

James Wilson’s Contributions to the Construction of Article II

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ABSTRACT

James Wilson, the best lawyer among the delegates to the Constitutional Convention of 1787, was the principal architect of the executive branch. In the initial debate over the executive plank of the Virginia Plan on June 1, Wilson championed the controversial idea that the executive power should be vested in a single person, but forcefully rejected the idea that the powers of the President should be modeled on the prerogative powers of the English monarch. At the moment, on June 1, the delegates paid his words little attention, but later, as a member of the Committee of Detail, Wilson and the Committee carefully allocated the various royal prerogatives among Congress and the Presidency (eliminating some of them altogether), then vested the residuum in the President through the Vesting Clause.

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James Wilson was the best lawyer at the Constitutional Convention in 1787. Practically alone among the delegates, he combined a belief in a strong and unified national government with no less strong a commitment to democratic governance. He expressed this combination of beliefs with the striking metaphor of a pyramid, which if it were to reach to great heights required a broad base. Less well known, perhaps, is Wilson's contribution to the Constitution's executive branch. In the great debate over executive power on June 1, Wilson presented the clearest and most comprehensive analysis of the nature of executive power and its relation to the royal prerogative. In mid-summer, along with John Rutledge of South Carolina—a man of few words but effective action—Wilson put his theoretical position into practice on the Committee of Detail. In particular, he defended the unitary character of the executive, as well as the President's veto and appointment powers. Along with Rutledge and Gouverneur Morris, Wilson should be credited as the architect of the executive branch.¹

In a nutshell: The first draft of the Constitution, the Virginia Plan (primarily the work of James Madison) contained only the sketchiest detail on the powers of the presidency. In addition to empowering the "National Executive" to execute the national laws, the plan vested in the President all the "Executive rights" of the confederation. This implied that the President, like the King of England, would have prerogative powers including those of "peace and war." This shocked the delegates. Charles Pinckney sputtered that this would "render the Executive a monarchy," albeit an elective one.² James Wilson of Pennsylvania and John Rutledge of South Carolina immediately responded. They wished to create a unitary executive, but not necessarily include all the prerogative powers

1. Much of the material in this essay is adapted from my book project: *The President Who Would Not Be King* (Jan. 21, 2019) (unpublished manuscript) (on file with author).

2. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 64–65 (photo. reprint 1966) (Max Farrand ed., rev. ed. 1937) [hereinafter FARRAND'S RECORDS].

of the Crown. Significantly, both of these men studied in Britain—Rutledge got his legal education at the Middle Temple in London and Wilson got a classical education at St Andrews in Scotland—and presumably were intimately familiar with the British experience of royal power. They did not get their way at first. Instead, the delegates created a unitary executive with only three enumerated powers: to carry into effect laws passed by Congress, to veto legislation (subject to override), and to appoint officers other than judges (and later ambassadors and a Treasurer). In late July, however, as dominant members of the Committee of Detail, Rutledge and Wilson did exactly what they had hinted on the first day: they carefully parceled out the prerogatives of the Crown between the President and the Congress. Gouverneur Morris, backed by Charles Pinckney, later made important suggestions about the structure of the executive branch and the relation between the President and the departments. Toward the end of the summer, another committee further strengthened the executive, giving it the foreign affairs power, which until that point had been vested in the Senate. Yet another committee led by Morris then reorganized the presentation of these powers by giving Article II its peculiar logical structure, which emphasizes the difference between inherent presidential powers not subject to congressional control, inherent presidential powers subject to congressional control, and delegated powers that the President cannot employ without congressional authorization.

I. THE DIFFICULTY OF THE TASK: LACK OF MODELS

John Dickinson famously told his fellow delegates that in drafting the new Constitution, “[e]xperience must be our only guide. Reason may mislead us.”³ Unfortunately, the delegates had no experience with a strong and effective executive other than a monarch. Under the Articles of Confederation, which governed the new United States until the adoption of the Constitution in 1788,⁴ the national government had no executive branch—only a Congress and a judiciary limited to maritime cases. That does not mean the Confederation government performed no executive functions. Those executive functions were exercised by Congress, by committees of Congress, or by ministers appointed by and accountable to Congress. This system did not work well.⁵ By the late 1780s, all seemed to agree

3. 2 *id.* at 278. I am well aware of the problematic nature of the notes on the Convention presented in Farrand’s collection, see generally MARY SARAH BILDER, *MADISON’S HAND: REVISING THE CONSTITUTIONAL CONVENTION* (2015), but Farrand’s edition remains the most familiar and accessible set of records of what took place in Philadelphia. See James Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEXAS L. REV. 1 (1986). Because I focus here on drafting history more than on comments made in debate, and especially on the work of the three committees, Bilder’s discoveries about Madisonian manipulation of the Notes are less concerning than with respect to other issues. Our knowledge of the Committee drafts is independent of Madison.

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

5. See CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY, 1775–1789: A STUDY IN CONSTITUTIONAL HISTORY* 62–64 (1922) (“Everything was confusion, and the confusion was only worse

that a new Constitution should include an executive. Every plan for constitutional reform, even the most conservative, the New Jersey Plan, called for creation of an executive of some sort, even if not unitary.

Devising an executive, however, was no easy matter. The Framers had extensive experience in colonial legislatures, making it relatively easy for them to draft a practical scheme for the legislative branch. And many of them were lawyers or judges. They knew what a judicial system should look like. But no one in attendance at the Philadelphia Convention—indeed no one anywhere—had experience with a strong republican executive for a nation the size of the United States. As we will discuss in great detail below, British constitutional history featured a series of struggles by whiggish parliamentarians and judges to curtail the powers of an often arbitrary and grasping royal monarch. Americans certainly did not want to replicate that kind of executive (though some privately believed a monarchy might be unavoidable).⁶ Colonial governors were even worse; their prerogative powers *vis-à-vis* colonial legislatures were significantly more formidable than those of the King *vis-à-vis* Parliament, and they had frequently abused those powers in their own self-interest. Obviously, colonial governors did not offer an attractive model for a republican executive. State governors after Independence were pitifully weak; Madison called them “little more than Cyphers.”⁷ The governors of New York and, to some extent, Massachusetts were exceptions. They were largely independent of the legislature and had significant powers. But even those governorships did not provide a real model for an energetic executive for an entire nation.

To make matters worse, Madison, the driving intellect behind the Virginia Plan, was a quintessentially legislative personality, and had few ideas about how to construct an executive branch. Just before he left for Philadelphia on April 16, 1787, he wrote a letter to General Washington outlining his thoughts about the new constitution. In that letter, he wrote: “I have scarcely ventured as yet to form my own opinion either of the manner in which [the executive] ought to be constituted or of the authorities with which it ought to be clothed.”⁸ The Convention had to construct an executive out of whole cloth, with no attractive precedents and little help from its ablest theorist.

confounded when Congress sought to effect a cure by introducing further complexity.”); Thomas E. Cronin, *The President's Executive Power*, in *INVENTING THE AMERICAN PRESIDENCY* 180, 182–83 (Thomas E. Cronin ed., 1989).

6. See LOUISE BURNHAM DUNBAR, *A STUDY OF “MONARCHICAL” TENDENCIES IN THE UNITED STATES* (1920). In an amusing episode reported in Farrand, the Maryland delegates swapped a list of fellow delegates who they said were “for a king.” 2 FARRAND’S RECORDS, *supra* note 2, at 191–92.

7. 2 FARRAND’S RECORDS, *supra* note 2, at 35.

8. Letter from James Madison to George Washington (Apr. 16, 1787), in 9 THE PAPERS OF JAMES MADISON 382, 384 (Robert A. Rutland & William M. E. Rachal eds., 1975), <https://founders.archives.gov/documents/Madison/01-09-02-0208> [<https://perma.cc/GK6D-TZH7>]. Madison wrote a similar letter to Edmund Randolph using the same language about the executive. Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in *id.* at 368, <https://founders.archives.gov/documents/Madison/01-09-02-0197> [<https://perma.cc/5HBY-KXHN>].

