The Founders' Constitution

The Founders' Constitution

Edited by
Philip B. Kurland
and
Ralph Lerner

VOLUME FOUR
Article 2, Section 2,
through Article 7

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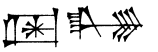

The cuneiform inscription that serves as our logo and as the design motif for our endpapers is the earliest-known written appearance of the word "freedom" (*amagi*), or "liberty." It is taken from a clay document written about 2300 B.C. in the Sumerian city-state of Lagash.

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To Joshua and Jesse

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References to documents follow a consistent pattern both in the cross-references (in the detailed tables of contents) and in the indexes. Where a document in volume 1 is being cited, reference is to chapter and document numbers: thus, for example, ch. 15, no. 23. Where the document is to be found in one of the subsequent volumes, which are organized by Constitutional article, section, and clause, or by amendment, reference is in this mode: 1.8.8, no. 12; or, Amend. I (religion), no. 66. Each document heading consists of its serial number in that particular chapter; an author and title (or letter writer and addressee, or speaker and forum); date of publication, writing, or speaking; and, where not given in the first part of the heading, an identification of the source of the text being reprinted. These sources are presented in short-title form, the author of the source volume being presumed (unless otherwise noted) to be the first proper name mentioned in the document heading. Thus, for example, in the case of a letter from Alexander Hamilton to Governor George Clinton, "Papers 1:425–28" would be understood to refer to the edition fully described under "Hamilton, Papers" in the list of short titles found at the back of each volume.

A somewhat different form has been followed in the case of the proceedings of the Constitutional Convention that met in Philadelphia from late May to mid-September of 1787. As might be expected, we have included many extracts from the various records kept by the participants while they were deliberating over the shape and character of a new charter of government. For any particular chapter or unit, those extracts have been grouped as a single document, titled "Records of the Federal Convention," and placed undated in that chapter's proper time slot. The bracketed note that precedes each segment within that selection of the "Records" lists the volume and opening page numbers in the printed source (Max Farrand's edition), the name of the participant whose notes are here being reproduced (overwhelmingly Madison, but also Mason, Yates, others, and the Convention's official Journal), and the month and day of 1787 when the reported transaction took place.

Article 2, Section 2, Clause 1

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

1. Records of the Federal Convention

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2. William Blackstone, Commentaries (1765)
3. A Georgian, 15 Nov. 1787
4. Luther Martin, Genuine Information, 1788
5. Alexander Hamilton, Federalist, no. 74, 25 Mar. 1788
6. Debate in Virginia Ratifying Convention, 18 June 1788
7. Debate in North Carolina Ratifying Convention, 28 July 1788
8. House of Representatives, Protection of Trade, 22 June 1797
9. St. George Tucker, Blackstone's Commentaries (1803)
10. *Little* v. *Bareme,* 2 Cranch 170 (1804), in 1.8.11, no. 13
11. James Monroe to Chairman of Senate Military Committee, Feb. 1815, in 1.8.15, no. 18
12. Joseph Story, Commentaries on the Constitution (1833)

Opinions in Writing

13. James Iredell, North Carolina Ratifying Convention, 28 July 1788
14. Thomas Jefferson to Walter Jones, 5 Mar. 1810
15. William Wirt, Office of Attorney General, 12 June 1818
16. William Wirt, Duties of the Attorney General, 3 Feb. 1820

Reprieves and Pardons

17. William Blackstone, Commentaries (1769)
18. Georgia Constitution of 1777, art. 19
19. Massachusetts Constitution of 1780, pt. 2, ch. 2, sec. 1, art. 8
20. Alexander Hamilton, Federalist, no. 74, 25 Mar. 1788
21. Gilbert Livingston, Proposed Amendment, New York Ratifying Convention, 4 July 1788
22. James Iredell, North Carolina Ratifying Convention, 28 July 1788
23. James Wilson, Executive Department, Lectures on Law, 1791
24. George Washington, Proclamation of 10 July 1795
25. St. George Tucker, Blackstone's Commentaries (1803)
26. William Wirt, Pardons, 30 Mar. 1820
27. William Rawle, A View of the Constitution of the United States (2d ed. 1829)
28. John Macpherson Berrien, Pardons before Conviction, 12 Oct. 1829
29. *United States* v. *Wilson,* 7 Pet. 150 (1833)
30. Joseph Story, Commentaries on the Constitution (1833)

1

Records of the Federal Convention

[*1:66; Madison, 1 June*]

Mr. Madison thought it would be proper, before a choice shd. be made between a unity and a plurality in the Executive, to fix the extent of the Executive authority; that as certain powers were in their nature Executive, and must be given to that departmt. whether administered by one or more persons, a definition of their extent would assist the judgment in determining how far they might be safely entrusted to a single officer. He accordingly moved that so much of the clause before the Committee as related to the powers of the Executive shd. be struck out & that after the words "that a national Executive ought to be instituted" there be inserted the words following viz, "with power to carry into effect. the national laws. to appoint to offices in cases 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". The words "not legislative nor judiciary in their nature" were added to the proposed amendment in consequence of a suggestion by Genl Pinkney that improper powers might otherwise be delegated,

Mr. Wilson seconded this motion

Mr. Pinkney moved to amend the amendment by striking out the last member of it; viz. "and to execute such other powers not Legislative nor Judiciary in their nature as may from time to time be delegated." He said they were unnecessary, the object of them being included in the "power to carry into effect the national laws".

Mr. Randolph seconded the motion.

Mr. Madison did not know that the words were absolutely necessary, or even the preceding words. "to appoint to offices" &c. the whole being perhaps included in the first member of the proposition. He did not however see any inconveniency in retaining them, and cases might happen in which they might serve to prevent doubts and misconstructions.

In consequence of the motion of Mr. Pinkney, the question on Mr. Madison's motion was divided; and the words objected to by Mr. Pinkney struck out; by the votes of Connecticut. N. Y. N. J. Pena. Del. N. C. & Geo: agst. Mass. Virga. & S. Carolina the preceding part of the motion being first agreed to: Connecticut divided, all the other States in the affirmative.

[*1:113; Mason, 4 June*]

We have not yet been able to define the powers of the Executive, and however moderately some gentlemen may talk or think upon the subject, I believe there is a general tendency to a strong Executive, and I am inclined to think a strong Executive necessary. If strong and extensive powers are vested in the Executive, and that executive consists only of one person, the government will of course degenerate (for I will call it degeneracy) into a monarchy—a government so contrary to the genius of the people that they will reject even the appearance of it.

[*4:15; Mason, 4 June*]

It is not yet determined how the Executive is to be regulated whether it is to act solely from its own Judgment, or with the Advice of others whether there is, or is not to be a Council annexed to it; and if a Council, how far their Advice shall operate in controuling the Judgment of the supreme magistracy—If there is no Council of State, and the executive power be vested in a single Person; what are the Provisions for its proper Operation, upon casual Disability by sickness, or otherwise.—These are Subjects which must come under our Consideration; and perhaps some of the most important Objections would be obviated by placing the executive Power in the hands of three, instead of one Person.

