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Author(s): JACK N. RAKOVE and SUSAN ZLOMKE

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James Madison and the Independent Executive

JACK N. RAKOVE and SUSAN ZLOMKE

*Departments of History and Political Science
Stanford University*

Abstract

James Madison entered the Philadelphia Convention with many of his ideas about executive power still indefinite. His principal concern was to render the executive politically independent of the legislature. Madison deserves credit as one of the major constitutional architects of the presidency, but his ideas of executive power diverged in critical respects from those of such other leading framers as Gouverneur Morris, James Wilson, and Alexander Hamilton.

The great puzzle in reconstructing the evolution of James Madison's ideas about executive power is to explain why his early thoughts on this subject were so tentative and incomplete. Four weeks before the scheduled opening of the Federal Convention of 1787, Madison wrote George Washington that he had "scarcely ventured as yet to form my own opinion either of the manner in which [the executive] ought to be constituted or of the authorities with which it ought to be cloathed." Other essential items on his agenda for the Convention were by then well emplaced, including not only his favorite scheme for "a negative in all cases whatsoever on the legislative acts of the States" but also the division of Congress into two clearly distinguished houses and the creation of an independent national judiciary. True, Madison did realize that "the national supremacy in the Executive departments" might be embarrassed "unless the officers administering them could be made appointable by the supreme Government"; and he went on to suggest that "the great ministerial officers might be super-added" to the joint executive-judicial council of revision which he somehow hoped to bring into the lawmaking process. But these inclinations hardly amounted to a coherent theory of the nature of executive power, much less a prescription for the independent and vigorous executive that Alexander Hamilton, Gouverneur Morris, and James Wilson were probably already predisposed to favor.¹

Why Madison was originally so diffident on the general subject of executive power is far from clear. His criticisms of the dangers of republican lawmaking could easily have led him to call for a vigorous and politically potent executive. But while he consistently favored a high degree of executive independence from improper legislative meddling, Madison was too much the republican to suggest that major decisions about policy should be taken anywhere else than the legislative arena. He believed, moreover, that even an executive serving for a limited term and subject to reelection should be exposed to the corrective discipline of impeachment. Yet even with these qualifica-

tions, it is also evident that within the Convention Madison played an active and important role in creating the presidency.

The usual starting point for the analysis of Madison's ideas about the executive is his August 1785 letter detailing his advice for a putative constitution for Kentucky (which, though still part of Virginia, was already moving toward statehood). In this first systematic effort to diagnose the failings of republican government within the states, Madison attached historical importance to the effect that prior experience of executive power had exerted on American constitution-making at the time of independence. Rather than frame governments with an eye to the need for "*wisdom* and *steadiness*" in legislation, Madison observed, it had been only "natural" for the Americans "to give too exclusive an attention" to the "grievance" that they (like other peoples) had felt most deeply: "the want of *fidelity* in the administration of power."²

Yet Madison did not conclude that the Revolutionaries had gone too far in eviscerating the executive. The relatively brief section of this letter that was devoted to executive power began with the observation that the executive was not even "entitled" to its usual position of "2d place" in the constitutional scheme, since "all the great powers which are properly executive" now belonged to the Continental Congress and its subordinate departments. Here Madison clearly equated executive power (or a significant fraction of it) with authority over war and foreign affairs—although equally clearly, the authority to administer ordinary acts of legislation remained with state officials. As to the questions of their appointment and authority, Madison seemed open-minded indeed. He was undecided whether the executive should be elected by the legislature or the people, and also whether it should consist of "one man assisted by a council" or "a council in which the president shall be only *primus inter pares*." Only two points seemed set: that its members should be relatively few in number, and that their salaries should be immune from legislative alteration. These devices would presumably promote responsibility and independence; they would not give the executive a political character of its own. The only limited weapon of self-defense Madison was willing to consider was to allow two branches of the government—most likely the executive and judiciary—to summon a "plenipotentiary convention whenever they may think their constitutional powers have been violated by the other"—in other words, the legislature. But this was clearly an exceptional measure. The most effective remedies for improper legislation, Madison believed, were those that could be applied within the legislature itself. In his 1785 letter, Madison placed his principal hope on the character of the Senate, with additional assistance to come from either a council of revision or the appointment of "a standing committee composed of a few select & skilful individuals" who could prepare bills for their colleagues either in advance of their meeting or "during their sessions."

