

Preface

More than three decades ago, we wrote and CQ Press published the first edition of *The American Presidency: Origins and Development*. Encouraged by the strong response that it and the next eight editions received, we have undertaken a tenth edition with three important objectives in mind.

- First, we have taken account of recent events and developments, including the entire presidency of Joseph Biden, the 2024 election, and the first year of Donald Trump's second term as president.
- Second, we have incorporated the best of the new scholarship on the origins and development of the presidency.
- Third, while adding new material on these matters, we have tightened the writing and organization throughout the book, resulting in a leaner text.

At its launch, *The American Presidency* was the first comprehensive one-volume history of the presidency to be written by political scientists in more than 50 years. One advantage of a developmental approach to the presidency is that it fills the enormous gap that has arisen in the education of most contemporary students of the office. Because the historical profession (with notable exceptions) has in recent years de-emphasized political history in favor of social history, political scientists have had to step into the breach. So be it: The historians' self-inflicted misfortune has become our opportunity.

Another reason for political scientists to approach the presidency with an eye to history is that in doing so, we depart from the approach taken by most standard textbooks. Instead of artificially segregating the presidency into its discrete parts—the president and Congress, presidential elections, party leadership, and so on—a historical approach necessarily integrates every aspect of the office in a way that accurately reflects the dynamic interaction of the various parts. We see, for example, how Franklin D. Roosevelt's attempt to seize control of the Supreme Court in 1937 simultaneously affected—and was affected by—his relations with Congress, his party, the public, and the media. The same can be said of Trump's use of social media, which deeply influenced public opinion, partisan politics, and public policy.

As we have developed this narrative through ten editions, our most important task has been to bring to light the history of how the presidency was created and how it has developed during its more than two centuries of existence. We describe what has

remained constant in the office, mostly because of its constitutional design. We also discuss those historical innovations that have endured, along with some that haven't.

We are less concerned about describing what is idiosyncratic about particular presidents. Abraham Lincoln and Millard Fillmore, for example, receive a chapter and a few paragraphs, respectively, but more because of how they affected the presidency and the political system than because of the kinds of people they were. We believe that the institutional history of the presidency is a sufficiently important and neglected topic to merit a book all its own.

Some readers may ask, how pertinent is the presidency's first century and a half to its more recent century? The answers of some political scientists have ranged from "hardly" to "not at all." Students of the modern presidency typically marked 1933, the year of Franklin D. Roosevelt's first inauguration, as Year One of relevant presidential history.

Our argument—and our evidence—is both different and, increasingly, widely accepted among presidential scholars. Many of the most important institutional characteristics of the presidency date from the Constitutional Convention and the earliest days of the Republic, which we chronicle in Chapters 1–3. During the 19th century, highly significant patterns and practices of presidential conduct took shape; these we discuss in Chapters 4–7. As for the era of the modern presidency—that is, the era in which the president has replaced Congress and the political parties as the leading instrument of popular rule—we trace its origins to Theodore Roosevelt and Woodrow Wilson as much as to Franklin D. Roosevelt and his successors (Chapters 8–14). Put simply, Theodore Roosevelt and Wilson began the practices that strengthened the president as the nation's popular and legislative leader; Franklin Roosevelt then consolidated, or institutionalized, the president's new leadership roles in ways that subsequent presidents have continued.

This book is an interpretive political history of the presidency (and, in Chapter 15, the vice presidency) as well as a factual one. We have worked hard to get our facts straight and to make our interpretations sound. Research scholars, we think, will continue to be stimulated by much of what we report about the deep roots of modern American political institutions. Students will gain a solid undergirding for their study of the presidency, the Constitution, political development, and contemporary American politics and government. We hope that this book will continue to find its home not only in reading rooms and classrooms but also in living rooms. After all, in a system of republican government such as ours, *political history* means our politics, our history.

We take pleasure and pride in the long friendship and collegueship that underlie our continuing collaboration on *The American Presidency*. The book is truly a joint intellectual endeavor.

We have many thanks to offer, not least to our wives and children, to whom this book is dedicated. We thank Jesse H. Rhodes of the University of Massachusetts, Amherst; Emily Charnock of the Marshall Scholarship Program; Nicholas Jacobs of Colby College; Noah Crabtree of Rhodes College; and Anna Goodell, University of

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Chapter 1

The Constitutional Convention

The Constitutional Convention of 1787 was, as Governor Samuel Huntington of Connecticut told the delegates to his state's ratifying assembly, "a new event in the history of mankind. . . . Never before did a people, in time of peace and tranquility, meet together by their representatives and, with calm deliberation, frame for themselves a system of government."¹ In the midst of this "new event," nothing was newer than the American presidency, an invention unlike any other national executive in history. When designing the office, the 55 convention delegates drew on their personal and professional experience, study of history and philosophy, understanding of political reality, and individual and collective wits.

The constitutional presidency that the convention created may be regarded as, in a sense, the office's genetic code. Because of the Constitution, the presidency is a one-person office, and the president, who is elected for a fixed four-year term by the entire country, shares virtually all the powers of the national government with an equally distinct and independent Congress.

The constitutional presidency contains, as does an individual's configuration of DNA molecules, some ingredients whose meaning has been clear and unchanging from the moment of conception, such as eye color for a person and the 35-year minimum age requirement for the president. The Constitution also includes sentences and phrases that are the legal equivalent of genetically rooted baldness: their meaning, although determined at the very beginning, could only be discovered later. For example, "He shall take Care that the Laws be faithfully executed" first appeared as a passing constitutional reference—the fifth of six clauses in the single sentence that constitutes Article II, Section 3. But in later years, this provision afforded presidents a strong legal claim to powers as varied as acting against secession by the southern states and directing the activities of the extensive federal bureaucracy, as well as weaker legal claims to defy laws at their discretion. Finally, there are those attributes whose meaning could be found only in the vagaries of individual choice and prevailing circumstance. Just as the relation of physical strength to well-being varies from person to person and situation to situation, so has the president's constitutional power to "recommend to [Congress's] consideration such Measures as he shall judge necessary and expedient" been of varying importance to different presidents at different times.²

Antecedents

As is true of any invention, the presidency had antecedents, all of which influenced the form the office took in the Constitution. The delegates to the Constitutional Convention had long experience with British executives—namely, the king in London and his appointed governors in the American colonies. And ever since independence was declared in 1776, delegates had the benefit of a decade's worth of experience with governments of their own design, both the state constitutions and the Articles of Confederation, which created and defined a kind of national government. These experiences set the stage for the calling of the convention and the creation of the presidency in the late spring and summer of 1787.

British and Colonial Executives

During their long years as colonists of Great Britain, Americans became well acquainted with the British form of government, which is best described as a constitutional monarchy. Great Britain was headed by a king or queen who assumed the throne through inheritance and reigned for life. The monarch's power was limited by Parliament, the British legislature. Although the king could order the nation into war, his order prevailed only if Parliament was willing to appropriate the funds needed to finance the effort. Conversely, Parliament could pass laws, but the king could veto them. Parliament, a bicameral legislature, consisted of the House of Commons (an elected body) and the House of Lords (made up at the time of hereditary peers and Anglican bishops with lifetime tenure).

The British form of government was more than the most familiar one to the American colonists. Many of them also regarded it as the best that human beings ever had devised. Basic liberties seemed better safeguarded by Great Britain's constitutional monarchy than by any other government in history. British wealth and power were first among the nations of the world. Indeed, Great Britain seemed to have solved what traditionally was regarded as an insoluble problem of classical political philosophy—that is, the inherent limitations of each of the three basic forms of government identified by Aristotle: monarchy (rule by one person), aristocracy (rule by an elite), and democracy (rule by the people).³ As the problem usually was formulated, because those who were entrusted to govern on behalf of the whole society ended up using power for their own selfish ends, monarchy soon degenerated into despotism, aristocracy into oligarchy, and democracy into anarchy, then tyranny. The British remedy, developed over several centuries, was to blend elements of all three forms of government into one—monarchy in the king, aristocracy in the House of Lords, and democracy in the House of Commons—and allow each element to check and balance the others.

In at least one important way, the governments of most of Great Britain's American colonies were different from the British government. Although the British constitution was a long-evolving, uncoded amalgam of laws and traditions, the colonies operated

according to written charters issued under royal authority. As historian Linda Colley wrote, these charters served as “examples of how systems and principles of government might be conveniently set down in writing in a single document.”⁴ When the time came for Americans to create their own state and national governments, it seemed obvious to them that they should do so in written constitutions.

In other ways, the British and colonial governments bore a close resemblance. Each colony had a governor chosen by the king and a legislature composed of an upper house, which was appointed in most colonies by the royal governor, and a lower house, which was elected by the people—that is, *the people* as defined in early America: the roughly two-thirds of white males who owned at least a small farm or shop.⁵ Royal governors were armed with substantial powers, including the right to cast an absolute veto over colonial legislation, the right to create courts and appoint judges, and even the right to prorogue (dissolve) the legislature. Politically astute governors exercised these powers cautiously because only the legislature was empowered to appropriate the funds required to finance a colony’s government and pay the governor’s salary.

For all their virtues, the British and colonial governments were prone to abuse by executives who were hungry for power. King George III, who reigned from London during the American Revolution, used government contracts, jobs, and other forms of patronage as bribes to ensure the support of members of Parliament. Some colonial governors employed similar practices to influence their legislatures.⁶ The king and his governors also stubbornly resisted the colonists’ pleas to respect their rights as Englishmen, dismissing Parliament member Edmund Burke’s argument that force would be “a feeble instrument, for preserving a people so numerous, so active, so growing, so spirited” as the Americans.⁷ In 1776, the colonists’ anger about these abuses of power was expressed fervently in the Declaration of Independence. The Declaration is best known for its ringing preamble (“all men are created equal,” “Life, Liberty and the pursuit of Happiness”), but it consists mainly of a long, detailed indictment of royal “injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.”

The lesson many Americans learned from their experience with the British and colonial governments was that liberty is threatened by executive power and safeguarded by legislative power. As James Wilson—a Scottish-born Pennsylvanian who signed the Declaration, fought in the Revolutionary War, and later served as a delegate to the Constitutional Convention—observed, “the executive and judicial powers of the [colonial] government were . . . derived from a foreign source. . . . On the other hand, our assemblies were chosen by ourselves: they were guardians of our rights.”⁸

State Constitutions

During the course of the Revolutionary War, 17 constitutions were written by the 13 newly independent states. (Some states began with one constitution, then replaced it with another.) For all their flaws, these were remarkable documents, marked like the

colonial charters by their concise, written character but adding new features as well: “rights declaration, democratic pedigree, republican structure, and amendability. Never before in history,” legal scholar Akhil Reed Amar observed, “had this particular combination of features come together.”⁹ Revulsion against their experience with the British executive—the king in London and his royal governors in the colonial capitals—led almost all the authors of state constitutions to provide for weak governors and strong legislatures.

In the state constitutions written after independence was declared, governors typically were elected by the legislature for a brief term (one year, in most cases) and were ineligible for reelection. They were forced to share their powers with a council whose members were appointed by the legislature or elected by the people. This arrangement made the governors, in the assessment of historian Gordon S. Wood, “little more than chairmen of their executive boards.”¹⁰ Indeed, at the Constitutional Convention, Governor Edmund Randolph of Virginia opposed the proposal to make the presidency a unitary office by saying that as governor, he was merely “a member of the executive.”

The powers the governors did have were meager. Most state constitutions made vague grants of authority to their executives and, by specifically denying them the right to veto legislation and make appointments, rendered them incapable of defending even that modest influence from legislative encroachment. In his *Notes on the State of Virginia*, Thomas Jefferson described the result in his home state, where in practice “all the powers of government, legislative, executive and judiciary, result to the legislative body.”¹¹

The constitution of the historically pro-British state of New York offered a striking exception to the general practice of weak governors and strong legislatures. New York’s governor was elected by the people (not the legislature) for a term of three years (not one) and (rather than being confined to a single term) could be reelected as often as the voters wanted. George Clinton, the first governor to be chosen under the New York constitution, was elected seven times for a total of 21 years. The executive power in New York’s government was unitary, exercised by the governor alone and not shared with a council. The governor was empowered to veto legislation (subject to override by the legislature) and to make appointments (subject to legislative confirmation).

The Articles of Confederation

The decision by the Continental Congress to declare independence from Great Britain in the summer of 1776 was accompanied by another important decision. Congress adopted Virginian Richard Henry Lee’s motion that “a plan of confederation be prepared and transmitted to the respective Colonies for their consideration and approbation.” Such a step was militarily necessary. Although the Declaration of Independence made each of the states, in effect, an independent nation, they could not fight a common war against the British without some sort of common government.

The states, jealous of their independence and reluctant to substitute even a home-grown central government for the British government they had just rejected, surren-

dered power grudgingly. They stipulated to their delegates in Congress that the confederation was to be no stronger than was absolutely necessary to wage the war for independence. Reacting against their experience with British rule, the states also made it clear that the confederation's executive component must be minimal. Nothing remotely resembling a king would be tolerated.

On June 11, 1776, the Continental Congress formed the Committee of Thirteen (one delegate from each state) to draft a plan of confederation. The committee acted expeditiously, submitting its recommendation on July 12. More than a year later, on November 15, 1777, Congress adopted a revised version of the plan, calling it the Articles of Confederation and Perpetual Union. Ratification by the states came slowly, with the last state not voting its approval until March 1, 1781. But because the articles so much resembled the ad hoc arrangement the states were already using under the Continental Congress, the delay in ratification made little difference.

The Articles of Confederation embodied the states' dread of central government and executive power. Indeed, they created less a government than an alliance or, as the articles themselves put it, a "league of friendship" among the states. Each state, regardless of wealth or population, was represented equally in Congress: one state, one vote. The president, chosen by Congress, was merely its presiding officer, not an executive at all. Eventually, after the burden of making all financial, diplomatic, and military decisions and executing all legislative enactments became more than the legislators could handle, Congress created small executive departments headed by appointed officials. In truth, Congress enacted few laws of consequence because passage required the support of nine of the 13 states. Amendments to the articles had to be approved by all 13 states, so none were adopted.

In addition to setting forth a weak institutional structure, the Articles of Confederation undermined the power of the national government in other ways. Technically, Congress was empowered to declare war, make treaties and enter alliances, raise an army and navy, regulate coinage, borrow money, supervise American Indian affairs, establish a post office, and adjudicate disputes between states. Funds and troops were supposed to be supplied by the states according to their wealth and population. But Congress had no power to tax the states or to enforce its decisions, generating "a massive collective-action problem."¹² When, as often happened, one or two states balked at meeting an obligation, other states followed suit. "Each state sent what was convenient or appropriate," historians Christopher Collier and James Lincoln Collier observed, "which usually depended on how close to home the fighting was."¹³ After the Revolutionary War was won, states felt even less reason to honor Congress's requests. The only thing binding the nation together, George Washington lamented, was a "rope of sand."¹⁴

National Problems

For all its weakness, the Articles of Confederation did not prevent the United States from winning independence. The war effectively ended on October 17, 1781, when

General George Washington's American army and a French fleet, anchored off Yorktown, Virginia, forced the British forces led by Charles Lord Cornwallis to surrender. But the problems of a weak, purely legislative national government became undeniable in the half-decade after victory. No longer bound together by the threat of a common foe, the states turned their backs almost completely on Congress and each other.

Overlapping claims to western lands brought some states into conflict. Connecticut settlers and Pennsylvania troops clashed in one disputed area. The western territories, which extended as far as the Mississippi River, were the nation's most valuable resource, but until the states' rival claims were settled, it was difficult to develop those lands and profit from them. On the Atlantic coast, some states with port cities placed taxes on goods imported from overseas by merchants in neighboring states. Caught between New York and Pennsylvania, Representative James Madison of Virginia wrote, New Jersey was like "a cask tapped at both ends." North Carolina, also lacking a deep-water port and trapped between Virginia and South Carolina, was "a patient bleeding at both arms."¹⁵ The new nation was burdened by a crippling debt. By 1789, foreign creditors held more than \$10 million in promissory notes and were owed \$1.8 million in interest. Unless paid, they were unwilling to engage in further trade with the United States. Yet Congress was unable to persuade the states to contribute to the treasury. By 1786, states were withholding 98% of congressionally requisitioned funds.¹⁶ Only a series of loans from Dutch bankers, negotiated by John Adams, kept the new nation solvent.

