

James Wilson as the Architect of the American Presidency

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ABSTRACT

For decades, James Wilson has been something of a “forgotten founder.” The most significant exception is with respect to Article II of the Constitution, which established the executive and defined its powers. Most scholars characterize him as a resolute advocate of an independent, energetic, and unitary Presidency, and a particularly successful one at that, with some scholars characterizing Wilson’s thinking as overly rigid. A close examination of the debates at the Constitutional Convention reveals that Wilson adopted a more pragmatic approach with respect to many aspects of the Presidency than is generally recognized, including the appointment power, the use of an advisory council, the veto power, and presidential selection. The most dramatic example of Wilson’s flexibility regarding executive power is an event that is almost entirely overlooked in the historical record: Wilson’s break late in the Convention from his consistent support for a unitary executive by proposing the creation of an advisory council to assist the President on appointments. While initially seeming like something of a puzzle, the reasons for Wilson’s change of heart become clearer when the debates over presidential power are placed in the context of the larger controversies that dominated the Convention, such as the Great Compromise and presidential re-eligibility, and presidential selection. This broader frame suggests that Wilson held a less doctrinaire vision of executive power than is commonly recognized.

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INTRODUCTION

For decades, James Wilson has been something of a “forgotten founder.”¹ The reasons for this are puzzling. Commentators as distinguished as Max Farrand and Clinton Rossiter have recognized his influence at the Constitutional Convention.²

The area where commentators do generally recognize Wilson’s influence at the Convention is with respect to Article II, which establishes the executive and defines its powers.³ Most scholars characterize him as a resolute advocate of an independent, energetic, and unitary presidency,⁴ and a particularly successful one at that.⁵ In this regard, some scholars have generally characterized Wilson’s thinking as overly rigid,⁶ perhaps abetted by a personality that William Ewald

1. Aaron T. Knapp, *Law’s Revolutionary: James Wilson and the Birth of American Jurisprudence*, 29 J.L. & POL. 189, 189 (2014); accord Nicholas Pederson, Note, *The Lost Founder: James Wilson in American Memory*, 22 YALE J.L. & HUMAN. 257, 258–60 (2010) (tracing Wilson’s initial obscurity, increasing interest, and present neglect since 1988).

2. See MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 197 (1913) (describing Wilson as “[s]econd to Madison and almost on a par with him” and even “[i]n some respects . . . Madison’s intellectual superior”); CLINTON ROSSITER, *1787: THE GRAND CONVENTION* 247–48 (1966) (calling Wilson “[s]econd only to Madison—and an honorable second”); MARK DAVID HALL, *THE POLITICAL AND LEGAL PHILOSOPHY OF JAMES WILSON* 21 (1997) (noting that James Bryce, Randolph G. Adams, and Robert McCloskey cited Wilson as no lower than second in influence at the Convention).

3. See, e.g., William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. PA. J. CONST. L. 901, 950–51 (2008) (noting that “it is clear that over the course of the Convention [Madison] was following Wilson on . . . matters [of executive power] rather than the other way around.”).

4. See Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Law*, 104 YALE L.J. 541, 608 (1994) (calling Wilson “the intellectual father of Article II’s vigorous, independent Executive”); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 742–52 (calling Wilson a “well-known champion of an energetic executive”).

5. Prakash, *supra* note 4, at 777 (observing that “advocates of a strong executive nearly ran the table” at the Convention).

6. See FARRAND, *supra* note 2, at 196, 198 (calling Wilson less “adaptable” and “practical” than Madison); Robert Green McCloskey, *Introduction to THE WORKS OF JAMES WILSON* 9 (Robert Green

has aptly characterized as “cerebral, bookish, and aloof.”⁷

Yet, a close examination of the Convention reveals Wilson to be more flexible than sometimes characterized. With respect to many aspects of the Presidency, including the appointment power, the use of an advisory council, the veto power, and presidential selection, he adopted a more pragmatic approach than generally recognized. The most dramatic example of this is an event that is almost entirely overlooked in the historical record: Wilson’s break late in the Convention from his consistent support for a unitary executive by proposing an advisory council to advise the President on appointments.⁸

While initially seeming somewhat puzzling, the reasons for Wilson’s change of heart become clearer when debates over presidential power are placed in the context of the larger controversies that dominated the Convention, such as the Great Compromise, presidential re-eligibility, and presidential selection. This broader frame suggests that Wilson held a more pragmatic, less doctrinaire vision of executive power than commonly recognized.

I. THE PRESIDENCY AT THE CONSTITUTIONAL CONVENTION

The basic timeline of the Convention is well known. Although the Convention convened on May 14, 1787, it did not achieve a quorum until May 25 and did not begin its work in earnest until May 29, when Edmund Randolph submitted the fifteen resolutions laying out the Virginia Plan. The Convention debated and amended the Virginia Plan as a committee of the whole for two weeks until June 15, when William Paterson introduced an alternate set of resolutions that constituted the New Jersey Plan. After five more days of debate, the committee of the whole rejected the New Jersey Plan in favor of the modified Virginia plan, which prompted two small state delegations to walk out. The disagreement between the large and small states continued to fester until Connecticut proposed the Great Compromise on June 29, which the Convention approved on July 16.

After ten days of further debate, the Convention appointed a Committee of Detail on July 26 to distill the various resolutions into a single document. The Committee of Detail issued its report on August 4, and the Convention reconvened on August 6. On August 31, the Convention appointed a Committee of Eleven (consisting of one representative from each state) to resolve the remaining issues. On September 8, the Convention turned the document over to a Committee of Style, which reported its work on September 12. After some further minor amendments, all but three of the delegates (Elbridge Gerry, George Mason, and Edmund Randolph) signed the Constitution on September 17. It is noteworthy that Wilson was one of the five members of the Committee of Detail,

McCloskey ed., 1967) (describing Wilson as having “a confidence in ideas and an impulse to push them to the limits of their implications without great regard for practicalities”).

7. Ewald, *supra* note 3, at 925.

8. The only acknowledgement of Wilson’s change of position of which I am aware is a passing mention in Robert E. DiClerico, *James Wilson’s Presidency*, 17 *PRESIDENTIAL STUD.* Q. 301, 313 (1987).

possibly serving as the sole author of the initial draft,⁹ and generally recognized as the primary author of the final draft.¹⁰ Wilson also played an important supporting role in the Committee of Style.¹¹

By the time the Framers gathered in Philadelphia on May 25, 1787, to revise the Articles of Confederation, the general antipathy toward executive power that dominated the period immediately following independence had given way to a consensus in favor of an executive that was far more independent and energetic.¹² From the standpoint of the Presidency, four important debates occurred at the Convention. Section A reviews the relatively uncontroversial dispute over whether the executive power should be vested in a single person or a triumvirate. Section B analyzes the somewhat more protracted discussion of whether the single executive should be supplemented by an advisory council modeled on the British Privy Council. The debate over the proposed advisory council became intertwined with the debate over the appointment power, including Wilson's surprising deviation from his opposition to such an institution late in the Convention. Sections C and D describe Wilson's pragmatism during debates over the veto and the method for presidential selection.

A. *Single Executive vs. Triumvirate*

As prior scholars have noted, the Framers rejected proposals to establish an executive triumvirate and instead embraced vesting the executive power in a single individual. Specifically, the Convention approved the idea of a unitary executive on June 4 (prior to the Great Compromise) by a vote of seven to three¹³ and reaffirmed that decision by affirmation on July 17 (after the Great Compromise) and on August 24 (after the Committee of Detail).¹⁴

The Virginia Plan, which was submitted on May 29 and devised principally by Madison,¹⁵ said relatively little about the executive.¹⁶ The Virginia Plan's Resolution Seven simply proposed that "[a] National Executive be instituted" and be "chosen by the National Legislature."¹⁷ The executive's salary could not be reduced, and the executive would be "ineligible a second time."¹⁸ It would

9. See Pederson, *supra* note 1, at 269.

10. DiClerico, *supra* note 8, at 310.

11. *Id.* at 302.

12. CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY 1775–1789*, at 51–53, 76 (1923); GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 432, 435–37, 471–74, 521, 551–52 (1969); Schmitt, *supra* note 2, at 125.

