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The Framers Establish an Administrative Constitution

by

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Introduction and Summary

Does the Constitution provide any guiding principles for administrative law? Or, as one scholar alleges, does the Constitution leave "a hole where administration might have been?"[1] This is far more than an academic question. If the Constitution does not guide or constrain the exercise of administrative power, then American constitutionalism would have little, if anything, to say about the rise of the modern administrative state.

A close look at the debates and discussion surrounding the framing and ratification of the Constitution, however, reveals important principles governing the structure of administration. These principles had emerged in part because of the lessons the Constitution's Framers learned during the colonial period and Revolutionary War.

In particular, the Framers outlined what a constitutional administration would look like. First, constitutional administration has to be consistent with the basic principle of republican government, which requires that all powers are derived through some mode of election, and that legislative powers are immediately drawn from popular election. The Framers specifically

[1] JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 30 (2012).

addressed the question of whether legislative power could be delegated to the executive, and they rejected that notion.

Second, the Framers were committed strongly to the principle of the separation of powers, which prohibited the consolidation of legislative, executive, and judicial power in the same hands. Separation of powers, according to the Federalists, also meant that legislative power had to be divided internally, so that no single institutional actor could create binding law. The same principle necessitated that the executive be independent from the legislature.

Finally, the delegates at the Constitutional Convention carefully weighed the question of unifying executive power in the hands of one person, and ultimately decided that unity in the executive would promote both energy and accountability ("responsibility" in their terminology). Thus, they rejected proposals to create a plural executive or to have the chief executive share power with some sort of executive council.

It is true that there was not unanimity on all of these questions or principles. Many critics of the Constitution wanted a weaker executive that could not act without the concurrence of other officials, and many fought for insulating legislative power from direct elections by the people. Nevertheless, there was a general consensus in favor of these principles among those most responsible for establishing and ratifying the Constitution.

Far from neglecting the question of administration, the Constitution's Framers provided critical guidance for how administrative power should be structured. These principles, central to our constitutional design, remain very relevant to the way government functions – or at least should function. Indeed, they should call us to question some features of modern administrative government, such as the widespread delegation of lawmaking power to agencies, the consolidation of powers in the federal bureaucracy, and the insulation of administrative officers from the President's oversight and control.

"The Elective Mode of Obtaining Rulers"

The Constitutional Convention confronted the issue of the delegation of legislative power to the executive early on in its proceedings. When discussing the Virginia Plan, James Madison moved to define the executive power as the "power to carry into effect the national laws…and to execute such other powers as may from time to time be delegated by the national legislature."[2] This was a curious formulation, and the delegates immediately noticed the problem: did this imply that the legislature could delegate its powers over to the executive?

Charles Pinckney suggested that the clause "to execute such other powers as may from time to time be delegated" was unnecessary, as the power to carry law into effect already included this power. Still, he insisted that the delegation portion of Madison's motion be changed to specify that only such powers "not legislative or judiciary in their nature" could be delegated by the legislature.[3] Madison replied that the addition was not required, since the power to "execute"

[2] MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 (1911), at 1:67.
[3] *Id.*

necessarily excluded the ability to exercise legislative or judicial powers. But he accepted Pinckney's proposal because it "might serve to prevent doubts and misconstructions."[4]

The Madison-Pinckney exchange on delegation of power to the executive reveals their commitment to the nondelegation principle – that the legislature may not delegate its power to the executive. First, both men agreed that some powers can be delegated by the legislature to the executive, because those powers are neither legislative nor judicial in nature. Not all delegations of power by the legislature to the executive, in other words, are delegations of legislative power. Second, both men agreed that the legislature could not be permitted to delegate powers "legislative or judiciary in their nature" to the executive. They merely disagreed about how to specify that restriction in the Constitution itself. Their commitment to this principle was so strong that they ultimately agreed to abandon the delegation clause of Madison's motion entirely, to prevent any possibility of confusion on the matter. This exchange, in short, is clear indication that the nondelegation principle was known to, and important to, the delegates at the Constitutional Convention.

Their attachment to the nondelegation principle was a result of their understanding of the nature of republican government, which requires that all powers are derived from the people through elections, and that legislative powers are immediately rather than indirectly derived from popular election. In *The Federalist*, James Madison made this argument repeatedly. Most famously, he noted in *Federalist No. 39* that a republic is a form of government "which derives all its powers directly or indirectly from the great body of the people….It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it….It is *sufficient* for such a government that the persons administering it be appointed, either directly or indirectly, by the people."[5] Madison insisted that the critical aspect of republican government is that officials derive their power through some sort of popular election: they are appointed, "directly or indirectly," he notes twice in his definition, by the people.