There is also to be a Council of Revision; invested, in a great Measure, with a Power of Negative upon the Laws; and an Idea has been suggested, either within or without doors, that this Council should be formed of the principal Officers of the State,—I presume of the members of the Treasury Board, the Board of War, the Navy Board, and the Department for foreign Affairs: it is unnecessary, if not improper, to examine this part of the Subject now, but I will venture to hazard an Opinion, when it comes to be thoroughly investigated, that we can hardly find worse Materials out of which to create a Council of Revision; or more improper or unsafe Hands, in which to place the Power of a Negative upon our Laws.—It is proposed, I think, Sir, in the Plan upon your Table, that this Council of Revision shall be formed out of the Members of the Judiciary Departments joined with the Executive; and I am inclined to think, when the Subject shall be taken up, it may be demonstrated, that this will be the wisest and safest mode of constituting this important Council of Revision.—But the foederal inferior Courts of Justice must, I presume, be fixed in the several respective States, and consequently most of them at a great Distance from the Seat of the foederal Government: the almost continual Operation of the Council of Revision upon the Acts of the national Parliament, and upon their Negative of the Acts of the several State legislatures, will require that this Council should be easily and speedily convened; and consequently, that only the Judges of the Supreme foederal Court, fixed near the Seat of Government, can be Members of it; their Number will be small: by placing the Executive Power in three Persons, instead of one, we shall not only increase the Number of the Council of Revision (which I have endeavoured to show will want increasing), but by giving to each of the three a Vote in the Council of Revision, we shall increase the Strength of the Executive, in that particular Circumstance, in which it will most want Strength—in the Power of defending itself against the Encroachments of the Legislature.—These, I must acknowledge, are with me, weighty Considerations for vesting the Executive rather in three than in one Person.

[*1:244; Madison, 15 June*]

4. Resd. . . . that the Executives besides their general authority to execute the federal acts ought to appoint all federal officers not otherwise provided for, & to direct all military operations; provided that none of the persons composing the federal Executive shall on any occasion take command of any troops, so as personally to conduct any enterprise as General, or in other capacity.

[*1:292; Madison, 18 June*]

IV. The supreme Executive authority of the United States to be vested in a Governour to be elected to serve during good behaviour—the election to be made by Electors chosen by the people in the Election Districts aforesaid— The authorities & functions of the Executive to be as follows: to have a negative on all laws about to be passed, and the execution of all laws passed, to have the direction of war when authorized or begun; to have with the advice and approbation of the Senate the power of making all treaties; to have the sole appointment of the heads or chief officers of the departments of Finance, War and Foreign Affairs; to have the nomination of all other

officers (Ambassadors to foreign Nations included) subject to the approbation or rejection of the Senate; to have the power of pardoning all offences except Treason; which he shall not pardon without the approbation of the Senate.

[*2:135, 145, 146, 157, 171; Committee of Detail*]

—In the Presidt. the executive Authority of the U.S. shall be vested.—His Powers and Duties—He shall have a Right to advise with the Heads of the different Departments at his Council

. . . . .

5. His powers shall be
   1. to carry into execution the national laws.
   2. to (command and superintend the militia,) to be Commander in Chief of the Land & Naval Forces of the Union & of the Militia of the sevl. states
   (3. to direct their discipline)
   (4. to direct the executives of the states to call them or any part for the support of the national government.)*

. . . . .

The power of pardoning vested in the Executive (which) his pardon shall not however, be pleadable to an Impeachmt.*

. . . . .

That the Executive direct all military Operations

. . . the Executive shall be authorised to enforce and compel Obedience by calling forth the Powers of the United States. . . .

There shall be a President, in which the Ex. Authority of the U.S. shall be vested. It shall be his Duty to inform the Legislature of the Condition of U. S. so far as may respect his Department—to recommend Matters to their Consideration—to correspond with the Executives of the several States—to attend to the Execution of the Laws of the U. S.—to transact Affairs with the Officers of Government, civil and military—to expedite all such Measures as may be resolved on by the Legislature—to inspect the Departments of foreign Affairs—War—Treasury—Admiralty—to reside where the Legislature shall sit—to commission all Officers, and keep the Great Seal of U. S.—He shall, by Virtue of his Office, be Commander in chief of the Land Forces of U. S. and Admiral of their Navy—He shall have Power to convene the Legislature on extraordinary Occasions—to prorogue them, provided such Prorogation shall not exceed Days in the space of any —He may suspend Officers, civil and military

. . . . .

He shall have power to grant Reprieves and Pardons; but his Pardon shall not be pleadable in Bar of an Impeachment. He shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the Several States.

[*2:328; Madison, 18 Aug.*]

Mr. Elseworth observed that a Council had not yet been provided for the President. He conceived there ought to be one. His proposition was that it should be composed of the President of the Senate– the Chief-Justice, and the Ministers as they might be estabd. for the departments of foreign & domestic affairs, war finance, and marine, who should advise but not conclude the President.

Mr Pinkney wished the proposition to lie over, as notice had been given for a like purpose by Mr. Govr. Morris who was not then on the floor. His own idea was that the President shd. be authorized to call for advice or not as he might chuse. Give him an able Council and it will thwart him; a weak one and he will shelter himself under their sanction.

Mr Gerry was agst. letting the heads of the departments, particularly of finance have any thing to do in business connected with legislation. He mentioned the Chief Justice also as particularly exceptionable. These men will also be so taken up with other matters as to neglect their own proper duties.

Mr. Dickenson urged that the great appointments should be made by the Legislature, in which case they might properly be consulted by the Executive—but not if made by the Executive himself—This subject by general Consent lay over; & the House proceeded to the clause "To raise armies".

[*2:342; Madison, 20 Aug.*]

Mr. Govr. Morris 2ded. by Mr. Pinkney submitted the following propositions which were in like manner referred to the Committee of Detail.

"To assist the President in conducting the Public affairs there shall be a Council of State composed of the following officers—1. The Chief Justice of the Supreme Court, who shall from time to time recommend such alterations of and additions to the laws of the U. S. as may in his opinion be necessary to the due administration of Justice, and such as may promote useful learning and inculcate sound morality throughout the Union: He shall be President of the Council in the absence of the President

. . . . .

The President may from time to time submit any matter to the discussion of the Council of State, and he may require the written opinions of any one or more of the members: But he shall in all cases exercise his own judgment, and either Conform to such opinions or not as he may think proper; and every officer abovementioned shall be responsible for his opinion on the affairs relating to his particular Department.

[*2:367; Journal, 22 Aug.*]

after the 2nd section of the 10th article insert the following as a 3rd section.

"The President of the United States shall have a Privy-Council which shall consist of the President of the Senate, the Speaker of the House of representatives, the Chief-Justice of the Supreme-Court, and the principal Officer in the respective departments of foreign affairs, domestic-affairs, War, Marine, and Finance, as such departments of office shall from time to time be established—whose duty it shall be to advise him in matters respecting the execution of his Office, which he shall think proper to lay before

*[EDITORS' NOTE.—Words in parentheses were crossed out in the original.]

them: But their advice shall not conclude him, nor affect his responsibility for the measures which he shall adopt"

[*2:411; Journal, 25 Aug.*]

It was moved and seconded to insert the words "except in cases of impeachment" after the word "pardons" 2 sect. 10 article

which passed in the affirmative

On the question to agree to the following clause

"but his pardon shall not be pleadable in bar"

it passed in the negative [Ayes—4; noes—6.]