The United States also faced numerous problems on its borders. The nation's northern, southern, and western boundaries were under siege, with only an ill-equipped, poorly financed army of 700 to defend them. British soldiers continued to occupy two Great Lakes forts that their government had promised to vacate under the Treaty of Paris, which formally ended the Revolutionary War in 1783. Similarly, Spain closed the Mississippi River to American ships and made claim to land east of the river that, according to the treaty, belonged to the United States. Spain also roused indigenous tribes in Spanish Florida to attack white settlers in Georgia. Returning from a trip to the interior, Washington lamented, "The Western settlers . . . turn on a pivot; the touch of a feather would turn them any way"—perhaps toward an alliance with Spain or Great Britain that would secure their safety.¹⁷ Abroad, American ships were preyed on by Mediterranean pirates based in the Barbary states of Algiers, Morocco, Tripoli, and Tunis. Great Britain denied American merchants commercial access to its colonies in Canada and the West Indies, two lucrative markets for trade.¹⁸

In the midst of foreign and domestic difficulties, another problem developed that mixed elements of both. A currency crisis engulfed the United States, largely because Americans had gone on a buying spree, importing luxury items such as glassware and furniture from Great Britain that they had been unable to get during the war. As specie—gold and silver, the only American currency acceptable to foreign creditors—flowed out of the country to pay for these goods, it became scarce at home. Meanwhile, many debtors, especially farmers who had left the land to fight for independence and still

had not been paid by the financially destitute national government, faced bankruptcy or foreclosure. In response, these debtors pressured their state legislatures to print vast sums of paper money that they could use to pay their debts to creditors who in turn were unwilling to accept depreciated currency.

Lessons of Experience

Fear of executive power remained strong among Americans during the decade after independence was declared. But the problems that beset the United States under the strong legislative governments of the states and the weak legislative government of the Articles of Confederation taught certain lessons, particularly to people of property.¹⁹ As political scientist Charles C. Thach Jr. wrote, “Experience with the state governments . . . confirm[ed] the tendencies toward increasing confidence in the executive and increasing distrust of the legislature.” Experience also taught several things about the proper design of an effective executive:

It taught that executive energy and responsibility are inversely proportional to executive size; that, consequently, the one-man executive is best. It taught the value of integration; the necessity of executive appointments, civil and military; the futility of legislative military control. It demonstrated the necessity of the veto as a protective measure . . . [for] preventing unwise legislation. . . . It discredited choice [of the executive] by the legislature.²⁰

The Constitutional Convention

Of all the problems that plagued the new nation after independence, none seemed more amenable to solution than those involving commerce among the states. Few benefited and many suffered from the protectionist walls that individual states built around their economies. The Virginia Assembly, at Madison’s urging, called for a trade conference to be held at Annapolis, Maryland, in September 1786 and invited all the other states to send delegations.

The Annapolis Convention was a failure. Only Virginia, New Jersey, and Delaware sent full delegations, and seven states, suspicious of Virginia’s intentions, boycotted the meeting altogether. The convention proposed no remedies to the nation’s trade difficulties. But the delegates who did come to Annapolis, notably Madison and Alexander Hamilton of New York, rescued the enterprise by issuing a bold call to Congress to convene an even more wide-ranging meeting. They urged that the states be enjoined to choose delegates charged to “devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union.”²¹

Initially, Congress was cool to the idea. But within weeks, an event occurred that lent urgency to the nationalist cause. An armed uprising of farmers in western Massachusetts,

saddled with taxes and debts and unable to persuade the state legislature to ease credit, closed down courts to prevent foreclosure orders from being issued against their lands. Although similar outbreaks had occurred in about half the other states, they had been suppressed easily.²² This one, dubbed Shays's Rebellion after Revolutionary War veteran Daniel Shays, one of its leaders, threatened for a time to rage out of control.

The reaction around the country among people of property was shock and horror, not only at the class warfare that seemed to be erupting and the inability of the national government to help states maintain the peace but also at several states' subsequent decision to avert future rebellions by allowing debtors to pay off their creditors with nearly worthless paper money. "What, gracious God, is man!" declared the usually stoic George Washington after hearing of the Massachusetts riots. "We are fast verging to anarchy and confusion."²³

On February 21, 1787, Congress decided to act on the Annapolis Convention's request by passing a resolution that called on the states to send delegates to a mid-May convention in Philadelphia. The convention's "sole and express purpose" would be to propose amendments to the Articles of Confederation, none of which would take effect unless "agreed to in Congress and confirmed by the states."

The states were no more compelled to obey this congressional summons than to follow any other. But when a sufficient number—whether frightened by the prospect of further uprisings, concerned about the nation's growing domestic and international weakness, or inspired by the example of the nationally revered Washington (who decided to attend as a delegate from his native Virginia)—selected delegations, all the other states but Rhode Island fell into line for fear of having their interests ignored.

The Delegates

The Constitutional Convention has been variously described as an "assembly of demigods" (Jefferson), a "nationalist reform caucus" (political scientist John P. Roche), and a "coup" (legal scholar Michael Klarman), to cite but three descriptions.²⁴ The convention was all of these things. But, mundanely, it also was a gathering of 55 individuals.

Who were the delegates? Self-selection had much to do with determining whom states chose to represent them at the convention and who actually went. Political leaders who were committed to the idea that the national government must be dramatically improved embraced the opportunity to attend. Most of those who were basically satisfied with the status quo—including prominent Americans such as Patrick Henry of Virginia, Samuel Adams of Massachusetts, and George Clinton of New York—chose to stay away. Henry, a strong defender of the Confederation, reputedly said that he "smelt a Rat."²⁵ If they had attended and fought stubbornly for their position, observed political scientist Clinton Rossiter, the convention "would have been much more perfectly representative of the active citizenry of 1787. It would also, one is bound to point out, have been crippled as a nation-building instrument."²⁶

The 55 delegates were generally united in their belief that a stronger government was vital to the health of the new American nation. In part, this agreement stemmed from their similar experiences in the national arena. Forty-two were current or former members of Congress. Thirty had risked life and livelihood by fighting in the Revolutionary War, and nearly all of the others had been involved in the war as civilian officeholders. Eight had signed the Declaration of Independence. All were republicans, at least to the extent that they opposed a hereditary monarchy and supported some form of representative government.

Collectively, the convention was young. Many of the delegates were, in the words of historians Stanley Elkins and Eric McKittrick, “the young men of the Revolution,” who came of age during the revolutionary decade of the 1770s, when the idea of building a nation was more inspiring than traditional state loyalties.²⁷ Madison, at 36, was older than 11 other delegates, including Gouverneur Morris of Pennsylvania (35), Edmund Randolph of Virginia (33), and Charles Pinckney of South Carolina, who was 29 but said he was 24 so he could claim to be the youngest delegate. (That distinction belonged to Jonathan Dayton of New Jersey, who was 26.) The average age of the delegates—even counting Benjamin Franklin of Pennsylvania, who, at age 81, was 16 years older than the next-oldest delegate—was 43.

Other shared characteristics contributed to the delegates’ common outlook on many fundamental issues. All were white; all were men. Almost all lived in the long-settled coastal regions of their states; the backcountry frontier was hardly represented at the convention. Almost all were prosperous—about half were lawyers, and another quarter owned plantations or large farms. Only two delegates were small farmers, a group that accounted for 85% of the nation’s white population. The wealth of most of the delegates derived from personal property—government securities and investments in manufacturing, shipping, and land speculation. The prosperity of other delegates lay in real property, notably large farms and, in the South and elsewhere, fellow human beings. Twenty-five delegates—nearly half—were enslavers.²⁸

Rules and Procedures

Congress had summoned the convention to assemble on Monday, May 14, 1787. But not until Friday, May 25, were the seven state delegations needed for a quorum present in Philadelphia. Although most of the other delegations arrived within a few days, some came much later. Others left early. Never were all 55 delegates present at the same time.

The first order of business on May 25 was to elect a president, a word that in the usage of the day, suggested a presiding officer more than a leader or chief executive. Not surprisingly, Washington was the delegates’ unanimous choice. Although he spoke on only one issue during the convention, he played more than a ceremonial role.²⁹ According to the *Colliers*, “during that long, hot summer, this gregarious man was constantly having dinner, tea, supper with people, and one must assume of course that he was actively promoting his position”—namely, a strong national government and a strong

executive within that government.³⁰ In a very real sense, the legal scholar Akhil Reed Amar observed, “The father of our country has the strongest claim to be the father of its Constitution.”³¹

After Washington was elected president of the convention, a secretary was chosen—Major William Jackson of Pennsylvania. Jackson kept the convention’s official journal, which was little more than a record of motions and votes. Fortunately, Madison decided to keep a more extensive record of the delegates’ debates and deliberations. Madison was frustrated in his studies of other governments by the near impossibility of determining what their founders intended when creating them. In fairness to his colleagues, Madison decided to keep his notes secret until the last delegate died. That delegate turned out to be Madison, who died in 1836, at the age of 85. Along with the rest of Madison’s papers, his notes on the Constitutional Convention were purchased by Congress in 1837 and published in 1840.

The only other business of the convention’s first day was to accept the credentials of the state delegations. In doing so, the delegates implicitly agreed to follow the then-customary procedure of granting each state one vote. James Wilson was displeased by this arrangement (he felt the more populous states should have a greater voice), but he was persuaded by Madison and others that to alienate the small-state delegates at such an early stage could abort the entire proceeding.

On Monday, May 28, the delegates adopted additional rules and procedures. None was more important to the success of the convention than the rule of secrecy. The rule was simple: No delegate was allowed to communicate anything to anyone except a fellow delegate about the convention’s discussions and deliberations.

Jefferson, then the U.S. ambassador to France, wrote John Adams, the ambassador to Great Britain, that he was appalled by “so abominable a precedent.” But in a letter to Jefferson, Madison explained the delegates’ decision: “It was thought expedient in order to secure unbiased discussion within doors, and to prevent misconceptions & misconstructions without.”³² In other words, secrecy permitted the delegates to speak candidly about issues without fearing immediate public retribution as well as to change their minds without appearing weak or vacillating. It also kept opponents of a stronger national government from sensationalizing particular proposals or decisions as a means of discrediting the whole undertaking. Years later, Madison told historian Jared Sparks that “no Constitution would ever have been adopted by the Convention if the debates had been made public” at the time.³³

Another important rule the convention adopted was to permit any of its decisions to be reconsidered at any time at the request of even a single delegate. Because issues could always be raised and decided again, those who were on the losing side of a crucial vote were encouraged to stay and try to persuade the other delegates to change their minds rather than to walk out and return home in protest.

An Overview of the Convention

The Constitutional Convention was not a scripted or even an especially orderly proceeding. The delegates' decision to allow issues to be reconsidered, reinforced by their twin desires to build consensus among themselves and to create a government whose parts would mesh with one another, meant that the convention "could not, and did not, proceed in a straight line, neatly disposing of one issue after the next until all were dealt with. It moved instead in swirls and loops, again and again backtracking to pick up issues previously debated."³⁴ Historian Jack N. Rakove compared the constitution-writing process to "the solution of a complex equation with a large number of dependent variables: change the value of one, and the values shift throughout."³⁵

Students of mathematics know that not all such equations are solved. Once the convention was called, the risk of failure was great. As Franklin wrote to Jefferson on April 19, 1787, "If it does not do good it will do harm, as it will show that we have not the wisdom among us to govern ourselves."³⁶ Nor did the delegates' work proceed smoothly. Near the midway point, Washington wrote, "I almost despair of seeing a favourable issue to the proceedings of the Convention, and do therefore repent having had any agency in the business."³⁷ Nevertheless, from May to September, the delegates used drafts, debates, compromises, and committees to organize their deliberations and help them work through the many issues that faced them. These plans and committees structured the work of the convention into seven main stages:

- Introduction of the Virginia Plan (May 29)
- Decision by the convention to recast itself as the Committee of the Whole, originally for the purpose of considering the Virginia Plan in detail but later to evaluate the New Jersey Plan and Alexander Hamilton's plan as well (May 30–June 19)
- Clause-by-clause debate by the delegates of their decisions when meeting as the Committee of the Whole (June 20–July 26)
- Work of the five-member Committee of Detail, which was appointed by the convention to produce a draft of the new constitution that reflected the delegates' previous decisions on multiple issues (July 24–August 6)
- Reconsideration by the delegates of each provision in the report of the Committee of Detail (August 7–31)
- Recommendations to the convention by the eleven-member Committee on Postponed Matters, which was created to propose acceptable solutions to problems that continued to stalemate the delegates (August 31–September 8)

- Final adjustments, including the work of the Committee of Style, which was charged to write a polished draft of the Constitution, and last-minute tinkering by the delegates, culminating in their signing of the proposed plan of government (September 9–17)

The Virginia Plan (May 29)

The Virginia Plan, introduced on May 29 by Governor Randolph but written mainly by Madison, offered a radical departure from the Articles of Confederation. The plan proposed to create a three-branch national government and to elevate it to clear supremacy over the states, partly by grounding its authority squarely in the sovereignty of the people.³⁸

According to the Virginia Plan, the heart of the national government would be a bicameral legislature. The lower house would be apportioned according to some combination of wealth and population and elected by the people. Members of the upper house would be chosen for a longer term by the lower house from a list of candidates nominated by the states. The legislature's powers would include broad authority not only to pass laws but also to conduct foreign policy and to appoint most government officials, including judges.

A national judiciary, appointed by the legislature to serve “during good behavior”—that is, with life tenure—would form the second branch. One of its broad-ranging powers was “impeachments of any National officers.”

The new government would also have an executive branch, although it was vaguely defined in the Virginia Plan. The “national executive” (the plan left unresolved the question of whether this would be a person or group of people) was “to be chosen by the National Legislature for a term of _____ years.” Its powers were obscure: “besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the [Articles of] Confederation.” No one knew exactly what the phrase “Executive rights” meant.

Another element of the proposed new government was a “Council of revision” consisting of “the executive and a convenient number of the National Judiciary.” The council would be empowered to veto laws passed by the legislature, subject to override if a vetoed law was passed again by an unspecified legislative majority.³⁹

Finally, the new government would have the power to veto state laws that were in conflict with the Constitution or with national legislation. For Madison, argued Gordon Wood, the worst thing about the Articles of Confederation was not the weakness of the national government but “vices within the several states” that produced an abundance of unjust and inconsistent laws. When the convention later rejected this provision of the Virginia Plan, Madison was for a time “convinced that the Constitution was doomed to fail.”⁴⁰

The delegates' response to the Virginia Plan was remarkably placid, especially considering that it proposed to replace the weak national government of the Articles rather

than amend the document. “So sharp a break was Virginia asking the other states to make with the American past that one wonders why at least one stunned delegate . . . did not rise up and cry havoc at the top of his lungs,” Rossiter wrote. “Instead, the delegates ended this [May 29] session by resolving to go into a ‘committee of the whole house’” on the next day to review and debate the plan.⁴¹

Committee of the Whole (May 30–June 19)

In becoming the Committee of the Whole, the convention was, in a sense, simply giving itself a different name. The same group of delegates made up the committee as made up the convention. But as the Committee of the Whole, they could operate more informally. To symbolize this change, Washington temporarily stepped down as president, and Nathaniel Gorham of Massachusetts was chosen to preside. In addition, any decisions made by the delegates while meeting as the committee would be in the form of recommendations that the convention would debate and vote on at least once more.

