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The Republican King: The Creation of Executive Power in America

Nicholas Cole
St. Peter's College, Oxford
nicholas.cole@history.ox.ac.uk

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Nicholas P. Cole

Oxford University

Though they emerged from the Revolution hating and fearing kings, their agents and royal power, sometimes even rejecting any notion of executive magistracy,[1] Americans in 1789 inaugurated George Washington into an office that proved more powerful than that held by George III. It is striking that although Washington himself, not least in his inaugural address on that occasion, drew a parallel between himself and Cincinnatus, the Roman leader who answered his country's call in time of need, the office into which he was inaugurated invited little or no comparison with ancient magistracy and was most naturally and compared by both its critics and by its supporters to the modern British monarchy. Washington, indeed, personified the state in a way that ancient counterparts had not done. Had the framers of the Constitution wished to suggest a more explicitly republican model, they might have adopted relatively small, even cosmetic changes and granted the Senate the power to receive ambassadors and listed the treaty-making power under the powers of the Senate rather than in the article concerned primarily with Executive authority. As it was, Washington was inaugurated with a pomp, ceremony and firing of cannon that invites comparison not with the ancient magistrate but with far more august figures.[2]

Montesquieu stated that 'executive power' exists in all states, and that liberty is secured by separating the different types of power from each other.[3] Certainly there are ancient precedents for his definition of executive power. Cicero states that the magistrates are what gives the laws their voice, for example.[4] Yet the ancient authorities tend to describe magistrates as exercising a form of royal power. The Roman concept of imperium, even so

[1] Oscar Handlin and Mary (Flug) Handlin, *The popular sources of political authority: documents on the Massachusetts constitution of 1780*, A Publication of the Center for the Study of the History of Liberty in America, Harvard University (Cambridge, Mass.: Belknap Press of Harvard University Press, 1966), p. 112.

[2] James Thomas Flexner, *George Washington and the new nation, 1783-1793* (Boston: Little, Brown and Company, 1970), pp. 175–81.

[3] Charles Montesquieu, *The Spirit of the Laws*, edited by Anne M. Cohler, Basia C. Miller and Harold S. Stone (Cambridge: Cambridge University Press, 1989), pp. 156–7.

[4] Cicero, *De Legibus* III.2.

far as it is distinguished from regnum, does not map neatly onto the modern notion of executive power. 'Imperium' implies a right of command or a right to apply the law. Even if one accepts that in the developed form of the Republic, the use of force by magistrates and their direct involvement in civil or criminal trials had become extremely limited, at a conceptual level the consuls of Rome and the lesser magistrates do not bear easy comparison to the idea of an officer whose job is merely to execute the law. In common with the magistrates of other ancient states, the Roman consul had considerable authority to direct the operation of the Senate and the business of the popular assemblies.[5] Though it is clearly possible to characterize their function as executive, to do so is to impose a modern concept onto the office as surely as to describe the King as 'but the first magistrate' of the British state is to apply terminology derived from one branch of political theory to an office that rests on other conceptual foundations. At the very least, the idea of an exclusively executive branch of government is a purely modern one, but there is certainly a case for suggesting that the notion of executive power is itself a distinctively modern concept.[6]

The second article of the United States Constitution states that the 'Executive Power' will be 'vested in a President of the United States of America.' The intent of this sentence is not self-evident. It is unclear whether those particular words grant the President of the United States any particular powers, rights, duties or prerogatives, or whether they are merely an introduction to the very specifically enumerated powers that follow. That question is still the subject of controversy.[7] This paper, however, examines approaches to that question during the early Republic, while suggesting that this question has become much more obvious over time, and that executive power was imprecisely conceived during the late eighteenth and early nineteenth century. It also suggests that the office of the President is not best understood as the sum of the powers granted by the Constitutional Convention, and suggests a divergence between the understanding of American lawyers, who tended to describe the Presidency in limited terms, and the understanding of executive power by politicians, who tended to have a more expansive view. Lastly, it suggests that executive power in its American form was created not through a mature theory of executive power in the eighteenth century, but rather in apposition to two other things—the more

[5]Here is not the place for a detailed discussion of Roman magistracies. For an introduction see Andrew Lintott, *The Constitution of the Roman Republic* (Oxford: Oxford University Press, 1999), pp. 17–8, 94–104.

[6]The view also taken in Harvey Claflin Mansfield, *Taming the prince: the ambivalence of modern executive power*, Johns Hopkins paperbacks ed edition (Baltimore: Johns Hopkins University Press, 1993), which traces the gradual development of this concept.

[7]A brief introduction to this controversy is provided by Cronin, 'The President's Executive Power', in: Thomas E. Cronin, editor, *Inventing the American Presidency* (Lawrence, Kan: University Press of Kansas, 1989), ⟨URL: `http://www.worldcat.org/oclc/20012733`⟩, p. 181.

developed understanding of legislative power on the one hand and the British monarch on the other. Though this paper confines itself to the early period of the Republic, implicit in its argument is a rejection of the suggestion of a once more-constitutional presidency that has only in relatively recent times become qualitatively different; instead it suggests that inherent in the Presidency from the beginning was a protean quality that could be shaped by the office's holders. By the same token it rejects the concept of any straight-forward, eighteenth-century, American notion of executive power that can be readily contrasted with modern developments.[8]

Though American writers discussing the constitution would most frequently work to distinguish the office of the President from the institution of monarchy, it is striking to note that the relatively brief description of the Executive office in the Constitution invites immediate parallel with the description of British monarchy found in Blackstone. Executive power is described in Article 2 of the United States Constitution. The incoming president is to swear an oath that he will faithfully execute his office. As well as being invested with 'the Executive Power' the article describes the office by enumerating particular powers. The President is commander-in-chief of the military forces of the United States, he is granted a power of pardon, the power to receive ambassadors. He is given a power to convene Congress and instructed, from time to time, both to provide them with 'information on the State of the Union' and to recommend to them such measures as he considers necessary and expedient. He is specifically charged with the duty to ensure that the laws are faithfully executed. Together with these powers and duties, which pertain to the Presidency alone, he is granted several tasks that, though they require the co-operation of parts of government, are clearly primarily conceived of as presidential tasks. He is granted (in Article 1) a veto over legislation, which can be overridden by the vote of two-thirds of both houses of Congress. He can make treaties 'with the advice and consent of the Senate', and also with their advice and consent shall appoint 'Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States,' though Congress is also empowered to grant the President a right of appointment without reference to Congress. He is given a power to fill up vacancies that occur while the Senate is in recess.