[*2:419; Madison, 25 Aug.*]

Mr. Sherman moved to amend the "power to grant reprieves & pardon" so as to read "to grant reprieves until the ensuing session of the Senate, and pardons with consent of the Senate."

On the question

N—H— no. Mas. no. Ct. ay— Pa no Md. no. Va. no. N. C. no. S. C. no. Geo. no. [Ayes—1; noes—8.]

"except in cases of impeachment" inserted nem: con: after "pardon"

On the question to agree to—"but his pardon shall not be pleadable in bar"

N.H. ay—Mas—no. Ct. no— Pa. no— Del. no. Md. ay. Va. no. N— C— ay— S. C. ay— Geo. no. [Ayes—4; noes—6.]

[*2:426; Madison, 27 Aug.*]

Mr. Govr. Morris. The question of a Council was considered in the Committee, where it was judged that the Presidt. by persuading his Council—to concur in his wrong measures, would acquire their protection for them—

Mr. Wilson approved of a Council, in preference to making the Senate a party to appointmts.

Mr. Dickinson was for a Council. It wd. be a singular thing if the measures of the Executive were not to undergo some previous discussion before the President

Mr Madison was in favor of the instruction to the Committee proposed by Col. Mason.

The motion of Mr. Mason was negatived. Maryd. ay. S. C. ay. Geo. ay—N. H. no. Mas. no. Ct: no. N. J. no Pa. no. Del. no. Va. no. N C no. [Ayes—3; noes—8.]

On the question, "authorizing the President to call for the opinions of the Heads of Departments, in writing": it passed in the affirmative, N. H. only being no. The clause was then unanimously agreed to.

[*2:564; Madison, 10 Sept.*]

Mr. Randolph moved to refer to the Committee also a motion relating to pardons in cases of Treason—which was agreed to nem: con:

[*2:575, 599; Committee of Style*]

He shall have power to grant reprieves and pardons except in cases of impeachment. He shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States when called into the actual service of the United States; and may require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices.

. . . . .

Art X. sect. 2. being resumed,

Mr. L. Martin moved to insert the words "after conviction" after the words "reprieves and pardons"

Mr. Wilson objected that pardon before conviction might be necessary in order to obtain the testimony of accomplices. He stated the case of forgeries in which this might particularly happen.—Mr. L. Martin withdrew his motion.

Mr. Sherman moved to amend the clause giving the Executive the command of the Militia, so as to read "and of the Militia of the several States, *when called into the actual service of the U— S—*" and on the Question

N—H. ay. Mas. abst. Ct. ay. N—J. abst Pa ay. Del. no. Md ay. Va. ay. N— C. abst. S. C— no. Geo— ay, [Ayes—6; noes—2; absent—3.]

[*2:499; Madison, 4 Sept.*]

(8) After the words "into the service of the U S." in sect. 2. art: 10. add "and may require the opinion in writing of the principal Officer in each of the Executive Departments, upon any subject relating to the duties of their respective offices."

[*2:533; Journal, 7 Sept.*]

It was moved and seconded to postpone the consideration of the 4 sect. of the report in order to take up the following.

That it be an instruction to the Committee of the States to prepare a clause or clauses for establishing an Executive Council, as a Council of State, for the President of the United States, to consist of six Members, two of which from the Eastern, two from the middle, and two from the southern States with a rotation and duration of office similar to that of the Senate; such Council to be appointed by the Legislature or by the Senate.

On the question to postpone

it passed in the negative [Ayes—3; noes—8.]

[To agree to the last question Ayes—11; noes—0.]

[*2:541; Madison, 7 Sept.*]

"and may require the opinion in writing of the principal officer in each of the Executive Departments, upon any subject relating to the duties of their respective offices." being before the House

Col: Mason said that in rejecting a Council to the President we were about to try an experiment on which the most despotic Governments had never ventured—The Grand Signor himself had his Divan. He moved to postpone the consideration of the clause in order to take up the following

"That it be an instruction to the Committee of the States to prepare a clause or clauses for establishing an Executive Council, as a Council of State for the President of the U. States, to consist of six members, two of which from the Eastern, two from the middle, and two from the Southern

States, with a Rotation and duration of office similar to those of the Senate; such Council to be appointed by the Legislature or by the Senate".

Doctor Franklin 2ded. the motion. We seemed he said too much to fear cabals in appointments by a number, and to have too much confidence in those of single persons. Experience shewed that caprice, the intrigues of favorites & mistresses, &c were nevertheless the means most prevalent in monarchies. among instances of abuse in such modes of appointment, he mentioned the many bad Governors appointed in G. B. for the Colonies. He thought a Council would not only be a check on a bad President but be a relief to a good one.

Sect. 2. The president shall be commander in chief of the army and navy of the United States, and of the militia of the several States: he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, when called into the actual service of the United States, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

[*2:626; Madison, 15 Sept.*]

Art. II. sect. 2. "he shall have power to grant reprieves and pardons for offences against the U.S. &c"

Mr Randolph moved to "except cases of treason". The prerogative of pardon in these cases was too great a trust. The President may himself be guilty. The Traytors may be his own instruments.

Col: Mason supported the motion.

Mr Govr Morris had rather there should be no pardon for treason, than let the power devolve on the Legislature.

Mr Wilson. Pardon is necessary for cases of treason, and is best placed in the hands of the Executive. If he be himself a party to the guilt he can be impeached and prosecuted.

Mr. King thought it would be inconsistent with the Constitutional separation of the Executive & Legislative powers to let the prerogative be exercised by the latter—A Legislative body is utterly unfit for the purpose. They are governed too much by the passions of the moment. In Massachusetts, one assembly would have hung all the insurgents in that State: the next was equally disposed to pardon them all. He suggested the expedient of requiring the concurrence of the Senate in Acts of Pardon.

Mr. Madison admitted the force of objections to the Legislature, but the pardon of treasons was so peculiarly improper for the President that he should acquiesce in the transfer of it to the former, rather than leave it altogether in the hands of the latter. He would prefer to either an association of the Senate as a Council of advice, with the President.

