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# How the Separation of Powers Doctrine Shaped the Executive

Louis J. Sirico Jr.  
1567, [sirico@law.villanova.edu](mailto:sirico@law.villanova.edu)

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## HOW THE SEPARATION OF POWERS DOCTRINE SHAPED THE EXECUTIVE

Louis J. Sirico, Jr.\*

### ABSTRACT

This Article examines the debates of the Founders over the separation of powers doctrine as it relates to the executive branch. After surveying the experience in the colonies and under the post-Revolutionary state constitutions, it analyzes the relevant issues at the Constitutional Convention. Rather than focusing on abstract discussions of political theory, the article examines specific decisions and controversies in which separation of powers was a concern. The Article offers a detailed recounting of those debates.

At the Convention, separation of powers arose most prominently in the arguments over nine issues: choosing the Executive, permitting the Executive to stand for second term, removing the Executive, devising the Executive veto, requiring legislative advice and consent for executive appointments, authorizing the Executive to grant reprieves and pardons, and making the Vice President the President of the Senate.

The Article demonstrates that much of the discussion centered on allocating power between the Legislative and Executive branches and thus really amounted to a struggle over defining the nascent office of the Executive. It thus offers the historical background for today's debates over separation of powers. For the Founders, separation of powers served not as a rigid rule, but as a functional guide, designed to help construct a working constitution with a workable executive branch.

### I. INTRODUCTION

On July 17, 1787, the Constitutional Convention continued its discussion on how long the Executive should serve in office.<sup>1</sup> At this point in the proceedings, the deputies had voted to make the Executive eligible for re-election, and the question was whether his term of office should be seven years. Dr. James McClurg (Va.) offered the perhaps surprising motion that the President should serve “during good behavior,” that is, potentially for life.<sup>2</sup> Perhaps even more surprising is the vote on his motion. Although six state delegations voted against it, four

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\* Professor of Law, Villanova University School of Law.

1. See JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 306-13 (W.W. Norton 1987) (1840) [hereinafter MADISON'S NOTES]. For a synopsis of the proceedings at the Convention, see HAROLD H. BRUFF, BALANCE OF FORCES: SEPARATION OF POWERS IN THE ADMINISTRATIVE STATE 21-29 (2006).

2. See MADISON'S NOTES, *supra* note 1, at 310.

delegations voted in favor.<sup>3</sup>

The close vote might seem particularly surprising given the country's colonial history with executives. To be sure, a number of deputies thought the British Constitution offered an ideal form of government, but not one appropriate for this country, at least not yet. For example, Alexander Hamilton (N.Y.) could proclaim that "the British Government was the best in the world" and state that he "doubted much that any thing short of it would do in America."<sup>4</sup> He even

went so far as to state his opinion that "the people will in time be unshackled from their prejudices" against an elected monarchy.<sup>5</sup> In contrast, Charles Pinckney (S.C.) declared an elected monarchy to be "a monarchy, of the worst kind;"<sup>6</sup> however, he also stated his belief that the British Constitution was "the best Constitution in existence, but "one that can not be introduced into this Country for many centuries"<sup>7</sup> until an aristocratic class similar to the British peerage developed.<sup>8</sup>

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3. *See id.* at 313. New Jersey, Pennsylvania, Delaware, and Virginia voted for the motion. Massachusetts, Connecticut, Maryland, North Carolina, South Carolina, and Georgia voted against it. The New Hampshire delegation did not arrive at the Convention until July 23. *See id.* at 347. Rhode Island refused to send a delegation. *See James Madison, Preface to Debates in the Convention: A Sketch Never Finished nor Applied, in MADISON'S NOTES, supra* note 1, at 12-13 (noting Rhode Island's fear that a revision of the Articles of Confederation would reduce its ability to tax consumers from neighboring states who purchased goods imported through its ports).

4. MADISON'S NOTES, *supra* note 1, at 134 (also stating that his opinion of the British government was supported "by the opinions of so many of the wise & good").

5. *Id.* at 137.

6. *Id.* at 45.

7. *Id.* at 182.

8. *See id.* at 182-87 (arguing that the socioeconomic equality of the American people would greatly impede this development and thus require the country to create a governmental structure different than that of Britain); *see also id.* at 46 (Edmund Randolph (Va.)) (referring to the British government as "that Excellent fabric," but arguing that "the fixed genius of the people of America required a different form of Government"); *id.* At 56-57 (John Dickinson (Del.) (stating he considered a "limited Monarchy . . . as one of the best Governments in the world," but

George III, however, was an unpopular monarch. According to the Declaration of Independence, “[t]he history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states.”<sup>9</sup> And, as Benjamin Franklin pointed out, there had been many bad colonial governors.<sup>10</sup> This unpopularity of executives greatly influenced the drafters of the post-Revolutionary state constitutions, who, as one historian puts it, made the executives “essentially figureheads.”<sup>11</sup> In the words of Madison, [t]he Executives of the States are in general little more than Cyphers; the legislatures omnipotent.”<sup>12</sup>

Given this history, the support that McClurg’s motion received might seem perplexing unless the reader consults a footnote in James Madison’s notes. Madison tells us that McClurg probably sought merely “to enforce the argument against the re-eligibility of the Executive Magistrate, by holding out a tenure during good behaviour as the alternative for keeping him independent of the Legislature.”<sup>13</sup> He further discloses that no more than three or four of the

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not suitable for this country because of the lack of a “House of Nobles”) (emphasis in original).

9. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

10. See MADISON’S NOTES, *supra* note 1, at 601. As one historian has observed, “[o]ne legacy of colonial politics was a deep distrust of executives . . . .” DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 148 (1988). In the American colonies, the popularly elected legislatures had significant power over the governors, who were mostly appointed by the King.. The legislatures controlled financial appropriations as well as the militias. Moreover, in most colonies, there was no upper house populated by an aristocracy that might ally itself with the governor. Yet, the governors had social status and enjoyed the support of the British military, particularly in the form of the British navy. *See id.* at 147-48.

11. LUTZ, *supra* note 10, at 148.

12. MADISON’S NOTES, *supra* note 1, at 312. For a summary of the development of the executive office in the first state constitutions emphasizing the complexity of the deliberations, see WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 271-75 (Rita & Robert Kimber trans., Univ. Of North Carolina Press 1980) (1973).

13. MADISON’S NOTES, *supra* note 1, at 310 n.\*. Madison had an additional reason for giving aid to Dr. McClurg. McClurg was a friend of Madison’s and “though possessing talents of the highest order, was modest &

deputies truly favored a lifetime term and may not have supported the concept in the end.<sup>14</sup> According to Madison, a number of the affirmative voted “probably had it chiefly in view to alarm those attached to a dependence of the Executive on the Legislature, and thereby facilitate some final arrangement of a contrary tendency.”<sup>15</sup>

Underlying this debate was a concern over separation of powers. As Madison noted, “[a]n independence of the three great departments of each other, as far as possible, and the responsibility of all to the will of the community seemed to be generally admitted as the true basis of a well constructed government.”<sup>16</sup> With respect to the relevance of the separation of powers doctrine to this debate, Madison pointed to a particular reason for endorsing a sufficiently long term of office for the Executive. He thought it necessary to insure a strong counterweight to the Legislature and thus secure a stable government: “Experience had proved a tendency to throw all power into the Legislative vortex. . . . If no effectual check be devised for restraining the instability and encroachments of the latter, a revolution of some kind or other would be inevitable.”<sup>17</sup>

The debate over Dr. McClurg’s motion, then, was a debate between those believing that the Executive should be little more than an secretary to the Legislature and those believing it should be a separate, vital branch of the government. Given the debate’s background of the

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unaccustomed to exert them in public debate.” Madison’s support “was meant to aid in parrying the animadversions likely to fall on the motion of Dr. McClurg.” *Id.* at 311 n†.

14. *See id.* at 313 n\*.

15. *Id.*

16. *Id.*

17. *Id.* at 312. Madison uses the same metaphor in *The Federalist* to argue the need for checks and balances: “The legislative department [in the states] is every where extending the sphere of its activity, and drawing

American experience with monarchs, weak or unaccountable executives, and powerful state legislatures, it is easy to understand why establishing a strong national Executive proved to be such a struggle.

