session. Oddly, in practice, royal precedent has prevailed over the constitutional wording. The State of the Union quickly became the most royal of all features of the executive. The President’s speech summons all the pageantry and solemnity of the royal address; nothing more clearly depicts the President as more than a co-equal branch of democratic government than the sight of him in front of a respectful audience, whose members are commanded by the occasion (and maybe even the constitutional text) to receive his words with serious “Consideration.”

This reversion to British norms may be laid at the feet of the first President, George Washington. Although the constitutional text merely requires the provision of “Information” to Congress “from time to time,” President Washington established the tradition of doing so in a single, highly publicized, in-person speech near the start of the first session of Congress, in imitation of the king. This gives the occasion its ceremonial punch. Washington delivered the State of the Union speech in the Senate chamber, not the more spacious House—just as the king

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<sup>333</sup> *Id.* at 398 (Journal).

<sup>334</sup> *Id.* at 405.

<sup>335</sup> Hamilton, writing in *The Federalist*, referred to the State of the Union and Recommendation Clauses, along with the remainder of the powers in what is now Article II, Section 3, as a “class of authorities”—suggesting that he thought of them as powers rather than duties. *THE FEDERALIST* No. 77, at 462 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classic ed. 1999).

delivered his Speech in the House of Lords.<sup>336</sup> The form of Washington’s speech, recommending certain topics to congressional consideration rather than presenting concrete proposals or draft legislation, also followed royal practice.<sup>337</sup> Congress, in turn, mimicked the parliamentary role; each House drew up a written answer to Washington’s speech—something the constitutional text did not suggest. When he became president, Jefferson broke from the practice of oral delivery and congressional response, thinking it “an English habit, tending to familiarize the public with monarchical ideas.”<sup>338</sup> (Only in the twentieth century, beginning with Woodrow Wilson, did Presidents return to Washington’s more royal approach, and only since Franklin Roosevelt has this become standard custom.<sup>339</sup>)

Morris’s motion also made the functions of information and recommendation giving perfectly parallel. Contrary to modern understanding, the provision does not contain two clauses, one establishing an annual “State of the Union” speech and the other allowing occasional recommendations from the White House to Capitol Hill.<sup>340</sup> Rather, it is a single provision giving the President power over the timing and content of the communication of both “information” and “recommendations” to Congress.

The Information and Recommendation Clause is the clearest indication that the drafters expected and intended the President to have a role (perhaps the leading role) in policy formation—and not be consigned to the purely executive role of carrying out legislative acts, or the checking role of vetoing improvident bills. The control of information flows from the executive to the legislative branch is important even today. (Consider, for example, the advance review by OMB of congressional testimony by executive officers and the frequent squabbles over executive “stonewalling” of information demands by Congress.) But the provision of “information” and “recommendations” was all the more important under the conditions of the

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<sup>336</sup> WILLIAM MACLAY, *JOURNAL OF WILLIAM MACLAY* 174, 176 (Edgar S. Maclay ed., 1890) (suggesting that President Washington, who delivered his January 8, 1790 speech in the Senate chamber, “wishes everything to fall into the British mode of business”); *see also* Kathleen M. Jamieson, *Antecedent Genre as Rhetorical Constraint*, 61 *Q. J. OF SPEECH* 406, 412 (1975). These decisions were not happenstance. In a document given to Madison by Hamilton near the close of the Convention, containing the latter’s private notions about what the Constitution should have looked like (not to be confused with the Plan he presented on the Convention floor), Hamilton proposed:

The President at the beginning of every meeting of the Legislature as soon as they shall be ready to proceed to business, shall convene them together at the place where the Senate shall sit, and shall communicate to them all such matters as may be necessary for their information, or as may require their consideration.

<sup>337</sup> *See* J.L. DE LOLME, *THE CONSTITUTION OF ENGLAND* 237 (1807).

<sup>338</sup> Letter from Thomas Jefferson to the President of the Senate and Speaker of the House of Representatives (Dec. 8, 1801); JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 56 (1987); Vasan Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 *WM. & MARY L. REV.* 1, 19, 41 n.166 (2002).

<sup>339</sup> Kesavan & Sidak, 44 *WM. & MARY L. REV.* at 19.

<sup>340</sup> Kesavan and Sidak, in their leading (and highly informative) article on the Clause, treat the “State of the Union Clause” as requiring a speech and the “Recommendation Clause” as a continuing power, rather than recognizing them both as requiring “information” and “recommendations” from time to time, in either oral or written form. *See id.* at 6-7, 35.

early republic, when members of Congress had no staff and no other institutional means of obtaining the information they need for legislative deliberations. The Information and Recommendation Clause gave the President the upper hand even with regard to legislation.

The constitutional text is attentive to the need for Congress to have access to information. It expressly compels the executive to provide four specified types of information, and inferentially three others. Article II, Section 3 requires the President to provide information on the state of the union, and also recommendations for legislative enactments. The Appropriations Clause of Article I, Section 9 requires that a “regular Statement and Account of the Receipts and Expenditures of all public money” be “published from time to time.” The Veto Clause of Article I, Section 7 requires that the President must provide his “Objections” to any bill he may veto, which objections must be entered in the Journal of the House that originated it. In addition, under the established practice of advice and consent, the Senate is entitled to all relevant information and documents related to treaties and nominations to office.<sup>341</sup> Likewise, the power of the House to impeach and of the Senate to try all impeachments implies the power to compel testimony and evidence, as in any other criminal or quasi-criminal proceeding. Beyond these six congressional entitlements, the President has a degree of control. The Information Clause requires that he provide information to Congress “from time to time,” which means he has an obligation to do so with some frequency, but there is no suggestion that Congress has a right to demand any particular information at any particular time.

Comparison of the Information and Recommendation Clause to the Opinions in Writing Clause shows a striking asymmetry in the authority of the President and of the Congress to obtain relevant information. The President may “require” the opinion of the heads of each executive department “upon any Subject relating to the Duties of their respective Offices.” Congress is given no such power.<sup>342</sup> Instead, Article II specifies that both the “information” imparted to Congress from the executive and the executive’s “recommendations” for legislative measure are to be provided “as he shall think necessary and expedient,” and not at Congress’s command.<sup>343</sup> During the Washington administration, there were repeated debates over whether Congress had an inherent right to call for information from executive branch officers, incidental to its powers to legislate and conduct investigations.<sup>344</sup> These did not flare up into major constitutional

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<sup>341</sup> For an early example of the Senate “ordering” the Secretary of Foreign Affairs to supply information relevant to a treaty, see Senate Executive Journal, at 6 (June 12, 1789). The Secretary, John Jay, complied the next day. *Id.* at 7.

<sup>342</sup> This asymmetry is thrown into starker relief when one considers that several early state constitutions provided just the opposite: the South Carolina and North Carolina legislatures were empowered to request information from the executive’s advisory council, but not vice versa. See *supra* note 329.

<sup>343</sup> The First Congress passed legislation requiring the Secretary of the Treasury (unlike other heads of departments) to make reports directly to Congress. This appears to relate to Congress’s unique power of the purse, and perhaps to the constitutional provision requiring a “regular” statement of receipts and expenditures. The statute may not have been constitutional. See Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 227-28, 241 (1989).

<sup>344</sup> An excellent account of these conflicts may be found in SOFAER, *supra* note 6, at 77-93.

conflicts because Washington made it a practice to provide information in most cases. Washington insisted, though – and the Congress complied – that requests for information from officers be directed to him,<sup>345</sup> so that he could exercise his discretion in the matter. This comports with the text, but not with current practice, under which Congress may subpoena documents, information, and testimony directly from executive officials, under threat of punishment for contempt of Congress.<sup>346</sup>

#### *E. Offices*

As a practical political matter, the most important prerogative power wielded by the Hanoverian kings in the eighteenth century was the ability to award lucrative and prestigious public benefits to political supporters, including members of Parliament. The more dramatic domestic prerogatives like proclamations, dispensing, or taxation had been repudiated or had, like the veto, fallen into desuetude. But the eighteenth-century kings, working with their ministers, created a vast patronage network with which to bribe, threaten, and cajole majorities in both houses of Parliament. Blackstone wrote in the 1760s: “Upon the whole, therefore, I think it is clear, that, whatever may have become of the nominal, the real power of the crown has not been too far weakened by any transactions in the last century. Much is indeed given up; but much is also acquired.”<sup>347</sup>

The king had power to appoint every officer in the British government other than members of Parliament. He could remove these officers as well, except for judges, who gained “good behavior” tenure by the Act of Settlement in 1701. Moreover, he had power to create new offices, including peerages. Many of these offices had lucrative stipends and few duties. The king thus could purchase the good will of members of Parliament by naming them to sinecures, or securing supportive members by enlisting the favor of those who controlled pocket boroughs.<sup>348</sup> By the time of George III, some two hundred members of the House of Commons benefitted from offices in the gift of the Crown; still others enjoyed lucrative public contracts, shares in Crown monopolies like the East India Company, or the ability to nominate friends and supporters

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<sup>345</sup> *Id.* at 82-83. Interestingly, Jefferson’s notes as Secretary of State reveal that the basis for this insistence was the British practice under which Parliament addressed information requests to the King. THE COMPLETE JEFFERSON 1222-23 (S. Padover ed., 1943). This suggests that Washington’s cabinet believed that precedents involving royal prerogative continued to inform questions of executive power.

<sup>346</sup> The Supreme Court opinion approving this power of Congress over the executive, which arose in connection with the Teapot Dome scandal, made no serious attempt to square it with the constitutional text. *See McGrain v. Daugherty*, 273 U.S. 135 (1927). The *McGrain* opinion notes that “there is no provision expressly investing either house with power to make investigations and exact testimony,” but approves the power as “so far incidental to the legislative function as to be implied.” *Id.* at 161. The opinion does not even mention the constitutional provisions that appear to give the President control over the timing and content of provision of information to Congress. Nor does it address the due process implications of allowing punishment for violation of duties imposed without the protections of bicameralism and presentment. *See Chapman & McConnell, supra* note 275, at 1679.

<sup>347</sup> 1 BLACKSTONE, *supra* note 20, at \*337.

<sup>348</sup> *See EINZIG, supra* note 253, at 122-23, 125-27.

to these privileges.<sup>349</sup> This gave the Crown effective control over the legislative branch. The Oppositionist literature so popular among the American patriots regarded this “corruption” as having undermined the mixed, or “balanced,” British constitution praised by Blackstone and Montesquieu, and considered the result as approaching something like an absolute monarchy.

Other than “peace & war,” these powers relating to offices were the most important, the most conspicuous, and the most controversial of the royal prerogatives existing as of 1787. The framers systematically dismantled the executive ability to dominate the legislature through these methods.

### *1. Creation of Offices*

As Chitty observes, “The prerogative of creating courts and offices has been immemorially exercised by the Kings of England.”<sup>350</sup> Because of its connection to the “corruption” and “influence” so decried by the founding generation, the drafters made certain that the executive would have no power to create offices. Peerages were eliminated altogether by the Titles of Nobility Clause.<sup>351</sup> The Supreme Court was created by the Constitution itself, and the power to create seats on that Court given to Congress; the creation of lower courts was left entirely to Congress.<sup>352</sup>

It is a bit surprising that the power to create other offices not specified in the Constitution was not made express. But there is no doubt that the framers intended and understood this power to be vested in Congress through the Necessary and Proper Clause. On August 20, when the debate over the Committee of Detail draft reached the Necessary and Proper Clause, Madison and Charles Pinckney jointly moved to add the words “and establish all offices” out of concern that it was “liable to cavil” that the power to establish offices might not fall within the general terms of the clause.<sup>353</sup> G. Morris, Wilson, Rutledge, and Ellsworth (three of them members of the Committee of Detail, which had crafted the Necessary and Proper Clause) “urged that the amendment would not be necessary.” Only two states voted for the Madison-Pinckney motion, so it was defeated.<sup>354</sup> Madison still seemed to be concerned. Four days later, during the debate over the executive provisions, Madison successfully moved a minor change in language (from empowering the President to “appoint officers” to empowering him to “appoint to offices”) in order “to obviate doubts that he might appoint officers without a previous creation of the offices by the Legislature.”<sup>355</sup> Then Dickinson moved to limit presidential appointment to “all offices which may hereafter be created by law,” thus making explicit that Congress, not the President,

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<sup>350</sup> CHITTY, *supra* note 20, at 75.

<sup>351</sup> U.S. CONST. art. I, § 9, cl. 8.

<sup>352</sup> U.S. CONST. art. III, § 1.

<sup>353</sup> 2 FARRAND, *supra* note 7, at 345

<sup>354</sup> *Id.*

<sup>355</sup> *Id.* at 405.

has the power to create offices. This passed six states to four.<sup>356</sup> Mysteriously, Madison's and Dickinson's motions seem to have been mislaid or forgotten, because they did not appear in the next full draft of the Constitution, that of the Committee of Style. Instead, on September 15, just two days before the Constitution was finally approved, the Convention unanimously and without debate or explanation added language to the Appointments Clause stating that the President's appointment power extended only to the specified offices and those "which shall be established by law,"<sup>357</sup> restoring the substance of Dickinson's motion. Thus, much like the appropriations power, the final constitutional text contains a double-barreled repudiation of any executive prerogative power to create offices. The Necessary and Proper Clause affirmatively grants Congress this power, and the Appointments Clause denies the President any power of appointment except to offices created "by law."

From an eighteenth-century point of view, certain other prerogative powers—like the power to grant patents and monopolies—were similarly subject to corruption and abuse.<sup>358</sup> The Crown could grant monopoly privileges to a political favorite, and thus purchase political loyalty. The Constitutional Convention assigned this power to Congress, with language limiting the exercise of the power to grant patent and copyright monopolies to "Authors and Inventors" for the purpose of "promot[ing] the Progress of Science and useful Arts."<sup>359</sup> Today, these features of our system seem to have more to do with innovation and free markets, but to our constitutional drafters the main point was to deprive the executive of the ability to grant privileges to certain economic actors as a way of garnering political power.