Mr Randolph could not admit the Senate into a share of the Power. the great danger to liberty lay in a combination between the President & that body—

Col: Mason. The Senate has already too much power—There can be no danger of too much lenity in legislative pardons, as the Senate must con concur, & the President moreover can require ⅔ of both Houses

On the motion of Mr. Randolph

N. H.no—Mas. no—Ct. divd. N— J— no. Pa. no—Del. no. Md no—Va ay—N—C. no—S. C. no. Geo—ay. [Ayes—2; noes—8; divided—1.]

[*2:638; Mason, 15 Sept.*]

The President of the United States has no Constitutional Council, a thing unknown in any safe and regular government. He will therefore be unsupported by proper information and advice, and will generally be directed by minions and favorites; or he will become a tool to the Senate—or a Council of State will grow out of the principal officers of the great departments; the worst and most dangerous of all ingredients for such a Council in a free country; for they may be induced to join in any dangerous or oppressive measures, to shelter themselves, and prevent an inquiry into their own misconduct in office. Whereas, had a constitutional council been formed (as was proposed) of six members, viz.: two from the Eastern, two from the Middle, and two from the Southern States, to be appointed by vote of the States in the House of Representatives, with the same duration and rotation of office as the Senate, the executive would always have had safe and proper information and advice; the president of such a council might have acted as Vice-President of the United States *pro tempore,* upon any vacancy or disability of the chief magistrate; and long continued sessions of the Senate, would in a great measure have been prevented. From this fatal defect has arisen the improper power of the Senate in the appointment of public officers, and the alarming dependence and connection between that branch of the legislature and the supreme Executive.

Hence also sprung that unnecessary and dangerous officer the Vice-President, who for want of other employment is made president of the Senate, thereby dangerously blending the executive and legislative powers, besides always giving to some one of the States an unnecessary and unjust preeminence over the others.

The President of the United States has the unrestrained power of granting pardons for treason, which may be sometimes exercised to screen from punishment those whom he had secretly instigated to commit the crime, and thereby prevent a discovery of his own guilt.

COMMANDER IN CHIEF

2

WILLIAM BLACKSTONE, COMMENTARIES 1:254
1765

II. The king is considered, in the next place, as the generalissimo, or the first in military command, within the kingdom. The great end of society is to protect the weakness of individuals by the united strength of the community: and the principle use of government is to direct that united strength in the best and most effectual manner, to answer the end proposed. Monarchical government is allowed to be the fittest of any for this purpose: it follows therefore, from the very end of it's institution, that in a monarchy the military power must be trusted in the hands of the prince.

3

A GEORGIAN
15 Nov. 1787
Storing 5.9.10

Art. 2, sect. 2. If the president should at any time be incompetent for military command in war, etc. (for he cannot be prevented from taking the chief command when it is his right) and should choose to take the command notwithstanding, what ill consequences may not result? for we know there are many wise and good men, and very fit for civil rulers, but are quite unfit for the command of armies and navies. Would it not be better said, "That the president, with the advice of both Houses of Congress, shall be commander in chief, etc. etc. etc." By this clause, ought we not to look into the troubles in Holland, and see how the Stadtholder (laying aside his hereditary claims) behaved, contrary to the positive orders of the States General, his masters, during our late glorious revolution? and has he not accumulated powers destructive to their commonwealth, and which are now the sole cause of their present troubles? and should we not avoid the like by making the president ineligible to the office as many years as you allow him to hold it? and that he only be commander in chief, and nominate and appoint all officers, civil and military, by and with the advice of the senate, etc. only? Therefore I would advise the clause, *"But the Congress may by law vest the appointment of such inferior officers as they think proper in the president alone,"* etc. be struck out.

4

LUTHER MARTIN, GENUINE INFORMATION
1788
Storing 2.4.85

Objections were made to that part of this article, by which the President is appointed commander in chief of the army and navy of the United States, and of the militia of the several States, and it was wished to be so far restrained, that he should not command in person; but this could not be obtained. The power given to the President of granting reprieves and pardons, was also thought extremely dangerous, and as such opposed—The President thereby has the power of pardoning those who are guilty of treason, as well as of other offences; it was said that no treason was so likely to take place as that in which the President himself might be engaged—The attempt to assume to himself powers not given by the constitution, and establish himself in regal authority; in which attempt a provision is made for him to secure from punishment the creatures of his ambition, the associates and abettors of his treasonable practices, by granting them pardons should they be defeated in their attempts to subvert the constitution.

5

ALEXANDER HAMILTON, FEDERALIST, NO. 74, 500
25 Mar. 1788

The President of the United States is to be "Commander in Chief of the army and navy of the United States, and of the militia of the several States *when called into the actual service* of the United States." The propriety of this provision is so evident in itself; and it is at the same time so consonant to the precedents of the State constitutions in general, that little need be said to explain or enforce it. Even those of them, which have in other respects coupled the Chief Magistrate with a Council, have for the most part concentred the military authority in him alone. Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms an usual and essential part in the definition of the executive authority.

6

DEBATE IN VIRGINIA RATIFYING CONVENTION
18 June 1788
Elliot 3:496–98

Mr. GEORGE MASON, animadverting on the magnitude of the powers of the President, was alarmed at the additional power of commanding the army in person. He admitted the propriety of his being commander-in-chief, so far as to give orders and have a general superintendency; but he thought it would be dangerous to let him command in person, without any restraint, as he might make a bad use of it. He was, then, clearly of opinion that the consent of a majority of both houses of Congress should be required before he could take the command in person. If at any time it should be necessary that he should take the personal command, either on account of his superior abilities or other cause, then Congress would agree to it; and all dangers would be obviated by requiring their consent. He called to gentlemen's recollection the extent of what the late commander-in-chief might have done, from his great abilities, and the strong attachment of both officers and soldiers towards him, if, instead of being disinterested, he had been an ambitious man. So disinterested and amiable a character as General Washington might never command again. The possibility of danger ought to be guarded against. Although he did not disapprove of the President's consultation with the principle executive officers, yet he objected to the want of an executive council, which he conceived to be necessary to any regular free government. There being none such, he apprehended a council would arise out of the Senate, which, for want of real responsibility, he thought dangerous. You will please, says he, to recollect that removal from office, and future disqualification to hold any office, are the only consequences of conviction on impeachment. Now, I conceive that the President ought not to have the power of pardoning, because he may frequently pardon crimes which were advised by himself. It may happen, at some future day, that he will establish a monarchy, and destroy the republic. If he has the power of granting pardons before indictment, or conviction, may he not stop inquiry and prevent detection? The case of treason ought, at least, to be excepted. This is a weighty objection with me.

Mr. LEE reminded his honorable friend that it did not follow, of necessity, that the President should command in person; that he was to command as a civil officer, and might only take the command when he was a man of military talents, and the public safety required it. He thought the power of pardoning, as delineated in the Constitution, could be nowhere so well placed as in the President. It was so in the government of New York, and had been found safe and convenient.

Mr. MASON replied, that he did not mean that the President was of necessity to command, but he might if he pleased; and if he was an ambitious man, he might make a dangerous use of it.

Mr. GEORGE NICHOLAS hoped the committee would not advert to this; that the army and navy were to be raised by Congress, and not by the President. It was on the same footing with our state government; for the governor, with the council, was to imbody the militia, but, when actually imbodied, they were under the sole command of the governor. The instance adduced was not similar. General Washington was not a President. As to possible danger, any commander might attempt to pervert what was intended for the common defence of the community to its destruction. The President, at the end of four years, was to relinquish all his offices. But if any other person was to have the command, the time would not be limited.

