

South Carolinians favored it, in keeping with their strong tendency toward foederalism, and so did the Massachusetts delegation, apparently out of concern that senators especially would otherwise lose sight of their constituents. Sherman expressed concern that congressmen would set their wages too low, not too high, in order to keep out all but the rich; he proposed that the constitution set a modest wage on the understanding that state governments could augment the amount if they chose. Instead, it was decided that congressmen would be paid by the national treasury and would establish their own salaries by law.<sup>47</sup>

Reaching agreement about the way in which the executive branch would be constituted was quite as difficult as agreeing about the legislative, but for different kinds of reasons. With the exception of two particulars, what was at issue were matters of principle rather than of power and influence; but the delegates differed considerably in their principles, and even when they agreed in principle, they disagreed as to the best means of achieving the desired ends.

Almost all the delegates agreed that there must be an executive branch, independent of the legislative and judicial branches. Many of them, however, particularly among those who had come of age politically before 1776, were extremely uneasy with the idea. Indeed, at least twelve—more than a fourth of the delegates who were present when the issue was decided—so feared executive power that they sought to diffuse it among several persons. These advocates of a plural executive included Sherman, Randolph, Mason, Blair, Franklin, Dickinson, Williamson, Lansing, Yates, Jenifer, Brearley, and William Churchill Houston. To this list might be added those who supported the Paterson plan, for it contemplated a plural executive.<sup>48</sup>

<sup>47</sup>Ibid., Aug. 14, 2:290–293; observe the change from the position adopted on June 26 (ibid., 1:428).

<sup>48</sup>For Sherman, ibid., June 1, 1:65; for Randolph, Blair, and Mason, June 4, 1:97; for Franklin, June 4, 1:102 n. The positions of Lansing and Yates are inferred from the fact that New York voted for a plural executive, even though Hamilton

On the opposite end of the spectrum, the concern was not with fear that the executive would be dangerously strong but that it would not be strong enough, as Madison phrased it, to resist the "powerful tendency in the Legislature to absorb all power into its vortex."<sup>49</sup> Champions of a vigorous executive (generally, those identified earlier as being nationalists of a Hume/Mandeville persuasion) were not, however, of one mind in regard to the most efficacious way of investing the office with sufficient energy. Several thought the best way lay in a long term of service. As indicated, Hamilton proposed having an executive chosen to serve during good behavior, and his position was supported at one time or another by Read, Gouverneur Morris, Jacob Broom, and a few others. Leaning in the same direction were those who thought the executive ought not to be impeachable, an idea that was endorsed by Morris, Charles Pinckney, Gorham, Strong, and King—the last, curiously, on the ground that giving the legislature the power of impeachment would violate the principle of the separation of powers.<sup>50</sup> (By contrast, early in the convention the Connecticut, South Carolina, and Georgia delegations voted to make the executive removable at the pleasure of Congress, and the Delaware delegation voted in favor of Dickinson's motion that the executive be removable by Congress on request of a majority of the state legislatures.)<sup>51</sup>

favored a single executive (June 4, 1:97). Jenifer's position is inferred: Maryland voted against a single executive on June 4 (1:97), and Jenifer was the only Marylander present. Brearley and Houston were the New Jersey delegates present, and they cast the state's vote against a single executive. Dickinson's position is derived from his notes for June 18–19, in Hutson, "John Dickinson at the Federal Convention," 270. According to Farrand's analysis of the attendance (3:587–590), eight of the fifty-five delegates had not yet arrived on June 4, and two had already departed, meaning that the maximum number in attendance was forty-five.

<sup>49</sup>Farrand, *Records*, July 21, 2:74.

<sup>50</sup>Ibid., July 20, 2:64, 66–67, 69. The position of Gorham and Strong is inferred: Gerry favored impeachment, but the Massachusetts delegation voted against it. Given King's stated position, had either Gorham or Strong voted in favor of impeachment, the state's vote would have been divided.

<sup>51</sup>Ibid., June 2, 1:85, 87. The impeachment process as finally adopted is a good example of the Framers' drawing, neither upon theory nor upon British practice, but upon colonial experience, as is clearly shown in Peter C. Hoffer and N. E. H.