## 2. Appointment Power

The Appointment Power underwent significant change during the course of the Convention. James Wilson declared the power of appointment to be one of only two "strictly Executive" powers, but evidently many delegates disagreed. For most of the summer, up until the Committee of Postponed Matters, the delegates allocated the appointment power to various branches in accord with their notion of the underlying function of the officers. The Senate, which had authority over foreign affairs, was to appoint ambassadors. The Congress as a whole, which had authority over appropriations, was to appoint the Treasurer. The President appointed the rest, including military officers and ministers of state, with no requirement of senatorial confirmation.

In addition, the Senate was to appoint judges. This appointment power is premised not on any particular senatorial authority over the judicial function, but rather on the well-founded concern that executive appointments of judges were subject to abuse—even with the protections of life tenure and security of salary. George Mason expressed this fear at the Convention: "He

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<sup>356</sup> *Id.* at 405-06.

<sup>357</sup> A confusing footnote in the Journal suggests that this amendment was an interlineation on the copy of the Committee of Postponed Matters draft. *Id.* at 621 n.1. Madison's notes simply report the amendment; the editor's footnote states that this was taken from the Journal. *Id.* at 628.

<sup>358</sup> See CHITTY, *supra* note 20, at 177.

considered the appointment by the Executive as a dangerous prerogative. It might even give him an influence over the Judiciary department itself.”<sup>360</sup> At the time of the Glorious Revolution, some radical whigs proposed that the power to appoint judges be shifted from the monarch to the Parliament: judges “should be chosen by them who are chiefly concern’d, and for whose benefit and protection both the King and Laws were first made and intended,” namely the people, whose representatives are in Parliament.<sup>361</sup> That view might have prevailed at the Convention, but for the delegates’ distrust of the ability of a large body, like the Congress, to make decisions of this sort with responsibility and without “intrigue & cabal.”<sup>362</sup> Ultimately, executive appointment with senatorial advice and consent, a method used in Massachusetts, was accepted as a compromise. As Gouverneur Morris put it, executive nomination brought “responsibility” and senatorial approval gave “security.”<sup>363</sup>

On August 24, during the debate over the executive plank of the Committee of Detail draft, some delegates expressed concern that the President’s ability to appoint all other officers could lead to the sorts of abuses that had corrupted Britain. While admitting it was appropriate for the President to name “many” federal officers, Roger Sherman expressed the opinion that “many ought not to be,” reminding the Convention that “[h]erein lay the corruption in G. Britain.”<sup>364</sup> He proposed that Congress be empowered to negate the President’s appointment power with respect to other offices. This was overwhelmingly rejected.<sup>365</sup> Randolph then “observed that the power of appointments was a formidable one both in the Executive & Legislative hands,” and proposed that some appointments should be referred to state authorities. Wilson and Morris denounced the idea of giving any federal appointment power to the states—Morris said it would make them “viceroys” over the federal government—and Randolph’s motion was rejected without need for a recorded vote.<sup>366</sup> On September 7, Mason, who was growing increasingly dissatisfied with the work of the Convention, stated that “he was averse to vest so dangerous a power [as the appointment power] in the President alone.”<sup>367</sup> He proposed that appointments be entrusted to a Privy Council chosen by the Senate. His suggestion, like most of his suggestions that month, went nowhere.

Toward the end of the Convention, this clear functional allocation of the appointment power was completely scrapped in favor of a homogeneous mixed power. All officers, whatever

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<sup>359</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>360</sup> 2 FARRAND, *supra* note 7, at 83.

<sup>361</sup> HARRIS, *supra* note [X], at 318 (quoting JOHN WILDMAN, *SOME REMARKS ON GOVERNMENT* (1688)).

<sup>362</sup> 2 FARRAND, *supra* note 7, at 42 (Gorham); *id.* at 81 (Randolph); *id.* at 389 (Wilson & G. Morris); *but see id.* at 43 (Sherman) (arguing contrary to the conventional view, that senatorial appointment would be less subject to “intrigue”).

<sup>363</sup> 2 FARRAND, *supra* note 7, at 539. Madison had used the same terms earlier in the session. *Id.* at 42-43 (July 18).

<sup>364</sup> *Id.* at 405.

<sup>365</sup> *Id.*

<sup>366</sup> *Id.* at 406.

<sup>367</sup> *Id.* at 537.

their function, were to be appointed by the President with the advice and consent of the Senate. This change was adopted over the objections of Wilson, who opined that the system “blend[ed] a branch of the Legislature with the Executive,” in violation of the principle of separation of powers, and of Pinckney, who thought the Senate should have no role in appointments other than ambassadors, in whose appointment the President should have no role.<sup>368</sup>

The decision to shift the appointment of ambassadors and judges to presidential nomination with advice and consent was heavily debated and evidently reflected a desire to reduce the role of the Senate, especially in foreign affairs. The decision to limit the President’s ability to appoint other officers, by requiring senatorial advice and consent, was made without much discussion. This was not a trivial change. It was a step away from a fully unitary executive and toward what I will call below “Ultimate Unitariness.” James Wilson, logically, was opposed. But unfortunately, we have no record of the reasoning of the Committee that made the change and no recorded debate that might have illuminated its rationale. (Madison’s notes at this stage of the Convention become especially perfunctory.<sup>369</sup>) Likely, this was a response to the concerns of delegates like Sherman, Randolph, and Mason, who feared that a unilateral appointment power was “formidable” and “dangerous” and would lead to the sort of “corruption” the royal prerogative of appointment had brought in Britain. Gouverneur Morris, who seems to have brokered the compromise, stated simply that “the weight of sentiment in the House, was opposed to the exercise of [the appointment power] by the President alone.”<sup>370</sup>

At the very end of the Convention, on September 14, Rutledge moved to strike the congressional power to name a Treasurer, and to “let the Treasurer be appointed in the same manner with other officers.”<sup>371</sup> The selfsame motion had been rejected a month before,<sup>372</sup> but this time it carried, eight states to three. It is hard to figure out why sentiment changed on this important question. The arguments on both sides remained the same. In favor of congressional appointment was that “[a]s the two Houses appropriate money, it is best for them to appoint the officer who is to keep it.”<sup>373</sup> In favor of executive appointment was the greater “responsibility” of the executive—meaning greater accountability. “[I]f the Treasurer be not appointed by the Legislature,” Gouverneur Morris claimed, “he will be more narrowly watched, and more readily impeached.”<sup>374</sup> The state-by-state vote is utterly unilluminating. Five states changed their votes. New Hampshire, Connecticut, North Carolina, and Georgia voted for congressional appointment in August and presidential appointment in September. Pennsylvania flipped the opposite

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<sup>368</sup> *Id.* at 538-39.

<sup>369</sup> See BILDER, *supra* note 13, at 116-17 (“By the third week in August, Madison had become so involved in the process of revising the draft [constitution] that the Notes completely collapsed.”).

<sup>370</sup> *Id.* at 524.

<sup>371</sup> 2 FARRAND, *supra* note 7, at 614.

<sup>372</sup> *Id.* at 314-15.

<sup>373</sup> *Id.* at 614 (Mr. Sherman).

<sup>374</sup> *Id.*

direction. None of this was explained. Modern constitutional doctrine struggles with the problem of giving the executive the power to monitor its own compliance with the congressional power of the purse.<sup>375</sup> Foxes and henhouses offer a precedent.

On September 15, G. Morris moved to empower Congress to vest the appointment of inferior Officers, “as they think proper,” in the President alone, the courts of law, or the heads of departments, all without senatorial advice and consent. Given Morris’s clear views on the subordination of all executive departments to the President, it seems clear that this was intended simply as a practical measure to deal with the likelihood of the Senate’s frequent absence from the capital on recess, and possibly to save the Senate’s precious time, and not as a back-door assault on the unitary executive. Appointments by the President alone would obviously not undermine the President’s authority, nor would appointments by the heads of departments, assuming the latter were subject to the President’s supervisory authority. As to “courts of law,” the most logical inference is that this refers to judicial branch functionaries, like clerks or bailiffs. The notion that the judiciary could be given the power of appointment to civil offices in the executive branch is so out of step with the framers’ vision of separation of powers that it seems inconceivable that such a thing would pass without comment—even if, alas, the Supreme Court has held otherwise.<sup>376</sup> The practical focus of this amendment is confirmed by the reception Morris’s motion received. The motion was initially rejected by an equally divided vote of five to five, whereupon “[i]t was urged that it be put a second time, some such provision being too necessary, to be omitted.”<sup>377</sup> On the revote, Morris’s motion passed unanimously.

### *3. Removal Power*

The king had the power to remove officers. Only in 1701 did the king lose the ability to cashier uncooperative judges (and that reform did not extend to the colonies).<sup>378</sup> The removal power was vital to the “influence” (or “corruption”) of the Crown. The benefits of a lucrative office might make a member of Parliament grateful; the possibility of losing the benefit rendered a member of Parliament subservient.

The absence of an express disposition of the removal power is perhaps the greatest puzzle of the Convention. The Morris-Pinckney proposal, under which all principal officers would serve “at pleasure” of the President, brought the question of removal to the forefront. Given the undoubted importance of the power, it is truly surprising that the drafters said nothing about it (except in the case of judges). This is the only clear case of an important royal prerogative not

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<sup>375</sup> See *Bowsher v. Synar*, 478 U.S. 714, 722-23 (1986); *U.S. House of Representatives v. Burwell*, 2016 WL 2750935, at \*2 (D.D.C. May 12, 2016).

<sup>376</sup> *Morrison v. Olson*, 487 U.S. 654, 696-97 (1988) (upholding statute vesting appointment of an executive officer in the courts of law).

<sup>377</sup> 2 FARRAND, *supra* note 7, at 627-28.

<sup>378</sup> King William chose to commission judges for good behavior starting in 1694, but this was not legally required. See HARRIS, *supra* note [X], at 352.

expressly dealt with by the Convention. I have no theory to offer about why the removal power did not get the same attention that the appointment power got.

The best reading of the constitutional text is that the President must have the removal authority, at least with respect to all officers vested by Congress with any part of the executive power. The only way a President can take care that the laws are faithfully executed, once an officer has been nominated, appointed, and commissioned, is to threaten (or carry out) removal. This issue has, however, been debated in hundreds of academic papers, dozens of legislative proceedings (including the impeachment of a President), and a large handful of Supreme Court decisions.<sup>379</sup> The view outlined here has not carried the day.

#### *4. Congressional Eligibility for Appointment*

The constitutional drafters viewed the issue of appointment and removal to office primarily from the perspective of their potential for corrupting the legislative branch. Their solution to that problem was simple and absolute:

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.<sup>380</sup>

Members of the Constitutional Convention recognized that this might sometimes preclude appointment of the fittest officers,<sup>381</sup> but the value of precluding the executive from corrupt subvention of the legislature overrode any such drawbacks. The most conspicuous effect of this provision is to preclude the sort of ministerial government Britain has enjoyed since the early nineteenth century.

#### *F. Law Execution*

Execution of the law is the very core of the executive power.<sup>382</sup> In British legal theory, all offenses against the law were offenses against the king—or “the king’s peace.” As Blackstone explained, the king “is therefore the proper person to prosecute for all public offences and breaches of the peace.”<sup>383</sup> Wilson told his fellow delegates that the power “of executing the laws” was, along with appointing officers, “the only power[] he conceived strictly Executive.”<sup>384</sup> No one at the Convention suggested vesting law execution anywhere other than the executive magistrate. Nonetheless, there is surprisingly deep disagreement among scholars regarding where this power is lodged, and which part of the constitutional text does the lodging. There are three

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<sup>379</sup> See *Humphrey’s Executor v. United States*, 295 U.S. 602, 632 (1935); *Morrison v. Olson*, 487 U.S. 654, 696 (1988); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

<sup>380</sup> U.S. CONST. art. I, § 6, cl. 2.

<sup>381</sup> 2 FARRAND, *supra* note 7, at 387-90.

<sup>382</sup> Any reader who has doubts should consult Prakash, *supra* note 6.

<sup>383</sup> 1 BLACKSTONE, *supra* note 20, at \*268.

<sup>384</sup> 1 FARRAND, *supra* note 12, at 66.

(most) relevant provisions. The first sentence of Art. II, the Vesting Clause, provides that “[t]he executive Power shall be vested in a President of the United States.”<sup>385</sup> Art. II, Section 3 provides that the President “shall take Care that the Laws be faithfully executed.”<sup>386</sup> And the eighteenth clause of Article I, Section 8, empowers Congress to pass “all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>387</sup>

There are three logical readings of the combination of these clauses (with numerous minor variations). I call these “Total Unitariness,” “Defeasible Unitariness,” and “Ultimate Unitariness.” (No one else uses those terms, to my knowledge.)

Under the Total Unitariness view, all power vested in the executive branch belongs to the President himself. He may exercise all such powers personally, or he may use the officers and employees supplied him by Congress, but the power is his and the decisions are his. The buck starts and stops with him. Congress may not provide otherwise. This view rests essentially on the first sentence of Article II, which by its terms vests the executive power—all of it—in the President.<sup>388</sup> It follows, as Professor Sai Prakash explains, that “the president may use his executive power to execute the laws himself” or “to direct the law execution of officers.”<sup>389</sup> Because this executive power is constitutionally vested, Congress may not abridge it or take it away. Congress may not insist that an executive action or decision be made by a particular officer of government (other than the President), and may not insulate executive officers from presidential control. “Because the Constitution vests the executive power only in the president’s hands, those who execute the law should be viewed as receiving their authority to execute from the president”<sup>390</sup>—not from Congress. This power rests on the Vesting Clause, and the Take Care Clause does not diminish it in any respect.

A second view, which I call “Defeasible Unitariness,” holds that the Vesting Clause imparts no power whatsoever to the President. “Instead, the clause [merely] announces the title of the single person that enjoys the powers listed in the remainder of Article II.”<sup>391</sup> Given the care with which Article II sets forth and limits the prerogative powers of the Crown, it would be “quite implausible” to read the Vesting Clause as “a residual source of plenary powers in the presidency.”<sup>392</sup> Nor does the Take Care Clause vest the President with the power to direct the officers of the government in their duties. That Clause is a limitation on presidential authority—a duty—rather than a grant of broad discretionary power. It does no more than “den[y] to the

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<sup>385</sup> U.S. CONST. art. II, § 1, cl. 1.