Madison's definition of republicanism is noteworthy for two reasons. First, elections to choose officers in the government are the cornerstone of republican government. Second, Madison distinguishes carefully between direct and indirect election by the people. He explained in *Federalist No. 39* that all three branches of government are republican institutions. The House, he wrote, "is elected immediately by the great body of the people," while the President "is indirectly derived from the choice of the people," and federal judges are "the choice, though a remote choice, of the people themselves," since they are indirectly appointed by an indirectly-elected President.[6]

Establishing a republican form of government was one of the most critical objectives of the Constitutional Convention. As a result, the Founders were careful to make sure that all three branches of the government were accountable to the people through election, either directly or

[4] *Id.*
[5] THE FEDERALIST NO. 39, at 194 (James Madison) (George Carey and James McClellan ed., 2001) (emphasis in original).
[6] *Id.* at 195.

indirectly. In addition, they insisted that the legislature, in particular, must be immediately derived from popular election rather than indirectly appointed. As James Madison explained in *Federalist No. 52*, discussing the House of Representatives: "As it is essential to liberty, that the government in general should have a common interest with the people; so it is particularly essential, that the branch of it under consideration should have an *immediate* dependence on, and an intimate sympathy with, the people. Frequent elections are unquestionably the only policy, by which this dependence and sympathy can be effectually secured."[7] Madison implied that while executive and judicial officials can be indirectly selected by the people, legislative representatives must be directly elected.[8] His collaborator, Alexander Hamilton, similarly listed "the representation of the people *in the legislature*, by deputies of their own election" as one of the great advancements in modern political science.[9] Admittedly, they compromised on the issue of direct election for both houses of Congress, but they nevertheless insisted upon the principle of immediate election of legislative representatives. To transfer legislative power to indirectly selected administrators or bureaucrats elected by civil service exams rather than political appointments would threaten the very basis of republican government.

Preventing "the Very Definition of Tyranny"

Another central objective of the Constitutional Convention was to craft a system of government that was consistent with the separation of powers. The difficulty was that no system to date had properly structured authority to ensure the separation of powers in practice. As the Founders themselves had learned from experience, the tendency in a republic was for the legislature to swallow up the other powers of government, "drawing all power into its impetuous vortex."[10]

Simply creating "parchment barriers" telling each branch to stay within its respective sphere of authority would be ineffective, Madison claimed. Instead, the Constitution needed to ensure that each separate branch has "a will of its own." That could only be accomplished by "giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others."[11] Since the different branches have different degrees of strength, the Constitution would have to balance power by strengthening the weaker branches, and weakening the stronger. It would also have to buttress the balance of powers by motivating each branch to use its powers to combat the other branches.

The Constitution, Madison argued, would accomplish this by dividing the legislature into two parts, and making each part motivated to operate independently. The "remedy," he famously explained, "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

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[7] THE FEDERALIST NO. 52, at 273 (James Madison) (George W. Carey and James McClellan ed., 2001) (emphasis added).
[8] Madison was only tepidly supportive of the indirect election of U.S. senators, as a political compromise required by public opinion and the politics of the Convention. See THE FEDERALIST NO. 62, at 320 (James Madison) (George W. Carey and James McClellan ed., 2001).
[9] THE FEDERALIST NO. 9, at 38 (Alexander Hamilton) (George W. Carey and James McClellan ed., 2001) (emphasis added).
[10] THE FEDERALIST NO. 48, at 257 (James Madison) (George W. Carey and James McClellan ed., 2001).
[11] THE FEDERALIST NO. 51, at 268 (James Madison) (George W. Carey and James McClellan ed., 2001).

possible.[12] The President, on the other hand, must be strengthened, which explains the existence of the President's veto on legislation. The President's constitutional means of resistance, however, are useless unless the President is motivated to resist the legislature. Giving the President an independent election (rather than having the legislature choose the President, as is done in parliamentary systems), and attaching the President to the office and its powers, would provide the personal motives to balance out the legislature's innate advantages.

In short, the Constitution preserves the separation of powers not by simply dividing up power and requiring that each department remain within its bounds. Instead, it establishes an intricate division of power to produce competing motivations. Legislative power cannot be exercised by a single individual, but is shared among many. The House, Senate, and President are all supposed to act independently, derive their power independently from separate sources, and be accountable to different constituencies. To substitute consolidated power within a single department or agency for this intricate system of separated and balanced powers would be to sacrifice much of the Convention's careful work.