Mr. MASON answered, that it did not resemble the state Constitution, because the governor did not possess such extensive powers as the President, and had no influence over the navy. The liberty of the people had been destroyed by those who were military commanders only. The danger here was greater by the junction of great civil powers to the command of the army and fleet. Although Congress are to raise the army, said he, no security arises from that; for, in time of war, they must and ought to raise an army, which will be numerous, or otherwise, according to the nature of the war, and then the President is to command without any control.

7

DEBATE IN NORTH CAROLINA RATIFYING CONVENTION
28 July 1788
Elliot 4:107–8, 114–15

Mr. IREDELL. Mr. Chairman, I was in hopes that some other gentleman would have spoken to this clause. It conveys very important powers, and ought not to be passed by. I beg leave, in as few words as possible, to speak my sentiments upon it. I believe most of the governors of the different states have powers similar to those of the President. In almost every country, the executive has the command of the military forces. From the nature of the thing, the command of armies ought to be delegated to one person only. The secrecy, despatch, and decision, which are necessary in military operations, can only be expected from one person. The President, therefore, is to command the military forces of the United States, and this power I think a proper one; at the same time it will be found to be sufficiently guarded. A very material difference may be observed between this power, and the authority of the king of Great Britain under similar circumstances. The king of Great Britain is not only the commander-in-chief of the land and naval forces, but has power, in time of war, to raise fleets and armies. He has also authority to declare war. The President has not the power of declaring

war by his own authority, nor that of raising fleets and armies. These powers are vested in other hands. The power of declaring war is expressly given to Congress, that is, to the two branches of the legislature—the Senate, composed of representatives of the state legislatures, the House of Representatives, deputed by the people at large. They have also expressly delegated to them the powers of raising and supporting armies, and of providing and maintaining a navy.

With regard to the militia, it must be observed, that though he has the command of them when called into the actual service of the United States, yet he has not the power of calling them out. The power of calling them out is vested in Congress, for the purpose of executing the laws of the Union. When the militia are called out for any purpose, some person must command them; and who so proper as that person who has the best evidence of his possessing the general confidence of the people? I trust, therefore, that the power of commanding the militia, when called forth into the actual service of the United States, will not be objected to.

. . . . .

Mr. MILLER acknowledged that the explanation of this clause by the member from Edenton had obviated some objections which he had to it; but still he could not entirely approve of it. He could not see the necessity of vesting this power in the President. He thought that his influence would be too great in the country, and particularly over the military, by being the commander-in-chief of the army, navy, and militia. He thought he could too easily abuse such extensive powers, and was of opinion that Congress ought to have power to direct the motions of the army. He considered it as a defect in the Constitution, that it was not expressly provided that Congress should have the direction of the motions of the army.

Mr. SPAIGHT answered, that it was true that the command of the army and navy was given to the President; but that Congress, who had the power of raising armies, could certainly prevent any abuse of that authority in the President—that they alone had the means of supporting armies, and that the President was impeachable if he in any manner abused his trust. He was surprised that any objection should be made to giving the command of the army to one man; that it was well known that the direction of an army could not be properly exercised by a numerous body of men; that Congress had, in the last war, given the exclusive command of the army to the commander-in-chief, and that if they had not done so, perhaps the independence of America would not have been established.

8

HOUSE OF REPRESENTATIVES, PROTECTION OF TRADE
22 June 1797

Annals 7:363–66

Mr. BROOKS did not apprehend any danger from leaving it in the power of the President to make use of the frigates as he pleased.

Mr. GALLATIN said, that after having determined that the three frigates should be got ready for sea, it became necessary to say upon what business they should be employed. There might be different opinions on the subject, but it was necessary to define the object. If not, they had reason to apprehend, from his Speech, that the President would employ them as convoys. The difficulties attending such an employ had been shown when the subject of galleys was under consideration; they were so many that the peace of the country would be greatly endangered by such an employment of the frigates. The danger was greatly increased by the disputed article of our treaty with France, which the President would be under the necessity of enforcing.

In ordinary times he said, the principle of the gentleman from New Jersey was a good one. If we had frigates in service, they were not from day to day to say how they should be employed; but, under our present circumstances, he thought the object ought to be defined, and that they ought to depart from the maxim laid down by that gentleman.

Mr. SEWALL was in favor of striking out the clause. If the President were to be limited at all he should have no objection to limit him with respect to convoys, from the incompetency of three vessels to that end; but these frigates were to be considered as the public force, as the navy of the United States. It was true, it was a small one; but it was such as Congress had thought proper to raise, and put in the power of the President. And why should this power be limited? It seemed as if they supposed, from his natural disposition, or from some other cause, he would abuse it, by employing the vessels contrary to law, and thereby involve the country in war.

The Constitution, Mr. S. said, had defined him to be commander-in-chief of the navy, and having a navy the command of course devolved upon him. If those vessels were but for a particular purpose, they might designate their object, but they were begun in 1794, and the act gave the President authority to "equip and employ these vessels." If at that period, when, in the opinion of many gentlemen, there was a greater prospect of war than at present, no object was pointed out for the vessels, he did not see why any should now be pointed out. With respect to the disputed articles in the French Treaty, they had already expressed an opinion of the President, which, he doubted not, would have its effect.

Mr. WILLIAMS thought that, having given the President

a discretionary power, in the first section of the bill, they ought not now to take it from him; because, if he did not see occasion to man the frigates, he would never do it; but if he did see occasion for manning them, they ought not to take from him the power of employing them as he pleased. He was, therefore, in favor of the motion of the gentleman from New Jersey.

Mr. GILES asked whether to ascertain the object upon which these vessels should be employed was a Legislative or an Executive act? It was certainly legislative. They ought to say to the President—Here is the force, and there is the object. It was said they had already given an opinion to the President, with respect to the disputed articles in the French Treaty; he now wished a law to be passed in conformity to that opinion.

He said, they were often charged with a want of confidence in the present President. He was free to own he had not much confidence in the President. His Speech, at the opening of the session, had destroyed all his confidence; but, however high their opinion might be of the Executive, they ought not to lodge improper powers in his hands.

Mr. HARPER was in favor of the motion. He wished to provide force, and not to direct the use of it; he believed this was the object for which they were called together. He was willing to leave the use of this force to the President, because he could employ it in a manner only applicable to peace; to employ it otherwise would be a breach of his power. He, therefore, could not repel any violation of our rights by force, except previously authorized by Congress.

The gentleman from Virginia, Mr. Harper said, need not to have told them that he had no confidence in the present Executive. He might have said in no Executive; for it was well known he never missed going out of the way to say rude things of the late President; but he did not believe this was the best way of discharging their duty. He believed the public cared little what his opinion of the President was; he thought they ought to do their duty and leave the President to do his. Mr. H. denied that they had the right to direct the public force. If we were at war with Great Britain, they should have no right to say to the President, attack Canada or the Islands. The use of this force must be left to the President; if he abuses it, upon his own head would lie the responsibility, and not upon them.

Mr. S. SMITH had not made up his mind on the subject. If the power of the employing the frigates was wholly left with the President, though he had not the power of declaring war, yet he might so employ them as to lead to war, particularly with respect to the French Treaty articles. On the other hand, it seemed to be a poor employment for these frigates, after all the expense which they had cost, to keep them within the jurisdiction of the United States. They could not cruise there, indeed, without danger of running on the shoals. Understanding, as he did, that by voting for the striking out of this clause, he should not be precluded from voting for the amendment of the gentleman from Virginia; if he should conclude to do so, he should vote for striking out the section in question.