<sup>386</sup> U.S. CONST. art. II, § 3.

<sup>387</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>388</sup> *Morrison v. Olson*, 487 U.S. 654, 705 (Scalia, J., dissenting).

<sup>389</sup> Prakash, *supra* note 6, at 713.

<sup>390</sup> *Id.* at 720.

<sup>391</sup> *Id.* at 706; *see, e.g.,* Reinstein, *supra* note 236, at 307-09.

<sup>392</sup> *Id.* at 308-09.

President the royal prerogatives of suspending and dispensing with statutes.”<sup>393</sup> Under this view, no provision of the Constitution explicitly empowers the President to execute the laws.<sup>394</sup> Any power to execute the laws must be “implied” from the Take Care Clause or imparted by Congress under the Necessary & Proper Clause.<sup>395</sup> Because that power is merely implied, and not a constitutionally vested plenary power, however, it is “subject to legislative limitations.”<sup>396</sup> Thus, if Congress decides that “certain laws should be enforced by independent agencies, by an independent counsel, by some other Executive officials, or by private parties, these are policy decisions that Congress has the power to make.”<sup>397</sup> Professors Cass Sunstein and Larry Lessig reach a similar result, though they rely more heavily on the Necessary and Proper Clause.<sup>398</sup> Under this view, Congress can vest executive authority in whomever it wishes; the President’s constitutionally infeasible “executive” power is really only found in the Appointments Clause,<sup>399</sup> and even that is not airtight.<sup>400</sup>

I take the third view, that of Ultimate Unitariness. Under this view, the first sentence of Article II vests in the President the executive power to the extent it is not modified, qualified, or allocated elsewhere. Congress has power to create offices, which includes the power to define their powers. Contrary to the Total Unitariness view, Congress can therefore entrust duties and powers to particular executive officers. If Congress decides that the Administrator of the Environmental Protection Agency has power to enforce the environmental laws, only the Administrator can exercise that power. The President cannot sign a regulation into law or initiate an investigation. But the Take Care Clause sets the limit of Congress’s power in this respect. Contrary to the Defeasible Unitariness view, the President has the authority, even the duty, to supervise the officers of the United States to determine whether, in his judgment, the laws of the nation are being faithfully executed. Without supervisory authority—the power to monitor and control what the officers of the government are doing—the President cannot meet his duty to “take care.” If Congress could strip the President of authority to supervise and control the actions of executive officers, there would be no unitary executive, but a plural executive comprised of hundreds of magistracies, each in command of his own fiefdom. That seems contrary to one of the most fundamental, and eventually unanimous, decisions of the Constitutional Convention, and to the unmistakable command of the Take Care Clause.

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<sup>393</sup> *Id.* at 316.

<sup>394</sup> See Bruce Ledewitz, *The Uncertain Power of the President to Execute the Laws*, 46 TENN. L. REV. 757, 759 (1979).

<sup>395</sup> Reinstein, *supra* note 236, at 313.

<sup>396</sup> *Id.* at 315.

<sup>397</sup> *Id.* at 320-21.

<sup>398</sup> Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 92-93, 99 (1994).

<sup>399</sup> See *Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976).

<sup>400</sup> See *Morrison v. Olson*, 487 U.S. 654, 696 (1988).

What does the President’s indefeasible supervisory authority comprehend? First, the power to know what is going on. The Opinions in Writing Clause makes this authority explicit. Second, the power to issue instructions. That power is implied by the executive power. Third, the power to compel obedience to those instructions. This is the difficult point, because the President’s instructions are not law. The officer cannot be prosecuted for violating a presidential directive. The President’s orders are in the nature of instructions from a principal to his agent. The penalty for violating them is removal from office. That is why removal has been central to cases about presidential authority from the Decision of 1789 to the *Free Enterprise Fund* case.

This system is one of ultimate but not immediate unitariness. Ultimately, the President has authority to exercise the entire executive power. But he must do so through subordinates if Congress has determined it is necessary and proper to place power and responsibility in officers or departments. That is why the Take Care Clause is worded in its peculiar passive voice. The Clause does not say the President has “authority to execute the National laws,” as the Virginia Plan put it.<sup>401</sup> It says the President shall take care that the laws “be” faithfully executed—meaning executed by someone else. This interpretation also explains how the Necessary and Proper Clause can speak of “Powers vested by this Constitution in . . . any Department or Officer thereof.”<sup>402</sup> It would be odd to say the Constitution vests “Powers” in departments or officers if those departments and officers receive any powers they have from the President, who actually retains all “power” over their fields of responsibility.

As a practical matter, this system provides an elegant check on abusive presidential administration. The President carries out his powers through officers of his own selection, which ensures that they share his approach and owe loyalty to him, but they must be confirmed by the Senate, which “tend[s] greatly to prevent the appointment of unfit characters,” as *The Federalist* puts it.<sup>403</sup> Presumably the Senate will reject nominees lacking the requisite experience and character. After they are appointed and take office, the President has authority to monitor everything they do.<sup>404</sup> In ordinary times, there is every reason to expect that these officers will carry out the President’s instructions and effectuate his program. There may be times, however—President Andrew Jackson’s insistence on withdrawing public funds from the Bank and President Richard Nixon’s firing of Archibald Cox come to mind—when the President issues an illegal or improper order. In those cases, the President cannot (contra Professor Prakash) simply do the deed himself. He must order the officer charged with authority to act, and if that person refuses (as Treasury Secretary Duane, Attorney General Richardson, and Deputy Attorney General Ruckelshaus did), the President must remove him from office and replace him with a more pliant

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<sup>401</sup> 1 FARRAND, *supra* note 12, at 62.

<sup>402</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>403</sup> THE FEDERALIST No. 76, at 457 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classic ed. 1999).

<sup>404</sup> See U.S. CONST. art. II, § 2, cl. 1 (“[H]e may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.”).

officer. The President gets his way; the ultimate unitariness of the executive is maintained. But getting his way comes at the cost of a very public firing of a principal officer, elevating the dispute to a national level and enabling the people to hold the President “responsible.”

But, Professor Prakash might object, how is this consistent with the first sentence of Article II, which vests “the executive power” in the President? “If the Executive Power Clause grants the power to execute the laws, absent some powerful textual reason or historical understanding to the contrary, it must enable the president to execute the laws himself.”<sup>405</sup> I doubt that the constitutional drafters in 1787 would have seen it that way. The king of England undoubtedly was vested with the “executive power,” but it was a basic tenet of British constitutionalism that the king could not execute the law in person. He always acted through ministers, who unlike the king were “responsible” to Parliament and to the law for any illegal or abusive acts.<sup>406</sup> It would be natural for the constitutional framers to assume the same of the President.<sup>407</sup> Certainly, the framers would not assume that the term “the executive power” in the Vesting Clause *necessarily* meant something greater than what the same term meant in British law. And we must not forget that the Vesting Clause is limited and qualified by the Take Care Clause, which strongly implies that the President’s “executive power” with respect to law execution is one of supervision of the work of others.

This interpretation gains further strength from the fact that the Morris-Pinckney proposal for executive administration<sup>408</sup> contemplated that principal officers would “attend to” or “supervise” the activities of their departments, being “responsible” to the President for their decisions. It also is consistent with *The Federalist*’s description of the operations of the executive branch:

The administration of government, in its largest sense, comprehends all the operations of the body politic, whether legislative, executive, or judiciary; but in its most usual, and perhaps its most precise signification, it is limited to executive details, and falls peculiarly within the province of the executive department. The actual conduct of foreign negotiations, the preparatory plans of finance, the application and disbursement of the public moneys in conformity to the general appropriations of the legislature, the arrangement of the army and navy, the

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<sup>405</sup> Prakash, *supra* note 6, at 716.

<sup>406</sup> See 10 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 340, 366-67 (photo. reprint 1966) (1938); 1 BLACKSTONE, *supra* note 20, at \*243-45. Interestingly, Blackstone treats the power to investigate, arrest, and prosecute alleged lawbreakers not as a Crown prerogative, but instead as a power of the privy council. See *id.* at \*231 (“The power of the privy council is to inquire into all offences against the government, and to commit the offenders to safe custody, in order to take their trial in some of the courts of law.”).

<sup>407</sup> The President, unlike the king, may be vested by Congress with direct executive authority, which need not be exercised through the medium of an officer. The principal practical legal effect is to circumvent the Administrative Procedure Act, obviating the need for public notice and comment and eliminating APA judicial review for arbitrariness and capriciousness.

<sup>408</sup> See *supra* section I.G.3.

directions of the operations of war—these, and other matters of a like nature, constitute what seems to be most properly understood by the administration of government. The persons, therefore, to whose immediate management these different matters are committed ought to be considered as the assistants or deputies of the Chief Magistrate, and on this account they ought to derive their offices from his appointment, at least from his nomination, and ought to be subject to his superintendence.<sup>409</sup>

In this description, the “management” of the various executive function is “committed,” presumably by Congress, to officers appointed by the President, and they “ought to be subject to his superintendence.”

In my view, the idea that Congress may create agencies entirely independent of presidential direction is impossible to square with the Take Care Clause. Even on the assumption that the Vesting Clause vests no power in the President, the Take Care Clause explicitly gives him the duty, and therefore surely the power, to supervise the operations of all government departments that execute the law—which is to say, all government departments.

The Supreme Court’s holding in *Humphrey’s Executor* that some agencies—the Federal Trade Commission in particular—“exercise[] no part of the executive power” and therefore may be made independent of the President,<sup>410</sup> is somewhat different from Defeasible Unitariness,<sup>411</sup> and bears even less relation to the constitutional text. The Court explained that the Federal Trade Commission “is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed.”<sup>412</sup> But this is an empty description. All executive offices are “created by Congress,” and the duty “to carry into effect legislative policies” is the textbook definition of the executive power. Congress makes policies in the form of laws; the executive branch carries them into execution.<sup>413</sup> The idea that Congress may render an agency like the Federal Trade Commission “free from executive control” is directly contrary to the Take Care Clause. The modern mishmash of *Humphrey’s Executor*, *Morrison v. Olsen*, *Bowsher v. Synar*, and *Free Enterprise Fund* can be justified, if at all, only on the basis of decades of practice and precedent. They make mincemeat of the constitutional text and original design.

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<sup>409</sup> THE FEDERALIST No. 72, at 434 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classic ed. 1999).

<sup>410</sup> *Humphrey’s Executor v. United States*, 295 U.S. 602, 628 (1935).

<sup>411</sup> The Defeasible Unitariness theory applies to all offices outside the legislative and judicial branches, treating them all as part of executive administration. The theory of *Humphrey’s Executor* is that there are some agencies, like the FTC, that are not really executive at all, but solely quasi-legislative or quasi-judicial.

<sup>412</sup> *Id.*

<sup>413</sup> See, e.g., Ledewitz, *supra* note 394, at 757 n.1 (defining “executive power” as “implementing a statutory scheme or carrying it into effect”).

## G. Peace and War

As of 1787, the king still had the powers of peace and war—including the power to make war, to declare war, to command troops and navy during war, to summon and employ the militia, to erect forts and other military installations, to issue letters of marque and reprisal, to send and receive ambassadors, to make treaties, and, possibly, to impose trade embargoes—subject only to the parliamentary power of the purse. It was these powers, and the assumption that they fall within the compass of “executive powers,” that made young Charles Pinckney on June 1 gasp and warn that the Convention was creating an elective monarchy.

### 1. Foreign Affairs and Diplomacy

The king’s prerogative power over foreign affairs was absolute. Blackstone explained that

With regard to foreign concerns, the king is the delegate or representative of his people. It is impossible that the individuals of a state, in their collective capacity, can transact the affairs of that state with another community, equally numerous as themselves. Unanimity must be wanting to their measures, and strength to the execution of their counsels. In the king, therefore, as in a centre, all the rays of his people are united, and form, by that union, a consistency, splendour, and power, that make him feared and respected by foreign potentates; who would scruple to enter into any engagement, that must afterwards be revised and ratified by a popular assembly. What is done by the royal authority, with regard to foreign powers, is the act of the whole nation . . . .<sup>414</sup>

Accordingly, the king had the “the sole power of sending ambassadors to foreign states, and receiving ambassadors at home.”<sup>415</sup> It was “also the king’s prerogative to make treaties, leagues, and alliances with foreign states and princes.”<sup>416</sup> If implementation of a treaty required the expenditure of money or enactment of a new law, however, Parliamentary approval was necessary; a treaty could not bind Parliament to pass necessary legislation.<sup>417</sup> The delegates were intimately familiar with these rules, and referred to them during their deliberations.<sup>418</sup>

There was significant disagreement about the disposition of these prerogative powers at the Convention, and opinion changed. For most of the Convention, until the Committee on Postponed Matters, both the power to send ambassadors and the power to make treaties were lodged in the Senate, with no formal role for the executive.<sup>419</sup> The only foreign affairs

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<sup>414</sup> 1 BLACKSTONE, *supra* note 20, at \*252.

<sup>415</sup> *Id.* at \*253

<sup>416</sup> *Id.* at \*257.

<sup>417</sup> **Cite** This was the origin of the idea that some treaties are not “self-executing.” See *Medellin v. Texas*, 552 U.S. 491, 504-05 (2008).

<sup>418</sup> See 2 FARRAND, *supra* note 7, at 392-93 (Madison’s Notes); *id.* at 395 (McHenry’s notes).

<sup>419</sup> The third internal draft of the Committee of Detail, Farrand’s Document IX, in Wilson’s handwriting, gave the Senate the power to “send Ambassadors,” but the printed version distributed to the delegates on August 6 changed this to the power to “appoint Ambassadors.” It is not clear what significance this change might have had (if any). This question will be considered below.

prerogative vested in the President was the power to receive ambassadors and other public ministers, which Hamilton in *The Federalist* called “more a matter of dignity than of authority.”<sup>420</sup> Hamilton claimed that this power “will be without consequence in the administration of the government,” and explained the provision on the pragmatic ground that “it was far more convenient that it should be arranged in this manner than that there should be a necessity of convening the legislature, or one of its branches, upon every arrival of a foreign minister, though it were merely to take the place of a departed predecessor.”<sup>421</sup>

The Committee on Postponed Matters reassigned all these senatorial powers (including the power to appoint Justices of the Supreme Court) to the President subject to the Senate’s “advice and consent.”<sup>422</sup> Compared to the prior drafts, this made the President the dominant voice in foreign affairs: he would choose the ambassadors and negotiate the treaties. But by comparison to the relevant royal prerogatives, the President’s power was seriously limited. Senatorial confirmation was required of ambassadors and a full two-thirds senatorial assent was required for treaties.