II. THE VIRGINIA PLAN, RESOLUTION SEVEN

When the Constitutional Convention gathered a quorum at the end of May 1787, the Virginia delegation stole a march by presenting a well-thought-through plan, mostly drafted by Madison.⁹ The executive power plank of the Virginia Plan, Resolution Seven, however, was one of the least thought-through parts of the Plan. It read in its entirety:

7. Resd. that a National Executive be instituted; to be chosen by the National Legislature for the term of years, to receive punctually at stated times, a fixed compensation for the services rendered, in which no increase or diminution shall be made so as to affect the Magistracy, existing at the time of increase or diminution, and to be ineligible a second time; and that besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation.¹⁰

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

Resolution Seven’s specification of executive powers is more significant for our purposes. It vested in the “National Executive” all “Executive rights” that had been vested in Congress under the Articles of Confederation, in addition to “a general authority to execute the National laws.”¹¹ This was more precise than it may sound to modern ears. The second half of the provision transferred to the new executive a number of powers previously exercised by the Continental Congress, including: the powers of “determining on peace and war,” of “sending and receiving ambassadors,” entering into treaties and alliances, regulating captures and prizes, granting letters of marque and reprisal, establishing certain courts, determining the value of coin and the standards of weights and measures, dealing with Indian tribes, establishing post offices, appointing and commissioning army and navy officers, and directing the “operations” of the land and naval forces.¹² These powers were exercised by the Crown in Britain. The first half of the provision, “a general authority to execute the National laws,” was new. Under

9. See 1 FARRAND’S RECORDS, *supra* note 2, at 18.

10. *Id.* at 21.

11. *Id.*

12. See ARTICLES OF CONFEDERATION OF 1781, art. IX.

the Articles of Confederation, the national government did not have the power to enforce its laws. Instead, it had to work through the states to collect taxes, raise armies, effectuate trade regulations, and otherwise to enforce the law. The Virginia Plan would cut out the states and entrust this power to an executive magistrate.

This wording necessarily presupposed that certain powers are “executive” in nature (and others “legislative” or “judicial”), as opposed to the view that powers take on their coloration as executive, legislative, or judicial according to the branch in which those powers are located.¹³ Otherwise, there would be no way to tell which powers vested in the Confederation Congress were “executive.” Madison, the presumed author of Resolution Seven, confirmed this presupposition by informing the Convention that “certain powers were in their nature Executive, and must be given to that departmt.”¹⁴

In addition, the executive, together with “a convenient number of the National Judiciary,” would be part of a “council of revision,” with authority to review and veto every act of the legislature, including negatives of state laws, subject to override.¹⁵ This merged the ideas of an executive veto and judicial review, which the Convention would later separate.

Resolution Seven came to the floor of the Convention, sitting as a Committee of the Whole, on June 1, 1787—its third day of substantive deliberations. The ensuing discussion set the tone of the entire debate over presidential powers. “Mr. Pinkney”—presumably the younger Charles Pinckney rather than his older cousin, General Charles Coatesworth Pinckney¹⁶—opened the debate. He “was for a vigorous Executive but was afraid the Executive powers of the <then existing> Congress might extend to peace & war &c which would render the Executive a Monarchy, of the worst kind, to wit an elective one.”¹⁷

This remark is striking, because Resolution Seven made no reference to “peace & war.” Why would Pinckney rush to the assumption that “executive” powers necessarily include those powers? Because, as of 1787, “peace & war” were

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

14. 1 FARRAND’S RECORDS, *supra* note 2, at 67.

15. *Id.* at 21.

16. Usually Madison’s notes refer to Charles Pinckney as “Mr. Pinkney” and his older cousin as “Genl. Pinkney” or “C. C. Pinkney” (the Notes are inconsistent about the spelling of the name.) Here, the text does not make clear which Pinckney spoke, but context suggests the former.

17. 1 FARRAND’S RECORDS, *supra* note 2, at 64–65 (spelling corrected). The angle brackets (< >) are Farrand’s editorial signal that Madison added the bracketed material to his Notes after the fact. Pinckney’s statement that an elective monarch is “the worse kind,” meaning worse than a hereditary monarchy, was a commonplace sentiment of the time. For an explanation, see THE FEDERALIST No. 75 (Alexander Hamilton), quoted with approbation by Madison in JAMES MADISON, LETTERS OF HELVIDIUS IV (1793), *reprinted in* 6 THE WRITINGS OF JAMES MADISON 171, 175–76 (Gaillard Hunt ed., 1906). Hamilton’s notes indicate that Madison spoke on this topic on June 1. 1 FARRAND’S RECORDS, *supra* note 2, at 72 (“Elective Monarchies turbulent and unhappy”).

among the most important prerogative powers remaining in the Crown. Under the British constitution, the King had authority, subject only to Parliament's power of the purse, to make war, to declare war, to conduct war as Commander in Chief, and to make peace.¹⁸ Pinckney evidently used the phrase "peace & war &c" as a synecdoche for the totality of the royal prerogative powers. The mere presence of the term "Executive rights" in Resolution Seven invoked the panoply of executive prerogative powers under the British constitution.

That is why Pinckney moved so quickly to his worry that Resolution Seven would "render the Executive [an elective] Monarchy." His train of thought involved three steps: (1) Resolution Seven vests all the executive powers of the nation in the Executive; (2) executive powers include the prerogative powers of the Crown, such as peace and war (and others, hence the "&c," meaning et cetera); (3) an executive with the prerogative powers of the British Crown is effectively a monarch, albeit elected.

James Wilson picked up on Pinckney's line of reasoning. While disagreeing with the second step of his logic, Wilson stated that he "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers."¹⁹ Resolution Seven had not used the language of "prerogative," any more than it had used the language of "peace & war," but to the ear of a late eighteenth century lawyer in the English tradition, the term "Executive rights" necessarily raised the question whether some, or all, or none, of the prerogative powers of the Crown were included.

III. PREROGATIVE

What is a "Prerogative" power? "Prerogative" was a formal legal term in the British constitutional lexicon, used by monarchs, judges, Parliamentarians, political theorists, and legal treatise writers alike. It refers to the powers of the executive that exist independently of statute, and are not subject to legislative regulation or abridgement. In his *Second Treatise of Government*, well known to the Framers, John Locke defined the term "*Prerogative*" as the "power to act according to discretion, for the publick good, without the prescription of the law, and sometimes even against it."²⁰ Sir William Blackstone wrote that when the King lawfully rests his orders on a royal prerogative, "the king is, and ought to be absolute; that is, so far absolute, that there is no legal authority that can either delay or resist him. He may reject what bills, may make what treaties, may coin what money, may create what peers, [and] may pardon what offences he

18. See 1 WILLIAM BLACKSTONE, COMMENTARIES *250, *257–58 (counting the powers to make war and peace among "a number of authorities and powers; in the exertion whereof consists the executive part of government"); JOSEPH CHITTY, A TREATISE ON THE LAW OF THE PREROGATIVES OF THE CROWN 43–50 (1820). Chitty's treatise obviously post-dates the constitutional framing, but it describes then-recent history, and was close enough in time to be of use.

19. 1 FARRAND'S RECORDS, *supra* note 2, at 65.

20. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 375 (C.B. MacPherson ed., 1980) (1689) (emphasis original).

pleases.”²¹ In modern American law, the term “prerogative” is used, albeit rarely, in connection with certain presidential powers under the Constitution. Professors Marty Lederman and (now Judge) David Barron define the term as “authorities that establish not only a power to act in the absence of legislative authorization, but also an indefeasible scope of discretion,” which they term “preclusive.”²² Modern examples of presidential prerogative under the Constitution include the veto and the pardon. These prerogatives may be exercised by the President for any reason, do not depend on any delegation by Congress, and may not be regulated by Congress or the courts.

Much of the terminological confusion over the term “executive power” at the time of the founding stems from three different conceptions of the relation between executive power and royal prerogative. Sometimes delegates—including James Wilson—spoke of “strictly” executive power, which consisted of the power, indeed the duty, to carry the laws into execution.²³ This is a narrow conception, and does not include the great prerogative powers of the British monarch. Sometimes delegates—for example, Charles Pinckney in the first speech on June 1—assumed that “executive powers” included the powers traditionally exercised by the executive magistrate.²⁴ This broad conception would include prerogative powers such as peace and war, legislative recommendations and vetoes, public finance, and patronage—at least unless those powers were explicitly vested elsewhere. A third conception, often used by modern lawyers, is the nominalist idea that “executive powers” are whatever powers happen to be lodged in the executive branch.

Over the course of the seventeenth and eighteenth centuries, the scope of royal prerogative powers was greatly reduced. Unchecked royal power was seen as the enemy to the liberties of the people, and the move toward parliamentary supremacy was seen as the remedy. As Madison wrote in 1800, the “danger of encroachments on the rights of the people” in Britain was “understood to be confined to the executive magistrate,” and “all the ramparts for protecting the rights of the people—such as their Magna Charta, their Bill of Rights, &c.—are . . . reared . . . against the royal prerogative.”²⁵ American constitutionalism, as Madison explained, was different because it aspired to make “laws paramount to prerogative” and “constitutions paramount to laws.”²⁶ Thus, at the Convention, delegates sought to create an executive capable of checking the excesses of the legislative branch, in addition to energetically executing the law. This was, in a sense, a reversal of course.