13. See 1 *THE RECORDS OF THE FEDERAL CONSTITUTION OF 1787*, at 113 (Max Farrand ed., 1911) [hereinafter *FARRAND'S RECORDS*].

14. 2 *id.* at 29.

15. Ewald, *supra* note 3, at 934.

16. Indeed, Madison, who was the architect of the Virginia Plan, confessed that he had given little thought to how the executive should be constituted and what powers it should wield. *Id.* at 946 (quoting Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in 9 *THE PAPERS OF JAMES MADISON*, 9 APRIL 1786–24 MAY 1787, at 370 (Robert A. Rutland et al. eds., 1975)).

17. 1 *FARRAND'S RECORDS*, *supra* note 13, at 21.

18. *Id.*

enjoy “a general authority to execute the National laws” as well as “the Executive rights vested in Congress by the Confederation.”¹⁹

As soon as the Convention began considering Resolution Seven on June 1, Wilson moved to proposed an amendment that specified that the executive would “consist of a single person.”²⁰ Madison’s *Notes* report that this proposal was followed by a “considerable pause,” after which Benjamin Franklin noted that the issue was of great importance and implored the delegates to state their views.²¹ Edmund Rutledge similarly chided the delegates for their reticence and offered his support for Wilson’s proposal on the ground that a single executive would feel the greatest accountability and would lead to better administration, although he believed that the power of war and peace should be withheld from the executive.²²

Roger Sherman disagreed, arguing that the composition of the executive should be left to the legislature.²³ Randolph offered an even stronger critique, condemning unity in the executive “as the fœtus of monarchy.”²⁴ He instead suggested that the executive power be placed in three people, arguing that a triumvirate could also exercise vigor, dispatch, and responsibility and would make the executive more independent.²⁵

It was during these initial debates that Wilson laid the conceptual foundation for a unitary executive. In his initial statement, Wilson emphasized that placing the executive power in a single person would give it the most energy and accountability.²⁶ Giving the power of appointment to a single person would make clear who was responsible for choosing a particular official, while a plural executive would allow officials to evade responsibility.²⁷ In response, Wilson argued that, far from being the embryo of monarchy, a single executive represented the best protection against tyranny: a complex executive may be more prone to turn into a despotism than a single one and, as reported colorfully in Pierce’s notes, “as bad as the thirty Tyrants of Athens, or as the Decemvirs of Rome.”²⁸

That Wilson would emerge as the unitary executive’s strongest proponent should come as no surprise. He advanced similar ideas in his lectures on law three years earlier, which offered two justifications for unity. The first was the need for democratic accountability. In contrast to the legislature, in which restraint is accomplished by dividing power, “[t]he executive power, in order to be restrained,

19. *Id.*

20. *Id.* at 63. Charles Pinckney seconded the motion. *Id.*

21. *Id.* at 65.

22. *Id.*

23. *Id.*

24. *Id.* at 66.

25. *Id.* at 65, 71.

26. *Id.* at 65, 70.

27. *Id.* at 70.

28. *Id.* at 66, 71, 74.

should be *one*.²⁹ While Congress relies primarily on internal restraints, “the restraints on the executive power are external.”³⁰ Such external constraints “are applied with greatest certainty, and with greatest efficacy, when the object of restraint is clearly ascertained” and “when one object only, distinguished and responsible, is conspicuously held up to the view and examination of the publick.”³¹ If a plural executive conducts its affairs poorly, “on whom shall we fix the blame? [W]hom shall we select as the object of punishment?”³²

The second justification was the need for vigor and dispatch, particularly in the case of emergencies. This would be dissipated if “every enterprise, mutual communication, mutual consultation, and mutual agreement among men, perhaps of discordant views, of discordant tempers, and of discordant interests, are indispensably necessary.”³³ Placing the executive power “in the hands of one person, who is to direct all the subordinate officers of that department,” would lead to “promptitude, activity, firmness, consistency, and energy.”³⁴

The notes of the Convention are somewhat contradictory as to Madison’s position regarding the unitary executive. Prior to the Convention, Madison was unsure whether the executive power “should be vested in one man assisted by a council or in a council of which the President shall be only *primus inter pares*.”³⁵ Madison’s *Notes* indicate that he sought to remain noncommittal during this initial discussion by postponing the decision between executive unity and plurality until the Convention defined the executive powers.³⁶ Pierce reported that Dickinson concurred.³⁷ King’s notes, in contrast, indicate that Madison stated that a single executive was probably the best plan.³⁸ Pierce’s notes record that Madison favored placing the executive power in a single person aided by an advisory council.³⁹ After the Convention, Madison wrote to Jefferson that “a proper energy in the Executive” was one of “the great objects” of the Constitutional Convention.⁴⁰

It appears that Wilson himself seconded Madison’s motion to postpone consideration of Wilson’s proposal, which the Convention approved by unanimous consent.⁴¹ The Convention returned to the issue late the next day and discussed it

29. JAMES WILSON, LECTURES ON LAW: OF GOVERNMENT, *in* 1 THE WORKS OF JAMES WILSON, *supra* note 6, at 284, 293.

30. *Id.*

31. *Id.* at 293–94.

32. *Id.* at 294.

33. *Id.* at 294.

34. *Id.* at 296.

35. Letter from James Madison to Caleb Wallace (Aug. 23, 1785), *in* 8 THE PAPERS OF JAMES MADISON, *supra* note 16, at 350, 352.

36. 1 FARRAND’S RECORDS, *supra* note 13, at 66–67.

37. *Id.* at 74.

38. *Id.* at 70.

39. *Id.* at 74.

40. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 3 FARRAND’S RECORDS, *supra* note 14, at 131, 132.

41. 1 FARRAND’S RECORDS, *supra* note 13, at 66–67.

further on June 4. Wilson responded directly to Randolph's claims that a single executive would be tantamount to monarchy and unacceptable to the people by pointing out that all thirteen states placed the executive authority in a single individual.⁴² Wilson believed that a single executive would also lead to greater tranquility: If all three members of a plural executive wielded equal power, they would be in constant disagreement, whereas if their powers were asymmetric, the benefits of tripartite balance would be lost.⁴³ Moreover, should an issue have more than two sides, the executive could well deadlock, with each executive espousing a different position.⁴⁴

A number of delegates supported Wilson. Pierce Butler, for one, argued that unity was critical in military matters. He responded to Randolph's criticism that a unitary executive would ignore the remote parts of the country by arguing that a unitary executive would be more likely to represent all parts of the country impartially.⁴⁵ Sherman offered his support for a unitary executive (although, as discussed in the next section, he favored annexing a council to the single magistrate).⁴⁶ Elbridge Gerry concurred, arguing that a plural executive would be extremely inconvenient, particularly in military matters, and would be tantamount to a general with three heads.⁴⁷

A handful of voices spoke in opposition to Wilson's proposal. Farrand believes that a document found in George Mason's papers is a speech given on June 4⁴⁸ arguing in favor of a three-person executive,⁴⁹ although Mason was not present for the vote.⁵⁰ Mason warned that single executives tend to degenerate into a monarchy, whereas a plural executive could represent different parts of the country.⁵¹ The Convention nonetheless approved Wilson's motion by a vote of seven states to three.⁵²

The New Jersey Plan as submitted on June 15 proposed a plural executive.⁵³ Aside from some side comments made during debates on the veto and the appointment powers,⁵⁴ the Convention did not return its focus to the topic until July 17. Immediately after the Great Compromise and prior to the appointment of the Committee of Detail, the Convention reaffirmed its embrace of a single executive by affirmation.⁵⁵ Except for an isolated comment offered by Hugh

42. *Id.* at 96, 105, 109.

43. *Id.* at 96.

44. *Id.* at 96, 105, 109.

45. *Id.* at 88–89.

46. *Id.* at 97, 105.

47. *Id.* at 97, 105.

48. *Id.* at 110 n.26.

49. *Id.* at 114.

50. *Id.* at 97, 101.

51. *Id.* at 113.

52. *Id.* at 93.

53. *Id.* at 244.

54. *Id.* at 100, 101–03, 107, 139.