Taking another approach, Madison and Wilson reasoned that no executive who would be acceptable to the people could be given enough power to restrain legislative excesses and therefore that the executive and the judiciary should be combined into a council of revision, with the power to veto legislation. Amidst cries that such a council would be an "improper coalition" of separate branches, the convention rejected the proposal on both occasions when Wilson and Madison brought it up, though the Connecticut and Virginia delegations voted in favor of it both times. New York also supported it on the first occasion, and Maryland (Jenifer and Carroll combining against Martin) and half of the Pennsylvania and Georgia delegations did on the second.<sup>52</sup> Most of the delegates supported a conditional executive veto, subject to overriding by Congress; the exceptions were the Connecticut delegates and Franklin, Bedford, and Jenifer, who opposed any veto power, and Hamilton, Wilson, and King, who favored an absolute veto.<sup>53</sup>

Those who ardently distrusted executive power drew their position, for the most part, from experience, both in the narrow sense of participation in the events leading to 1776 and in the broader sense of history, especially of the Stuart kings of England. The position of the advocates of a strong executive was more nearly ideological or theoretical. Together, these two camps numbered something over half of the delegates. Most of the remainder were governed neither by history nor by ideology, but by considerations of power.

Attitudes were slow to come to light, partly because delegates were loath to speak their minds and partly because, at first, no one knew how far the convention would go in departing from the Articles of Confederation. Accordingly, when the Randolph plan was initially under discussion, only tentative resolutions concerning the execu-

Hull, "Power and Precedent in the Creation of an American Impeachment Tradition: The Eighteenth-Century Colonial Record," *William and Mary Quarterly* 36 (1979): 51-77.

<sup>52</sup>Farrand, *Records*, June 6, July 21, 1:138-140, 2:73-80.

<sup>53</sup>*Ibid.*, June 4, 1:98-100, 104, 108.

tive were adopted, pending the settlement of the structure of the legislative. At that stage, it was agreed that the executive should be a single person, that he should be elected by the legislative for a seven-year term, and that he should be ineligible for a second term. These resolutions were approved by all delegations except those of Pennsylvania and Maryland, which preferred election by electors chosen by the qualified voters at large.<sup>54</sup> Except in the Paterson and Hamilton plans, the subject was not raised again for more than six weeks.

Between July 17 and July 26—between the adoption of Franklin's compromise on representation and the adjournment for the committee of detail—the matter was vigorously debated. Gouverneur Morris led off the debates, attacking the idea of congressional election of the executive on the ground that "it will be the work of intrigue, of cabal, and of faction." He proposed, instead, election by the freeholders. Sherman objected that the people would not be well-enough informed to make an intelligent choice, that they would never give a majority to one man, and that popular election would throw the choice into the hands of the largest states. Charles Pinckney endorsed Sherman's objections and added that the people would "be led by a few active & designing men." Wilson countered Sherman's contention regarding the improbability of a majority by offering as a backup plan an ultimate choice by Congress. Morris declared that designing men would have little chance of succeeding in a nationwide election. As for the danger that large states would combine to swing the election, he said that it would be impossible for the people of such states to combine, though their representatives in Congress could easily do so. If the executive were elected by the legislative, "he will not be independent on it; and if not independent, usurpation & tyranny on the part of the Legislature will be the consequence."<sup>55</sup>

<sup>54</sup>*Ibid.*, June 1, 2, 4, 1:64-75, 80-92, 96-97.

<sup>55</sup>*Ibid.*, July 17, 2:29-31. Morris likened legislative election to the choice of kings of Poland by the Polish diet, which had produced notoriously bad selections. Several other delegates also referred to the Polish example, and it must be remembered that the first partition of Poland had only recently taken place.