This debate suggested no ill reflection on George Washington, presumably the first President. However, it did indicate apprehension about the more distant future. Benjamin Franklin observed, “[t]he first man put at the helm will be a good one. No body knows what sort may come afterwards. The Executive will always be increasing here, as elsewhere, till it ends in a Monarchy.”<sup>18</sup> Franklin thus iterated a prominent theme of the era, that of corruption.<sup>19</sup> A corrupt Executive could destroy the American enterprise.

By the time of the Convention, Americans had moved away from the mixed government model of the British Constitution and accepted the doctrine of separation of powers.<sup>20</sup> By 1776,

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all power into its impetuous vortex.” THE FEDERALIST NO. 48, at 333 (James Madison) (Jacob E. Cooke ed. 1961).

18. MADISON’S NOTES, *supra* note 1, at 65-66.

19. It should be no surprise that the proponents of the Constitution were obliged to defend the document against arguments that it would foster corruption. In *The Federalist*, the theme of corruption arises nine times. See THE FEDERALIST, *supra* note 17, at 141-41 (NO. 22 (Hamilton) discussing the threat of corruption by foreign nations); at 376-77 (NO. 55 (Madison) arguing that a small House of Representatives of 65 delegates would not be susceptible to corruption); at 377 (NO. 55 (Madison) arguing that constitutional checks and the positive aspects of human nature limit the possibility of the President and the Senate making appointments to government positions in a corrupt manner); at 418 (NO. 62 (Madison) arguing that the need for the two houses in the legislature to act concurrently serves as a check on corrupt legislative conduct); at 437-38 (NO. 64 (Jay) arguing that the need for the President and two-thirds of the Senate to concur in the making of a treaty serves to prevent the making of treaties for corrupt purposes); at 459-60 (NO. 68 (Hamilton) arguing that the procedure for electing the President involves so many individuals that it makes corruption of the process extremely difficult and thus highly unlikely); at 505-06 (NO. 75 (Hamilton) arguing that requiring the concurrence of both the President and the Senate to make treaties serves as a check on corruption); at 514 (NO. 76 (Hamilton) arguing that the ability of a President to corrupt the Senate is impracticable because he would have to corrupt so large a number of Senators and because the Constitution provides checks on executive influence over the Senate); at 563 (NO. 83 (Hamilton) arguing that trial by jury serves as a check on corruption more in criminal cases than in civil cases). See THORNTON ANDERSON, CREATING THE CONSTITUTION: THE CONVENTION OF 1787 AND THE FIRST CONGRESS 166-72 (1993) (arguing that the anti-democratic biases in the Constitution stem in part from an effort to avoid corruption arising from the force of popular opinion).

20. See M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 175-76 (2d ed. 1998). The English theory of mixed government held that the presence in the legislature of the three

the perceived primary purpose of the doctrine was to separate a state's governmental branches in order to curb the executive power so that it could not corrupt the legislative and judicial branches.<sup>21</sup> In the ensuing years, the founding generation recognized the importance of employing the doctrine to limit the powers of the legislative and judicial branches as well as the executive branch.<sup>22</sup> In the words of historian Gordon Wood, [s]eizing upon this relatively minor eighteenth century maxim, the constitutional reformers in the years after 1776 exploited it with a sweeping intensity and eventually magnified it into the dominant principle of the American political system.”<sup>23</sup>

By 1787, the date of Constitutional Convention, Madison and others argued that the primary purpose of the separation of powers doctrine was to prevent the legislative branch from amassing too much power, particularly at the expense of the Executive.<sup>24</sup> For example, in debating the provision for Congressional override of a presidential veto, Madison noted: “It was an important principle in this & in the State Constitutions to check legislative injustice and incroachments. The Experience of the States had demonstrated that their checks are

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states of monarchy, aristocracy, and people would prevent the constitution from degenerating into the corrupt forms of tyranny, oligarchy, or anarchy. By contrast, separation of powers emphasized the qualitatively distinct *functions* performed by the legislative, executive, and judicial departments of government. In securing the *balance* that both principles were expected to promote, the two theories could be regarded as complementary, alternative, or even rival explanations of the “matchless constitution” that Britons and Americans revered.

JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 245-46 (1996) (emphases in original).

21. See GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 449 (1969).

22. See *id.*

23. *Id.*

24. See *id.* at 337-338; see also *id.* at 326 (stating that separation of powers is a “fundamental principle of free government”).

insufficient.”<sup>25</sup> And in *The Federalist No. 48*, Madison explained in detail why the Legislature had so much potential power and therefore why the proposed Constitution sought to limit its potential encroachments on the other branches:

[W]here the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate the multitude; yet not so numerous as to be incapable of pursuing all the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department, that the people ought to indulge all their jealousy and exhaust all their precautions.<sup>26</sup>

Throughout the Convention, the debate over separation of powers included an extensive debate over what power the Executive should enjoy and the extent to which the Executive and Legislative branches could exercise power over one another. Of the twelve most explicit discussions of the separation of powers doctrine, nine referred to the issues of how to select the executive,<sup>27</sup> what the executive’s term of office should be,<sup>28</sup> how to remove a derelict Executive,<sup>29</sup> or whether the Executive should exercise the veto power jointly with members of

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25. MADISON’S NOTES, *supra* note 1, at 629.

26. THE FEDERALIST NO. 48, *supra* note 17, at 334. Madison also noted two additional sources of a legislature’s power: (1) extensive constitutional powers that lack precise limits and thus permit encroachment on the other branches, and (2) its access to “the pockets of the people,” and thus influence over the pecuniary rewards of those who serve in the other branches, which may create a dependence of those individuals on the legislature. *See id.* *See also* VILE, *supra* note 20, at 155-60 (describing the extensive power of state legislatures in the post-Revolutionary period and the concerns that it raised).

27. *See* MADISON’S NOTES, *supra* note 1, at 49, 326 & 588.

28. *See id.* at 311-12 & 313n.\*.

29. *See id.* at 56.

the Judiciary.<sup>30</sup>

For example, the method of selecting the Executive proved a controversial subject throughout the Convention. Although the initial proposal called for election by the Legislature,<sup>31</sup> the deputies eventually rejected it,<sup>32</sup> because it could make the Executive dependent on that electing body.<sup>33</sup> On the other hand, the nature of the executive veto over the legislature also generated considerable debate.<sup>34</sup>

The deputies to the Convention were practical, experienced people<sup>35</sup> and most recognized that a complete separation of powers was an impossibility. Beginning with the deliberations leading to the Massachusetts Constitution of 1780,<sup>36</sup> American thinkers resuscitated

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30. *See id.* at 80, 338 & 340.

31. *See* MADISON'S NOTES, *supra* note 1, at 31.

32. The Convention encountered great difficulty in settling on a method of selecting the Executive. On July 19, the deputies voted in favor of an electoral system. *See id.* at 328. On July 24, they voted in favor of selection by the national legislature. *See id.* at 357. On July 26, they reaffirmed this decision and referred it and related provisions to the Committee of Detail. *See id.* at 372. On August 6, the Committee of Detail delivered its report, which continued to declare that the national legislature would select the Executive. *See id.* at 392. It also provided that the first national legislature would choose the first President. *See id.* at 395-96. On August 31, Gouverneur Morris successfully moved that the latter provision be stricken. *See id.* at 567. On the same day, the deputies voted to send to a Committee of Eleven "such parts of the Constitution as have been postponed, and such parts as have not been acted on . . ." *Id.* at 569. On September 4, the Committee proposed that the Executive be chosen by electors from the states who would be appointed "in such manner as [each] Legislature may direct . . ." *Id.* at 574. If no candidate received a majority or if more than one candidate received a majority, the Senate would make a selection from the five highest vote getters. *See id.* On September 6, the deputies approved replacing the Senate with the House as the final decision maker. *See id.* at 592. From this chronology, I have omitted an account of the many motions to refine the successful proposals and the unsuccessful motions to establish alternative methods of selection.

33. *See id.* at 576-77 (Gouverneur Morris summarizing reasons for employing an electoral college instead of the national legislature for selecting the Executive).

34. *See* ANDERSON, *supra* note 19, at 140-43 (summarizing the issues in this debate).

35. *See* FRAMERS OF THE CONSTITUTION 117-216 (James H. Charleton, Robert G. Ferris & Mary C. Ryan eds., 1986) (providing biographies of the deputies to the Convention).