"A Considerable Pause"

The most difficult theoretical task facing the delegates at the Constitutional Convention was how to establish a strong but "safe" chief executive – that is, safe in a republican sense. Although the debates over representation threatened to tear the Convention apart, representation was a political challenge. Establishing a republic with separated powers and a strong executive, on the other hand, was a new undertaking that required careful thinking and argument.

On this question there was much less unanimity among the Convention's delegates, compared to debates on the separation of powers. There was no consensus even in favor of a single chief executive, and many advocated for executive power to be shared among several heads of the executive branch. The Virginia Plan did not even specify how many chief executives there would be, and so James Wilson moved to amend it a few days after it was introduced, to read "that a national Executive to consist of a single person be instituted."[13]

When Wilson made his motion, according to James Madison's notes, "a considerable pause" ensued. The seriousness of setting up a single chief executive moved the convention to silence. Finally, Benjamin Franklin had to cajole the delegates to speak up, saying "that it was a point of great importance and [he] wished the gentlemen would deliver their sentiments upon it."[14] Franklin's request brought the opponents of a unitary executive out of hiding. John Randolph called "unity in the Executive magistracy…the foetus of monarchy."[15] He was supported by other prominent delegates such as Elbridge Gerry and Roger Sherman.

Eventually, the arguments in favor of a single chief executive won the assent of most of the delegates. When James Wilson initially moved to establish a single rather than a plural chief

[12] *Id.* at 269.
[13] FARRAND, *supra* note 2, at 1:65.
[14] *Id.*
[15] *Id.*, at 1:66.

executive, he asserted that "a single magistrate" would provide the "most energy, dispatch, and responsibility to the office."[16] This term "responsibility" would be repeated throughout the discussion on the unitary executive question. John Rutledge, for instance, echoed Wilson when he argued that "[a] single man would feel the greatest responsibility and administer the public affairs best."[17] Finally, the Convention decided, seven states to three, to establish a single chief executive in the Constitution.

Having lost on the question of the single executive, some opponents retreated to a different ground: undermining executive unity by insulating parts of the executive branch from the control of the single chief magistrate. For instance, Roger Sherman advocated following the practice of many state governments by combining a single chief executive with "a Council of advice, without which the first magistrate could not act."[18] Sherman's proposal would undermine executive unity by requiring the President to gain the agreement of other, independent actors before acting.

This proposal was consistently advanced at the Convention and during the ratification debates. Versions of it were promoted even by James Wilson and James Madison, both staunch defenders of the single executive – though they only favored a council for the exercise of the veto power.

Perhaps the most interesting proposal, though it stopped short of creating independent subordinate executives, came from Gouverneur Morris and Charles Pinckney. The Morris-Pinckney plan would have established a "Council of State" in the Constitution itself, composed of the Chief Justice and several cabinet-level secretaries whose titles were specified by constitutional provision. All of the secretaries would be appointed and removed at will by the President, and the plan clarified that the council could only advise the President: "But their advice shall not conclude him, nor affect his responsibility for the measures which he shall adopt."[19] Even the Morris-Pinckney proposal, then, sought to preserve the President's exclusive responsibility for the measures he adopted, while providing for an administrative structure – appointed and removed at will by the President – that would advise him on measures.

The Morris-Pinckney proposal made it to the Committee on Postponed Matters at the end of August 1787. However, it was eliminated and likely replaced with the Written Opinions Clause of the Constitution by the Committee. While we have no concrete evidence of the reasons for this change, it is reasonable to infer that the Convention did not want to undermine the President's control over and accountability for the actions of the executive branch. As George Mason – hardly an advocate for a strong executive – explained: "it was judged that the President by persuading his Council, to concur in wrong measures, would acquire their protection for them."[20] Even a Council completely under the control of the President and unable to do more than advise him on matters might undermine the accountability that a unitary executive would afford.

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[16] *Id.*, at 1:65.
[17] *Id.*
[18] *Id.*, at 1:97.
[19] *Id.*, at 2:367.
[20] *Id.*, at 2:542.

