Introduction

The framers of the Constitution sought to construct a system in which no branch of the national government could make important decisions alone. To be sure, the last 200 years of history include many examples of autonomous actions taken by one branch despite the wishes of the rest of the government. Nevertheless, the fabric of national politics consists of a system of "separated institutions sharing powers."[1]

For this reason, the course of national politics cannot be understood without an appreciation of the relationships between the branches. This book will examine only one of the three interbranch relationships—that between the executive and the legislative. This relationship merits special attention for several reasons.

First, the executive and legislative branches engage in regular, affirmative governance. The third branch—the judiciary—does not.[2] The primary means by which this governance takes place is through

[1] Richard E. Neustadt, *Presidential Power and the Modern Presidents* (New York: Free Press, 1990), p. 29.

[2] This is not to say that the courts are less important than the rest of the government but rather to acknowledge that the courts' impact on national politics and policy-making is sporadic. Unlike Congress and the executive branch, the courts are passive institutions in that they must wait for cases to come before them. No court ruling can occur without a court challenge. When they do arise, however, court cases may dramatically change the nature of governing, as in the areas of abortion and civil rights.

lawmaking, a process that can occur only through joint presidential-congressional action (leaving aside the process of administrative rule making, which itself springs from prior legislative enactments).

The Constitution divides these responsibilities. Even though Congress is granted "all legislative powers" in Article I, any proposed legislation enacted by both houses of Congress must cross the President's desk for a signature or veto. Any vetoed bill, excluding bills which the President cannot return to Congress (the conditions for a pocket veto), must go back to Congress for reconsideration. The President is charged with recommending to Congress "necessary and expedient" measures. The President may also call Congress into session when circumstances warrant.

To be sure, the contemporary political relationship between the two branches extends well beyond this formal framework. Presidential administrations put their own distinctive mark on the legislative process by influencing every phase of that process from bill drafting to implementation, yet the President's politically strong hand in legislative affairs could have come about only within a constitutional structure that shared these responsibilities in the first place. As constitutional scholar Louis Fisher notes, "To study one branch of government in isolation from the others is usually an exercise in make-believe."[3]

Second, the presidency and Congress are elective and therefore popularly based institutions. This simple but crucial fact means that policy-making and governing extend well beyond the mechanics of formulating and carrying out laws. It means that presidents and members of Congress must be prepared to gauge public opinion when it is likely to be a factor and more often be adept at influencing and molding public opinion. One key reason presidents have tended to dominate legislative affairs in the twentieth century is because of their built-in advantages over Congress when it comes to rallying national sentiment. After all, the President is the only national leader whose district consists of the entire country. Moreover, the President is widely expected to be both the administrative and the symbolic head of the government.

Third, the political fortunes of each branch are affected by its relations with the other. A President who is considered skillful at deal-

[3]Louis Fisher, *The Politics of Shared Power* (Washington, D.C.: C Q Press, 1987), p. ix.

ing with Congress and who succeeds in realizing the enactment of important parts of a legislative program will be considered effective. By contrast, a President whose relations with Congress are confrontational, belligerent, and negative (as shown, for example, by heavy veto use) will probably not be considered either successful or effective. Similarly, a Congress caught up with policy and power struggles with the President is likely to be criticized for excessive partisanship and an inability to deal with substantive problems and concerns.

Congress faces a double standard in the public's evaluation of its performance. It is alternatively criticized for being too submissive to presidential wishes, as during the early days of the Franklin Roosevelt and Lyndon Johnson presidencies, and for behaving too aggressively toward the President, as during the later years of the Nixon and Reagan administrations. Political life for presidents is less contradictory in that weak or unambitious presidents are typically scorned for their weakness, whereas stronger, assertive presidents are rarely condemned in the long run for their assertiveness.[4] In fact, presidential success is frequently determined by the extent to which presidents expand the limits of their office and powers.

Fourth, anyone who understands and appreciates the presidential-congressional relationship can also claim a considerable knowledge of American politics. Those who follow national news know that reporting on national affairs is invariably laced with stories about presidential-congressional dealings. Whether a confirmation hearing, haggling over the size and impact of the national debt, the future of farm subsidies, or a quarrel over a national security leak, presidential-congressional relations provide the news media with endless political grist. What a stormy marriage between celebrities is for the supermarket tabloids, the presidential-congressional "marriage" is for national political news hounds.

* * *

[4] An exception to this statement might be the case of the Franklin Roosevelt administration and the Twenty-second Amendment. Roosevelt's popularity carried him through four successful elections. After his death, the Twenty-second Amendment was added to the Constitution, barring presidents from being elected more than twice. On its face, this action limits presidential power by limiting access to the office. Yet whether this amendment actually has the effect of inhibiting the President's power while in office is open to debate. See Earl Spangler, *Presidential Tenure and Constitutional Limitation* (Washington, D.C.: University Press of America, 1977); Thomas E. Cronin, *The State of the Presidency* (Boston: Little, Brown, 1980), pp. 46-49.