36. *See* VILE, *supra* note 20, at 162-68 (recounting those deliberations).

the seventeenth century British notion of checks and balances.<sup>37</sup> As Madison later argued in *Federalist No. 48*, “unless these departments be so far connected and blended, as to give each a constitutional controul over the others, the degree of separation which the maxim [of the separation doctrine] requires as essential to a free government, can never in practice, be duly maintained.”<sup>38</sup>

This Article explores the debates of the Founders over separation of powers as it relates to the executive branch. After surveying the experience in the colonies and under the post-Revolutionary state constitutions, it analyzes the relevant issues at the Constitutional Convention. Rather than focusing on abstract discussions of political theory, the article examines specific decisions and controversies in which separation of powers was a concern. At the Convention, the debate arose most prominently in the arguments over nine issues: choosing the Executive, permitting the Executive to be eligible for second term, removing the Executive, devising the Executive veto, requiring legislative advice and consent for executive appointments, authorizing the Executive to grant reprieves and pardons, and making the Vice President the President of the Senate. The Article demonstrates that much of the discussion centered on allocating power between the Legislative and Executive branches and thus really amounted to a struggle over defining the nascent office of the Executive.

## II. PRELUDE: COLONIAL GOVERNORS AND STATE CONSTITUTIONS

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37. *See id.* at 135, 168-69 (describing the shift in thought).

38. THE FEDERALIST NO. 48, *supra* note 17, at 332.

### *A. Colonial Governors*

The reputation of America's colonial governors did not further the argument for a strong national executive. At the Constitutional Convention, Benjamin Franklin noted the corrupt conduct of Pennsylvania's colonial governor:

The negative of the Governor was constantly made use of to extort money. No good law whatever could be passed without a private bargain with him. . . . When the Indians were scalping the western people, and notice of it arrived, the concurrence of the Governor in the means of self-defence could not be got, till it was agreed that his Estate should be exempted from taxation: so that the people were to fight for the security of his property, whilst he was to bear no share of the burden.<sup>39</sup>

Corruption flowed from the nature of British politics in the eighteenth century. The political structure was based on the power of the monarch--and the colonial governor-- to bestow patronage and emoluments. As Gordon Wood has noted, the Americans "knew only too well how society was organized by intricate and personal ties to men of power."<sup>40</sup>

The power of the governors over the colonial legislatures also raised the ire of Americans. A governor might dismiss officers from the militia if their votes in the legislature displeased him.<sup>41</sup> If a legislature was compliant, a governor might decline to call a new election.

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39. MADISON'S NOTES, *supra* note 1, at 62. *See also id.* at 601 (Franklin stating that "many bad governors" had been appointed in the past).

40. WOOD, *supra* note 21, at 147.

41. *See id.* at 157.

On the other hand, he might choose to rule on his own and neglect to call the body into session.<sup>42</sup>

Antipathy toward the colonial governors, however, resulted from more than the issue of corruption. In the royal colonies, the governor had ruled with the advice of a governor's council, which consisted of the upper house of the legislature and which had a membership drawn from the colonial gentry, that is, the aristocratic class of society. This collaboration suggested a "mixed government" model far removed from a "separation of powers model" bottomed on a democratic base, which was gaining popularity in America.<sup>43</sup> As one historian described the political situation:

The Governor was not, of course, a true "executive officer." He did execute the decisions of the colonial legislature but his power was much greater than this. He exercised royal prerogatives, and could attempt to coerce the legislature. He played an essential role in the passage of legislation, and had powers of prorogation and dissolution. But his power was even greater than that of the King in the balanced constitution, for he claimed to exercise powers over the government of the colony which no monarch claimed any longer to exercise in Britain itself.<sup>44</sup>

One historian has observed that "[T]he responsibility of the royal governor to the home government had placed him in much the same relation to the local assemblies as that in which

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42. *See id.* at 166.

43. *See VILE, supra* note 20, at 139-40. *See also supra* note 20-23 and accompanying text (describing reasons for the growing popularity of the separation of powers doctrine).

44. VILE, *supra* note 20, at 144-45.

the Stuart kings had been to the Commons.”<sup>45</sup> James Wilson (Pa) recognized that the difficulty lay in the accountability of the governors to a foreign source. “[T]hey were regulated by foreign maxims: they were directed to a foreign purpose. Need we be surprised, that they were objects of aversion and distrust? Need we be surprised, that every occasion was seized for lessening their influence, and weakening their energy?”<sup>46</sup>

Initially, the colonists decried the extensive gubernatorial power as symptomatic of an imbalanced constitution. Over time, however, they articulated their discontent as a concern with a lack of a proper separation of powers.<sup>47</sup> Thus, the idea of a mixed and balanced government gave way to a democratic version of separation of powers that eschewed monarchical and aristocratic power.<sup>48</sup> Separation of powers was not a new idea; one historian has described it as a “relatively minor eighteenth century maxim.”<sup>49</sup> Yet, it had received considerable attention in the political theories of such relatively modern thinkers as James Harrington, Marchamont Nedham, John Locke, Henry St. John Bolingbroke, Charles-Louis de Secondat Montesquieu, William Blackstone, Jean-Jacques Rousseau, and Emmanuel-Joseph Sieyès<sup>50</sup> as well, to some degree in

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45. CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY, 1775-1787: A STUDY IN CONSTITUTIONAL HISTORY* 14 (Liberty Fund 2007) (1922). See Louis J. Sirico, Jr., *The Trial of Charles I: A Sesquicentennial Reflection*, 16 *CONST. COMMENT.* 51, 52 (1999) (briefly describing the conflicts of Charles I with Parliament, ending when the Puritan-controlled army took over Parliament and had it order a trial of Charles for treason).

46. See THACH, *supra* note 45, at 15 n.3 (quoting Wilson).

47. See VILE, *supra* note 20, at 140, 144-45.

48. See *id.* at 132-33.

49. WOOD, *supra* note 21, at 449. See *supra*, text accompanying n.23 for the full quotation.

50. See GERHARD CASPAR, *SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD* 8 (1997). Caspar also notes the commonly recognized fact that these writers often conflated the notion of separation of powers with the arguably incompatible notion of mixed government.

the theories of such classical thinkers as Aristotle and Polybius.<sup>51</sup>

### *B. The Post-Revolutionary State Constitutions*

In light of the unfortunate history with colonial governors, it is unsurprising that when it came time for Americans to write their state constitutions, they generally would insist on powerful legislatures and extremely weak executives. As Thomas Jefferson observed: “Before the Revolution we were all good English Whigs, cordial in their free principles, and in their jealousies of their executive Magistrates.” These jealousies are very apparent in all our state constitutions.<sup>52</sup>

This reallocation of political authority to the legislatures, however, did not mean a rejection of separation of powers, at least in theory. That doctrine explicitly made its way into the state constitutions of Virginia,<sup>53</sup> Maryland,<sup>54</sup> North Carolina,<sup>55</sup> Massachusetts,<sup>56</sup> New

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51. See VILE, *supra* note 20, at 39-40; see also CASPAR, *supra* note 50, at 9-10 (noting the respect that John Adams had for Polybius).

52. See THACH, *supra* note 45, at 14 n.2 (quoting Jefferson).

53. See VA. CONST. of 1776, para 2.

54. See MD. CONST. of 1776, A DECLARATION OF RIGHTS, § VI.

55. See N.C. CONST. of 1776, A DECLARATION OF RIGHTS, § IV.

56. See MA. CONST. of 1780, A DECLARATION OF RIGHTS, art. XXX. After considerable delays brought on by a conflict over who should draft the state constitution, the state house of representatives and the council—a body of 28, which sat as the upper house, the executive and the supreme judicial tribunal—sat as a convention and proposed a constitution, which the voters rejected. See VILE, *supra* note 20, at 164-65. Between 1779 and 1780, a constitutional convention, beset with delays, drafted a new constitution, which town meetings considered, article by individual article. When the majority of a town’s voters rejected an article, the town meeting often proposed an alternative. In 1780, faced with a confusing set of responses from the towns, the convention declared that the constitution had received the approval of two-thirds of the voters. See ADAMS, *supra* note 12, at 86-93.