21. 1 BLACKSTONE, *supra* note 18, at *250.

22. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 726 (2008).

23. 1 FARRAND’S RECORDS, *supra* note 2, at 66.

24. *Id.* at 64–65.

25. JAMES MADISON, REPORT ON THE VIRGINIA RESOLUTIONS (Va. 1800), reprinted in 6 THE WRITINGS OF JAMES MADISON, *supra* note 17, at 341, 386.

26. *Id.* at 387.

From Magna Carta through the English Civil War and the Glorious Revolution, the monarch's most dramatic claims to absolute authority—to impose taxes and laws without parliamentary approval, and to imprison or seize property without due process—were defeated after titanic struggle. The eighteenth-century monarch nonetheless continued to have important prerogative powers, such as the powers of peace and war; to command army, navy, and militia; to appoint and remove officers; to create peerages and other offices and name people to them; to head the church by law established; to coin money and grant charters of incorporation and sometimes monopoly privileges; to declare embargoes, to pardon, to veto, and to prorogue Parliament—to list some of the more important.²⁷ The constitutional framers had no doubt that they should deny to the republican executive the prerogative powers that had been wrested from the Stuart Kings, but it was harder to decide what to do about the surviving eighteenth-century prerogative powers.

A more existential threat to royal prerogative—namely, the subjection of the royal powers to the control of a ministry chosen by the dominant party in Parliament—came about more gradually, but was nearly complete by the time of American independence. Under this new system, the remaining prerogatives could still be exercised by “the Crown” without Parliamentary vote, but the King was expected to exercise those powers only on advice of his ministers. In effect, this retains much of the unity, energy, and dispatch of a single-headed executive, because “the Crown” could act swiftly, without need for debates and votes in a legislative body. But the executive was no longer really the king. It was the head of the dominant political party in Parliament. Some delegates understood this and some did not.

James Wilson, among others, favored the first development, namely elimination of many specific prerogative powers, and transfer of those powers to the legislative branch. But he abhorred the second development. He believed that ministerial government was the worst of both worlds. It combined the potentially abusive authority of a single monarch with the intrigue, cabal, and lack of democratic accountability of the ministry—and without the open debate that was the hallmark of legislative bodies. Councils serve more often to “cover” than to “prevent” executive misconduct.²⁸ Wilson went so far as to declare, late in the Convention, that constitutional developments in eighteenth-century Britain had resulted in the “destruction of the King,” leaving Parliament—surely referring to the ministry—able to exercise “a more pure and unmixed tyranny” than ever had been exercised by the monarch.²⁹

Readers may be wondering how, if prerogative powers were *constitutionally* vested in the Crown under the unwritten British Constitution, some of those prerogatives were reformed or abolished by Acts of Parliament, such as the Petition

27. See generally 1 BLACKSTONE, *supra* note 18, at *230–70 (“Of the King’s Prerogative”).

28. 1 FARRAND’S RECORDS, *supra* note 2, at 97.

29. 2 FARRAND’S RECORDS, *supra* note 2, at 300–01.

of Right, the Bill of Rights, the Habeas Corpus Act, or the Mutiny Act. The answer is that, as a formal matter, royal prerogatives could not be abridged or regulated *except with the consent of the Crown*, manifested by royal assent to legislation. What this meant, in practice, is that prerogatives could be reformed or eliminated by passage of statutes so long as the royal signature could be cajoled or extorted, often by denying financial support for projects, such as wars, to which the monarch was committed or even by means of armed rebellion. Coerced royal assent was still assent. This points to a major difference between prerogative under the British and U.S. Constitutions. Under the United States Constitution, executive prerogatives are set forth in Article II, and are impervious to statutory abridgement *even if a particular President were to sign legislation purporting to give them up*. They are indefeasible. Moreover, acts of Parliament were sometimes understood to be declarative of preexisting law. A statute might confirm a royal prerogative or declare it unlawful. Such a statute should not necessarily be understood to change constitutional norms so much as to take a position on what they were. This, too, is a difference from American law, which typically treats decisions about “what the law *is*” as falling within the judicial rather than the legislative department. Finally, because British constitutional law is (mostly) unwritten and is a product of longstanding custom, an ancient prerogative power could fall into desuetude by reason of disuse over a century or two. American’s written Constitution obviates this possibility.

IV. THE DEBATE OF JUNE 1

James Wilson started off the debate over Resolution Seven by moving “that the Executive consist of a single person.”³⁰ He argued that a unitary executive would give “most energy dispatch and responsibility to the office,” thus rejecting the ministry model that had come to prevail in Britain.³¹ By “responsibility” he meant what we would call democratic accountability. One of the vices of ministerial government was that Parliament would not hold ministers accountable when those ministers were the leadership of the dominant party. They had been held accountable when the ministers were the King’s men—the King’s men were susceptible to impeachment, attainder, and various lesser legislative sanctions. Thus, in a way, the triumph of Parliament over King had undermined the accountability of executive officers. Moreover, any time authority is shared among many hands, it is difficult to attach blame or impose accountability. A unitary executive independent of the legislative branch solves these problems better than ministerial government.

But a unitary executive independent of the legislative branch, while solving one set of problems, creates another: the danger of autocracy. Governor Edmund Randolph of Virginia, the official movant of the Virginia Plan, argued that “unity

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

31. *Id.*

in the Executive magistracy” is “the foetus of monarchy.”³² He favored a multi-headed executive like the consulate of ancient Rome or later the Directorate in Republican France, eventually settling on the idea of one co-executive from each of the three regions: East, Middle, and South.³³ Elbridge Gerry of Massachusetts, later joined by Sherman and Colonel George Mason of Virginia, agreed with Randolph about the dangers of a unitary executive,³⁴ but favored the solution of attaching to the single executive magistrate a council, as existed in most of the state constitutions, “in order to give weight & inspire confidence.”³⁵ Even Madison flirted with saddling the chief executive with a privy council. His cherished Council of Revision idea would be a kind of privy council for the veto power, and late in August, he voted for George Mason’s more general council proposal.³⁶

Wilson and Rutledge led the forces against a multiple executive in early June. Wilson responded to the dangers of monarchy in two ways. First, he championed popular election of the President—the first delegate to do so. His initial speech is worthy of quotation: “[H]e was almost unwilling to declare the mode which he wished to take place, being apprehensive that it might appear chimerical. He would say however at least that in theory he was for an election by the people.”³⁷ He quickly shifted to an electoral college directly elected by the people as the most practicable second best option, but continued to support direct election by the people. If the executive is chosen by the people and answerable to them, Randolph’s fears of an oppressive monarchy would be obviated.

Second, and more interestingly for understanding the ultimate structure of Article II, Wilson urged that “the powers of this independent unitary executive not be modeled on the prerogative powers of the king.”³⁸ He explained that “the British Model . . . was inapplicable to the situation of this Country; the extent of which was so great, and the manners so republican, that nothing but a great confederated Republic would do for it.”³⁹

Wilson offered the most elaborate and developed explanation of the relation between royal prerogatives and executive powers in a republic. While explaining why he did not consider the royal prerogative powers a “proper guide,” he

32. *Id.*

33. *Id.* at 66.

34. Mason was absent for the vote on June 2, but he delivered a forceful speech against a unitary executive upon his return. *See id.* at 101–02; *see also* SUPPLEMENT TO MAX FARRAND’S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 49–51 (James Hutson ed., 1987). On June 4, Sherman spoke against the unitary executive and in favor of a council).

35. 1 FARRAND’S RECORDS, *supra* note 2, at 66. William Pierce’s notes, but not Madison’s or any others, quotes Madison as saying that: “[A]n Executive formed of one Man would answer the purpose when aided by a Council, who should have the right to advise and record their proceedings, but not to control his authority.” *Id.* at 74. Subsequently, Madison never wavered from support for a unitary executive.

36. 2 FARRAND’S RECORDS, *supra* note 2, at 542.

37. 1 *id.* at 68.