A flurry of votes and counterproposals ensued. Morris's motion for election by the freeholders was supported only by the Pennsylvania delegation. Luther Martin then moved, Bedford seconding, that the executive be chosen by electors chosen by the state legislatures, but they were supported only by their own delegations, those of Maryland and Delaware. Houstoun of Georgia then moved to strike out the clause making the executive ineligible for reelection, and somewhat surprisingly the motion carried, six states to four. Many thought that this would make the executive unacceptably dependent on the legislative—it would render the legislative the executor as well as the maker of laws, said Madison, and "then according to the observation of Montesquieu, tyrannical laws may be made that they may be executed in a tyrannical manner." To dramatize their position, advocates of an independent executive then proposed that he serve during good behavior, and four of the ten state delegations supported the motion. That vote had a chilling effect, and on the next day the delegates agreed unanimously to reconsider the whole question.<sup>56</sup>

The subject was thrashed out anew on Thursday the nineteenth. Sentiment for a choice by electors now began to grow, and Ellsworth moved that the executive be chosen by electors, who would be appointed by the state legislatures, each state being allotted one, two, or three electors, depending on the size of its population. On the question of choice by electors, Massachusetts was divided, and the three southernmost states voted no, but all states in between voted aye; and therefore that part of the motion carried. On the question of having the state legislatures appoint the electors, all but Virginia and South Carolina approved. Thus, for the first time, the convention voted in favor of election of the executive by somebody other than Congress.<sup>57</sup>

Morris thought the use of Poland as a horrible example had been decisive; see Morris to the President of the New York Senate, Dec. 25, 1802, *ibid.*, 3:394. See also Butler's remarks in the United States Senate, Dec. 2, 1803, *ibid.*, 3:403-404.

<sup>56</sup>*Ibid.*, July 17, 18, 2:33-36, 37.

<sup>57</sup>*Ibid.*, July 19, 2:52-58.

The arrangement, however, did not hold, and when the subject was raised anew on July 24, an additional dimension came to light. It was generally assumed that if a system of electors were resorted to, the electors would gather and vote in the national capital, and it was also assumed that the national capital would be in New York or Philadelphia. But while those cities were centrally located and easily accessible for Americans who lived between Norfolk and Boston, they were remote from the Carolinas, Georgia, and New Hampshire. Houstoun of Georgia, who with Spaight was responsible for bringing about the reconsideration, pointed out that few capable men, chosen as electors "from the more distant States," would undertake the long and arduous trip to cast their ballots. In other words, such states would in effect be deprived of a voice in the election of the executive unless he were chosen by the national legislature. Delegates from the Carolinas and Georgia were supported by those from New Hampshire (who had just arrived) and Massachusetts (who were now reunified) and also, unaccountably, by those from New Jersey and Delaware. Accordingly, the six to three to one vote in favor of electors on July 19 was reversed, the convention now voting seven to four to return to the original plan of having Congress elect the executive. But that decision rekindled the dispute over what means were to be employed to make the executive branch independent, and the day's deliberations ended in rancor and confusion.<sup>58</sup>

The next day was even more rancorous and confused. Ellsworth led off with a cumbersome proposal whereby "a deserving Magistrate may be reelected without making him dependent on the Legislature," namely, that the executive be appointed by Congress for his first term but by electors chosen by the state legislatures if he sought reelection. That proposal was rejected, seven to four. Charles Pinckney then proposed a Harrington-like "rotation": that the executive be elected by Congress "with a proviso that no person be eligible for more than 6 years in any twelve years."

<sup>58</sup>*Ibid.*, July 24, 2:99-101.

Pinckney's motion was favored by the two northernmost and the three southernmost states, but it too failed, six to five.<sup>59</sup>

Between these two votes a great many things were said, two of them being of some influence. One was an observation that Madison made during a long analysis in which he discountenanced every mode of election except by the people, directly or through electors: that ministers of European powers would "have and make use of" the opportunity to intrigue in the election if it were in the hands of Congress. That prospect affrighted a number of delegates into moving toward a decentralized election. The other was a suggestion by Williamson that afforded a positive step toward a solution. Several delegates had observed that electors, however chosen, would tend to vote for citizens of their own states, in which case the large states would have a great advantage over the small ones. That consideration disposed a number of delegates from small states to favor congressional selection, and it left others doubtful as to whether any but a mediocrity would be elected through a decentralized plan. What Williamson suggested was that the electors vote for three candidates; then, he said, they would probably vote for only one person from their own state. Gouverneur Morris instantly took to the idea and offered a refinement: that electors vote for two persons, "one of whom at least should not be of his own State." Madison endorsed the idea and proposed another which, had it been adopted, would later have prevented the emergence of the Virginia Dynasty and probably his own presidency: to provide a mandatory rotation of the executive from state to state. Gerry remarked sourly that an election on such a basis would be "radically vicious," for it would enable "some one set of men dispersed through the Union & acting in Concert"—he named the Society of the Cincinnati—to control the election.<sup>60</sup>

Gerry's comment may have been a telling one. On the next day Mason, who had been much upset by Madison's

<sup>59</sup>Ibid., July 25, 2:108-109, 111-112, 115.

