

Creating the Presidency

During the course of the Constitutional Convention, the presidency developed along two main lines. First, the loosely designed executive of the Virginia Plan took on greater clarity and specificity. Second, the weak executive, which was subordinate to the legislature and initially seemed to be favored by most delegates, was made stronger. These two developments manifested themselves at the convention in a variety of specific issues of executive design. The issues included the number of the executive, the methods of executive selection and succession, the length and character of the term of office, the means of removing the executive in extraordinary circumstances, the institutional separation of the executive from the legislature, and the enumerated powers of the executive.

THE MAKING OF THE PRESIDENCY: AN OVERVIEW

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

One problem the delegates encountered was that their experience offered several models of what they did not want in an executive but few models that they found attractive. The British monarch and the royal colonial governors had been, in their eyes, trampers of liberty. The constitutions that the states wrote after independence provided for governors who were unthreatening but

also weak to the point of impotence. The national government of the Articles of Confederation, such as it was, had no chief executive at all.

A second problem that stymied the delegates derived from their general ambivalence about executive authority. They wanted an executive that was strong enough to enforce the law and check a runaway legislature but not so strong as to become despotic. This ambivalence was shared by the American people, whose hatred of monarchy existed side by side with their longing to make George Washington king. As political scientist Seymour Martin Lipset has shown, Washington was a classic example of what the German sociologist Max Weber called a charismatic leader, one “treated as endowed with supernatural, superhuman, or at least specifically exceptional powers or qualities.”² Historian Marcus Cunliffe records:

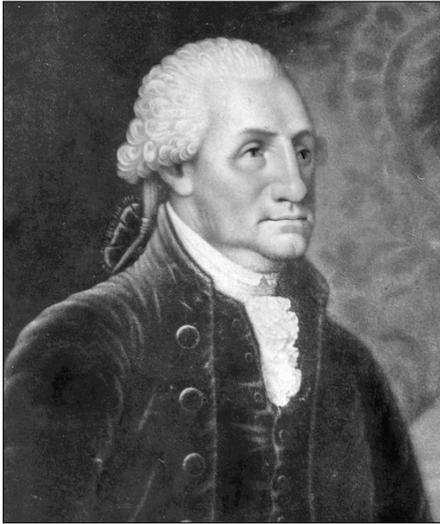
Babies were being christened after him as early as 1775, and while he was still President, his countrymen paid to see him in waxwork effigy. To his admirers he was “godlike Washington,” and his detractors complained to one another that he was looked upon as a “demigod” whom it was treasonous to criticize. “Oh Washington!” declared Ezra Stiles of Yale (in a sermon of 1783). “How I do love thy name! How have I often adored and blessed thy God, for creating and forming thee into the great ornament of humankind!”³

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

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

GREATER CLARITY

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



George Washington, hero of the American Revolution and presiding officer of the Constitutional Convention, was to many people the personification of the new republic and of the presidency.

Source: Library of Congress.

Madison himself claimed no role in creating the presidency. As he wrote to George Washington on April 16, 1787, less than a month before the scheduled opening of the convention, “I have scarcely ventured as yet to form my own opinion either of the manner in which [the executive] ought to be constituted or of the authorities with which it ought to be clothed.”⁷ Madison’s Virginia Plan offered the convention a shadowy and vaguely defined national executive. Even the basic structure of the executive—whether it would be a single person, a chaired board, or a committee—was unclear. In addition, the length of the executive’s term was not specified, and its powers were not enumerated.⁸

Madison’s fellow delegates seem to have shared his uncertainty. The only issues they resolved to their satisfaction during the convention’s first two months were the unitary nature of the executive and its power to veto laws passed by the legislature, subject to override. The Committee of Detail, which began its work on July 24, helped matters some: it gave the executive the name *president*, provided for succession, and enumerated the powers of the office. But the main issues that divided the delegates—the president’s selection, term, and reeligibility—were not resolved until September, when the Committee on Postponed Matters proposed selection by an Electoral College, a four-year term with no limit on eligibility for reelection, and the creation of the vice presidency.

GREATER STRENGTH

For all the vagueness of its conception, the national executive of the Virginia Plan generally accorded with what most delegates at the start of the Constitutional Convention seem to have been seeking: an agent of restraint in a basically legislative government. The executive in Madison’s proposal was weak (it was bound by a council and devoid of enumerated powers), but it certainly was stronger than in the one-branch legislative government of the Articles of Confederation. The executive also was subordinate to the legislature, which was empowered to

elect it. But it was not subservient, as demonstrated by its fixed term, the veto power, and the bar on legislative reductions of the executive's salary.

Dissatisfied with the convention's early inclination toward a subordinate executive, a coterie of committed and talented delegates worked diligently and effectively to strengthen the office's constitutional power. They were led by two Pennsylvania delegates: James Wilson, who envisioned the executive as "the man of the people," and Gouverneur Morris, who regarded a properly constituted executive as "the great protector of the Mass of the people."⁹ Although Wilson and Morris both favored a strong executive, they did so for different reasons. Morris thought that a strong executive would restrain public opinion.¹⁰ Wilson thought that such an executive would enhance the influence of public opinion. Historian Richard Beeman accurately describes Wilson as the only delegate who envisioned presidents "much like those we have today—vigorous and powerful, but based firmly on the will of the people."¹¹ Despite these differences, during the course of the convention, the pro-executive group won victory after victory. Once the architects of the Constitution had resolved to strengthen the national government—to create self-government on a grand scale—they had no recourse, it seemed, but to attempt to reconcile popular government with executive power.

NUMBER OF THE EXECUTIVE

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

UNITARY OR PLURAL?

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

On June 1 the convention, meeting as the Committee of the Whole, heard a motion from Wilson that the executive be a single person. According to Madison's notes, "a considerable pause ensu[ed]" as the usually talkative delegates lapsed into silence.¹² They were discomforted by the prospect of discussing the issue in the presence of George Washington, whom everyone assumed would be the first leader of whatever executive branch they created.¹³ After Franklin admonished his colleagues to speak freely, however, the debate was joined. The issue became an early test for the pro-executive delegates at the convention.