An interesting detail that has escaped the commentators is the Committee of Detail’s decision, after its final draft (Document IX) and before its printed recommendations to the Convention, to change the Senate’s power from “to send Ambassadors” to “to appoint Ambassadors.”<sup>423</sup> No extrinsic materials cast light on this change. It could have been inadvertent, but this seems unlikely, given the rarity of differences between Document IX and the final draft. There are two possible differences between the powers to send and appoint, one occurring before the appointment of an ambassador and one occurring after. First, the power to “send” ambassadors would seem to include the power to decide whether and when to send an envoy to a particular place. Unless specifically assigned, this part of the function would logically fall to the body with power to create offices, namely the Congress. As a purely textual matter, the Committee’s change thus could be seen as giving Congress – and not just the Senate – control over this first step in the process of sending ambassadors. For example, Congress would vote, subject to presidential veto, to establish the office of Ambassador to the Court of St. James, following which the Senate would appoint the person to hold that office. Second, once a person is appointed as ambassador, the question arises: who decides whether he should be sent, or recalled? This might seem to be an executive function, vested in the President through the Vesting Clause.

This latter ambiguity was removed when the President was given the appointing and removal power for ambassadors, but the former ambiguity remained. Did Congress have power

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<sup>420</sup> THE FEDERALIST No. 69, at 419 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classic ed. 1999)

<sup>421</sup> *Id.*

<sup>422</sup> The origin and meaning of the peculiar language “advice and consent” was explained above. *See supra* section I.H.

<sup>423</sup> Compare 2 FARRAND, *supra* note 7, at 169 (“to send Ambassadors”) with *id.* at 183 (“to appoint Ambassadors”).

to decide whether and when to send ambassadors to particular places? This could have significant implications for the recognition power. If Congress decides where to send ambassadors, it would seem to follow that Congress decides what foreign governments to recognize. At least that inference is as strong as the inference that the presidential power to “receive Ambassadors” implies an exclusive presidential power to recognize foreign governments. As a textual matter, the recognition question thus may turn on the significance of the Committee’s last-minute decision to narrow the power to “send ambassadors” to a power to “appoint ambassadors.” As it happens, early Congresses hotly debated whether Congress should decide where to send emissaries,<sup>424</sup> and the Senate, prior to giving its advice and consent to Washington’s nominations to diplomatic posts, first debated and acted on a motion that an “occasion now exists for appointing a Minister Plenipotentiary to [a particular court],”<sup>425</sup> or, alternatively, “that there is not, in the opinion of the Senate, any present occasion that a minister should be sent to [a particular court].”<sup>426</sup> All three possible positions were taken: that the power to establish a particular diplomatic power was vested in Congress, that it was part of the Senate’s power of advice and consent, and that it pertained entirely to the executive. Eventually the President won out.<sup>427</sup>

## 2. War

According to Blackstone, the king “has also the sole prerogative of making war and peace.”<sup>428</sup> He also had the power to *declare* war, because as Blackstone says, “in order to make a war completely effectual, it is necessary, with us in England, that it be publicly declared, and duly proclaimed by the king’s authority; and, then, all parts of both the contending nations, from the highest to the lowest, are bound by it.”<sup>429</sup> The purpose of declaring war, according to Blackstone (following Grotius) is to make “certainly clear that the war is not undertaken by private persons, but by the will of the whole community.”<sup>430</sup> A formal declaration will ensure that soldiers are not mistaken for marauders, pirates, or other illegal combatants, and enable all parties to observe the laws of war. It was nonetheless common in the eighteenth century for countries to *make* war in advance of *declaring* war. When young Colonel Washington went into his first battle, against the French in western Pennsylvania, under command of British General Braddock, it was about a year before King George formally declared war.<sup>431</sup>

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<sup>424</sup> 12 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 31, 37, 71 (1974).

<sup>425</sup> See, e.g., S. EXECUTIVE JOURNAL, 2d Cong., 1st Sess. 94 (1792) (ministers to France and London).

<sup>426</sup> See, e.g., *id.* at 97-98 (minister to the Hague).

<sup>427</sup> See Prakash & Ramsey, *supra* note 6, at 304.

<sup>428</sup> 1 BLACKSTONE, *supra* note 20, at \*257.

<sup>429</sup> *Id.* at \*258.

<sup>430</sup> *Id.*

<sup>431</sup> See Although Washington served in the Braddock Expedition in the summer of 1755, King George II formally declared war on May 17, 1756. See WINTHROP SARGENT, THE HISTORY OF AN EXPEDITION AGAINST FORT DU QUESNE, IN 1755 (1856); His Majesty’s Declaration of War Against the French King, May 17, 1756.

In significant departure from the royal model, the Committee of Detail assigned the war power to Congress, not to the President. No surprise. On the first day of discussion of the executive power, Charles Pinckney, John Rutledge, James Wilson, and James Madison all objected to assignment of the powers of “peace and war &c.” to the executive magistrate. To them, the possession of this power marked the line between a republic and an elective monarchy. The Convention also assigned to Congress the royal prerogative of issuing letters of marque and reprisal—authorizations for private citizens to attack and seize property of another nation as recompense for prior unlawful acts against them—because such reprisals could lead to war. In a debate on the floor of the Convention, however, the delegates rejected the proposed congressional power to “make war” and substituted the narrower and more legalistic term “declare war.” This change requires explanation.

Let us begin by examining the various verbs used in prior texts. Blackstone used both “make war” and “declare war,” giving the terms different meanings. “Make” was the broader term, meaning something like starting war or going to war. “To declare war” was one means of starting a war or making it official. “Declaring” the war is something the king could and perhaps should do, in order to “make a war completely effectual.” But often the king sent troops into battle without a declaration. Sir Robert Walpole famously said that “of late most Wars have been declar’d from the Mouths of Cannons, before any formal Declaration.”<sup>432</sup>

The Articles of Confederation gave Congress “the sole and exclusive right and power of determining on peace and war.”<sup>433</sup> The Virginia Plan referred to the “executive powers” that had been vested in Congress under the Articles, which Charles Pinckney and others immediately interpreted as including the powers of “peace & war.”<sup>434</sup>

Hamilton’s Plan was more precise. His plan gave the Senate “the sole power of declaring war,” and the executive “the direction of war when authorized or begun.”<sup>435</sup> The President had no power to initiate war. Hamilton apparently treated the terms “declare” and “authorize” as equivalent, perhaps because, as he notes in *The Federalist*, “the ceremony of a formal denunciation of war has of late fallen into disuse.”<sup>436</sup> What matters is who has power to determine on war—not whether that determination is called a “declaration.” His plan gave the President authority to conduct war when “begun” as well as when “authorized.” Presumably this is when the war is begun by others. During America’s first real war, against the Barbary States,

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<sup>432</sup> 10 THE HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS FROM THE RESTORATION TO THE PRESENT TIME 292, 304 (1742) (recording the proceedings of May 12, 1738).

<sup>433</sup> ARTICLES OF CONFEDERATION of 1781, art. IX, cl. 1.

<sup>434</sup> 1 FARRAND, *supra* note 12, at 64-65.

<sup>435</sup> *Id.* at 292.

<sup>436</sup> THE FEDERALIST No. 25, at 161 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classic ed. 1999). *Accord* Saikrishna Prakash, *Exhuming the Seemingly Moribund Declaration of War*, 77 GEO. WASH. U. L. REV. 89, 89 (2008) (“Whenever Congress authorizes or commands a war, it has issued a declaration of war, regardless of whether Congress uses the phrase ‘declare war.’”).

Hamilton would argue that no congressional authorization was needed because the Bey of Tripoli had already declared war against the United States.<sup>437</sup> By this reasoning, no declaration of war against Japan was needed after Pearl Harbor. Hamilton's term "direction of war" similarly suggests that the presidential role is limited to tactical control and does not include decisions about when or why to go to war. Hamilton's Plan is highly suggestive, because it indicates that the delegate with perhaps the most expansive views of executive authority, and the one most willing to model the presidency after the Crown, drew a sharp line between the power to start war, which is congressional, and the power to direct it.

The New Jersey Plan, by cross-reference to congressional powers under the Articles, gave Congress the power of "determining on war."<sup>438</sup> The (plural) executive was given power "to direct all military operations; provided that none of the persons composing the federal Executive shall on any occasion take command of any troops, so as personally to conduct any enterprise as General, or in other capacity."<sup>439</sup> The Plan independently used the same term as Hamilton to describe the executive role: to "direct" all military operations.

The Committee of Detail returned to the language of royal prerogative: "to make war," assigning this power to Congress. It designated the President as "Commander in Chief of the Army and Navy of the United States, and of the Militia of the Several States."<sup>440</sup> When the Committee's draft reached the floor of the Convention on August 17,<sup>441</sup> the war power excited considerable debate; the President's "commander in chief" power was accepted without comment or cavil. Some of the debate was over whether the power to make war should be in Congress as a whole, in the Senate alone, or in the President; delegates supported all three options. But the more pointed question was whether to strike out the word "make" and substitute the word "declare," as Madison and Gerry jointly moved. They explained that the original language might make the executive unable to "repel sudden attacks." Late in the debate, Rufus King raised a second point: that the original language might be understood to give Congress power to "conduct" war, which he said was "an executive function." The Madison-Gerry motion passed. (The Journal reports two votes, with the motion losing the first time, 5-4. Both Madison and the Journal report that the motion ultimately passed 8-1, after Ellsworth of Connecticut changed his vote on account of King's argument.)

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<sup>437</sup> Alexander Hamilton, *The Examination No. 1*, in 25 THE PAPERS OF ALEXANDER HAMILTON 444, 454-57 (Harold C. Syrett ed., 1976).

<sup>438</sup> 1 FARRAND, *supra* note 7, at 243.

<sup>439</sup> *Id.* at 245.

<sup>440</sup> 2 FARRAND, *supra* note 7, at 172. The first internal draft, in Randolph's handwriting, expressed the President's authority over the militia by verbs (to "command and superintend") and over the army and navy by the noun "Commander in Chief." *Id.* at 145 (Document IV). There appears to be no difference in substance, but this may suggest the Committee thought of the two functions as being independent of each other.

<sup>441</sup> The entire debate is reported in two pages in Farrand. *Id.* at 318-19. I will not separately footnote quotations from the debate.

Putting aside the details for a moment, the motion was significant for understanding the structural relation of Article I to Article II, because it indicates that a change in the power given Congress has the effect of changing the power given the executive: when Congress's power over war is reduced, the President's is augmented. This confirms what the great constitutional scholar Edwin Corwin called the principle of "reciprocally limiting" powers.<sup>442</sup> When a power is given one branch, it not only empowers that branch, but also denies that power to the other branches, even if that power might otherwise have fallen in their bailiwick. When Congress is given the war power, that power is taken away from the President, even if the war power is thought to be of "an executive nature." When Congress is given something less than the full war power—just the power to "declare" war—less of the President's residual war power is taken away. Thus, to understand the scope of "the executive power" imparted by the first sentence of Article II, it is necessary not only to figure out what "the executive power" entails, but what portions of the executive power have been vested elsewhere.

The Madison-Gerry motion necessarily presupposes that in the absence of any grant of war power to Congress, the President would have power to repel an attack. Otherwise, reducing the power of Congress would have no effect on the power of the President. Where might that authority come from? There are two candidates: the Vesting Clause and the Commander in Chief Clause. Given the assumption on June 1 that "the executive power" included the powers of "peace & war &c.," it is logical that the Vesting Clause, which grants the President that "executive power," must be the source. At that juncture, there was no Commander in Chief power.

The August 17 debate is susceptible to two interpretations consistent with the conclusion that the Madison-Gerry amendment restored the President's power to repel a sudden attack. The difference depends on the precise distinction between the terms "make war" and "declare war." One possibility is that the term "declare war" is solely concerned with the ability to create the legal or juridical condition of "war"; it has nothing to do with whether combat takes place. Blackstone's account of the purpose of declarations is consistent with this interpretation. If so, the Madison-Gerry amendment had the effect of restoring the President's underlying "executive power" to send troops into combat without congressional authorization. The sole limit on his executive war power is that only Congress can trigger the legal condition of "war."<sup>443</sup> There is no evidence that any of the framers thought this was its meaning, though it is linguistically possible. The second possibility is that "declare war" means to "determine on" war: to start a war, to authorize a war, or to decide that the actions of another nation have put us at war. Professor Charles Lofgren quotes Hamilton, Madison, Wilson, Gerry, and John Jay using the term "declare" war to mean the decision to go to war,<sup>444</sup> making this second interpretation the more

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<sup>442</sup> See generally EDWIN CORWIN, *THE PRESIDENT: OFFICE AND POWERS* (4th ed. 1957).

<sup>443</sup> John Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1666-67 (2002).

<sup>444</sup> Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 680

compelling of the two. Under this theory, the President can take actions such as repelling an attack, which are purely responsive, but cannot initiate a war without congressional authorization. Jefferson as President took the position that the power went only so far as immediate defense. When a Barbary warship attacked the U.S.S. Enterprise,<sup>445</sup> the captain could defend the vessel and its crew, but having done so, was obliged to release the disabled attacker and its crew and to take no further retaliatory action.<sup>446</sup>

Assuming the second, narrower interpretation, there arises the question: just how much power did the change in wording give to the President? Many commentators assume the answer is obvious: the President was given just the power to “repel sudden attacks.”<sup>447</sup> But those words do not appear in the Constitution. Repelling sudden attacks is an *example* of the war powers left to the executive, but those words are not themselves constitutional terms either of power grant or of power limitation. Moreover, we know that at least two delegates believed the change did something more than just give a “repel sudden attack” power. Sherman agreed that the President should be able to “repel,” but he opposed the Madison-Gerry motion because he thought it “narrow[ed]” Congress’s power too much—meaning that it applied more broadly than just to repelling attacks. Gerry, one of the two co-movers, thought that the power to issue letters of marque (which are neither sudden nor a form of repelling) “was not included in the power of war,” and had to be independently vested in Congress, lest it fall into executive hands. That indicates a belief that there are forms of military action other than repelling sudden attack that fall within the daylight between “making” and “declaring” war.<sup>448</sup> Those would be actions involving military force that fall short of war and do not necessarily lead to wider conflict. Many of the several hundred military engagements the United States has fought without congressional authorization probably fall into this category, although it would be quite a stretch to include Korea, Bosnia, or Libya.