55. 2 *id.* at 29.

Williamson on July 24,⁵⁶ the issue did not arise again until August 24, when it was once again reaffirmed by unanimous consent.⁵⁷

The choice of a single executive over a plural one thus ultimately proved relatively uncontroversial. As Madison noted in a letter to Thomas Jefferson following the Convention, the plural executive “had finally but few advocates” aside from Randolph and that “a proper energy in the Executive” was one of “the great objects” of the Constitutional Convention.⁵⁸ A tally of those who spoke and voted in favor of the proposition confirms Madison’s observation, revealing that only twelve of the forty-five delegates currently in attendance supported a plural executive.⁵⁹ Moreover, it is telling that the two most vocal proponents of the plural executive, Randolph and Mason, found the final document so repugnant that they refused to sign it.

Wilson would reiterate his support for the unitary executive in his remarks before the Pennsylvania Ratifying Convention. In the words of one commentator, Wilson argued that shifting certain powers in the executive instead of the legislature was justified by the fact that plural bodies such as legislatures “cannot plan well, act decisively, or keep the common good in view.”⁶⁰ Wilson argued that government is most effective when “the *executive authority is one*” and that “[t]he executive power is better to be trusted when it has no *screen*.”⁶¹ “We well know what numerous executives are. We know there is neither vigor, decision, nor responsibility in them.”⁶² Indeed, having a “single magistrate” promotes “strength, vigor, energy, and responsibility in the executive department.”⁶³

The Constitutional Convention thus yielded an unusually clear decision on whether the executive should be headed by a single person or a plural institution, with Wilson serving as the delegate primarily responsible for this outcome. Concluding that the executive power should reside in a single individual left unanswered many key questions about what powers that person would wield. As will become clear later, Wilson’s support for the unitary executive would ultimately depend on the precise substantive powers given to the President.

56. 1 *id.* at 100.

57. *Id.* at 401.

58. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 3 FARRAND, *supra* note 2, at 131–32.

59. FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 240, n.48 (1985).

60. Daniel J. McCarthy, *James Wilson and the Creation of the Presidency*, 17 *PRESIDENTIAL STUD. Q.* 689, 691 (1987).

61. 2 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787*, at 480 (Jonathan Elliot ed., 1836) [hereinafter *DEBATES IN THE SEVERAL STATE CONVENTIONS*].

62. *Id.* at 524.

63. *Id.* at 484.

B. Proposals for an Executive Council, the Appointment Power, and Wilson's Big Switch

The Convention similarly rejected the idea of supplementing the President with an executive council similar to the British Privy Council, although this idea received occasional support during the course of the Convention and ultimately became intertwined with the debate over the appointment power. It was initially debated and arguably implicitly rejected during consideration of Wilson's amendment endorsing a unitary executive during the opening days of the Convention. It would subsequently be re-proposed following the Great Compromise, endorsed by the Committee of Detail, rejected by the Committee of Eleven, and then debated and rejected again in the closing days of the Convention. Perhaps most surprisingly, Wilson consistently opposed the idea of an executive council until the final debate, when, in an event the significance of which has not yet been noted in the literature, he switched sides.

The idea of an executive council was first advanced on June 1 by Gerry, who, despite supporting a single executive,⁶⁴ averred that such a council would add gravitas to and inspire greater public confidence in the executive.⁶⁵ King's and Pierce's notes report that Madison endorsed the idea of a council as well, albeit one that operated in a purely advisory capacity.⁶⁶ Williamson also favored the idea, arguing that there was no difference between a single executive supplemented by a Council and an executive triumvirate.⁶⁷

The Convention again debated the idea of an executive council when it returned to Wilson's proposal on June 4. Sherman argued in favor of such a council, pointing out that all of the states possessed such an institution and that even the British king was subject to the advice of the Privy Council.⁶⁸ Wilson, however, came out firmly against the idea because such a council would tend to obscure responsibility for any malpractices that may occur.⁶⁹ This exchange provides some support for the inference that the Convention's subsequent approval of Wilson's proposal on June 4 represented an implicit rejection of the idea of an executive council as well.

At the same time the Convention weighed the merits of an advisory council, it engaged in a parallel debate over the appointment power. The original Virginia Plan, proposed on May 29, provided that judges be appointed by the national legislature.⁷⁰ On June 1, Madison successfully moved that the power to appoint all other officers rest with the executive.⁷¹ Wilson offered his support, arguing that the appointment power and the power to execute the law represented the only

64. 1 FARRAND'S RECORDS, *supra* note 13, at 97.

65. *Id.* at 66, 70–71.

66. *Id.* at 70, 74.

67. *Id.* at 71.

68. *Id.* at 97, 105.

69. *Id.* at 97.

70. *Id.* at 21, 28.

71. *Id.* at 63, 67, 70.

quintessentially executive powers.⁷² Allowing a plurality of individuals to wield the appointment power instead of a single executive would destroy all responsibility for appointments.⁷³ This accords with the views Wilson expressed prior to the Convention in his lectures on law, in which he argued that the executive's appointment power should be "unfettered and unsheltered by counsellors" who would only allow the executive to avoid political responsibility for ill-considered selections.⁷⁴

On June 5, the Convention addressed the nomination of lower court judges. During this debate, Wilson again complained that placing the appointment power in a plural body invariably devolved into intrigue, partiality, and concealment.⁷⁵ According to Madison's *Notes*, Wilson further contended, "A principal reason for unity in the Executive was that officers might be appointed by a single, responsible person."⁷⁶ Rutledge and Franklin opposed Wilson out of concern that giving the appointment power to the President would give the executive too much authority.⁷⁷

Madison characteristically equivocated. On the one hand, he questioned allowing legislatures to appoint judges because of their tendency toward partiality and their lack of the background necessary to assess potential judges' qualifications.⁷⁸ On the other hand, he disliked giving so much power to the executive, suggesting that perhaps the power ought to be given to the Senate alone.⁷⁹ Rather than resolve this conundrum, Madison attempted to buy time. He proposed that the clause that determined who should appoint lower-court judges be struck out and left blank, a proposal that was approved by a vote of nine to two.⁸⁰ Wilson immediately stated that he would oppose any future attempt to give legislatures the power to appoint judges, which was met by an equally determined statement by Pinckney in favor of legislative appointment of judges.⁸¹

Rutledge quickly derailed Madison's attempt to postpone resolution of the appointment question. Concerned with protecting the prerogatives of state courts, Rutledge successfully pushed through an amendment deleting the clause affirmatively creating inferior federal courts.⁸² In a sharp reversal of position, Wilson and Madison pushed through compromise language that, instead of creating inferior federal courts by virtue of the Constitution itself, gave Congress the power to create such courts if it so wished. Although Butler complained about the fineness of the distinction, the Convention approved the amendment by a vote of eight to

72. *Id.* at 66.

73. *Id.* at 70.

74. WILSON, *supra* note 29, at 402.

75. 1 FARRAND'S RECORDS, *supra* note 13, at 119, 126–27.

76. *Id.* at 119.

77. *Id.* at 119–20.

78. *Id.* at 120.

79. *Id.*

80. *Id.* at 116, 120, 126.

81. *Id.* at 120–21.

82. *Id.* at 118, 125.

two, with one state divided.⁸³ As later summaries revealed, the new language was taken to give the legislature the power to appoint lower court judges.⁸⁴

On June 13, Pinckney pushed through an amendment favoring senatorial appointment of the Supreme Court,⁸⁵ but only after proposing and withdrawing an amendment to involve both houses of Congress.⁸⁶ According to the summaries of the proposals under consideration, the Convention was considering giving the Senate the power to appoint the members of the Supreme Court, Congress the power to appoint lower court judges, and the executive the power to appoint all other offices.⁸⁷

It was not until July 18, after the Great Compromise and before the document had been referred to the Committee of Detail, that the Convention returned to the issue. Wilson's proposal to vest the power to appoint judges solely in the executive failed by a vote of two to six.⁸⁸ Wilson supported a compromise proposal to give the executive the power to nominate with the advice and consent of the Senate. Although this was the solution that would ultimately prevail, it failed by a divided vote of four to four.⁸⁹ The Convention postponed consideration on a third proposal submitted by Madison, which would have given the executive the power to nominate the members of the Supreme Court and the Senate the power to overturn a nomination based on a two-thirds vote.⁹⁰ A final proposal that gave the legislature the power to appoint lower court judges passed unanimously by a vote nine to zero.⁹¹

When the Convention returned to Madison's compromise proposal on July 21, it voted the proposal down by a vote of three to six.⁹² The Convention then approved a provision giving the Senate the power to appoint the members of the Supreme Court by a vote of six to three.⁹³

The issue now passed to the Committee of Detail. Although Wilson bore the laboring oar in drafting its report, the committee expanded the legislature's role in appointments. Specifically, in addition to the sole power to appoint the members of the Supreme Court, the report of August 6 gave the Senate the authority to appoint ambassadors (as well as make treaties).⁹⁴ The authority to "constitute

83. *Id.* at 118, 125, 127.