From May 30 to June 13 the Committee of the Whole spent most of its time going over the Virginia Plan, clause by clause. Much of the plan was accepted, but parts of it were altered and some ambiguous provisions were clarified.⁴² The executive was defined as a unitary—that is, a one-person office. This person would be elected by the legislature for a single, seven-year term and would be subject to impeachment and removal on grounds of “malpractice or neglect of duty.” The executive alone, not a council of revision, was empowered to veto laws passed by the legislature, subject to override by a two-thirds vote of both houses. The requirement for a supermajority here and elsewhere in the new plan of government was an American innovation unknown to the British Parliament but already used widely in the states.⁴³

In deference to the states, the Committee of the Whole decided that members of the upper house of the national legislature (who had to be at least 30 years old) would be chosen by the state legislatures. They would serve seven-year terms and be eligible for reelection. Members of the lower house, also eligible for reelection, would serve three-year terms. All members of the national legislature would be barred from holding any other government office, mainly to prevent the emergence of conflicts of interest. As for the courts, there would be one “supreme tribunal,” and the judges who served on it or on such “inferior tribunals” as the national legislature might decide to create would be appointed by its upper house for a lifetime term.

The New Jersey Plan. One plank of the Virginia Plan was especially controversial: the provision that both houses of the national legislature would be apportioned according to population. Delegates from the states that thought of themselves as large (Virginia, Massachusetts, Pennsylvania, and the three southern states whose populations were growing most rapidly at the time—Georgia, North Carolina, and South Carolina) favored the idea. They fought sharply with the delegates from the other states who feared that their constituents would be hopelessly outnumbered in the legislature and wanted

to preserve the existing arrangement of equal representation in Congress for each state. A compromise plan, proposed by Roger Sherman of Connecticut on June 11, would have apportioned the lower house of the legislature according to population and the upper house on the basis of one state, one vote. But few delegates were ready yet for compromise. Instead, small-state delegates responded to the Virginia Plan with a sweeping counterproposal. It was introduced on June 15 by William Paterson of New Jersey.

The New Jersey Plan came in the form of amendments to the Articles of Confederation rather than as a new constitution. It proposed to add two branches to the one-branch national government of the Articles: a plural or committee-style executive, to be elected by Congress for a single term and “removeable by Cong[ress] on application by a majority of the Executives [governors] of the several States,” and a supreme court consisting of judges appointed by the executive for lifetime terms. The plan also declared national laws and treaties to be “the supreme law of the respective States” and authorized the executive to use force if necessary to implement them. In addition, Congress would be empowered to regulate interstate and international commerce and impose taxes. But the main purpose of the New Jersey Plan was unstated: to preserve the structure of Congress under the Articles as a unicameral legislature in which each state, regardless of size, cast one vote.⁴⁴

Hamilton's Plan. On June 18, Hamilton delivered a four- to six-hour speech to the delegates in which he urged them to consider his plan for an avowedly British-style government.⁴⁵ “He had no scruple in declaring,” according to the notes kept by Madison, “supported as he was by the opinions of so many of the wise & good, that the British Government was the best in the world; and that he doubted much whether any thing short of it would do in America.”⁴⁶

Specifically, Hamilton proposed that the national government would be supreme in every way to the states. State governors would be appointed by the national legislature and granted the right to veto laws passed by their own assemblies. Members of the upper house of the national legislature, similar to members of the British House of Lords, would serve for life. As for the executive, “the English model is the only good one,” Hamilton asserted.⁴⁷ Although he did not suggest that the United States create a hereditary monarchy, Hamilton did propose that the executive be chosen by electors and granted lifetime tenure and vast powers, including “a negative on all laws about to be passed, . . . the direction of war when authorized or begun, the sole appointment of the heads of the departments, the power of pardoning all offences except Treason,” and, along with the Senate, treaty-making power. In truth, argues biographer Ron Chernow, Hamilton proposed “a new hybrid form of government that would have the continuity of a monarchy combined with the civil liberties of a republic.”⁴⁸

Hamilton's design was dismissed by most of the delegates as being far beyond the bounds of what the people or the states would accept. Some scholars have suggested that his real purpose was to offer a plan so extreme that the Virginia Plan would seem moderate by comparison.⁴⁹ Yet several of Hamilton's specific proposals were adopted

later in the convention, notably those concerning the president's power to grant pardons and to negotiate treaties. As for the New Jersey Plan, it was defeated on June 19 by a vote of seven states to three. Later that day, the Virginia Plan, as already modified, was approved by the Committee of the Whole and referred to the convention for further consideration. But the conflict between the delegates from the large states and the small states over apportionment in the national legislature was far from resolved.

Convention Debate (June 20–July 26)

On June 20, with Washington again in the chair as president of the convention, the delegates began their clause-by-clause evaluation of the plan of government they had tentatively laid out while meeting as the Committee of the Whole. Among the changes they voted in the plan were these:

- Members of the lower house of the legislature would be elected for a term of two years, not three, and would have to be at least 25 years old.
- Members of the upper house would serve a six-year rather than a seven-year term. Terms would be staggered so that one-third were elected every two years.
- The national legislature would not have the power to veto state laws, much to Madison's dismay. But, borrowing a plank from the New Jersey Plan, national laws and treaties would be "the supreme law of the respective States."
- A property-owning requirement for members of the executive, legislative, and judicial branches would be established. (This idea was later abandoned.)
- Delegates expressed enough displeasure with the provision for legislative election of the president to a single, seven-year term to indicate that it would not remain in the final document, but they failed to agree on an alternative.

More than any other issue, deciding how the legislature would be apportioned consumed the convention's time, attention, and patience for five weeks of debate in late June and July. Delegates from the small states pressed relentlessly for equal representation of the states. Large-state delegates just as adamantly insisted that representation in both houses reflect population, wealth, or some combination of the two.

A special committee, with members from every state, was appointed on July 2 to propose a compromise. On July 5, after a break to celebrate Independence Day, the committee recommended a plan of equal representation for each state in the upper house and apportionment according to population in the lower house. As a sop to delegates from the large states who feared that an upper house dominated by small-state delegates would push for spending programs that would impoverish the large states, the committee vested exclusive power in the lower house to originate all legislation dealing with money.

For more than a week, the delegates engaged in a complex and sometimes bitter debate about the proposed compromise. New questions were raised about whether states yet to be admitted to the Union should receive as much representation as the original 13, how often a national census should be taken to measure population changes, and whether apportionment in the lower house should reflect a state's wealth as well as its population. On July 16, the convention voted narrowly to approve the main points of the special committee's proposal, sometimes called the Connecticut Compromise in honor of its author, Roger Sherman. One week later, the delegates undermined the idea that the upper house would represent the states in the new government by deciding that every state would have two senators, each of them free to vote independently of each other and of their state governments.

This happy mixture of principle and practicality was tarnished by a dreadful, if unavoidable, compromise with America's "peculiar institution." In one of the three constitutional clauses that protected slavery, each enslaved individual was counted as three-fifths of a person for purposes of representation in the lower house. These three clauses, which also included both a guarantee that slaves could continue to be imported from abroad for 20 years and a fugitive slave provision requiring states to return escaped slaves to their owners, would cast a long, dark shadow over the republic.

As terrible as these concessions were, they could have been worse. Although allowing the continuation of slavery and even abetting it by promising to help catch fugitive slaves—a Faustian bargain that most Framers feared was necessary to prevent the dissolution of the Union—the delegates refrained from providing slavery with a moral stamp of approval. Indeed, the word *slavery* is never used in the document; instead, the delegates resorted to euphemisms such as "persons held to service," a tacit acknowledgment of their embarrassment. By depriving the defenders of slavery of moral ground to stand on, the Constitution's wording also allowed later opponents of the practice, such as the abolitionist Frederick Douglass and President Abraham Lincoln, to claim that the Framers regarded it as a politically necessary evil rather than a positive good.

Committee of Detail (July 24–August 6)

Having worked through the Committee of the Whole report, on July 24 the delegates appointed a Committee of Detail to review all of their decisions and draft a constitution that incorporated them. The five-member committee included representatives of the three main regions of the country—Nathaniel Gorham of Massachusetts and Oliver Ellsworth of Connecticut (a protégé of Sherman) from New England, James Wilson of Pennsylvania from the middle Atlantic states, and Edmund Randolph of Virginia and John Rutledge of South Carolina from the South. The committee worked while the rest of the convention adjourned until August 6.

One indication of the committee's influence is that it took convention-passed resolutions amounting to 1,200 words and transformed them into a draft constitution of 3,700 words.⁵⁰ The committee also drew from a wide range of other sources in compil-

ing its report: the New Jersey Plan, the Articles of Confederation, the rules of Congress, some state constitutions (notably those of New York and Massachusetts), and a plan of government proposed by Charles Pinckney of South Carolina.

Most of the memorable phrases in the Constitution were written by the Committee of Detail, including “state of the Union” and “We the People.” Institutions were named. The executive became the president; the national tribunal, the Supreme Court; and the legislature, Congress, with its upper house called the Senate and its lower chamber, the House of Representatives.

For the most part, the committee, in keeping with its name, simply fleshed out the details of earlier convention decisions. It established procedures for the president’s veto, defined the jurisdiction of the courts, and adjusted certain relations among the states. In some instances, however, the committee substituted its own judgment for the convention’s. For example, it vested the power to impeach in the House and omitted the property requirement for officeholders.

Perhaps the most important decision by the Committee of Detail was to transform general grants of power for each branch into specific ones. What previously had been Congress’s broadly stated authority “to legislate in all cases for the general interests of the Union” became instead a list of 18 enumerated powers, including the power to lay and collect taxes, regulate interstate commerce, establish post offices, “make war,” elect a national treasurer, and create inferior courts—all culminating in a sweeping grant “to make all Laws that shall be necessary and proper for carrying into Execution” these and “all other Powers vested” in the new government. The states were forbidden certain powers, notably to make treaties with other nations, to print money, and to tax imports.

The committee granted the president authority to recommend legislation to Congress, make executive appointments, receive ambassadors from other nations, issue pardons, “take care” that the laws be executed, and command the armed forces. An oath to “faithfully execute the office” of president also was included, as was a provision that the Senate’s own elected leader would exercise the powers and duties of the presidency if the president died, resigned, or became disabled. The judiciary was given jurisdiction in cases arising under the laws of the national government as well as over controversies between states or between citizens of different states. Finally, responding to a threat to walk out by General Charles Cotesworth Pinckney of South Carolina (an older cousin of fellow delegate Charles Pinckney), the committee forbade Congress to tax or ban the importing of slaves.

Convention Debate (August 7–31)

As they had with the Virginia Plan and the report of the Committee of the Whole, the delegates reviewed the draft constitution proposed by the Committee of Detail clause by clause. Much of the draft was approved. Some parts, however, were modified, and others became matters of serious controversy.

Modifications. The delegates tinkered with several provisions of the Committee of Detail's draft:

- They enacted minimum citizenship requirements for members of Congress (seven years for members of the House, nine years for senators), along with a requirement that legislators be inhabitants of the states they represent.
- They raised the majority needed in both houses of Congress to override a president's veto from two-thirds to three-fourths. (Near the end of the convention, the delegates restored the two-thirds requirement.)
- They judged Congress's power to "make war" too sweeping to protect the nation if it was attacked when Congress was out of session. The clause was revised to read "declare war."
- They forbade Congress to pass ex post facto laws (retroactive criminal laws) or bills of attainder (laws that declare an individual guilty of a crime without a trial).
- They barred the government from granting "any title of nobility" to any person and forbade government officials to receive "any present, emolument, office, or title of any kind whatever from any king, prince, or foreign state."
- They empowered Congress to activate the militia of any state "to execute the laws of the Union, suppress insurrections, and repel invasions."
- They created a convention-based procedure for amending the Constitution: "on the application of the legislatures of two-thirds of the states in the Union for an amendment of this Constitution, the legislature of the United States shall call a convention for that purpose."
- They prohibited any religious test as a requirement for holding office.
- They expanded the president's oath to include these words: "and will to the best of my judgment and power preserve, protect, and defend the Constitution of the United States." (Later, "to the best of my judgment and power" became "to the best of my ability.")
- The Committee of Detail had proposed that the new constitution take effect when ratified by state conventions, not state legislatures that might resent the plan's dilution of their powers. The delegates agreed and then voted to set the number of states needed for ratification at nine, or two-thirds.

Controversies. The draft constitution's slavery provisions came under fierce assault from several northern delegates, especially the three-fifths rule for counting enslaved

people as part of the population and the prohibition against laws banning the importation of slaves. The North's concern derived less from moral considerations than from fear of slave rebellions, which might attract foreign intervention and, in any event, probably would require northern arms and money to suppress. Southern delegates not only defended the provisions to protect slavery but also confirmed that their states would not ratify any constitution that placed slavery in jeopardy.

Adopting the approach previously used to settle the controversy between the large and small states, on August 22 the convention appointed a special committee to find a compromise solution. Two days later, the committee proposed that Congress be authorized, if it so decided, to end the importation of enslaved people after 1800. In the meantime, Congress could tax imported slaves at a rate no greater than ten dollars each. General Pinckney persuaded the convention to change 1800 to 1808. The committee's recommendation, as amended, was passed.

Controversies over two other matters caused the convention to bog down: the powers of the Senate, which delegates from the large states wanted to minimize and delegates from the small states wanted to maximize, and a cluster of issues concerning presidential selection. On August 31, nearing the end of its labors, the convention appointed a Committee on Postponed Matters, with a member from each state delegation, to propose solutions to these vexing problems.

Committee on Postponed Matters (August 31–September 8)

Beginning on September 4, the Committee on Postponed Matters, chaired by David Brearley of New Jersey, made several recommendations about the presidency.⁵¹ The committee proposed a presidential term of four years rather than seven, with no limit on the number of terms to which a president could be elected. The president was to be chosen not by Congress but by the newly created Electoral College. To constitute the Electoral College, each state would select, by whatever means it chose, electors equal in number to its representatives and senators in Congress. The candidate who received the largest majority of electoral votes would become president. The candidate who finished second would become vice president. (This was the first mention of the vice presidency at the convention.) If no candidate received a majority, the Senate would select the president and vice president from among the five candidates who received the greatest number of electoral votes.

As a corollary to its proposal for the Electoral College, the committee recommended that certain responsibilities be assigned to the vice president: to preside over the Senate, with the right to cast tie-breaking votes, and to act as president if the office became vacant before the president's term expired. Finally, the committee recommended that qualifications for president be stated in the Constitution. The president would have to be at least 35 years old, a natural-born citizen of the United States or a citizen at the time of the Constitution's enactment, and a resident of the United States for at least 14 years.

For several days, the delegates carefully considered the committee's complex proposal for presidential selection. On September 7, they passed it after making just one substantial change: the House of Representatives, not the Senate, would choose the president in the event of an Electoral College deadlock, with each state delegation casting one vote. The Senate still would choose the vice president if the electoral vote for that position was tied.

Having approved the Electoral College, the convention quickly acted to reduce the powers of the Senate, mostly in response to demands by the large states. The president, not the Senate, was granted the authority to make treaties and to appoint ambassadors, public ministers, consuls, Supreme Court justices, federal judges, and all other officers whose selection was not otherwise provided for. Senate confirmation would nonetheless be required for all of these appointments. A two-thirds vote of senators was stipulated for ratifying treaties.

On September 8, the convention approved the final proposal of the Committee on Postponed Matters. The president was to be impeached by the House on grounds of "treason or bribery or other high crimes and misdemeanors against the United States" and removed from office if convicted by the Senate. The delegates added the vice president and other civil officers to the roster of those who were subject to impeachment, but they raised the margin needed for Senate conviction from a simple majority to two-thirds.

Having completed (or so they believed) their work on the Constitution, the delegates ended their business later that day by voting to create a five-member Committee of Style to write a polished final draft of the document for them to sign. The committee's leading members were Madison, Hamilton, and Gouverneur Morris, who seems to have done most of its work.

Final Adjustments (September 9–17)

Even as the Committee of Style labored, the delegates continued to modify some of their earlier decisions. On September 10, Madison urged that special constitutional conventions not be a part of the process of amending the Constitution. Instead, he argued, amendments should be initiated by a two-thirds vote of Congress or by two-thirds of the state legislatures, with approval by three-fourths of the states needed for ratification. Two days later, Hugh Williamson of North Carolina successfully moved that the requirement for overriding a presidential veto be reduced from a three-fourths vote of each house of Congress to a two-thirds vote. The Committee of Style incorporated these changes into its draft.