### 3. *The Commander-in-Chief Power*

Blackstone described the king as “the generalissimo, or the first in military command, within the kingdom.”<sup>449</sup> Within this prerogative power were included the command “of all forces by sea and land,” the “sole power of raising and regulating fleets and armies,” and the “prerogative of enlisting and of governing them.”<sup>450</sup> This power extended “not only to fleets and

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nn. 30-31, 680-81, 684-85, 685 nn. 48-50 (1972).

<sup>445</sup> Yes, that was its name.

<sup>446</sup> JOSEPH WHEELAN, *JEFFERSON’S WAR: AMERICA’S FIRST WAR ON TERROR, 1801–1805*, at 118 (2003); DAVID CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS XX* (date).

<sup>447</sup> See, e.g., Bestor, *supra* note 6, at 612 (referring to “[t]he power of the President ‘to repel sudden attacks’”).

<sup>448</sup> Gerry’s suggestion was committed to the Committee on Postponed Matters, which gave the power to issue letters of marque and reprisal to Congress. The Convention approved unanimously. No one suggested the marque and reprisal clause was unnecessary or redundant, which indicates that Gerry’s view that there are military acts that are not encompassed within the term “declare war” was widely shared.

<sup>449</sup> 1 BLACKSTONE, *supra* note 20, at \*262.

<sup>450</sup> *Id.*

armies, but also to forts, and other places of strength, within the realm; the sole prerogative as well of erecting, as manning and governing of which, belongs to the king in his capacity of general of the kingdom.”<sup>451</sup> The power to raise fleets and armies was limited by the common law in important ways. No one could be conscripted into the regular army except in case of sudden invasion or formidable insurrection.<sup>452</sup> Only career seamen could be conscripted into the navy.<sup>453</sup> And the militia could not be deployed outside of the kingdom.<sup>454</sup> The Bill of Rights of 1689 forbade the king to maintain a standing army in times of peace without leave of Parliament,<sup>455</sup> but as Blackstone noted, there was continual need for a standing army throughout the eighteenth century, and the prohibition was therefore a dead letter. The real limit came from the power of the purse. Military forces could be funded only a year at a time, which meant that Parliament could be confident it would be summoned to meet at least that often.

The constitutional drafters followed the British lead in making the President the commander-in-chief. This was apparently uncontroversial, though some thought it prudent to forbid him from commanding troops in person. A key detail from a federalism perspective was that the President is commander in chief of the militia only when “called into the actual Service of the United States,” which would happen only according to law passed by Congress and only for three constitutionally-specified reasons: to execute the laws of the Union, to suppress insurrections, and to repel invasions.

The other prerogative powers incidental to commander in chief were all allocated to Congress. Congress, not the President, has the power to raise the army and the navy, with appropriations for the army limited to two years.<sup>456</sup> Congress, not the President, has the power to make “Rules for the Government and Regulation of the land and naval Forces,” and for organizing and disciplining the militia, and “for governing such Part of them as may be employed in the Service of the United States.”<sup>457</sup> And Congress, not the President, has authority to purchase and exercise jurisdiction over “Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.”<sup>458</sup> Moreover, the consent of the states must be given when land is purchased for the erection of these forts and other buildings. Thus, although the President was given the selfsame power as King George to command the troops—a guarantee of civilian control over the military—much of the king’s prerogative as commander-in-chief was assigned to Congress, and the states retained some authority over militias and the purchase of land for military installations.

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<sup>451</sup> *Id.*; see CHITTY, *supra* note 20, at 45.

<sup>452</sup> CHITTY, *supra* note 20, at 46-47.

<sup>453</sup> *Id.* at 47.

<sup>454</sup> *Id.* at 45 (“[I]t is expressly enacted by all the statutes on this subject that the militia shall, on no account, be sent out of Great Britain.”).

<sup>455</sup> Bill of Rights 1689, 1 W. & M. c. 2.

<sup>456</sup> U.S. CONST. art. I, § 8, cl. 12.

<sup>457</sup> U.S. CONST. art. I, § 8, cl. 14, 16

<sup>458</sup> U.S. CONST. art. I, § 8, cl. 17.

## *H. Other Prerogative Powers*

### *1. Suspension of Habeas Corpus*

Early monarchs asserted authority to suspend the writ of habeas corpus, the so-called “Great Writ” that entitled anyone held against his will within the kingdom to challenge the legality of his confinement in court. By statutes in 1640 and 1679, that authority was ended. The suspension of habeas corpus was thus not among the royal prerogatives in 1787. Rather, as Blackstone states,

it is not left to the executive power to determine when the danger of the state is so great, as to render [suspension of the writ of habeas corpus] expedient; for it is the parliament only, or legislative power, that, whenever it sees proper, can authorize the crown, by suspending the habeas corpus act for a short and limited time, to imprison suspected persons without giving any reason for so doing . . . .”<sup>459</sup>

The framers lodged the power of suspending the writ in Article I, and subjected that power to a narrow compass.

### *2. Ecclesiastical Powers*

The king had substantial prerogative powers in his capacity as the supreme governor of the established church. It is not necessary to enumerate those powers here, or to deduce which ones still existed in 1787, because the United States would have no established church. Those prerogative powers, whatever their extent, therefore devolved upon authorities outside the federal government, or ended altogether.

### *3. Commerce*

It was well established “that the King does not possess any general common law prerogative with respect to foreign commerce.”<sup>460</sup> Foreign commerce was regulated by what Chitty calls “a variety of statutes,” which “contain comprehensive and positive enactments which bind the Crown.”<sup>461</sup> There was some suggestion that kings retained the prerogative to declare trade embargoes in time of peace; Jefferson listed this as among the prerogatives that should expressly be denied to the governor of Virginia.<sup>462</sup> But when King George imposed a temporary embargo on the export of wheat in 1766, for the best of reasons, Parliament declared that it had been illegal,<sup>463</sup> and Blackstone denies that the king has any such authority.<sup>464</sup> Accordingly, it was no surprise that the Committee of Detail assigned this power to Congress.

As to domestic commerce, Blackstone wrote that the king had three prerogative powers: the power to establish public markets and fairs, the power to regulate weights and measures, and

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<sup>459</sup> 1 BLACKSTONE, *supra* note 20, at \*136.

<sup>460</sup> CHITTY, *supra* note 20, at 163; *see* 1 BLACKSTONE, *supra* note 20, at \*273.

<sup>461</sup> *Id.* at 162-63.

<sup>462</sup> *See supra* section I.D.4.

<sup>463</sup> *See supra* section II.B.

<sup>464</sup> 1 BLACKSTONE, *supra* note 20, at \*271.

the power to coin money and determine its value.<sup>465</sup> The first of these powers had become obsolete by 1787, at least under the circumstances of the American states, and the constitutional drafters made no provision. (Presumably, states would regulate intrastate fairs and markets and Congress had power to regulate interstate ones, if such there were.) The other two powers were assigned to Congress, using the same terminology used by Blackstone.

The king also had the prerogative power to charter corporations,<sup>466</sup> though an act of Parliament was needed to vest a corporation with special powers or privileges, such as the power of imprisonment, eminent domain, or exclusive trading privileges.<sup>467</sup> At the Convention, Madison proposed to give Congress the power “to grant charters of incorporation where the interest of the U. S. might require & the legislative provisions of individual States may be incompetent,” but this was voted down, perhaps because it was unnecessary, perhaps because of fear of monopolies or worry that it would set off an unhelpful debate about banks.<sup>468</sup> The general power to create corporations was thus denied to the federal government, except insofar as creating a corporation might be necessary and proper to the effectuation of other enumerated powers,<sup>469</sup> in which case it was vested in Congress.

#### 4. *Aliens*

The status of natural-born subject could be attained only by birth or by statute, but the king had the prerogative of converting aliens into “denizens,” who enjoyed many of the rights and privileges of natural-born citizens.<sup>470</sup> Parliament also enjoyed the power of denization, but rarely exercised it.<sup>471</sup> Only Parliament had the full power of naturalization, which gives the former alien all the civil (but not political) rights of a natural-born subject.<sup>472</sup> The drafters of the Constitution vested all authority over naturalization in Congress, apparently leaving it to Congress to decide about any classes of citizenship akin to denizenship. As Madison stated, “the Natl. Legislre. is to have the right of regulating naturalization, and can by virtue thereof fix different periods of residence as conditions of enjoying different privileges of Citizenship.”<sup>473</sup>

##### *I. The Vesting Clause*

The king was universally recognized as possessing the whole of the executive power. As Blackstone put it, “The supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen.”<sup>474</sup> The first sentence of Article II uses very similar words: “The executive Power shall be vested in a President of the United States of America.” This sentence

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<sup>465</sup> *Id.* at \*273-79.

<sup>466</sup> *Id.* at \*472-73; CHITTY, *supra* note 20, at 122-26.

<sup>467</sup> CHITTY, *supra* note 20, at 127.

<sup>468</sup> 2 FARRAND, *supra* note 7, at 615-16.

<sup>469</sup> *See* *McCulloch v. Maryland*, 17 U.S 316, 411-15 (1819).

<sup>470</sup> 1 BLACKSTONE, *supra* note 20, at \*272, \*374.

<sup>471</sup> *Id.* at \*374.

<sup>472</sup> *Id.*

<sup>473</sup> 2 Farrand, at 235.

<sup>474</sup> *Id.* at \*190.

has engendered lively debate since the earliest years of the Republic. Is it merely a naming clause, or does it vest all powers of an executive nature not otherwise allocated by the Constitution in the President?

The classic statement of the substantive view of the Vesting Clause is a 1793 essay by Alexander Hamilton, under the pseudonym “Pacificus,” written in defense of President Washington’s Proclamation of Neutrality, which rested neither on any statutory authority nor any explicit enumerated presidential prerogative. Comparing the language of the vesting clauses of Articles I and II, Hamilton wrote that “The general doctrine then of our constitution is, that the Executive Power of the Nation is vested in the President; subject only to the *exceptions* and *qualifications* which are expressed in the instrument.”<sup>475</sup> He explained that “the difficulty of a complete and perfect specification of all the cases of Executive authority would naturally dictate the use of general terms,” and that “[i]t would not consist with the rules of sound construction to consider [the] enumeration of particular authorities as derogating from the more comprehensive grant contained in the general clause, further than as it may be coupled with express restrictions or qualifications.” “The enumeration ought rather therefore to be considered as intended by way of greater caution, to specify and regulate the principal articles implied in the definition of Executive Power; leaving the rest to flow from the general grant of that power, interpreted in conformity to other parts of the constitution and to the principles of free government.”<sup>476</sup>

It is often said that this Hamilton essay was the first suggestion that the Vesting Clause imparts substantive power, the implication being that because of Hamilton’s pro-executive slant and the polemical purposes of the essay, it should be dismissed as evidence of original understanding.<sup>477</sup> That is not accurate. Thomas Jefferson, at the opposite end of the political spectrum, relied on a substantive reading of the Vesting Clause as early as 1790, in a written opinion in his capacity as Secretary of State. President Washington had asked whether the Senate had power to countermand his decision regarding the diplomatic rank of certain American envoys. Jefferson responded that the Constitution “has declared that ‘the executive powers shall be vested in the President,’ submitting only special articles of it to a negative by the senate.” His opinion proceeded:

The transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the senate. Exceptions are to be construed strictly; the constitution itself . . . has taken care to circumscribe this one within very strict limits; for it gives the nomination of the foreign agent to the president, the

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<sup>475</sup> Alexander Hamilton, Pacificus No. 1, in [cite] (spelling corrected).

<sup>476</sup> Id. at .

<sup>477</sup> See, e.g., Bestor, *supra* note 6, at 581 n.190; Steven G. Calabresi, *The Vesting Clause as Power Grants*, 88 Nw. U. L. Rev. 1377, 1398 (1994); Prakash & Ramsey, *supra* note 6, at 330.

appointment to him and the senate jointly, and the commissioning to the president.<sup>478</sup>

This is almost exactly the same view that Hamilton later expounded as *Pacificus*.

There is a large and entrenched literature on this topic, taking both sides. The Supreme Court has likewise taken both sides<sup>479</sup>—and in the most recent relevant opinion, declined to take either side.<sup>480</sup> I will not repeat the arguments that already have been made. Textual advocates of the substantive view point to the difference between the wording of the three vesting clauses,<sup>481</sup> while textual opponents claim that the substantive view is implausible because it renders the specific grants of power in Sections 2 and 3 redundant.<sup>482</sup> Functionalist advocates of the substantive view argue that many widely accepted executive powers, especially in foreign affairs, cannot be explained except by reference to a substantive vesting clause. Functionalist opponents generally argue that the grant of a sweeping set of unenumerated “executive” powers to the President contradicts the premises of constitutionally limited government.

This dispute over the meaning of the Vesting Clause will likely never be resolved. An understanding of the structural logic of Article II as it was developed at the Convention, however, lends weight to the substantive side of the debate. The power-granting part of Resolution 7 of the Virginia Plan was little more than a vesting clause. Its entire treatment of the powers of the “National Executive” was as follows: “besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation.”<sup>483</sup> In its Virginia Plan incarnation, the clause must have been substantive, because otherwise the Executive would have no power. (Critics of the draft at the Convention did not worry that it gave the Executive no power, but that it entailed a vast array of powers, tantamount to making him an elective monarch.) Moreover, the language of Resolution 7 demonstrates that its drafters believed that executive powers encompass more than just the authority to execute the laws. Otherwise, its grant of “the general authority to execute the National laws” would be wholly redundant of its grant of “the Executive rights vested in Congress by the Confederation.”<sup>484</sup> Only if the executive power is understood as broader than the power of law execution does the argument over the Vesting Clause have any substance.