Hampshire<sup>57</sup>, and Georgia.<sup>58</sup> Perhaps Virginia's constitution offered the most complete statement of the doctrine in its strictest form:

The legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other: nor shall any person exercise the powers of more than one of them, at the same time; except that the Justices of the County Courts shall be eligible to either House of Assembly.<sup>59</sup>

In accepting the doctrine, the former colonists claimed that they rejected the structure of most previous colonial governments. However, the new structures did not necessarily reflect that doctrine. For example, the colonists had seen the extensive power of the governors as resulting in an imbalanced constitution. In the new state constitutions, the governorships were far from separate independent branches of government. They had advisory councils elected by the legislatures or by popular vote. If the governor acted against the council's advice, the council

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57. See N.H. CONST. of 1784, THE BILL OF RIGHTS, para. XXXVII. In 1775 and 1776, a convention drafted a provisional constitution, which was unpopular, at first, with those opposed to independence from Britain, and later with the small inland towns, who complained that they were underrepresented in state legislature. That constitution provided that the house of representatives would choose a council of twelve members "to be a distinct and separate branch of the Legislature . . ." N.H. CONST. OF 1776, para. 3; see ADAMS, *supra* note 12, at 68-70, 266. In 1779, town meetings rejected another proposed constitution. See *id.* at 70.

58. See GA. CONST. of 1777, art. I. No provisions addressed separation of powers in the New Jersey Constitution of 1776, the Pennsylvania Constitution of 1776, or the South Carolina Constitution of 1776. Three constitutions declared a separation of the branches of the state legislature. See DEL. CONST. of 1776, art. 2 ("two distinct branches"); N.Y. CONST. of 1777, art. II ("two separate and distinct bodies of men"); S.C. CONST. of 1778, art. II ("two distinct bodies"). Connecticut and Rhode Island relied on their colonial charters and adopted no true constitutions until 1818 and 1842, respectively. See CT. CONST. of 1776, para. 1 (declaring that the royal charter of 1662 would continue as the civil constitution of the state). Rhode Island adopted no similar document declaring that it was continuing to follow its royal charter of 1663.

59. VA. CONST. of 1776, para. 2.

was expected to file a formal dissent.<sup>60</sup> Moreover, in most states, the legislature appointed the governor's subordinate officials.<sup>61</sup>

In practice, then, the post-revolutionary state governments typically offered only a nod to the doctrine of separation of powers. With respect to the first post-Revolution constitutions, one historian has concluded: "With one exception, that of New York, they included almost every conceivable provision for reducing the executive power to a position of complete subordination."<sup>62</sup> When the executive acted, the legislature would regularly decide that the executive had intruded onto turf that belonged to the legislative branch.<sup>63</sup>

According to some historians, the primary result of the separation of powers doctrine was to bar the same individual from serving in both the executive and legislative branches but allowing many intrusions by the legislative branch on the other branches.<sup>64</sup> On the other hand, the doctrine also separated the executive from the lawmaking function of the legislative branch.<sup>65</sup>

During the next few years, however, the executive branch gained comparatively more independence in the later constitutions of New York, Massachusetts, and New Hampshire.<sup>66</sup> The words of these constitutions suggest a sophisticated understanding of the practical limits on

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60. See RAKOVE, *supra* note 20, at 252; THACH, *supra* note 45, at 16.

61. *See id.*

62. THACH, *supra* note 45, at 15-16.

63. *See id.* at 17-22.

64. See EDWARD S. CORWIN, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention in AMERICAN CONSTITUTIONAL HISTORY* 1, 4-5 (Alpheus T. Mason & Gerald Garvey ed. 1964 (giving the New Hampshire experience as an example); VILE, *supra* note 20, at 147-49 (generally agreeing, but noting that the actual degree of separation varied from state to state).

65. See VILE, *supra* note 20, at 148.

66. See THACH, *supra* note 45, at 23-39 (offering a detailed accounting of the drafting of these documents).

implementing a separation of powers doctrine.

The New Hampshire Constitution recognized that a strict separation of powers might not be possible or in the best interests of a free government:

In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from and independent of each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.<sup>67</sup>

The New York Constitution awarded the governor considerable power. The citizenry elected the governor. The governor could veto legislation, but only as part of a revisionary council that also included the state supreme court judges and the chancellor. A two-thirds majority of both houses was required to overrule the veto. Although the lower house of the legislature could initiate impeachment proceedings, conviction could come only from a special council consisting of senators, the chancellor, and state supreme court judges.<sup>68</sup> The New York Constitution also gave the governor a role in making political appointments by including him in a Council for Appointments whose other members were four senators.<sup>69</sup> Thus this constitution suggested an acceptance of checks and balances, that is, sacrificing strict separation in favor of permitting the branches to share some powers so that one branch could check the conduct of the

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67. N.H. CONST. of 1784, THE BILL OF RIGHTS, para. XXXVII

68. See ADAMS, *supra* note 12, at 268 (summarizing N.Y. CONST. of 1777, art. III, XVII & XXXII).

69. See ADAMS, *supra* note 12, at 274 (summarizing N.Y. CONST. of 1777, art. XXIII & amend. V). The New York Constitution initially provided that the governor would have “a casting voice, but no other vote . . . .” The amendment clarified this ambiguous wording to provide that the vote was “vested concurrently” in the governor and council members.

other branches.<sup>70</sup>

The Massachusetts Constitution also gave the governor considerable power. A popular vote served as the method for selecting the governor.<sup>71</sup> Although the state constitution also established an executive council, the governor was authorized to call together its members at his discretion and employ it in an advisory capacity.<sup>72</sup> The governor also enjoyed the check of a legislative veto power, subject to an override by two-thirds of both houses of the legislature.<sup>73</sup> New Hampshire's 1784 constitution followed the Massachusetts scheme, although it did not grant its executive a legislative veto.<sup>74</sup>

Although the state constitutions suggest some common themes, particularly in their delegation of most authority to the legislature and their reliance on the separation of powers doctrine, they also suggest a lack of consensus on other issues. The drafters of the constitutions disagreed on how much power to grant the executive<sup>75</sup> and on whether government works best with a strict separation of powers or with some sharing of powers in order to provide for checks and balances on the governmental branches.<sup>76</sup> A concern about structuring government to avoid

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70. See VILE, *supra* note 20, at 147 (recognizing New York's contribution to American constitutional theory).

71. See MA. CONST. of 1780, Part II, ch. II, § I, art. III.

72. See *id.* at Part II, ch. II, § I, art. IV-VI.

73. See *id.* at Part II, ch. I, § I, art. II. The prominence of checks and balances in the Massachusetts constitution was encouraged by the "Essex Result" in which Essex County called for greater executive authority and the use of checks and balances. See VILE, *supra* note 20, at 164-67; THACH, *supra* note 45, at 33-36 (discussing the Essex Result).

74. See THACH, *supra* note 45, at 39.

75. See VILE, *supra* note 20, at 169 (identifying this issue).

76. See *id.* at 168-69 (identifying this issue).

or minimize corrupt conduct also underlay this dialogue.<sup>77</sup>

Because of this diverse background, the deputies to the Constitutional Convention were of differing minds on these issues. In addition, although the deputies had previous experience on the state level, they now were dealing with these issues on the national level where their deliberations had to consider the demands of this new political context. These issues were intertwined; in sorting them out, views of the deputies on separation of powers had decisive influence on the process of defining the Executive.

### III. THE CONSTITUTIONAL CONVENTION AND THE EXECUTIVE

The deputies to the Convention focused on the separation of powers doctrine with respect to seven issues concerning the executive branch: choosing the Executive, permitting the Executive to stand for a second term, devising the executive veto, requiring legislative advice and consent on executive appointments, authorizing the Executive to grant reprieves and pardons, and making the Vice President the President of the Senate. On these issues, the debate made clear how interconnected were the questions of how much power the Executive should enjoy, how strictly the separation of powers doctrine should apply, and how effective a variety of checks and balances might prove.<sup>78</sup>

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77. See *supra* text accompanying notes 39 & 40.