84. *Id.* at 226, 231, 237.

85. *Id.* at 224, 226, 230, 233, 238.

86. *Id.* at 232, 238.

87. *Id.* at 230–31, 236–37. A similar document providing that Congress had the power to appoint the members of the Supreme Court is recognized as being current as of the beginning of the day on June 12. *Id.* at 225 n.4, 226.

88. 2 *id.* at 37, 41, 44.

89. *Id.* at 38, 41, 44.

90. *Id.* at 38, 44.

91. *Id.* at 38–39, 46.

92. *Id.* at 71–72, 83.

93. *Id.* at 72, 83

94. *Id.* at 183.

tribunals inferior to the Supreme Court” rested with the entire legislature.⁹⁵ The power to appoint all other officers rested with the President.⁹⁶

The recommendations of the Committee of Detail provided an occasion to revisit the idea of an executive council. On August 18, Oliver Ellsworth again proposed that the President be advised by a council consisting of the President of the Senate, the Chief Justice, and the heads of the departments of foreign affairs, domestic affairs, war, finance, and marine.⁹⁷ Charles Pinckney noted that Gouverneur Morris was planning to submit a similar proposal and suggested that the matter be postponed until the Convention could consider both proposals.⁹⁸ Pinckney preferred allowing chief executives to seek advice as they thought best, warning that a strong council would tend to thwart the executive and that a weak one would only provide a pretext for the chief executive to disavow responsibility.⁹⁹

Morris submitted his proposal two days later on August 20, seconded by Pinckney. It advocated establishing a Council of State comprised of the same officials suggested by Ellsworth minus the President of the Senate.¹⁰⁰ The proposal made clear that the purpose of this council was to assist the President and not to serve as an independent repository of executive power. The President could “submit any matter to the discussion of the Council of State, and . . . require the written opinions of any one or more of the members.”¹⁰¹ But the President “shall in all cases exercise his own judgment, and either Conform to such opinions or not as he may think proper.”¹⁰²

These proposals were referred back to the Committee of Detail, which issued a supplemental report on August 22.¹⁰³ The report endorsed what it called a “Privy-Council” consisting of the members suggested by Morris, but also including the President of the Senate and the Speaker of the House.¹⁰⁴ Again the language made clear that the Council was subordinate to the President and was not an independent repository of executive power. Instead, the Privy Council was simply charged with advising the President with “respect [to] the execution of his Office, which he shall think proper to lay before them: But their advice shall not conclude him, nor affect his responsibility for the measures which he shall adopt.”¹⁰⁵

The Convention returned to the question of the appointment power on August 23, when Wilson supported Gouverneur Morris’s complaint that legislative bodies like the Senate were too numerous, subject to cabal, and devoid of

95. *Id.* at 182.

96. *Id.* at 185.

97. 2 *id.* at 328–29.

98. *Id.* at 329.

99. *Id.*

100. *Id.* at 342–43.

101. 2 *id.* at 343.

102. *Id.* at 343–44.

103. *Id.* at 334, 341 n.4, 342.

104. *Id.* at 367.

105. *Id.*

responsibility to wield the appointment power.¹⁰⁶ Rather than follow this suggestion, the Convention expanded the Senate's authority by expanding its appointment power to include "other public ministers" as well as ambassadors and judges.¹⁰⁷ Some inconsequential jousting over minor changes to the President's residual appointment power ensued on August 24.¹⁰⁸

On August 31, the Committee of Eleven began considering matters that had been postponed or on which no action had been taken, including questions about an advisory council and the appointment power.¹⁰⁹ When the Committee of Eleven issued its report on September 4, all mention of a Privy Council had disappeared in favor of the familiar language specifying that the President "may require the opinion in writing of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices."¹¹⁰ Morris later explained that the Committee believed an executive council would allow the President to avoid responsibility for any actions that turned out to be mistakes.¹¹¹

The Committee of Eleven report eliminated appointment by the Senate in favor of nomination by the President subject to the advice and consent of the Senate.¹¹² The abandonment of direct senatorial appointment came at a price, however: the advice and consent power now applied to all officers of the U.S. and was no longer limited to judges, ambassadors, and other public ministers.¹¹³

The Committee of Eleven's report appeared to sound a death knell for the idea of an executive council. Wilson commented again about the Senate's inability to make appointments on September 6 when he criticized the role envisioned for the Senate in selecting the President when the Electoral College failed to yield a clear majority.¹¹⁴

Yet, during the debates on September 7, the idea of an advisory council received an unlikely advocate in Wilson. He reiterated his beliefs that the proper execution of the law depends on the ability to appoint responsible officers to execute it and the appointment power represented a quintessential executive power.¹¹⁵ When faced with a proposal that would subject presidential nominations of all federal officers to confirmation by the Senate, however, Wilson believed that senatorial involvement in the appointment power would destroy executive responsibility.¹¹⁶ Compared with this alternative, Wilson preferred an advisory executive council of the type proposed by Mason to giving the Senate a

106. *Id.* at 389.

107. *Id.* at 383, 394.

108. *See id.* at 398–99, 405–07.

109. *Id.* at 473.

110. *Id.* at 495.

111. *Id.* at 542.

112. *Id.* at 495, 498–99.

113. *Id.* at 495, 498–99, 539; *see also* DiClerico, *supra* note 8, at 313.

114. 2 FARRAND'S RECORDS, *supra* note 13, at 522–23, 530.

115. *Id.* at 538–39.

116. *Id.* at 539.

role in the appointment power.¹¹⁷ The Convention disagreed, unanimously affirming the Senate's role in confirming appointments and voting nine to two to confirm the decision to extend it to all federal officers.¹¹⁸

Mason followed this exchange by making a last ditch effort to revive the idea of an executive council by proposing that it consist of two members each from the eastern, middle, and southern states, appointed either by the Legislature or the Senate.¹¹⁹ Not surprisingly, Benjamin Franklin, John Dickinson, and Madison all supported the proposal.¹²⁰ The real shock was that Wilson spoke in favor of it as well, again as an alternative to giving the Senate a role in appointments.¹²¹ The Convention rejected Mason's amendment by a vote of three to eight.¹²²

Wilson's consistent opposition to an advisory council made his support for one, in conjunction with a power that he regarded as quintessentially executive, quite surprising. It would seem to contradict the vision of Wilson as a doctrinaire advocate of a strong, unitary presidency. Indeed, in his *Lectures on Law* delivered after the Constitution's ratification, James Wilson applauded the lack of the constitutional council:

In the United States, our first executive magistrate is not obnubilated behind the mysterious obscurity of counselors. Power is communicated to him with liberality, though with ascertained limitations. To him the provident or improvident use of it is to be ascribed. For the first, he will have and deserve undivided applause. For the last, he will be subjected to censure; if necessary, to punishment. He is the dignified, but accountable magistrate of a free and great people.¹²³

Wilson was willing to compromise unitariness if necessary to recalibrate the larger balance of power between the branches. Admittedly, this concession may have been nothing more than the product of *realpolitik*, but even still it implicitly acknowledges that the content of executive power is a human construct, rather than a matter of principle not subject to negotiation. Indeed, it was the more important issue of the appointment power that led Wilson to compromise.

