**CONSTITUTIONAL LAW I**

**Professor Mike Ramsey**

**Spring 2022**

**Supplemental Reading No. 1:**

**Historical Introduction to Executive Power**

**I. Michael D. Ramsey, The Constitution’s Text in Foreign Affairs, Ch. 6, pp. 116-119 (Harvard Univ. Press 2007) [footnotes and some text omitted].**

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Americans’ views of executive power were shaped in the first instance by the man whom they (figuratively) fought in the Revolution: George III. Historians debate how much of the oppression felt by the colonists can be traced to King George himself, as opposed to his ministers or Parliament. But Americans saw the monarchy as part of the problem, if not the whole problem. “The colonial period ended with the belief prevalent that the ‘executive magistracy’ was the natural enemy, the legislative assembly the natural friend of liberty, a sentiment strengthened by the contemporary spectacle of George III’s domination of Parliament.” They were also fascinated by the historical experience of republics, which all too often collapsed into executive dictatorship. … [In particular,] the Roman republic was closely studied by Americans, who attributed its end to executive overreaching.

These general impulses found concrete expression in the early forms of government after the Revolution. In every state government formed in the Revolution’s immediate aftermath, executive authority was heavily constrained. The states’ chief magistrates (called “Governors” or “Presidents”) were appointed by state legislatures, often for very short terms without ability to stand for reelection. None had veto power. Many had executive councils that they had to consult, and from which some had to gain approval for important actions. State governors were, as Madison put it, “little more than Cyphers.”

At the national level … initially there was no chief executive magistrate. The “President” of the [Continental Congress] was an empty title (so much so that hardly anyone today remembers who held that post). Executive powers were exercised by the Congress as a while – a body so cumbersome that surely the remotest fear was that it might seize dictatorial powers. ….

In sum, then, Americans feared executive power, and the governmental structures they created after the Revolution ensured that no single person would accumulate any meaningful amount of it. Deliberative assemblies – state legislatures, the states’ executive council, the Congress – controlled its exercise …

…[B]ut much happened in the ensuing eleven years [after 1776] to change perceptions of executive power.

First, many Americans judged the legislative-supremacy model of early state constitutions – and the deliberating executive assembly of the Continental Congress – to be structural failures. Whether they actually were failures is another question, and much debated; the key point is that they were perceived this way at the time. … [T]he Congress had many structural problems … [including] its sheer inability to get anything done. This in turn had various causes including that its delegates often failed even to attend. But one important commonly perceived problem was that the Congress lacked a single person with executive authority to manage the operation of government. Anything the Congress did had to be approved by a vote of the delegates – meaning that effectively nothing could be done when the Congress was out of session or lacked a quorum, or when the delegates deadlocked or became bogged down in minor matters (as they frequently did). Foreign secretary John Jay complained of “unseasonable delays and successive obstacles in obtaining the decisions and sentiments of Congress” and concluded that “the executive business of sovereignty, depending on so many wills,” could not be adequately performed. The project of bringing energy and focus to the national executive thus became central to the campaign for reform.

A parallel reawakening of executive power occurred in the states. Soon after the Revolution, voice began to be heard in favor of strengthening state governors. Historians record a shift from the early state constitutions (such as Pennsylvania in 1776), which gave almost complete control to legislatures and councils, to gradually more powerful governors. In 1777, New York adopted a constitution with a somewhat stronger governor; in 1778, Massachusetts … rejected a proposed constitution, partly because its governor was not strong enough; Massachusetts then adopted a constitution influenced by New York’s model in 1780, but added, for the first time, an executive veto. Although state governors on the whole remained weak, constitution writers began to show some interest [in] the chief magistrates’ independent powers.

Partly these developments reflected desire for an executive branch with “energy” – that is, one that could accomplish things. They were also driven by new appreciations of legislatures’ excesses. Americans began to believe that the structures adopted in early constitutions were defective forms of separation of powers, because (at least in practice) most power accrued to the legislatures. In this way, Americans began thinking about what we now call “checks and balances”: that each of the different branches had to have a store of *independent* power to restrain the power of the others. This thinking, for example, explicitly underlay the revival of the veto, a feature of royal government avoided in early state constitutions because it was thought to concentrate too much power in the governor. By 1787, “the delegates’ chief concern was thus to secure an executive strong enough, not one weak enough.”

Even within the Philadelphia Convention, the shift is noticeable. Most delegates seemed to assume that the chief magistrate should have a longer term in office than the state Governors and have a veto. But in early drafts, Congress appointed the President, and it was not even clear that executive powers would be held by a single person ([Virginia governor Edmund] Randolph, among others, thought they should not). Only after much debate did delegates reconcile themselves to a single, independent chief magistrate. As they did so, a single magistrate’s energy and effectiveness became a central argument.