This book will advance two broad arguments and a related analytic perspective. The first is didactic in that it is aimed primarily at those who seek to acquire a basic understanding of our national institutions and is inspired by the Constitution itself. When the Constitution's framers constructed a three-branch system, they considered Congress the first branch and indicated this preference by devoting the Constitution's first article to it. This "significant" fact reflects the framers' desire for " 'a government of laws and not of men,' and they expected Congress, except in times of war or emergency, to be the central and directing organ of the government."[5] But if the Constitution were to be rewritten today, an honest appraisal would recognize that the executive branch has in effect become the first branch. This is not to suggest that Congress is any less empowered to enact law than it was two centuries ago. It is, rather, a commentary on how much the relationship between these two branches has changed, especially in the twentieth century. It is for this reason that the title of this book lists the presidency first. What was designed as a congressionally centered system has evolved into a presidentially centered, or "executive-hegemonic," system. I rely on the straightforward dictionary definition of *hegemony,* derived from description of the city-states of ancient Greece, meaning here a presidentially predominant system. This does not mean that the executive usually or even often succeeds in political endeavors with respect to the legislature but rather that the President establishes most of the assumptions, tone, style, and nature of national political discourse between the two branches.[6] In short, we have undergone "a polar shift in how the constitutional system operates."[7]

This observation is old news to most analysts of American politics (although some may disagree over the degree of the shift), yet it is a plain fact that has been set aside or even challenged by two divergent but intersecting schools of thought. The first includes those who applaud the return of the post-Watergate strong presidency as a rem-

[5] J. W. Peltason, *Understanding the Constitution* (New York: Holt, Rinehart & Winston, 1988), p. 36. See also Alfred DeGrazia, ed., *Congress: The First Branch of Government* (New York: Anchor, 1967).

[6] According to the *Oxford English Dictionary,* the Greek city-state of Athens, for example, was considered hegemonic when it dominated the other city-states of the peninsula in ancient times. The analogue for the presidency might be labeled the sphere of influence. This concept is discussed in more detail in Chapter 7.

[7] Donald L. Robinson, *Government for the Third American Century* (Boulder, Colo.: Westview, 1989), p. ix.

edy for the alleged obstructionism and anachronistic nature of Congress. Most of these critics see the growth of the modern presidency as being well within the constitutional framework of 200 years ago. The second school of thought incorporates those who criticize Congress for its "imperial" behavior since the Watergate era, arguing that it is Congress rather than the presidency which has principally overstepped its constitutional boundaries and that Congress has been responsible for improperly restricting presidential governance. For both educational and argumentative reasons, the first argument merits careful attention.

As a corollary to this argument, I propose that the presidential-congressional intersection quite literally forms the crux of national governing. In imagery and form it is, as this book's subtitle says, the "crossroads of American government."

The second argument I will advance addresses a fundamental critique of modern governing. The prevailing contemporary critique of presidential-congressional relations posits that our national system is infused with the disease of paralysis. Variously characterized as stalemate, decay, deadlock, or gridlock, this problem causes our governing institutions to be ever less able to govern successfully—that is, lacking in speed, efficiency, and responsiveness. As early as 1963 historian James MacGregor Burns warned of the "cycle of deadlock and drift." [8] These concerns were echoed and amplified in the 1970s and especially the 1980s and indeed have become a prevailing critique of relations between the President and Congress.[9] Pertinent to this book, the stalemate argument serves as the centerpiece of a recent important study of the President and Congress by political scientist Michael Mezey, who observes an "inability to produce good public policy [that] is rooted in our constitutional arrangement of separate political institutions sharing power and in our political cul-

[8] James MacGregor Burns, *The Deadlock of Democracy* (Englewood Cliffs, N.J.: Prentice-Hall, 1963), p. 2. The concern over deadlock and drift actually predates Burns's analysis, as seen, for example, in repeated calls for more "responsible" political parties as a means to add coherence and vigor to national governing. See Austin Ranney, *The Doctrine of Responsible party Government* (Urbana: University of Illinois Press, 1954).