C. The Veto Power

The positions that Wilson took with respect to the veto power further illustrate his non-doctrinaire approach to the executive branch. Initially, the Virginia Plan called for the veto power to reside in a "council of revision" composed of "the

117. *Id.*

118. *Id.* at 533.

119. *Id.* at 542.

120. *Id.*

121. *Id.*

122. 2 *id.* at 533, 542.

123. WILSON, *supra* note 29, at 319.

Executive and a convenient number of the National Judiciary.”¹²⁴ This veto would be final unless overridden by an unspecified supermajority of Congress.¹²⁵

The Convention took up the issue on June 4. Gerry submitted a successful amendment that eliminated the council of revision, thereby removing the judiciary from any role in the exercise of the qualified veto.¹²⁶ Wilson, seconded by Hamilton, proposed an amendment to eliminate the legislative override, which the Convention rejected unanimously.¹²⁷ Gerry successfully moved to set the necessary majority to override a presidential veto at two-thirds.¹²⁸ Then, somewhat curiously, Wilson, seconded by Madison, attempted to reintroduce the courts into the process by restoring the requirement that the national executive exercise the veto power in conjunction with “a convenient number of the national judiciary.”¹²⁹ At Hamilton’s request, debate was postponed until June 6,¹³⁰ at which time Wilson renewed his plea for including the judiciary in the veto power.¹³¹ The Convention rejected Wilson’s proposal by a vote of three to eight.¹³²

Wilson renewed this proposal on July 21 after the adoption of the Great Compromise, before the appointment of the Committee of Detail, and during the period when the small states had walked out of the Convention.¹³³ Despite Wilson’s and Madison’s assurances that such an arrangement would not violate the separation of powers and was necessary to counterbalance the weight of the legislature,¹³⁴ the amendment was defeated again by the narrower vote of three to four, with two states divided.¹³⁵

Consistent with the debates of June 4 and 6, and despite the fact that Wilson was the primary drafter of the report, the Committee of Detail’s report of August 4 provided for a presidential veto that was subject to being overridden by a two-thirds vote of both houses of Congress.¹³⁶ The Convention debated this proposal on August 15. Madison, seconded by Wilson, proposed adding the Supreme Court to the veto process and increasing the supermajority needed for an override to three-fourths should both the President and a majority of the Supreme Court object to the legislation.¹³⁷ This proposal failed by a vote of three to eight.¹³⁸ Williamson’s subsequent motion to increase the supermajority required to

124. 1 FARRAND’S RECORDS, *supra* note 13, at 21.

125. *Id.*

126. *Id.* at 94.

127. *Id.*

128. *Id.*

129. *Id.* at 95.

130. *Id.*

131. *Id.* at 138.

132. *Id.* at 131, 140.

133. 2 *id.* at 71, 73.

134. *Id.* at 77–79

135. *Id.* at 71, 80.

136. *Id.* at 146, 167, 181.

137. *Id.* at 294–95, 298.

138. *Id.* at 295, 298

override a presidential veto to three-fourths passed by a vote of six to four, with 1 state divided.¹³⁹

The Committee of Style's September 12 report incorporated the presidential veto subject to override by three-fourths of both Houses of Congress.¹⁴⁰ When the Convention debated the report later that day, it immediately reversed its decision of August 15 and reduced the supermajority required for Congress to override a presidential veto back to two-thirds.¹⁴¹ This final language was integrated into the Constitution.

Consistent with the view of Wilson as a consistent advocate of strong executive authority, Wilson initially argued that the President should have an absolute veto (without judicial participation or being subject to legislative override) on the grounds that the three branches should be kept as distinct and independent as possible.¹⁴² As noted earlier, this proposal failed unanimously.¹⁴³ What is harder to explain was his support on June 4, June 6, and August 15 for Madison's proposal to vest the veto power jointly in the executive and the Supreme Court. It is possible that Wilson insisted on executive unity only with respect to core executive powers, but not with respect to executive involvement with legislative powers such as the veto.¹⁴⁴ Whatever the explanation, Wilson's views on the separation of powers were far from rigid. Quite the contrary, his views exhibit a willingness to reallocate powers to strike the proper balance between the branches. In the words of one historian, "[t]he need to control the legislature was more important than the principle of a strictly unitary executive authority."¹⁴⁵

D. Presidential Selection

Aside from the Great Compromise, the selection of the executive represented perhaps the most controversial issue during the Convention and the issue on which Wilson came the closest to losing.¹⁴⁶ The Virginia Plan had proposed selection of the executive by the legislature.¹⁴⁷ Wilson had initially suggested the direct election of the President on June 1.¹⁴⁸ When that idea received a tepid response, Wilson instead formally proposed election by an electoral college, only to see that proposal rejected by a vote of two to eight and legislative selection affirmed by a vote of eight to two.¹⁴⁹

139. *Id.* at 295, 301

140. *Id.* at 593–94.

141. *Id.* at 583.

142. *Id.* at 98.

143. See *supra* note 127 and accompanying text.

144. 1 FARRAND'S RECORDS, *supra* note 13, at 140.

145. McCarthy, *supra* note 60, at 692.

146. DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 61, at 511; DiClerico, *supra* note 8, at 305.

147. 1 FARRAND'S RECORDS, *supra* note 13, at 21.

148. *Id.* at 68.

149. *Id.* at 77, 80–81.

The Convention debated the issue again on July 17, immediately following the Great Compromise. Despite Wilson's support, direct elections were again rejected by a vote of one to nine, and selection by an electoral college was rejected by a vote of two to eight, after which the provision that the President be chosen by the legislature was unanimously reaffirmed.¹⁵⁰

The issue would arise again two days later on July 19 when the Convention debated whether Presidents would be allowed to stand for reelection. Madison pointed out that if the legislature selected the President, re-eligibility would make the President dependent on the legislature.¹⁵¹ Wilson noted the unanimous opinion of the Convention that the President should not be selected by the legislature if eligible to serve a second term and observed that the idea of popular elections, either directly or indirectly through an electoral college, was gaining ground.¹⁵² Madison admitted that direct election was probably the best principle, but supported the electoral college because the limits to the right to vote associated with slavery would limit southern states' influence over the outcome of direct presidential elections.¹⁵³ The motion to reconsider was rejected by a vote of three to seven.¹⁵⁴ The Convention then approved a proposal to elect the President through an electoral college by a vote of six to three and agreed, by a vote of eight to two, that those electors would be selected by state legislatures.¹⁵⁵

Five days later, on July 24, John Houstoun's motion to reconsider presidential selection via the electoral college was rejected by the narrower vote of four to seven.¹⁵⁶ A series of additional proposals followed, including a somewhat bizarre suggestion from Wilson that the President be elected by fifteen members of Congress chosen by lot.¹⁵⁷ Wilson stated that he had not given this proposal much thought and that he preferred direct election.¹⁵⁸ Consequently, he acceded to the decision to postpone consideration of his proposal.¹⁵⁹

When the Convention reconvened on July 25, the delegates struggled to reconcile re-eligibility with legislative selection. Ellsworth moved for legislative selection of first-term Presidents and for selection by electors appointed by state legislatures in the case of re-eligible candidates. His proposal was rejected by a vote of four to seven.¹⁶⁰ Although Butler, Morris, and Madison spoke in favor of Wilson's proposed electoral college, the Convention failed to concur, and the entire issue was committed to the Committee of Detail.¹⁶¹

150. 2 *id.* at 32.

151. *Id.* at 56.

152. *Id.*

153. *Id.* at 56–57.

154. *Id.* at 57.

155. *Id.* at 58.

156. *Id.* at 101.

157. *Id.* at 103, 105.

158. *Id.* at 106.

159. *Id.*

160. *Id.* at 111.

161. *Id.* at 112–15.

The Committee of Detail's report on August 6 reaffirmed the idea of legislative selection, notwithstanding the fact that Wilson was the report's principal author.¹⁶² But the entire issue was reframed by the Committee of Eleven's report of August 31, which gave the Presidency most of its familiar outlines: a four-year term, eligibility for reelection, selection by an electoral college chosen by a method determined by each state legislature, with the Senate deciding elections in which no candidate received an electoral college majority.¹⁶³ On September 6, the Convention substituted the House for the Senate as the institution that would resolve presidential elections that did not yield an electoral college majority.¹⁶⁴

Thus, after many twists, turns, and hardships, Wilson's proposal for presidential selection by electoral college finally prevailed. The core concern was that legislative selection would render any President planning to seek reelection unduly subservient to Congress.

