How Congress Lost, Part II: The Constitutional Presidency

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Key Points

- An examination of presidential dominance in our contemporary government requires an understanding of the more limited role the framers envisioned the president having under the Constitution.
- The framers were primarily committed to an independent executive with the power to enforce the laws and act as a check on Congress.
- To these ends, they empowered the presidential office with a legislative veto and established the Electoral College, a system to choose the president independent of Congress.
- The framers rejected more elaborate mechanisms to empower the president, as proposed variously by Alexander Hamilton and James Madison (among others).

The American presidency has come to dominate Congress and the political process in ways that the framers of the Constitution never anticipated. The reports in this series seek to explain how this has happened. To begin that process, it is important to understand exactly what the framers thought the president should do and how he should go about it. That is the focus of this report.

Americans had bad experiences with executive government in the lead-up to the American Revolution. It was not simply the king who behaved in a high-handed manner; it was also his agents in the colonies—namely, the royal governors. While the royal governors had for generations governed harmoniously with colonial legislatures, tensions emerged after the Seven Years' War ended. As the British government imposed greater burdens on the colonies, it was often the colonial governors at the sharp end of the proverbial stick, enforcing those dictates. Accordingly, after the colonists declared their independence, they were at pains to sharply reduce executive power. State legislatures strictly curtailed governors' authority, and the national government under the Articles of Confederation did not have an executive branch at all.

The results were disastrous. If the prerevolutionary era was a kind of monarchical despotism, the postrevolutionary era was close to a legislative tyranny. In James Madison's view, the laws—particularly at the state level—were so unjust that "it brings more into question the fundamental principle of republican government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights."[1]

The Constitution was, at its core, an attempt to right these many wrongs. And doing that, as far as the framers were concerned, required a president—a single person

whose main tasks were to enforce the laws of the nation, protect the people from foreign and domestic threats, and serve as an independent check on legislative overreach. To accomplish these goals, the framers were careful to give the president the power to monitor Congress through the veto. They were also intent on giving him an independent will to do so. The Electoral College is, to our 21st-century eyes, an archaic holdover from a long-gone era, but the framers intended it as an alternative institution to congressional selection of the president.

In the main, this satisfied most delegates—although not everybody. Madison and Alexander Hamilton were counted among those who still had concerns. Hamilton thought it prudent to endow the president with patronage powers to manage the legislature. Madison did not support this idea, but he sought to strengthen the presidential veto power by joining it to the judiciary in what he called a "council of revision."[2] This, he believed, would give the president more heft in fights against Congress, which Madison expected to preponderate in a republican system. While neither Madison nor Hamilton won these measures, their efforts were noteworthy because both framers took on crucial roles in the government during the Washington administration and sought to create through the law the reforms they thought the Constitutional Convention should have enshrined in the Constitution.

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From a certain perspective, it is shocking that the framers of the Constitution would create the presidential office that they did. They imbued the chief executive with the power of issuing vetoes over laws enacted by Congress. This is an authority the British monarchy had used abusively against the colonies in the lead-up to the American Revolution. The first of Thomas Jefferson's specific complaints about King George III in the Declaration of Independence was, "He has refused his Assent to Laws, the most wholesome and necessary for the public good."[3] Moreover, the British sovereign had the power to reject laws passed by Parliament, but no monarch had done so since Queen Anne. Why would the framers give the president a power that had been abused in the colonies and unexercised in the homeland?

There were skeptics at the Constitutional Convention, no doubt. Virginia Gov. Edmund Randolph—who eventually refused to sign the Constitution when the convention finished—hated the presidency. He called it "the form at least of a little monarch"[4] and believed the framers were using "the British government as our prototype."[5] His preference was for an executive council rather than a single person. Benjamin Franklin likewise was dubious. He noted that Pennsylvania's governor had abused the veto power under the state constitution to "extort money. No good law whatever could be passed without a private bargain with him."[6]

But this was a minority view. If the colonial period had demonstrated the dangers of an unchecked monarchy, the subsequent decade of republican experimentation in the new United States had illuminated the threat of legislative assemblies without constraints. For the most part, the 13 states had created weak governorships, and the national government had no executive branch whatsoever. The result had been chaos, a nation on the brink of economic and even civil ruin. The framers' goal was to create an independent executive branch that could impose order and discipline—in not only implementing laws but also employing the veto power as a kind of guardrail on the new Congress.