<sup>60</sup>Ibid., July 25, 2:109-114.

observation about the danger of foreign intrigue, indicated that with him, fear of the danger posed by aristocracy was even greater; he concurred with Gerry's remark about the Cincinnati and announced that he had come back to favoring election by Congress. Others, including Mason's colleague John Blair, apparently felt the same way. In any event, New Hampshire and the three southernmost states were joined by Connecticut and New Jersey; Virginia's vote was divided; and the original plan—to have an executive elected by the national legislature for a seven-year term and ineligible for reelection—was passed and turned over to the committee of detail on July 26.<sup>61</sup>

The tenth article of the report of the committee of detail stipulated that "the Executive power of the United States shall be vested in a single person," to be styled "The President of the United States of America." During their debates on the subject the delegates had addressed themselves to form rather than to substance, and except for an occasional hint that "the executive power" would be limited, no one made any extensive comments as to just what it would include. Experience was not an adequate guide, for their experience with colonial and state governors was largely irrelevant to the task presently at hand. Hume was silent on the subject, Montesquieu muddled, Locke too general. That left Blackstone's description of the royal prerogative as the only readily available account of what had traditionally been regarded as the executive power in a mixed form of government.

The executive powers, as itemized by Blackstone, can be grouped under several headings. One broad heading was the conduct of relations with foreign nations. The king was commander in chief of the armed forces, having exclusive power to raise and regulate fleets, armies, and the militia, though standing armies were prohibited by law in time of peace and Parliament could dissolve armies simply by not

<sup>61</sup>Ibid., July 26, 2:119-121.

appropriating money for their support. The Crown also had the exclusive power to send and receive ambassadors, to make treaties, to make war and peace (including the declaring of war), to grant letters of marque and reprisal, and to grant safe conducts. Domestically, the Crown had an absolute power to veto legislation, though it had not exercised that power since the reign of Queen Anne, and it convened and dissolved parliaments within limits established by law. Several of its additional powers were broadly economic: to designate ports and havens for persons and merchandise to pass into and out of the realm, to erect beacons and lighthouses, to coin money and establish the value thereof, to establish markets, and to regulate weights and measures. Related powers were those of prohibiting the exportation of arms and ammunition, prohibiting persons from leaving the kingdom, and issuing proclamations that had the force of law, such as proclaiming embargoes in time of war. Next came powers to enforce the law, which included the powers to establish courts, appoint judges, prosecute law violators in the courts, and grant reprieves and pardons except in cases of impeachment. More personally, the Crown had the exclusive power to appoint persons to civil and military offices, to confer dignities and titles, and to grant privileges such as making denizens of aliens and creating corporations. Finally, the Crown was the head of the Church of England.<sup>62</sup>

Wilson, however, expressly rejected the prerogative as a guide; and the other members of the committee of detail obviously agreed with him. In their draft, certain of the executive powers were not lodged in any part of the government, and the power to confer nobility was specifically withheld. The other executive powers were distributed three ways. The commercial powers, the naturalization power, the power to establish courts, the power to appoint a treasurer, and the power to subdue rebellions, make war, raise armies, build and equip fleets, and call out the militia—all of these were assigned to Congress, not to

<sup>62</sup>Blackstone, *Commentaries*, 1:250-280, 334, 408-421, 4:394-402.

the president. More interestingly, the Senate, representing the residual sovereignty that lay in the states, was given the exclusive power to make treaties, to appoint ambassadors, and to appoint the judges of the supreme court. The president was empowered to appoint all other officials except the treasurer, to grant pardons and reprieves except in regard to impeachments, and to receive ambassadors. He was also given a conditional veto and was made commander in chief. So much for the doctrine of the separation of powers.<sup>63</sup>