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<sup>478</sup> Thomas Jefferson, *Opinion on the Powers of the Senate* (Apr. 24, 1790), in 5 *THE WORKS OF THOMAS JEFFERSON* 50 (Paul Leicester Ford ed., 1905).

<sup>479</sup> Compare *Myers v. United States*, 272 U.S. 52, 117-18, 135, 151 (1926), with *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640-41 & n.9 (1952) (Jackson, J., concurring).

<sup>480</sup> *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2086 (2015).

<sup>481</sup> See *supra* [XXX].

<sup>482</sup> See, e.g., *Youngstown Sheet & Tube Co.*, 343 U.S. at 640-41 & n.9 (Jackson, J., concurring); Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 648 n.3 (1996) (citing sources).

<sup>483</sup> 1 FARRAND, *supra* note 12, at 21.

<sup>484</sup> One might argue that the language is redundant one way or the other, but this would not be accurate. Under the Articles, the national government did not have power to pass and enforce laws directly applicable to individuals. It had to work through the medium of the states. Thus, the Confederation Congress did not have the “general authority

On June 1, the Convention decided to limit presidential powers to three specific functions: law execution, certain appointments, and (a few days later) a qualified veto. At that time, it struck the proto-Vesting Clause of Resolution 7. The Vesting Clause returned with the Committee of Detail, which—true to the pronouncements of Rutledge and Wilson on June 1—approached the problem of executive power by allocating virtually every known or asserted prerogative power of the Crown to the Congress, the President, or to no one in the federal government. Vastly more of King George’s prerogatives went to Congress than to the President, along with all the disputed prerogatives that had been wrested from the Stuart kings in the seventeenth century. Moreover, almost all of the prerogatives assigned to the President were qualified or limited in important ways. The Committee was far more careful to allocate prerogatives to Congress and to limit the prerogatives assigned to the President than it was to ensure that the President had all the tools necessary for an effective executive. That is a sensible approach, if the Vesting Clause was understood as a backstop, granting the President residuary but unenumerated powers of an executive nature. If the Vesting Clause is nonsubstantive, it was reckless not to give the President a more comprehensive set of powers.

The claim that the substantive interpretation renders the enumerated powers of Sections 2 and 3 redundant is greatly overstated if not wholly false. Most of those enumerated power provisions actually limit the scope of the relevant executive power, relative to its scope in the British constitution. For example, the President, like the king, is commander-in-chief. But Article II, Section 2 makes President commander of the militia only under limited circumstances, and large swathes of the royal commander-in-chief power were allocated to Congress.<sup>485</sup>

The clauses most frequently cited as redundant under the substantive interpretation are the power to receive ambassadors and the power to demand opinions in writing from heads of departments. But given the shared nature of the power to *send* ambassadors, it would not necessarily have been clear that the President could exercise the power to *receive* ambassadors had it not been specified. Indeed, when Edmond Genêt presented his credentials as envoy from the French revolutionary republic, which were “addressed to the Congress of the United States,” Jefferson returned them on President Washington’s authority, “declin[ing] to enter into any discussion of the question as to whether it belonged to the President under the Constitution to admit or exclude foreign agents.”<sup>486</sup> Madison expressly took the opposing view, arguing that “the authority of the executive does not extend to a question, whether an existing government ought to be recognised or not.”<sup>487</sup> Without the Receive Ambassadors Clause, it might have been possible

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to execute the National laws”; that power rested in the states.

<sup>485</sup> See *supra* section II.G.3.

<sup>486</sup> 4 A DIGEST OF INTERNATIONAL LAW 680-81 (1906). [get original source]

<sup>487</sup> James Madison, Helvidius No. III, in LETTERS OF PACIFICUS AND HELVIDIUS ON THE PROCLAMATION OF NEUTRALITY OF 1793, at 78 (1845) [cite to modern edition; give original date]

for Congress to direct the Secretary of Foreign Affairs to receive envoys from nations favored by the political majority and to refuse others.

The Opinions in Writing Clause, as has been discussed, negated any lingering idea that the cabinet would have the checking function of a privy council, prevented Congress from trying to making the heads of departments independent of presidential supervision, and (possibly) made the President the gatekeeper for information requests by Congress to executive officers. It is not a redundancy.

It thus seems reasonably clear that the Vesting Clause was needed as a backstop to the enumerated presidential powers, and that it does not create any redundancy. Perhaps there are reasons of policy, functionalism, or subsequent practice and precedent for rejecting the substantive interpretation of the Clause today, but the logic and structure of Article II support that interpretation.

What is at stake? If we assume that the Take Care duty implies a power to see to the enforcement of the laws, then the sole function of a substantive vesting clause is to empower the President to perform functions of an executive nature that do not amount to law enforcement. Locke wrote: “Many things there are, which the Law can by no means provide for, and those must necessarily be left to the discretion of him, that has the Executive Power in his hands, to be ordered by him, as the publick good and advantage shall require.”<sup>488</sup> The readiest examples come from foreign policy, what Locke called the federative power. It is hard to describe treaty negotiation as law execution; no law is being executed. The same may be said of treaty termination, the decision whether to recognize a new government as legitimate, and how to deploy military resources. Some of these functions are explicitly allocated in Article II, but some are not. The Vesting Clause fills the gap.<sup>489</sup>

In the domestic arena, the Vesting Clause presumably encompasses the various aspects of administration that are not, strictly speaking, law execution. Many executive branch decisions involve discretion rather than law interpretation and execution. No one would call the decision to appoint one person or remove another a matter of law execution. Many of the congressional powers in Article I, Section 8 require discretionary judgment and administration rather than enforcement of laws. The Vesting Clause seems to work with Article I, Section 8 to empower Congress to create federal policies and programs and the President to carry them out.

For a concrete example, the First Congress passed a bill creating the Department of Foreign Affairs. Its Secretary was charged with performing “such duties as shall from time to time be enjoined on, or entrusted to him by the President of the United States, agreeable to the Constitution, relative to correspondences, commissions, or instructions to, or with public Ministers or Consuls from the United States, or to negotiations with public Ministers from

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<sup>488</sup> LOCKE, *supra* note 25, at 374-75.

<sup>489</sup> See generally Prakash & Ramsey, *supra* note 6, at 262-63.

foreign States or princes, . . . or to such other Matters respecting foreign Affairs, as the President of the United States shall assign to the said department.”<sup>490</sup> Where did the President get the authority to assign these duties? Not from the statute, which presupposed these presidential authorities and did not create them. Nor did the presidential functions have anything to do with law enforcement or execution, so the Take Care Clause cannot be invoked as the source of power. The most plausible answer is that the presidential powers presupposed by the statute were executive powers the President enjoys by virtue of the Vesting Clause. This example happens to arise in the foreign policy arena, but one can imagine a similar structure for domestic programs.

Opposition to a substantive reading is largely, and sensibly, driven by the fear that an aggressive President could lay claim to powers that would upset the constitutional balance. The worry may, however, be overblown. The Vesting Clause is limited to powers that are “executive.” It does not empower the President to make new law that individuals are bound to obey, or that would affect their property or natural liberty. The Due Process Clause reinforces that.<sup>491</sup>

Moreover, it is important to bear in mind that, whatever the precise content of residual presidential powers under the Vesting Clause, they are subject to the “exceptions and qualifications” expressed elsewhere in the Constitution, which include all congressional powers listed in Article I.<sup>492</sup> Thus, if Congress exercises one of its enumerated powers in a way that countermands a presidential decision made pursuant to his residual executive powers, that statute must prevail, under the logic of reciprocally limiting powers. The Constitutional Convention (and the Committee of Detail in particular) parceled out the powers of the king, and residual powers under the Vesting Clause cannot logically take priority over powers vested elsewhere. This gives the president’s residual powers the character of being defeasible: they can be exercised without advance congressional authorization, but are displaced as soon as Congress exercises one of its enumerated powers to the contrary.

To illustrate, let us take a variant on the example of the Jefferson opinion. The power to designate the diplomatic rank of envoys is of an executive nature and is not otherwise allocated by the Constitution; thus, the President has the power to exercise it. The Senate has no power to make contrary designations, as Jefferson’s opinion went on to explain. The Senate’s sole power is to advise and consent to nominations of particular persons to diplomatic posts and that power does not include the power to determine diplomatic rank. But suppose Congress as a whole (and

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<sup>490</sup> An Act for Establishing an Executive Department, to Be Denominated the Department of Foreign Affairs, H.R. 8, 1st Cong. § 1 (1789).

<sup>491</sup> See Chapman & McConnell, *supra* note 275, at 1677-80.

<sup>492</sup> The term “exceptions and qualifications” comes from Hamilton’s *Pacificus* essay. Alexander Hamilton, *Pacificus No. 1*, in *LETTERS OF PACIFICUS AND HELVIDIUS ON THE PROCLAMATION OF NEUTRALITY OF 1793*, at 10 (1845). I am not inclined to endorse the view, shared by Hamilton and Jefferson, that these exceptions and qualifications should be “construed strictly.” See *id.* at 14. As the late Justice Scalia said in a different context, I am inclined to think they should be construed neither strictly nor expansively, but fairly.

not the Senate alone) exercises its power to create and define offices,<sup>493</sup> and sees fit to attach diplomatic rank to particular positions—to say, for example, that envoys to other countries should be ambassadors rather than ministers (as actually happened in 1893<sup>494</sup>). In that case, the congressional statute would prevail over the presidential determination, because the power to create offices is an exception to the general grant of the “executive power.” Powers under the Vesting Clause thus fall somewhere between prerogative powers and statutory powers. They require no advance authorization from Congress, but they can be regulated or even displaced by congressional acts—assuming Congress has a relevant enumerated power under which to do so. This considerably deflates the worries that a substantive interpretation would license presidential overreach.

### III. The Structure of Article II

We are now equipped to examine Article II itself—to investigate its organizational structure and internal logic.

#### A. *The Logic of the Organization*

Section 1 of Article II is about the selection and perquisites of the President, and Section 4 about impeachment. The powers of the President are set forth in the first sentence of Article I, Section 1, called the “Vesting Clause” or the “Executive Power Clause,” and in Sections 2 and 3. Section 2 is divided into three paragraphs. One additional presidential power, the veto, is found in Article I, Sec. 7. Its location underscores the legislative character of this presidential power.

The organizational principle behind the power-defining provisions of Article II is not obvious. Their arrangement might well be thought haphazard. The powers are certainly not organized according to subject matter. Section 2, Clause 1 lists three powers: one relating to the military, one relating to internal administrative organization of the executive branch, and one relating to criminal law (namely, the pardon power). Section 2, Clause 2 addresses two entirely unrelated topics: appointments and treaties. Clause 3 is devoted to the single topic of recess appointments. Section 3 begins with functions relating to the legislative process, followed by three seemingly miscellaneous powers relating to foreign affairs, domestic law execution, and commissioning officers. For some reason, the Committee of Style located the power of commissioning at the end of Section 3, whereas the Committee of Detail paired that power with the closely-related power of appointment, connected by a semi-colon. None of this makes sense from a topical perspective.

Nor are the four paragraphs organized according to whether they involve powers or duties. The verbs in Section 2, Clause 1 are, in order, “shall,” “may,” and “shall.” The presidential powers (or are they duties?<sup>495</sup>) listed in Clauses 2 and 3 employ either the verb

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<sup>493</sup> See *supra* section II.E.1.

<sup>494</sup> See *supra* note 175.

<sup>495</sup> G. Morris described the appointment power as a duty. 2 FARRAND, *supra* note 7, at 52.

“shall” or the phrase “shall have the power to” (which appears synonymous with “may”). Clause 2 includes a congressional power, introduced by the verb “may.” The verbs of Section 3 are “shall,” “may,” “may,” “shall,” “shall,” and “shall.” Sometimes it is not clear whether a function is a duty or a power. For example, the President “shall” recommend to Congress such measures “as he shall judge necessary and expedient.” This is cast as a duty, but looks more than a power in reality.

We should not assume, however, that the arrangement of presidential functions in the four paragraphs is nothing but a hodgepodge. Coming as it does from the pen of Gouverneur Morris, a careful and precise user of language with a particular interest in the executive branch, the organization should be given at least the presumption of rationality. My thesis is that the relevant provisions are organized according to the types of executive power:

- (1) Prerogative powers, meaning powers that the President has the constitutional right to exercise without need for statutory authorization, and which cannot be regulated or abridged by Congress;
- (2) Prerogative powers subject to after-the-fact congressional override;
- (3) Statutory powers, meaning powers exercised only with the authorization of Congress, and subject to statutory specification;
- (4) Residual powers, meaning unenumerated powers exercised without statutory authorization, but subject to regulation or even displacement by statutes within the enumerated powers of Congress; and
- (5) Powers or duties in service to the legislative process.

This schema, with one possible exception, explains every provision of Article II and much of Article I, Section 8. It is the fruition of the project announced by Rutledge and Wilson on the first day the executive power was discussed: to create a unitary executive but without following the British model with respect to allocation of prerogative powers.

Section 2, Clause 1 lists three pure prerogative powers: the Commander-in-Chief power, the Opinions in Writing power, and the pardon power. The President exercises all of these powers by virtue of his office and not by grant from Congress. All may be exercised without advance consultation with Congress, and without need of any additional authority from Congress. None may be abridged or taken away by Congress.

The first half of Section 2, Clause 2 defines the two powers that are subject to the advice and consent of the Senate: the making of treaties and appointments to office. These powers are prerogative in nature: they are vested in the President by virtue of his office and require no authorization by Congress. But they are *qualified* prerogative powers, subject to a senatorial check. For most of the Convention, these powers were assigned absolutely to the Senate, with no presidential involvement. Late in the Convention, sentiment shifted against the Senate, partly because it was aristocratic and partly because it would be beholden to parochial state interests. At the same time, the powers to enter treaties and make appointments were too important and too

susceptible to abuse simply to leave them to the unchecked prerogative of one person. Senatorial advice and consent, borrowed from the Massachusetts Constitution, was the compromise solution. The veto power is structurally similar, in that it is also subject to congressional override, albeit by two-thirds of both Houses rather than a majority of the upper house.