There was accordingly a widespread consensus on the need for a strong executive branch and a shared sense that—as James Wilson of Pennsylvania put it—"the prerogatives of the British monarch" were not the "proper guide in defining the executive powers." The president would not have unilateral power in foreign affairs, as the British sovereign did. Neither would he have the ability to prorogue Congress, as the king also possessed. Rather, per Wilson, the president's tasks would focus on "executing the laws and appointing officers," which would make him a "safeguard against tyranny."[7]

What the framers collectively had in mind was a blending of two of the great theorists of republican politics—Montesquieu, the French philosopher who wrote in the mid-1700s, and Polybius, the Greek-born defender of the Roman Republic at the peak of its power (around 200 BC). Montesquieu had famously advocated the idea of the separation of powers. In *The Spirit of the Laws*, he asserted that

> political liberty of the subject is a tranquility of mind arising from the opinion each person has of his safety. In order to have this liberty, it is

> requisite the government be so constituted as one man need not be afraid of another.[8]

This is not possible when the executive and legislative powers are united, "because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." Likewise, the judicial power must be separate from the legislative and executive authorities, "for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression."[9]

The matter was not simply one of separation but also a careful blending. Montesquieu further argued that "the executive power, pursuant of what has been already said, ought to have a share in the legislature by the power of rejecting; otherwise it would soon be stripped of its prerogative."[10] In this, he drew indirectly on the work of Polybius, who asserted that the Roman Republic worked because the Senate, consuls, and assemblies each had a share of the others' power. This, Polybius believed, had helped the Romans maintain their republic, because

> when any one of the three classes becomes puffed up, and manifests an inclination to be contentious and unduly encroaching, the mutual interdependency of all the three, and the possibility of the pretensions of any one being checked and thwarted by the others, must plainly check this tendency: and so the proper equilibrium is maintained by the impulsiveness of the one part being checked by its fear of the other.[11]

Granting the president a role in legislative affairs should not be taken to imply that the framers saw the president as a "coequal" branch with Congress. As Madison put it in *Federalist* 51 (a text that relies on Polybius's insights), "In republican government the legislative authority necessarily predominates."[12] The legislative power by its very character is prior to the executive and judicial authorities, for the latter two cannot operate without the actions of the first. And the central character of a republic was thought to be one in which the citizens are held to account for laws that they themselves have a share in making.

Thus, the legislature was always meant to come first, and indeed—as noted in the first report in this series—the constitutional Congress has all sorts of means to check the judicial and executive authorities. The Senate has the right to advise and consent on presidential appointments. Matters of war and peace cannot be conducted without congressional input. And, of course, Congress can remove members of the executive branch through the impeachment power.

Still, the framers were intent on not only keeping the executive authority out of the hands of Congress but also using it as a tool to prevent an abuse of the legislative power itself. To that end, the principal instrument the framers created was the qualified presidential veto. It was not absolute, but it could be overridden only by a two-thirds vote of both chambers of Congress. Such a supermajority action against the president would likely indicate that Congress spoke for the whole community of the people. And outside of such circumstances, the veto would enable the president to protect his executive authority and reject laws that benefit one faction of the nation over another.

Of course, the veto power would not hamper Congress if the president were a mere functionary of Congress. He had to possess not only an independent source of power but also an independent *will*. Madison's original plan of government called for the president to be chosen by Congress and to serve for just one seven-year term. His ineligibility for reelection would liberate him from the factionalism of the legislature. But delegates objected, arguing that presidents should be eligible for additional terms; it would keep them motivated to do their best and reward those executives who had done a good job. In that case, congressional appointment would not serve the purpose of independence, as the president would surely curry favor with congressional factions. Thus was born the Electoral College.

To modern eyes, the Electoral College is a clunky Rube Goldberg device that seems to make no sense. But it was designed as a way to select a president independent of congressional meddling, so that, as Pennsylvania delegate Gouverneur Morris put it, the president would be interested in "maintaining the rights of his Station" and thus preventing a "Legislative tyranny."[13] The president would not be chosen by Congress but rather an ad hoc body (not consisting of any members of Congress) chosen by the state legislatures, meeting in state capitals (away from the wiles of congressional intrigue) and casting their ballots independent of electors from other

states. Congress's role in this selection process was to act only in the absence of an electoral-vote majority.

The Electoral College reflects the skepticism the framers had about strongly democratic institutions. Obviously, the people are independent of Congress as well, but there were doubts that the public was sufficiently capable of judging the candidates' qualifications. The Electoral College by design was indirectly tied to the people (mediated by the state legislatures, who prescribed the manner of choosing electors) and thus essentially republican. But it was not democratic. By the 1830s, the Electoral College was reduced to a mere pass-through for popular sovereignty, but the framers of the Constitution were unprepared to mandate democratic selection of the chief executive.