Inasmuch as the committee had virtually no instructions from the convention in this matter, the roots of its decision to divide and distribute the executive power in this curious manner must be looked for in the attitudes of the committee members themselves. Two of the members, Rutledge and Ellsworth, were foederalists. The other three, Gorham, Wilson, and Randolph, were nationalists; but Randolph was also an agrarian republican who preferred a plural executive. Assigning executive powers to the Senate was consistent with the views of the two foederalists and also with Randolph's preference for a plural executive. Wilson might have agreed because of his intense dislike of the plan for congressional election of the president: he was ill disposed to entrust such an official with any power. As for the executive powers vested in Congress as a whole, some were in keeping with a trend that had been present in Britain; as a practical matter, for example, the powers to regulate weights and measures and to determine what was money had been taken over by Parliament. That the committee went much further in that direction must have reflected, at least in part, the discontent with the mode of choosing the president and with the structure of the office in general.

Being preoccupied with the powers of Congress, the convention was slow in getting around to serious consid-

<sup>63</sup>Farrand, *Records*, June 1, Aug. 6, 1:65, 70, 2:177-189.

eration of the presidency. On August 15 it voted to increase the majority necessary for overriding a veto from two-thirds to three-fourths; on the eighteenth and twentieth there was a brief discussion about providing an executive council; on the twenty-third there was desultory talk about the Senate's treaty-making power. Then, on the twenty-fourth, the method of electing the president came up, and though the debates and votes were indecisive, they indicated considerable discontent with every mode that had been suggested so far. Over the objection of four of the small states, the convention approved a motion to have the election be by a joint ballot of the two houses of Congress. It rejected, six to five, a motion that each state have one vote in such election, rejected by the same margin a motion that the president be chosen by popularly elected electors, and rejected (by a tie vote) an abstract proposal that electors, however selected, should make the choice.<sup>64</sup>

On Friday August 31 a committee composed of one delegate from each state was appointed in an effort to resolve all unsettled questions, and it was in that committee that Pierce Butler came up with a method of electing the president that almost satisfied almost everybody. The proposal was complex. It provided for both a president and a vice-president; this feature satisfied those who had been concerned about the succession in the event of the death or disability of the president. It provided that electors be appointed in such manner as the several legislatures should direct; that took care of the objections of those who feared popular election, for it meant that the legislatures could elect the electors if they chose to do so. Each state was allotted a number of electors equal to the combined number of senators and members of the House of Representatives to which it was entitled; this effected a compromise between proportional and equal allocation. The proposal provided that the electors meet in their respective states, which overcame the problem of distance of travel and also reduced the possibility of intrigue, and provided that they

<sup>64</sup>Ibid., Aug. 15, 18, 20, 23, 24, 2:299-302, 328-329, 342-344, 392-394, 401-404.

vote for two candidates, one of whom must be the resident of another state. The person receiving the most votes, if a majority, would become president, and the one with the second most votes would become vice-president. In the expectation that a president thus elected would be sufficiently independent, the office was now to be entrusted with a share in the executive powers previously vested in the Senate: the president would be empowered to appoint ambassadors, judges, and other officers with the concurrence of the Senate, and to make treaties with the concurrence of two-thirds of the Senate.<sup>65</sup>

That much of the proposal was generally accepted; but there was more. The scheme provided that in the event that two persons had a majority and they had the same number of electoral votes, the Senate should choose between them, and that if no one had a majority, the Senate would elect the president from among the top five candidates. Most of the delegates thought it unlikely, as a rule, that any candidate would have a majority, and therefore they assumed that the Senate would normally elect the president from nominees chosen by the electors. If that should prove to be the case, the partly national, partly foederal government would be strongly tilted on the foederal side, for three of the four branches (including the judicial) would then be chosen directly or indirectly by the state governments. A good many nationalists objected to this feature of the electoral-college system, protesting that it would make the Senate a dangerous aristocracy. After three days of heated discussion, Sherman came up with a motion that undermined the aristocracy argument: he moved that in case of a tie or in the absence of a majority, the decision be made by