This rationale for the unitary executive was most famously and eloquently defended by Alexander Hamilton in Federalist No. 70. In that essay, Hamilton argued that unity in the executive would promote not only energy but also "safety in the republican sense," which requires "a due dependence on the people" and "a due responsibility."[21] Destroying this unity, "either by vesting the power in two or more magistrates…or by vesting it ostensibly in one man, subject…to the control and cooperation of others," would eliminate the responsibility that protects the people from abuse of executive power.[22] It does so, Hamilton asserted, because "it tends to conceal faults, and destroy responsibility."[23] If there are multiple executives, or multiple independent decisionmakers in an administration, "[i]t often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, ought really to fall."[24]

The term "responsibility" was used throughout the Convention and the ratification debates to combat proposals to set up either a plural executive or an ostensibly unitary executive that required the concurrence of other actors. Although the Framers of the Constitution were fearful of executive power, they also understood the threats associated with feeble executive power due to their experience during the Revolutionary War. They sought to provide for a strong, but safe executive through concentrating accountability in a unitary executive who would be responsible for the measures of his administration. Although numerous proposals for undermining this unity were advanced, even by some friends of a strong executive, the fact that the Framers consistently rejected such proposals is a strong indication of their preference for responsibility through unity in the executive.

Conclusion: Constitutional Administration Through Republicanism, Separation of Powers, and Unity in the Executive

Three core principles of American constitutionalism emerged as a result of the Framers' experience during the Revolutionary War and their deliberations at drafting and ratifying of the Constitution. Those principles – republicanism, the separation of powers, and unity in the executive – are central to understanding the proper role and structure of administration in the American Constitution – and thus central to understanding the proper place of the modern administrative state in our government. The Constitution was not silent on administration, but in fact provides significant guidance for how it must be structured.

First, republicanism requires that legitimate power is derived from the people through elections. In a republic, the rulers are selected by the people, either directly or indirectly. But legislative power, in particular, should be tied more closely to the people through immediate elections. As James Madison explained in *Federalist No. 57*: "The *elective* mode of obtaining rulers is the

[21] THE FEDERALIST NO. 70, at 363 (Alexander Hamilton) (George W. Carey and James McClellan ed., 2001).
[22] *Id.*
[23] *Id.* At 366.
[24] *Id.*

characteristic policy of republican government."[25] Most laws today, on the other hand, are enacted not by elected representatives in the legislature, nor even by indirectly-elected political appointees in the administration, but rather by civil service appointees who do not derive their powers either "directly or indirectly from the great body of the people."[26] This raises serious questions about the extent to which modern administrative lawmaking threatens basic principles of republicanism.

Second, the separation of powers demands that each department has a will of its own, as well as the constitutional means and personal motivations to resist the encroachments of other departments, and that legislative power is divided among multiple, independent powers. Modern administrative agencies consolidate these powers, unifying legislative power rather than dividing it, and undermining the independent exercise of legislative, executive, and judicial power. Instead of incentivizing the departments to resist each other, modern agencies are designed so that lawmakers, enforcers, and adjudicators work together. While there is some separation of functions within administrative agencies, so that prosecutorial and adjudicatory power cannot be combined, this does not apply to the heads of agencies. And the separation of functions that exists below agency heads is certainly weaker than the separation of powers provided by the Constitution.[27]

Third, and finally, unity in the executive promotes safety in the republican sense by ensuring accountability for the decisions made by administrative agencies. However, modern administrative agencies are often structured to be independent of the President's control. This replicates one of Hamilton's two methods for undermining unity in the executive: "by vesting [executive power] ostensibly in one man, subject…to the control and cooperation of others."[28] Independent administrators within the executive recreate the infamous "*imperium in imperio*" that some Founders grappled with during the Revolutionary War when they rejected the creation of independent bodies such as Committees of Public Safety which were not accountable to the state governors. Modern presidents often embrace the ability to transfer accountability for unpopular measures to independent agencies rather than assuming responsibility for them.[29]

The American Constitution was not designed to destroy or undermine administrative power, but to check it and ensure its accountability to the people. Limiting legislative delegations of power to administrative agencies, preserving the separation of powers, and restoring unity in the executive would not require the abolition of large portions of the modern administrative state. Administrative agencies would still be needed to investigate, prosecute, and enforce violations of laws enacted by elected representatives in Congress.

The Framers of the Constitution believed that regulation played a legitimate role in a free society, and that administration should be sufficiently robust to ensure society was well-

[25] THE FEDERALIST NO. 57, at 295-6 (James Madison) (George Carey and James McClellan ed., 2001) (emphasis added).
[26] THE FEDERALIST NO. 39, *supra* note 5, at 194.
[27] See PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUl? 233-7 (2014).
[28] THE FEDERALIST NO. 70, *supra* note 19, at 363.
[29] See Adam J. White, *Reining in the Agencies*, 35 NATIONAL AFFAIRS 42 (2018).

regulated. But they sought to reconcile regulation and administration with republicanism, the separation of powers, and executive responsibility. Understanding the questions they confronted, and how they resolved them, should guide contemporary efforts to reconcile the modern administrative state with American constitutionalism.

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