Though it is brief, the Constitution's description of Presidential duty and power cannot but bring to mind the relevant sections of Blackstones's much more extended account of the duties and privileges of the British monarch. Blackstone, just as the Constitution, lays stress on the oath that the monarch takes on entering office, the three aspects of which are to govern according to the law, to execute judgement in mercy, and to maintain the

[8]The most famous discussion of twentieth-century developments is Arthur M Schlesinger, *The imperial Presidency* (Boston: Houghton Mifflin, 1973).

established religion.[9] The President's oath, of course, parallels only the first of these, but his power of pardon evokes the second. Blackstone lays stress on the King's role as representative of his people in foreign affairs, making treaties and sending and receiving ambassadors,[10] and on his powers of veto and pardon and his role as commander of the military. And though the Constitution clearly envisages that some offices will be filled by the choice of Congress rather than the President, 'He is to commission all officers of the United States' and can require reports from the heads of all departments, aspects of the Presidency that parallel Blackstone's description of the king as 'properly the sole magistrate of the nation all others acting by commission from him.'[11] To be sure, other powers that Blackstone declares to be fundamental to the nature of royal power, the Constitution explicitly grants to Congress rather than the President. These include the 'organizing, arming, and disciplining the Militia',[12], the declaring of War and the granting of letters of Marque,[13] and, perhaps most importantly, the establishing of inferior courts. Significantly, the Constitution also explicitly vested the powers to 'To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures' in the hands of Congress, whereas Blacksone had described these as aspects of royal power.[14] If the Constitution is explicit in creating an office that is distinct from the British monarch, the text does so in many cases by granting the President, granting him in modified form or vesting elsewhere the specific powers discussed by Blackstone in his account of Royal power and prerogative.[15]

This is not to say that all aspects of Blackstone's summary of royal power have parallels in the Constitutional text. Blackstone devotes considerable space to discussion of 'royal dignity' and sovereignty,[16] and to explaining the King's relationship to the law and to the other branches of government, in particular those areas where the king's prerogative is absolute and the ways in which the law can restrain the king. Blackstone cites Locke on the subject of the king's discretionary power to act for the public good where the law is

[9] William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769*, volume 1 (Chicago and London: University of Chicago Press, 1979), pp. 227–9.

[10] Ibid., pp. 245–6.

[11] Ibid., pp. 243, 261–2.

[12] Ibid., p. 254.

[13] Cf. Ibid., pp. 249–50.

[14] Ibid., pp. 264ff.

[15] I am grateful to Lorianne Updike Toller, currently working with me at the start of her D.Phil project, for her suggestion that the connection of Blackstone to the specific provisions of the Constitution rewards closer investigation. Her research will in time make the precise nature of this link clearer.

[16] Ibid., p. 234.

silent,[17] and also notes the king's power to issue proclamations.[18] Though the Constitution itself is, very understandably, silent on such matters, that is not to say that they did not all have important parallels in the evolution of presidential power and its understanding.

Hamilton, in the *Federalist Papers*, described the Presidency as one of the most carefully constructed aspects of the Constitution, and yet he noted the criticism of Antifederalists that the Presidency was 'not merely the embryo, but as the full-grown progeny of that detested parent [monarchy].'[19] Yet for all Hamilton's assertions, what is perhaps most striking about the creation of the Presidency is the apparent lack of priority given to the discussion of executive power in the ratification debates. Of the three writers of the *Federalist*, only Hamilton devotes space to any extended discussion of the presidency, and although he dismisses the attacks of Antifederalists as degenerating into the realm of fiction, for their part too, Antifederalist emphasis on the presidency is relatively infrequent. One of the more famous Antifederalist attacks, the letters signed 'The Federal Farmer' were muted in their criticism of the President, fearing rather the undue influence of the Senate and the tendency of the system to aristocracy than the executive office itself:

> [T]he general government ... will have a strong tendency to aristocracy, or the government of a few. The executive is, in fact, the president and the president and the senate in all transactions of any importance; the president is connected with, or tied to the senate; he may always act with the senate, but never can effectively counteract its views.[20]

In similar fashion, the most famous critiques of the proposed Constitution that were the product of the ratification debates, the letters signed 'Brutus', were directed primarily at the powers of the Federal government generally, and the construction of its legislature and judiciary in particular. The Presidency itself was not the primary target of criticism. The Antifederalist 'Centinel' also thought the president less of a threat than that of the potential for aristocracy in the legislature, in his first letter saying of the president only that he 'would be a mere pageant of state, unless he coincides with the views of the Senate, [and] would either become the head of the aristocratic junto in that body, or its minion.' The primary fear relating to the president himself is that his power of pardon might shield the misdeeds of Senators.[21]

[17] Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769*, p. 244.

[18] Ibid., p. 261.

[19] James Madison, Alexander Hamilton and John Jay, *The Federalist Papers*, edited by Isaac Kramnick (London: Penguin, 1987), p. 389 (67).