[9] See, for example, Donald L. Robinson, ed., *Reforming American Government* (Boulder, Colo.: Westview, 1985); James L. Sundquist, *Constitutional Reform and Effective Governance* (Washington, D.C.: Brookings Institution, 1986); Donald L. Robinson, *To the Best of My Ability* (New York: Norton, 1987); Report and Recommendations of the Committee on the Constitutional System, *A Bicentennial Analysis of the American Political Structure*, January 1987 (Washington, D.C.: Committee on the Constitutional System).

ture. . . ."[10] These critics offer much insightful analysis about the problems of contemporary government. I will argue, however, that contemporary governing problems have been in part misdiagnosed; that traditional separation of powers is a source of strength, not of weakness for modern governing, its alleged and actual inefficiencies notwithstanding; that separation of powers invigorates rather than enervates national governing; and that much of our self-described national malaise can be traced to our abandonment of the principles of separation of powers rather than continued adherence to them. This argument is addressed specifically in Chapter 7.

Aside from sustaining these two arguments, this book also applies an analytic perspective to the study of the presidency and Congress that is summarized by presidential scholar Michael Nelson, who offered this comment in a review essay on the presidency: "Political science, traditionally the intellectual bedfellow of history and law, has become distressingly ahistorical since World War II in its haste to imitate, in rapid succession, sociology, various branches of psychology, economics, even biology."[11] I do not propose to reject nontraditional analytic or methodological perspectives pertaining to the study of the President and Congress. I do, however, share Nelson's distress at the sometimes narrow and arcane vision of those who would study these two institutions. Therefore, this book will lean heavily on historical, legal, and structural perspectives pertaining to political relations insofar as history, law, and political structures are central to explaining the evolution and behavior of the executive and legislative branches of government. In addition, careful and detailed attention will be given to foreign policy, because (1) this realm of interaction has been central in shaping relations between the branches[12] and (2) the literature on the presidency and Congress tends to focus on either domestic or foreign policy but not both in the same work.[13]

[10] Michael Mezey, *Congress, the President, and Public Policy* (Boulder, Colo.: Westview, 1989), p. xiii.

[11] Michael Nelson, "Is There a Postmodern Presidency?" *Congress and the Presidency*, 16 (Autumn 1989): 155.

[12] This argument has been made by, among others, Arthur Schlesinger, Jr., *The Imperial Presidency* (Boston: Houghton Mifflin, 1973).

[13] For example, foreign policy receives little or no attention in such studies of presidential-congressional relations as Rowland Egger and Joseph P. Harris, *President and Congress* (New York: McGraw-Hill, 1963); Louis W. Koenig, *Congress and the President* (Chicago: Scott, Foresman, 1965); Nelson W. Polsby, *Congress and the Presidency* (Englewood Cliffs, N.J.: Prentice-Hall, 1986); Fisher, *The Politics of*

To this end, Chapters 1 and 2 summarize and analyze the constitutional and historical basis of the presidential-congressional relationship, setting the stage for the evolution of executive hegemony. Chapter 3 discusses the ways in which executive hegemony plays itself out in domestic executive-legislative processes. Chapter 4 offers several explanations for presidential-congressional behavior that are grounded in the book's analytic perspective. Chapters 5 and 6 pay careful attention to foreign affairs, and Chapter 7 draws on information and conclusions arising from the previous chapters to return to the normative questions raised in this introduction. I will argue that executive hegemony is certainly inevitable, probably necessary, and possibly desirable, but I will also argue that it is acceptable only in the context of a renewal of separation of powers in which Congress can continue to play a vigorous and active role.

Finally, two extended appendixes follow Chapter 7 to provide basic information about the President and Congress for readers not fully acquainted with the political forces that serve as the context for the two branches. This basic descriptive information is placed at the end of the book so as not to disrupt the book's arguments. Readers are invited to refer to these appendixes as appropriate.

Shared Power; Mezey, *Congress, the President, and Public Policy*. By contrast, foreign policy is the sole focus in such books as Cecil V. Crabb, Jr., and Pat M. Holt, *Invitation to Struggle: Congress, the President, and Foreign Policy* (Washington, D.C.: CQ Press, 1989); Thomas E. Mann, ed., *A Question of Balance: The President, the Congress, and Foreign Policy* (Washington, D.C.: Brookings Institution, 1990).

Chapter 1

Foundations of the Presidential-Congressional Relationship

In a republican government, the legislative authority necessarily predominates.

JAMES MADISON, *FEDERALIST* NO. 51

Our long tradition of veneration for the U.S. Constitution has helped perpetuate the myth that there was something inevitable about the political system that emerged at the conclusion of the federal convention in 1787. To be sure, the Constitution's founders had an intimate acquaintance with such concepts as separation of powers, a three-branch governmental system, and a two-house legislature. Indeed, these features were an integral part of most state governmental systems.

But even a casual look at colonial history, the country's experience under the Articles of Confederation, and the founders' deliberations reveals wide disagreement over the appropriate configuration of the new national government. It also reveals the antecedents of the struggles and ambiguities surrounding executive-legislative relations. More specifically, it reveals how this relationship lay at the very core of the constitutional system.