The immediate sources of Madison's exasperation with state lawmaking were his own experiences first on the Virginia council of state in 1778 and 1779 and later as a delegate to the state assembly (1784–86). As much as this experience had instructed him in the fallibility of legislation, it had also done little to provide positive illustrations of the potential for executive leadership. But his aversion to the political dimensions of executive power may have been influenced even more by his four years of

service in the Continental Congress, and especially by his involvement in Superintendent of Finance Robert Morris's overly ambitious and poorly conceived plans to force a comprehensive scheme for national powers of taxation through Congress (and then the states) in 1782 and 1783. Madison was initially supportive of Morris's goals, but by February 1783 he broke with the Superintendent and, with the assistance of a handful of other influential delegates, fashioned the set of compromises that Congress finally endorsed in mid-April. Madison was privately disgusted with Morris's heavy-handed tactics, which included efforts to foment mutiny in the army; and while he did not draw the lesson in so many words, this experience with the excesses of a semi-ministerial government may have reinforced all those ideological affinities for Country ideology to which Madison was reputedly prey.³

Yet it was his postwar experience in the Virginia assembly, not his earlier service in Congress, that most powerfully shaped the ideas that Madison carried to Philadelphia in May 1787. His constitutional thinking rested on a sweeping indictment of the inevitable shortcomings and failings of state lawmaking and state legislators. Convinced that the great danger to private liberty, minority rights, and the public good lay in the propensity of local majorities to pursue their self-interest, Madison sought to fashion a system that would both improve the quality of legislation and permit the executive and judiciary to carry out their responsibilities free from legislative meddling. Extending the sphere of the republic would make it more difficult for factious popular majorities to coalesce within the society, Madison argued, and it would also encourage the election of a better class of legislators. But against the dangers that even an elite bicameral Congress would still legislate unwisely or seek to interfere with the impartial administration and adjudication of the laws, Madison sought to find ways to enhance both the independence and the authority of the two weaker branches of government.

Going into the Convention, then, Madison's position on the executive centered on three general concerns. First, he evaluated the different modes of selection and tenure that the Convention considered primarily in terms of how well they would allow the executive to discharge its essential administrative duties free from improper legislative control and influence. Second, to enable the executive both to protect itself against legislative interference and to contribute to the quality of lawmaking, he favored the establishment of a joint executive-judicial council of revision which would be armed with a limited veto over national laws. By uniting the two weaker branches as a check upon the legislature, Madison hoped to compensate for their individual political inferiority. Third, Madison's ideas about the scope of executive power were dependent on the decisions to be taken regarding selection and tenure. An executive elected by the legislature had to be vested with limited powers unless he were made ineligible for reelection; an executive appointed by some other mode might be given greater authority and made eligible for reelection, *if* safeguards against the abuse of power could be provided through a satisfactory mechanism of impeachment.

Madison's opening positions on the executive were expressed in the debates of early June. On the question of instituting a unitary or a plural executive, Madison was reluctant to offend his friend and colleague Edmund Randolph, who had promptly

denounced the idea of a unitary executive as the “foetus of monarchy.” Accordingly, on June 1 Madison declared himself in favor of a unitary executive, but with the proviso that it should be “aided by a council, who should have the right to advise and record their proceedings, but not to control his authority.” But perhaps to avoid immediate controversy on this issue, Madison suggested that the Convention might do better to fix the scope of executive power first. Thus on June 1 he also moved that the national executive should have “power to carry into effect national laws, to appoint to offices not otherwise provided for, and to execute such other powers, not legislative nor judiciary in their nature, as may from time to time be delegated by the national legislature.” Since the Virginia Plan had also proposed legislative election of the executive, Madison also declared himself in favor of a seven year term without reeligibility.⁴