[20] Storing, 'Letters from The Federal Farmer', in: Storing, *The Complete Anti-Federalist*, vol. 2, p. 237 (III).

[21] Storing, 'Letters of Centinel', in: Storing, *The Complete Anti-Federalist*, vol. 2, p. 144.

Centinel's slightly more explicit criticism of executive power in the second letter is not entirely consistent, condemning both the involvement of the Senate in executive functions and the failure to extend that mechanism to the presidential power to grant pardon.[22] Hamilton was right that there were those who feared that the Presidency would develop into monarchy or even prove worse than the British monarhcy—the idea can be found in Patrick Henry's criticisms of the Constitution, for example[23]—but such concerns were not central to the majority of Antifederalist arguments, which were far more likely to be concerned about the Federal power to maintain a standing army at all than they were to worry about the office of its commander-in-chief.

The most radical elements of Revolutionary republicanism during and after 1776 had rejected the idea of unitary executive power. The general story of the fate of executive power in America between 1776 and 1789 is well understood. As Gordon Wood noted, radical Whig thought emphasized the importance of legislative assemblies, and in the newly Independent States executive power was considerably weakened. In Pennsylvania the separate, executive magistrate was entirely eliminated, replaced with a council of twelve members. In other states the executive magistrate was stripped of his independent authority in other ways, being in various combinations indirectly elected, stripped of particular powers (or rather granted very few), or made to act with the consent and advice of an executive council.[24] Wood emphasizes the fact that in his 1776 draft of a proposed Constitution for Virginia (not the Constitution actually adopted), Jefferson even styles the magistrate 'The Administrator', though the significance of the term is perhaps not as great as Wood suggests, for though Jefferson does strip his proposed magistrate of the power of veto and a series of the king's prerogatives, and make him bound by legislation even though not explicitly named,[25] he leaves him in possession of the remaining 'powers formerly held by the king.' The Virginian Constitution actually adopted in 1776 perhaps made an even weaker office though granting it a loftier title. It declared that the Governor 'shall not, under any presence, exercise any power or prerogative, by virtue of any law, statute or custom of England,' a provision also present in Maryland's Constitution, and also created a Council of State, on whose

[22]Storing, 'Letters of Centinel', p. 151.

[23]Herbert J. Storing and Murray Dry, editors, *The Anti-Federalist* (Chicago: University of Chicago Press, 1985), pp. 308, 311, 320.

[24]Gordon S. Wood, *The Creation of the American Republic 1776–1787*, 2nd edition (Chapel Hill, NC: University of North Carolina Press, 1998), p. 136. Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of State Constitutions in the Revolutionary Era* (Lanham, Md.: Rowman & Littlefield, 2001), pp. 269ff. Adams suggests that in reality, reaction against the power of Governors was rather muted.

[25]Thomas Jefferson, *The Papers of Thomas Jefferson*, volume 1, edited by Julian P. Boyd (Princeton, N.J.: Princeton University Press, 1950), p. 360; Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769*, p. 253.

consent the governor depended in the exercise of most of his enumerated functions.

It was in the context of this Constitution that one of the most remarkable experiments in executive power was suggested, though not actually implemented. Describing it in his *Notes on the State of Virginia*, Jefferson was almost incredulous. 'What clause in our constitution,' asked an exasperated Jefferson in *Notes on the State of Virginia*, 'has substituted that of Rome, by way of residuary provision, for all cases not otherwise provided for?'[26] His question is placed at the end of his extended discussion of one of the most remarkable and direct attempts in post-Revolutionary America to apply Roman constitutional thinking to America—the proposal twice made in the Virginian legislature and only narrowly defeated to create 'a *dictator*, invested with every power legislative, executive and judiciary, civil and military, of life and death, over our persons and over our properties'.[27] It was, as Jefferson accurately observed, a proposal with no precedent in English law and practice, and had instead been borrowed from the example of ancient Rome. As Jefferson explains, he 'stood confounded and dismayed' at the proposal, which seemed to him to oppose every principle of government for which he and others had begun the Revolution. 'One who entered this contest for a pure love of liberty, and a sense of injured rights, who determined to make every sacrifice and to meet every danger, for the re-establishment of those rights on a firm basis' had almost been asked to replace a 'limited monarch' with a 'despotic one'.[28] The proposal failed, but Jefferson's question still demands an answer: why were Virginia republicans so ready to create an executive authority far more powerful than anything they had swept away in the summer of 1776?

One of the interesting features of Jefferson's account of the proposal for a dictatorship is he does not condemn those who had proposed it. Despite his strong objections to the idea of a dictator, and even his assertion that 'the very thought alone was treason against the people', he does not allege the influence of corruption, nor even challenge the republican credentials of those who made the proposal, two tactics that were a staple of eighteenth-century writing, and which Jefferson elsewhere deployed to great effect.[29] Instead, he goes out of his way to vindicate those who had pressed for a Virginian dictator:

> Those who meant well, of the advocates for this measure, (and

[26]Thomas Jefferson, *Notes on the State of Virginia*, edited by William Peden (Chapel Hill, NC: University of North Carolina Press, 1954), p. 129.

[27]Ibid., p. 126.

[28]Ibid., pp. 126–7.

[29]The full catalogue of charges often levelled at those who made a suggestion thought not to be in the public interest are illustrated in Hamilton's attack on opponents of the constitution in *Federalist* I: Madison et al., *The Federalist Papers*, pp. 87–90. Jefferson's own most public use of the same language of corruption would be in the *Anas*.