II. UNDERSTANDING WILSON'S VIEWS ON EXECUTIVE POWER

Although Wilson is often portrayed as an adamant supporter of presidential power, his switch with respect to an executive council and his views on the veto and presidential selection reveal that his beliefs may not have been as simple as is typically thought. Indeed, when his late support for an advisory council is placed within the broader context of the positions he took during the Convention (e.g., supporting direct democracy and favoring institutional design over class divisions) a strong argument emerges that the Constitution is better regarded as a reflection of Wilson's vision for the country, not Madison's.

A. *Wilson, the Executive Power Pragmatist*

Wilson's reversal on the executive council is most easily understood as a reflecting a pragmatic conception of the executive power. As an initial matter, it is useful to differentiate between two distinct concepts that are often conflated: the unitary executive and inherent executive power. The former addresses the institutional form that the executive branch should take. The latter addresses the scope of the power the executive branch should wield. Taking a strong position with respect to one does not necessarily require taking a strong position with respect to the other. More specifically, one can adopt a narrow vision on the scope of inherent executive power and yet insist that whatever power is properly considered executive in nature (either because it is inherently executive or because the Constitution conferred that power on the President as a matter of positive law) must be wielded by a single person.

Focusing on the scope of inherent power, Wilson is far from an executive power essentialist or an executive power maximalist. While Wilson strongly supported a unitary executive, he exhibited greater flexibility when discussing the

162. *Id.* at 185.

163. *Id.* at 497–98.

164. *Id.* at 127.

scope of executive power. In this sense, Wilson shared the innate pragmatism of the other Founders.¹⁶⁵ McLaughlin notes, “The men of the convention, and Wilson above all, were not rote-learners: they did not absorb unquestioningly the lessons of Blackstone or of Montesquieu. They were themselves original seekers after truth, making their own inductions and extracting the principles of their science from the raw materials of history.”¹⁶⁶ Indeed, Wilson did not base his arguments in favor of a unitary executive on citations to Blackstone, although he could have done so.¹⁶⁷ Instead, Wilson offered his own normative defense of the institution based on energy, accountability, and democratic values.

Wilson’s non-doctrinaire approach to executive power was also reflected in his positions on the veto and appointment powers. As noted above, although Wilson supported giving the President an absolute veto, he proposed various alternatives that would have included the judiciary in the veto process. Similarly, although Wilson regarded appointment as one of two quintessentially executive powers (the other being the power to execute the law)¹⁶⁸ and initially opposed giving the legislature any role, he compromised by ceding to Congress the advice and consent powers in appointing Supreme Court justices and lower court judges. His pragmatism was also reflected by his acquiescence in a proposal that gave the Senate the power to appoint ministers and ambassadors as well and made a surprising proposal to augment the Presidency with a council to advise it regarding appointments.

B. *Wilson, the Democrat*

Wilson’s belief in democracy became even more fundamental than his position on the proper scope of executive power. Ultimately his willingness to compromise on structural matters was counterbalanced by the Convention’s willingness to embrace democratic principles.¹⁶⁹

1. Madison’s Distrust of Democracy and Embrace of Mixed Government

Many in the Convention harbored a healthy distrust of what they called the “extravagances of the populace.”¹⁷⁰ The principal embodiment of this perspective was Madison. According to his notes from the Convention, Madison began from the premise that “[i]n all civilized Countries the people fall into different classes havg. a real or supposed different interests . . . particularly the distinction of rich & poor.”¹⁷¹ As population increased, “the equal laws of suffrage” caused power

165. McDONALD, *supra* note 59, at 235; Andrew C. McLaughlin, *James Wilson in the Philadelphia Convention*, 12 POL. SCI. Q. 1, 14 (1897).

166. McLaughlin, *supra* note 165, at 3.

167. WILLIAM BLACKSTONE, COMMENTARIES *242–43.

168. See 2 FARRAND’S RECORDS *supra* note 13, at 538–39; 1 *id.* at 66.

169. McCarthy, *supra* note 60, at 692.

170. McLaughlin, *supra* note 165, at 15; see also DiClerico, *supra* note 8, at 309.

171. 1 FARRAND, *supra* note 13, at 422.

to “slide into the hands” of the agrarian poor that would exhibit a “leveling spirit” seeking to impose a forcible redistribution of the nation’s wealth.¹⁷²

Madison believed that conducting elections through a series of “successive filtrations” insulated the government from the democratic will.¹⁷³ As an initial step, Madison sought to limit the franchise to those owning real property, warning that unlanded citizens “will become the tools of opulence & ambition.”¹⁷⁴ Although his plan allowed voters to elect the House of Representatives, Madison proposed allowing the House of Representatives to elect members of the Senate instead of holding direct elections.¹⁷⁵

The Senate was the key institution to Madison’s vision for the federal government. Under his plan, a small number of “enlightened citizens” would constitute the Senate through indirect elections.¹⁷⁶ The Senate, moreover, was supposed to represent the wealth of the nation,¹⁷⁷ with “one of its primary objects the guardianship of property.”¹⁷⁸ As such, the Senate was designed to serve as a “check on the democracy.”¹⁷⁹ As Madison would later state in his letter to Jefferson describing what had transpired at the Convention, the Senate would serve as the “great anchor of the Government.”¹⁸⁰

To achieve this, Madison envisioned a Senate composed of a relatively small number of members serving relatively long terms and invested with vast power,¹⁸¹ including the authority to negotiate treaties,¹⁸² appoint judges,¹⁸³ and even invalidate state legislation.¹⁸⁴ Madison argued that representation in the Senate would be proportional to population, not out of some commitment to equality, but rather to ensure that Virginia would be well-represented in what would be the most powerful institution in the federal government.¹⁸⁵ Madison’s proposed primacy of the Senate explains why he gave so little thought to the design of the executive. In his vision of a government dominated by the Senate, the President was little more than an auxiliary player.¹⁸⁶

172. *Id.* at 422–23.

173. *Id.* at 50.

174. 2 *id.* at 203–04.

175. *Id.* at 20.

176. *Id.* at 432–433.

177. *Id.* at 158.

178. 1 *id.* at 562; *accord id.* at 431 (stating that the Senate is supposed “to protect the minority of the opulent against the majority”).

179. *Id.* at 222.

180. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 3 FARRAND’S RECORDS, *supra* note 13, at 131, 133.

181. Ewald, *supra* note 3, at 944, 966, 969, 972, 985.

182. *Id.* at 1000.

183. 1 FARRAND’S RECORDS, *supra* note 13, at 120.

184. 1 *id.* at 21. *See id.* at 164; (Madison regarded power as the lynchpin of the entire system); McDONALD, *supra* note 59, at 165; Ewald, *supra* note 3, at 968.

185. Ewald, *supra* note 3, at 971.

186. *Id.* at 970, 1007.

In this sense, Madison's conception was less like the American conception of the separation of powers than the traditional British tradition of mixed government. Mixed government bears some superficial similarity to the American vision of separated powers leavened by a system of checks and balances, but it is based on fundamentally different principles. As M.J.C. Vile noted in his landmark book, mixed government relies on supposed differences among different social classes of people in ways that are generally considered antithetical to traditional American hostility towards aristocracy.¹⁸⁷

The theory of mixed government envisioned a society constituted of three elements—monarchy, aristocracy, and democracy—and sought to blend each of these groups into every function of government.¹⁸⁸ The central concern was to use royal and aristocratic elements as a check on the democratic tendency toward “mob rule.”¹⁸⁹ The idea, then, is not to divide power for its own sake or to segregate particular functions that should be kept separate for theoretical reasons. Instead, mixed government is based on maintaining a dynamic tension between the different social classes, with the upper classes receiving particular favor.