By the end of the first fortnight of debate, the Convention had tentatively endorsed most of the positions Madison had proposed, approving the idea of a single executive with a seven-year term, appointed by the legislature but ineligible for reelection, impeachable, and with the power to put laws into effect and to appoint to offices not otherwise provided for. But on the one issue about which he seemingly felt most strongly—the Council of Revision—Madison met an early rebuff. On June 4 and again on the 6th, he and Wilson pressed the case for the joint council on the theoretical grounds that Madison had worked out before the Convention. Against the claim that a veto would be better trusted to the executive alone, Madison voiced his double-edged doubts about the political capacities of a republican executive. In republican America, no individual citizen could enjoy “that settled preeminence” that “an hereditary magistrate” possessed; nor could he be entirely free of the temptations to abuse his trust. “He would stand in need therefore of being controuled as well as supported,” Madison concluded, so that the addition of the judges to the “revisionary” function would have the double advantage of strengthening the political influence of the executive while assuring that the veto would be exercised on the right grounds.⁵ On these points, Madison and Wilson found themselves in a decided minority, and though they later attempted to revive the proposal, a majority of the Convention remained convinced that both the executive and the judiciary would be better able to exercise their particular functions if left constitutionally independent of each other.

Madison’s justification for the Council of Revision offers revealing insights into his notions of executive power. In his desire to unite the executive and judiciary in the review of national legislation, Madison not only sought to strengthen the executive vis-a-vis the legislature, but also to assure that the exercise of its veto would be constrained by the responsible and expert advice the judges could offer. No executive could stand alone against a dominant legislative majority confident that it enjoyed the support or reflected the will of an aroused populace, Madison believed. Braced by the moral and even political support of the judiciary, however, the executive might grow more willing to resist the people’s representatives. This would be especially critical on those occasions when lawmakers sought to prevent both executive and judicial officials from carrying out their proper duties. But to a certain extent, Madison may also have wanted the two weaker branches to acquire influence over the making of policy, especially when legislative acts seemed likely to violate the private rights of

minorities and individuals. His concluding remarks of June 6 indicate the open-ended grounds on which he was prepared to see the Council of Revision exercise its power: "In short, whether the object of the revisionary power was to restrain the Legislature from encroaching on the other coordinate 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 seems incontestable."

After the first week of June, further consideration of the executive was postponed until the Convention resolved its great impasse over the apportionment of representation. When debate at last returned to the executive (July 17–26), Madison's preeminent concern with securing its independence from the legislature became clear. No matter what question was under debate—mode of election, tenure (including impeachment), reeligibility, veto—his position consistently reflected his intention of "guarding against a dangerous union of the legislative & executive departments." "Experience had proved a tendency in our governments to throw all power into the legislative vortex," he reminded the Convention on July 17 (and again on the 21st). Nothing less than "the preservation of republican government" required that an "effectual check be devised for restraining the instability & encroachments" of the legislature.⁶

The key issue, of course, was the mode of election. Like other delegates, Madison may have wondered whether schemes for the popular election of the executive would prove practicable. But his fear of the consequences of legislative election ran even deeper, and finally led Madison to align himself quite closely with the leading positions taken by Wilson. As early as July 19, he declared that "the people at large was in his opinion the fittest in itself" to enjoy the right of electing the executive, because "the people generally could only know & vote for some citizen whose merits had rendered him an object of general attention & esteem." But, he immediately added, the disparity between the size of the electorates in the North and South created a serious difficulty: southern candidates would have little hope of prevailing in a national at-large election. A scheme for an electoral college based on apportionment by population would remove that difficulty.⁷

On July 21 the Convention approved the idea of an electoral college by a vote of six states to three; three days later, by a vote of seven states to four, it reversed course and returned to the idea of legislative election. Caught between his objections against legislative election and the apparent unacceptability of an electoral college scheme, Madison now endorsed the idea of election by the people at large. "With all its imperfections he liked this best." True, he still worried about the partiality citizens might show to candidates from their own states, and even more about "the disproportion of qualified voters in the N. & S. States, and the disadvantages which this mode would throw on the latter." But believing that future population movements would level the differences between the regions, Madison professed himself willing in the short run to "make the sacrifice" for "the general interest."⁸

The active support Madison gave to proposals either for popular election or an electoral college was further reinforced by his dismay over the emerging character of the Senate. In his pre-Convention thinking, Madison had placed special importance

on the role the upper house would play both in checking an impetuous lower house and in providing a stable and elite corps of public servants qualified to identify and pursue the general good of the entire society. But a Senate in which the states would be represented equally, and even worse, whose members would be elected by the state legislatures, could no longer be relied upon to act as Madison had originally hoped it would. Declining faith in the Senate, in other words, required enhancing the power and independence of the executive—which either popular election or an electoral college would promote.