> most of them meant well, for I know them personally, had been their fellow-labourers in the common cause, and had often proved the purity of their principles) had been seduced in their judgement by the example of an ancient republic, whose constitution and laws were fundamentally different.[30]

This seduction was possible, Jefferson thought, because his colleagues did not correctly understand the nature of the Roman constitution, and had incorrectly thought that the situation of Virginia could be profitably compared to it. They had, he argued, misunderstood the reasons that had made a dictator necessary in Rome. It was not, Jefferson argued, adopted by the Romans to deal with foreign invasion, but rather to deal with the internal problems of the Roman state, problems that he argued were not present in Virginia. The Romans, he suggested, were 'rent by the most bitter factions and tumults, where the government was of a heavy-handed unfeeling aristocracy, over a people ferocious, and rendered desperate by poverty and wretchedness', and the character of their state bore little comparison to the character of the state of Virginia. The latter were 'a people mild in their dispositions, patient under their trial, united for the public liberty, and affectionate to their leaders.'[31] Ancient writers did indeed emphasize that one function of the Roman office dictator was to deal with civil unrest, but also that it was an office that was sometimes necessary to deal with military emergencies. No less an authority than Cicero recommended that a republic should create such a magistrate in times of emergency, and it undoubtedly this, more positive, view of the office of dictator, preserved for American readers in the narratives of Rome's early, almost mythical, military successes, that the Virginian legislature had in mind as it considered the proposal as a way of best resisting the British threat to the young state.[32] George Washington, indeed, was later widely associated with the dictator Lucius Quinctius Cincinnatus, who had come to Rome's aid at a time of siege and imminent disaster, and who had then, in the best tradition of Rome's dictators, laid down his powers after only sixteen days, as soon as crisis was averted.[33]

Even if he neither shared the sense of crisis that had prompted the dictatorship proposal nor agreed with its remedy, Jefferson was not at a loss to explain the reasons that lay behind it. Most obviously, there was the received wisdom that a republican form of government was incapable of

[30] Jefferson, *Notes on the State of Virginia*, p. 128.

[31] Ibid., p. 129.

[32] For Cicero's recommendation of the office of dictator, see *De Republica* 1.64 and 2.56, and *De Legibus* 3.9. An introduction to the place of the office in Roman history is Lintott, *The Constitution of the Roman Republic*, pp. 109–113.

[33] Livy, *Ab Urbe condita*, 3.25–9. For Washington's association with him, Garry Wills, *Cincinnatus: George Washington and the Englightenment* (London: Robert Hale, London, 1984), pp. 36–7, 21.

meeting certain challenges, and extra-ordinary measures might be necessary.

This suspicion reflected a long tradition in western thought, and though Jefferson argued that it was a misplaced fear, it was nevertheless common to much eighteenth-century writing. In its weaker form, which insisted only that the direction of military affairs should always be under the control of a single figure, it was so uncontroversial and widely accepted that whatever other controversies surrounded the creation of the Federal Constitution's President, the writers of the *Federalist* did not need to spend time justifying the President's role as commander-in-chief.[34] Yet the stronger case found its way even into Rousseau's *The Social Contract*, who wrote that 'The inflexibility of the laws, which keeps them from bending to events, can in some cases render them pernicious, and through them cause the ruin of the state in crisis.' He noted that even Sparta had 'let its laws lie dormant' in times of crisis, and not only praised the early Roman state for its relatively frequent recourse to dictators during its early period, but identified the unwillingness to create dictators during the late Republic as one of its weaknesses. He, as Machiavelli had also done, praised the Roman model of dictatorship of a term of office limited to a maximum of six months—long enough for a man set above the law to deal with crisis, but not so long as to encourage greater ambition. So approving was Machiavelli of the office, on the grounds that it provided a way to preserve the republic through emergencies, that he predicted that 'republics which, when in imminent danger have recourse neither to a dictatorship, nor to some form of authority analogous to it, will always be ruined when grave misfortune befalls them.'[35] Though Caesar and others had brought the office into disrepute, enough of a more positive tradition of Roman dictatorship had survived into modern thought to make the attempt to create a dictator in Virginia, in the early days of the republic and facing imminent danger in war, very understandable indeed.

In this light, the dictatorship proposal represents not a retreat from the republican revolution, but rather an attempt to find a truly republican solution to the problem of crisis. Jefferson himself recognized that the defence of Virginia posed real problems and even he went more than a little way towards endorsing the view that had given rise to the proposal when he explained his resignation as governor in his autobiography:

> From a belief that, under the pressure of the invasion under which we were then laboring, the public would have more confidence in a Military chief, and that the Military commander, being invested with the Civil power also, both might be wielded with more energy, promptitude, and effect for the defence of

[34] *Federalist* 74.

[35] Jean-Jacques Rousseau, *The Social Contract*, edited by Victor Gourevitch (Cambridge: Cambridge University Press, 1997), Book IV, Chapter 6. Niccolo Machiavelli, *The Discourses*, edited by Bernard Crick (London: Pengiun, 2003), 1.34.