<sup>65</sup>Ibid., Sept. 4, 2:497-498. Regarding Butler's authorship see Butler to Weedon Butler, May 5, 1788, *ibid.*, 3:302. Several years later, Dickinson said that Madison had sketched out the idea for the electoral college in a committee (Dickinson to George Logan, Nov. 4, 1802, quoted in Milton E. Flower, *John Dickinson: Conservative Revolutionary* [Charlottesville, Va., 1983], 247). Dickinson's memory seems to have been inaccurate; Madison did not like the plan when it was first proposed, and he offered several amendments to it (see Farrand, *Records*, Sept. 4, 5, 2:500, 513, 514, 515).

the House of Representatives, the member or members from each state having one vote for the occasion.<sup>66</sup>

Even on that basis the states would retain a powerful voice in the election of the president (it would, in fact, be the common practice for the legislatures to choose the electors until after the War of 1812); and the small states would continue to have a disproportionate voice in the selection. A bit of backstage maneuvering helped to bring this about. Early in August the delegates from three small states (New Jersey, Delaware, and Maryland) had reneged on the compromise that had won them equal representation in the Senate, and they had joined with four other states to strike out the provision that money bills must originate in the House. Champions of the originating clause strove vainly to have it reinserted, and when the electoral college came up for consideration, they supported the electoral college in exchange for votes for reinsertion of the originating clause. The clause was changed, however, to allow the Senate to amend money bills after they had been passed by the House.<sup>67</sup>

As in the matter of constituting the legislative branch, foederalists and small-state delegates had the better of the exchange with large-state nationalists in constituting the executive. The more ideologically oriented of the nationalists were extremely unhappy over the turn of events; Randolph, Mason, and Gerry would refuse to sign the Constitution. Wilson, too, was unhappy, especially with the convention's denial to the House of a share in the treaty-making power and with the "blending a branch of the Legislature with the Executive" in requiring senatorial confirmation of executive appointments—in other words, with giving greater power to the foederal branch of the legislative than to the national or popular branch. Charles Pinckney shared that view. And Madison, on the day that the electoral-college system was agreed to, wrote to Jefferson, outlining the main features of the proposed constitution and opining that "the *plan, should it be adopted, will*

<sup>66</sup>Farrand, *Records*, Sept. 4-6, 2:499-502, 511-515, 522-525.

<sup>67</sup>*Ibid.*, Aug. 8, 9, 13, 15, 21, Sept. 5, 8, 2:222-225, 232-234, 273-280, 297-298, 357-359, 509-510, 552.

neither effectually *answer its national object, [nor] prevent the local mischiefs which everywhere excite disgusts agst. the State Governments.*"<sup>68</sup>

The delegates devoted less time to forming the judiciary—and less attention to careful craftsmanship—than they had expended on the legislative and executive branches. In part the judiciary received minimal consideration because it was regarded as the least powerful and least active branch of government.<sup>69</sup> In part, too, it could be disposed of with little contention because the delegates were in general agreement as to the principles that should be embodied in forming it.

One such principle was that the judiciary should be independent. Accordingly, though the proposed mode of appointing the judges varied as the convention progressed—at first they were to be elected by Congress, then by the Senate, and finally by the president with the confirmation of the Senate—it was agreed from the outset that they would hold their positions during good behavior, which is to say for life unless they chose to resign or were impeached and convicted of high crimes and misdemeanors. Only once did anybody propose a departure from that principle: late in August, Dickinson made a motion that the justices be removable by the president upon the petition of both houses of Congress. Gerry seconded the motion, and Sherman spoke in favor of it, pointing out that that was the practice in Britain. Wilson, Gouverneur Morris, Rutledge, and Randolph all spoke against it: Wilson declared that the rule was a safe one in Britain because the Lords and Commons were unlikely to concur on the same occasions, whereas it was entirely probable that the "gust of faction" might prevail in both houses of Congress. In

<sup>68</sup>*Ibid.*, Sept. 7, 2:538-539; Madison to Jefferson, Sept. 6, 1787, *ibid.*, 3:77.

<sup>69</sup>Hamilton observed, in *Federalist* number 78, that of the three branches, the "judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution." This was true in the eighteenth century; and it was true of the Constitution as it was written. The Framers could not have foreseen the development of judicial activism a century later.