Edmund Randolph of Virginia and Sherman led the fight against Wilson's motion. Randolph, arguing that a single executive, by its nature, would be the "foetus of monarchy," proposed instead a three-person committee, with one member from each region of the country. Sherman, who regarded the ideal executive "as nothing more than an institution for carrying the will of the Legislature into effect," said he "wished the number might not be fixed, but that the legislature should be at liberty to appoint one or more as experience might dictate."¹⁴ Franklin argued that the policies pursued by an executive board would be less easily changed and, therefore, more stable and consistent than those of an individual. In addition, he pointed out that the death or disability of an executive board member would not pose problems of succession, unlike the death or disability of a single executive.¹⁵

Wilson defended his motion shrewdly. To be sure, he argued, a single executive would be a source of "energy" and "dispatch"—that is, of vigorous and timely action—in the new government. But Wilson also claimed that a single executive was indispensable to controlling executive power—how could responsibility for incompetence or abuses of power be assigned to a committee?¹⁶ These arguments were persuasive to most delegates. They feared monarchy, but they also realized how much the national government had suffered under the Articles of Confederation from the diffuseness of executive responsibility. As property owners, they worried about threats to the social order such as Shays's Rebellion and regarded a single executive as more likely than a committee to respond quickly and effectively to riot and discord.

On June 4 the convention voted strongly for a unitary executive. One of Washington's few recorded votes was in favor of this motion. Washington's concern to unify executive responsibility was born of his experience as commander in chief of the revolutionary forces. Lacking clear administrative authority, even in the appointment of his own officers, he complained bitterly of having "power without the means of execution when these ought to be coequal at least."¹⁷ On average, the most vocal proponents of a unitary executive were nearly fifteen years younger than the opponents. The reason for this discrepancy, political scientist Richard J. Ellis has argued, is that "the views of executive power of the older delegates were colored by their battles against the royal governors. The younger delegates who had come of age during the 1770s and 1780s were more worried about the weakness of executive power in the state constitutions and the Articles of Confederation."¹⁸

A COUNCIL?

The Virginia Plan provided that a "council of revision" consisting of the executive and "a convenient number of the National Judiciary" would be created to veto laws passed by the legislature. All thirteen state constitutions provided for

councils of various sorts, most of which were legislatively selected. Sherman, who voted in the end for the single executive, said that he had done so only because he assumed it would be forced to share power with a council. Wilson, however, opposed a council because he believed that such a body would dilute the virtues of the unitary executive—energy, dispatch, and responsibility.

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

The council idea recurred in several guises throughout the convention. Morris and others tried to persuade the delegates to enact a purely advisory council, consisting mainly of the heads of the executive departments.¹⁹ As late as September 7, George Mason of Virginia suggested that the House of Representatives or the Senate be charged to appoint an executive council with members from all regions of the country. “The Grand Signor himself had his Divan,” Mason noted, drawing from Ottoman history.²⁰ But because no consensus ever formed about either the wisdom of having a council or the form it should take, the idea was abandoned.

SELECTION AND SUCCESSION

Wilson was as much opposed to the clause in the Virginia Plan that provided for the executive “to be chosen by the National Legislature” as he was in favor of a unitary executive. Legislative selection would make the executive a creature of (and therefore subservient to) the legislature, Wilson believed. On June 1 he proposed instead that the executive be elected by the people. Wilson said he realized that his idea “might appear chimerical,” but he could think of no better way to keep the executive and legislative branches “as independent as possible of each other, as well as of the states.”²¹

The delegates dismissed Wilson’s proposal for popular election. To some, the idea was just too democratic. (They thought democracy was suited only for small polities.) In addition, by requiring voters to pass judgment on candidates from distant states of whom they knew little or nothing, popular election seemed impractical. Mason stated both of these objections cogently: “It would be as unnatural to refer the choice of a proper character for chief Magistrate to the people, as it would, to refer a trial of colours to a blind man.”²² Speaking on behalf of the southern delegates, Madison added a more

overtly political point: in direct elections, candidates from the more populous North almost always would win.²³

Undiscouraged, Wilson returned to the convention on June 2 with a proposal for an Electoral College to select the executive. For purposes of election, each state would be divided into a few districts. The voters in these districts would choose electors, who in turn would gather at a central location to elect the executive. A plan similar to Wilson's was accepted in principle on July 19 and a modified version ultimately was adopted in September. But in the early days of the convention it still seemed too novel.²⁴ Delegates feared the mischief that might ensue when the electors met, perhaps instigated by agents of foreign governments. They also doubted whether "men of the 1st nor even of the 2d. grade" would be willing to serve as electors.²⁵ The delegates voted instead to affirm the legislative selection provision of the Virginia Plan.

The convention's decision to adopt legislative selection of the executive, although it was reaffirmed in several votes taken in July and August, was not a happy one. The source of the unhappiness was that, in the delegates' minds, a legislatively selected executive could not be allowed to stand for reelection lest executive powers and patronage be used, in effect, to bribe legislators for their votes. But the delegates also believed that the prospect of reelection was a valuable incentive to good performance in office and regretted that legislative selection ruled out executive reeligibility. The result was an ongoing search for a selection process that was desirable in its own right and also allowed for reelection. This was no easy task. In the memorable description of political scientist Robert A. Dahl, "The Convention twisted and turned like a man tormented in his sleep by a bad dream as it tried to decide."²⁶ Of the ideas the delegates considered and rejected, wrote Clinton Rossiter, some were rather far-fetched:

election by the state governors or by electors chosen by them, neither a scheme that could muster any support; nomination by the people of each state of "its best citizen," and election from this pool of thirteen by the national legislature or electors chosen by it, an unhelpful proposal of John Dickinson; election by the national legislature, with electors chosen by the state legislatures taking over whenever an executive sought reelection, a proposal of [Oliver] Ellsworth that found favor with four states; and, most astounding of all, election by a small group of national legislators chosen "by lot."²⁷

The search for an alternative to legislative selection became more urgent after August 24. Until that day, no consideration had been given to how the legislature would choose the president. Now, by a vote of seven states to four, the convention approved a motion that Congress would elect the president by a "joint ballot" of all the members of the House of Representatives and Senate, following the practice most states used to elect their governors. This decision, by giving the large states a clear majority in the presidential selection process,

threatened to reignite the controversy between large and small states that had already split the convention once. To avert this catastrophe, Sherman, the author of the Connecticut Compromise between the large and small states on legislative apportionment, moved on August 31 to refer the whole issue of presidential selection to the Committee on Postponed Matters.

On September 4 the committee proposed the Electoral College as a method to elect the president, with no restriction on the president's right to seek reelection. The president would be selected by a majority vote of the electors, who would be chosen by the states using whatever method each state decided to adopt. (The delegates expected that in time most states would entrust the selection of electors to the people.²⁸) Every state would receive electoral votes equal in number to its representation in Congress. If no presidential candidate won the votes of a majority of electors, the Senate would elect the president from among the five highest electoral vote recipients. To prevent a cabal from forming in the Electoral College, electors would never meet as a national body—instead, they would vote in their state capitals and then send the results to the Senate for counting. Finally, to ensure that the electors would not simply support a variety of home-state favorites, each was required to vote for two candidates for president, at least one from a different state (an idea first proposed by Gouverneur Morris on July 25), with the runner-up in the presidential election filling the newly created office of vice president.