> the State, I resigned the administration at the end of my second year, and General Nelson was appointed to succeed me.[36]

He recognized that the broader assumptions about the nature of republics and their disadvantage in war, certainly inspired by ancient example and discussion, themselves needed challenging. It is for this reason that he takes care to challenge the argument of necessity both in practice and in principle. The fear that had seemed to necessitate extreme measures had, he argued, been proved false not only by events themselves, but by the experience of several other American states, 'several of whom grappled through greater difficulties without abandoning their forms of government.' He pointed out that Massachusetts even resisted British invasion guided only by 'the government of committees.' In other words, experience had proved false the ancient prejudice that the more democratic a state, the more diffused authority, then the greater the danger in wartime.[37] Had the proposal succeeded, Jefferson feared it would have confirmed these prejudices for all time:

> [It] was treason against mankind in general; as riveting for ever the chains which bow down their necks, by giving to their oppressors a proof, which they would have trumpeted through the universe, of the imbecility of republican government, in times of pressing danger, to shield them from harm.[38]

While Jefferson could take comfort that on neither occasion had a dictator actually been created, on both occasions the dictatorship proposals were put, the compromise was to grant executive of the state emergency powers. Jefferson's successor as governor was granted extensive powers to banish on pain of death suspected enemies, to call out the militia, to impress equipment, slaves and property, to imprison without charge and to organize courts. The emergency powers stopped just short enough of the full proposals for dictatorship to allow Jefferson to claim that the principle of republican government had not been suspended. Patrick Henry advised that the term 'dictator' be avoided, but Virginian Republicans went much further towards adopting the Roman model than Jefferson's account hints, and in 1776 even the language used in the grant of extraordinary powers seemed to echo Roman emergency degrees.[39]

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[36] Thomas Jefferson, 'The Autobiography', in: Saul K. Padover, editor, (Heritage Press, 1967), pp. 47–8.

[37] Jefferson, *Notes on the State of Virginia*, pp. 127–8.

[38] Ibid., p. 128.

[39] For the circumstances of the two Virginian dictatorship proposals: John E. Selby, *The Revolution in Virginia 1775–1783* (Charlottesville, VA: Colonial Williamsburg Foundation and The University of Virginia Press, 1988), pp. 129–30, 283–5. Georgia also conferred emergency powers on its governor to deal with invasion. See the discussion of his powers in Robert W. Barnwell, 'Rutledge, "the Dictator"', *Journal of Southern History* 7:2 (1941).

Understandable it may have been, but the impulse to mimic the dictators of Rome seemed to Jefferson symptomatic of a greater danger facing American republicanism, and one that was far more serious and fundamental than an unhealthy fascination with the workings of the Roman state or misplaced fear about the danger to the state. Though the dictatorship proposal had been motivated by a misplaced fear about the strength of America's republican governments, Jefferson shared concerns about the nature of the Virginian constitution, and criticized it in fundamental terms.

> The constitution was formed when we were new and inexperienced in the science of government. It was the first too which was formed in the whole United States. No wonder then that time and trial have discovered many very capital defects in it.[40]

This sense that the political science was in a state of rapid development at the end of the eighteenth century was shared by many American writers on government, and was picked up prominently by Federalists after 1787, who presented the proposed Constitution as the triumph of a better understanding of the fundamentals of the science of politics. Amongst the 'wholly new discoveries' of modern political science[41] was usually held to be the separation of the legislative, executive and judicial functions into three distinct branches. In 1776, constitutions such as that in Virginia did endorse this principle, but interpreted it solely as implying that the same person could not hold office in more than once branch of government at a time. Little thought was given to restricting each branch of government to operation within its own sphere. As a consequence, Jefferson listed as the fourth 'capital defect' in his state's constitution the problem that 'All the powers of government, legislative, executive, and judiciary, result to the legislative body.' The laws created by the assembly were binding on the other two branches of government, whose officers were in any case dependent on the legislature for their salaries, and without some power to restrain it, he complained, the legislative branch had become accustomed to decide 'rights which should have been left to judiciary controversy' and to direct the actions of the executive branch.[42] Despite this complaint, however, Jefferson's solution was not to create a much more powerful executive. In *Notes* he

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While Governor, Jefferson did himself make certain compromises with the military authority, for discussion of which see Mark A. Clodfelter, 'Between Virtue and Necessity: Nathanael Greene and the Conduct of Civil-Military Relations in the South, 1780–1782', *Military Affairs* 52:4 (1988). On the problems of principle in wartime see also the discussion of Jefferson's conduct during the Revolutionary War in Leonard W. Levy, *Jefferson and Civil Liberties: The Darker Side* (Cambridge, MA: Harvard University Press, 1963), pp. 25–42, which makes a damning, though not entirely convincing, case against Jefferson on points of principle..

[40] Jefferson, *Notes on the State of Virginia*, p. 118.

[41] Federalist I.

[42] NSV.

offered no explicit solution, but his 1783 draft of a Constitution for Virginia, written for a Convention that was not in the event called, offers hints of his thinking at this time. His description of the Executive office in that document makes the Governor dependent on the legislature in the execution of all of his enumerated powers, even modifying his power to 'direct' the military force of the state by explicitly requiring him to leave the execution of his directions to officers chosen by the legislature. The Governor, in this draft too, is to be aided and restrained by Council of State, given the explicit power to give advice even unasked. In three ways, however, Jefferson attempted to protect the Governor from an over-zealous legislature. Firstly, he proposed making him part of a Council of Revision, which would have had the power to review and reject legislation, unless overridden by two thirds of both legislative houses. Secondly, he ensured that the Governor's salary was fixed in constitutional law. Lastly, he included the curious stipulation that the president was to be granted such powers (but only such powers)

> which are necessary to execute the laws (and administer government) which are not in their nature either legislative or judiciary. The application of this idea must be left to reason.

In this, Jefferson anticipated his mature view that the Constitutional duties of the President of the United States were for the President himself alone to judge.[43]

This rather curious provision also, however, reveals a more fundamental truth about American conceptions of executive power in the 1780s: that whereas the power to make law and the power to judge civil and criminal controversies were more easily defined in themselves, the nature of executive power was largely understood in apposition to them: that power which was not legislative or judicial in character was executive. This understanding of executive power also helps to explain the shape of the executive offices created as enthusiasm for the more radical, legislative-centred forms of republicanism waned. The idea central to classical mixed-government theory, namely that the disadvantages of a particular form of government could be remedied through the careful creation of a state that mixed aspects of all of the basic forms of government, was never entirely jettisoned from eighteenth-century theory, even if almost all republican writers (with the notable exception of John Adams) did de-emphasize explicit description of American governments as mixtures of monarchy, aristocracy and democracy, preferring instead to suggest that bodies with similar features had been created through purely republican forms.[44] As Wilson described the disadvantages

[43]Thomas Jefferson, 'Draught of a Fundamental Constitution', in: Jefferson, *Notes on the State of Virginia*, pp. 214–5.