ANTECEDENTS

Early American experiences with governing were of two types: governing forms and rulers imposed by Great Britain and indigenous

governing institutions. Dissatisfaction with British rule was of course a principal cause of the revolution. Many Americans came to resent the laws and procedures dictated by the British monarch, the colonial governors, and Parliament.

Nowhere are these complaints more loudly articulated than in the Declaration of Independence, which purports to detail "a long train of abuses and usurpations." Of George III (and by extension "his [colonial] Governors"), the Declaration charged that "the history of the present King of Great Britain is a history of repeated injuries and usurpations" whose actions resulted in the "establishment of an absolute tyranny over these States." The Declaration goes on to provide a laundry list of complaints, most of which pertain to fundamental matters of governing, including the making of law, individual rights, and the administration of justice.

While the king is the primary target of criticism, Parliament also comes under fire for "attempts . . . to extend an unwarrantable jurisdiction over us" and for being "deaf to the voice of justice." James Wilson noted during debate at the federal convention of 1787 that Americans "did not oppose the British King but the parliament—the opposition was not agt. an Unity but a corrupt multitude." While Wilson's argument understates the actual antipathy toward the British monarch during the revolutionary period, his comments underscore the ire that was also directed toward Parliament.[1]

The American revolutionary leaders sought autonomy from the arbitrary and oppressive features of British rule, but they were also British descendants who embraced the Magna Carta, the British Bill of Rights, and other landmarks of the British constitutional tradition. The outgrowth of this dilemma was the weak governing structure embodied in this country's first constitution, the Articles of Confederation. It called for a single governing structure—a national single-chamber Congress—that would exercise executive and judicial as well as legislative powers. Unquestionably, the country's leaders were reacting in this document to distasteful experiences with strong centralized governmental authority in general and strong executives in particular.

Under the Articles, administrative responsibilities came to be assumed by congressional committees. These committees resembled

[1] Max Farrand, *The Records of the Federal Convention of 1787*, 4 vols. (New Haven, Conn.: Yale University Press, 1966), I, p. 71.

modern legislative committees in form, but in substance they attempted to fulfill the purpose later served by the cabinet departments. Burgeoning size and responsibilities forced Congress to establish separate administrative boards that eventually came to be headed by single executives. Responsibilities over such areas as the treasury, the military, foreign affairs, commerce, and taxation were given by Congress to boards and individuals who remained dependent on Congress for authority and direction. The executives were usually chosen from outside Congress. As often happens with committees, most of the work fell on the shoulders of the appointees, who often requested added powers from Congress commensurate with their responsibilities. In 1781, for example, Congress agreed to grant overall administrative direction to a secretary for foreign affairs. The first man to occupy the post, Robert Livingston, quit the job after a year out of frustration. Without administrative centralization and adequate independent authority, the need for administrative reform became increasingly evident, and the problems with this jerry-built system of legislative committees exercising executive powers became exacerbated with the end of the Revolutionary War and war-related pressures (the war was a key factor in establishing stronger executive authority in the national government).[2]

In short, the governing of the country in the postrevolutionary United States under the weak one-branch national system was an administrative nightmare. Dissatisfaction with this system's administrative inefficiency was a central factor leading to the convening of a special convention organized to examine the government's evident problems.[3]

THE FOUNDERS' FEARS

Three important facts can help us understand the difficulties of constructing this new system of governing. First, the founders had real difficulty grappling with the definition, nature, extent, and limits of legislative, executive, and judicial power (while such offices had long existed, this by no means resolved the more complex question of the

[2] See Louis Fisher, *President and Congress* (New York: Free Press, 1972), pp. 6–14.

[3] J. W. Peltason, *Understanding the Constitution* (New York: Holt, Rinehart & Winston, 1988), pp. 8–11.

powers of the offices). Americans today take these concepts for granted, although they are subject to continual interpretation and evolution. However, for the founders, "the conceptual content of these terms was inchoate."[4] This ambiguity was much in evidence in the definition and operations of early state governments, and it contributed to the observed abuses of legislative powers.

Second, "the chief structural problem of the Constitutional Convention," according to Wilfred Binkley, was "a solution of the old problem of the relation of the Executive to the legislature."[5] The difficulty of resolving the relationship between the legislative and executive branches in the eighteenth century foreshadowed similar contemporary political problems.

Third, the construction of the legislative and executive branches that emerged in the Constitution was influenced by both theoretical and practical concerns. We know that the founders were well read and sophisticated in their understanding of theories of governance. Principal among influential works was Montesquieu's treatise *The Spirit of the Laws,* published in 1748. In this work Montesquieu articulated the notion of separation of powers as an essential means for limiting governmental power and protecting individual liberty from governmental usurpations.[6]

However, the theoretical formulations of Montesquieu and others probably played a less vital role than did the practical considerations and experiences that the founders brought with them.[7] For example, of the fifty-five delegates who attended the 1787 convention twenty had participated in the writing of state constitutions, thirty were serving as members of their state legislatures, and more than

[4] Wilfred E. Binkley, *President and Congress* (New York: Vintage, 1962), p. 27.