Meanwhile, some delegates were expressing more fundamental reservations about the Constitution. Randolph worried that the convention had gone far beyond its original charge to propose revisions in the Articles of Confederation. He urged that the proposed constitution be approved not only by state ratifying conventions but also by Congress and the state legislatures, even if this process necessitated a second con-

stitutional convention. His fellow Virginian, George Mason, and Elbridge Gerry of Massachusetts objected to the absence of a bill of rights from the Constitution. So convinced were the other delegates that such an addition was unnecessary, observes historian Richard Beeman, that “not a single state delegation in the Convention supported the idea of a federal bill of rights.”⁵² Most delegates were convinced that they had designed the new government’s system of check and balances so well that individual rights were not in jeopardy. They also were ready to wrap things up.

The Committee of Style reported to the convention on September 12.⁵³ Its draft not only reduced the number of articles from 23 to seven but also included some significant innovations. The most memorable of these was the preamble:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.⁵⁴

The committee also added a provision that barred states from passing laws to impair the obligations of contracts. Finally, it wrote vesting clauses for Congress and the president that, intentionally or not, suggested that the president might have executive powers beyond those enumerated in the Constitution.

The committee’s draft met with widespread approval from the delegates, but they continued to tinker. Congress was stripped of its power to choose the national treasurer in favor of the president. A provision was added that the Constitution could not be altered to deprive a state of equal representation in the Senate without the state’s consent. And, at the initiative of Morris and Gerry, a compromise procedure for amending the Constitution was created that incorporated both the Committee of Detail’s recommendation and Madison’s plan. As finally agreed, a constitutional amendment could be proposed by either a two-thirds vote of both houses of Congress or a convention that Congress was required to call if two-thirds of the state legislatures requested one. In either case, three-fourths of the states would have to ratify an amendment for it to become part of the Constitution.

Despite these alterations, Randolph, Gerry, and Mason remained unconvinced, expressing doubts about the magnitude of the changes that the convention was recommending. But their motion for another constitutional convention to consider any recommendations that might be offered by the states was defeated by a vote of 11 states to none. As Jack Rakove noted, the delegates realized from experience that “a second federal convention would assemble encumbered by proposals for amendments of all kinds and bound by instructions that would make it impossible to replicate the process of persuasion, compromise, and bargaining from which the completed Constitution had so laboriously emerged.”⁵⁵ As it turned out, state ratifying convention proposed (but did not insist on) 292 proposed changes in the Constitution.⁵⁶

The convention's work finished, the delegates assembled on September 17 to sign the Constitution. Forty-two of the original 55 delegates were still present in Philadelphia, and all but Randolph, Mason, and Gerry affixed their signatures to the document. Even then, the delegates could not resist some fine-tuning, unanimously approving a Washington-supported motion to slightly alter the apportionment formula for the House of Representatives.

Speaking first before and then during the signing ceremony, Franklin offered the convention's most memorable benediction. To the delegates, he presented a long speech that—as read by Wilson because of Franklin's frailty—said in essence that he supported “this constitution because I expect no better, and because I am not sure it is not the best.”



George Washington presiding at the signing of the Constitution in Philadelphia on September 17, 1787.

Source: Library of Congress.

Later, as the last few delegates waited to sign the Constitution, Franklin gestured toward the image of the sun carved into the back of Washington's chair. He said to those standing nearby that although “painters have found it difficult to distinguish in their art a rising from a setting sun . . . I have the happiness to know that it is a rising and not a setting sun.”⁵⁷

Chapter 2

Creating the Presidency

During the course of the Constitutional Convention, the presidency developed along two main lines. First, the loosely designed executive of the Virginia Plan took on greater clarity and specificity. Second, the plan's weak executive, which was subordinate to the legislature, was made stronger. These two developments manifested themselves at the convention in a variety of specific issues of executive design. As described in this chapter, the issues encompassed the number of the executive (unitary or plural), the methods of executive selection and succession, the length and character of the term of office, the means of removing the executive in extraordinary circumstances, the institutional separation of the executive from the legislature, and the office's enumerated powers.

The Making of the Presidency: An Overview

The design of the executive was one of the most vexing problems of the Constitutional Convention, and solving it was the convention's most creative act. Other issues were more controversial, but they typically lent themselves to compromise solutions, such as the small states agreeing to split the difference with the large states and provide for a bicameral legislature. When it came to the nature and powers of the executive, however, the delegates labored in a realm of such intellectual and political uncertainty that the politics of compromise were largely irrelevant. The result, although long in coming, was that "the presidency emerged not from the clash of wills to gain a long-contested point, but from a series of ingenious efforts to design a new institution that would be suitably energetic but safely republican."¹

One problem the delegates encountered was that their experience offered several models of what they did not want in an executive but few models that they found attractive. The British monarch and the royal colonial governors had been, in their eyes, trampers of liberty. The constitutions that nearly all of the states wrote after independence provided for governors who were unthreatening but also weak to the point of impotence. The national government of the Articles of Confederation, such as it was, had no chief executive at all.

A second problem that stymied the delegates derived from their general ambivalence about executive authority. They wanted an executive that was strong enough to enforce the law and check a runaway legislature but not so strong as to become despotic. This ambivalence was shared by the American people, whose hatred of monarchy existed side by side with their longing to make George Washington king. As political scientist

Seymour Martin Lipset showed, Washington was a classic example of what the German sociologist Max Weber called a charismatic leader: one “treated as endowed with supernatural, superhuman, or at least specifically exceptional powers or qualities.”² “Oh Washington!” declared Ezra Stiles, the president of Yale University, in one typical comment. “How I do love thy name! How have I often adored and blessed thy God, for creating and forming thee into the great ornament of humankind!”³

But the public’s longing for Washington was just that: a longing for Washington, not for a hereditary monarchy. As Stanley Elkins and Eric McKittrick pointed out, Washington’s wide-ranging responsibilities as commander in chief during the Revolutionary War meant that “he had in a certain sense been acting as President of the United States since 1775.”⁴ Delegates and citizens alike knew that Washington would wield power responsibly and relinquish it voluntarily. He had already done so once when, following victory in the Revolutionary War and British recognition of American independence, he surrendered his sword to Congress and retired to his farm at Mount Vernon. But would his successors be so worthy? “The first man put at the helm will be a good one,” Benjamin Franklin told the convention. “No body knows what sort may come afterwards.”⁵

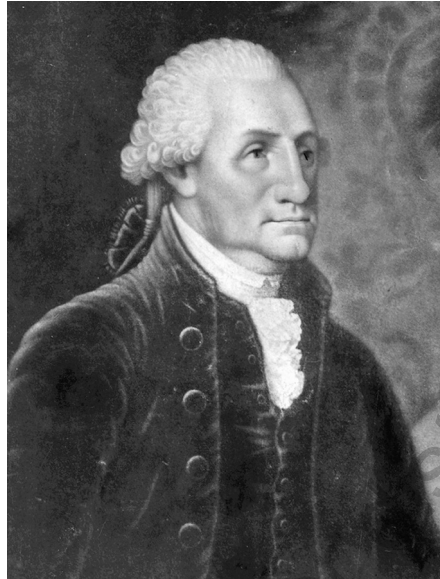
Despite the delegates’ difficulties, the presidency gradually took shape as the convention wore on. For all their intellectual uncertainty, they moved steadily in the direction of a more clearly defined executive. For all their ambivalence about power, they made the executive stronger than they were initially inclined to do.

Greater Clarity

Charles Thach noted in his classic book, *The Creation of the Presidency*, that Virginia delegate James Madison “has with much justice been called the father of the Constitution.” But even as admiring a scholar as Thach conceded that “the claims for his paternity do not extend to the fundamentals of Article II,” the executive article.⁶

Madison himself claimed no role in creating the presidency. As he wrote to Washington on April 16, 1787, less than a month before the scheduled opening of the convention, “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.”⁷ Madison’s Virginia Plan offered the convention a vaguely defined national executive. Even the basic structure of the executive—whether it would be a single person, a chaired board, or a committee—was unclear. In addition, the length of the executive’s term was not specified, and its powers were not enumerated.⁸

Madison’s fellow delegates seem to have shared his uncertainty. The only issues they resolved to their satisfaction during the convention’s first two months were the unitary nature of the executive and its power to veto laws passed by the legislature, subject to override. The Committee of Detail, which began its work on July 24, helped matters some: It gave the executive the name *president*, provided for succession if the office became prematurely vacant, and enumerated its powers. But the main issues that divided the delegates—the method of selecting the president, the length of the term,



George Washington, hero of the Revolutionary War and presiding officer of the Constitutional Convention, was to many people the personification of the new Republic and of the presidency.

Source: Library of Congress.

and the president's eligibility for reelection—were not resolved until September, when the Committee on Postponed Matters proposed selection by an electoral college, a four-year term with no limit on reeligibility, and the creation of the vice presidency.

Greater Strength

For all the vagueness of its conception, the national executive of the Virginia Plan generally accorded with what most delegates at the start of the Constitutional Convention seem to have been seeking: an agent of restraint in a basically legislative government. The executive in Madison's proposal was weak (it was bound by a council and devoid of enumerated powers), but it certainly was stronger than in the one-branch legislative government of the Articles of Confederation. The executive also was subordinate to the legislature, which was empowered to elect it. But it was not subservient, as demonstrated by its fixed term, the veto power, and a ban on legislative reductions of the executive's salary.

Dissatisfied with the convention's early inclination toward a subordinate executive, a coterie of committed delegates worked diligently and effectively to strengthen the office's constitutional power. They were led by two Pennsylvania delegates: James Wilson, who envisioned the executive as "the man of the people," and Gouverneur Morris, who regarded a properly constituted executive as "the great protector of the Mass of

the people.”⁹ Although Wilson and Morris both favored a strong executive, they did so for different reasons. Morris thought that a strong executive would serve the people best by restraining their occasional impulse to support dangerous popular leaders—demagogues who obtain power by emotional appeals to prejudice and fear.¹⁰ Wilson thought that such an executive would enhance the public’s influence. Historian Richard Beeman accurately described Wilson as the only delegate who envisioned presidents “much like those we have today—vigorous and powerful, but based firmly on the will of the people.”¹¹

Despite these differences, during the course of the convention, the pro-executive group won victory after victory. Once the architects of the Constitution resolved to strengthen the national government—to create self-governance on a grand scale—they had no recourse, it seemed, but to attempt to reconcile it with executive power. Their halting efforts to construct an energetic and independent executive became more decisive once they decided to give every state equal representation in the Senate. It was at that point, political scientist David Robertson wrote, that “Madison began to assert that the president should have more power to pursue the nation’s interest.”¹²

Number of the Executive

The number of the executive was the first issue to rouse the delegates. The debate on number followed two tracks. First, should the executive be unitary or plural—that is, a person or a group of people? Second, should the executive be forced to consult with a council before exercising some or all of its powers?

Unitary or Plural?

The Virginia Plan said nothing about the number of the executive, perhaps because Madison had no clear opinion on the matter or perhaps because, like Roger Sherman of Connecticut, he initially felt that the legislature should be free to define and then redefine the shape of the executive as it saw fit.

On June 1, the convention, meeting as the Committee of the Whole, heard a motion from Wilson that the executive be a single person. According to Madison’s notes, “a considerable pause ensu[ed]” as the usually talkative delegates lapsed into silence.¹³ They were discomforted by the prospect of discussing the issue in the presence of Washington, whom everyone assumed would be the first leader of whatever executive branch they created.¹⁴ After Franklin admonished his colleagues to speak freely, however, the debate was joined. The issue became an early test for the pro-executive delegates at the convention.

Edmund Randolph of Virginia and Sherman led the fight against Wilson’s motion. Randolph, arguing that a single executive, by its nature, would be the “foetus of monarchy,” proposed instead a three-person board, with one member from each region of the

country. Sherman, who regarded the ideal executive “as nothing more than an institution for carrying the will of the Legislature into effect,” said he “wished the number might not be fixed, but that the legislature should be at liberty to appoint one or more as experience might dictate.”¹⁵ Franklin added that the policies pursued by an executive board would be less easily changed and, therefore, more stable and consistent than those of an individual. In addition, he pointed out that the death or disability of an executive board member would not pose problems of succession, unlike the death or disability of a single executive.¹⁶

Wilson defended his motion shrewdly. To be sure, he argued, a single executive would be a source of “energy” and “dispatch”—that is, of vigorous and timely action—in the new government. But Wilson also claimed that a single executive was indispensable to controlling executive power—how could specific responsibility for incompetence or abuse of power be assigned to a multi-member committee?¹⁷ These arguments were persuasive to most delegates. They feared monarchy, but they also realized how much the national government had suffered under the Articles of Confederation from the absence of executive responsibility. As property owners, they worried about threats to the social order (such as Shays’s Rebellion) and regarded a single executive as more likely than a committee to respond quickly and effectively to riot and discord.

On June 4, the convention voted strongly for a unitary executive. One of Washington’s few recorded votes was in favor of this motion. His concern to unify executive responsibility was born of his experience as the wartime commander in chief of the revolutionary army. Lacking clear administrative authority, even in the appointment of his own officers, Washington complained bitterly of having “power without the means of execution.”¹⁸ On average, the most vocal proponents of a unitary executive at the convention were nearly 15 years younger than the opponents. The reason for this discrepancy, political scientist Richard J. Ellis argued, is that

the views of executive power of the older delegates were colored by their battles against the royal governors. The younger delegates who had come of age during the 1770s and 1780s were more worried about the weakness of executive power in the state constitutions and the Articles of Confederation.¹⁹

A Council?

The Virginia Plan proposed that a “council of revision” consisting of the executive and “a convenient number of the National Judiciary” be created with authority to veto laws passed by the legislature. All 13 state constitutions provided for councils of some sort, most of which were legislatively selected. Sherman, who voted in the end for the single executive, said that he had done so only because he assumed it would be forced to share power with a council. Wilson, however, opposed a council because he believed that such a body would dilute the virtues of the unitary executive—energy, dispatch, and responsibility.

The proposal for a council was tabled on June 4 after two Massachusetts delegates, Elbridge Gerry and Rufus King, injected a new argument into the debate. Gerry and King questioned the wisdom of having judges participate in making laws on which they later would be asked to rule. Delegates also wondered what effect a council would have on executive power. Some saw it as a check on the executive, but others, including Madison, thought a council would buttress the executive with the support of the judiciary, thereby strengthening it in its relations with the legislature.

The council idea recurred in several guises throughout the convention. Morris and others tried to persuade the delegates to enact a purely advisory council, consisting mainly of the heads of the executive departments.²⁰ As late as September 7, George Mason of Virginia suggested that the House of Representatives or the Senate be charged to appoint an executive council with members from all regions of the country. "The Grand Signor himself had his Divan," Mason noted, drawing from Ottoman history.²¹ But because no consensus ever formed about either the wisdom of having a council or the form it should take, the idea was abandoned.

Selection and Succession

Wilson was as much opposed to the clause in the Virginia Plan that provided for the executive "to be chosen by the National Legislature" as he was in favor of a unitary executive. Legislative selection would make the executive a creature of (and therefore subservient to) the legislature, Wilson believed. On June 1, he proposed instead that the executive be elected by the people. Wilson said he realized that his idea "might appear chimerical," but he could think of no better way to keep the executive and legislative branches "as independent as possible of each other, as well as of the states."²²

The delegates dismissed Wilson's proposal for popular election. To some, the idea was too democratic. (They thought democracy was suited only for small polities.) In addition, by requiring voters to pass judgment on candidates from distant states of whom they knew little or nothing, popular election seemed impractical. Mason stated both of these objections cogently: "It would be as unnatural to refer the choice of a proper character for chief Magistrate to the people, as it would, to refer a trial of colours to a blind man."²³ Speaking on behalf of the southern delegates, Madison added a more overtly political point: In direct elections, candidates from the more populous North almost always would win.²⁴

Undiscouraged, Wilson returned to the convention on June 2 with a proposal for an electoral college to select the executive. For purposes of election, each state would be divided into a few districts. The voters in these districts would choose electors, who in turn would meet at a central location to elect the executive. A plan similar to Wilson's was accepted in principle on July 19 and a modified version was ultimately adopted in September. But in the early days of the convention, the idea still seemed too novel.²⁵ Delegates feared the mischief that might ensue when the electors gathered, perhaps

instigated by agents of foreign governments. They also doubted whether “men of the 1st nor even of the 2d. grade” would be willing to serve as electors. The delegates voted instead to affirm the legislative selection provision of the Virginia Plan.