[44]Federalist 67. James Wilson, 'Speech in the Pennsylvania Convention, 24 November 1787', in: Colleen A. Sheehan and Gary L. McDowell, editors, *Friends of the Constitution:*

of democracy in a November 1787 speech: 'The disadvanages [of democracy] are dissentions, the delay and disclosure of public councils, the imbecility of public measures retarded by the necessity of numerous consent.'[45] Wilson did not suggest that the Federal Constitution was a mixed-government in the classical sense, but he did suggest that the Constitution embodied the advantages and disadvantages of each of the classical, 'simple' modes of government. If the Presidency was understood as making up for the deficiencies inherent in the numerous legislative branch, as Wilson, who had chaired the committee of detail that had drawn up the basic text of the Constitution, strongly hints it should be, then it is no surprise that there was little appetite for hampering the President with colleagues in office or giving him an executive council, both ideas floated and the convention but which received little support. Indeed, a maxim common in 1780s politics, often supported by little reasoning except an apparent sense that legislative and executive bodies ought in some sense to mirror each other, held that whereas responsibility in the legislative branch was best ensured by making it as large as possible, the reverse held true in the case of the executive department.[46]

If in its construction the Executive branch owed most to the lingering and momentarily renewed influence of a form of mixed-government theory, in its explanation and defence it was most commonly understood in apposition to the British monarch, a trend reflected both in Hamilton's contributions to the Federalist and the descriptions of the Constitution offered by lawyers' commentaries on the constitution in the 1790s and early nineteenth century. These were eager to stress the relative weakness of the office compared to the British king. Much of Wilson's account of the the presidency, in his lecture specifically devoted to the discussion of the executive department, is unremarkable, enumerating and elaborating on at some length the principle of election (contrasted with hereditary power) and the specific powers granted to the president by the constitution. Wilson notes that in requiring the consent of the Senate in the appointment of officers and in the making of treaties, the Constitution did not strictly preserve unmingled the legislative and executive powers.[47] The text of his lecture does not hint at the much more forceful objection he had raised in the Convention itself, where he had shown considerable alarm at the blending of legislative and executive power. Like the Antifederalists' objections, however, his defence of the executive was based on his fear of the potential of the Senate to degenerate into aristo-

Writings of the 'Other' Federalists 1787–1788 (Indianapolis, IN: Liberty Fund, 1998), pp. 86–7. A similar instinct is evident in all of Wilson's descriptions of the Constitution.

[45] Wilson, 'Friends of the Constitution', pp. 86–7.

[46] See, for example, James Wilson's speech calling for a single executive, in Madison's Notes on the Debates of the Constitutional Convention, 16th June 1787.

[47] James Wilson, Kermit Hall and Mark David Hall, *Collected works of James Wilson* (Indianapolis, IN: Liberty Fund, 2007), ⟨URL: `http://www.loc.gov/catdir/toc/ecip077/2006102965.html`⟩, p. 879.

cracy rather than a positive defence of executive prerogative.[48] The power of pardon, however, gave him particular pause, since Montesquieu had declared that the more republican a government, the less place there ought to be for any need of or even power of pardon. Here Blackstone came partially to his aid, providing him with a justification for the power of pardon, but Blackstone's argument in favour of vesting the king with it is clearly not applicable to the American case. Blackstone, like Montesquieu, describes the power of pardon as incompatible with democracy, and therefore a power that can only be exercised by a monarch, acting in 'a superior sphere.'[49] Yet the executive in America cannot be imagined as 'the first mover' of government, nor does Wilson find his reasoning on the subject of democracies sound. The American principle of popular sovereignty, a repeated theme of Wilson's description of the American Constitution, instead rescues the republican state from inconsistency when it offers a pardon. The people, as the sovereign and themselves (at least conceptually) a superior power to the law itself, are able to pardon, and therefore create a power of pardon, 'with perfect consistency.'[50] Yet as Wilson notes, though the state constitutions of his day incorporated powers of pardon, they did not all imagine it to be properly an executive power, and Wilson remains ambivalent on the point.

In his public descriptions of the Constitution, Wilson did not similarly pause over the power of the President to make treaties. His audience at the time could not have guessed that at the Convention he had expressed a rather different view, one shared by fellow lawyer and legal scholar St George Tucker, that in so far as the power of making treaties created law, it ought also to involve the House of Representatives. Tucker's most significant work, published in the first years of the nineteenth century, was a full reprinting of Blackstone's commentaries, but with footnotes throughout contrasting American and British law, and with several more extended essays on the subject of republican government and American law. Intended for the use of law students, who had previously continued to use Blackstone notwithstanding the obvious incongruity, for want of a similarly comprehensive treatment of American law, this provided and indeed forced a much more detailed contrast between the specific powers of the King and the President than had been provided in any setting hitherto. At times sharply critical of the Federalist[51] and with an eye for consistency and detail that exposed the logical and legal flaws of elements of that work's rhetoric, the treaty-making power of the President and the Senate gave him particular pause. A case in 1799 had decided that Senators were not officers of the Constitution liable

[48] Madison's Notes on the Debates of the Constitutional Convention 6th September 1787.

[49] Wilson et al., *Collected works of James Wilson*, p. 883.

[50] Ibid..

