

Sec. 1—The President

Clause 1—Powers and Term of the President

of the nation is vested in the President; subject only to the *exceptions* and *qualifications*, which are expressed in the instrument.”¹⁸

Madison’s reply to Hamilton, in five closely reasoned articles,¹⁹ was almost exclusively directed to Hamilton’s development of the contention from the quoted language that the conduct of foreign relations was in its nature an executive function and that the powers vested in Congress which bore on this function, such as the power to declare war, did not diminish the discretion of the President in the exercise of his powers. Madison’s principal reliance was on the vesting of the power to declare war in Congress, thus making it a legislative function rather than an executive one, combined with the argument that possession of the exclusive power carried with it the exclusive right to judgment about the obligations to go to war or to stay at peace, negating the power of the President to proclaim the nation’s neutrality. Implicit in the argument was the rejection of the view that the first section of Article II bestowed powers not vested in subsequent sections. “Were it once established that the powers of war and treaty are in their nature executive; that so far as they are not by strict construction transferred to the legislature, they actually belong to the executive; that of course all powers not less executive in their nature than those powers, if not granted to the legislature, may be claimed by the executive; if granted, are to be taken strictly, with a residuary right in the executive; or . . . perhaps claimed as a concurrent right by the executive; and no citizen could any longer guess at the character of the government under which he lives; the most penetrating jurist would be unable to scan the extent of constructive prerogative.”²⁰ The arguments are today pursued with as great fervor, as great learning, and with two hundred years experience, but the constitutional part of the contentiousness still settles upon the reading of the vesting clauses of Articles I, II, and III.²¹

¹⁸ 7 WORKS OF ALEXANDER HAMILTON 76, 80–81 (J. C. Hamilton ed., 1851) (emphasis in original).

¹⁹ 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 611–654 (1865).

²⁰ Id. at 621. In the congressional debates on the President’s power to remove executive officeholders, cf. C. THACH, THE CREATION OF THE PRESIDENCY 1775–1789 ch. 6 (1923), Madison had urged contentions quite similar to Hamilton’s, finding in the first section of Article II and in the obligation to execute the laws a vesting of executive powers sufficient to contain the power solely on his behalf to remove subordinates. 1 ANNALS OF CONGRESS 496–497. Madison’s language here was to be heavily relied on by Chief Justice Taft on this point in *Myers v. United States*, 272 U.S. 52, 115–126 (1926), but compare, Corwin, *The President’s Removal Power Under the Constitution*, in 4 SELECTED ESSAYS ON CONSTITUTIONAL LAW 1467, 1474–1483, 1485–1486 (1938).

²¹ Compare Calabresi & Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155 (1992), with Froomkin, *The Imperial Presidency’s New Vestments*, 88 NW. U. L. REV. 1346 (1994), and responses by Calabresi, Rhodes and Froomkin, id. at 1377, 1406, 1420.