It is, therefore, incomplete to say that Americans feared unified executive power. They did; but they also embraced unified executive power, as a means to get things done and to resist legislative excesses. The Constitution’s provisions on presidential power – both in their drafting history and in their final product – reflect an interplay between these two competing goals. …

**II. Excerpts from The Federalist Papers (1787-88), by James Madison, Alexander Hamilton and John Jay**

*Available at:* [*http://www.foundingfathers.info/federalistpapers/*](http://www.foundingfathers.info/federalistpapers/)

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# FEDERALIST No. 47 (James Madison)

The Particular Structure of the New Government and

the Distribution of Power Among Its Different Parts.

*February 1, 1788*

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No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than … [the proposition that] [t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny. . . . .

**FEDERALIST No. 48 (James Madison)**

These Departments Should Not Be So Far Separated

as to Have No Constitutional Control Over Each Other.

 *February 1, 1788*

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It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others. What this security ought to be, is the great problem to be solved. ….

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**FEDERALIST No. 51 (James Madison)**

The Structure of the Government Must Furnish the Proper

Checks and Balances Between the Different Departments.

*February 8, 1788*

To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. Without presuming to undertake a full development of this important idea, I will hazard a few general observations, which may perhaps place it in a clearer light, and enable us to form a more correct judgment of the principles and structure of the government planned by the convention.

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…[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.

But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified. An absolute negative on the legislature appears, at first view, to be the natural defense with which the executive magistrate should be armed. But perhaps it would be neither altogether safe nor alone sufficient. On ordinary occasions it might not be exerted with the requisite firmness, and on extraordinary occasions it might be perfidiously abused.

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# FEDERALIST No. 67 (Alexander Hamilton)

The Executive Department *March 11, 1788*

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The constitution of the executive department of the proposed government, claims next our attention.

There is hardly any part of the system which could have been attended with greater difficulty in the arrangement of it than this; and there is, perhaps, none which has been inveighed against with less candor or criticised with less judgment.

Here the writers against the Constitution seem to have taken pains to signalize their talent of misrepresentation. Calculating upon the aversion of the people to monarchy, they have endeavored to enlist all their jealousies and apprehensions in opposition to the intended President of the United States; not merely as the embryo, but as the full-grown progeny, of that detested parent. To establish the pretended affinity, they have not scrupled to draw resources even from the regions of fiction. The authorities of a magistrate, in few instances greater, in some instances less, than those of a governor of New York, have been magnified into more than royal prerogatives. He has been decorated with attributes superior in dignity and splendor to those of a king of Great Britain. He has been shown to us with the diadem sparkling on his brow and the imperial purple flowing in his train. He has been seated on a throne surrounded with minions and mistresses, giving audience to the envoys of foreign potentates, in all the supercilious pomp of majesty. The images of Asiatic despotism and voluptuousness have scarcely been wanting to crown the exaggerated scene. We have been taught to tremble at the terrific visages of murdering janizaries, and to blush at the unveiled mysteries of a future seraglio.

Attempts so extravagant as these to disfigure or, it might rather be said, to metamorphose the object, render it necessary to take an accurate view of its real nature and form: in order as well to ascertain its true aspect and genuine appearance, as to unmask the disingenuity and expose the fallacy of the counterfeit resemblances which have been so insidiously, as well as industriously, propagated.

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[Note: in two succeeding essays, Nos. 68 and 69, Hamilton reviewed the method of election of the President and the President’s textual powers to argue that the constitutional office more resembled the Governor of New York than it did the British monarch.]

**FEDERALIST No. 70 (Alexander Hamilton)**

The Executive Department Further Considered

*March 18, 1788*

 There is an idea, which is not without its advocates, that a vigorous Executive is inconsistent with the genius of republican government. … [But] [e]nergy 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 history, 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.

There can be no need, however, to multiply arguments or examples on this head. A feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government.

Taking it for granted, therefore, that all men of sense will agree in the necessity of an energetic Executive, it will only remain to inquire, what are the ingredients which constitute this energy? How far can they be combined with those other ingredients which constitute safety in the republican sense? And how far does this combination characterize the plan which has been reported by the convention?

The ingredients which constitute energy in the Executive are, first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers.

The ingredients which constitute safety in the republican sense are, first, a due dependence on the people, secondly, a due responsibility.

Those politicians and statesmen who have been the most celebrated for the soundness of their principles and for the justice of their views, have declared in favor of a single Executive and a numerous legislature. They have with great propriety, considered energy as the most necessary qualification of the former, and have regarded this as most applicable to power in a single hand, while they have, with equal propriety, considered the latter as best adapted to deliberation and wisdom, and best calculated to conciliate the confidence of the people and to secure their privileges and interests.

That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and despatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.