[5] Binkley, *President and Congress,* p. 12.

[6] For more on the intellectual tradition behind the Constitution, see Donald L. Robinson, *"To the Best of My Ability": The Presidency and the Constitution* (New York: Norton, 1987), chap. 2.

[7] Fisher makes this argument in *President and Congress,* pp. 3–4. Binkley said that "the vogue of Montesquieu in America . . . provided the formula with which Americans could rationalize their political experience." *President and Congress,* p. 19. References to the political thought of Montesquieu and others can be found in the records of the debate at the federal convention and in the *Federalist Papers.* See Farrand, *Records of the Federal Convention;* and *Federalist Papers* (New York: New American Library, 1961). For example, Madison discusses Montesquieu in *Federalist* No. 43 and No. 47, as does Hamilton in No. 9 and No. 78.

three-fourths had also served in the national Congress under the Articles.[8] These experiences converged in the debate and bargaining that composed the Philadelphia convention.

Nowhere was this exploration and tinkering more evident than in the various plans, proposals, and counterproposals that provided the basis for discussion and debate at the federal convention. Delegates from Virginia took advantage of initial delays at the start of the convention to caucus and produce a package of fifteen resolutions that came to be known as the Virginia Plan. Formally offered by the Virginia delegate and governor, Edmund Randolph, but masterminded by James Madison, the plan proposed a tripartite system of government, yet the legislative branch was clearly to be the center of this three-member solar system. The lower house was to be popularly elected, with more representatives apportioned to the more populous states. The upper house was to be elected by the lower house. The executive was to be chosen by Congress and could serve only a single term, the length of which was not initially specified. The President was to exercise a qualified veto, but only as a member of a "council of revision" composed of the executive and "a convenient number of the national judiciary." Among other powers, the legislature was to have the power to veto state laws, without recourse to override.[9]

The leading alternative constitutional scheme, the New Jersey Plan, was promoted by representatives of smaller states that feared a system dominated by the larger states. This proposal was composed of nine resolutions that were really amendments to the existing Articles of Confederation. This plan proposed to keep a single-house Congress organized with equal representation from each state, but with enhanced powers. There would be an executive, but it was to be a plural executive (the actual number was not specified) rather than a single individual. This collective group would have powers and limits similar to those spelled out in the Virginia Plan, except for the veto power. A federal court ("supreme Tribunal") was to be appointed by the executive alone.[10]

[8] Kenneth Prewitt, Sidney Verba, and Robert H. Salisbury, *An Introduction to American Government* (New York: Harper & Row, 1987), p. 31.

[9] See Max Farrand, *The Framing of the Constitution of the United States* (New Haven, Conn.: Yale University Press, 1913), chap. V and app. II.

[10] Farrand, *The Framing of the Constitution*, chap. VI and. app. III.

Fear of a Strong Executive

Adverse colonial experiences with British monarchs and their appointed governors provoked a strong backlash to executive authority. Speaking as a delegate to the 1787 convention, Ben Franklin related a story of how the king's appointed governor of Pennsylvania had used his absolute veto powers over colonial legislation to "extort money. No good law whatever could be passed without a private bargain with him." Such bargains, according to Franklin, usually involved salary increases or other direct monetary benefits in exchange for the governor's assent.[11] These and similar experiences helped fuel indignation against executive authority.

As a result, the independent state governments established in the 1770s were structured to sharply limit executive powers in that they encouraged "the tendency to make the governor as far as possible dependent upon and subordinate to the legislature."[12] This tendency is clearly seen in early state constitutions. The state constitution of Virginia, for example, said that its governor could "exercise the executive powers of government, according to the laws of this Commonwealth." The thrust of this kind of language was to allow legislatures to subject executive actions to final legislative approval.[13] Legislative intervention in state executive affairs extended to such areas as appointment and removal of administrative officials, the granting of pardons and reprieves to citizens, and the convening and adjournment of state legislatures.[14] In fact, some states abandoned the idea of governors altogether, in favor of state commissions. And until the New York State Constitution of 1777, no state granted its governor permanent veto power over legislation.[15]

Antiexecutive sentiment was expressed by many at the federal convention. This sentiment usually took the form of cautions against

[11] Farrand, *Records of the Federal Convention*, I, p. 99.

[12] Quoted in William M. Goldsmith, *The Growth of Presidential Power*, 3 vols. (New York: Chelsea House, 1983), I, p. 15.