This concern was also reflected in Madison's positions on the substantive powers of the executive. He had consistently supported proposals for an executive veto, though he balked at the arguments that Wilson and Hamilton offered for an absolute veto. On the question of appointments, however, Madison at first favored giving the Senate exclusive power over major offices. When the appointment of the judiciary was first raised on June 5, for example, Madison argued against giving that power to either the legislature (as the Virginia Plan itself proposed) or the executive. Instead, "he rather inclined to give it to the Senatorial branch, as numerous eno' to be confided in—as not so numerous to be governed by the motives of the other branch; and as being sufficiently stable and independent to follow their deliberate judgments."⁹

But that preference, too, fell victim to the Convention's later decisions on the Senate. Madison reversed his position after the Great Compromise, less because he favored executive appointment on its merits than because he feared an unchecked senatorial appointment. And again, Madison made explicit his resentment of the political implications of the Great Compromise. On July 18, he moved that the executive should be allowed to nominate judges whose appointment would require the approval only of a third of the Senate. Three days later, Madison argued that an exclusive senatorial appointment was objectionable on two grounds: first, that it would enable "a minority of the people, tho' . . . a majority of the states," to make the appointment; second, that it would "throw the appointments entirely into the hands of the Northern States," and thus create "a perpetual ground of jealousy & discontent" in the South.¹⁰

Similar reasoning also led Madison to oppose exclusive senatorial authority over treaty-making. When the treaty power was finally (and belatedly) discussed on August 23, Madison "observed that the Senate represented the States alone, and for this as well as other obvious reasons it was proper that the President should be an agent in the Treaties." Executive involvement in any form was desirable if only because it would lessen the authority of the Senate. But it is equally notable that Madison also sought to bring the House of Representatives into the treaty process, if not in the active consultative role the Senate would play, then at least for purposes of ratification whenever national security would not be harmed by allowing the more numerous and politically representative chamber to participate in the highest acts of foreign relations.¹¹

The treaty and appointments powers, and the provisions for election, were left to be resolved in the eleven member Committee on Postponed Parts, of which Madison was a member. Its report of September 4 proposed the crucial changes which gave the executive its final form, most notably by providing for an electoral college and

by vesting the appointive and treaty powers in the President and Senate. There is every reason to believe that Madison was deeply and fundamentally supportive of all of its recommendations, and it is even possible—according to the later recollection of John Dickinson—that he did the literal drafting of the key provisions.¹² At various points in the Convention Madison spoke in favor of the electoral college and reeligibility; he consistently argued in favor of a limited veto; he came to prefer joint executive-senatorial responsibility over foreign affairs and appointments to the exclusive senatorial authority he ideally desired; and he also endorsed the necessity for impeachment. Most of all, he sought to render the executive politically independent of the legislature. Believing that the desire to prevent the election of the President to devolve on the Senate (or eventually the House, voting by states) would encourage the large states to make the decision of the Electoral College “conclusive,” Madison sensed that this hybrid device would work far better than many of his colleagues supposed.¹³

For all of these reasons, then, James Madison deserves to be numbered with James Wilson and Gouverneur Morris as one of the chief constitutional architects of the presidency. Yet the points of convergence between Madison and the Pennsylvanians should not disguise important residual distinctions. Nothing in Madison’s observations of 1787 suggests that he foresaw, much less desired, that executive independence could or should develop into executive initiative in the ways that Morris, Wilson, and Alexander Hamilton may have hoped the presidency would evolve into a creative, active office whose influence would equal if not overshadow that of Congress. He never went as far as Gouverneur Morris did in describing the President as “the general guardian of the national interests.”¹⁴ Madison’s consistent point of reference was the danger that an unrestrained legislature would portend to republican government. He left Philadelphia convinced that the executive and the judiciary would remain the weaker branches of government, but perhaps hopeful that a “fortified”¹⁵ executive might temper the excesses of legislative misrule.