Many of the leading writers of the day were influenced by the mixed government vision of the state. John Adams's vision of the separation of powers showed such clear sympathy for monarchy and aristocracy¹⁹⁰ that Thomas Paine was provoked to complain that Adams's “head was as full of kings, queens and knaves as a pack of cards.”¹⁹¹

The institutions of government implemented this balance, and the institutional forms were instrumental toward achieving these goals. Although the tendency to equate the executive with the monarchy, the judiciary with the aristocracy, and the legislature with democracy existed, mixed government did not perceive any particular institution as having an essential character.¹⁹² The British government eloquently demonstrates the mutability of functions, which blended executive, legislative, and judicial functions in the Crown, selected executive ministers from the members of Parliament, and allowed the House of Lords to evolve into a judicial body. The separation of powers, in contrast, allows the nature of particular governmental functions to determine the branch to which it should be assigned. Rather than blending functions across multiple institutions, the separation of powers attempts to prevent other branches from unduly interfering with a function's exercise once it has been allocated.¹⁹³

187. M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 144–45, 184–86 (1967).

188. *Id.* at 37.

189. *Id.*

190. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 577 n.15 (rev. ed. 1998); C. BRADLEY THOMPSON, *JOHN ADAMS AND THE SPIRIT OF LIBERTY* 87, 107, 190–91, 216–17, 248–49 (1998).

191. Thomas Paine, *To the Citizens of the United States, Letter II* (Nov. 22, 1802), in 3 *THE WRITINGS OF THOMAS PAINE* 389 (Moncure Daniel Conway ed., G.P. Putnam's Sons 1895).

192. VILE, *supra* note 187, at 37.

193. *Id.*

Mixed government is thus based on principles that are quite different from those underlying the separation of powers and indeed conflicts with it to a considerable extent.¹⁹⁴ Both concepts share a common focus on relying on institutional internal checks within the government to guard against abuses of power, but for radically different reasons.¹⁹⁵ The separation of powers prevents the aggrandizement of power by dividing functions according to an abstract principle and isolating those sets of functions into separate spheres. Mixed government requires some division of functions but is not wedded to any particular allocation of power. Instead, it relies on what Vile called “the separation of agencies”¹⁹⁶ or what modern scholars might call “the separation of functions”¹⁹⁷ that simply requires that powers be divided without embracing any preconceived vision of what that division should be. The checking was done not by the differences in the institutions, but rather by the differences in the nature of the people constituting those institutions.

The inapplicability of mixed government to a country where monarchy and aristocracy were considered anathema naturally led the former colonists to eschew it in favor of the separation of powers when organizing state governments.¹⁹⁸ Aside from the constitutions of South Carolina, New Hampshire, and New Jersey, which were intended to be temporary, the state constitutions drafted in 1776 and early 1777 embraced the separation of powers as an organizing principle and rejected any concept of checks and balances. The weakness of the Governors and the strength of the legislatures created by these constitutions made the separation of powers unimportant.¹⁹⁹ Still, while the non-viability of mixed government as a theory left Americans no other alternative, the separation of powers left many key questions unanswered, including: how the executive should be selected, whether the legislature should be bicameral or unicameral, and where certain powers should reside.²⁰⁰

Equally important, early state legislatures engaged in a wide range of abuses. Most notably, they failed to protect private property,²⁰¹ but they also failed to respect religious freedom, the rights of criminal defendants, and freedom of the press.²⁰² The separation of powers offered no way to place limits on the legislature aside from elections.²⁰³ As Vile notes, “unlike the theory of mixed government, which opposed power with power, the pure separation of powers depended upon an intellectual distinction between the functions of government for its

194. *Id.* at 37, 38, 152, 153.

195. *Id.* at 38.

196. *Id.* at 40.

197. Peter L. Strauss, *The Place of Agencies in the Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

198. VILE, *supra* note 187, at 138–39, 1651–62.

199. *Id.* at 147–48.

200. *Id.* at 155–57.

201. McDONALD, *supra* note 59, at 154–57.

202. Ewald, *supra* note 3, at 967.

203. VILE, *supra* note 187, at 158, 162.

safeguard and upon elections for its sanction."²⁰⁴ This explains why later state constitutions, including New York and Massachusetts, began to move away from the strict conception of the separation of powers.²⁰⁵

2. Wilson's Embrace of Democracy

In the debate between the separation of powers and the Madisonian vision of mixed government, Wilson came down squarely on the side of the former. Mixed government was inappropriate for the United States, as it was "suited to an establishment of different orders of men."²⁰⁶ Instead, Wilson envisioned a government based on the sovereignty of the people.²⁰⁷ The contrast between Madison's and Wilson's position was stark. As Vile has noted, the idea of delegation of power from the people "is deeply opposed to the ideas of the balanced constitution, in which important elements were independent of popular power, and able to check the representatives of that power."²⁰⁸

Moreover, Wilson regarded men as being fundamentally equal, perhaps not in all respects, but at least with respect to civil government.²⁰⁹ He thus opposed making property ownership a prerequisite for voting and favored making the franchise as broad as possible.²¹⁰ Not only could the electorate be trusted, but participation in elections would serve an educative function by forcing people to look beyond their limited circle, which in turn would heighten their awareness of the interdependence of society.²¹¹

Wilson espoused democratic positions on a wide range of other issues. He opposed an unsuccessful attempt to replace direct election of the members of the House of Representatives with selection by state legislatures²¹² and advocated unsuccessfully for direct election of Senators.²¹³ He opposed imposing property qualifications on both the franchise²¹⁴ and as a precondition to serving in Congress.²¹⁵ He insisted that the Constitution be ratified by state conventions rather than by Congress²¹⁶ and was the only delegate to favor proportional representation as a matter of justice.²¹⁷ He thus opposed efforts to have each state

204. *Id.* at 161.

205. *Id.* at 162–63.

206. JAMES WILSON & THOMAS MCKEAN, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 40 (Philadelphia, T. Lloyd 1792).

207. VILE, *supra* note 187, at 174.

208. *Id.* at 150.

209. WILSON, *supra* note 29, at 306, 308; George W. Carey, *James Wilson's Political Thought and the Constitutional Convention*, 17 POL. SCI. REVIEWER 49, 67 (1987).

210. 1 FARRAND'S RECORDS, *supra* note 13, at 375.

211. McCarthy, *supra* note 60, at 694.

212. 2 FARRAND'S RECORDS, *supra* note 13, at 132–33.

213. *Id.* at 151.

214. *Id.* at 375.

215. Ewald, *supra* note 3, at 994.

216. 2 FARRAND'S RECORDS, *supra* note 13, at 253.

217. *Id.* at 179, 183.

represented equally in the Senate²¹⁸ as well as proposals to limit the representation of newly admitted states in the west.²¹⁹

Perhaps Wilson's greatest labor in support of direct democracy is his advocacy for direct election of the President. As discussed above, the Convention's rejection of this proposal led him to offer the ultimately successful compromise of an electoral college. However, even this proposal was repeatedly rejected until the waning days of the Convention, when the Framers' desire to permit George Washington to stand for reelection led them to reject congressional selection of the President.

Wilson believed that direct elections and a broad franchise best reflect the power of the people and are the source from which all sovereignty flows. Moreover, his belief in the equality of all citizens led him to adhere to the principle of one person, one vote. His reasons for favoring direct election of the Senate were thus squarely in conflict with Madison's filtration model of the Senate.²²⁰ Rather than having each house of Congress be elected by different constituencies, Wilson argued that election of both branches of Congress should rest on the same foundation: the power of the people at large.²²¹ He opposed the Great Compromise not because it undercut Madison's vision of the Senate as a repository of wisdom and stability, but because it abandoned the principles of equal representation.²²²

In short, Wilson and Madison proceeded from fundamentally different premises. Madison believed that the government should be designed to represent social interests, whereas Wilson believed that the government should be designed to represent individuals.²²³ The differences between Madison's and Wilson's positions also explain the two men's disparate reactions to the Great Compromise. In effect, the Great Compromise simultaneously killed Madison's animating vision of setting up the Senate as a filter to limit democracy and as the dominant governmental institution and stopped short of embracing Wilson's vision based on equal representation.²²⁴ Wilson viewed giving each state equal representation in the Senate as privileging state sovereignty over popular sovereignty.²²⁵

C. Wilson, the Institutionalizer

Wilson's commitment to democracy extended beyond participation in elections. He also believed that elections promoted accountability. Accountability stems from three sources. The first, as discussed above, is the tendency of

218. *Id.* at 179–80.