Mr. MACON proposed a clause similar in effect to that proposed by the gentleman from Virginia to be inserted in place of one struck out, but the Chairman declared it not in order.

Mr. DAYTON said, that those gentlemen who were not prepared to vote for retaining the eleventh section, must be prepared to say these frigates shall be employed as convoys. It was to avoid this, that he had moved to strike it out. He again expressed his wish that the direction of this force might be left with the President.

Mr. GILES declared his intention of voting for striking out the section, and to risk the insertion of another afterwards.

The question for striking out was carried without a division.

Mr. GILES then moved to insert the section before proposed by Mr. MACON, to confine the use of our frigates to the protection of our coasts, and commerce within the jurisdiction of the United States.

Mr. OTIS did not think that the object of the mover of this amendment would be obtained by it, since he believed vessels would be as much exposed to danger within as without the jurisdiction of the United States. He trusted they should leave this business to the President; for whatever personal objections gentlemen might have to him, (because he was not the man of their choice,) he believed the people at large would be willing he should have this power. Indeed, he thought whatever it might display of candor in gentlemen to say they had no confidence in the first officer of Government, it had very little of discretion in it. It was to destroy one of the objects of the session, which was to show to the world that we are not a divided people.

Mr. O. did not say that Congress had not a right to designate the object of this force; but he believed it would not be convenient; for, said he, suppose either of the Barbary States were to declare war against us. (and they all knew there was no certain reliance upon their observance of treaties,) should not the President have a right to send those vessels into the Mediterranean? Or, suppose we wanted to send an Ambassador to a foreign country, or despatches to our Minister residing there, shall we, said he, limit his power in this respect?

It seemed to be the object of gentlemen, Mr. O. said, to hang a dead weight upon every measure, to prevent any thing effectual from being done, that an idea might go abroad that the President had called them together unnecessarily. If gentlemen could succeed in this, the people might adopt their opinion, and believe that the President was unworthy of their good opinion.

He thought, when all the world was in arms, and we did not know how soon we might be involved in the calamity, it behooved us to be upon our guard, and to give the President such powers as should enable him to take proper measures of defence against any attack that might be made upon us.

Mr. MACON thought every thing which had been introduced about confidence or the want of it, in the President, was extremely irrelevant and improper. For gentlemen to charge others with a want of confidence in the President, because they happened to disagree in opinion, was extraordinary conduct. His reason for proposing the present

amendment, was to prevent these vessels being sent to the Mediterranean or the West Indies. He read an extract from the law of 1794, to show that the object of the frigates was there designated to be against the Algerines. His object was now, that they should be employed on the coast, and no where else. If a provision of this kind was not agreed to, they knew, from his Speech, upon what business the President would employ them. He had given his opinion to the House with candor, and he wished the House to be equally explicit.

Mr. GALLATIN observed, it seemed to be the opinion of the gentleman from Massachusetts, that if they defined the object upon which these vessels were to be employed, they should be chargeable with disrespect to the President. We have, or we have not a right, said Mr. G., to define the object. If we have not the right, we ought not to exercise it; but if we had the right, there could be no disrespect shown to the President, by an exercise of that right. It might be improper, but could not be disrespectful. If once such an argument as this were admitted, it would be introduced on every occasion when it would have weight. Indeed, the gentleman saw that such an assertion was likely to have its weight on this question, and therefore introduced it. He wished to know whether the clause from the Senate did not define the object? and if so, whether that body could be charged with wanting respect for the President?

The object of the frigates had never been defined, for a good reason; because they were never ordered to be manned till now. The gentleman from South Carolina had said they were not to be used for any hostile purposes whatever. He wished to know how they were then to be employed? He thought they would be somewhat expensive packet boats, to carry despatches abroad. He knew only of two purposes for which they could be used, that is, to be held in readiness in case of war, and in the mean time to be employed in some purpose or other, which he thought should be defined, and not left in doubt. He therefore hoped the amendment would be agreed to.

Mr. DANA said, admitting that they had a right to define the object of this armament, it was no reason why they should insist upon exercising it. He agreed that they had a right. He had no objection to leaving the business to the President, except that, if the vessels were employed in convoying our commerce, he should have wished to have shared the responsibility with him. He denied that the danger which had been predicted could arise from the disputed articles in the French Treaty, as the President had a right to give such instructions to the commanders on that subject, as he saw proper.

Mr. W. SMITH thought the proposition vague, since it did not say the vessels should not be used in any other way. Gentlemen were begging the question, when they said, that if the business were left with the President, the consequence would be that the vessels would be employed as a convoy, since he did not believe they were equal to that object. It was his wish that the hands of the President should not be tied.

9

ST. GEORGE TUCKER,
BLACKSTONE'S COMMENTARIES
1:APP. 329–31
1803

1. The first is, That he shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the service of the United States. A power similar to that of the king of England, and of the stadtholder of Holland, before the late revolution; yet qualified, by some important restrictions, which I believe were not to be found in either of those governments. As, first; he cannot make rules for the regulation and government of the army and navy, himself, but they must be governed according to regulations established by congress. But notwithstanding this provision in the constitution, the act of 5 Cong. c. 74, authorised the president to make and establish such rules for training and disciplining the corps of volunteers, authorised to be raised by that act, as should be thought necessary to prepare them for actual service. . . . Secondly; the president of the United States hath not an unqualified right to appoint what officers he pleases; but such appointment (if there be no provision to the contrary made by law) must be made with the advice and consent of the senate: a restriction, perhaps of little importance, whilst the right of nomination, in all cases, and the right of filling up vacancies during the recess of the senate, remain uncontrollably in his power; to which may be added, the authority given him by the act for raising a provisional army, (and perhaps some others) to appoint such officers as he may think proper in the recess of the senate; "the appointment of field officers to be submitted to the advice and consent of the senate, at their next subsequent meeting;" leaving the appointment of all officers of inferior rank to the discretion of the president, alone. The stadtholder of Holland derived his power and influence in great measure from a similar authority. . . . A third and infinitely more important check, than either of the former, so long as elections continue as frequent, as at present, is, that no appropriation for the support of an army can be made for a longer term than two years, the period for which congress is chosen. This puts it in the power of the people, by changing the representatives, to give an effectual check to the power of the executive at the end of that period. . . . In England, the power of raising armies, *ad libitum*, is vested in the king, though he is said to be dependent upon the parliament for their support; a supply bill, which is always limited to one year, passes accordingly, every session. Should it be refused, (a case which I believe has not happened for more than a century), a dissolution would pave the way, immediately, for a more complying parliament. Fourthly; the militia of the several states, though subject to his command when called into actual service, can only be called into service by the authority of congress, and must be gov-

erned according to law: the states, moreover, have the right of appointing the officers, and training the militia, according to the discipline prescribed by congress, reserved to them by the constitution. But we have seen in what manner this very important clause has been evaded, by at acts of 5 Cong. c. 64 and 74, authorising the president to accept companies of volunteers, and to appoint their officers, &c. A precedent, which if it be drawn into authority and practice in future, may be regarded as superceding every part of the constitution, which reserves to the states any effectual authority over their militia.