The convention’s decision to adopt legislative selection of the executive, although it was reaffirmed in several votes taken in July and August, was less a happy one than a return to its “default mode.”²⁶ The major source of the unhappiness was that in the delegates’ minds, a legislatively selected executive could not be allowed to stand for reelection lest executive powers and patronage be used, in effect, to bribe legislators for their votes. But the delegates also believed that the prospect of reelection was a valuable incentive to good performance in office and regretted that legislative selection ruled out executive reeligibility.

The result was an ongoing search for a selection process that was desirable in its own right and also allowed for reelection. This was no easy task. In the memorable description of political scientist Robert Dahl, “The Convention twisted and turned like a man tormented in his sleep by a bad dream as it tried to decide.”²⁷ Of the ideas the delegates considered and rejected, wrote Clinton Rossiter, some were rather far-fetched, including “election by the state governors; . . . election by the national legislature, with electors chosen by the state legislatures taking over whenever an executive sought reelection; . . . and, most astounding of all, election by a small group of national legislators chosen ‘by lot.’”²⁸

The search for an alternative to legislative selection became more urgent after August 24. Until that day, no consideration was given to how the legislature would choose the president. Now, by a vote of seven states to four, the convention approved a motion that Congress would elect the president by a “joint ballot” of all the members of the House of Representatives and Senate, following the practice most states used to elect their governors. This decision, by giving the large states a clear majority in the presidential selection process, threatened to reignite the controversy between large and small states that had already split the convention once. To avert this catastrophe, on August 31, the delegates referred the issue to the Committee on Postponed Matters.

On September 4, the committee proposed the Electoral College as a method to elect the president, with no restriction on the president’s right to seek reelection. The president would be selected by a majority vote of the electors, who would be chosen by the states using whatever method each state decided to adopt. (The delegates expected that in time, most states would entrust the selection of electors to the people.²⁹) Every state would receive electoral votes equal in number to its representation in Congress. If no presidential candidate won the votes of a majority of electors, the Senate would elect the president from among the five highest electoral vote recipients. To prevent a cabal from forming in the Electoral College, electors would never meet as a national body. Instead, they would vote in their state capitals and then send the results to the Senate for counting. Finally, to ensure that the electors would not simply support a variety of home-state favorites, each was required to vote for two candidates for president, at

least one from a different state. The runner-up in the presidential election would fill the newly created office of vice president.

The proposal for an electoral college was generally well received by the delegates. As political scientist Andrew Rudalevige noted, it was “very much a salesman’s straddle, allowing proponents of popular election and legislative selection both to tout its provisions.”³⁰ Only one aspect of the proposal proved controversial among the delegates: Senate selection of the president in the absence of an electoral college majority for any candidate. Large-state delegates objected because the Senate underrepresented them in favor of the small states. Moreover, not foreseeing the development of a two-party system, some delegates believed that after Washington (the obvious choice as the first president), majorities seldom would form in the Electoral College, and the Senate would choose most presidents. Mason estimated that the Electoral College would fail to reach a majority “nineteen times in twenty.”³¹

Sherman proposed what historian Carol Berkin called “a brilliant solution”: let the House of Representatives elect the president if the Electoral College failed to produce a majority but assign each state’s House delegation a single vote.³² The Senate still would choose the vice president in the event of a tie. Quickly, on September 6, the convention agreed.

One issue that the creation of the vice presidency resolved, at least partially, was what would happen if the president died, resigned, became disabled, or was impeached and removed. The Committee of Detail was the first to deal with the matter. It recommended that the president of the Senate “discharge the powers and duties of [the presidency] . . . until another President of the United States be chosen, or until the disability of the President be ended.” When Madison and other delegates objected that this proposal might give the Senate an incentive to remove the president in favor of one of its own members, the issue was referred to the Committee on Postponed Matters.

The committee proposed that the vice president, not a senator, be president of the Senate. It also designated the vice president as the person to step in if a vacancy occurs in the presidency. The convention agreed, but only after passing an additional motion, discussed later in this chapter, that seemed to call for a special presidential election before the expiration of the prematurely departed president’s term. Somehow this intention was lost when the Committee of Style wrote its final draft of the Constitution. No one caught the error. As a result, the convention left the Constitution vague on two important matters. First, in the event of the president’s death, resignation, disability, or removal, did the vice president become president or merely assume the powers and duties of the office as an acting president? Second, would the vice president serve out the unexpired balance of the president’s term or only fill in until a special election could be held to pick a new president?

Term of Office

Questions about length of term, eligibility for reelection, and selection were so interwoven in the minds of the delegates that they could not resolve any one of them without resolving the others. Indeed, one political scientist compared their efforts to sort out these questions to a game of “three-dimensional chess.”³³

The Virginia Plan left the length of the executive’s term of office blank—literally: “Resolved, that a National Executive be . . . chosen by the National Legislature for the term of _____ years.” The plan also stipulated that the executive was “to be ineligible a second time.” When these provisions came before the Committee of the Whole on June 1, a variety of alternatives was proposed, including a three-year term with no limit on reeligibility, a three-year term with two reelections allowed, and a seven-year term with no reeligibility at all. Although the delegates approved the single seven-year term, the vote was close: five states to four.

Underlying the delegates’ uncertainty was the relationship between two aspects of the executive that they eventually came to regard as incompatible: eligibility for reelection and legislative selection. Mason explained why the Constitution could not include both: If the legislature could reelect the executive, there would be a constant “temptation on the side of the Executive to intrigue with the Legislature for a re-appointment,” using political patronage and illegitimate favors to buy legislators’ votes.³⁴ Nevertheless, on July 17, the convention voted for both legislative selection and reeligibility. When James McClurg of Virginia pointed out the contradiction between these two decisions, the one-term limit on the executive was reinstated. McClurg, supported by Morris and by Jacob Broom of Delaware, offered a different way out of the dilemma: election of the executive by the legislature for a life term. But this proposal smacked too much of monarchy to suit most of the other delegates.

On July 24 and 26, the convention voted again to have the legislature select the executive for a single seven-year term. But the advantages the delegates saw in reeligibility were so powerful that the issue remained alive. Reeligibility would allow the nation to keep a good executive in office and give the executive what Morris called “the great motive to good behavior, the hope of being rewarded with a re-appointment.”³⁵ As Alexander Hamilton later argued in *Federalist* No. 72, even an executive whose behavior was governed by personal motives such as “ambition,” “avarice,” or “the love of fame” would do a good job in order to hold onto the office that could fulfill those desires.³⁶ More ominously, Morris warned: “Shut the Civil road to Glory & he may be compelled to seek it by the sword.”³⁷

To complicate their task further, the delegates’ choice between legislative selection and reeligibility implied a related decision between a short term and a long term. If the executive were chosen by the legislature for a single term only, the delegates believed, the term should be long. If the executive were eligible for reelection, it should be short.

In late August, the convention changed course for the last time. Effectively deciding against legislative selection of the president, the delegates created the Committee on Postponed Matters to propose an alternative. The committee's recommendation, adopted by the convention, was that the Electoral College choose the president for a four-year term with no limit on reeligibility. Even this relatively short term was longer than that of any state governor.

Removal

As the convention unfolded, the delegates realized they ought to provide for situations in which the executive should be removed from office before the four-year term expired.³⁸ Serious abuse of power was one such situation. The remedy was impeachment. Inability was the other, but even at convention's end, the delegates were less than clear about what ought to happen if the executive became incapable of functioning.

Impeachment

Impeachment, a traditional practice of the British political system, has deep historical roots. As Richard Ellis wrote, during the 17th century, impeachment of the king's ministers and councilors by the House of Commons, with trial by the House of Lords, "became a tool in Parliament's struggle to rein in the power of the monarchy and to make ministers of the Crown accountable to Parliament."³⁹ In the 18th century, when the House of Commons gained the power to force ministers to resign after a simple vote of no confidence, impeachment waned in importance. But the tradition of executive accountability remained.

Although the Virginia Plan made no detailed provision for impeaching the executive (it merely said that the "supreme tribunal" would "hear and determine . . . impeachments of any National officers"), most of the delegates agreed that some mechanism should be included in the Constitution. Even proponents of a strong executive realized that their goal could be achieved only if the other delegates were assured that an out-of-control president could be removed from office.

The convention's consensus on impeachment became apparent on June 2, when the Committee of the Whole passed North Carolina delegate Hugh Williamson's motion that the executive be "removable on impeachment and conviction of malpractice or neglect of duty."⁴⁰ The consensus was confirmed and strengthened on July 19, when Morris suggested that if the executive was assigned a short term of office, there would be no need for impeachment because the passage of time would lead to the executive's removal soon enough. Morris was answered the next day by Gerry, Randolph, Franklin, and Mason, all of whom made clear that they regarded impeachment not only as a vital safeguard against and punishment for abuses of power but also (at least in Franklin's view) as a way to remove tyrants without "recourse . . . to assassination." Morris retreated,

declaring that he was persuaded by his colleagues' arguments. Unlike a king who has "a life interest" in the nation's welfare, Morris added, "our Magistrate . . . may be bribed by a greater interest to betray his trust," especially by "foreign pay."⁴¹

The Committee of Detail tried to clarify Williamson's definition of the grounds for presidential impeachment, changing it from the vague "malpractice or neglect of duty" to the somewhat more specific "treason, bribery, or corruption." It also created a mechanism for removal: "impeachment by the House of Representatives and conviction in the Supreme Court." The convention did not take up the impeachment provision of the committee's report until August 27, when Morris asked that it be tabled. He argued that if, as still seemed possible, the convention decided to create an executive council that included the chief justice of the United States, the Court should not be involved in the impeachment process. The delegates agreed to Morris's motion without objection. Later that week, on August 31, the Committee on Postponed Matters was formed and took charge of the impeachment issue.

The committee made its three-part recommendation on September 4: first, impeachment (that is, indictment) by the House; second, trial by the Senate, with the chief justice presiding; and third, impeachment and conviction on grounds of treason or bribery but not the broad offense of "corruption." On September 8, Mason complained that to bar only treason and bribery "will not reach many great and dangerous offenses," including certain "attempts to subvert the Constitution." Drawing from the constitutions of six states, including his own state of Virginia, Mason proposed that "maladministration" be added to the list of impeachable actions.⁴² After Madison objected that, in practice, maladministration would mean nothing more than unpopularity with Congress, Mason moved to substitute "other high crimes and misdemeanors," a term borrowed from 14th-century English common law that referred to serious abuses of authority. This definition passed, despite Madison's continuing objection to its breadth.

The delegates made three other modifications to the committee's impeachment proposal on September 8. The majority required for Senate conviction was raised to two-thirds. The vice president and "all civil officers of the United States" were made subject to impeachment in the same way as the president. Finally, to remind senators that they should vote impartially, the delegates decided that "they shall be on Oath or Affirmation" during impeachment trials.

Inability

Although the delegates were thorough and deliberate in considering the grounds for and process of impeachment, they treated presidential inability carelessly. The matter was first put before the convention on August 6 as part of a provision in the Committee of Detail report that dealt mainly with succession. It read: "In the case of his . . . disability to discharge the powers and duties of his office, the President of the Senate shall exercise

those powers and duties, until another President of the United States be chosen, or until the disability of the President be removed.”

On August 27, when this proposal came before the convention, John Dickinson of Delaware complained that “it was too vague. What is the extent of the term ‘disability’ & who is to be the judge of it?”⁴³ The delegates decided to postpone their discussion of inability until another time, presumably intending to supply answers to these questions. But that time never came. Disability was left undefined in the Constitution, and no process was created either to determine if a president is unable to fulfill the responsibilities of the office or to transfer the powers and duties of the office to someone else. Instead, the Committee on Postponed Matters merely named the vice president, rather than the president of the Senate, as the successor to a such a president and substituted “inability” for “disability,” without explaining what difference, if any, this substitution made.

Institutional Separation from Congress

Many of the delegates were strongly committed to the idea that to preserve liberty, government should incorporate the principle of separation of powers. Several political philosophers of the Enlightenment, including England’s John Locke, had articulated this idea, but no version was more influential than that of French writer Baron de Montesquieu. One oft-quoted passage in Montesquieu’s 1748 book *L’Esprit des lois* (The Spirit of the Laws), stated:

When the legislative and executive powers are united in the same person or body, there can be no liberty because apprehensions may arise lest *the same* monarch or senate should enact *tyrannical laws to execute* them in a tyrannical manner. . . . Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*.⁴⁴

As applied in the Constitution, the separation of powers principle did not require a strict division of labor in which each branch of the government is assigned exclusive power to perform certain functions. Indeed, the Constitution assigns few powers of the national government to only one branch. To the delegates, separation of powers actually meant something more like “separated institutions sharing powers”—that is, a joint exercise of the government’s powers by an executive and legislature whose membership does not overlap.⁴⁵ Some blending of executive, legislative, and judicial powers was necessary, Madison argued in *Federalist* No. 48, “to give to each a constitutional control over the others.” Defenders of a strong executive were especially concerned that the president be given specific grants of power, including the veto, to prevent Congress from encroaching on its authority.

From the beginning, the convention imposed two prohibitions to preserve institutional separation within the government. The first banned alterations in the incumbent executive's salary. The second forbade simultaneous membership in the legislative and executive branches. Both prohibitions were in the Virginia Plan and remained substantially unaltered in the final Constitution.

Salary

Immediately after the clause stating that the executive shall be chosen by the legislature, the Virginia Plan provided that the executive shall “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.” In view of the Virginia Plan's brevity and generality, the level of detail in this provision is remarkable, as is the priority Madison assigned to it. Clearly, he feared that the legislature might infringe on executive independence by either lowering the executive's salary or enticing the executive by increasing the salary.

During the course of the convention, the provision for executive salary was modified only slightly. The delegates eventually added stipulations that “he shall not receive within [his term of office] any other Emolument from the United States, or any of them” or from “any King, Prince, or foreign State.” On June 2, Franklin urged that the executive not be compensated at all. To attach a salary to the position, he said, “united in view of the same object” two

passions which have a powerful influence on the affairs of such men. These are ambition and avarice, the love of power, and the love of money. . . . Place before the eyes of men a post of *honor* that shall be at the same time a place of *profit*, and they will move heaven and earth to obtain it.⁴⁶

The delegates gave Franklin's words courteous attention but no more. Their concern was to protect the executive from the legislature, not to create an office that only the rich could afford to occupy.

Membership

The delegates' commitment to separating membership in Congress from the executive branch did not waver. The Virginia Plan said that legislators were “ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to the functions of the first branch [the legislature], during the term of service, and for the space of _____ after its expiration.” The final document, although lifting the restriction on legislators holding executive office after they left Congress, included essentially the same provision: “no Person holding any Office under the United States, shall be a Member of either House during his Continuance in

Office.” The Constitution also prohibited members of Congress from serving as electors in presidential elections.

The delegates wanted to keep the membership of the legislative and executive branches separate to prevent the executive from, in effect, bribing members of Congress with jobs and salaries. On June 22, Pierce Butler of South Carolina, supported by Mason, “appealed to the example of G[reat] B[ritain] where men got into Parl[iamen]t, that they might get offices for themselves or their friends. This was the source of corruption that ruined their Govt.”⁴⁷

The office-holding issue was raised again on August 14, when John Mercer of Maryland took the opposite side of the question. He argued that because “governments can only be maintained by *force or influence*” and the president lacks force, to “deprive him of influence by rendering the members of the Legislature ineligible to Executive offices” would reduce the president to “a mere phantom of authority.”⁴⁸ Unpersuaded, the delegates did not alter their earlier decision, either then or on September 3, when Wilson and Charles Pinckney argued that honorable people would be reluctant to serve in the new government under a constitution that presumed they were too corrupt to faithfully fulfil the responsibilities of more than one office.⁴⁹

Nothing was said during the convention about judges holding executive offices. The New Jersey Plan would have prohibited them from doing so, but the subject never was discussed on the convention floor. Political scientist Robert Scigliano argued that allowing judges to hold executive office was not an oversight. Instead, the delegates regarded the executive and judicial powers as joined because both involved carrying out the law. According to Scigliano, the delegates also believed that Congress would be the most powerful branch in the new government unless the executive and the judiciary could unite when necessary to restrain it.⁵⁰

Enumerated Powers

The convention was slow to enumerate the powers of either the presidency or the other branches of the government. Indeed, the delegates’ initial inclination seems to have been to give each branch a general grant of power rather than a specific list. The Virginia Plan empowered the legislature simply “to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual [state] Legislation.” The executive, in addition to sharing the veto with a council, was to execute the national laws.