The proposal for an Electoral College was generally well received by the delegates, who realized, as committee member John Dickinson later wrote, that “the Powers which we had agreed to vest in the President were so many and so great that I did not think the people would be willing to deposit them with him unless they themselves would be more immediately concerned in his Election.”²⁹ As political scientist Andrew Rudalevige has noted, “The Electoral College [was] very much a salesman’s straddle, allowing proponents of popular election and legislative selection both to tout its provisions.”³⁰ Fred Barbash has listed several ways in which the proposal was “baited” with something for virtually every group at the convention:

For those in the convention anxious for the President to be allowed reelection, the committee made him eligible without limit.

For those worried about excessive dependence of the President on the national legislature, the committee determined that electors chosen as each state saw fit would cast ballots for the presidency.

For the large states and the South, the committee decided that the number of electors would be proportioned according to each state’s combined representation in the House and Senate. . . .

For the small states, the committee determined that when no candidate won a majority of electoral votes, the Senate would choose the president from among the leading contenders.³¹

Only one aspect of the proposed Electoral College proved controversial among the delegates: Senate selection of the president in the absence of an Electoral College majority for any candidate. Large-state delegates objected because the Senate underrepresented them in favor of the small states. Moreover, not foreseeing the development of a two-party system, some delegates believed that, after Washington (the obvious choice as the first president), majorities seldom would form in the Electoral College, and the Senate would choose most presidents. George Mason estimated that the Electoral College would fail to reach a majority “nineteen times in twenty.”³²

Sherman proposed what historian Carol Berkin has called “a brilliant solution”: let the House of Representatives elect the president if the Electoral College failed to produce a majority, but assign each state’s House delegation a single vote.³³ The Senate still would choose the vice president in the event of a tie. Quickly, on September 6, the convention agreed.

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

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

TERM OF OFFICE

Questions about length of term, eligibility for reelection, and selection were so interwoven in the minds of the delegates that they could not resolve any one

of them without resolving the others. Indeed, one political scientist has compared their efforts to sort out these questions to a game of “three-dimensional chess.”³⁴

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

Underlying the delegates’ uncertainty was the relationship between two aspects of the executive that they eventually came to regard as incompatible: eligibility for reelection and legislative selection. Mason explained why the Constitution could not include both: if the legislature could reelect the executive, there would be a constant “temptation on the side of the Executive to intrigue with the Legislature for a re-appointment,” using political patronage and illegitimate favors to buy legislators’ votes.³⁵

Nevertheless, on July 17 the convention voted for both legislative selection and reeligibility. When James McClurg of Virginia pointed out the contradiction between these two decisions, the one-term limit on the executive was reinstated. McClurg, supported by Morris and by Jacob Broom of Delaware, offered a different way out of the dilemma: election of the executive by the legislature for a life term. But this proposal smacked too much of monarchy to suit the other delegates.

On July 24 and 26 the convention voted again to have the legislature select the executive for a single seven-year term. But the advantages the delegates saw in reeligibility were so powerful that the issue remained alive. Reeligibility would allow the nation to keep a good executive in office and give the executive what Morris called “the great motive to good behavior, the hope of being rewarded with a re-appointment.”³⁶ In that era, “Ambition was neither a Christian nor a republican virtue . . .” biographer Fred Kaplan has written. “Honor and rewards should search out deserving men, not be sought after.”³⁷ Nevertheless, Alexander Hamilton later argued in *Federalist* No. 72, even an executive whose behavior was governed by personal motives such as “ambition,” “avarice,” or “the love of fame” would do a good job in order to hold onto the office that could fulfill those desires.³⁸ More ominously, Morris warned: “Shut the Civil road to Glory & he may be compelled to seek it by the sword.”³⁹

To complicate their task further, the delegates’ choice between legislative selection and reeligibility implied a related decision between a short term and

a long term. If the executive were chosen by the legislature for a single term only, the delegates believed, the term should be long. If the executive were eligible for reelection, it should be short.

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

REMOVAL

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

IMPEACHMENT

Impeachment, a traditional practice of the British political system, has deep historical roots. During the seventeenth century, as Richard Ellis has written, impeachment of the king's ministers and councilors by the House of Commons, with trial by the House of Lords, "became a tool in Parliament's struggle to rein in the power of the monarchy and to make ministers of the Crown accountable to Parliament."⁴⁰ In the eighteenth century, when the House of Commons gained the power to force ministers to resign after a vote of no confidence, impeachment waned in importance. But the tradition of executive accountability remained.

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

The convention's consensus on impeachment became apparent on June 2, when the Committee of the Whole passed North Carolina delegate Hugh Williamson's motion that the executive be "removable on impeachment and conviction of malpractice or neglect of duty."⁴¹ (Impeachment is analogous to indictment by a grand jury; it must be followed by a trial and conviction for the impeached official to be removed from office.) The consensus was

confirmed and strengthened on July 19, when Gouverneur Morris suggested that, if the executive were assigned a short term of office, there would be no need for impeachment because the passage of time would lead to the executive's removal soon enough. Morris was answered the next day by Gerry, Randolph, Franklin, and Mason, all of whom made clear that they regarded impeachment not only as a vital safeguard against and punishment for abuses of power but also (at least in Franklin's view) as a way to remove tyrants without having to resort to assassination. Morris retreated, declaring that he was persuaded by his colleagues' arguments.