10

LITTLE v. BAREME
2 Cranch 170 (1804)

(See 1.8.11, no. 13)

11

JAMES MONROE TO CHAIRMAN OF SENATE MILITARY COMMITTEE
Feb. 1815
Writings 5:308–18

(See 1.8.15, no. 18)

12

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 3:§§ 1485–86
1833

§ 1485. The command and application of the public force, to execute the laws, to maintain peace, and to resist foreign invasion, are powers so obviously of an executive nature, and require the exercise of qualities so peculiarly adapted to this department, that a well-organized government can scarcely exist, when they are taken away from it. Of all the cases and concerns of government, the direction of war most peculiarly demands those qualities, which distinguish the exercise of power by a single hand. Unity of plan, promptitude, activity, and decision, are indispensable to success; and these can scarcely exist, except when a single magistrate is entrusted exclusively with the power. Even the coupling of the authority of an executive council with him, in the exercise of such powers enfeebles the system, divides the responsibility, and not unfrequently defeats every energetic measure. Timidity, indecision, obstinacy, and pride of opinion, must mingle in all such councils, and infuse a torpor and sluggishness, destructive of all military operations. Indeed, there would seem to be little reason to enforce the propriety of giving this power to the executive department, (whatever may be its actual organization,) since it is in exact coincidence with the provisions of our state constitutions; and therefore seems to be universally deemed safe, if not vital to the system.

§ 1486. Yet the clause did not wholly escape animadversion in the state conventions. The propriety of admitting the president to be commander-in-chief, so far as to give orders, and have a general superintendency, was admitted. But it was urged, that it would be dangerous to let him command in person without any restraint, as he might make a bad use of it. The consent of both houses of congress ought, therefore, to be required, before he should take the actual command. The answer then given was, that though the president might, there was no necessity, that he should, take the command in person; and there was no probability, that he would do so, except in extraordinary emergencies, and when he was possessed of superior military talents. But if his assuming the actual command depended upon the assent of congress what was to be done, when an invasion, or insurrection took place during the recess of congress? Besides, the very power of restraint might be so employed as to cripple the executive department, when filled by a man of extraordinary military genius. The power of the president, too, might well be deemed safe; since he could not, of himself, declare war, raise armies, or call forth the militia, or appropriate money for the purpose; for these powers all belonged to congress. In Great Britain, the king is not only commander-in-chief of the army, and navy, and militia, but he can declare war; and, in time of war, can raise armies and navies, and call forth the militia of his own mere will. So, that (to use the words of Mr. Justice Blackstone) the sole supreme government and command of the militia within all his majesty's realms and dominions, and of all forces by sea and land, and of all forts and places of strength, ever was and is the undoubted right of his majesty; and both houses or either house of parliament cannot, nor ought to pretend to the same. The only power of check by parliament is, the refusal of supplies; and this is found to be abundantly sufficient to protect the nation against any war against the sense of the nation, or any serious abuse of the power in modern times.

OPINIONS IN WRITING

13

JAMES IREDELL, NORTH CAROLINA
RATIFYING CONVENTION
28 July 1788
Elliot 4:108–10

The next part, which says "that he may require the opinion in writing of the principal officers," is, in some degree, substituted for a council. He is only to consult them if he thinks proper. Their opinion is to be given him in writing. By this means he will be aided by their intelligence; and the necessity of their opinions being in writing, will render them more cautious in giving them, and make them responsible should they give advice manifestly improper. This does not diminish the responsibility of the President himself.

They might otherwise have colluded, and opinions have been given too much under his influence.

It has been the opinion of many gentlemen, that the President should have a council. This opinion, probably, has been derived from the example in England. It would be very proper for every gentleman to consider attentively whether that example ought to be imitated by us. Although it be a respectable example, yet, in my opinion, very satisfactory reasons can be assigned for a departure from it in this Constitution.

It was very difficult, immediately on our separation from Great Britain, to disengage ourselves entirely from ideas of government we had been used to. We had been accustomed to a council under the old government, and took it for granted we ought to have one under the new. But examples ought not to be implicitly followed; and the reasons which prevail in Great Britain for a council do not apply equally to us. In that country, the executive authority is vested in a magistrate who holds it by birthright. He has great powers and prerogatives, and it is a constitutional maxim, *that he can do no wrong.* We have experienced that he can do wrong, yet no man can say so in his own country. There are no courts to try him for any high crimes; nor is there any constitutional method of depriving him of his throne. If he loses it, it must be by a general resistance of his people, contrary to *forms* of law, as at the revolution which took place about a hundred years ago. It is, therefore, of the utmost moment in that country, that whoever is the instrument of any act of government should be personally responsible for it, since the king is not; and, for the same reason, that no act of government should be exercised but by the instrumentality of some person who can be accountable for it. Every thing, therefore, that the king does, must be by some *advice,* and the adviser of course answerable. Under our Constitution we are much happier.

No man has an authority to injure another with impunity. No man is better than his fellow-citizens, nor can pretend to any superiority over the meanest man in the country. If the President does a single act by which the people are prejudiced, he is punishable himself, and no other man merely to screen him. If he commits any misdemeanor in office, he is impeachable, removable from office, and incapacitated to hold any office of honor, trust, or profit. If he commits any crime, he is punishable by the laws of his country, and in capital cases may be deprived of his life. This being the case, there is not the same reason here for having a council which exists in England. It is, however, much to be desired, that a man who has such extensive and important business to perform should have the means of some assistance to enable him to discharge his arduous employment. The advice of the principal executive officers, which he can at all times command, will, in my opinion, answer this valuable purpose. He can at no time want advice, if he desires it, as the principal officers will always be on the spot. Those officers, from their abilities and experience, will probably be able to give as good, if not better, advice than any counsellors would do; and the solemnity of the advice in writing, which must be preserved, would be a great check upon them.

Besides these considerations, it was difficult for the Convention to prepare a council that would be unexceptionable. That jealousy which naturally exists between the different states enhanced this difficulty. If a few counsellors were to be chosen from the Northern, Southern, or Middle States, or from a few states only, undue preference might be given to those particular states from which they should come. If, to avoid this difficulty, one counsellor should be sent from each state, this would require great expense, which is a consideration, at this time, of much moment, especially as it is probable that, by the method proposed, the President may be equally well advised without any expense at all.

We ought also to consider that, had he a council by whose advice he was bound to act, his responsibility, in all such cases, must be destroyed. You surely would not oblige him to follow their advice, and punish him for obeying it. If called upon on any occasion of dislike, it would be natural for him to say, "You know my council are men of integrity and ability: I could not act against their opinions, though I confess my own was contrary to theirs." This, sir, would be pernicious. In such a situation, he might easily combine with his council, and it might be impossible to fix a fact upon him. It would be difficult often to know whether the President or counsellors were most to blame.