38. *Id.*

39. *Id.* at 66.

pointed out that the King's prerogatives were not all of an executive nature. "Some of these prerogatives," he noted, were "Legislative."⁴⁰ Presumably, he was thinking of King George III's powers to prorogue Parliament and veto bills, which were unquestionably legislative and not executive in nature. He might also have been thinking of the Proclamation Power, the Suspending Power, and the Dispensing Power, which were repudiated by the Petition of Right of 1628 and the Bill of Rights of 1689. "Among others," Wilson said—meaning royal prerogative powers that were not of a legislative nature—were "that of war & peace &c."⁴¹ He then concluded that "[t]he only powers he conceived strictly Executive were those of executing the laws, and appointing officers, not [appertaining to and] appointed by the Legislature."⁴²

To modern ears, this sounds peculiar. If the powers of "peace & war" were neither legislative nor "strictly Executive," what were they? Locke suggests one possible answer. He dubbed the powers related to foreign affairs as "federative."⁴³ Although executive and federative powers are "distinct in themselves," for practical reasons they are usually placed in the same hands.⁴⁴ As Locke explained, both powers "requir[e] the force of the Society for their exercise," and if they were separated, "the Force of the publick would be under different Commands: which would be apt sometime or other to cause disorder and ruine."⁴⁵ If Wilson was following Locke, this would make sense of his taxonomy of powers. The powers of "peace & war," being the core of the federative power, are neither "legislative" nor "strictly" executive in nature, but it is almost always lodged in the executive. Federative powers are an example of the difference between powers that are customarily executive and those that are inherently or "strictly" executive. The term "executive power" was sometimes used in its narrow technical sense and sometimes in the broader customary sense, as including the federative powers.⁴⁶

Some scholars portray Wilson as stating that the powers of peace & war are by nature *legislative* powers.⁴⁷ That is not what he said, according to Madison's *Notes*. He said that the powers of war & peace were "among others," meaning

40. *Id.* at 65.

41. *Id.* at 65–66.

42. *Id.* at 66. Later, Wilson would oppose giving the Senate the power to advise and consent to appointments, describing this as "blending a branch of the Legislature with the Executive." 2 *id.* at 538. This is fully consistent with his view that the appointment power is "strictly" executive.

43. LOCKE, *supra* note 20, at 365.

44. *Id.* at 366.

45. *Id.*

46. For example, in an opinion provided for President Washington in his capacity as Secretary of State, Jefferson stated that "The transaction of business with foreign nations is executive altogether." Thomas Jefferson, *Opinion on the Powers of the Senate* (Apr. 24, 1790), in 5 THE WORKS OF THOMAS JEFFERSON 50 (Paul Leicester Ford ed., 1905).

47. See, e.g., David Gray Adler, *The President's War-Making Power*, in INVENTING THE AMERICAN PRESIDENCY 119, 131 (Thomas E. Cronin ed., 1989); Thomas E. Cronin, *The President's Executive Power*, in *supra*, at 180, 184; Arthur Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 527, 576 (1974).

powers *other than* legislative powers. True, Wilson did not include war & peace among the powers he deemed “strictly” executive, but that is not the same as saying he thought of these powers as legislative. They could be mixed, or “federative.” These commentators may have been misled by William Pierce’s notes from June 1, which are quite different from Madison’s. Pierce reports: “Mr. Wilson said the great qualities in the several parts of the Executive are vigor and dispatch. Making peace and war are generally determined by Writers on the Laws of Nations to be legislative powers.”⁴⁸ However, most “Writers” on the topic—such as Blackstone, Montesquieu, Vattel, DeLolme, and Rutherford—classed the power to make treaties and to go to war as pertaining to the executive.⁴⁹ It is unlikely Wilson got this wrong. Perhaps Pierce misheard him. And, in any event, Pierce does not purport to give Wilson’s own view on the legislative or executive character of these powers.

Madison jumped into the debate at this point. Rufus King’s notes recount that he agreed with Wilson’s explanation of the strict meaning of the term “executive,” including that the term does not “*ex vi termini*” (meaning “by definition”) “include the Rights of war & peace &c.”⁵⁰ Madison further warned that if the executive powers were “large we shall have the Evils of elective Monarchies.” That echoed Pinckney’s concerns. He advocated that the executive powers be “confined” and “defined.” All this seems to echo Wilson.

Madison’s own notes of his speech are somewhat different. According to those notes, Madison began by stating that “certain powers were in their nature Executive, and must be given to that departmt,” and that the sensible way to proceed was to define what those inherently executive powers are, and then decide “how far they might be safely entrusted to a single officer.”⁵¹ He then moved to amend Resolution Seven to do just that. His amendment struck out the language vesting in the executive all the executive rights of Congress under the Articles and replaced it with enumerated powers “to carry into effect the national laws” and “to appoint to offices in cases not otherwise provided for”—the two powers identified by Wilson as “strictly Executive.” This part of Madison’s motion passed almost unanimously; one state, Connecticut, was divided. More interestingly, Madison moved to give the executive the power “to execute such other powers as may from time to time be delegated by the national Legislature.” At the suggestion of General C.C. Pinckney, he amended the motion to read “to

48. 1 FARRAND’S RECORDS, *supra* note 2, at 73–74.

49. For quotations and citations, see Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231, 268–70 (2001). In a backhanded acknowledgement that the “writers” were all on the other side, Madison would later try to explain them away on the ground that they “wrote before a critical attention was paid to those objects, and with their eyes too much on monarchical governments, where all powers are confounded in the sovereignty of the prince.” JAMES MADISON, LETTER OF HELVIDIUS I (1793), in 6 THE WRITINGS OF JAMES MADISON, *supra* note 17, at 138, 144.

50. 1 FARRAND’S RECORDS, *supra* note 2, at 70.

51. *Id.* at 67.

execute such other powers *not legislative nor judiciary in their nature* as may from time to time be delegated by the national Legislature.”⁵²

This motion clarifies Madison’s view of the executive. He believed the executive must be given all powers that are “in their nature Executive,” and he agreed with Wilson’s narrow construction of what powers are by definition “strictly” executive: namely executing the laws and making certain appointments. But Madison evidently did not think the President should be *confined* to those strictly executive functions. The President could be vested with other powers, so long as they did not trench upon the inherent spheres of the legislature (making laws) or judiciary (resolving cases and controversies). As will become clear, Wilson shared this view. We must not infer from Wilson’s analysis of a narrow set of powers as “strictly executive” that he believed the President should be confined to those.

Madison’s proposal did not survive the debates of June 1. Charles Pinckney moved to strike out the authorization for the executive to carry out such other powers as the legislature might assign, on the ground that it was redundant. The powers of the executive were confined to appointment and execution (plus the veto, which was added the next Monday). The result was a mere shadow of the “energetic” and powerful executive that Wilson and Rutledge evidently had in mind, which would eventually emerge from the Convention. The presidential office created at the beginning of June had no generalized “executive” power, had no “federative” powers, had no authority to receive additional delegated powers from Congress, and had only the three enumerated powers of law execution, some appointments, and veto. The executive was unitary and independent, but weak.

The addition of the veto was the last change in the enumeration of presidential powers until the Committee of Detail.

V. THE COMMITTEE OF DETAIL

In the month and a half after June 4, the Convention did not return to the question of presidential powers, but it did debate the mode of selection, length of term, removal, and qualifications of the office. It could reach no consensus on any of these points. The delegates vacillated between choice by the legislature and by an electoral college, first voting for the former, then the latter, then the former again with popular election seemingly gaining in support, but never commanding a majority.⁵³ Ultimately, unable to reach a consensus, the Convention sent to the Committee of Detail a resolution providing for selection by the legislature for a single seven-year term without possibility of reelection, subject to removal on impeachment for malpractice or neglect of duty, and vesting the President with

52. *Id.*

53. *See* 1 *id.* at 79–81 (election by national legislature on June 2); 2 *id.* at 54–58 (appointment by electors chosen by state legislatures); *id.* at 99–101 (appointment by national legislature).

only the three enumerated powers of law execution, qualified veto, and appointment of most officers of government.⁵⁴

After the big-state/little-state problem had been hashed out, Elbridge Gerry moved and the delegates unanimously voted “that the proceedings of the Convention for the establishment of a Natl. Govt. (except the part relating to the Executive), be referred to a Committee to prepare & report a Constitution conformable thereto.”⁵⁵ The motion omitted the “part relating to the Executive” from committal in the hope that the Convention would reach agreement on the qualifications and mode of selection of the President. The Convention continued to meet for three more days, unsuccessfully trying to agree on a method for choosing a President. On July 26, they gave up and temporarily left those provisions of Resolution Nine unchanged. The Convention then referred the executive provisions to the Committee along with the rest of Resolution Nine.⁵⁶ The language regarding the executive was unchanged from June 4.