The requirement of advice and consent by a two-thirds vote applies to all treaties. The delegates debated making treaties of peace subject to merely a majority vote, and possibly empowering the Senate to make such treaties over the disapproval of the President.<sup>496</sup> In the end, however, all treaties were subjected to the same process. But the drafters chose not to impose advice and consent on all appointments. The second half of Section 2, Clause 2, gives Congress a power to vest the appointment of inferior officers in the President alone, the courts of law, or the heads of departments—all without advice and consent. This provision was added in the waning days of the Convention, apparently for reasons of practicality. It could as logically have been located among the other powers of Congress in Article I, Section 8, but its presence here unifies all provisions about appointments in a single place, which is convenient. Clause 3, which was adopted unanimously on the floor,<sup>497</sup> gives the President power to make temporary recess appointments. There is no obvious reason the Committee of Style numbered this as a separate paragraph rather than tacking it onto Clause 2, but that organizational choice creates no substantive confusion.

Section 2, then, is all about presidential prerogative. Clause 1 lists the three pure prerogatives. Clause 2 lists the two qualified prerogatives, which are subject to senatorial advice and consent, and then carves out an exception to the requirement of advice and consent in the case of inferior officers. Clause 3 similarly carves out an exception to advice and consent, giving the President power to make temporary recess appointments unilaterally when the absence of the Senate for lengthy periods of time would otherwise disrupt the operations of government. The organization thus underscores that the powers of treaty-making and appointment are prerogatives, qualified by advice and consent, with exceptions to the requirement of advice and consent for some appointments. So far, the organizational logic of Article II is impeccable.

The third and largest category of presidential powers consists in carrying out the programs and policies of Congress, as reflected in law. Even though many of these were prerogative powers of the Crown, under the Constitution they are not prerogative powers, but are created and defined by statutory law. To make explicit that this class of powers are not intended to be part of the “Executive power” vested in the President, the Committee of Detail lifted a long list of royal prerogatives from British law—presumably their principal source was Blackstone—and gave them to Congress. This was a radical break from the Virginia Plan, which vested all powers of an executive nature in the President. We now think of the powers on this list as

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<sup>496</sup> *Id.* at 540, 547-49.

<sup>497</sup> *Id.* at 540.

quintessentially legislative powers, but in fact they were actual or former powers of the Crown, which the drafters decided to allocate to the legislative branch. As amended by the Convention and reorganized by the Committee of Style as Article I, Section 8, this list provides that the Congress shall have the Power, among others:

- To lay and collect Taxes, Duties, Imposts and Excises;
- To borrow Money on the credit of the United States;
- To regulate Commerce with foreign Nations;
- To establish an uniform Rule of Naturalization;
- To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;
- To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;
- To constitute Tribunals inferior to the supreme Court;
- To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;
- To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
- To raise and support Armies;
- To provide and maintain a Navy;
- To make Rules for the Government and Regulation of the land and naval Forces;
- To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; and
- To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.<sup>498</sup>

All of these powers either were prerogatives of the Crown at the time the Constitution was drafted, or had been claimed as prerogatives of the Crown in historical memory. By one scholarly count, fourteen of the twenty-five enumerated powers of Congress were prerogatives of the king.<sup>499</sup> To which list we might add Section 9, Clause 2: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it,” which by virtue of its location in Article I suggests that Congress, not the President, has the power to suspend the Great Writ.

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<sup>498</sup> U.S. CONST. art. I, § 8.

<sup>499</sup> Reinstein, *supra* note 236, at 304 n.276.

It is well recognized that the Committee of Detail’s decision to enumerate the powers of Congress had important implications for federalism. The implications for the separation of powers and the definition of the executive power were scarcely less significant. Unlike the pre-1688 king, the President cannot spend a dime of public money without passage of an appropriation by Congress.<sup>500</sup> Nor may he prosecute or penalize anyone for violating a public policy unless that policy has been enacted into law.<sup>501</sup> Nor may he borrow above the congressionally-authorized debt ceiling. Nor may he initiate war on his own authority. For the Constitution to vest a power in Congress is to deny that power to the President, even if that power might be “of an executive nature” or otherwise within the traditional prerogative powers of the executive under the British Constitution.

On the other hand, Article I specifies that Congress has only the “legislative Powers” associated with this enumeration. Congress cannot administer these powers itself, or through its own agents. Members of Congress or their staffs do not stamp coins or evaluate patent applications. The “executive part of the business”<sup>502</sup> must be left to the executive, and due to the Vesting Clause, that means to the President and the officers appointed to serve under his supervision. Article I, Section 8 is thus paired to the first sentence of Article II: “The Congress shall have the power to” legislate with respect to its enumerated powers and the President is vested with the attendant power to execute. Together, Article I, Section 8 and the Vesting Clause define the third category of executive powers: those exercised only with the authorization of Congress, and subject to its dictates.

So far, the power-defining provisions of Article II and Article I, Section 8 have followed the pattern of allocating royal prerogative powers (a) to the President, (b) to the President with advice and consent of the Senate, or (c) to Congress with execution by the President and his officers. The organization of these sections has been logical, in light of that pattern and purpose. What then of Section 3?

The first four provisions of Section 3 form a logical unit. All involve presidential powers relating to the legislative process. The President’s duties to provide “Information” and to recommend “Measures” was discussed in detail above. These important political powers were not included among the prerogatives of Section 2 precisely because the drafters wanted them to be regarded not as prerogative powers, but rather as duties owed to Congress. This has the effect of republicanizing some of the more regal features of executive authority. Locating these as “duties” in Section 3 rather than as prerogative powers in Section 2 emphasizes that status. The third provision of Section 3 allows the President to convene Congress for a special session “on

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<sup>500</sup> U.S. House of Representatives v. Burwell, 2016 WL 2750935, at \*1 (D.D.C. May 12, 2016).

<sup>501</sup> See *United States v. Hudson & Goodwin*, 11 U.S. 32, 34 (1812) (“The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.”); *but see In re Debs*, 158 U.S. 564, 582-83 (1895) (one of the Supreme Court’s most inexplicable decisions).

<sup>502</sup> 4 ELLIOT’S DEBATES 425 (2d ed. 1836) (Rep. Thomas Sedgwick); see also 10 GREAT DEBATES IN AMERICAN

extraordinary Occasions.” This is framed as a power and not a duty, and could be seen as a prerogative. But it is confined to “extraordinary Occasions” and is really a service to the Congress, to make it possible for Congress to do its constitutionally assigned job. The fourth provision empowers the President to adjourn Congress when the two houses cannot agree on a date for adjournment. Again, it is framed as a power but is in reality a service, and it kicks in only upon congressional disagreement. Whether framed as duties or as powers, these first four provisions were cast as modest functions a republican chief executive would perform in service to the legislative branch. Rather than mimicking the king, these Section 3 functions stand in contrast to the king’s awesome powers to set a legislative agenda, to prorogue uncooperative Parliaments, and to summon Parliaments only when it suited him.

The final three provisions of Section 3 are all cast as duties: to receive ambassadors and other public ministers, to take care that the laws be faithfully executed, and to commission all the officers of the United States. Why are they in Section 3? Why were they not cast as prerogative powers, and placed in Section 2?

We have already considered at length the decision of the Committee of Detail to recast the President’s power to execute the laws into a presidential duty to ensure that the law is properly executed by executive officers. As conceived in Philadelphia, law execution is emphatically not a prerogative power; it is a duty. By framing the clause as a duty, the drafters made clear that the President does not have the disputed prerogative powers of dispensing with or suspending the laws, which precipitated the downfall of James II. By placing the Take Care Clause in Section 3, among the functions the President undertakes in service to Congress, rather than in Section 2, among the prerogative powers of the President, the Committee of Style reinforced that message: the President owes a duty to Congress to ensure faithful execution of the laws.

The Commissioning Clause is slightly harder to understand. It, too, is cast as a duty. With respect to executive officers, however, the Clause seems empty, possibly pointless. When the President nominates a person to an office and the Senate gives its advice and consent, the next step, according to the text of Article II, Section 2, is for the President to “appoint” him. Why, then, does a separate provision in a different Section of Article II require the President to “Commission” him? What does the act of “appointing” consist of, other than commissioning? And for officers subject to presidential removal—which, contrary to current precedent, should include all executive branch officers—what does the commission signify, other than a piece of paper to hang on the wall, since the President can fire the officer as soon as the commission has been delivered?<sup>503</sup>

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HISTORY 133-34 (Marion Mills Miller ed., 1913).

<sup>503</sup> It was on this point that *Myers v. United States*, cite, overruled *Marbury v. Madison*, cite (quote).

The most persuasive reason for the framers to cast the Commissioning Clause as a duty relates to officers outside the executive branch, appointed by authorities other than the President or his subordinates. These may include judicial branch officers like bankruptcy judges or magistrate judges, whose appointments are vested in the courts of law. They may also include non-elected legislative branch officers like the sergeant-at-arms, independent prosecutors (if the office of independent prosecutor is constitutional<sup>504</sup>), or officers appointed by independent agencies. In 1792, the Senate asked Secretary of the Treasury Alexander Hamilton to compile a list of all “persons holding Offices . . . under the United States” and their salaries. Hamilton’s response included nonelected officials in each branch, including the Legislative Branch.<sup>505</sup> To the extent these officers need a commission to exercise their authority,<sup>506</sup> it would be the duty of the President to provide it. This is clear from the wording of the Committee of Detail draft: “[the President] shall commission all the Officers of the United States; and shall appoint Officers in all Cases not otherwise provided for by this Constitution.”<sup>507</sup> He appoints only some of the officers, but commissions “all” of them. At the time of that draft, the Senate had the power to appoint ambassadors and Supreme Court judges. The President should not be given power to thwart this senatorial power (or the power of the legislative and judicial branches to name officers within their bailiwicks) by refusing a commission. This explains why it was logical for the framers to locate the President’s commissioning duty among the other duties he performs in service to the legislature.

The Receive Ambassadors Clause, however, seems out of place. Today, this Clause is interpreted as giving the President the exclusive power to decide on the recognition of foreign governments, and their claims to disputed territory. The theory is that by receiving an ambassador, the President recognizes the legitimacy of the government that sent him.

There appears to be little doubt that the President does have the power to recognize foreign governments, which is a significant foreign policy power.<sup>508</sup> In early 1793, the Washington administration faced the question whether to recognize the new revolutionary regime in Paris as the legitimate government in France, rather than old monarchical regime with which the young United States had signed treaties of amity. Congress was not in session. Washington’s cabinet, which included Randolph, Hamilton, and Jefferson, unanimously concluded that the authority to make this decision rested in the President. Hamilton later wrote that the Receive Ambassadors Clause “includes th[e power] of judging, in the case of a revolution of government in a foreign country, whether the new rulers are competent organs of the national will, and ought

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<sup>504</sup> Morrison v. Olson, cite.

<sup>505</sup> Seth Barrett Tillman is responsible for unearthing this interesting fact. See Seth Barrett Tillman, *Originalism & The Scope of the Constitution’s Disqualification Clause*, 33 QUINNIPIAC L. REV. 59, 81-82 (2014).

<sup>506</sup> Officers internal to the legislative branch apparently do not receive commissions.

<sup>507</sup> 2 FARRAND, *supra* note 7, at 171.

<sup>508</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW §204 (1987); *but see* Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 U. RICH. L. REV. 801, 860-62 (2011).

to be recognised, or not.”<sup>509</sup> Since then, presidents have frequently exercised this power, even in the face of opposition.

It is not so clear where in the text of the Constitution the recognition power resides. The Receive Ambassadors Clause is a textually plausible foundation, but not self-evident. We will review the drafting history of that clause in a moment, and see that it is unlikely to impart so important a power. No one at the Convention suggested the clause entailed the recognition power (nor did they deny it). During the ratification debates, Hamilton wrote in *The Federalist* that the clause is “more a matter of dignity than of authority,” and that it “would be without consequence in the administration of the government.” As we have seen, Hamilton later changed his mind in the Pacificus-Helvidius debates over President Washington’s Proclamation of Neutrality. But Madison, taking the opposite side of the argument as Helvidius, remained convinced “that little, if any thing, more was intended by the clause, than to provide for a particular mode of communication” and “that it would be highly improper to magnify the function into an important prerogative.”<sup>510</sup> The most persuasive modern scholarship, in my opinion, concludes that the recognition power comes to the President as part of the general “executive Power” imparted by the Vesting Clause.<sup>511</sup>

The modern Supreme Court, however, traces the recognition power to the Receive Ambassadors Clause supplemented by the power to negotiate treaties and to nominate ambassadors, and has said that “[b]ecause these specific Clauses confer the recognition power on the President, the Court need not consider whether or to what extent the Vesting Clause, which provides that the ‘executive Power’ shall be vested in the President, provides further support for the President’s action here.”<sup>512</sup>

If the power to receive ambassadors truly is the source of the recognition power, then it must be classed as a prerogative power. It is important; it was a royal prerogative; it does not require congressional authorization or advance consultation; and it cannot be regulated, limited, or abridged by Congress. As such, it should be located in Section 2 with the prerogative powers of the President, rather than in Section 3 with duties the President owes to the legislative branch. But it is not.

What might possibly explain the placement of this power in Section 3? Several points. First, the Receive Ambassadors Clause is worded as a duty, not a power: “he *shall* receive Ambassadors and other public Ministers.”<sup>513</sup> As we have seen, the drafters paid attention to their shalls and mayas. Gouverneur Morris in particular, who wrote the final version, had offered

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<sup>509</sup> Alexander Hamilton, *Pacificus No. I*, in LETTERS OF PACIFICUS AND HELVIDIUS ON THE PROCLAMATION OF NEUTRALITY OF 1793, at 12 (1845).

<sup>510</sup> James Madison, *Helvidius No. III*, in LETTERS OF PACIFICUS AND HELVIDIUS ON THE PROCLAMATION OF NEUTRALITY OF 1793, at 75-76 (1845).

<sup>511</sup> Prakash & Ramsey, *supra* note 6, at 234-35.