The advantage the delegates saw in a general grant of power (which they approved both while meeting as the Committee of the Whole and soon afterward in convention) was that the alternative—a specific enumeration—risked limiting the government to a list of powers that the passage of time would render obsolete. But the convention was uneasy with its choice. “Incompetent” was a vague word, easily subject to abuse, and so was any other word or phrase they might devise for a general grant.

Reading the delegates' mood, the Committee of Detail enumerated each branch's powers in the draft constitution that it presented to the convention. The delegates' reaction confirmed the committee's judgment. Although they debated each proposed power separately, they never questioned the decision to enumerate.

All the powers of the presidency are detailed in Article II of the Constitution, except the veto power, which is in Article I, Section 7. The powers are discussed below in the order they appear in the document, as are three other provisions of Article II: the president's title, oath of office, and qualifications.

Veto

The right to veto acts passed by the legislature was the only specific grant of power to the executive proposed in the Virginia Plan. The states' recent experience with weak governors and powerful legislatures was proof enough to most delegates that the veto was indispensable to executive self-defense against legislative encroachments. Even so, they were initially reluctant to cede too much responsibility to the executive. After all, as legal historian Michael Klarman pointed out, "the first three grievances listed in the Declaration of Independence had been directed at abuses of the veto power by the king."⁵¹

The Virginia Plan provided that the executive could cast a veto only with the cooperation of a council of judges. Madison believed that support from such a council would buttress the executive's willingness to cast vetoes. He based this belief on the contrasting experiences of New York, where the governor alone had the veto power and almost never used it, and Massachusetts, where council-supported governors vetoed bills freely.⁵² The Virginia Plan also stipulated that a vetoed act would become law if an unspecified majority of both houses of the legislature voted to override it.

On June 4, Wilson and Hamilton urged the delegates, then meeting as the Committee of the Whole, to grant the executive an absolute veto—that is, a veto not subject to legislative override. Franklin, Sherman, Mason, and others rose in opposition to this suggestion, invoking their own and the public's memories of the king and his royal governors, who had cast absolute vetoes against acts passed by colonial legislatures. "We are not indeed constituting a British Government, but a more dangerous monarchy, an elective one," warned Mason, who wanted to empower the executive merely to postpone the enactment of an offensive law in the hope that the legislature would decide to revise it.⁵³ Gerry found a middle ground that was acceptable to most of the delegates: an executive veto, subject to override by a two-thirds vote of both houses of the legislature. The recommendation that the executive share the veto power with a council was tabled.

In its report of August 6, the Committee of Detail sought to settle an unresolved issue. The committee stipulated that after a bill was passed and presented, the president would have seven days in which to respond. If the president neither signed nor vetoed the bill during that week, it would become law. But the committee made an important exception to prevent Congress from getting its way by adjourning before the president had a chance to cast a veto. If Congress adjourned during the seven-day period, the

president had merely to ignore the bill for it to be vetoed. Such vetoes later became known as “pocket vetoes,” the image being of the president sticking the bill in a deep pocket.

On August 15 and 16, the convention voted to modify the Committee of Detail’s report in ways that strengthened the president’s veto power. The two-thirds requirement for congressional override of a veto was raised to three-fourths. In addition, the period in which a president could cast a veto was lengthened from seven days to ten days, not including Sundays. Finally, to prevent Congress from evading a veto by passing legislation and calling it something other than a bill, the veto power was extended to “every order, resolution, or vote” of Congress.

Only one further modification was made to the veto. On September 12, in a gesture designed to persuade delegates suspicious of presidential power to sign the Constitution, the convention voted to make veto overrides easier by restoring the two-thirds requirement. Even so, the president’s veto power, like the appointment power discussed later in this chapter, exceeded that of any state governor at the time.

“The Executive Power”

The Virginia Plan began the executive article by stating “that a national Executive be instituted.” The Committee of the Whole modified this provision of the plan by adding “to consist of a single person.” The Committee of Detail, however, proposed “vesting” clauses to introduce the articles for all three branches of government:

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

The Executive Power of the United States shall be vested in a single person.

. . .

The Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States.

The vesting clause that the Committee of Detail proposed for the president was particularly important because it made clear that the powers of the presidency derive directly from the Constitution, not from discretionary grants by Congress. But the clause was less instructive on another important aspect of presidential power. As political scientist Richard M. Pious noted,

“Executive Power” was a general term, sufficiently ambiguous so that no one could say precisely what it meant. It was possible that the words referred to more than the enumerated powers that followed, and might confer a set of unspecified executive powers.⁵⁴

First among these unspecified powers was prerogative, which John Locke discussed at length in his *Second Treatise of Government*, a book that was widely familiar among the delegates. Locke argued that in times of crisis, laws that are inadequate to the challenges

facing the country should temporarily “give way to the executive power, viz., that as much as may be, all the members of society are to be preserved.” Prerogative, according to Locke, is

the people’s permitting their rulers to do several things of their own free choice, where the law was silent, or sometimes, too, against the direct letter of the law, for the public good, and their acquiescing in it when so done.⁵⁵

The theory that the powers of the presidency extend beyond those listed in the Constitution is supported by the language of the document itself, thanks to a “joker,” as Charles Thach called it, that Morris, the chief drafter for the Committee of Style, tossed into the final version. The committee’s charge was merely to put the Constitution into polished language. Morris’s pro-executive biases were so well-known that any changes in wording involving the presidency would have been detected quickly. He left the vesting clause for the executive unaltered (“the executive Power shall be vested in a President of the United States of America”), but he changed the vesting clause for Congress to read: “All legislative Powers *herein granted* shall be vested in a Congress of the United States” (emphasis added).

Thach suspected that Morris did his tinkering “with full realization of the possibilities”—that is, presidents could later claim that the different phrasing of the two branches’ vesting clauses implies that there are executive powers beyond those “herein granted.” Otherwise, why would the Constitution not apply those restricting words to the president in the same way it does to Congress? “At any rate,” Thach concluded, “whether intentional or not, it [the difference between the two vesting clauses] admitted an interpretation of executive power which would give the president a field of activity wider than that outlined by the enumerated powers.”⁵⁶ As legal scholar Michael McConnell observed, “when limiting language appears in one provision of a carefully drafted legal document and not in a parallel provision, canons of interpretation familiar to the founders tell us both that the limiting language applies to the first and also that it does not apply to the second.” The question is how “carefully crafted” (other than by Morris) the contrast in the vesting clauses of Articles I and II was by the delegates, considering how late in the four-month-long convention the language appeared and how eager they were to wrap things up and go home.⁵⁷

Commander in Chief

War was a fresh memory of the delegates to the Constitutional Convention, most of whom had played a role in the revolution. With the new nation surrounded by potential enemies on its borders, the possibility of invasion remained an ongoing concern.

Because the Virginia Plan said nothing about who would direct the armed forces, the delegates initially took for granted that Congress would be the controlling branch, as it had been under the Articles of Confederation. The issue did not come up for debate in

the Committee of the Whole. The Committee of Detail, however, suggested a military role for the president in its enumeration of the powers of each branch.

The committee proposed that the president “shall be commander in chief of the Army and Navy of the United States, and of the Militia of the several States.” Commander in chief was a title nearly all state governors had. It involved authority not to initiate a war but rather to direct the fighting once a war was under way. Not willing to leave such an important act of sovereignty open to misinterpretation, however, the committee also recommended that Congress be empowered “to make war; to raise armies; to build and equip fleets; to call forth the aid of the militia, in order to execute the laws of the Union; enforce treaties; suppress insurrections, and repel invasions.”

The meaning of these provisions confused the delegates when they took them up for consideration on August 17. Clearly, Congress’s power to “make” war included directing the actual conduct of the fighting, but so did the president’s power as “commander in chief.” Which branch actually would order soldiers and sailors into action? Which would tell them where to go and what to do when they got there?⁵⁸

The debate on the convention floor about the powers of war was brief and went only partway toward resolving the ambiguities created by the Committee of Detail. Pierce Butler, doubting that Congress would be able to react quickly enough if an urgent need for military action should arise, urged the convention to vest the power to make war in the president, “who will have all the requisite qualities, and will not make war but when the Nation will support it.” Madison and Gerry agreed that Congress might be unable to respond to a foreign invasion promptly, perhaps because it was not in session. But, unwilling to entrust the president with such vast military powers, they “moved to insert ‘declare’ [war], striking out ‘make’ war; leaving to the Executive the power to repel sudden attacks.” Sherman agreed: “The Executive shd. be able to repel and not to commence war.”⁵⁹ Madison and Gerry’s motion passed.

As for control of the state militia, on August 27, the convention approved without discussion a motion by Sherman that the president act as commander in chief of the various state militia only “when called into the actual service of the U.S.” The clause as finally written in the Constitution reads: “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States,” leaving in doubt who would initiate a state militia’s call to service: the governor or the president?

“Require the Opinion”

The Constitution authorizes the president to “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.”⁶⁰ This curious provision (Hamilton described it in *Federalist* No. 74 “as a mere redundancy in the plan, as the right for which it provides would result of itself from the office”⁶¹) was proposed on September 4 by the Committee on Postponed Matters and adopted by a unanimous vote on September 7.

But the clause's origin lay in the Virginia Plan's proposal for an executive council, an idea that recurred frequently during the convention.

Although most delegates seem to have favored some sort of council, they never created one because they held such varied opinions about who should be on it and whether its relationship to the president should be merely advisory or involve the shared exercise of executive powers. One version of the council idea was included in a sweeping plan for the organization of the executive branch that Morris and Charles Pinckney introduced on August 20. The Morris–Pinckney plan provided for the creation of five departments: domestic affairs, commerce and finance, foreign affairs, war, and marine. The “principal officers” of each department would be appointed by the president and serve at the president's pleasure. Together with the chief justice of the United States, they would constitute a Council of State whose purpose would be to “assist the President in conducting the Public affairs. . . . 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.*”⁶²

The Morris–Pinckney plan was not debated by the delegates, and although the Constitution presumed that executive departments would be created, none were specifically provided for or named. But the proposal to empower the president to require written opinions from individual department heads on matters relating to their responsibilities seems to have been the basis for the September 4 recommendation of the Committee on Postponed Matters. On September 7, after Mason, Franklin, Wilson, Dickinson, and Madison again urged that a council be created, their colleagues, frustrated by their inability to agree on a specific proposal and eager to conclude the convention's business, approved the committee's recommendation as written.

Pardon

Hamilton was the first delegate to suggest that the president be empowered to pardon criminals. In his long speech to the convention on June 18, he urged that the executive “have the power of pardoning all offences except Treason; which he shall not pardon without the approbation of the Senate.”⁶³ Perhaps persuaded by Hamilton's proposal, the Committee of Detail recommended that the president “shall have power to grant reprieves and pardons; but his pardon shall not be pleadable in bar of an impeachment” (that is, to prevent an impeachment).

The pardon power is a power of kings. In Great Britain, all crimes were regarded as offenses against the Crown. Accordingly, the power to forgive was a royal prerogative. Crimes in the United States were regarded as offenses against the law, not the executive, which is why no state constitution at the time allowed governors a unilateral pardon power.⁶⁴ It is therefore remarkable that the delegates resisted efforts to modify the committee's recommendation in any substantial way. Sherman's August 25 motion to require the president to gain the Senate's consent for a pardon was defeated by a vote of eight states to one. Two days later, Luther Martin of Maryland moved to allow par-

dons only “after conviction.” He withdrew the motion when Wilson, using the crime of forgery as an example, objected that “pardon before conviction might be necessary in order to obtain the testimony of accomplices.”

On September 12, the Committee of Style clarified one aspect of the pardon power by limiting it to “offences against the United States”—that is, to violations of federal rather than state law. A September 15 motion by Randolph to disallow pardons for treason (“The President may himself be guilty. The Traytors may be his own instruments.”) was defeated by a vote of eight states to two after Wilson argued that if the president “be himself a party to the guilt he can be impeached and prosecuted.”⁶⁵ The pardon entered the Constitution as the president’s only important unchecked power. Indeed, as legal scholar Jeffrey Toobin observed, the issue of presidents pardoning themselves was discussed “not at all.”⁶⁶

Although no thorough case for granting the pardon power to the president was ever offered at the convention, Hamilton’s defense of it in *Federalist* No. 74 may reflect the delegates’ thinking. Hamilton began by pleading the need for leeway in the criminal justice system to “make exceptions in favor of unfortunate guilt.” As to pardons for treason, he argued, perhaps with Shays’s Rebellion in mind, that “in seasons of insurrection or rebellion there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall.”

“Make Treaties”

At the start of the convention, most delegates seemed to assume that the power to make treaties with other countries would be vested in Congress. That had been the practice under the Articles of Confederation, and although the Virginia Plan said nothing specific about treaties, it did provide that “the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation.”

The first suggestion that the treaty power be shared between the legislative and executive branches came from Hamilton. One provision of the plan of government he proposed on June 18 was that the executive should “have with the approbation and advice of the Senate the power of making all treaties.”⁶⁷ The delegates did not discuss Hamilton’s suggestion on the convention floor, and it appeared to be dead when the August 6 report of the Committee of Detail provided instead that “the Senate shall have power to make treaties.”

The committee’s proposal sparked heated debate, much of it spawned by changes in the design of the Senate that had occurred during the convention. The conclave of national statesmen envisioned by the Virginia Plan had become a states-dominated body, a smaller and perhaps more easily manipulated cousin of the Articles’ version of Congress.⁶⁸ Mason argued that an exclusive treaty-making power would enable the Senate to “sell the whole country by means of treaties.”⁶⁹ Madison thought that the president, who would represent the entire country, should make treaties.

Regional concerns also were expressed. Southern delegates worried that their states' right to free navigation of the Mississippi River might be surrendered in a treaty, thereby inhibiting the growth of their export-dominated agricultural economies. New Englanders expressed similar fears about their right to fish in the waters near Newfoundland. Having reached an impasse, the delegates referred the treaty issue to the Committee on Postponed Matters.

On September 4, the committee recommended that the president, "with the advice and Consent of the Senate," be granted the treaty-making power and that no treaty be approved "without the consent of two-thirds of the members [of the Senate] present." The provision for a two-thirds majority was designed to assuage the separate concerns of southerners and New Englanders that they would be outvoted on issues of regional importance. It was highly controversial and provoked numerous motions to revise. One proposal would have deleted the two-thirds requirement for ratification in favor of a simple majority. Another would have included the House of Representatives in the treaty ratification process. Yet another proposal—which initially passed and then was rejected—would have applied the simple majority rule to treaties whose purpose was to conclude a war. In the end, however, the committee's recommendation of a two-thirds vote of the senators present was accepted.

Only one motion was made to modify the president's role in treaty making. Madison moved to allow two-thirds of the Senate, acting alone if it chose to do so, to conclude peace treaties. Madison worried that the president, who inevitably would derive unusual power and prominence from a state of war, might be tempted to "impede a treaty of peace." His motion failed when Nathaniel Gorham of Massachusetts pointed out that Congress could end a war by simply refusing to appropriate funds to continue the fighting.⁷⁰

Appointment and Commissioning

Article II, Section 2, of the Constitution provides three methods for appointing federal judges and unelected executive branch officials: presidential appointment with Senate confirmation (the ordinary method); presidential appointment without Senate confirmation (when the Senate is in recess); and, when Congress so determines by statute, appointment of certain "inferior Officers" (that is, officers subordinate to the heads of the departments or the courts of law) by the individual department heads or courts. Clearly, the delegates moved a long way from both the Articles of Confederation, which vested the appointment power entirely in Congress, and the Virginia Plan, which proposed to continue that practice.