A. Documents

We have no records of the deliberations of the Committee of Detail—no direct evidence of how any individual members may have voted or why, or even of the collective rationales for the Committee’s decisions. Many historians of the Convention therefore have brushed quickly past the Committee, treating it as merely as an “interlude” in the Convention’s proceedings.⁵⁷ That view cannot be sustained. It was this Committee that devised the principal elements in the constitutional framework for federalism, as well as the executive branch, interstate federalism, the amendment process, the Necessary and Proper Clause, and much more. The leading modern historian of the work of the Committee, William Ewald, calls the Committee meetings “arguably the most creative period of constitutional drafting of the entire summer,” and says that “for certain fundamental issues, it was the main event.”⁵⁸ That was certainly true of the executive power.

The Committee met for ten days, while the Convention was in recess. Our knowledge of the Committee’s decision-making process comes solely from analysis of documents mostly found among James Wilson’s papers. Among them are two complete drafts of a constitution. One, in Edmund Randolph’s handwriting with marginalia and corrections in John Rutledge’s handwriting, largely conforms to the votes of the Convention with respect to the executive. This is produced as Document IV in Farrand’s *Records*.⁵⁹ A second draft, in Wilson’s

54. 2 *id.* at 116.

55. *Id.* at 95. In his diary, Washington wrote that the Committee would “arrange, and draw into method & form the several matters which had been agreed to by the Convention, as a Constitution for the United States.” 3 *id.* at 65.

56. 2 *id.* at 120–21.

57. See William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197, 207–09 (2012) (noting the scanty treatment of the Committee in major histories of the Convention).

58. *Id.* at 201.

59. William Ewald & Lorianne Updike Toler, *Early Drafts of the U.S. Constitution*, 135 PA. MAG. HIST. & BIOG. 227, 263–85 (2011).

handwriting and with emendations in Rutledge's handwriting, contained major revisions of the executive powers portion, and is the focus of our attention. This was produced as Document IX in Farrand's *Records*.⁶⁰ (An intermediate draft, in Wilson's handwriting with marginalia and corrections in Rutledge's handwriting, is missing its middle section, where provisions pertaining to the executive branch would have appeared. Our loss!) The Committee's final product, of which fifty copies were printed in secret and presented to the Convention on August 6, is different in only a few respects from Document IX; we have no internal clues about those changes.

B. Membership

Three of the five members of the Committee of Detail—Rutledge, Wilson, and Randolph—actively participated in the June 1 debate over the nature of executive power. The other two members were Nathaniel Gorham and Oliver Ellsworth. Rutledge delivered the Committee's report and is generally assumed to have been the chairman.⁶¹ He brought with him the most extensive executive experience of any delegate, having been perhaps the nation's most effective wartime state governor. He was not a man to give persuasive speeches but he was uncommonly successful at getting his way. Wilson is often said to have been the Committee's dominant thinker,⁶² but the author of the leading modern study of the Committee writes that "on many issues, Wilson, far from being dominant, appears to have been outflanked by Rutledge and the others."⁶³

In any event, Rutledge and Wilson shared many views on the executive. Both had forcefully advocated a unitary executive on June 1. Wilson made the first motion on June 1 "that the Executive consist of a single person," and Rutledge made a similar motion on June 2 (both seconded by Charles Pinckney).⁶⁴ On June 1, Wilson delivered the most thoughtful analysis of the relationship between the executive power and the prerogative powers of the Crown. Wilson also advocated for an absolute rather than a qualified veto.⁶⁵ Rutledge took the same position in 1778 in connection with the South Carolina Constitution.⁶⁶ Both men spoke in favor of an executive with energy and "responsibility."⁶⁷ Both thought it desirable to depart from the British model of royal prerogative—for example, neither

60. *Id.* at 321.

61. Ewald, *supra* note 57, at 230–31; *but see id.* at 249 (noting that it is not even clear that there was a chairman).

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

63. Ewald, *supra* note 57, at 218.

64. 1 FARRAND'S RECORDS, *supra* note 2, at 88. On June 4, the motion was made by Pinckney and seconded by Wilson, and approved, seven states to three. *Id.* at 96–97.

65. *Id.* at 100; 2 *id.* at 300–01.

66. ERIC NELSON, *THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING* 146–47 (2014) (quoting David Ramsay, 1 *HISTORY OF THE REVOLUTION OF SOUTH CAROLINA* 133–34 (1785)).

67. 1 FARRAND'S RECORDS, *supra* note 2, at 65.

wanted the executive to be vested with the powers of “peace & war.” Yet neither supported Sherman’s effort to eliminate executive prerogative altogether.⁶⁸ Wilson and Rutledge did disagree on a few executive issues: Wilson believed the President should have the power to appoint judges while Rutledge did not, and Wilson favored popular election of the President while Rutledge favored legislative selection. Nonetheless, their agreements predominated over their disagreements.

Randolph was a different fish. While he vociferously opposed the unitary executive, calling it the “foetus of monarchy,”⁶⁹ his views on what powers should be vested in the executive branch are unknown. The office of Governor of Virginia, which Randolph held at the time of the Convention, was exceptionally weak—a factor that could have cut either way in his thinking. Randolph claimed to agree with the need for executive independence and affirmed that the “great requisites for the Executive department” were “vigor, despatch & responsibility,” but he fervently supported a three-headed executive instead of a unitary one and favored election by the legislature.⁷⁰ Madison’s notes of the June 1 debate hint that the disagreement between Randolph and his future co-committee members may have become personal. Rutledge, in his imperious manner,⁷¹ proclaimed the reasons “to be so obvious & conclusive in favor of one [i.e., a single-headed executive] that no member would oppose the motion.”⁷² In the next sentence, Madison tells us, “Mr. Randolph opposed it with great earnestness.”⁷³ We can almost picture Rutledge shaking his head in disbelief. The next day, Wilson led off the debate with an extended response to Randolph.⁷⁴ Notwithstanding this memorable clash, there is no evidence that on the Committee of Detail, Randolph resisted the efforts of Rutledge and Wilson to create an executive with some, but not all, of the prerogatives of the Crown.

Gorham had been Chairman of the Committee of the Whole during the executive power debate of June 1–4, and therefore lacked opportunity to express any opinions on the nature of the executive. Nevertheless, his general temper was that of a moderate Hamiltonian, and he would therefore be expected to support a strong executive. In fact, he was the first, other than Hamilton, to propose presidential appointment of judges with the advice and consent of the Senate—commenting that that “mode had been long practised” in his home state of Massachusetts.⁷⁵ Ellsworth did not participate in the June 1 debate, and later became a staunch Federalist (and third Chief Justice of the United States). But at the Convention, more often than not, he was allied with Sherman, the

68. *Id.*

69. *Id.* at 66.

70. 2 FARRAND’S RECORDS, *supra* note 2, at 55.

71. Louis Otto, the French chargé d’affaires, described Rutledge as “the most proud and most imperious [man] in the United States.” JOSEPH C. MORTON, SHAPERS OF THE GREAT DEBATE AT THE CONSTITUTIONAL CONVENTION OF 1787: A BIOGRAPHICAL DICTIONARY 268 (2006).

72. 1 FARRAND’S RECORDS, *supra* note 2, at 88.

73. *Id.*

74. *Id.* at 96.

75. 2 *id.* at 41.

Convention's most consistent foe of a powerful executive. So far as can be discerned from the records of the Committee, neither Gorham nor Ellsworth contributed much of substance.

C. Innovations

On a range of issues, the Committee did not hesitate to exceed the instructions of the Convention. It added many provisions not considered by the Convention, effectively doubling the length of the working document. Some of these innovations, such as the Necessary and Proper Clause, are among the most significant provisions of the Constitution. The Committee even adopted provisions *inconsistent* with the votes of the Convention. For example, the Convention rejected Rutledge's July 16 motion to appoint a committee to enumerate the powers of Congress, preferring instead a general description of the criteria for those powers.⁷⁶ Now the Committee of Detail, with Rutledge as Chairman, proceeded to do precisely what the Convention voted against: It enumerated and thus constrained Congress's powers. The Committee, not the Convention, was the creative power behind our federalist system.

The Committee's reformation of the executive power was almost as audacious. On June 1, the Convention voted almost unanimously to strike the Clause vesting the President with the broad "executive power" of the Confederation Congress. Instead, the Convention chose to enumerate only three presidential powers: law execution, appointment of offices other than judges, and a qualified veto. Undeterred, the Committee of Detail reinstated a vesting clause at least as broad as the original Resolution Seven. It stated, "The Executive Power of the United States shall be vested in a single person."⁷⁷ So much for preparing a draft "conformable" to the Convention's decisions.