A thousand plausible excuses might be made, which would escape detection. But the method proposed in the Constitution creates no such embarrassment. It is plain and open. And the President will personally have the credit of good, or the censure of bad measures; since, though he may ask advice, he is to use his own judgment in following or rejecting it. For all these reasons, I am clearly of opinion that the clause is better as it stands than if the President were to have a council. I think every good that can be derived from the institution of a council may be expected from the advice of these officers, without its being liable to the disadvantages to which it appears to me, the institution of a council would be.

14

THOMAS JEFFERSON TO WALTER JONES
5 Mar. 1810
Writings 11:137–38

I received duly your favor of the 19th ultimo, and I salute you with all ancient and recent recollections of friendship. I have learned, with real sorrow, that circumstances have arisen among our executive counsellors, which have rendered foes those who once were friends. To themselves it will be a source of infinite pain and vexation, and therefore chiefly I lament it, for I have a sincere esteem for both parties. To the President it will be really inconvenient; but to the nation I do not know that it can do serious injury, unless we were to believe the newspapers, which pretend that Mr. Gallatin will go out. That indeed would be a day of mourning for the United States; but I hope that the position of both gentlemen may be made so easy as to give no cause for either to withdraw. The ordinary business of every day is done by consultation between the President and the Head of the department alone to which it belongs. For measures of importance or difficulty, a consultation is held with the Heads of departments, either assembled, or by taking their opinions separately in conversation or in writing. The latter is most strictly in the spirit of the constitution. Because the President, on weighing the advice of all, is left free to make up an opinion for himself. In this way they are not brought together, and it is not necessarily known to any what opinion the others have given. This was General Washington's practice for the first two or three years of his administration, till the affairs of France and England threatened to embroil us, and rendered consideration and discussion desirable. In these discussions, Hamilton and myself were daily pitted in the cabinet like two cocks. We were then but four in number, and, according to the majority, which of course was three to one, the President decided. The pain was for Hamilton and myself, but the public experienced no inconvenience. I practised this last method, because the harmony was so cordial among us all, that we never failed, by a contribution of mutual views on the subject, to form an opinion acceptable to the whole. I think there never was one instance to the contrary, in any case of consequence. Yet this does, in fact, transform the executive into a directory, and I hold the other method to be more constitutional. It is better calculated too to prevent collision and irritation, and to cure it, or at least suppress its effects when it has already taken place. It is the obvious and sufficient remedy in the present case, and will doubtless be resorted to.

15

WILLIAM WIRT, OFFICE OF ATTORNEY GENERAL
12 June 1818
1 Ops. Atty. Gen. 211

The commission of Attorney General authorizes and empowers him to execute the duties of that office *according to law;* and the law which creates this office prescribes its duties in the following terms: "*Whose duty it shall be* to prosecute and conduct all suits in the Supreme Court, in which the United States shall be concerned, and to give his advice and opinions upon questions of law, *when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments.*" Under this law, which is the only one upon the subject, I do not think myself authorized to give an *official opinion* in any case, except on the call of the President, or some one of the heads of departments; and I should consider myself as transcending the limits of my commission in a very unjustifiable manner, in attempting to attach the weight of *my office* to any opinion not authorized by the law which prescribes my duties. You will, I trust, excuse me, therefore, in declining to give the *official* opinion which you request; and which I assure you I do, not from any want of respect to you, but purely from a sense of official duty, and my respect for the law which prescribes that duty.

If you think the matter of sufficient consequence to make an *official* opinion from me desirable, you will, perhaps, have it in your power to give your application such a direction, through the Navy Department, or that of War, as to justify me in expressing the opinion *officially,* which I have every *personal* disposition to give.

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WILLIAM WIRT, DUTIES OF THE ATTORNEY GENERAL
3 Feb. 1820
1 Ops. Atty. Gen. 335

Sir: The order of the House of Representatives of the United States, of the 28th January last, "that the petition of Joseph Wheaton, and the accompanying documents, together with the report of the Committee of Claims, of the 6th January instant, thereon, be referred to the Attorney General of the United States, and that he be requested to report his opinion thereupon to this House," was handed me by Major Wheaton (the petitioner) this evening, together with the documents which are now returned.

The duties of Attorney General's office are specified by our laws, and are confined to the following heads:

1. "To prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned."

2. "To give his advice and opinion upon questions of law, when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments."

3. "To discharge the duties of a commissioner of the sinking fund."

The Attorney General is sworn to discharge the duties of his office *according to law.* To be instrumental in enlarging the sphere of his official duties beyond that which is prescribed by law, would, in my opinion, be a violation of this oath. Under this impression I have, with great care, perused all the documents which have been handed to me in this case, for the purpose of ascertaining whether the order with which I have been honored from the House of Representatives falls under either head of my official duties; and it appears to me that it does not. A reference to the law will show, I think, that this is indisputably clear.

I had the honor to intimate this impression in the case of Major Thomas, referred to me officially by the House of Representatives, in the session of 1818–'19, in the hope that if it was thought advisable to connect the Attorney General with the House of Representatives in that character of legal counsellor which he holds by the existing law towards the President and heads of departments, a provision would be made by law for that purpose.

No such provision having been made, and believing, as I do, that in a government purely of laws it would be incalculably dangerous to permit an officer to act, under color of his office, beyond the pale of the law, I trust I shall be excused from making any official report on the order with which the House has honored me. It is true that in this case I should have the sanction of the House for the measure; and it is not less true that my respect for the House impels me strongly to obey the order. The precedent, however, would not be the less dangerous, on account of the purity of motives in which it originated. The maxim is as old, at least, as republican Rome, that *omnia mala exempla ex bonis orta sunt:* on this ground I hope to be excused by the House of Representatives for declining their request. And I assure you, sir, that it gives me more pain to be thus obliged to decline it, than it would give me trouble to make the report; but in a conflict between my wishes and my sense of duty, there ought to be no question which I should obey. I may be wrong in my view of the subject. The order may be sanctioned by former precedents; but my predecessors in office have left nothing for my guidance; and I am constrained, therefore, to act on my own construction of the law as it stands.

REPRIEVES AND PARDONS

17

WILLIAM BLACKSTONE, COMMENTARIES
4:397–402
1769

This is indeed one of the great advantages of monarchy in general, above any other form of government; that there is a magistrate, who has it in his power to extend mercy, wherever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment. Pardons (according to some theorists) should be excluded in a perfect legislation, where punishments are mild but certain: for that the clemency of the prince seems a tacit disapprobation of the laws. But the exclusion of pardons must necessarily introduce a very dangerous power in the judge or jury, that of construing the criminal law by the spirit instead of the letter; or else it must be holden, what no man will seriously avow, that the situation and circumstances of the offender (though they alter not the essence of the crime) ought to make no distinction in the punishment. In democracies, however, this power of pardon can never subsist; for there nothing higher is acknowleged than the magistrate who administers the laws: and it would be impolitic for the power of judging and of pardoning to center in one and the same person. This (as the president Montesquieu observes) would oblige him very often to contradict himself, to make and to unmake his decisions: it would tend to confound all ideas of right among the mass of the people; as they would find it diffi-