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

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

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

DISABILITY

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

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

INSTITUTIONAL SEPARATION FROM CONGRESS

Many of the delegates were strongly influenced by the idea that, to preserve liberty, government should incorporate the principle of separation of powers. Various political philosophers of the Enlightenment, including England's John Locke, had articulated this idea, but no version was more familiar to the delegates than that of French writer Baron de Montesquieu. As the author of *L'Esprit des lois* (The Spirit of the Laws) in 1748, Montesquieu was "the oracle who is always consulted and cited" on the subject of separation of powers, wrote Madison in *Federalist* No. 47. One passage in Montesquieu's book, which the delegates knew well and Madison quoted, stated: "When the legislative and executive powers are united in the same person or body, there can be no liberty because apprehensions may arise lest *the same* monarch or senate should enact *tyrannical laws to execute* them in a tyrannical manner. . . . Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*."⁴⁴

As applied in the Constitution, the separation of powers principle did not require a strict division of labor in which each branch of the government was assigned complete and exclusive power to perform certain functions. Indeed,

the Constitution assigns few powers to the federal government that are not shared by two or more branches. To the delegates, separation of powers actually meant something more like “separated institutions sharing powers”—that is, a joint exercise of the government’s powers by an executive and legislature whose membership does not overlap.⁴⁵

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

SALARY

Immediately after the clause stating that the executive shall be chosen by the legislature, the Virginia Plan provided that the executive shall “receive punctually at stated times, a fixed compensation for the services rendered, in which no increase or diminution shall be made so as to affect the Magistracy existing at the time of increase or diminution.” In view of the Virginia Plan’s brevity and generality, the level of detail in this provision is remarkable, as is the priority Madison assigned to it. Clearly, Madison feared that the legislature might either infringe on executive independence by lowering the executive’s salary or reward or entice the executive by increasing the salary.

During the course of the convention, the provision for executive salary was modified only slightly. The delegates eventually added a stipulation that “he shall not receive within [his term of office] any other Emolument from the United States, or any of them.” On June 2 Franklin urged that the executive not be compensated at all. To attach a salary to the position, he said, “united in view of the same object” two “passions which have a powerful influence on the affairs of such men. These are ambition and avarice, the love of power, and the love of money. . . . Place before the eyes of men a post of *honor* that shall be at the same time a place of *profit*, and they will move heaven and earth to obtain it.”⁴⁶ The delegates gave Franklin’s words courteous attention but no more. Their concern was to protect the executive from the legislature, not to create an office that only the rich could afford to occupy.

MEMBERSHIP

The delegates’ commitment to separating membership in Congress from the executive branch did not waver. The Virginia Plan said that legislators were “ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to the functions of the first branch [the legislature], during the term of service, and for the space of _____ after its expiration.” The final document, although lifting the

restriction on legislators holding executive office after they left Congress, included essentially the same provision: “no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.” The Constitution also prohibited members of Congress from serving as electors in presidential elections.

The delegates wanted to keep the membership of the legislative and executive branches separate to prevent the executive from, in effect, bribing members of Congress with jobs and salaries. On June 22 Pierce Butler of South Carolina, supported by Mason, “appealed to the example of G[reat] B[ritain] where men got into Parl[iamen]t, that they might get offices for themselves or their friends. This was the source of corruption that ruined their Govt.”⁴⁷ On June 23 Butler added: “To some of the opposers he [George III] gave pensions—others offices, and some, to put them out of the house of commons, he made lords. The great Montesquieu says, it is unwise to entrust persons with power, which by being abused operates to the advantage of those entrusted with it.”

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

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

ENUMERATED POWERS

The convention was slow to enumerate the powers of either the presidency or the other branches of the government. Indeed, the delegates’ initial inclination seems to have been to give each branch a general grant of power rather than

a specific list. The Virginia Plan empowered the legislature simply “to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual [state] Legislation.” The executive, in addition to sharing the veto with a council, was to execute the national laws.

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

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

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

VETO

The right to veto acts passed by the legislature was the only specific grant of power to the executive proposed in the Virginia Plan. The states’ recent experience with weak governors and powerful legislatures was proof enough to most delegates that the veto was indispensable to executive self-defense against legislative encroachments. Even so, they were initially reluctant to cede too much responsibility to the executive.

The Virginia Plan provided that the executive could cast a veto only with the cooperation of a council of judges. Madison believed that support from such a council would buttress the executive’s willingness to cast vetoes. He based this belief on the contrasting experiences of New York, where the governor alone had the veto power and almost never used it, and Massachusetts, where council-supported governors vetoed bills freely.⁵¹ The plan also stipulated that a vetoed act would become law if an unspecified majority of both houses of the legislature voted to override it.

On June 4 Wilson and Hamilton urged the delegates, then meeting as the Committee of the Whole, to grant the executive an absolute veto—that is, a veto not subject to legislative override. Franklin, Sherman, Mason, and others rose in opposition to this suggestion, invoking their own and the public’s memories of the British king and his royal governors, who had cast absolute

vetoed against acts passed by colonial legislatures. “We are not indeed constituting a British Government, but a more dangerous monarchy, an elective one,” warned Mason, who wanted to empower the executive merely to postpone the enactment of an offensive law in the hope that the legislature would decide to revise it.⁵² Elbridge Gerry found a middle ground that was acceptable to most of the delegates: an executive veto, subject to override by a two-thirds vote of each house of the legislature. The recommendation that the executive share the veto power with a council was tabled.

In its report of August 6 the Committee of Detail, although faithfully reflecting the decisions of the Committee of the Whole on the veto, also sought to settle an unresolved issue. The committee stipulated that, after a bill was passed and presented, the president would have seven days in which to respond. If the president neither signed nor vetoed the bill during that week, it would become law. But the committee made an important exception to prevent Congress from getting its way by adjourning before the president had a chance to cast a veto. If Congress adjourned during the seven-day period, the president had merely to ignore the bill in order for it to be vetoed. Such vetoes later became known as “pocket vetoes,” the image being of the president sticking the bill in a back pocket.

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

Only one further modification was made to the veto. On September 12, in a gesture designed to persuade delegates suspicious of presidential power to sign the Constitution, the convention voted to make veto overrides easier by restoring the two-thirds requirement.

“THE EXECUTIVE POWER”

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

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

The Executive Power of the United States shall be vested in a single person. His stile shall be, “The President of the United States of America,” and his title shall be, “His Excellency.”

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

The vesting clause that the Committee of Detail proposed for the president was particularly important because it made clear that the powers of the presidency derive directly from the Constitution, not from discretionary grants by Congress. But the clause was less instructive on another important aspect of presidential power. As political scientist Richard M. Pious has noted, “‘Executive Power’ was a general term, sufficiently ambiguous so that no one could say precisely what it meant. It was possible that the words referred to more than the enumerated powers that followed, and might confer a set of unspecified executive powers.”⁵³ First among these unspecified powers was prerogative, which philosopher John Locke had discussed at length in his *Second Treatise of Government*, a book that was widely familiar among the delegates. Locke had argued that in times of crisis, laws that were inadequate to the challenges at hand should temporarily “give way to the executive power, viz., that as much as may be, all the members of society are to be preserved.” Prerogative, according to Locke, was “the people’s permitting their rulers to do several things of their own free choice, where the law was silent, or sometimes, too, against the direct letter of the law, for the public good, and their acquiescing in it when so done.”⁵⁴

The theory that the powers of the presidency extend beyond those listed in the Constitution is supported by the language of the document itself, thanks to a “joker,” as Charles Thach has called it, that Morris, the chief drafter for the Committee of Style, tossed into the final version. The committee’s charge was merely to put the Constitution into polished language. “Positively with respect to the executive article,” noted Thach, Morris “could do nothing.” His pro-executive biases were so well known that any changes involving the presidency would have been detected quickly. Morris left the vesting clause for the executive unaltered (“the executive Power shall be vested in a President of the United States of America”), but he changed the vesting clause for Congress to read: “All legislative Powers *herein granted* shall be vested in a Congress of the United States” (emphasis added).