[13] Charles C. Thach, Jr., *The Creation of the Presidency, 1775–1789* (New York: Da Capo, 1969), p. 29. This study was first published in 1922.

[14] Stephen J. Wayne, *The Legislative Presidency* (New York: Harper & Row, 1978), p. 3.

[15] New York was the last state to complete its constitution and the first to include a permanent veto. South Carolina experimented with a gubernatorial veto in its constitution of 1776. When its governor, John Rutledge, actually used the power, the resulting outcry forced him to resign; in its revised constitution of 1778, South Carolina eliminated the veto.

the development of an American monarchy. While some favored the idea, it did not garner public support. Edmund Randolph cautioned that a single executive would be "the foetus of monarchy." Franklin spoke at length, articulating his apprehension that the new American government would eventually evolve into a monarchy. John Dickinson proposed that the executive be removable by vote of the Congress as a means of placing limits on an executive that he considered otherwise inconsistent with a republican form of government. Pierce Butler observed, perhaps with foresight but certainly with concern, that executive power seemed to be on the rise in countries around the world. George Mason feared that an elective executive would pose an even more dangerous threat to liberty than would a hereditary monarch. James Madison stated as an axiom that if the new constitution created a single executive with appreciable powers, that executive would inexorably become a monarchy. John Rutledge figured that any effort to create a single executive would be interpreted by the people as an attempt to create a monarchy. Hugh Williamson viewed the proposals to limit the executive to a single term and to establish a plural executive as vital checks on monarchy. Luther Martin urged circumspection on the convention, lest the rest of the country fear that the convention intended to impose a monarchy.[16]

The sentiment to construct a more "parliamentary" system, as seen in the legislature-centered Virginia Plan, was reflected in its provision that the executive be elected by Congress. The convention voted on five separate occasions in support of this method of selecting the President. Independent selection of the President by an electoral college was proposed as early as mid-July, but the idea gained support and ultimate acceptance relatively late in the convention's deliberations. Its inclusion was the product of a small committee organized to iron out persisting difficulties in the draft document (called the Committee of Eleven, it was dominated by delegates who favored a stronger executive).[17]

[16]Farrand, *Records of the Federal Convention*, I, pp. 66, 83, 86–87, 100, 101, 113, 119; II, pp. 100–101; IV, p. 27.

[17]James Wilson was a strong proponent of using the Electoral College as a method of selecting the President, but the idea was defeated in a vote on July 17. Hamilton proposed the idea on June 18, but no vote was taken. For more on the politics at the convention relating to choosing a presidential selection method, see William H. Riker, "The Heresthetics of Constitution-Making," *American Political Science Review*, 78 (March 1984): 1–16.

Fear of a Strong Legislature

For all the concerns expressed about the dangers of strong executives, most agree that the founders and other early leaders shared an even greater concern about domineering legislatures. This concern received strong impetus from state experiences in the time preceding the 1787 convention and from the shortcomings of an executiveless national government under the Articles. As Charles Thach concluded in his important study, "the political psychology of the men who framed the Federal Constitution was by no means characterized by that jealousy of the executive which was so prevalent in 1776 . . . indeed, the pendulum of conservative opinion had swung so far in the opposite direction that the 'people's representatives' had become the chief object of its dislike. . . ."[18] Historian Gordon Wood concluded that state legislatures in the postrevolutionary period were susceptible to corruption and were the object of much pressure by various special-interest groups. The result, according to Wood, was the enactment of many laws considered "unjust" in such areas as debtor relief, paper money, and property rights. Thus, "state assemblies were abusing their extraordinary powers."[19]

These suspicions of legislative-dominated systems are readily seen in the Constitution itself. Article I, the longest in the document, details numerous specific congressional powers, but also specific limits on those powers. Limits also appear in the Bill of Rights, which was added in 1791. By enumerating powers with such specificity, the founders were codifying the legislature's importance, but they were also seeking to impose clearly defined boundaries.

Article II, by contrast, is much more brief and vague in its description of executive powers. The importance of vagueness in law lies in the fact that it bestows discretion; that is, it affords an opportunity to interpret powers as one sees fit. The founders were well aware of this fact and sought to give the President this discretion so that the executive would have greater room to maneuver in dealings with Congress (although the vagueness of Article II also resulted from the founders' inability to come to a more precise agreement about the

[18]Thach, *The Creation of the Presidency*, p. 76. See also Fisher, *President and Congress*, pp. 21–22.