Having vested "the Executive Power" in a unitary President, the Committee then created a new section containing a list of specific presidential powers and duties. These listed powers were constitutionally vested in the President and thus untouchable by Congress—in marked contrast to Madison's June 1 proposal to give Congress authority to determine what powers "not Legislative nor Judiciary in their nature" the President should enjoy in addition to law execution and some appointments. This list guaranteed a powerful executive independent of the legislature, and was a decisive rejection of Roger Sherman's view of "the Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect."⁷⁸ Equally important, the Committee vested many powers in Congress that had been prerogative powers of the King, making clear that they did not belong to the executive. The eccentric constitutional scholar William Winslow Crosskey of the University of Chicago was the first to note that the

76. *Id.* at 17.

77. *Id.* at 185.

78. 1 *id.* at 65. Sai Prakash stresses the importance of this change in Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 717–18.

enumeration of powers by the Committee of Detail was as much about legislative-executive separation of powers as it was about federalism.⁷⁹

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

D. Appointments

As we have seen, Wilson regarded the power of appointment as one of only two "strictly Executive" functions. His fellow Committee members evidently did not view it that way. The Committee divided the appointment power and allocated it to different institutions according to the substantive responsibilities of the position.⁸⁰ It gave the Senate power to appoint ambassadors as well as to make treaties, which made the Senate the principal repository of the foreign affairs power—though the President's enumerated power to "receive ambassadors" gave him at least a share of this responsibility. Under the travel and communications technologies of the day, the identities of ambassadors were far more important than today because ambassadors in distant places frequently had to use their own judgment. Moreover, for important negotiations, ambassadors were often given the plenipotentiary power to sign agreements on behalf of the nation. The choice of one ambassador over another was tantamount to the choice of one policy over another.⁸¹ The replacement of Jefferson by Gouverneur Morris as Minister to France, for example, tilted from sympathy to worry about the revolutionary regime in Paris.

The Committee gave Congress as a whole the power to appoint a Treasurer,⁸² which was consistent with the idea that the power of the purse—the power to tax and spend—was a quintessentially legislative authority.

Following the approach of the Virginia Plan, the Committee of Detail empowered the Senate to appoint the "Judges of the supreme Court."⁸³ This cannot have been because judicial power was legislative or senatorial in its nature. More likely it was a reaction to the notorious practice of the Stuart Kings of "packing the bench" with pliant judges to secure favorable rulings.⁸⁴ (This is not to say that

79. William W. Crosskey, 1 *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES*, Ch. XV (1953); see also GERHARD CASPER, *SEPARATING POWER* 21 (1997) (crediting Crosskey with this discovery).

80. This is powerful evidence that the third Committee of Detail draft, which was in Wilson's handwriting, was not Wilson's handiwork—at least not in all respects.

81. British diplomatic history is replete with examples. See generally SIR WILLIAM ADOLPHUS WARD, *THE CAMBRIDGE HISTORY OF BRITISH FOREIGN POLICY, 1783–1919* (1933).

82. 2 FARRAND'S RECORDS, *supra* note 2, at 182.

83. *Id.* at 183.

84. FREDERICK ANDREW Inderwick, *THE KING'S PEACE: A HISTORICAL SKETCH OF THE ENGLISH LAW COURTS 191–92*, 213 (London, Swan Sonnenschein & Co. 1895) (noting this practice of the Stuart

modern presidents would ever do such a thing!) On this issue, the Committee members were divided. In earlier debates, Wilson favored presidential appointment, Gorham favored presidential appointment with advice and consent, Rutledge and Randolph favored appointment by the Senate, and Ellsworth favored appointment by the Senate subject to presidential veto, with the possibility of override by two-thirds of the Senate.⁸⁵ Given this degree of internal disagreement, it is possible the Committee uncharacteristically deferred to the prior votes of the Convention.

The Committee did, however, reduce the *scope* of the Senate's judicial appointment power. Just a few days before committal to the Committee, the Convention had reaffirmed senatorial appointment of all judges, rejecting presidential appointment by six states to two and presidential appointment with advice and consent by an equally divided vote of four to four.⁸⁶ The first internal draft, in Randolph's handwriting, conformed to that decision.⁸⁷ However, the final internal draft, in Wilson's handwriting, gave the Senate only the power to name "the Judges of the Supreme (national) Court," leaving the appointment of lower court judges by default to the President alone.⁸⁸ We do not know anything about this change, and at no point in the proceedings of the Convention did delegates discuss the possibility that lower court judges and Supreme Court Justices be named in different ways. Perhaps this was hashed out in the missing middle draft. Perhaps it was a compromise. Perhaps the Committee members assumed (incorrectly) that since Congress had discretion whether to establish lower courts, Congress would also decide by whom they would be appointed. One might suspect that Wilson surreptitiously slipped in the change since the draft was in his handwriting and he favored the presidential appointment of all judges. But it would be uncharacteristic for eagle-eyed Rutledge, who made extensive corrections to both Randolph's and Wilson's drafts, to miss it.

The Committee of Detail made no change in the Convention's decision of June 4 to vest the President with the power to appoint all other officers, without any requirement of advice and consent, in keeping with the Convention's apparent preference for a unitary executive in areas other than foreign affairs and finance. The President's appointment power was increased in one respect (lower court judges), and diminished in another (the Treasurer). Overall, the Committee made

kings "reduced the position of the Bench to almost its lowest degradation"). In one famous incident, when the Chief Justice of the King's Bench, Randolph Crewe, refused to uphold the legality of forced loans and unauthorized taxes under Charles I, the King summarily dismissed him and replaced him with Nicholas Hyde, who did the King's bidding. 1 JOHN LORD CAMPBELL, *THE LIVES OF THE CHIEF JUSTICES OF ENGLAND: FROM THE NORMAN CONQUEST TILL THE DEATH OF LORD MANSFIELD 374-75* (London, John Murray 1849).

85. See 1 FARRAND'S RECORDS, *supra* note 2, at 119 (Wilson); *id.* (Rutledge); 2 *id.* at 41 (Wilson); *id.* at 43 (Randolph); *id.* at 41, 44 (Gorham); *id.* at 81 (Ellsworth).

86. 2 *id.* at 44.

87. *Id.* at 146.

88. *Id.* at 169, 172. The President was given power to appoint officers "not otherwise provided for by this Constitution." *Id.* at 171.

no discernible move toward enhancing or diminishing the presidential appointment power. Rather, the Committee made the appointing authority follow the relevant substantive power and did not treat appointment as an object in itself.

E. Law Execution

The Convention draft had given the President the “power to carry into execution the national Laws.” The Committee’s first internal draft, in Randolph’s handwriting, repeated this language.⁸⁹ The second internal draft is missing the relevant pages, so we do not know what it contained on this point. The third internal draft, in Wilson’s handwriting, began the section on executive power (section 12) with a vesting clause: “The Executive Power of the United States shall be vested in a single Person.”⁹⁰ In the second paragraph, which was mostly devoted to the President’s duties and to a lesser extent the discretionary powers related to the legislature, the draft provided: “He shall take Care to the best of his Ability, that the Laws of the United States be faithfully executed.” Rutledge struck out most of these words and wrote in, “It shall be his duty to provide for the due & faithful exec—of the Laws of the United States to the best of his ability.” The final report of the Committee, presented on August 6, provided: “he shall take care that the laws of the United States be duly and faithfully executed.”⁹¹

The changes in these internal drafts altered law execution in two important ways. First, they made law execution a duty and not merely a power. It is obvious from the drafting that the term “shall,” which usually but not invariably imparts a mandatory duty, was deliberately chosen: Rutledge’s draft, like the Pinckney Plan from which it borrowed,⁹² literally used the term “Duty.”⁹³ This followed British precedent. According to Blackstone, “[T]he principal duty of the king is, to govern his people according to law.”⁹⁴

Second, the Committee of Detail draft substituted a passive construction to describe law execution (that the laws “be faithfully executed”), which indicates its expectation that the President would oversee the execution of the law by others, rather than do it personally. This change also was deliberate. The Pinckney Plan required the President “to attend to the Execution of the Laws of

89. *Id.* at 145.

90. *Id.* at 171–72 (see *id.* for next two quotations from this third draft).

91. *Id.* at 185.