78. The index to a leading edition of *Madison's Notes* highlights how much the debate over separation of powers focused on the executive branch. See MADISON'S NOTES, *supra* note 1, at 673. In that edition, under the heading "separation of powers," the index lists ten references to the executive branch (*see id.* at 49, 56, 80, 311-12, 313 n\*, 326, 338, 340, 588 & 596), three references to summaries of proceedings thus far or to drafts of the final document (*see id.* at 115, 379 & 385) and two to general allusions to the doctrine (*see id.* at 34-35 & 124).

## A. Choosing the Executive

Determining the method for selecting the Executive proved to be one of the Convention's most difficult tasks. It did not fully resolve the issue until the very end of the three and one-half month session.<sup>79</sup> Proposed methods included election by the national legislature, popular vote, state legislatures, state executives, and popularly chosen electors.<sup>80</sup> One concern was how to insure that the Executive would not become dependent on whoever selected him. Yet, Roger Sherman (Ct.), at this point fearful of a strong executive, declared that he favored election by the national legislature, making the executive "absolutely dependent" on the national legislature "as it was the will of that which was to be executed."<sup>81</sup> In his opinion, an "independence of the Executive on the supreme Legislature was . . . the very essence of tyranny if there was any such thing."<sup>82</sup>

The prevailing sentiment, however, favored separating the executive and legislative branches. Gouverneur Morris (Pa.) elaborated on dangers of corruption and the threat of legislative tyranny.

If the Legislature have the Executive dependent on them, they can perpetuate & support their usurpations by the influence of tax-gatherers & other officers, by fleets armies, etc. Cabal & corruption are attached to that mode of election . . . .

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79. See *supra* note 32 (providing a chronology of the major votes on the issue).

80. See MADISON'S NOTES, *supra* note 1, at 370 (George Mason (Va.) summarizing the proposed choices and finding them all unsatisfactory).

81. *Id.* at 48.

82. *Id.*

Hence the Executive is interested in Courting popularity in the Legislature by sacrificing his Executive Rights; and then he can go into that Body, after the expiration of his Executive office, and enjoy there the fruits of his policy. To these considerations he added that rivals would be continually intriguing to oust the President from his place.<sup>83</sup>

The question, then, was what alternative method should the deputies choose. James Wilson (Pa.) advocated appointment by popular vote in an effort to make the legislative and executive departments “ as independent as possible of each other, as well as of the states.”<sup>84</sup> He was the first to suggest selecting the executive with an electoral system in which citizens would choose electors who would make the choice.<sup>85</sup>

James Madison also agreed it was essential that “the appointment of the Executive should either be draw from some source, or held by some tenure, that will give him a free agency with regard to the Legislature.”<sup>86</sup> Like Wilson, he preferred popular election<sup>87</sup> and reiterated the separation of powers concern, noting that a coalition of the executive and legislative powers “would be more immediately & certainly dangerous to public liberty [than would be a coalition of the legislative and judicial branches].”<sup>88</sup>

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83. *Id.* at 525. Morris had previously made the same point and had urged popular election of the Executive, evidencing an sanguine trust in the people: “If the people should elect, they will never fail to prefer some man of distinguished character, or services; some man . . . of continental reputation.” *Id.* at 306.

84. *Id.* at 49.

85. *See id.* at 50.

86. *Id.* at 327.

87. *See id.* at 365; *see id.* at 363-66 (Madison reiterating this point).

88. *Id.* at 326-27.

Oliver Ellsworth (Ct.) offered a different solution: Authorize the national legislature to choose an Executive, but if the Executive chooses to seek a second term, authorize the state legislatures to appoint electors to decide the election.<sup>89</sup>

Elbridge Gerry (Ma.) also opposed authorizing the legislature to appoint the executive and emphasized the threat of corruption that it entailed: “[I]t would lessen that independence of the Executive which ought to prevail, would give birth to intrigue and corruption between the Executive and Legislature previous to the election, and to partiality in the Executive afterwards to the friends who promoted him.”<sup>90</sup> However, always fearful of the democratic impulse, he rejected popular election and instead, proposed an electoral system in which the state executives would choose electors.<sup>91</sup>

The Convention eventually reached a consensus on employing an electoral system;<sup>92</sup> however, it still faced the problem of deciding how to select the Executive if more than one candidate received an equal number majority of votes or if no candidate received a majority of electoral votes. A committee proposed authorizing the Senate to choose one of the majority candidates as President, and if no candidate received a majority of electoral votes, authorizing the Senate to choose the President from among the five highest vote getters.<sup>93</sup>

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89. *See id.* at 363.

90. *Id.* at 93.

91. *See id.* at 93 & 327. Gerry later modified his proposal. He suggested permitting the state executives to appoint the Executive “with the advice of their Councils and where there are no Councils by Electors chosen by the Legislatures.” *Id.* at 363.

92. A committee with representatives from all states in attendance proposed the shift to electors. *See id.* at 574. Gouverneur Morris (Pa.) justified the shift on several grounds, including “the indispensable necessity of making the Executive independent of the Legislature” and the impossibility of corrupting the electors. *Id.* at 577. At this point, the controversy on the issue came to a halt.

93. *See id.* at 574.

The proposal failed to garner unanimous approval. Alexander Hamilton (N.Y.) disapproved of the “mutual connection and influence” that the proposal would create between the two branches.<sup>94</sup> Charles Pinckney (S.C.) feared the mode of election would make the Executive “the mere creature” of the Senate.<sup>95</sup> James Wilson argued that the proposal had a “dangerous tendency toward aristocracy” in that it gave too much power to the Senate:<sup>96</sup> “They will have in fact, the appointment of the President, and through his dependence on them, the virtual appointment to offices; among others the offices of the Judiciary Department. They are to make Treaties; and they are to try all impeachments.”<sup>97</sup>

In response to these concerns and with little debate, the Convention later shifted the responsibility to the House, the less aristocratic body and the body having fewer entanglements with the Executive.<sup>98</sup>

These deliberations illustrate how strongly the separation of powers doctrine influenced the method of selecting the Executive and led to a method closely related to popular election. To avoid executive dependency on the legislative branch, the deputies explored a variety of alternative methods and ultimately settled on an electoral system. The chosen system permitted considerable reliance on the democratic voice. In addition, by reducing the disproportionate voting power that the heavily populated states enjoyed, the use of electors prevented those states from completely controlling the outcome.

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94. *See id.* at 589.

95. *See id.* at 582.

96. *See id.* at 587.

97. *Id.*

98 *See id.* at 592 (providing the vote).

Without the concern over separation of powers, it is doubtful that the deputies would have turned to a system that would so reflect popular sentiment. Instead, they likely would have delegated the power of appointment to the Senate or House.

When the deputies faced the problem of breaking ties and resolving close election contests, situations some expected to occur regularly,<sup>99</sup> they were willing to violate the strict version of the separations of powers doctrine by assigning that responsibility first to the Senate and later to the House. Shifting the forum to the House also reflected in part a concern over separation of powers. In addition to being the more democratic legislative branch, the House was also comparatively less entwined with the Executive.

#### B. Permitting the Executive to Seek a Second Term

Closely connected with the issue of appointing the Executive was the issue whether an Executive could seek reelection. If the Executive were chosen by the national legislature, and eligible for a second term as well, the Executive wishing a second term might decide to assume a submissive role with respect to the Legislature and become dependent upon it. Moreover, if he courted reappointment, as Edmund Randolph (Va.) noted, he might exercise his powers in a way “subservient to the views of the Large States,” which would control the Legislature.<sup>100</sup>

On the other hand, as Gouverneur Morris (N.Y.) stated, ineligibility for an additional

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99. *See. e.g., id.* at 577 (George Mason (Va.) arguing that if the Senate were to decide the inconclusive elections, “nineteen times out of twenty the President would be chosen by the Senate, an improper body for the purpose.”); *see id.* at 582 & 589 (Charles Pinckney (S.C.) and Alexander Hamilton (N.Y.), respectively, making the same point.)