This unity may be destroyed in two ways: either by vesting the power in two or more magistrates of equal dignity and authority; or by vesting it ostensibly in one man, subject, in whole or in part, to the control and co-operation of others, in the capacity of counsellors to him. Of the first, the two Consuls of Rome may serve as an example; of the last, we shall find examples in the constitutions of several of the States. New York and New Jersey, if I recollect right, are the only States which have intrusted the executive authority wholly to single men. Both these methods of destroying the unity of the Executive have their partisans; but the votaries of an executive council are the most numerous. They are both liable, if not to equal, to similar objections, and may in most lights be examined in conjunction.

The experience of other nations … teaches us not to be enamoured of plurality in the Executive. We have seen that the Achaeans, on an experiment of two Praetors, were induced to abolish one. The Roman history records many instances of mischiefs to the republic from the dissensions between the Consuls, and between the military Tribunes, who were at times substituted for the Consuls. . …

Wherever two or more persons are engaged in any common enterprise or pursuit, there is always danger of difference of opinion. If it be a public trust or office, in which they are clothed with equal dignity and authority, there is peculiar danger of personal emulation and even animosity. From either, and especially from all these causes, the most bitter dissensions are apt to spring. Whenever these happen, they lessen the respectability, weaken the authority, and distract the plans and operation of those whom they divide. If they should unfortunately assail the supreme executive magistracy of a country, consisting of a plurality of persons, they might impede or frustrate the most important measures of the government, in the most critical emergencies of the state. And what is still worse, they might split the community into the most violent and irreconcilable factions, adhering differently to the different individuals who composed the magistracy.

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Upon the principles of a free government, inconveniences from the source just mentioned must necessarily be submitted to in the formation of the legislature; but it is unnecessary, and therefore unwise, to introduce them into the constitution of the Executive. It is here too that they may be most pernicious. In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarrings of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority. ... But no favorable circumstances palliate or atone for the disadvantages of dissension in the executive department. Here, they are pure and unmixed. There is no point at which they cease to operate. They serve to embarrass and weaken the execution of the plan or measure to which they relate, from the first step to the final conclusion of it. They constantly counteract those qualities in the Executive which are the most necessary ingredients in its composition, vigor and expedition, and this without any counterbalancing good. In the conduct of war, in which the energy of the Executive is the bulwark of the national security, every thing would be to be apprehended from its plurality.

It must be confessed that these observations apply with principal weight to the first case supposed that is, to a plurality of magistrates of equal dignity and authority a scheme, the advocates for which are not likely to form a numerous sect; but they apply, though not with equal, yet with considerable weight to the project of a council, whose concurrence is made constitutionally necessary to the operations of the ostensible Executive. An artful cabal in that council would be able to distract and to enervate the whole system of administration. If no such cabal should exist, the mere diversity of views and opinions would alone be sufficient to tincture the exercise of the executive authority with a spirit of habitual feebleness and dilatoriness.

But one of the weightiest objections to a plurality in the Executive, and which lies as much against the last as the first plan, is, that it tends to conceal faults and destroy responsibility. Responsibility is of two kinds to censure and to punishment. The first is the more important of the two, especially in an elective office. Man, in public trust, will much oftener act in such a manner as to render him unworthy of being any longer trusted, than in such a manner as to make him obnoxious to legal punishment. But the multiplication of the Executive adds to the difficulty of detection in either case. It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures, ought really to fall. It is shifted from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author. The circumstances which may have led to any national miscarriage or misfortune are sometimes so complicated that, where there are a number of actors who may have had different degrees and kinds of agency, though we may clearly see upon the whole that there has been mismanagement, yet it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable.

"I was overruled by my council. The council were so divided in their opinions that it was impossible to obtain any better resolution on the point." These and similar pretexts are constantly at hand, whether true or false. And who is there that will either take the trouble or incur the odium, of a strict scrutiny into the secret springs of the transaction? Should there be found a citizen zealous enough to undertake the unpromising task, if there happen to be collusion between the parties concerned, how easy it is to clothe the circumstances with so much ambiguity, as to render it uncertain what was the precise conduct of any of those parties?

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It is evident from these considerations, that the plurality of the Executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power, first, the restraints of public opinion, which lose their efficacy, as well on account of the division of the censure attendant on bad measures among a number, as on account of the uncertainty on whom it ought to fall; and, secondly, the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office or to their actual punishment in cases which admit of it.

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The idea of a council to the Executive, which has so generally obtained in the State constitutions, has been derived from that maxim of republican jealousy which considers power as safer in the hands of a number of men than of a single man. If the maxim should be admitted to be applicable to the case, I should contend that the advantage on that side would not counterbalance the numerous disadvantages on the opposite side. But I do not think the rule at all applicable to the executive power. I clearly concur in opinion, in this particular, … that "the executive power is more easily confined when it is ONE"; that it is far more safe there should be a single object for the jealousy and watchfulness of the people; and, in a word, that all multiplication of the Executive is rather dangerous than friendly to liberty.