92. The Pinckney Plan divided executive functions into duties and powers. It gave the President the “Duty” to inform Congress of the “condition” of the nation and to make recommendations, to correspond with state executives, to “attend to the Execution of the Laws of the U S,” to “transact Affairs” with the officers of the government, to “expedite all such Measures as may be resolved on by the Legislature,” to “inspect” the great departments, to reside where the legislature sits, to commission “all Officers,” and to keep the Great Seal. The Plan made the President commander in chief “by Virtue of his Office,” and gave him the powers to convene Congress on extraordinary occasions, to prorogue Congress for limited periods, and to “suspend Officers, civil and military.” 3 *id.* at 606. The Committee did not adopt Pinckney’s principle of organization, but it did make law execution a duty.

93. 2 *id.* at 158 (“It shall be his Duty . . . to attend to the Execution of the Laws of the U. S.”).

94. 1 BLACKSTONE, *supra* note 18, at *226.

the U.S.”⁹⁵ This phrase, “to attend to,” was standard language indicating the primary responsibility of an officer over particular subject areas.⁹⁶ The Committee’s passive “take care” formulation was more convoluted and would not have been substituted for the straightforward Virginia or Pinckney language unless there was a reason. The institutional implications of these terminological innovations will be examined below.

F. Federative Powers

The Committee’s allocation of the foreign affairs powers is particularly noteworthy. On June 1, concern over the powers of “peace & war” had touched off the debate over whether the executive would effectively be a monarchy. At that time, Rutledge, Wilson, and Madison all opposed giving the executive “the power of war and peace,” leading the Convention to adopt the narrow enumeration of executive powers already discussed. Nothing more on the subject was said for a month and a half. Now, with Rutledge and Wilson on the Committee of Detail, the Committee assigned almost all the foreign affairs powers to Congress or to the Senate. Congress as a whole was given the power to regulate trade with foreign nations, which is an important part of foreign relations at all times. The Senate was given the power to make treaties without executive involvement or the possibility of executive veto,⁹⁷ and to appoint ambassadors.⁹⁸ Neither of those senatorial powers had been voted on by the Convention; they were the Committee’s innovations.

Congress as a whole was entrusted with the power to “make war,” along with the related powers “[t]o raise armies; [t]o build and equip fleets; [and] [t]o call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions.”⁹⁹ In addition to being vested with the “Executive Power,” the President was named “commander in chief of the Army and Navy of the United States, and of the Militia of the several States.”¹⁰⁰ The commander-in-chief power first appeared in Rutledge’s handwriting annotating the first (Randolph) draft. As Governor of South Carolina during the British invasion and occupation, Rutledge directed the military effort, so it is natural that he would be the one to think of this. There was no definition of the powers associated with that title, either in the Committee’s draft or in the final Constitution. But clearly the office of the commander-in-chief did not entail the power to decide whether to go to war, or to determine the size or composition of the armed forces, since all these authorities were assigned to Congress.

95. 3 FARRAND’S RECORDS, *supra* note 2, at 606.

96. For example, see the Morris-Pinckney proposal of August 20. 2 *id.* at 342–44.

97. *Id.* at 183; *id.* at 197 (Col. Mason) (noting that under the proposal treaties “are to be made . . . by the Senate alone”).

98. *Id.* at 183.

99. *Id.* at 182.

100. *Id.* at 185.

Thus, despite Locke's argument that the federative powers normally should be vested in the executive, the Committee went the other way: the only federative powers vested in the President were the power to "receive"—but not to send—ambassadors, and to exercise military command.

G. Other Prerogative Powers

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

- To establish a uniform rule of naturalization throughout the United States;
- To coin money;
- To regulate the value of foreign coin;
- To fix the standard of weights and measures.¹⁰¹

Except for the foreign affairs power, the Committee's allocations of prerogative power all were approved by the Convention and constitute the fundamental structure of Article II. The Committee vested "executive" power in the President and then excluded specific prerogative powers it did not wish him to have, giving these powers instead to the legislature or eliminating federal power altogether.

H. Enumerations of Power

The Committee's treatment of the enumeration of powers for the executive and legislative branches is highly suggestive. In both contexts, it departed from the decisions made by the Convention, but it did so in seemingly opposite ways. On the one hand, the Committee jettisoned the Convention's general authorization for Congress to "legislate in all cases for the general interests of the Union" in favor of a specific and exclusive enumeration of legislative powers. On the other hand, the Committee augmented what had been a narrow and exclusive enumeration of presidential powers by adding a general grant of "the Executive Power of the United States"—albeit with numerous qualifications and exceptions. This had to be deliberate. The Committee would not have moved in opposite directions for the two branches—from description to enumeration for the legislature and from enumeration to qualified description for the executive—by happenstance.

The enumeration of congressional powers served two important purposes. First, the objects of legislation within the United States were not all centralized in Congress. Many (arguably most¹⁰²) were left to the states. Enumeration was necessary to distribute legislative powers between the national and state levels. Because of these federalism considerations, it was not possible to use an unqualified vesting clause for Congress, like that used for the executive and the judiciary.

101. *Id.* at 182.

102. See THE FEDERALIST NO. 45 (James Madison) ("The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite.").

Second, some powers that had been vested in the Crown under the British system were given to Congress. The enumeration of Article I, Section 8 was a convenient way to allocate these formerly royal prerogatives. Enumeration of presidential power was not necessary because purely executive power, the power to enforce the law, naturally pertained only to federal law and thus was limited to the objects specified by Article I, Section 8. The “federative” branch of executive powers was national, not state, in nature. It may also have been true that “executive powers” are more difficult to identify than legislative powers. Hamilton explained that “the difficulty of a complete and perfect specification of all the cases of Executive authority would naturally dictate the use of general terms.”¹⁰³ In this connection, it is suggestive that Madison and Jefferson (and C.C. Pinckney) sought to limit executive power by denying to the President powers “not legislative nor judiciary in their nature”—rather than more straightforwardly limiting the executive to powers of “an executive nature.”¹⁰⁴ That wording suggests, perhaps, that they had a clearer notion of what was legislative or judicial than of what was executive. In light of its history, “executive” power in the British system was whatever governmental power was left after subtracting the powers of the Parliament and of the courts.

VI. DEBATE ON THE COMMITTEE OF DETAIL DRAFT

The Convention proceeded to debate the Committee of Detail draft, clause by clause, during much of August. There remained great dissensus over the mode of selection of the President. That issue occupied many days of “tedious and reiterated” debate, as Madison described,¹⁰⁵ that this study will not address. The basic structure of the powers of the presidency, as set forth by the Committee of Detail, went unquestioned, but there were debates about some important specifics.

A. *Power of Appointment*

No one doubted the importance of the appointment power. As Hugh Williamson of North Carolina commented, citing Montesquieu, “an officer is the officer of those who appoint him.”¹⁰⁶ But the delegates were all over the map regarding where the appointment power should be vested. John Dickinson “urged that the great appointments [apparently a reference to the ministers of the major departments] should be made by the Legislature.”¹⁰⁷ Gouverneur Morris and James Wilson objected to the provisions that vested the powers of appointment in

103. ALEXANDER HAMILTON, PACIFICUS NO. 1 (spelling corrected).

104. 1 FARRAND’S RECORDS, *supra* note 2, at 67. For Jefferson’s use of the same verbal formula, see Jefferson’s Draft of a Constitution for Virginia, in 6 THE PAPERS OF THOMAS JEFFERSON 294, 298–99 (Julian P. Boyd ed., 1952).

105. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON, *supra* note 104, at 270, <https://founders.archives.gov/documents/Jefferson/01-12-02-0274> [<https://perma.cc/UL3F-ZZLU>].

106. 2 FARRAND’S RECORDS, *supra* note 2, at 530.