<sup>512</sup> *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2086 (2015).

<sup>513</sup> U.S. CONST. art. II, § 3.

amendments specifically addressing the power-versus-duty distinction. The duty to receive ambassadors first appeared in the Committee of Detail. That Committee’s report provided that the President “*shall* receive Ambassadors, and *may* correspond with the supreme Executives of the several States.”<sup>514</sup> The contrast between the shall and the may surely indicates that the choice was intentional—especially considering an earlier draft read “shall” for both clauses.<sup>515</sup> To be sure, a duty often entails a power. For example, the Take Care duty implies the power to supervise executive officers. But in what sense is the reception of ambassadors a *duty*? A duty to *whom*?

A review of the drafting history may provide an answer. The final internal Committee of Detail draft gave the President the duty to receive ambassadors at a time when the Senate was assigned the other foreign affairs powers: to make treaties and “to send Ambassadors.”<sup>516</sup> It makes no sense to say that the President has the power to recognize foreign governments if the Senate sends the ambassadors and makes the treaties. The most plausible reason for giving the President the duty to receive ambassadors is practicality. Ambassadors might arrive at any time. Congress was expected to be in session only a few months out of the year. Were ambassadors expected to cool their heels for months on end, not attending to any duties, until Congress could summon a quorum? As Hamilton explained in *The Federalist*: “it was far more convenient that it should be arranged in this manner than that there should be a necessity of convening the legislature, or one of its branches, upon every arrival of a foreign minister, though it were merely to take the place of a departed predecessor.”<sup>517</sup> No doubt he was recalling the difficulties the Confederation Congress had in receiving foreign ambassadors as a body, under the Articles. Both the wording and the placement of the Receive Ambassadors Clause show that it was conceived as a ceremonial function done on behalf of the entity with the foreign affairs power, the Senate.<sup>518</sup>

Of course, the Committee on Postponed Matters later shifted the Senate’s foreign affairs functions to the President in the final weeks of the Convention, subject to senatorial advice and consent. But there is no reason to think the phrase “he shall receive Ambassadors and other public Ministers” changed in meaning because of the shift. If the function was ceremonial before, it was ceremonial after. None of this necessarily means that the President lacks the recognition power, but it does suggest that power must come from some other provision of the Constitution, most plausibly the Vesting Clause.<sup>519</sup>

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<sup>514</sup> 2 FARRAND, *supra* note 7, at 185 (emphases added).

<sup>515</sup> *Id.* at 171.

<sup>516</sup> *Id.* at 169.

<sup>517</sup> THE FEDERALIST No. 69, at 419 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classic ed. 1999).

<sup>518</sup> This may also explain the oddity that “consuls” are omitted from the Receive Ambassadors Clause, in contrast to the Appointments Clause and the provision of Article III granting original jurisdiction to the Supreme Court over disputes involving diplomats. Under international diplomatic practice, consuls, unlike ambassadors and ministers, did not have to be ceremonially received. *See* Reinstein, *supra* note 508, at 813.

<sup>519</sup> That was Justice Thomas’s conclusion in *Zivotofsky v. Kerry*. *See* 135 S. Ct. 2076, 2097-98 (2015) (Thomas, J., concurring in part and dissenting in part).

If this understanding of the Receive Ambassadors Clause is correct, we have identified a sound reason why every power-granting Clause in Article II is located where it is. The organization of Article II is cogent and meaningful. It divides presidential powers into four categories:

- (1) Prerogative powers that the President has the constitutional right to exercise without need for statutory authorization, and which cannot be regulated or abridged by Congress;
- (2) Prerogative powers subject to congressional override;
- (3) Statutory powers, meaning powers exercised only with the authorization of Congress, and subject to statutory specification;
- (4) Residual powers, meaning unenumerated powers exercised without statutory authorization, but subject to regulation or even displacement by statutes within the enumerated powers of Congress;
- (5) Powers or duties in service to the legislative process.

This cogency matters for constitutional interpretation, because it suggests an approach to separation of powers unlike that propounded by Justice Robert Jackson in his famed *Steel Seizure* concurrence. That implication will be addressed in the next subpart.

Powers in the final category, found in Section 3, operate functionally like prerogatives, and for most of the discussion to follow will be subsumed in that category. They do not require statutory authorization and, with one qualification, cannot be regulated or abridged by Congress. These functions are set apart in Section 3 to emphasize that they are duties in service of the legislative branch rather than being high kingly prerogatives. That distinction is more of attitude and appearance than of legal substance.

The one qualification is that the Take Care duty takes its content from the laws. The powers entailed by the Take Care Clause are similar to statutory powers in that the scope of executive discretion is set by statute. The powers entailed by the Take Care Clause are constitutionally infeasible only in the (important) sense that Congress may not vest the power to execute the laws in anyone *other than* an executive officer subject to the supervisory authority of the President. Within whatever exiguous limits there might be under the nondelegation doctrine, Congress may impart broad discretion, narrow discretion, or no discretion at all—but whatever discretion it imparts must be vested in officers subject to the President’s Take Care responsibility.<sup>520</sup> Thus, it is not strictly true that prosecutorial discretion is constitutionally vested in the executive.<sup>521</sup> In principle (though not in reality) Congress could define the laws in such a way as to eliminate all discretion and reduce the executive function to the performance of

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<sup>520</sup> Obviously, this is a description of the author’s reading of the text, and not of modern caselaw.

<sup>521</sup> For excellent discussions of the constitutional dimension of prosecutorial discretion and its relation to the Take Care Clause, see Steven G. Calabresi & Saikrishna Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2014).

ministerial duties. But prosecutorial discretion is constitutionally vested in the executive in the sense that Congress may not vest it elsewhere.

### *B. Significance of Structure*

As we have seen, Article II is organized according to the nature of executive powers as prerogative powers, qualified prerogative powers, statutory powers, or residual powers. This framework should guide separation of powers disputes. Unfortunately, modern separation of powers analysis got off on the wrong foot with Justice Robert Jackson's elegant, but ultimately unhelpful and misleading, three-part framework in his concurrence in the *Steel Seizure Case*. That approach was adopted by a unanimous Court in *Dames & Moore v. Regan*,<sup>522</sup> and in three cases since.<sup>523</sup> While occasionally criticized,<sup>524</sup> it is most often treated as the starting point for all analysis of separation of powers questions involving the executive.<sup>525</sup>

Jackson claimed that "Presidential powers are not fixed, but fluctuate, depending upon their disjunction or conjunction with those of Congress." He then put forward his celebrated three-part framework for analyzing the scope of presidential power:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power . . . .

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

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<sup>522</sup> 453 U.S. 654, 668-69 (1981).

<sup>523</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006); *Medellin v. Texas*, 552 U.S. 491, 524-25 (2008); *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083-84 (2015).

<sup>524</sup> See, e.g., Reinstein, *supra* note 236, at 260-262. A co-author and I have criticized the Jackson framework in Chapman & McConnell, *supra* note 275, 121 YALE L.J. at 1783-85. Those criticisms were based on due process considerations. This essay offers criticisms based instead on the logic of Article II.

<sup>525</sup> See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2050 (2005); Neal K. Katyal & Laurence H. Tribe, Essay, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1274 (2002).

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.<sup>526</sup>

This approach essentially ignores the structural logic of Article II, paying no attention to the Constitution's own classification of the power asserted. It simultaneously erases the category of constitutionally-vested prerogative while allowing Presidents to exercise what amounts to prerogative power in areas where no prerogative power was vested. It disregards the Constitution's own differentiation between types of power in favor of reliance on policy-laden intuitions about context and situational imperative.

1. Acts taken with congressional authorization

The first paragraph is the least problematic, and also the least likely to be contested in litigation. Stripped of its quasi-monarchical reference to “personification of the federal sovereignty,” which contributes no analytical content, the paragraph is nothing more than a description of *statutory power*, as defined above: that is, power that may be exercised only with the authorization of Congress, and subject to statutory specification. There is no doubt that statutes (along with treaties and the Constitution) are proper sources of legal authority, assuming they are within the enumerated power of Congress and do not violate other provisions of the Constitution, such as the Bill of Rights or the nondelegation doctrine. If Congress has authorized presidential action by enactment of a statute that is constitutional, any question of authority has been answered. The paragraph essentially states an obvious and uncomplicated truism.

The *wording* of the paragraph nonetheless introduces confusion and ambiguity. Why does Jackson use the phrase “express or implied authorization of Congress”? Why not just say “statute”? Congress has no power to “authorize” any legal act except by passing a statute, through the processes of bicameralism and presentment.<sup>527</sup> Either the phrase “express or implied authorization” is synonymous with “statute” or it is misleading, perhaps dangerously so. To extent that the phrase invites the President to act on the strength of informal signals of approval like speeches, committee hearings, or press conferences, this is wrong. For example, the people are entitled to a congressional vote on the record before the nation goes to war. Members of Congress may be perfectly happy for the President to take military action on his own – as the recent war to topple the Qaddafi regime in Libya perfectly illustrates – but this does not satisfy the Constitution's requirement that war requires congressional act, as do taxation, spending,

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<sup>526</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J. concurring).

<sup>527</sup> *INS v. Chadha*, cite.

borrowing, regulation, and every other legal act not covered by the limited grants of prerogative. The Constitution is not about political agreement; it is about law. A solid majority of members of Congress might favor presidential action and even urge him to act, but unless they pass a law, the President cannot exercise statutory authority. The opinion’s language of “implied authorization” is problematic because it might be understood to include approval by means short of statute.

Importantly, these means include the *defeat* of proposed legislation, which may signal political support, but supplies no legal authority. For example, Congress failed to adopt legislation disapproving the recent executive agreement with Iran. To the extent that agreement contained measures that require congressional authorization (a difficult question), the defeat of the resolution of disapproval was not sufficient. Only passage of a law can add to or subtract from the President’s well of authority.

A second confusion bred by the language of Jackson’s first paragraph is that it overlooks the possibility that the congressional authorization might be unconstitutional for a reason other than that the federal government as a whole lacks the power. For an obvious example, an executive act pursuant to congressional authorization might be unconstitutional because it violates the Bill of Rights or other sources of individual rights. The military commissions in *Boumedienne v. Bush* were authorized, and insulated from judicial oversight, by Congress; the President’s actions therefore fell in Jackson’s Category One, but that does not mean it should have escaped searching constitutional scrutiny.<sup>528</sup> Separation of powers cases also arise, where there should be no strong presumption of constitutionality despite being in Category One. For example, if Congress authorizes executive action through officials insufficiently subject to presidential oversight, as in the *Free Enterprise Fund* case, this will be unconstitutional.<sup>529</sup> The nondelegation doctrine, to the extent it has any bite, is another example. In the event of a separation of powers challenge, the courts must look to the details of the Constitution for their answer. That the challenged action falls within Justice Jackson’s first paragraph will count for nothing at all.

## 2. Measures incompatible with the will of Congress.

The third paragraph seems to deny the existence of prerogative powers – or at least to indicate they are rare and must be recognized only with caution. Yet prerogatives are the dominant topic of Article II. All of Section 2 is about prerogative, and arguably Section 3 as well. The non-prerogative powers are in Article I, Section 8 through the Vesting Clause. The “equilibrium established by our constitutional system” is not endangered when the President exercises these prerogative powers. It would endanger the constitutional equilibrium—or at least the arrangement of powers set by the text of the Constitution—to allow Congress to interfere with them. To say that the President’s power is “at its lowest ebb” when he acts without statutory

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authority contributes nothing to the analysis. Either the Constitution gives the President the claimed prerogative power or it does not; this may sometimes be a difficult question of constitutional interpretation, but there should be no presumption that the claim of power is invalid.

### 3. Acts neither authorized nor prohibited by Congress

The second paragraph is a muddle. Whether the President can act in the absence of a grant of statutory authority depends on what kind of power is at issue. If the controversy involves a prerogative power, the President can act by virtue of his office, and Congress has no authority to deny it. If the controversy involves implied Presidential power under the Vesting Clause, the questions are twofold: whether it is an “executive power,” and whether it has been limited or displaced by an act of Congress pursuant to Congress’s enumerated powers. The “imperatives of events and contemporary imponderables” have nothing to do with it.

The great danger of this paragraph is that it implies that in some cases, “congressional inertia, indifference or quiescence” may “enable, if not invite” presidential acts that are authorized by statute nor by the Constitution. In other words, prerogatives granted by the Constitution itself are “scrutinized with caution,” but the President can exercise prerogative powers of uncertain dimension so long as Congress has been silent. I submit that this is simply not what the structural logic of Article II provides. To be sure, under the Vesting Clause the President may exercise some powers that are not expressly enumerated in Sections 2 or 3, subject to the authority of Congress (within the scope of its enumerated power) to say otherwise. Any assertion of such powers requires constitutional justification based on history and other standard interpretive tools. The paragraph suggests that instead of ordinary constitutional interpretation, the analysis in such cases turns to “contemporary” considerations. This is nothing but a bald transfer of policymaking discretion to the courts.

Some executive powers (statutory and residual powers) fluctuate according to their disjunction or conjunction with those of Congress, and some (prerogative powers) do not. That is the essential message of the structure of Article II. The fundamental error of Justice Jackson’s approach is to treat all executive powers as an undifferentiated mass, rather than to recognize that the relation between executive power and congressional power depends on what kind of executive power is at issue.

I would propose an alternative three-part approach:

1. A presidential act pursuant to a prerogative power is constitutional as a matter of separation of powers whether or not Congress has passed a statute authorizing or denying the power.
2. A presidential act pursuant to a statutory power is unconstitutional unless Congress has passed a statute authorizing it.

3. A presidential act pursuant to the residual executive power is constitutional unless Congress has passed a statute (pursuant to Congress's own enumerated powers) countermanding it.

This is simply a restatement of the typology of presidential powers reflected in the structure of Article II. We can see the force and clarity of these typology by considering some examples.

*C. Illustrative Examples*

1. *Steel Seizure Case*

2. *Dames & Moore v. Regan*

3. *Hamdan v. Rumsfeld*

4. *So-called "Torture Memo"*

5. *Medellin v Texas*

6. *Zivotofsky v. Kerry*