Thach suspected that Morris did his tinkering “with full realization of the possibilities”—that is, presidents could later claim that the different phrasing of the two branches’ vesting clauses implies that there are executive powers beyond those “herein granted.” Otherwise, why would the Constitution not apply those restricting words to the president in the same way it does to Congress? “At any rate,” Thach concluded, “whether intentional or not, it [the difference between the two vesting clauses] admitted an interpretation of executive power which would give the president a field of activity wider than that outlined by the enumerated powers.”⁵⁵

COMMANDER IN CHIEF

Because the Virginia Plan said nothing about who would direct the armed forces, the delegates took it for granted during the early stages of the convention that Congress would be the controlling branch, as it had been under the Articles of Confederation. The issue did not come up for debate in the Committee of the Whole. The Committee of Detail, however, suggested a military role for the president in its enumeration of the powers of each branch.

The committee proposed that the president “shall be commander in chief of the Army and Navy of the United States, and of the Militia of the several States.” Commander in chief was a title nearly all state governors had. No one thought it involved authority to initiate a war but rather to direct the fighting once a war was underway. But not willing to leave such an important act of sovereignty open to misinterpretation, the committee also recommended that Congress be empowered “to make war; to raise armies; to build and equip fleets; to call forth the aid of the militia, in order to execute the laws of the Union; enforce treaties; suppress insurrections, and repel invasions.”

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

The debate on the convention floor about the powers of war was brief and went only part way toward resolving the ambiguities created by the Committee of Detail. Pierce Butler, doubting that Congress would be able to react quickly enough if an urgent need for military action should arise, urged the convention to vest the power to make war in the president, “who will have all the requisite qualities, and will not make war but when the Nation will support it.” Madison and Gerry agreed that Congress might be unable to respond to a foreign invasion promptly, perhaps because it was not in session. But, unwilling to entrust the president with such vast military powers, they “moved to insert ‘declare’ [war], striking out ‘make’ war; leaving to the Executive the power to repel sudden attacks.” Sherman agreed: “The Executive shd. be able to repel and not to commence war.”⁵⁶ Madison and Gerry’s motion passed.

As for control of the various state militia, on August 27 the convention approved without discussion a motion by Sherman that the president act as commander in chief of the militia only “when called into the actual service of the U.S.” The clause as finally written in the Constitution reads: “The President shall be Commander in Chief of the Army and Navy of the United States, and

of the Militia of the several States, when called into the actual Service of the United States.”

“REQUIRE THE OPINION”

The Constitution authorizes the president to “require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.”⁵⁷ This curious provision (Hamilton described it in *Federalist* No. 74 “as a mere redundancy in the plan, as the right for which it provides would result of itself from the office”⁵⁸) was proposed on September 4 by the Committee on Postponed Matters and adopted by a unanimous vote on September 7. But the clause’s origin lay in the Virginia Plan’s proposal for an executive council, an idea that recurred frequently during the convention.

Although most delegates seem to have favored some sort of council, they never created one because they held such varied opinions about who should be on it and whether its relationship to the president should be merely advisory or involve the shared exercise of executive powers. One version of the council idea was included in a sweeping plan for the organization of the executive branch that Gouverneur Morris and Charles Pinckney introduced on August 20. The Morris–Pinckney plan provided for the creation of five departments: domestic affairs, commerce and finance, foreign affairs, war, and marine. The “principal officers” of each department would be appointed by the president and serve at the president’s pleasure. Together with the chief justice of the United States, they would constitute a Council of State whose purpose would be to “assist the President in conducting the Public affairs. . . . The President may from time to time submit any matter to the discussion of the Council of State, and *he may require the written opinions of any one or more of the members*: But he shall in all cases exercise his own judgment, and either Conform to such opinions or not as he may think proper; and every officer abovementioned shall be responsible for his opinion on the affairs relating to his particular Department” (emphasis added).⁵⁹

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

PARDON

Alexander Hamilton was the first delegate to suggest that the delegates grant the president the power to pardon criminals. In his long speech to the convention on June 18, he urged that the executive “have the power of pardoning all offences except Treason; which he shall not pardon without the approbation of the Senate.”⁶⁰ Perhaps persuaded by Hamilton’s proposal, the Committee of Detail recommended that the president “shall have power to grant reprieves and pardons; but his pardon shall not be pleadable in bar of an impeachment” (that is, to prevent an impeachment).

The pardon power is a power of kings. In Great Britain all crimes were regarded as offenses against the Crown. Accordingly, the power to forgive was a royal prerogative. Crimes in the United States were regarded as offenses against the law, not the executive, which is why no state constitution allowed governors a unilateral pardon power.⁶¹

It is therefore remarkable that the delegates resisted efforts to modify the committee’s recommendation in any substantial way. Sherman’s August 25 motion to require the president to gain the Senate’s consent for a pardon was defeated by a vote of eight states to one. Two days later Luther Martin of Maryland moved to allow pardons only “after conviction.” He withdrew the motion when Wilson, using the crime of forgery as an example, objected that “pardon before conviction might be necessary in order to obtain the testimony of accomplices.” On September 12 the Committee of Style clarified one aspect of the pardon power by limiting it to “offences against the United States”—that is, to violations of federal rather than state law. A September 15 motion by Randolph to disallow pardons for treason (“The President may himself be guilty. The Traytors may be his own instruments.”) was defeated by a vote of eight states to two after Wilson argued that if the president “be himself a party to the guilt he can be impeached and prosecuted.”⁶² The pardon entered the Constitution as the president’s only important unchecked power.