[19]Gordon S. Wood, "Democracy and the Constitution," in *How Democratic Is the Constitution?*, ed. by Robert A. Goldwin and William A. Schambra (Washington, D.C.: American Enterprise Institute, 1980), p. 8.

appropriate nature and shape of the executive; the founders labored throughout the convention over appropriate wording and powers for the President). Judicial scholar Robert Scigliano goes so far as to argue that the three-branch system was not designed to be equal among the three branches but was rather a two-on-one arrangement; that is, the executive and judicial branches were fortified with defensive powers against the legislative branch, which was expected to be more aggrandizing and aggressive.[20]

The framers' fears of an aggrandizing legislature prone to domination of the executive are illustrated by the debate over the veto power. Much discussion at the convention was devoted to the veto. A central theme of that discussion was the necessity of the veto as a method for presidents to defend themselves against legislative encroachment. This lesson emerged directly from state experiences. The first two governors to be given permanent veto powers were those of New York (in 1777) and Massachusetts (in 1780), and both states were cited as places where executives had functioned effectively, in contrast to the experiences of the other states. The need for a veto power as a defensive weapon for the President is also articulated in several of the *Federalist Papers*.[21] Interestingly, despite ambiguity and uncertainty at the convention over the scope and nature of executive power—not to mention resentment at the way the king and his colonial governors had used and abused their veto power—no serious disagreement arose over granting the executive some kind of veto power.

As with other political problems of the time, delegates to the federal convention had much to say about the problems of legislative domination. Elbridge Gerry observed that contemporary governing problems flowed from what he called "the excess of democracy"—that is, legislatures. Edmund Randolph argued in favor of a Senate not directly elected by the people so that such a body could serve as a check on the popularly elected House, a body prone, he said, to turbulence and folly. James McClurg thought an open-ended presidential term lasting as long as the President exhibited "good behavior"

[20] Robert Scigliano, *The Supreme Court and the Presidency* (New York: Free Press, 1971).

[21] For more on the veto power, see Robert J. Spitzer, *The Presidential Veto: Touchstone of the American Presidency* (Albany: State University of New York Press, 1988), pp. 15–16 and passim. The *Federalist Papers* in which the veto power is discussed are No. 51, No. 66, and No. 73.

was necessary to prevent tyrannies committed in the name of republican (representative) government. Gouverneur Morris proposed that the legislature would "continually seek to aggrandize & perpetuate themselves" and that the executive had to serve as the people's guardian against legislative tyranny. John Mercer saw the judicial branch to be in a similar position as that of the executive, that is, needing to defend itself against legislative excesses and oppressive practices. James Wilson said that the natural tendency of legislatures was to devour executives. Wilson's ally, Alexander Hamilton, spent six hours detailing his plan for an executive-centered constitutional system predicated on the premise that a congressional-centered system is incompatible with good government. Hamilton's vision incorporated sweeping executive powers, including a national executive selected by electors chosen by electors, to serve for life; an absolute veto; sole power to appoint cabinet secretaries; presidential impeachment by the Supreme Court; and broad war-making powers. Hamilton's plan for an executive-centered national system was not accepted by the convention.[22] As the delegate Dr. William Johnson noted, Hamilton "has been praised by every body" but "supported by none."[23] But the provisions of Article II that emerged in September reflected Hamilton's influence and some of his ideas. Of greatest importance was the decision to leave executive power and organization relatively vague and undefined in order to leave open the possibility of a more Hamiltonian executive.[24]

Perhaps more than any founder, James Madison agonized over the appropriate structure and nature of executive authority. While he cautioned the convention about executive excesses, he also observed "a tendency in our governments to throw all power into the Legislative vortex. The Executives of the States are in general little more than Cyphers; the legislatures omnipotent."[25] Madison's analysis underscored the difficult lessons learned from the state governments

[22] Farrand, *Records of the Federal Convention*, I, pp. 48, 51, 107, 282–293; II, pp. 36, 52, 298; III, pp. 617–630. No actual vote was taken on the plan Hamilton introduced on June 18. Several versions of Hamilton's plan survived, and disputes continue as to whether these discrepancies represent changes in Hamilton's thinking or recording errors.

[23] Farrand, *Records of the Federal Conventions*, I, p. 363.

[24] See Forrest McDonald, *Alexander Hamilton: A Biography* (New York: Norton, 1979), pp. 95–107.

[25] Farrand, *Records of the Federal Convention*, II, p. 35. Madison offered similar comments in *Federalist* No. 48 and No. 49.

and also the intractable problem of balancing effective, energetic government with responsible government mindful of individual rights.[8]

Finally, it is important to point out an obvious but often overlooked fact about the founders and their fear of legislatures. The men attending the 1787 convention represented the cream of society, which is to say they were America's political and social elite. Many of these men were frankly suspicious of any mechanism that facilitated direct popular control of the government because they considered the citizenry unqualified to make direct governing choices and feared that the citizenry might rise up and deprive the wealthy of their property and other holdings. Founders such as Hamilton, Madison, and Gerry all expressed their mistrust of direct links between governing institutions and the people. This concern is directly seen in the Constitution, where of the four national governing institutions—the House, Senate, presidency, and judiciary—only the House was directly elected (the Senate was to be elected by the state legislatures, the President by the Electoral College, and the members of the federal court by the President and the Senate only).