100. *Id.* at 325.

term “tended to destroy the great motive to good behavior, the hope of being rewarded by a re-appointment.”<sup>101</sup> To make the legislature independent of the Legislature, Morris favored popular election.<sup>102</sup> Oliver Ellsworth (Ct.) agreed with Morris: “And he will be more likely to render himself, worthy of [reelection] if he be rewarded with it.”<sup>103</sup>

The deputies also considered how the threat of impeachment should affect their decision. Rufus King (Ma.) favored reeligibility, because he believed that the benefit of reelecting a good Executive outweighed the danger of dependency on the Legislature, especially because the threat of impeachment would deter misconduct.<sup>104</sup> Other deputies proposed banning reelection, but establishing a longer term of office, perhaps relying on impeachment as a sufficient check on the Executive.<sup>105</sup>

During the debate, one deputy proposed rotation of office as an alternative to reelection. Charles Pinckney (S.C.) unsuccessfully proposed that no one elected Executive by the Legislature could serve for more than six years out of every twelve years. In his view, this method would eliminate the need to ban reelection.<sup>106</sup>

When a committee of deputies proposed employing an electoral system to select the

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101. *Id.* at 310; *see id.* at 323-26 (Morris making the same point).

102. *See id.* at 325.

103. *Id.* at 358.

104. *See id.* at 358.

105. *See id.* at 358 (Luther Martin (Md.) proposing an 11 year term, Elbridge Gerry (Ma.) Proposing a 15 year term, William Davie proposing an 8 year term). In contrast, in most state constitutions, where the legislature enjoyed considerable power, the typical term for an executive was one year. *See VILE, supra* note 20, at 156.

106. *See id.* at 366.

Executive,<sup>107</sup> it argued that the change obviated the need to prohibit reelection.<sup>108</sup> Once the Convention adopted the proposal, objections to reelection quickly died out. The concern over reelection, then, was tied to the separation of powers concern that permitting the legislative branch to select the Executive would compromise the independence of the individual that it appointed.

### C. Removing the Executive

The Convention debated how to deal with an Executive who was performing his duties in a highly inappropriate manner. Some deputies rejected the notion of removing an Executive and advocated relying on his leaving office at the end of his term.<sup>109</sup> Perhaps they were accustomed to the practice under the state constitutions, which made no provisions for the recall of a legislator or governor during a term of office.<sup>110</sup> This position assumed a relatively short term of office and the right to seek reelection. Most, however, supported establishing a method for impeachment. The issue dividing the deputies was which body would make the decision to

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107. *See id.* at 574. The proposal included no ban on reelection and thus implicitly permitted reelection. Gouverneur Morris (Pa.) spoke to the Convention on behalf of the committee and made the committee's position clear. *See infra* note 108 and accompanying text.

108. *See id.* at 576 (Gouverneur Morris (Pa.) indirectly making this point). *But see id.* at 577 (Hugh Williamson (N.C.) objecting that reelection "will endanger the public liberty"), *id.* at 582 (Charles Pinckney (S.C.) & John Rutledge (S.C.) objecting to reeligibility even under an electoral system).

109. *See id.* at 331 (Gouverneur Morris (Pa.) & Charles Pickney (S.C.)), 333 (Rufus King (Ma.)). Morris later reversed his position. *See id.* at 335.

110. *See ADAMS, supra* note 12, at 244 (stating this fact). The South Carolina Constitution of 1776 did authorize an absolute executive veto. *See S.C. CONST. of 1776*, art. VII. The state's 1778 constitution, however, did not. Most state governors served for a single term and presumably would not be able to continue corrupt conduct in office for very long. *See ADAMS, supra* note 12, at 245 (providing term lengths for governors, senators, representatives, and councillors for each state).

impeach. The most appropriate candidate seemed to be the national legislature. Yet, this solution raised the problem of separation of powers.

At an early stage in the Convention when the deputies assumed that the Legislature would select the Executive, John Dickinson (De.) unsuccessfully proposed removal of the Executive by the National Legislature at the request of the majority of the state legislatures.<sup>111</sup> Presumably under the proposal, tiny Delaware would have an equal vote with heavily populated Virginia. However, Dickinson based his proposal on his concern with maintaining a separation of powers. He argued that “the Legislative, Executive, and Judiciary departments ought to be made as independent as possible,” but that a very independent Executive “was not consistent with a republic; that a firm Executive could only exist in a limited monarchy.”<sup>112</sup> In the absence of a limited monarchy, Dickinson staked the stability of the Executive on the support it could enjoy from the dual branches of the national legislature and the separate states.<sup>113</sup> Therefore, he proposed involving the states in any effort to remove the Executive.

George Mason (Va.) agreed that some procedure for removal was necessary. However, he “opposed decidedly the making of the Executive the mere creature of the Legislature as a violation of the fundamental principle of good Government.”<sup>114</sup>

Following the failure of Dickinson’s motion, Hugh Williamson (N.C.) and William Davies (N.C.), successfully moved that the Executive “be removeable on impeachment and

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111. *See* MADISON’S NOTES, *supra* note 1, at 55. Only Delaware voted for Dickinson’s proposal. *See id.* at 57.

112. *Id.* at 56.

113, *See id.* at 56-57.

114. *Id.* at 56.

conviction of mal-practice or neglect of duty.”<sup>115</sup> These grounds are far broader than the grounds in the final document: “Treason, Bribery or other high Crimes and Misdemeanors.”<sup>116</sup> The broad grounds made the Executive quite vulnerable to impeachment. By granting the Legislature such power, the deputies indicated that they did not view the Executive as a strong, independent branch of government and were willing to risk excessive executive dependence on the Legislature.

The issue, however, was far from settled. In a later debate, Charles Pinckney (S.C.) argued that if the Legislature held the power of impeachment, it would hold impeachment “as a rod over the Executive and by that means effectively destroy his independence.”<sup>117</sup> Pinckney seemed to assume that the Executive would not be strong branch of government: “He presumed that [the Executive’s] powers would be so circumscribed as to render impeachments unnecessary.”<sup>118</sup>

Rufus King (Ma.) largely agreed that impeachment was inadvisable and took the strict separationist position. He urged “the primitive axiom that the three great departments of Government should be separate and independent . . . .”<sup>119</sup> He would not permit impeachment unless the Executive should serve “during good behavior” and even then would not grant the authority to impeach to the Legislature, because such an arrangement “would be destructive of

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115. *Id.* at 58.

116. U.S. CONST. art. 2, § 4.

117. MADISON’S NOTES, *supra* note 1, at 333.

118. *Id.* at 335.

119. *Id.* at 333.

[the Executive's] independence and of the principles of the Constitution.”<sup>120</sup>

By July 20, the Convention had decided overwhelmingly that the Executive should be subject to impeachment.<sup>121</sup> Yet, on the closing days of the convention, John Rutledge (S.C.) and Gouverneur Morris (Pa.) moved “that persons impeached be suspended from their office until they be tried and acquitted.”<sup>122</sup> James Madison successfully opposed the motion arguing that the Executive “is made too dependent already on the Legislature, by the power of one branch to try him in consequence of an impeachment by the other. This intermediate suspension, will put him in the power of one branch only.”<sup>123</sup>

With respect to authorizing impeachment, the major contrary argument was that a removal process would violate the separation of powers doctrine and thus make the Executive too dependent on the Legislature. Yet, even during a time when selection of the Executive lay within the province of the Legislature, the deputies were willing to set aside the objection in order to establish a mechanism for removing an Executive who engaged in misconduct. The deputies thus showed that they were willing to modify a strict separation of powers by adding a check by one branch on another. Moreover, by making the procedure for removal cumbersome, they gave the Executive—and the Judiciary—more independence than they otherwise might have enjoyed.<sup>124</sup>

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120. *Id.* at 334.

121. *Id.* at 335.

122. *Id.* at 635.

123. *Id.*

124. See BRUFF, *supra* note 1, at 311 (making this point).

#### D. Devising the Executive Veto

The Virginia Plan, the set of proposals that the Convention first considered, provided that a Council of Revision should have veto power over the national legislature with the Council consisting of “the Executive and a convenient number of the National Judiciary.”<sup>125</sup> The proposal perhaps offered a compromise with the precedent of the state constitutions that did not authorize an executive veto.<sup>126</sup> However, the proposal failed and gave way to a veto exercised by the Executive alone, but with the option of a legislative override.<sup>127</sup>

With the defeat of the proposal for a revisionary council, James Wilson (Pa.) and James Madison immediately moved for an alternative in which the Executive and some members of the federal judiciary would exercise a joint legislative veto.<sup>128</sup> On three occasions, Wilson and Madison unsuccessfully moved for a veto exercised by both these branches.<sup>129</sup>

As might be expected, the proposal met with the objection that it would defeat the doctrine of separation of powers. Elbridge Gerry (Ma.) argued that the proposal would bind together the Executive and Judiciary “in an offensive and defensive alliance against the Legislature, and render the latter unwilling to enter into a contest with them.”<sup>130</sup> Nathaniel

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125. *Id.* at 32.