Although no thorough case for granting the pardon power to the president was ever offered at the convention, Hamilton’s defense of it in *Federalist* No. 74 may reflect the delegates’ thinking. Hamilton began by pleading the need for leeway in the criminal justice system to “make exceptions in favor of unfortunate guilt.” As to pardons for treason, he wrote, perhaps with Shays’s Rebellion in mind, “The principal argument for reposing the power of pardoning in this case in the Chief Magistrate is this: in seasons of insurrection or rebellion there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall.”⁶³

“MAKE TREATIES”

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

The first suggestion that the treaty power be shared between the legislative and executive branches came from Hamilton. One provision of the plan of government he proposed on June 18 was that the executive should “have with the approbation and advice of the Senate the power of making all treaties.”⁶⁴ The delegates did not discuss Hamilton’s suggestion on the convention floor, and it appeared to be dead when the August 6 report of the Committee of Detail provided instead that “the Senate shall have power to make treaties.”

The committee’s proposal sparked heated debate, much of it spawned by changes in the design of the Senate that had occurred during the convention. The conclave of national statesmen envisioned by the Virginia Plan had become a states-dominated body, a smaller and perhaps more easily manipulated cousin of the Articles’ congress.⁶⁵ Mason argued that an exclusive treaty-making power would enable the Senate to “sell the whole country by means of treaties.”⁶⁶ Madison thought that the president, who would represent the entire country, should make treaties.

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

On September 4 the committee recommended that the president, “with the advice and Consent of the Senate,” be granted the treaty-making power and that no treaty be approved “without the consent of two-thirds of the members [of the Senate] present.” The provision for a two-thirds majority, which was designed to assuage the separate concerns of southerners and New Englanders that they would be outvoted on issues of regional importance, was highly controversial and provoked numerous motions to revise. One proposal would have deleted the two-thirds requirement for ratification in favor of a simple majority. Another would have strengthened the requirement by stipulating two-thirds approval by the entire membership of the Senate, not just those who were present for the vote. Another would have included the House of Representatives in the treaty ratification process. Yet another proposal—which initially passed and then was rejected—would have applied the simple

majority rule to treaties whose purpose was to conclude a war. In the end, however, the committee's recommendation of a two-thirds vote of the senators present was accepted.

The proposal to involve the president with senators in treaty making was relatively uncontroversial, reflecting the occasional alliance between pro-executive delegates and small-state delegates that had formed after the convention decided that the states would be represented equally in the Senate. Only one motion was made to modify the president's role: Madison moved to allow two-thirds of the Senate, acting alone if it chose to do so, to conclude peace treaties. Madison worried that the president, who inevitably would derive unusual power and prominence from a state of war, might be tempted to "impede a treaty of peace." His motion failed when Nathaniel Gorham of Massachusetts pointed out that Congress could end a war by simply refusing to appropriate funds to continue the fighting.⁶⁷

APPOINTMENT AND COMMISSIONING

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

The appointment power was one of the first, last, and (in between) most contentious issues at the convention. Although, as Richard Ellis has shown, no delegate doubted that "it was the legislature and not the executive that should have the power to create offices, there the agreement ended."⁶⁸ On June 1 the delegates, meeting as the Committee of the Whole, approved Madison's motion to modify the Virginia Plan slightly by adding to the then-limited powers of the executive the ambiguous phrase "to appoint to offices in cases not otherwise provided for."⁶⁹ But this decision simply opened the door to stronger advocates of executive power, such as Wilson and Hamilton, who wanted to make the appointment of judges, ambassadors, and other government officials a purely executive responsibility, with no involvement at all by the legislature.

Heated debates erupted periodically in June and July about issues such as which branch of government would be most prone to favoritism in appointments and which would know best the qualifications of prospective

appointees. Many delegates, mindful of how George III and his royal governors in the colonies had used government appointments as patronage plums to curry support among legislators, dreaded giving this power to even a home-grown executive.

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

On August 24, at a time in the convention when the delegates generally were trimming back the power of the Senate, they passed a motion that, although not altogether clear, seemed to expand the president's right to make most appointments while still leaving complete responsibility for choosing judges and ambassadors in the Senate's jurisdiction. The motion, which was offered by John Dickinson, stated that the president "shall appoint to all offices established by this Constitution, except in cases herein otherwise provided for, and to all offices which may hereafter be created by law."⁷⁰ But the delegates did not revisit their August 17 rejection of Delaware delegate George Read's motion to allow the president to appoint the treasurer. They still wanted anything to do with money firmly in Congress's hands.

As it had for the treaty power, the Committee on Postponed Matters proposed in early September to extend even further the president's role in the appointment process. Judges, ambassadors, ministers, and officers that the delegates had not already provided for would be appointed by the president with the advice and consent of the Senate. A simple majority vote of the senators present would suffice to confirm a presidential appointment. Wilson tried again to persuade the delegates to make appointments a unilateral power of the president. To involve the Senate, he argued, would foster "a dangerous tendency to aristocracy." But his motion failed.⁷¹

The convention accepted the committee's recommendation after making three additions: the president was given the power to fill vacancies that occur while the Senate is in recess (September 6); the power to appoint the treasurer at last was transferred from Congress to the president (September 14); and control of certain forms of patronage was distributed between the two branches by giving Congress the power to "vest the appointment of such inferior officers as they think proper" in the president, the courts, or the heads of the departments (September 15).

ADVISORY LEGISLATIVE POWERS

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

The convention approved Morris's suggestion that the words "he may" be replaced by "and."⁷² The Constitution as finally written reads, "He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient."

CONVENE AND ADJOURN CONGRESS

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

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

"RECEIVE AMBASSADORS"

The president's power to "receive Ambassadors" was proposed by the Committee of Detail. The committee joined this power to another—permission to "correspond with the supreme Executives of the several States" (the state governors)—which the convention rejected on August 25 as being, according to Morris, "unnecessary and implying that the president could not correspond with others."⁷³ As for receiving ambassadors, the absence of debate or discussion by the delegates leaves unclear whether they meant this power to be substantive or merely ceremonial. In practice, the power to receive or, in particular cases, to refuse to receive ambassadors has made the president the sole official

recipient of communications from foreign governments and the sole determiner of which governments the United States recognizes diplomatically. Joined with the convention's later decisions to transfer the treaty-making and ambassador-appointing powers from the Senate to the president, however, it underscored the primacy of the presidency in matters of diplomacy.