As a collective assembly, the members of the Constitutional Convention decided that, between the veto and the Electoral College, the executive would have the means and the will to resist legislative encroachments on his prerogatives and offer the necessary check against laws that were bad for the whole community without sliding into European-style absolutism. But not everybody was convinced. Randolph, as mentioned above, believed the convention tacked too closely to the European model. Others, notably Hamilton and Madison, believed the president needed more power. Though Madison and Hamilton's efforts to strengthen the presidential office failed, they are worth examining in detail, as they anticipate the fights in the 1790s on the appropriate relationship between the executive branch and Congress.

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The Constitutional Convention was filled at times with high drama over consequential questions of the shape the republic would take: What about the differences between large and small states? What about the issue of slavery? What about the role of state governments? On each of these, the framers came to important, lasting compromises.

Yet they also frequently had to get deep into the weeds, considering questions whose importance seems to have diminished as time has moved on. But when looked at through the historical context of the period, these ostensible quibbles entangle meaningful disagreements about the nature of power in a republic. One such issue had to do with the debate over congressional eligibility for executive appointments.

The new Congress would be creating all sorts of offices that would then be filled by presidential appointment. As they thought through the matter, the framers asked whether it would be proper for the president to appoint members of Congress. Again, to modern eyes this might seem inconsequential. But a key complaint that Americans had of the British system was that the king's ministers had used the appointment power to bribe members of Parliament to support the government's initiatives. The monarch, in this telling, had not exercised the veto power because he had not been required to. His access to elaborate and lavish patronage enabled him to control Parliament from the inside.

The framers were certainly aware of what Virginia delegate George Mason called the "venality and abuses" of the British system.[14] But there were other considerations in play—namely, the framers hoped that Congress would consist of the best and brightest of the political community. Did it not make sense for the president to draw on this pool of talent? Would the president be forced to select "unfit characters," as Madison put it?[15] As Rufus King—a delegate from Massachusetts—put it, "Such a restriction on the members would discourage merit. It would also give a pretext to the executive for bad appointments, as he might always plead this as a bar to the choice he wished to have made."[16]

Notably—for it was a sign of the upcoming political battles between Madison and Hamilton—the latter made the case that perhaps the British system's "corruption" was beneficial. While acknowledging that "there are inconveniences on both sides," he believed this was a power the president should have: "We must take man as we find him, and if we expect him to serve[,] the public must interest his passions in doing so. A reliance on pure patriotism had been the source of many of our errors."[17] In this, he approvingly cited David Hume, the Scottish philosopher who—in an essay titled "On the Independency of Parliament"—asserted that the king's patronage powers were essential to the state's stability. Hume argued that, on paper, the king possessed little ability to check the Parliament.

> The share of power allotted by our constitution to the House of Commons is so great that it

> absolutely commands all the other parts of the government. The king's legislative power is plainly no proper check to it. For though the king has a negative in framing laws, yet this in fact is esteemed of so little moment that whatever is voted by the two houses is always sure to pass into a law, and the royal assent is little better than a form.[18]

How then does the system maintain a balance between the institutions of government? Hume answered, royal patronage:

> The crown has so many offices at its disposal that, when assisted by the honest and disinterested part of the House, it will always command the resolutions of the whole, so far, at least, as to preserve the ancient constitution from danger. We may therefore give to this influence what name we please; we may call it by the invidious appellations of *corruption* and *dependence;* but some degree and some kind of it are inseparable from the very nature of the constitution and necessary to the preservation of our mixed government.[19] (Emphasis in original.)

Few delegates agreed with Hamilton on the utility of executive patronage, instead inclining to see it as a dangerous meddling by the executive in the legislative domain. Ultimately, they struck a compromise: Members of Congress would be ineligible to accept nomination to any office created during the period in which they had been elected, and none was eligible to serve jointly in the executive and legislative branches.

Madison would have nothing to do with Hamilton's praise of Hume. From Madison's perspective, the solution to congressional meddling of the presidency could not possibly be presidential meddling in Congress. This was, in his mind, a matter of corruption—plain and simple. And in the 1790s, he would rail vehemently in the pages of the *National Gazette* that executive meddling in Congress was a threat to liberty. He believed that Congress had to be the tribune of the people, and if members of Congress were effectively bribed by the executive—as Hume had averred—then the republican character of the government would be diminished. As we shall see in the next report in this series, this would become a major point of contention in the development of executive power.