From start to finish, the appointment power was one of the most contentious issues at the convention. Although, as Richard Ellis showed, no delegate doubted that "it was the legislature and not the executive that should have the power to create offices, there the agreement ended."⁷¹ On June 1, the delegates, meeting as the Committee of the Whole, approved Madison's motion to modify the Virginia Plan slightly by adding to

the then-limited powers of the executive the ambiguous phrase “to appoint to offices in cases not otherwise provided for.”⁷² But this decision simply opened the door to stronger advocates of executive power, such as Wilson and Hamilton, who wanted to make the appointment of judges, ambassadors, and other government officials a purely executive responsibility, with no involvement by the legislature.

Heated debates erupted periodically in June and July about issues such as which branch of government would be most prone to favoritism in appointments and which would know best the qualifications of prospective appointees. Many delegates, mindful of how King George III and his colonial governors had used government appointments as patronage plums to curry support among legislators, dreaded giving this power to even a homegrown executive.

On July 21, the delegates voted to assign the Senate sole responsibility for judicial appointments. The Committee of Detail added the appointment of ambassadors to the Senate’s list of powers and then stipulated that Congress as a whole would elect the national treasurer. The committee also confirmed the convention’s earlier decision that the president “shall appoint officers in all cases not otherwise provided for by this Constitution.” It remained unclear, however, where responsibility would lie for appointing the heads of the departments and other departmental officials and employees.

On August 24, at a time in the convention when the large-state delegates were doing their best to trim back the powers of the small-state-dominated Senate, they passed a motion that seemed to expand the president’s right to make most appointments while still leaving the Senate complete responsibility for choosing judges and ambassadors. The motion, which was offered by Dickinson, stated that the president “shall appoint to all offices established by this Constitution, except in cases herein otherwise provided for, and to all offices which may hereafter be created by law.”⁷³ But the delegates did not revisit their August 17 rejection of Delaware delegate George Read’s motion to allow the president to appoint the treasurer. They still wanted anything to do with money firmly in Congress’s hands.

As it had for the treaty power, the Committee on Postponed Matters proposed in early September to extend even further the president’s role in the appointment process. Judges, ambassadors, ministers, and officers that the delegates had not already provided for would be appointed by the president with the advice and consent of the Senate. A simple majority vote of the senators present would suffice. The convention accepted the committee’s recommendation after making three additions: The president was given the power to fill vacancies that occur while the Senate is in recess (September 6); the power to appoint the treasurer at last was transferred from Congress to the president (September 14); and control of certain forms of patronage was distributed between the two branches by giving Congress the power to “vest the appointment of such inferior officers as they think proper” in the president, the courts, or the heads of the departments (September 15).

Advisory Legislative Powers

In enumerating the proposed powers of the presidency, the Committee of Detail specified: “He shall, from time to time, give information to the Legislature, of the state of the Union: he may recommend to their consideration such measures as he shall deem necessary, and expedient.” The latter of these two provisions, both of which were uncontroversial, was modified slightly in response to an August 24 motion by Morris. He argued that the Constitution should make it “the *duty* of the President to recommend [measures to Congress], & thence prevent umbrage or cavil at his doing it.” In other words, Congress would be less likely to resent presidential recommendations if the president had no constitutional choice but to offer some.

The convention approved Morris’s suggestion that the words “he may” be replaced by “and.”⁷⁴ The Constitution as finally written reads, “He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient.”

Convene and Adjourn Congress

The Committee of Detail recommended that the president be allowed to “convene them [the House and Senate] on extraordinary occasions”—that is, to call Congress into special session. Furthermore, “in case of disagreement between the two Houses, with regard to the time of adjournment, he may adjourn them to such time as he thinks proper.”

James McHenry of Maryland was among those who wanted to grant the president the flexibility to call only the Senate back into session, presumably to consider a matter in which the House had no authority, such as a treaty or a presidential appointment. He persuaded the delegates to amend the special session clause to that effect on September 8. The Constitution therefore reads: “he may, on extraordinary Occasions, convene both Houses, or either of them.”

“Receive Ambassadors”

The president’s power to “receive Ambassadors” was proposed by the Committee of Detail. The committee joined this power to another—permission to “correspond with the supreme Executives of the several States”—which the convention rejected on August 25 as being, according to Morris, “unnecessary and implying that the president could not correspond with others.”⁷⁵ As for receiving ambassadors, the absence of debate or discussion leaves unclear whether the delegates meant this power to be substantive or merely ceremonial. In practice, the power to receive or, in particular cases, to refuse to receive ambassadors has made the president the sole official recipient of communications from foreign governments and the sole determiner of which governments the United States recognizes diplomatically. Joined with the convention’s later decisions to transfer the treaty-making and ambassador-appointing powers from the Senate to the president, it underscored the primacy of the presidency in matters of diplomacy.

“Take Care”

According to the Virginia Plan, the executive was to have “general authority to execute the National Laws.” On June 1, Madison sought to revise this provision to read: “power to carry into effect the national laws . . . and to execute such other powers not Legislative nor Judiciary in their nature as may from time to time be delegated by the national Legislature.” The stipulation about legislative and judicial powers reflected Madison’s acceptance of a suggestion by Charles Cotesworth Pinckney, who felt it was important to explicitly prohibit “improper powers” from being delegated to the executive. The other South Carolina Pinckney (Charles) persuaded the delegates to strike the amendment as “unnecessary.”⁷⁶ No further controversy over the “take care” clause ensued. The Committee of Detail’s formulation—“he shall take care that the laws of the United States be duly and faithfully executed”—was adopted without discussion by the convention and survived virtually intact in the final Constitution: “he shall take Care that the Laws be faithfully executed.”

What remains unclear is the meaning of “take Care.” On the face of it, the phrase seems to direct the president to be especially vigilant in fulfilling the meaning of the laws and Congress’s purpose in enacting them. Yet the phrase can also be read—and has been in some cases—as suggesting that whatever meaning presidents chooses to find in the laws is by definition the product of their having taken care.

Title

During the first two months of their deliberations, the delegates usually referred to the head of the executive branch as the national executive, supreme executive, or governor. On August 6, the Committee of Detail included the term “president” in its report to the convention. The title had been used for the presiding officer of Congress and other legislative bodies, including the convention itself. It was familiar and seemed reassuringly innocuous to those who feared that the delegates might be creating a monarchical office. Once proposed by the committee, the title “president” was accepted without debate by the convention.

Oath of Office

“Before he enter on the Execution of his Office,” the Constitution requires the president to “take the following Oath or Affirmation:—‘I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.’” Although another provision of the Constitution states that all legislators, judges, and other officials of both the national government and the state governments “shall be bound by Oath or Affirmation, to support this Constitution,” the language of only the president’s oath is included in the document. Some regard the wording of the oath (it pledges the president

to execute “the office” rather than the laws) as further support for the claim that there are implied powers of presidential prerogative in the Constitution.

Virtually no debate or discussion accompanied the writing of the president’s oath by the Constitutional Convention. The first half of the oath was proposed by the Committee of Detail on August 6: “I _____ solemnly swear (or affirm) that I will faithfully execute the office of President of the United States of America.” On August 27, Mason and Madison moved that the phrase “and will to the best of my judgment and power preserve, protect and defend the Constitution of the U.S.” be added. Wilson objected that a special presidential oath was unnecessary, but Mason and Madison’s motion passed handily.⁷⁷ On September 15, the delegates substituted “abilities” for “judgment and power,” but no discussion was recorded that explains this alteration.

Departing from the practice that prevailed in most of the states at the time, the convention barred the imposition of a religious oath on the president and other officials of the national government. Some state constitutions required public adherence to Christianity as a condition for serving as governor; North Carolina insisted that its governor affirm the truth of the Protestant form of Christianity. On August 30, Charles Pinckney moved that “no religious test shall ever be required as a qualification to any office or public trust under the authority of the U. States.” Sherman said he thought the proposal was “unnecessary, the prevailing liberality being a sufficient security agst. such tests.” Nevertheless, Pinckney’s motion was approved.⁷⁸

Qualifications

No statement of qualifications for president was included in the Constitution until September 7, only ten days before the convention ended. The lateness of the convention’s actions on presidential qualifications was the result of deliberation, not neglect. Throughout the proceedings, the delegates seem to have operated on the principle that qualifications for an office needed to be established only if qualifications for those choosing the person to fill the office were not.⁷⁹ Qualifications, which were not included in the Constitution for voters or state legislators, were included for members of the national legislature: Members of the House of Representatives must be at least 25 years old, seven years a citizen, and an inhabitant of the state they represented; and senators must be at least 30 years old, nine years a citizen, and an inhabitant of their state. Conversely, qualifications for judgeships and other appointed offices never were included in the Constitution because these officials are selected by other government officials for whom qualifications were stated.⁸⁰

Through most of the convention’s deliberations, the majority of delegates remained wedded to the idea that Congress, a body of constitutionally qualified members, would elect the president. The delegates thus saw no need to include qualifications for president in the Constitution. By mid-August, however, it was obvious that most of them had changed their minds about legislative selection of the executive. Although they had not yet decided on an alternative, whatever procedure they eventually devised to

choose the president would involve selection by an “unqualified” body because members of Congress were the only officials for whom constitutional qualifications were stated. This new election procedure, in turn, would necessitate the writing of qualifications for president. These qualifications would have to be high because the delegates also seem to have agreed that the greater the powers of an office, the more stringent the qualifications to hold it should be.

On August 20, Gerry moved successfully that the Committee of Detail be revived for the purpose of proposing a list of qualifications for president. Two days later, the committee did so: The president was to be 35 years old or older, a U.S. citizen, and an inhabitant of the United States for at least 21 years. On September 4, the Committee on Postponed Matters submitted a revised statement of qualifications: at least 35, a natural-born citizen or a citizen at the time of the Constitution’s adoption, and 14 years a resident. The delegates approved the revised recommendation on September 7.

Each element of the presidential qualifications clause was grounded in its own rationale. The age requirement had two justifications. First, the delegates presumed that age would foster maturity. As Mason said in the debate on establishing a minimum age for members of the House of Representatives, “Every man carried with him in his own experience a scale for measuring the deficiency of young politicians; since he would if interrogated be obliged to declare that his political opinions at the age of 21 were too crude & erroneous.”⁸¹ Second, the passage of years would leave in its wake a record for the electorate to assess. According to John Jay, the author of *Federalist* No. 64, the age requirement assured that voters would not “be deceived by those brilliant appearances of genius and patriotism which, like transient meteors, sometimes mislead as well as dazzle.”

The residency and citizenship requirements for president were grounded less in principles of good government than in the politics of the moment. The stipulation that the president must be at least 14 years a resident of the United States was designed to eliminate both British sympathizers who fled to England during the Revolutionary War and popular foreign military leaders, notably Baron Frederick von Steuben of Prussia, who emigrated to the United States to support the revolutionary cause. As for the length of the residency requirement, the Committee of Detail’s recommendation of 21 years probably was reduced to 14 because the longer requirement—but not the shorter one—might have been interpreted to bar three of the convention’s delegates from the presidency: Alexander Hamilton, Pierce Butler, and James McHenry.

The reason for requiring that the president be a natural-born citizen also was tied to contemporary politics. In early August, rumors spread that the delegates were plotting to invite a European monarch to rule the United States. The Duke of Osnaburgh, who was King George III’s second son, was the most frequently mentioned pretender.⁸² The practice of importing foreign rulers was not unknown among European monarchies and would not have seemed preposterous to Americans who heard the rumor. The delegates, aware that the mere existence of an independent executive in the Constitution

was going to provoke attacks by opponents who suspected that the presidency was a latent monarchy, seem to have believed that they could squelch the foreign king rumor by requiring that the president be a natural-born citizen of the United States.⁸³

No property qualification for president was included in the Constitution, even though most state constitutions required that the governor own property and the delegates had approved a similar requirement for the president more than a month before they enacted the presidential qualifications clause. On July 26, the convention adopted a motion by Mason and the Pinckneys that a property qualification be stated for judges, legislators, and the executive. The Committee of Detail neglected the motion in its proposed draft of the Constitution, which provoked both a complaint and another motion from Charles Pinckney on August 10. John Rutledge of South Carolina, the chair of the committee, apologized and seconded Pinckney's motion. He said the committee had made no recommendation about property "because they could not agree on any among themselves, being embarrassed by the danger on one side of displeasing the people by making them high, and on the other of rendering them nugatory by making them low."⁸⁴ Pinckney suggested \$100,000.⁸⁵

In response, Franklin rose to attack the very idea of property qualifications. As Madison paraphrased Franklin's argument in his notes, "Some of the greatest rogues he was ever acquainted with, were the richest rogues." Pinckney's motion, Madison recorded, quickly "was rejected by so general a no, that the States were not called."⁸⁶ In truth, the practical difficulty of establishing an acceptable property requirement, more than the belief that such a requirement should be rejected as a matter of principle, explains why the Constitution was silent about property ownership by the president.

The Vice Presidency

The idea of an office like vice president was not unknown among the delegates. During the period of British rule, several colonies had lieutenant governors whose ongoing duties were minor but who stood by to serve as acting governor if the governor died, was removed from office, was ill, or was absent from the colony.

After independence, several states included lieutenant governors in their constitutions. Each was elected in the same manner as the governor and was charged to act as governor when needed. New York's lieutenant governor was also the president of the state senate and could break tie votes. Still, it is difficult to say whether the experience of the states had much influence on the convention's decision to create the vice presidency. No one referred to the state lieutenant governors in the debates. Nor was any proposal made to include a vice president in the Constitution until very late in the proceedings. Instead, the invention of the vice presidency was an afterthought of the convention, a residue of its solution to the problem of presidential selection.

As noted earlier, the delegates initially decided that the legislature should choose the executive, but they eventually replaced legislative selection with the Electoral College,

providing that each state pick electors, who in turn would elect the president by majority vote. A possibly fatal defect of this procedure was that the electors would simply vote for a variety of local favorites, preventing the choice of a nationally elected president. The committee remedied this potential problem by assigning each elector two votes for president, requiring that they cast at least one of their votes for a candidate who “shall not be an inhabitant of the same State with themselves,” and attaching a consequence to both votes. The runner-up in the election for president would be awarded the newly created office of vice president.

As Hugh Williamson, a member of the Committee on Postponed Matters, testified, “Such an office as vice-President was not wanted. He was introduced only for the sake of a valuable mode of election which required two to be chosen at the same time.”⁸⁷ But, having invented the vice presidency, the committee proposed that the office be used to solve two other problems that troubled the convention.

Senate President

The first problem was the role of president of the Senate. Some delegates fretted that if a senator were chosen for this position, one of two difficulties would arise. If the senator was barred from voting except in the event of a tie (which was customary for presiding officers because it guaranteed that tie votes would be broken), the senator’s state would be denied half its representation on most issues. If the senator was allowed to vote on all matters, the state would be effectively overrepresented in the Senate, occupying two voting positions and the presiding officer’s casting vote. As a way around this dilemma, the Committee on Postponed Matters recommended that the vice president serve as president of the Senate, voting only to break ties. An exception was made for presidential impeachment trials, when the chief justice of the United States presides. In an oversight, vice presidents were not barred from presiding at their own impeachment trials.

Succession

The second problem the committee used the vice presidency to solve was succession when the presidency unexpectedly became vacant. This, too, was a matter to which the convention turned rather late. The Virginia Plan and the New Jersey Plan were silent about succession. On June 18, as part of his sweeping proposal for a national executive chosen by electors to serve for life, Hamilton suggested that in the event of the executive’s death, resignation, impeachment and removal, or absence from the country, the senator who served as president of the Senate should “exercise all the powers by this Constitution vested in the President, until another shall be appointed.” Sustained attention was first given to the succession question by the Committee of Detail, which built on Hamilton’s proposal by having the Senate president exercise a disabled president’s powers “until the disability of the President be removed.”