“TAKE CARE”

According to the Virginia Plan, the executive was to have “general authority to execute the National Laws.” On June 1 Madison sought to revise this provision to read: “power to carry into effect the national laws . . . and to execute such other powers not Legislative nor Judiciary in their nature as may from time to time be delegated by the national Legislature.” The stipulation about legislative and judicial powers reflected Madison's acceptance of a suggestion by Charles Cotesworth Pinckney, who felt it was important to explicitly prohibit “improper powers” from being delegated to the executive. The other South Carolina Pinckney (Charles) persuaded the delegates to strike the amendment as “unnecessary.”⁷⁴ No further controversy over the “take care” clause ensued. The Committee of Detail's formulation—“he shall take care that the laws of the United States be duly and faithfully executed”—was adopted without discussion by the convention and survived virtually intact in the final Constitution: “he shall take Care that the Laws be faithfully executed.”

TITLE

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

OATH OF OFFICE

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

Oath or Affirmation, to support this Constitution,” the language of only the president’s oath is included in the document. Some regard the wording of the presidential oath (it pledges the president to execute “the office” rather than the laws) as further support for the claim that there are implied powers of presidential prerogative in the Constitution.

Virtually no debate or discussion accompanied the writing of the president’s oath by the Constitutional Convention. The first half of the oath was proposed by the Committee of Detail on August 6: “I _____ solemnly swear (or affirm) that I will faithfully execute the office of President of the United States of America.” On August 27 Mason and Madison moved that the phrase “and will to the best of my judgment and power preserve, protect and defend the Constitution of the U.S.” be added. Wilson objected that a special presidential oath was unnecessary, but Mason and Madison’s motion passed handily.⁷⁵ On September 15 the delegates substituted “abilities” for “judgment and power,” but no discussion was recorded that explains this alteration.

Departing from the practice that prevailed in most of the states at the time, the convention barred the imposition of a religious oath on the president and other officials of the national government. Some state constitutions required public adherence to Christianity as a condition for serving as governor, others an adherence to the Protestant form of Christianity. North Carolina insisted that its governor affirm the existence of God and the truth of Protestantism and hold no religious beliefs that were inimical to the “peace and safety” of the state. On August 30 Charles Pinckney moved that “no religious test shall ever be required as a qualification to any office or public trust under the authority of the U. States.” Sherman said he thought the proposal was “unnecessary, the prevailing liberality being a sufficient security agst. such tests.” Nevertheless, Pinckney’s motion was approved.⁷⁶

QUALIFICATIONS

No statement of qualifications for president was included in the Constitution until September 7, just ten days before the convention ended. In all likelihood, the lateness of the convention’s actions on presidential qualifications was the result of deliberation, not neglect. Throughout their proceedings, the delegates seem to have operated on the principle that qualifications for an office needed to be established only if qualifications for those choosing the person to fill the office were not.⁷⁷ Therefore, qualifications, which were not stated for voters or state legislators, were included for members of the national legislature: members of the House of Representatives must be at least twenty-five years old, seven years a citizen, and an inhabitant of the state they represented; and senators must be at least thirty years old, nine years a citizen, and an inhabitant of the state. Conversely, qualifications for judgeships and other appointed offices

never were included in the Constitution because these officials are selected by other government officials for whom qualifications were stated.⁷⁸

Through most of the convention's deliberations, the majority of delegates remained wedded to the idea that Congress, a body of constitutionally qualified members, would elect the president. The delegates thus saw no need to include qualifications for president in the Constitution. By mid-August, however, it was obvious that most had changed their minds about legislative selection of the executive. Although they had not yet decided on an alternative, whatever procedure they eventually devised to choose the president clearly would involve selection by an unqualified body because members of Congress were the only officials for whom constitutional qualifications were stated. This new election procedure, in turn, would necessitate the writing of qualifications for president. These qualifications would have to be high because the delegates also seem to have agreed that, the greater the powers of an office, the more stringent the qualifications to hold it should be.

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

Each element of the presidential qualifications clause was grounded in its own rationale. The age requirement had two justifications. First, the delegates presumed, age would foster maturity. As Mason said in the debate on establishing a minimum age for members of the House of Representatives, "Every man carried with him in his own experience a scale for measuring the deficiency of young politicians; since he would if interrogated be obliged to declare that his political opinions at the age of 21 were too crude & erroneous to merit an influence on public measures."⁷⁹ Second, the passage of years left in its wake a record for the electorate to assess. According to John Jay, the author of *Federalist* No. 64, "By excluding men under 35 from the first office [president], and those under 30 from the second [senator], it confines the electors to men of whom the people have had time to form a judgment, and with respect to whom they will not be liable to be deceived by those brilliant appearances of genius and patriotism which, like transient meteors, sometimes mislead as well as dazzle."⁸⁰

The residency and citizenship requirements for president were grounded less in principles of good government than in the politics of the moment. The stipulation that the president must be at least fourteen years a resident

of the United States was designed to eliminate both British sympathizers who had fled to England during the Revolutionary War and popular foreign military leaders, notably Baron Frederick von Steuben of Prussia, who had emigrated to the United States to fight in the Revolution. As for the length of the residency requirement, the Committee of Detail's recommendation of twenty-one years probably was reduced to fourteen because the longer requirement—but not the shorter one—might have been interpreted to bar three of the convention's delegates from the presidency: Alexander Hamilton, Pierce Butler, and James McHenry.

The reason for requiring that the president be a natural-born citizen also was tied to contemporary politics. In early August rumors spread that the delegates were plotting to invite a European monarch to rule the United States. The Duke of Osnaburgh, who was King George III's second son, was the most frequently mentioned pretender.⁸¹ The practice of importing foreign rulers was not unknown among the European monarchies of the day and would not have seemed preposterous to Americans who heard the rumor. The delegates, aware that the mere existence of an independent executive in the Constitution was going to provoke attacks by opponents who suspected that the presidency was a latent monarchy, seem to have believed that they could squelch at least the foreign king rumor by requiring that the president be a natural-born citizen of the United States.⁸²

No property qualification for president was included in the Constitution, even though most state constitutions required that the governor own property, and the delegates had approved a similar requirement for the president more than a month before they enacted the presidential qualifications clause. On July 26, the convention adopted a motion by Mason and the Pinckneys that a property qualification be stated for judges, legislators, and the executive. The Committee of Detail neglected the motion in its proposed draft of the Constitution, which provoked both a complaint and another motion from Charles Pinckney on August 10. John Rutledge of South Carolina, the chair of the committee, apologized and seconded Pinckney's motion. He said the committee had made no recommendation about property "because they could not agree on any among themselves, being embarrassed by the danger on one side of displeasing the people by making them high, and on the other of rendering them nugatory by making them low."⁸³ Pinckney suggested \$100,000.⁸⁴

In response, Franklin rose to attack the very idea of property qualifications. As Madison paraphrased Franklin's argument in his notes, "Some of the greatest rogues he was ever acquainted with, were the richest rogues." Pinckney's motion, Madison recorded, quickly "was rejected by so general a no, that the States were not called."⁸⁵ In truth, the practical difficulty of establishing an acceptable property requirement, more than the belief that such a

requirement should be rejected as a matter of principle, seems to explain why the Constitution was silent about property ownership by the president.