126. *See* LUTZ, *supra* note 10, at 105-06. *See also* ADAMS, *supra* note 12, at 273 (describing the failure of John Adams to include an executive veto in the Massachusetts constitution). New York’s constitution provided for an executive veto three-fifths legislative override. The executive veto would be exercised by the governor, the chancellor, and the judges of the state’s supreme court, or any two of them. *See* N.Y. CONST. of 1777, art. III.

127. *See* MADISON’S NOTES, *supra* note 1, at 66.

128. *See id.* at 66.

129. *See id.* at 66, 79-81, 336-43 & 461-62.

130. *Id.* at 342

Ghorum (Ma.) feared that giving the Judiciary a share of the revisionary power would affect how judges would later carry out the exposition of the law in deciding cases.<sup>131</sup> He further noted that under the proposal “the Judges would outnumber the Executive [and] the revisionary check would be thrown entirely out of the Executive hands, and instead of enabling him to defend himself, would enable the Judges to sacrifice him.”<sup>132</sup>

In support of the proposal, Madison argued that combining with Executive with the Judiciary would encourage the Executive to stand firm in pursuing the public interest and in avoiding corrupting temptations.<sup>133</sup> He further argued that the arrangement would “enable the Judiciary Department to better defend itself against Legislative encroachments.”<sup>134</sup> But perhaps the primary concern was that the Legislature would overwhelm the other branches. He brought home his point with a striking metaphor:

Experience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex. This was the real source of danger to the American Constitutions; and suggested the necessity of giving every defensive authority to the other departments that was consistent with republican principles.<sup>135</sup>

Madison saw no violation of the separation of power doctrine. Rather, he thought of the

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131. *See id.*

132. *Id.* at 343.

133. *See id.* at 79 & 337.

134. *Id.*

135. *Id.* at 338. Madison had previously used the same metaphor. *See id.* at 312 & *supra* note 17 and accompanying text.. He repeated it during the ratification debates. *See* THE FEDERALIST NO. 48, *supra* note 17, at 333.

proposal as “an auxiliary precaution in favor of the maxim;” it added a “defensive power” to each branch that would secure the branch’s independence.<sup>136</sup> Madison pointed to the British constitutional practices of admitting judges to the House of Lords and executive councils where they could review certain laws and of permitting the King to veto legislation.<sup>137</sup> He further noted that if joining the Executive and Judicial into a revisionary body was an improper mixture of powers, then so was granting a veto to the Executive alone.<sup>138</sup>

Wilson also denied any violation of the separation of powers doctrine. “The separation of the departments does not require that they should have separate objects but that they should act separately though on the same objects.”<sup>139</sup>

After the final defeat of the proposal by Madison and Wilson, the Convention expressed its concern over the lack of a sufficient check on the Legislature by voting to change the legislative override of a veto so that an override would require a three-fourths vote by each House, as opposed to a two-thirds vote.<sup>140</sup> In the final days of the Convention, however, it reversed itself and reverted to requiring only a two-thirds vote out a fear that a three-fourths override put too much power in the hands of the Executive.<sup>141</sup>

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136. *See* MADISON’S NOTES, *supra* note 1, at 340.

137. *See id.* at 341. Madison neglected to point out that the British monarch had not exercised the veto power against Parliament since 1708. *See* EDWARD GREGG, QUEEN ANNE 144 (2001) (Queen Anne’s veto of the Scottish Militia Bill). However, the royal governors regularly exercised their veto power over colonial laws. The British monarch override these vetoes. *See* EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 140 (1989).

138 *See id.*

139. *Id.* at 342.

140. *See id.* at 462-65.

141. *See id.* at 627-29. In opposition to the reversal, Gouverneur Morris (Pa.) and Alexander Hamilton (N.Y.) argued that in New York, a two-thirds override vote had proven ineffective in curbing legislative abuses. *See*

The proposal by Madison and Wilson and the ensuing debate demonstrates how checks and balances can clash with the separation of powers doctrine. Although the deputies were ready to award the Executive a qualified veto over the Legislature, they were unwilling to go so far as to permit the Executive and Judiciary to combine against the Legislature. The argument that the Legislature possessed too great a potential for abuse, as documented by the conduct of the state legislatures, proved insufficiently strong to justify so strong a check on it. Still, it seems remarkable that Madison and Wilson should have felt so strongly about the abuse of legislative power that they repeatedly raised an arguably extreme proposal that offered no chance of approval.<sup>142</sup>

Madison later argued that the veto protected the Executive from encroachments by the Legislature.<sup>143</sup> He further argued that because the veto involved both branches in law making, it helped insure that only good legislation would gain approval.<sup>144</sup>

Underlying the deliberations must also have been a lingering fear of the Executive. The

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*id.* at 628. Madison pointed out that [w]hen 3/4 was agreed to, the President was to be elected by the Legislature and for seven years. He is now to be elected by the people and for four years.” *Id.* at 629. It is unclear how this observation confirmed Madison’s vote in favor of a three-quarters vote. Popular election would increase the independence of the Executive, while a short term would seem to make him less independent.

142. The votes on the proposal were 3-8 (*See id.* at 81); 3-4, with Pennsylvania and Georgia divided and New Jersey not present (*See id.* at 343); and 3-8 (*See id.* at 462). New York’s constitution, however, contained a very similar arrangement. *See supra* note 124.

143. “Without [the veto] the [Executive] would be absolutely unable to defend himself against the depredations of the latter. He might gradually be stripped of his authorities by successive resolutions, or annihilated by a single vote.” THE FEDERALIST NO. 73, *supra* note 17, at 494-95.

144. The power in question has a further use. It not only serves as a shield to the executive, but it furnishes an additional security against the enactment of improper laws. It establishes a salutary check upon the legislative body calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body.

*Id.* at 495.

debate over whether the legislative override should require a two-thirds or three-fourths vote demonstrates the concern over granting the Executive too much power.

#### E. Requiring Legislative Advice and Consent on Executive Appointments

In developing a provision governing executive appointments, the deputies followed an increasingly complex course and arrived at a sophisticated resolution. The Virginia Plan, the first proposal that the Convention considered, made no mention of who should appoint the various national officers. Early in the deliberations, however, James Madison successfully moved that the Executive should have the power “to appoint to offices in cases not otherwise provided for . . . .”<sup>145</sup> He thus departed from the rule in most states granting the power of appointment to the legislature.<sup>146</sup>

Later, Alexander Hamilton (N.Y.) suggested, but did not make a motion for a more specific statement of this authority: “to have the sole appointment of the heads or chief officers of the departments of Finance, War and Foreign Affairs; to have the nominations of all other officers (Ambassadors to foreign Nations included) subject to the approbation or rejection of the Senate . . . .”<sup>147</sup> This proposal followed a speech in which Hamilton advocated a strong Executive with lifetime tenure.<sup>148</sup> Thus it is noteworthy that even Hamilton would place a senatorial check on a great number of important executive appointments.

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145. MADISON’S NOTES, *supra* note 1, at 47.

146. *See* CASPAR, *supra* note 50, at 13.

147 MADISON’S NOTES, *supra* note 1, at 138.

148. *See id.* at 136-37.

Yet, even by early August, the Convention’s Committee of Detail could draft a broad grant of power to the Executive and face no opposition: “[H]e shall commission all officers of the United States; and shall appoint officers in all cases not otherwise provided for in this Constitution.”<sup>149</sup> However, the Committee’s proposal delegated to the Senate the power to appoint ambassadors and judges of the Supreme Court,<sup>150</sup> and to the Legislature, the election of the Treasurer.<sup>151</sup> The Committee thus adhered to a strict separation of powers. Rather than these two branches of government collaborating or checking one another, each would make different appointments independent of the other. Moreover, it allocated some of the most significant appointments to the Senate.