When the delegates discussed this provision on August 27, considerable dissatisfaction was voiced. Madison feared that the Senate would have an incentive to create presidential vacancies if its own president was the designated successor. He suggested instead that “the persons composing the Council to the President” fill that role.⁸⁸ Of course, despite Madison’s hopes, there was no such council. Morris offered the chief justice as successor. Finally, Williamson asked that the question be postponed. The convention agreed, placing the issue in the hands of the Committee on Postponed Matters.

Reporting to the convention on September 4, the committee proposed that

in the case of his [the president’s] removal as aforesaid, death, absence, resignation, or inability to discharge the powers or duties of his office the Vice President shall exercise those powers and duties until another President be chosen, or until the inability of the President be removed.

Three days later, Randolph, in an effort to supplement the committee’s proposal with one that provided a method of presidential succession if there were no vice president, moved:

The Legislature may declare by law what officer of the United States shall act as President in the case of the death, resignation, or disability of the President and Vice President; and such Officer shall act accordingly until the time of electing a President shall arrive.

Madison then moved to replace the last nine words of Randolph’s motion with “until such disability be removed, or a President shall be elected.” The motion passed, as amended.⁸⁹

Madison’s reason for amending Randolph’s motion is clear: He wanted Congress to call a special presidential election to replace a departed president or, in his words, to permit “a supply of vacancy by an intermediate election of the President.” Other evidence from the records of the convention suggests that most of the delegates intended that the president’s successor serve merely as acting president until a special election could be called.⁹⁰ But sometime between September 8 and 12, when the Committee of Style was working to fulfill its charge to produce a polished final draft of the Constitution, that intention was lost, probably unwittingly. The committee took the September 4 motion of the Committee on Postponed Matters and Randolph’s September 7 motion and merged them into one provision, which with minor modification, became Paragraph 6 of Article II, Section 1, of the Constitution:

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such

Officer shall act accordingly, until the Disability be removed, or a President shall be elected.⁹¹

Clearly, the delegates' intentions regarding succession were obscured by the Committee of Style. Grammatically, it is impossible to tell—and in its rush to adjournment, the convention did not notice the ambiguity—whether the antecedent of “the Same” in this provision is “the said office” (the presidency) or, as the delegates intended, only to its “powers and duties.” Nor can one ascertain if “until . . . a President shall be elected” means until the end of the original four-year term or, again as intended, until a special election occurs.⁹²

The vice presidency was not a controversial issue at the Constitutional Convention. On September 4, when the delegates were considering the Committee on Postponed Matters' proposal for the Electoral College, Gorham worried that “a very obscure man with very few votes” might be elected because the proposal required only that the vice president be the runner-up in the presidential election, not the recipient of a majority of electoral votes. Sherman replied that any of the leading candidates for president would likely be distinguished.

The role of the vice president as president of the Senate was discussed on September 7. Gerry, seconded by Randolph, complained about mixing legislative and executive elements: “We might as well put the President himself at the head of the Legislature. The close intimacy that must subsist between the President & vice-president makes it absolutely improper.” Morris responded wryly that “the vice president then will be the first heir apparent that ever loved his father.” Sherman added that “if the vice-President were not to be President of the Senate, he would be without employment.” He also reminded the convention that for the Senate to elect a president from among its own members probably would deprive that senator of a vote. Mason ended the brief debate by branding “the office of vice-President an encroachment on the rights of the Senate; . . . it mixed too much the Legislative & Executive, which as well as the Judiciary departments, ought to be kept as separate as possible.”⁹³ Despite these objections, the convention voted overwhelmingly to approve the vice presidency. As with the vesting clauses, the delegates' lack of clarity in this matter may have been at least partly a consequence of their sense that after four months in Philadelphia and so close to the finish line, they were ready to be done. In their haste the convention delegates left the difficult—and often contentious—task of interpreting these cryptic clauses to history.

Ratifying the Constitution

Congress's original call for a convention in Philadelphia charged the delegates only to propose amendments to the Articles of Confederation, not to design an entirely new system of government. By itself, the delegates' decision to ignore this charge ensured that controversy would ensue when, having met so long in secret, they published their

proposed plan of government in September. In addition, several provisions of the draft Constitution, including the enhanced powers of the national government and the design of the legislative branch, were certain to be controversial. But nothing astonished the nation more than the convention's decision to recommend that a strong national executive be established—unitary, independently elected for an unrestricted number of terms, and entrusted with a substantial grant of powers.

In the debates that the state ratifying conventions held on the Constitution, Anti-Federalists (the label attached to those who opposed the plan) were quick to attack the Constitution in newspaper essays, concentrating much of their fire on the presidency. Organized by Hamilton, Federalists rose to the office's defense. Most state conventions debated at least one aspect of the proposed executive.⁹⁴

The Anti-Federalist Critique of the Presidency

Anti-Federalists attacked the presidency as a disguised monarchy that, in collaboration with an allegedly aristocratic Senate, would rule the United States much as the British king, assisted by the House of Lords, was said to rule England.

The most strident opposition to the presidency was registered by Patrick Henry of Virginia. On June 7, 1788, speaking with unvarnished fervor, Henry voiced the Anti-Federalists' fears of the presidency to his state's ratifying convention. "It squints towards monarchy," he charged. "Your President may easily become a King; . . . if your American chief, be a man of ambition, how easy it is for him to render himself absolute: The army is in his hands."⁹⁵ Other Anti-Federalists focused their criticisms on the close relationship they thought the Constitution fostered between the "monarchical" president and the "aristocratic" Senate, the two bodies that shared the powers of appointment and treaty making without the involvement of the "democratic" House of Representatives.⁹⁶

Although monarchy was the Anti-Federalists' main fear, few features of the presidency were immune from their attack. The North Carolina and Virginia ratifying conventions urged the enactment of a constitutional amendment to limit each president to no more than eight years in office in any 16-year period. The Anti-Federalist Cato, who is often but not conclusively identified as New York governor George Clinton, argued in the *New York Journal* in November 1787 that the president's term was too long and cited Montesquieu's endorsement of annual elections. In addition, Cato charged, the absence of a council meant that the president would "be unsupported by proper information and advice, and will generally be directed by minions and favorites." Instead of direct election by the people (which Cato favored), the president "arrives to this office at the fourth or fifth hand."⁹⁷

Some of the most pointed criticisms of the proposed constitution came from disaffected delegates to the Constitutional Convention. Mason told the Virginia ratifying convention that the "mode of [presidential] election is a mere deception . . . on the American people" because, after Washington's certain election as the first president, the Electoral College almost never would produce a majority for a candidate. Conse-

quently, the House of Representatives would end up selecting nearly all presidents.⁹⁸ In a widely published article, Mason also decried the absence of a council and the president's "unrestrained power of granting pardons for treason."⁹⁹ Martin complained to the Maryland convention that the veto allowed the president to prevail over all but a two-thirds majority of both houses of Congress.¹⁰⁰

The presidency also drew criticism from two future presidents. Thomas Jefferson warned in private correspondence that a president "may be reelected from 4 years to 4 years for life." Vacancies would seldom occur in the presidency, he argued, and when they do, the stakes will be so high as to make "every succession worthy of intrigue, of bribery, of force, and even of foreign interference."¹⁰¹ James Monroe also worried about the possibility of a president being reelected into life tenure.

The Federalist Defense of the Presidency

As the Anti-Federalist critiques showed, Article II posed a political challenge for Federalists who were trying to persuade the states to ratify the Constitution. Proponents of ratification stressed both the virtues of the presidency and the restraints the Constitution placed on the office. In doing so, they relied heavily on the explanations and defenses of the Constitution that Hamilton, Madison, and Jay were putting forth in a series of 85 newspaper articles that Hamilton commissioned. These articles, soon gathered in a two-volume book called *The Federalist*, appeared pseudonymously in several New York newspapers under the name "Publius," after the Roman statesman Publius Valerius, who is celebrated in Plutarch's *Parallel Lives* for stabilizing the nascent republic even though he was falsely criticized as a monarchist.¹⁰² Hamilton wrote about 50 of the articles, Madison about 25, and Jay, who became ill after writing four of the first five numbers in the series, wrote five. Hamilton and Madison collaborated on the rest. The articles were reprinted in other newspapers and disseminated widely throughout the states.¹⁰³

In March 1788, Hamilton wrote *Federalist* Nos. 69 to 77, which dealt with the presidency. In the constitution Hamilton would have preferred, the president would be elected for life, exercise an absolute veto and undiluted appointment powers, and in general be much more powerful than in the Constitution the convention actually wrote. But like fellow delegate Pierce Butler, Hamilton resolved to "follow the example of Solon who gave the Athenians not the best Government he could devise but the best they would receive."¹⁰⁴ In his essays urging ratification, Hamilton defended every provision of Article II without reservation.

Federalist No. 69 squarely addressed the Anti-Federalist charge that the presidency was a latent monarchy. Hamilton argued that in contrast to the British king, who secured his office by inheritance and served for life, the president is elected for a limited term. The king had an absolute veto on laws passed by Parliament; the president's veto could be overridden by Congress. The king could both declare war and raise an army and navy; the president could do neither. The king could create offices and appoint

people to fill them; the president could not create offices and could fill them only with the approval of the Senate. Finally, Hamilton noted that the president, unlike the king, could be impeached and removed. In *Federalist* No. 65, he described impeachable offenses as “the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.”

Hamilton dissembled to some degree in drawing these contrasts. The powers he ascribed to the British monarch were more characteristic of the 17th century than of the 18th century, during which the influence of Parliament and the prime minister had grown. For example, the last British monarch to veto an act of Parliament was Queen Anne in 1707. But *Federalist* No. 69 was effective in deflating the Anti-Federalists’ caricature of the presidency. Indeed, Hamilton deftly argued that in many cases, the president’s power was less than that wielded by the governor of New York, the staunchly Anti-Federalist Clinton.

Federalist No. 70, less defensive in tone than No. 69, described the virtues of the presidency. Its theme was “energy,” a quality that according to Hamilton, is requisite to good government because it

is essential to the protection of the community against foreign attacks; . . . to the steady administration of the laws; to the protection of property . . . ; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.

Energy in the government created by the Constitution was provided by the president, Hamilton argued, mostly because of the office’s unitary character. Unity provided the presidency with a whole host of virtues—“decision, activity, secrecy, and dispatch . . . vigor and expedition.” In contrast, a plural executive would be riven by disagreements among its members that would render it slow to act and prone to faction. It also would be hard for the people to hold a plural executive responsible for failures because each member could blame the others.

In *Federalist* Nos. 71 to 73, Hamilton defended the presidency as having additional qualities indispensable to energy. “Duration,” the theme of No. 71, was one. The four-year term provided the president with enough time to act firmly and with resolve but was not so long as “to justify any alarm for the public liberty.” Hamilton shrewdly added in No. 72 that the provision for reelection acknowledged that “the desire of reward is one of the strongest incentives of human conduct.” Without that incentive, a president would be tempted either to slack off or, at the opposite extreme, to usurp power violently. With it, a national leader would be prompted “to plan and undertake extensive and arduous enterprises for the public benefit.” Presidential reeligibility also allowed the nation to keep a president in office if it so desired. “There is an excess of refinement in the idea,” he insisted, “of disabling the people to continue in office men who had entitled themselves, in their opinion, to approbation and confidence.”

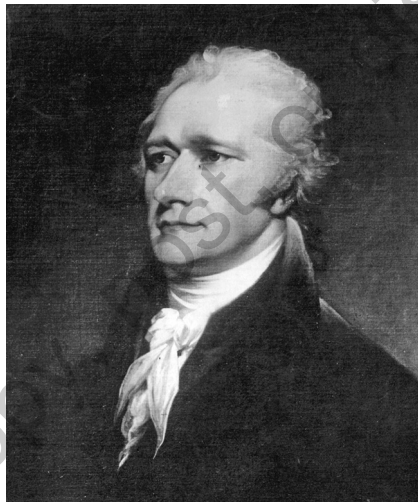
“Adequate provision” was a third energy-inducing quality of the presidency, according to Hamilton. He attached great importance to the prohibition that the Constitution placed on Congress not to raise or lower an incumbent president’s salary. In *Federalist* Nos. 73 to 77, Hamilton defended the enumerated powers of the presidency, which along with unity, duration, and adequate provision, were for him the indispensable ingredients of presidential energy. Far from being threatening, he argued, the office’s constitutional powers were modest and essential to the operations of good government:

- Veto: “The propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments has been already more than once suggested. . . . [Without the veto, the president] might gradually be stripped of his authorities by successive resolutions or annihilated by a single vote. . . . But the power in question has a further use. It not only serves as a shield to the executive, but it furnishes an additional security against the enactment of improper laws.”
- Commander in chief: “Even those [constitutions] which have in other respects coupled the Chief Magistrate with a council have for the most part concentrated the military authority in him alone. Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.”
- Treaties: “With regard to the intermixture of powers [between the president and the Senate], . . . the joint possession of the power in question, by the President and Senate, would afford a greater prospect of security than the separate possession of it by either of them.”
- Appointment: “I proceed to lay it down as a rule that one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices than a body of men of equal or perhaps even of superior discernment. The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. . . . To what purpose then require the co-operation of the Senate? . . . It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters. . . . The possibility of rejection would be a strong motive to care in proposing.”¹⁰⁵
- Other powers: “The only remaining powers of the executive are comprehended in giving information to Congress on the state of the Union; in recommending to their consideration such measures as he shall judge expedient; in convening them, or either branch, upon extraordinary occasions; in adjourning them when they cannot themselves agree upon the time of adjournment; in receiving ambassadors and other public ministers; in faithfully executing the laws; and in

commissioning all the officers of the United States. Except some cavils about the power of convening *either* house of the legislature, and that of receiving ambassadors, no objection has been made to this class of authorities; nor could they possibly admit of any.”

The Vice Presidency in the Ratification Debates

“Post-convention discussion of the vice presidency was not extensive,” legal scholar John D. Feerick noted.¹⁰⁶ The only mention of the office in *The Federalist* is in No. 68, written by Hamilton. He argued in passing that having a vice president serve as presidential successor made sense because “all the reasons which recommend the mode of election prescribed for the one, apply with great if not with equal force to the manner of appointing the other.”



Alexander Hamilton, one of the authors of *The Federalist Papers*, defended the Constitution's provisions for a strong executive office.

Source: Library of Congress.

In contrast, Luther Martin of Maryland, who opposed ratification, expressed concern that large states such as Pennsylvania and Virginia typically would benefit from the vice president's role as Senate president. Because the vice president is “that person who has the next greatest number of votes of the electors . . .,” Martin argued, “it is very possible, and not improbable, that he may be appointed by the electors of a *single large state*; and a very undue influence in the Senate is given to that State of which the Vice-President is a citizen.” Mason, another convention delegate who opposed ratification, complained about the vice president's right to vote in the Senate and the

office's admixture of legislative and executive responsibilities. His fellow Virginia Anti-Federalist Richard Henry Lee worried about the absence of stated qualifications for the vice president.¹⁰⁷

Defenders of the vice presidency made a virtue of the office's role as Senate president. In their view, the vice president's election by the nation as a whole would be good for the Senate. "There is much more propriety to giving this office to a person chosen by the people at large," urged Madison, "than to one of the Senate, who is only the choice of the legislature of one state." William R. Davie of North Carolina expressed confidence that a nationally elected vice president would cast tie-breaking votes "as impartially as possible," not favoring any section of the country. Answering another argument of the Constitution's critics, Connecticut delegates Oliver Ellsworth and Roger Sherman wrote separately that the vice president did not wield a mix of legislative and executive powers but rather that the vice presidency was part of the legislative branch except in the event of a succession, at which time it entered the executive branch.¹⁰⁸

In all, according to Feerick, the vice presidency "received scant attention in the state ratifying conventions. . . . The discussion of the vice-presidency that did occur centered mostly on the fact that the office blended legislative and executive functions."¹⁰⁹ As at the Constitutional Convention, little was said in the state debates about the vice president's duties as successor to the president.