THE VICE PRESIDENCY

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

After independence, five states—Connecticut, Massachusetts, New York, Rhode Island, and South Carolina—included lieutenant governors in their constitutions. Each lieutenant governor was elected in the same manner as the governor and was charged to act as governor when needed. New York's lieutenant governor was also the *ex officio* president of the state senate and was allowed to break tie votes. Other states handled the matter of gubernatorial death, absence, or inability differently. In Georgia and Virginia the head of the privy council, a cabinet-style body, was the designated gubernatorial successor; in Delaware and North Carolina it was the speaker of the upper house of the legislature; in New Hampshire, the senior member of the state senate.⁸⁶

It is difficult to say whether the experience of the states had much influence on the convention's decision to create the vice presidency. No one referred to the state lieutenant governors in the debates. Nor was any proposal made to include a vice president in the Constitution until very late in the proceedings. Indeed, the invention of the vice presidency seems to have been an afterthought of the convention, a residue of its solution to the problem of presidential selection.

As noted earlier, the delegates initially decided that the legislature should choose the executive, but they eventually replaced legislative selection with the Electoral College, providing that each state pick presidential electors, who in turn would elect the president by majority vote. A possibly fatal defect of this procedure was that the electors would simply vote for a variety of local favorites, preventing the choice of a nationally elected president. But the committee remedied this potential problem by assigning each elector two votes for president, requiring that they cast at least one of their votes for a candidate who "shall not be an inhabitant of the same State with themselves," and attaching a consequence to both votes: the runner-up in the election for president would be awarded the newly created office of vice president.

As Hugh Williamson, a member of the Committee on Postponed Matters, testified, "Such an office as vice-President was not wanted. He was introduced

only for the sake of a valuable mode of election which required two to be chosen at the same time.”⁸⁷ But, having invented the vice presidency, the committee proposed that the office be used to solve two other problems that had troubled the convention.

SENATE PRESIDENT

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

SUCCESSION

The second problem that the committee used the vice presidency to solve was succession when the presidency unexpectedly became vacant. This, too, was a matter to which the convention turned rather late. The Virginia Plan and the New Jersey Plan were silent about succession. On June 18, as part of his sweeping proposal for a national executive chosen by electors to serve for life, Hamilton suggested that, in the event of the executive's death, resignation, impeachment and removal, or absence from the country, the senator who served as president of the Senate should “exercise all the powers by this Constitution vested in the President, until another shall be appointed, or until he shall return within the United States, if his absence was with the Consent of the Senate and Assembly [House of Representatives].” But Hamilton's proposal was never formally discussed.

Sustained attention was first given to the succession question by the Committee of Detail. Knowingly or not, the committee followed Hamilton's lead in its August 6 report to the convention, providing that “in the case of his [the president's] removal as aforesaid, death, resignation, or disability to discharge the powers and duties of his office, the President of the Senate shall exercise those powers and duties, until another President of the United States be chosen, or until the disability of the President be removed.” When the delegates discussed this provision on August 27, considerable dissatisfaction was

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

The committee, which reported to the convention on September 4, proposed that “in the case of his [the president’s] removal as aforesaid, death, absence, resignation, or inability to discharge the powers or duties of his office the Vice President shall exercise those powers and duties until another President be chosen, or until the inability of the President be removed.” Three days later Randolph, in an effort to supplement the committee’s proposal with one that provided a method of presidential succession if there were no vice president, moved: “The Legislature may declare by law what officer of the United States shall act as President in the case of the death, resignation, or disability of the President and Vice President; and such Officer shall act accordingly until the time of electing a President shall arrive.” Madison then moved to replace the last nine words of Randolph’s motion with “until such disability be removed, or a President shall be elected.” The motion passed, as amended.⁸⁹

Madison’s reason for amending Randolph’s motion is clear: he wanted Congress to call a special presidential election to replace a departed president or, in his words, to permit “a supply of vacancy by an intermediate election of the President.” Other evidence from the records of the convention suggests that most of the delegates intended that the president’s successor serve merely as acting president and only until a special election could be called.⁹⁰ But sometime in the period September 8 to 12, when the Committee of Style was working to fulfill its charge to produce a smooth, final draft of the Constitution, that intention was lost, probably unwittingly. The committee took the September 4 motion of the Committee on Postponed Matters and Randolph’s September 7 motion and merged them into one provision, which with minor modification, became paragraph 6 of Article II, section 1, of the Constitution: “In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.”⁹¹

Clearly, the delegates’ intentions regarding succession were obscured by the Committee of Style. Grammatically, it is impossible to tell—and in its rush to

adjournment, the convention did not notice the ambiguity—whether “the Same” in this provision refers to “the said office” (the presidency) or, as the delegates intended, only to its “powers and duties.” Nor can one ascertain if “until . . . a President shall be elected” means until the end of the original four-year term or, again as intended, until a special election is held.⁹²

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

The role of the vice president as president of the Senate was discussed on September 7. Gerry, seconded by Randolph, complained about mixing legislative and executive elements: “We might as well put the President himself at the head of the Legislature. The close intimacy that must subsist between the President & vice-president makes it absolutely improper.” Morris responded wryly that “the vice president then will be the first heir apparent that ever loved his father.” Sherman added that “if the vice-President were not to be President of the Senate, he would be without employment.” He also reminded the convention that for the Senate to elect a president from among its own members probably would deprive that senator of a vote. Mason ended the brief debate by branding “the office of vice-President an encroachment on the rights of the Senate; . . . it mixed too much the Legislative & Executive, which as well as the Judiciary departments, ought to be kept as separate as possible.”⁹³

Despite these minor objections, the convention voted overwhelmingly to approve the vice presidency. The delegates, however, gave no serious attention to the vice president’s responsibilities as successor to the president.

RATIFYING THE CONSTITUTION

Congress’s original call for a convention in Philadelphia had charged the delegates only to propose amendments to the Articles of Confederation, not to design an entirely new system of government. By itself, the delegates’ decision to ignore this charge ensured that controversy would ensue when, having met so long in secret, they published their proposed plan of government in September. In addition, several provisions of the draft Constitution, including the enhanced powers of the national government and the design of the legislative branch, were certain to be controversial. But nothing astonished the nation more than the convention’s decision to recommend that a strong