Fear of Concentrated Power

The particular concerns about executive and legislative excesses are more clearly understood in the larger context of apprehension about governments. The very idea that the legislative and executive branches would share responsibility over such matters as control of the military and the appointment of ambassadors stems from an abiding suspicion of too much governmental power concentrated in too few hands. Whether referring to the excesses of King George III or to those of the early state legislatures, their collective sin was also one held in common, that is, the abuse of governmental powers resulting from power concentrated in the hands of one branch or body. Similarly, the idea that executive, legislative, and judicial powers ought to be exercised by distinct bodies was also a means of limiting the concentration of power, as was the principle of legislative bicameralism.

These two principles—known familiarly as checks and balances and separation of powers—aroused no little controversy in the eighteenth century and were vigorously defended in the *Federalist Pa-*

[8] For more on the design of the executive and the evolution of Madison's thought on the subject, see Jeffrey Leigh Sedgwick, "James Madison & the Problem of Executive Character," *Polity*, XXI (Fall 1988): 5–23.

pers. James Madison spoke directly to this arrangement of powers in the context of this nation's adverse governing experiences when he observed in *Federalist* No. 51 that

> the 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.[27]

This principle was central to Madison's resolution of the dilemma facing the executive branch, that is, how to construct an energetic executive without also encouraging executive tyranny. Madison's resolution—and that of the Constitution—was to rely on separation of powers as a means of grounding executive energy in the constitutional document.[28]

Another provision of the Constitution that was considered vital to maintaining proper separation of the executive and legislative branches was that which barred a member of Congress from simultaneously holding any other governmental office. Concern for such dual office holding was long-standing in the British system (although it is now an integral part of the contemporary British Parliament, where members of Parliament also serve as cabinet secretaries). On several occasions in the late seventeenth century Parliament enacted such a ban on dual service as a means to limit the monarch's influence in Parliament, only to have such measures vetoed by the king.

Fear of Governmental Paralysis

Much emphasis has been placed on the founders' desire to construct a governing system that was slow, deliberate, and multicentered, yet it is also important to remember that if the founders had really wanted governmental sloth, they could have kept the Articles of Confederation. Without question, they were also seeking greater governmental efficiency and effectiveness. Unless the nation created a more effective governing apparatus, it could not hope to ward off the intrusions of hostile nations, improve economic conditions, or conduct the

[27] *Federalist Papers*, pp. 321–322.

[28] See Sedgwick, "James Madison & the Problem of Executive Character," p. 22.

business of the country.[29] As Madison noted in *Federalist* No. 45, "If the new Constitution be examined with accuracy and candor, it will be found that the change which it proposes consists much less in the addition of *new powers* to the Union than in the invigoration of its *original powers*."[30] In other words, the new government was to be given greater powers to do what the Articles had failed to do.

In *Federalist* No. 9 Hamilton argued similarly that "A Firm Union will be of the utmost moment to the peace and liberty of the States as a barrier against domestic faction and insurrection."[31] An early and shrewd constitutional scholar, Joseph Story, summarized the problem, suggesting that "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 may be its theory, must, in practice, be a bad government."[32]

THE CONSTITUTIONAL FRAMEWORK

The plain words and composition of the Constitution reveal much about the basic relationship between the legislative and executive branches. It is no accident, for example, that Article I is devoted to the legislative branch. As John Locke wrote, "In all cases whilst the government subsists, the legislative is the supreme power . . . and all other powers in any members or parts of the society [are] derived from and subordinate to it."[33] As a result, Congress was to be the first branch, the cornerstone of the republican system.

In Article I, "Congress is granted a breathtaking array of powers . . . the bulk of governmental authority as the Founders understood it."[34] This sweeping collection of powers begins with the first sentence

[29] See Fisher, *President and Congress*, esp. p. 3.

[30] *Federalist Papers*, p. 292.

[31] *Federalist Papers*, p. 71. Hamilton made a similar point during the federal convention when he discussed the weakness of confederated systems of government. Farrand, *The Records of the Federal Convention*, I, p. 285.

[32] Joseph Story, *Commentaries on the Constitution of the United States* (Durham, N.C.: Carolina Academic Press, 1987), p. 517. Story's *Commentaries* were first published in 1833.

[33] John Locke, *Of Civil Government* (Chicago: Regnery, 1955), p. 125.

[34] Roger Davidson, "'Invitation to Struggle': An Overview of Legislative-Executive Relations," *Annals of the American Academy of Political and Social Science*, 499 (September 1988): 11.