219. *Id.* at 583, 605–06.

220. Ewald, *supra* note 3, at 945.

221. 2 FARRAND'S RECORDS, *supra* note 13, at 151.

222. *Id.* at 179–80.

223. Ewald, *supra* note 3, at 978.

224. *Id.* at 1002.

225. 2 FARRAND'S RECORDS, *supra* note 13, at 482–83; GORDON WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 207 (1991); Ewald, *supra* note 3, at 978; Pederson, *supra* note 1, at 267.

plurality to obscure the precise actor responsible for particular decisions. The second is produced by certain fundamental differences between legislatures and executives. The third turns on the relationship between the size of the electoral district and the responsiveness of elected officials to the popular will. Wilson used these various insights to construct a system that did not define how powers would be divided based on underlying social differences among classes of people nor the immutable nature of the governmental functions. Moreover, Wilson's system avoided the need to hermetically seal the branches off from one another by creating a new basis for dynamic interaction based on institutional design rather than class.

Wilson did not share Madison's reflexive fear that the government would be too strong. Instead, Wilson's primary concern was that the government would be too weak.²²⁶ Specifically, one of the Framers' central concerns was the danger of all power being drawn into the legislative vortex.²²⁷ Thus, Wilson saw the need to use other institutions to counterbalance legislative power. The problem is that the rejection of the class-based institutions associated with mixed government left Wilson searching for alternative bases for identifying other institutions.

Instead of class differences, Wilson relied on institutional differences between types of actors. For example, plural institutions like legislatures do not plan well, lack secrecy and decisiveness, and often lose focus on the common good.²²⁸ Moreover, the nature of the checks that operate on the two branches is different.²²⁹ Wilson noted in his lectures on law, "The restraints on the legislative authority must, from its nature, be chiefly internal; that is, they must proceed from some part or division of itself. But the restraints on the executive power are external."²³⁰ And external restraints require clear lines of responsibility. Thus, as Wilson noted during the Convention, "In order to control the Legislative authority, you must divide it. In order to control the Executive you must unite it."²³¹

Wilson also suggested that large electoral districts were less likely to elect bad representatives than small districts, which provided greater opportunity for bad men to intrigue their way into office.²³² This reaches its logical conclusion in the President, who, having been elected by all of the country, will consider himself charged with watching over the entire nation rather than favoring particular parts.²³³ The President then "may justly be styled *the man*

226. McCarthy, *supra* note 60, at 691.

227. 1 FARRAND'S RECORDS, *supra* note 13, at 74; McDONALD, *supra* note 59, at 241.

228. McCarthy, *supra* note 60, at 691. For the classic statement, see THE FEDERALIST NO. 70 (Alexander Hamilton).

229. DiClerico, *supra* note 8, at 304.

230. WILSON, *supra* note 29, at 400.

231. 2 FARRAND'S RECORDS, *supra* note 13, at 254, 343; accord WILSON, *supra* note 29, at 400 ("The legislature, in order to be restrained, must be *divided*. The executive power, in order to be restrained, should be *one*. Unity in this department is at once a proof and an ingredient of safety and of energy in the operations of government.")

232. 2 FARRAND'S RECORDS, *supra* note 13, at 133. Madison sounded similar sentiments. *Id.* at 136.

233. 2 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 61, at 448.

of the people,”²³⁴ (emphasis added) a post-revolutionary concept typically associated with Andrew Jackson.²³⁵

These differences provide some justifications for dividing power that are distinct from the class-based system of mixed government. Because these classifications avoid the categorical approach of the strict separation of powers, they permit the development of checks and balances between the branches. For example, the legislature would be restrained by bicameralism and by the executive and judicial departments through the veto and judicial review.²³⁶

At the time, Wilson was quite concerned that the current structure would turn the President into a “Minion of the Senate.”²³⁷ He opposed the Senate’s initial role in resolving presidential elections that did not yield a clear electoral college majority, a role that was eventually transferred to the House of Representatives. Wilson similarly disliked the role of the Senate in ratifying treaties, which he also proposed be shifted to the House.²³⁸

But Wilson’s biggest concern during the closing days of the Convention was the Senate’s role in appointments. Wilson regarded appointments as an executive function and argued that giving that power to the legislature would create partiality and reduce accountability.²³⁹ The Committee of Detail had given the Senate the exclusive right to appoint judges and ambassadors.²⁴⁰ However, the Committee of Eleven transferred that power to the President, making nominations subject to confirmation by the Senate, while simultaneously expanding it to cover all executive officials.²⁴¹

Framing Wilson as a nonessentialist who cared about accountability as a means of promoting democracy provides a possible explanation for why he embraced augmenting the single executive with an advisory council during the waning days of the Convention. Wilson was more concerned about the lack of democratic accountability resulting from the blurring of responsibility than he was about the diminution of executive power.²⁴² In the process, he created a uniquely American vision of the separation of powers that preserved the checks and balances of mixed government without assuming any of the aristocratic baggage.²⁴³

234. McCarthy, *supra* note 60, at 693; *see also* 1 FARRAND’S RECORDS, *supra* note 13, at 133; 2 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 61, at 452. Wilson advanced similar views during the Pennsylvania Ratifying Convention. FORREST McDONALD, THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY 201 (1994). For a discussion of Wilson’s views and other historical antecedents, *see* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 96–97 (2008).

235. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 78 (1994).

236. *See* 1 FARRAND’S RECORDS, *supra* note 13, at 52.

237. 2 *id.* at 523.

238. *See id.* at 129–33.

239. 1 *id.* at 119; 2 *id.* at 41.

240. 2 *id.* at 169, 171.

241. *Id.* at 498–99; *see also* DiClerico, *supra* note 8, at 313.

242. DiClerico, *supra* note 8, at 314.

243. VILE, *supra* note 187, at 174–76.

D. Wilson, the Nationalist

Equally fundamentally, Wilson rejected the Virginia conception that civic virtue required that the country remain a small, agrarian republic. Drawing on an emerging “new science of politics” influenced by the Scottish school of political economy led by Adam Smith, Thomas Reid, and David Hume, Wilson developed a view that interaction with a large community developed civic virtue differently by underscoring people’s interdependence and shared human nature.²⁴⁴ A person elected by a broad electorate would not be obligated to “particular economic or local interest[s],” but instead would have to appeal to a wider range of people representing a broader range of interrelated interests.²⁴⁵ At the same time, participation in national elections would develop voters’ “public spirit” by heightening their awareness of the different ways of life in their larger community.²⁴⁶

Wilson saw the need to create a strong state broad enough to knit these different communities together into a single nation.²⁴⁷ His conception views the state as a potential edifier rather than a necessary evil.²⁴⁸ The lesson of the Articles of Confederation was that a government that is too weak can be as problematic as a government that is too strong. Equally important was ensuring that the federal government was not simply the minion of the state governments.²⁴⁹

CONCLUSION

What emerges is a vision of Wilson that is more complex than the idea of a simple adherent of strong executive power. Instead, Wilson’s positions were animated by a commitment to democracy, a keen awareness of institutional design, and a vibrant sense of how to create a national polity. That said, willingness to reallocate powers during the Framing does not necessarily authorize further reallocation after ratification. The balance enshrined in the Constitution was intended to be enduring.

More importantly, a comparison of Wilson’s vision for the nation with Madison’s is quite revealing. Madison hoped to create a plutocracy of small landowners with a limited franchise governed largely by a Senate comprised of the landed gentry. Wilson hoped to create a large, integrated nation with a strong commitment to broad-based democracy in which the Presidency was the preeminent institution. A moment’s reflection reveals that Wilson’s vision is the one that became a reality.

244. McCarthy, *supra* note 60, at 689–90.

245. *Id.* at 693.

246. *Id.* at 694.

247. McLaughlin, *supra* note 165, at 4–5.

248. McCarthy, *supra* note 60, at 690.

249. McLaughlin, *supra* note 165, at 6.