[51] St. George Tucker, *Blackstone's Commentaries: with Notes of Reference, to the The Constitution and Laws of the Federal Government of the United States*, volume 1 (The Lawbook Exchange, Ltd, 1996), p. 336.

to impeachment, causing Tucker to lament that whereas Blackstone could hold out the possibility of the impeachment as a punishment for those who are complicit in having advised treaties that turn out not to be in the interests of the nation. In the American case, the President alone was liable to impeachment, and even then only formally, for his analysis of the mechanism for impeachment persuaded him that it was extremely unlikely to be deployed.[52] For Tucker, too, however, the real danger was the Senate rather than the Executive:

> I have chosen to consider the power of trying impeachments, which the Constitution vests in the senate, here, in order to place that of making treaties, which are to become a part of the supreme law of the land, and in which that body has a principle agency, in a stronger point of view. The union of these powers in that body, and the total exemption of the senators from impeachment, seems to render this part of the federal constitution, the most defective and unsound, of any part of the fabric.[53]

By 'this part' of the constitution Tucker means the Senate. As he noted at length, however, the treaty-making power had aroused the jealousy of the House of Respresntatives in 1796 and prompted an exchange between the House and the President on the nature of executive and legislative power.[54] By the time of James Kent's *Commentaries*, published in 1824 and modelled on those of Blackstone but with a completely rewritten text for the use of the American student, this controversy was still worth noting but seemed settled against the claims of the House of Representatives. In so far as history seemed to prove that negotiations were best conducted with secrecy and dispatch, the Presidency seemed the proper branch of government in which to vest the principle treaty-making power, and the consent of the Senate Kent presented as an excellent compromise that avoided the inconveniences that would be inherent in involving also the much more numerous house of Representatives. He noted with approval President Washington's firm rejection of the right to examine the legal consequences of treaties claimed by the House of Representatives in 1796 and hoped that the House's contrary sense in 1816 had now settled the issue.[55]

These specific problems, however, were not the only concerns that the detailed studies by these two lawyers revealed. Tucker rather dramatically closed his account of the presidency with a passage that wondered whether the operation of the Constitution had not already at least

[52]Tucker, *Blackstone's Commentaries: with Notes of Reference, to the The Constitution and Laws of the Federal Government of the United States*, pp. 335, 329.

[53]Ibid., p. 338.

[54]Ibid., pp. 334–5n.

[55]James Kent, *Commentaries on American Law*, volume 1 (New York: O. Halstead, 1826), pp. 216–7.

> raised doubts whether some important amendments are not necessary for the preservation of the liberty of the people of the United states... The limitations which the constitution has provided to the powers of the president, seem not to be sufficient to restrain this department within its proper bounds, or preserve it from acquiring and exerting more than a due share of influence. To this cause it may be attributed, that in addition to very extensive powers, influence and patronage which the Constitution gives to the President of the United States, congress have with a liberal hand, conferred others still more extensive; many of them altogether discretionary.[56]

Such reflections left him wondering whether the principle of a unitary executive was really better than the quasi-executive committee that had existed under the Articles of Confederation, and whether, in fact, an executive composed of a member from each state and which might be safely trusted with all the powers currently exercised by Senate and President together, would not be less liable to the problems that he identified in the existing constitutional arrangements.[57]

An apparently small but instructive problem identified by Tucker concerned the power of proclamations. The power to issue proclamations was one of the prerogatives of the British crown, but no such power was expressly granted to the Federal President. Certain types of proclamations, such as those declaring a truce or restating and reinforcing 'the observance of duty, enjoined by law' Tucker found justified either by expediency and the law of nations or by the President's obligation to ensure that the laws are faithfully executed. Yet he was troubled by the fact that both Houses of Congress seemed to have accepted the President's assumed power to make proclamations, and that two Presidents had already issued proclamations recommending fasting and prayer.[58] In retrospect it is clear to see the office in this respect being defined not by the strict powers enumerated but by congressional—and beyond that popular—acceptance of a wider political role for the executive.

Even in his 1803 analysis of American law, Tucker had noted that the Presidency had acquired, through the actions of Congress, significant and often discretionary powers. In light of this, Kent's 1826 description of executive power, though perhaps a satisfying formulation of the kind of extremely limited, administrative executive power envisaged by many after the Revolution as a replacement for extensive royal authority, seems strikingly old-fashioned and evocative of Wilson's description:

[56]Tucker, pp. 348–9.
[57]Ibid., pp. 349–50.
[58]Ibid., pp. 346–7.

> But when the laws are made and promulgated [by the legislature] they only remain to be executed. No discretion is submitted to the executive officer. It is not for him to deliberate and decide upon the wisdom or the expediency of the law. What has been once declared to be law, under all the cautious forms of deliberation prescribed by the Constitution, ought to receive prompt and irresistible obedience.[59]

This description of the President offered by Kent as a creature of the legislature, the more responsive to his duty because of the unity of the executive power, seems a much poorer description of the office than that offered by Tucker two decades previously, who perceived that the executive branch was in fact far more potentially powerful than the enumerated powers in the Constitution at first suggested.

What was perhaps obvious to those who held the office and others who viewed it in its political character rather than through the more narrow lens of its formal powers, were three crucial points. Firstly that though nowhere stated in the Constitution, the political effect of creating a elected executive officer chosen by the people, even if their choice had been mediated through a unique and complicated system of electors, would be to create a de facto personification of the state. Republican sensibility may have baulked at his Vice-President's suggestion that he be addressed as His Excellency, but Washington entered office acutely aware of his position of preeminence within the new system, even if Wilson, Tucker and Kent were at pains to emphasize that the republican principle of equality meant that much of Blackstone's description of the monarchy was entirely obsolete.