For Madison, then, as for most of his colleagues, the nature and extent of “the executive power” which Article II of the Constitution vested in the President remained to be discovered. The delegates’ obsession with the mode of election had expressed itself in “tedious and reiterated discussions,” as Madison wrote Thomas Jefferson a month after the Convention adjourned,¹⁶ but it had not forged a consensus as to how much initiative in the making of laws and national policies a President could subsequently be expected to take. It is perhaps unfortunate that Madison’s assignments in the writings of *The Federalist* did not require him to reflect in any notable detail on the nature of executive power. One can at least speculate whether he might have taken a different tack than Hamilton did in his essays on the presidency. But for Madison it was enough to suggest, as he sought to do in *Federalist* 51, that the personal ambition of the executive could be turned into useful channels if it was used to check the impetuous and encroaching character of the legislature.

Madison thus left the Convention still convinced that the greatest threats to the preservation of the principles and forms of republican government would arise from the legislature, just as the danger of an “invasion of private rights is chiefly to be apprehended,” as he reminded Jefferson in October 1788, “not from acts of govern-

ment contrary to the sense of its constituents, but from acts in which the government is the mere instrument of the major number of the constituents." With such convictions as yet unaltered by the constitutional deliberations of 1787–88, Madison would grudgingly concede only that "a succession of artful and ambitious rulers, may be gradual & well-timed advances, finally erect an independent government on the subversion of liberty."¹⁷ It would take the political controversies of the 1790s to revise the opinions he held so deeply in 1787 and 1788. When Hamilton and the Federalists seemingly demonstrated that the greatest dangers to American liberties would arise neither from the national legislature nor from popular majorities nor even from the centrifugal propensities of the states, but rather from the dominant influence of a national administration, Madison was forced to concede that executive power, even in a republic, might not prove as feeble as he had once thought. What Madison lacked in imagination he was prepared to learn from experience. One hopes we can still do the same.

Notes

1. Madison to Washington, April 16, 1787, in William T. Hutchinson *et al.*, eds., *The Papers of James Madison* (Chicago and Charlottesville, 1962-), IX, 385.
2. Madison to Caleb Wallace, August 23, 1785, *ibid.*, VIII, On the character of executive power in the state constitutions, see Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (Chapel Hill, 1969), 132–50.
3. There is an extensive body of historical literature on the political disputes of the 1780s. See Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (New York, 1979), chap. xiii; Lance Banning, "James Madison and the Nationalists, 1780–1783," *William and Mary Quarterly*, 3d ser., XL (1983), 227–255; E. James Ferguson, "The Nationalists of 1781–1783 and the Economic Interpretation of the Constitution," *Journal of American History*, LVI (1969), 241–261.
4. Max Farrand, ed., *The Records of the Federal Convention of 1787*, rev. ed., (New Haven, 1937), I, 66–67; 70 (King); 74 (Pierce).
5. *Ibid.*, 138–139.
6. *Ibid.*, II, 34–35, 74.
7. *Ibid.*, 56–57.
8. *Ibid.*, 109–111.
9. *Ibid.*, I, 120.
10. *Ibid.*, II, 42–43, 80–81.
11. *Ibid.*, 392–94; the drafting of the treaty clause is analyzed in excruciating detail in Jack N. Rakove, "Solving a Constitutional Puzzle: The Treaty Clause as a Case Study," *Perspectives in American History*, n.s., 1 (1984), 233–81.
12. See Milton E. Flower, *John Dickinson: Conservative Revolutionary* (Charlottesville, Va., 1983), 246–47.
13. Farrand, ed., *Records*, II, 513.
14. *Ibid.*, 541.
15. The word used in *Federalist* 51.
16. Madison to Jefferson, October 24, 1787, in Hutchinson *et al.*, eds., *Papers of Madison*, X, 208–209.
17. Madison to Jefferson, October 17, 1788, *ibid.*, XI, 298.