107. *Id.* at 329.

the Senate on the ground that the Senate would be prone to “cabal” and lacked “responsibility”—which meant accountability to the public.¹⁰⁸ Recall that on June 1, Wilson had said that the appointments and law execution powers were the only powers that were “strictly [e]xecutive.” Roger Sherman argued that presidential appointment of some officers would not be “proper,” giving as an example the appointment of military officers in times of peace.¹⁰⁹ Randolph and Dickinson, supported by the vote of three states, favored referral of some appointments to state governors.¹¹⁰ George Read’s motion to strike out the clause empowering Congress to appoint a Treasurer lost narrowly (six to four) because of the close relation between the Treasurer’s function and Congress’s power of the purse.¹¹¹ This vote was reversed in the final week of the Convention.¹¹² On August 23 or 25 (the Journal and Madison’s Notes differ), the Convention unanimously broadened the Senate’s power of appointing ambassadors to include “other public ministers,” meaning diplomats not of ambassadorial rank.¹¹³ The title “ambassador” was not used by American diplomats until 1893; prior to that they were called “ministers.”¹¹⁴

B. Peace and War

The Committee of Detail had given Congress the power to make war and the Senate the power of making treaties and appointing ambassadors.¹¹⁵ In a fascinating and enigmatic debate on August 17, the Convention narrowed Congress’s war power by substituting “to declare war” for “to make war.”¹¹⁶

On August 23, the Convention debated the special powers of the Senate. The underlying theory of the Senate was something of a muddle, and perhaps it should be no surprise that these special powers would all be eliminated. Some delegates regarded the Senate as a select, quasi-aristocratic body—virtually a privy council to the President. Others regarded Senators as the representatives of the state governments because they were appointed by the legislatures and thus accountable to them. Both theories had difficulties, and both could not be entirely true. Wilson warned that the power and structure of the Senate gave the plan as a whole “a dangerous tendency to aristocracy.”¹¹⁷ Madison instead worried that “the Senate represented the States alone.”¹¹⁸ Delegates could agree with one or the other criticism, or even both. There were ample reasons to be suspicious of the Senate.

108. *Id.* at 389.

109. *Id.* at 405.

110. *Id.* at 405–06, 418–19.

111. *Id.* at 314–15.

112. *Id.* at 614.

113. *Id.* at 383, 419.

114. *Who Were the First U.S. Ambassadors?*, OFFICE OF THE HISTORIAN, U.S. DEP’T OF STATE, <https://history.state.gov/about/faq/who-were-first-ambassadors> [<https://perma.cc/U6WC-W37A>].

115. 2 FARRAND’S RECORDS, *supra* note 2, at 182, 183.

116. *Id.* at 318–19.

117. *Id.* at 522.

118. *Id.* at 392.

C. Administrative Organization

Few delegates, including Wilson, had given much thought to the internal workings of the administration. The Committee of Detail draft did not address intra-executive branch organization other than to say that the President had power to “inspect” the Departments of Foreign Affairs, War, Treasury, and Admiralty, and power to “suspend”—but apparently not to remove—“civil and military” officers.¹¹⁹ Those provisions suggested that the administration would be under the loose supervision, but not the full control, of the President.

On August 22, a reconvened Committee of Detail, chaired again by John Rutledge, reported a proposal to create a “Privy-Council” made up of the heads of the various departments (not including the Attorney General), the Chief Justice, the Speaker of the House, and the President of the Senate (who at that time was not the same as the Vice President).¹²⁰ The sole duty of this privy council was to advise the President, who was not required either to seek or to take its advice. Notably, three members of this council came from outside the circle of the President’s own subordinates. According to the Journal, the Convention voted six to five in favor of postponing consideration of this report until the delegates had copies.¹²¹ However, it was never mentioned again. Professor Bilder speculates that the idea was referred to the Committee on Postponed Matters, which quietly buried it.¹²² There is no evidence of Wilson dissenting from this idea, but he must have. Perhaps it was an elaborate charade to reassure Mason and Gerry that their concerns were being taken seriously.

One last amendment to the Committee of Detail draft bears note. After yet another rejection of Madison’s pet idea of a council of revision giving veto authority to a combination of the executive and the judiciary, the Convention voted to increase the percentage needed for Congress to override a presidential veto, from two-thirds to three-fourths.¹²³ Both this decision and adoption of the Opinions Clause strengthened the President’s hand. Wilson defended the stronger version of the veto.

VII. TWO MORE COMMITTEES, AND A CONCLUSION

On August 31, the Convention voted to refer unresolved issues to a committee made up of one member from each of the states remaining in attendance. Called the Committee of Postponed Matters, or sometimes the Committee of Eleven, it was chaired by David Brearly of New Jersey and reported on September 4. Madison and Gouverneur Morris were members. Wilson, Rutledge, Gorham, Ellsworth, and Pinckney, who were the other leading figures in formation of the

119. *Id.* at 158.

120. *Id.* at 367.

121. *Id.* at 368.

122. BILDER, *supra* note 3, at 145.

123. 2 FARRAND’S RECORDS, *supra* note 2, at 301.

presidency to that point, were not.¹²⁴ The executive branch was prominent among the unresolved matters. Contested issues included: how to elect the President, whether he should be eligible for reelection, the respective powers of the Senate and the President over foreign affairs and the appointment of judges, the question of an executive council, impeachment, and presidential succession.

The Committee scrapped legislative selection in favor of an electoral college, which had originally been Wilson's idea. This rendered the President independent of Congress and was a step in the direction of popular election. The Committee also shifted the three special powers of the Senate to the President, making them subject to senatorial advice and consent.¹²⁵ These were the powers to appoint judges, to appoint ambassadors, and to make treaties. Treaties were to require two-thirds concurrence.¹²⁶ Today, it is commonly thought that shifts in the power of the Senate were due to the Connecticut Compromise—that big-state delegates lost faith in the Senate when they would no longer control it. That explanation, though plausible in the abstract, does not fit the facts. It was the Committee of Detail—dominated by big-state delegates Randolph, Wilson, Rutledge, and Gorham—that assigned the foreign affairs powers to the Senate, and it was the Committee on Postponed Matters, chaired by David Brearly of New Jersey, a leader of the small state movement, that took them away. I believe that distrust of the Senate had more to do with its Janus-like character. The Senate was cobbled together on the basis of two antagonistic theories: that it would be a wise and impartial body that could rise above the turbulence of democratic politics, or that it would be the voice of state governments and protector of their authority. Both halves of that institutional mission inspired distrust, just as both halves attracted support. Gerry for example, with characteristic understatement, labeled the Senate “as compleat an aristocracy as ever was framed.”¹²⁷ Wilson, too, condemned the aristocratic character of the Senate. Madison rather liked its aristocratic character, hoping that it would be a bulwark against redistributivist policies,¹²⁸ but he worried that Senators selected by state legislatures would be “the mere Agents & Advocates of State interests & views, instead of being the impartial umpires & Guardians of justice and general Good.”¹²⁹ Whatever the reason, the shift seemed to be motivated more by unease about the Senate than by a tilt in favor of the executive. No one made an affirmative case for exclusive executive control over foreign policy.

Wilson strongly protested giving the Senate a veto on appointments within the executive branch. “Good laws are of no effect without a good Executive; and there can be no good Executive without a responsible appointment of officers to execute,” he said. “Responsibility is in a manner destroyed by such an agency of

124. *Id.* at 481.

125. *Id.* at 498–99.

126. *Id.* at 495.

127. *Id.* at 286.

128. 1 *id.* at 422–23.

129. *Id.* at 428.

the Senate.”¹³⁰ Gouverneur Morris, who agreed with Wilson that senatorial advice and consent to the appointment power was ill-advised, frankly stated that “the weight of sentiment in the House, was opposed to the exercise of it by the President alone.”¹³¹ Morris was not a man to let the ideal get in the way of the achievable.

On September 8, the Convention committed the plan to yet another committee, denominated the Committee of Style and Arrangement, to prepare a final draft. The members were G. Morris, Madison, Hamilton, Johnson of Connecticut, and King.¹³² Obviously, these men were neither geographically nor ideologically representative, which suggests they really were intended to attend to wording and organization rather than substance. There is reason to believe the work was entrusted to Morris, essentially working alone.¹³³

The Committee of Style neither added nor subtracted new powers, but it completely reordered and reorganized Article II. One may say the Committee of Detail created the substance, and the Committee of Style the organization, of Article II.

CONCLUSION

There is little point in worrying about who were the most important drafters of the Constitution, but undoubtedly Wilson was among the most influential. His understanding of the nature of executive power under the unwritten British constitution was unsurpassed, and his basic prescription for the scope of executive authority, offered at the beginning of the Convention, was largely followed. He did not achieve his “chimerical” plan of popular election, an issue that still bedevils us, but his idea of a popularly elected electoral college was the second-most democratic idea of the day. He was often pedantic and less than politically adroit, but his judgment was sound and his legal acumen of the highest order. In broad strokes, our Constitution is more Wilson’s Constitution than it is Madison’s: a combination of nationalism and democratic republicanism that many framers doubted could be achieved. He sought to build the “federal pyramid” to a “considerable altitude,” and for that reason he “wished to give it as broad a base as possible.” That is the Constitution we have today.

130. 2 *id.* at 538–39.

131. *Id.* at 524.

132. *Id.* at 553.

133. THACH, *supra* note 5, at 138; Bestor, *supra* note 47, at 660 n.495.