Both Gouverneur Morris (Pa.) And James Wilson (Pa.) objected to the proposal. Morris stated that he considered the Senate “as too numerous for the purpose; as subject to cabal and as devoid of responsibility.” Moreover, if the Senate were to have the power to try judges for impeachment, “it was particularly wrong to let the Senate have the filling of vacancies which its own decrees were to create.”<sup>152</sup>

Near the end of the Convention, a committee proposed increasing the number of appointments that the Executive could make, but also proposed a limitation on the Executive’s discretionary authority:

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149. *Id.* at 392. Under the proposal of the Committee of Detail the House would have the power to choose its Speaker and other officers. *See id.* at 386. The Senate would have the power to choose its President and other officers. *See id.* at 387. The deputies later agreed to reword the authorization to the Executive for the sake of clarity. The new wording stated that the Executive “shall appoint to all offices established by this Constitution, except in cases herein otherwise provided for, and to all offices which may hereafter be created by law.” *Id.* at 527.

150. *See id.* at 391.

151. *See id.*

152 *Id.* at 517 ( including both quotations).

The President by and with the advice and Consent of the Senate, shall have the power to make Treaties; and he shall nominate and by and with the advice and consent of the Senate shall appoint ambassadors, and other public Ministers, Judges of the Supreme Court, and all other Officers of the U.S., whose appointments are not otherwise herein provided for.<sup>153</sup>

James Wilson of Pennsylvania unsuccessfully objected that this mode of appointing “as blending a branch of the Legislature with the Executive.”<sup>154</sup> He argued that a good executive must have “a responsible appointment of officers to execute,” and that “[r]esponsibility is in a manner destroyed by such an agency.”<sup>155</sup> Aside from some support from Charles Pinckney of South Carolina,<sup>156</sup> and George Mason’s proposal for a privy council for the Executive,<sup>157</sup> Wilson stood alone.

Later, Gouverneur Morris successfully moved to authorize Congress to “vest the appointment of such inferior offices as they think proper, in the President alone, in the Courts of law, or in the heads of Departments.”<sup>158</sup>

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153. *Id.* at 575.

154. *Id.* at 598.

155. *Id.*

156. *See id.*

157. *See id.* at 596-97.

158. *Id.* at 647. The Constitution thus states that the Executive: shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, to the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2 cl. 2.

In the end, the deputies had moved from giving the Executive unfettered discretion, to dividing authority over appointments between the Executive and Senate, to increasing the Executive appointment power, but with a Senatorial check on the major appointments. From a separation of powers perspective, the deputies moved from a strict separation of powers to a system of checks and balances. In return for greater breadth of authority, to the dismay of some deputies, the Executive lost a degree of autonomy. Nonetheless, the Executive had gained considerable power. As one authority on separation of powers has argued, authorizing the Executive to make appointments to the judiciary and to positions central to foreign policy, “was a critical step toward a unified executive that could implement its own vision of foreign policy, and that could leave an enduring mark on the federal judiciary.”<sup>159</sup>

#### F. Authorizing the Executive to Grant Reprieves and Pardons

With relatively little debate, the deputies authorized the Executive to grant pardons. Alexander Hamilton (N.Y.) first suggested establishing the power in the Executive, although he would have not permitted a pardon for treason.<sup>160</sup> Later in the Convention, the Committee of Detail proposed that [The Executive] shall have the power to grant reprieves and pardons; but his pardon shall not be pleadable in bar of an impeachment.”<sup>161</sup> Only Roger Sherman attempted to check the Executive’s discretion by making an overwhelmingly unsuccessful motion authorizing

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159. BRUFF, *supra* note 1, at 390.

160. *See* MADISON’S NOTES, *supra* note 1, at 138.

161. *Id.* at 392. The Convention later adopted a more felicitous rephrasing: “[H]e shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.” *Id.* at 623.

the Executive “to grant reprieves and pardons until the ensuing session of the Senate, and pardons with consent of the Senate.”<sup>162</sup>

The issue of separation of powers arose briefly when Edmund Randolph (Va.) unsuccessfully moved to exempt treason from the crimes that the Executive could pardon. The fear of corruption motivated him: “The prerogative of power in these cases was too great a trust. The President himself may be guilty. The Traytors may be his own instruments.”<sup>163</sup>

Rufus King (Ma.), however, directly addressed the separation of powers concern. He declared that assigning the pardoning power for treason to the Legislature “would be inconsistent with the Constitutional separation of the Executive and Legislative powers . . . .”<sup>164</sup> King regarded the Legislature as overly governed by passions of the moment and therefore unfit for the task. Instead, he suggested permitting the Executive to grant pardon in these cases, but to require the concurrence of the Senate.<sup>165</sup> Madison offered an alternative. He agreed that the pardon of treasons was “so peculiarly improper for the President” and preferred “an association of the Senate as a Council of advice, with the President.”<sup>166</sup> Randolph, however, objected to combining the Executive and the Senate in this task as “ a great danger to liberty.”<sup>167</sup> On this issue, then, the separation of powers arguments failed, perhaps because the deputies did not see a great danger to liberty arising from investing the pardoning power in one branch of government.

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162. *Id.* at 534. Only Connecticut voted in favor of Sherman’s motion.

163. *Id.* at 646.

164 *Id.* at 646.

165. *See id.*

166. *Id.*

167. *Id.*

## G. Making the Vice President the President of the Senate

The notion of creating the office of Vice President arose late in the Convention.<sup>168</sup> The only responsibility given the office holder was to preside over the Senate. Roger Sherman (Ct.) explained the necessity of giving him this responsibility: “If the vice-President were not to be President of the Senate, he would be without employment, and some member by being made President must be deprived of his vote, unless when an equal division of votes might happen in the Senate, which would be but seldom.”<sup>169</sup>

Although the deputies approved of this proposal, they first engaged in a brief debate concerning the issue of separation of powers. Elbridge Gerry (Ma.) objected that the close intimacy of the President and Vice-President made the proposal improper.<sup>170</sup> George Mason (Va.) argued that “such an officer as vice-President [was] an encroachment on the rights of the Senate; and that it mixed too much the Legislative and Executive, which as well as the Judiciary departments, ought to be kept as separate as possible.”<sup>171</sup> The vote favoring the proposal, however, was decisive.<sup>172</sup> Practical considerations seemed to override any concern over separation of powers.

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168. On September 4, a committee proposed the office to the Convention. *See id.* at 575.

169. *Id.* at 596.

170 *See id.*

171. *Id.*

172. *See id.* at 597 (the Convention voting 8-2 with one state absent).

#### IV. CONCLUSION

The separation of powers doctrine played a significant role in shaping the Executive. Concern over violating the doctrine led to an electoral system that bottomed the branch on the people and threw close elections to the House, the more democratic legislative body. These results, in turn, opened the door to the possibility of reelection.

Concern over separation of powers, however, proved insufficiently compelling to deprive Congress of the power to remove an Executive for serious misconduct. On this matter, the need to check one branch with another prevailed.

The notion of checks and balances also played a significant role in constructing the executive veto. Without the legislative override, the executive veto doubtless would have proven unacceptable. As for executive appointments, concern over excessive executive power led to granting the Senate a concurring role and thus weakened the Executive. Concern over separation of powers, however, failed to prove strong enough to curb the Executive's power to pardon and to create a vice presidency.

During the course of the Convention, the resolution of these issues helped the notion of the Executive grow stronger. Perhaps the most significant contributions to this growth were the decisions to embrace a modified popular election and to permit an executive veto. Given the background of the post revolutionary state constitutions with their weak executives and powerful legislatures, these decisions could not have come easily.

Although these decisions had theoretical foundations, the deputies still acted

pragmatically. When strict separation seemed impractical, they were willing to accept some intermingling of powers and adopt checks and balances, as, for example, with the executive veto and senatorial advice and consent on appointments. When these approaches seemed unnecessary, as with the pardoning power and the creation of the vice presidency, they were willing to disregard them. For the deputies, separation of powers served not as a rigid rule, but as a functional guide, designed to help construct a working constitution with a workable executive branch.<sup>173</sup>

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173. “Axioms alone, however, do not solve problems; specific calculations are always needed to derive the desired results. In practice, the entire enterprise of constitution making in revolutionary America centered on determining which forms of republican government were best suited as securing the general principles all accepted.” RAKOVE, *supra* note 20, at 19; *see* ADAMS, *supra* note 12, at 118-24 (illustrating this point).