Nevertheless, Madison agreed in principle not only that the executive had to be strong enough to resist the legislature. He also thought that the veto alone would not be enough. He strongly believed that the bad actors of the previous decades had been state legislatures, whose irresponsibility had nearly brought the nation to ruin. And he inferred from that "experience . . . a powerful tendency in the legislature to absorb all power into its vortex."[20] Madison did not agree with Hamilton that executive patronage was an acceptable solution, but he nevertheless felt something should be done.

Madison borrowed an idea from New York's state constitution—the council of revision. In his proposal to the convention, Madison suggested that the "executive and a convenient number of the national judiciary, ought to compose a council of revision with authority to examine every act of the national legislature before it shall operate."[21]

At first blush, it might appear that Madison sought to limit the president's power over Congress, but in fact the opposite was the case. He doubted that, in a republic, the president alone could possibly stand up to Congress. "In a republic," he claimed, "personal merit alone could be the ground of political exaltation, but it would rarely happen that this merit would be so pre-eminent as to produce universal acquiescence." Consequently, the president would constantly be "envied and assailed by disappointed competitors."[22]

This would be too much for the chief magistrate to withstand, and "his firmness therefore would need support"—especially since he lacked the ability to deal out the "emoluments from his station" to members of Congress (as Hamilton had suggested he should possess). Bringing judges into the veto process would "both double the advantage and diminish the danger." The executive branch alone would not be able to withstand the legislature, but the executive backed with the judiciary might provide sufficient weight and substance—enough to protect the president's power and help maintain "a consistency, conciseness, perspicuity and technical propriety in the laws."[23]

Madison thought this would have other beneficial effects. It would also give the "Judiciary Department . . . an additional opportunity of defending itself against Legislative encroachments."[24] Implicit as well here is a Madisonian alternative to the institution of judicial review—the extra-constitutional innovation through which the courts

have claimed final authority on the constitutionality of congressional legislative. Madison's council of revision would have served this purpose—and not only over congressional laws. His original proposal vested Congress with the power to veto state laws, but before those vetoes were final, the council of revision could overrule congressional rejections of state laws (subject to congressional override). As Madison summarized the plan:

> In short, whether the object of the revisionary power was to restrain the legislature from encroaching on the other co-ordinate departments, or on the rights of the people at large; or from passing laws unwise in their principle, or incorrect in their form, the utility of annexing the wisdom and weight of the judiciary to the executive seemed incontestable.[25]

Ultimately, his fellow delegates did contest this argument. His plan for a council of revision was never seriously considered—much like Hamilton's idea to encourage executive involvement in the legislature. When the convention finished its work, it had produced a decidedly Whiggish chief executive—influenced partly by the British model, shorn of its pomp and circumstances and denuded of its power to extend its reach into other realms of government, but (hopefully) imbued with a power and will to implement the law and serve as an independent check on Congress.

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The most famous statement on executive power probably comes from Hamilton, who wrote in *Federalist* 70,

> Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks: It is not less essential to the steady administration of the laws, to the protection of property against those irregular and high handed combinations, which sometimes interrupt the ordinary course of justice to the security of liberty against the enterprises and assaults of ambition, of faction and of anarchy. Every man the least conversant in Roman story knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of dictator, as well against the intrigues of ambitious individuals, who aspired to the tyranny, and the seditions of whole classes of the community, whose conduct threatened the existence of all government, as against the invasions of external enemies, who menaced the conquest and destruction of Rome.[26]

Nobody has better summarized the Constitutional Convention's sentiment on the need for a president. Sure, history was replete with monarchs abusing their power, stamping out free government wherever it had emerged. But the United States' experience since its break with Great Britain had demonstrated decisively that the country needed a single person in charge of enforcing the laws who should also serve as an independent check on the legislative branch.

But did the Constitution actually accomplish this task? The "public-facing" persona of Hamilton, under the pseudonym Publius, was quite confident that it did. But at the actual convention, he had advocated forcefully for a much stronger executive than what his fellow delegates agreed to. And so had Madison, although the two disagreed on how to strengthen the executive against what they believed was a potentially obtrusive legislative branch. Whereas Hamilton sought to empower the executive to employ patronage to involve himself in legislative matters, Madison wished to strengthen the president's ability to withstand legislative intrusion of his own matters.

This partial agreement, partial disagreement turned out to be of huge consequence, for Hamilton and Madison would play important roles during the Washington administration—Hamilton as secretary of the treasury and Madison as a leader in the House of Representatives. Both would seek to strengthen the executive over domestic and foreign matters, albeit according to their preferred strategies. Their seemingly abstruse intellectual disagreements would give rise to the first great political cleavage, separating the Federalists from the Republicans—a fight that had much to do over the proper role of the president in a republican system of government. That debate and its lasting implications will be the subject of the next report in this series.

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Notes

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