Secondly, while the President might be legally subordinate to the directions of the legislative body, at least in the view of constitutional lawyers, from the beginning Washington was acutely conscious that his role had a further dimension—a national authority—that was scarcely captured in the technical powers of appointment, veto and foreign negotiation. After taking office he wrote to his deputy asking for advice on a range of issues, but none had to do with the formal legal powers of the President. Instead he was anxious to hear Adams's thoughts on the extent to and manner in which he should mix with broader society or hold himself apart. Was it possible and proper for the President to visit his acquaintances in a purely private capacity? How, perhaps would a rare appearance at tea parties be interpreted? During the recess of Congress, surely the President should tour the Union? The parallel with a Royal progress was obvious, if unstated and even if clothed in a republican guise. He closed the letter by emphasizing the need to maintain, from the beginning, the dignity of his particular office.[60]

[59] Kent, p. 253.

[60] Washington to John Adams, 10th May 1789.

He expressed similar thoughts to Hamilton.[61] To another correspondent he declared, 'I now give up all expectations of private happiness in this world', declaring himself ready to be consumed entirely by 'the duties of my arduous office.'[62] He interpreted the Constitution's hint that he should from time to time call together Congress by calling together both houses for an inaugural address that emphasized his own republican virtue and the new role of leadership he had assumed. He stressed the the duty that the Constitution entrusted him with to recommend necessary and expedient measures to Congress. He further cemented his role by replying to an extremely congratulatory reply sent by the House of Representatives with his own extremely gracious acknowledgement.[63] The tone was very far from that of a mere administrator.

The quasi-regal tone that characterized Washington's presidency has been much discussed before, as has Jefferson's deliberate attempt to distance himself from what he regarded as the excesses of his two predecessors' conception of the executive office.[64] Yet even if he clothed himself and his Presidency in more overtly republican style, he too viewed the Presidency in ways that seem more in keeping with Washington's vision of the office than that of the legal authorities. Reflecting late in his retirement on his Presidency and the nature of executive power, he emphasized the popular mandate enjoyed by the President. The President, he claimed, enjoyed the powers of veto and pardon as a defence to the people against unjust law. Indeed, he thought the Executive department, by virtue of its elected and hence more republican character, to be a better place to vest such decisions than the judicial branch. As for *Marbury v Madison*, the case in which John Marshall had famously asserted the principle of judicial review of both the actions of the legislative and executive branches of government, Jefferson remained entirely unconvinced, asserting instead the right of the President to decide for himself his duty under the Constitution.[65]

Thirdly, by virtue of this authority, it might become politically acceptable for the President to exercise powers not explicitly enumerated. In an earlier letter Jefferson had gone even further than asserting the authority of the president and interpreting the intent behind specific presidential powers, though he asked the recipient to keep the letter private. 'A strict observance of the written laws is doubtless,' he wrote, '*one* of the high duties of the good citizen, but it is not the highest.' The law of necessity and self-preservation

[61] Washington to Hamilton, 5th May 1789.

[62] Washington to Edward Rutledge, 5th May 1789.

[63] Washington to Madison, 5th May 1789. The House of Representatives to Washington, 5th May 1789. Washington to the House of Representatives, 8th May 1789.

[64] For an account that focuses specifically on the aspects of this that relate to Jefferson's theory of executive power, see Jeremy D. Bailey, *Thomas Jefferson and Executive Power* (Cambridge: Cambridge University Press, 2007), ⟨URL: `http://www.loc.gov/catdir/toc/ecip074/2006036502.html`⟩, p. 132.

[65] Jefferson to Spencer Roane, 6th September, 1819.

imposed on the 'Executive of the Union', he reasoned, an overarching duty. The '*salus populi*', he explained, was supreme over written law, and it was the duty of the officer of the people, on occasions of great urgency and need, to act illegally but in the interest of the safety of the people, and to risk their judgement and 'throw himself on the justice of his country and the rectitude of his motives.'[66]

The particular controversies over the precise nature and limits of the President's powers seem unlikely to be settled. Tucker has so far proved right that the power of impeachment is unlikely to be used to control the actions of the President, and while some Presidential actions are subject to judicial review or legislative control, many others are not. The twentieth and twenty-first centuries have seen the nature of the office and its powers hotly contested by theorists, lawyers and politicians. Yet even by Jefferson's election in 1800 it was clear that the authority of the President had broken free of the complex mode of election intended to mediate between the President and the electorate, and from the very beginning the authority of the office, the unique claim the President can make to represent not only a constituency but the whole Union, have been as important as any of the specific powers granted in the Constitution. The powers of veto and pardon and the duties in relation to the two Houses of Congress have been as important in helping to emphasize the dignity and authority of the office as they have been in their actual execution. Executive power in the states has been from the beginning bound tightly together with this broader political authority, to the point that the two are inseparable. Yet this did not result from a conscious effort to create an office to mirror that of a king; indeed, Hamilton's suggestion at the Convention that America come as close to that as republicanism would allow garnered no support. Nor did the Constitution appeal to a non-British, alternative source for a notion of executive power. The granting of a relatively limited subset of royal powers to an elected executive created a head of state that, like any ancient magistrate or European monarch, had the potential to wield authority that far beyond the vision of eighteenth-century constitutional lawyers, who had imagined only a magistrate who would be the instrument of legislative will. Their political contemporaries, however, saw the greater potential of the office.

[66]Thomas Jefferson to John B. Calvin, 20th September 1810. For a discussion that links this vision of the Presidency to broader themes in Jeffersonian thought: Ralph Ketcham, 'The Jefferson Presidency and Constitutional Beginnings', in: Martin L. Fausold and Alan Shank, editors, *The Constitution and the American Presidency* (Albany: State University of New York Press, 1991).