

The
Creation
of the
Presidency,
1775-1789

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A Study in Constitutional History

Charles C. Thach, Jr.

Foreword by Forrest McDonald

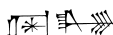
Introduction by Herbert J. Storing



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To the memory of my Father

CHARLES COLEMAN THACH

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Foreword to the Liberty Fund Edition

By Forrest McDonald

Accounts of the Philadelphia Convention that wrote the Constitution usually concentrate on the struggle concerning the basis of representation in the bicameral Congress that would replace the unicameral Congress of the Articles of Confederation, wherein each state had a single vote. Delegates from the larger states insisted that representation in both houses should be apportioned to population. Delegates from the smaller states were as adamant in demanding the retention of equal representation. After several weeks of heated and sometimes acrimonious debate, during which delegates threatened to withdraw from the Convention and one state's delegation did walk out, the delegates finally agreed upon the so-called Connecticut Compromise: seats in the House of Representatives would be apportioned on the basis of population, and in the Senate each state would have two seats.

The constitution of the executive branch, by contrast, has often been treated summarily, though it was quite as vexed and, as Charles C. Thach demonstrates in this pioneering study, crucial to the formation of the new nation. By 1787—though not long before—virtually every nationally minded American had become convinced that a government without a viable executive arm was as bad as no government at all. And yet precious few of them had firm ideas about how to establish an executive that would be safe or, indeed, compatible with the nation's commitment to republicanism.

Widespread mistrust of executive power had arisen from two sets of roots. The obvious one was recent experience. Prior to the imperial crisis that led to independence, American colonists had been warm in their admiration for the British Crown and especially toward George III. When Parliament began to enact measures that evoked the colonists' anxieties—the Sugar Act, the Stamp Act, the Townshend Duties, the Tea Act—the Americans' characteristic response, even Thomas Jef-

person's in his 1774 *Summary View*, was to appeal to the king for his intervention. But then in 1775, after armed resistance to the measures of the mother country had broken out, George III declared the colonies to be in a state of rebellion and announced that he was sending Hessian mercenaries as well as regular troops to crush the opposition. American patriots felt totally betrayed and forthwith perceived that the king had always been the true enemy. Hence the Declaration of Independence is a recitation of the evil acts committed by the king, a long list of what "He has" done, demonstrating his "design to reduce" the colonies "under absolute Despotism."

The other root was deeper and longer lived. Every colony had, early on, developed a legislative assembly. Each also had a governor and advisory council. With rare exceptions, governors and assemblies were at odds. Save in Connecticut and Rhode Island, the governors and councils were appointed in London, and they were regarded by locals as enemies. The assemblies, being chosen by the qualified voters, thought of themselves as the voice of the people though most inhabitants did not meet the property qualifications necessary for the franchise. When independence came, the revolutionary assemblies believed they were entering paradise.

For these sets of reasons grounded in experience, not theory, patriots emasculated the executives at the state level. The revolutionary state constitutions, far from ushering in a paradisaical era, proved to be catastrophic. Most states provided for governors who served one-year terms, usually governors were elected by the legislatures, and only one governor, that of New York, had appreciable power. The unchecked legislatures proceeded to enact a greater quantity of legislation between 1776 and 1787 than they had during the entire colonial period. As James Madison said during the Constitutional Convention, "Experience had proved a tendency in our governments to throw all power into the Legislative vortex. The Executives of the States are in general little more than Cyphers; the legislatures omnipotent. If no effectual check be devised for restraining the instability & encroachments of the latter, a revolution of some kind or other would be inevitable."¹

1. Max Farrand, ed., *The Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1911), 2:35.

Matters at the congressional level were no better. Public figures at the time, and historians since, opined that the weaknesses of the Articles of Confederation arose from Congress' inability to legislate for individuals—it could only make recommendations to the states, who were free to ignore them, and often did—and from the lack of a direct source of revenue. Thach shows, on the contrary, that Congress was so devoid of instrumentalities of administration that it would have been hopelessly incompetent even if it had been given the power to tax and bind individuals by passing laws. The government had no judicial branch and, what Thach saw as fatal, no executive.

In the Constitutional Convention, delegates could agree upon the need to create an executive branch, but they did not at first agree on much else. A goodly number thought a plural executive preferable to a single one. Among the others, the problem was that no successful model existed. The British monarchy was discussed at length, but the general impression was that the British system worked through “corruption,” by which was meant distribution of patronage to legislators and their friends and families as a means of buying votes. Americans shrank in horror from that prospect.

Indeed, at first the delegates shied away from discussing the subject. A proposal to establish an executive branch arose on June 1, and no one spoke. Benjamin Franklin urged that the subject was so important that someone should say something, but only seven delegates said anything, and none spoke at length. Roger Sherman indicated his reluctance to create a real executive and expressed a common view when he said that “he considered the Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect” and “ought to be appointed by and accountable to the Legislature.”²

In the ensuing days some delegates, though recognizing the need for an executive branch, were fairly naive in their understanding of it. George Mason of Virginia, for instance, admitted that a unified executive had the advantage of “secrecy, the dispatch, the vigor and energy which the government will derive from it.” Even so, he doubted “whether these advantages are not greater in theory than in practice” and suggested that there was “a pervading principle in republican gov-

2. *Ibid.*, 1:65.

ernment which sets at naught and tramples upon this boasted superiority.” That principle, he declared, was “to be found in the love, the affection, the attachment of the citizens to their laws, to their freedom, and to their country.” Anyone skeptical of the force of that principle as compared to secrecy, dispatch, and energy, Mason added, should reflect upon the situation of America at the start of the War for Independence: “without arms—without soldiers—without trade, money or credit, in a manner destitute of all resources” except for this “pervading” republican principle.³ Franklin, who agreed with Mason, wanted to ensure republican virtue and principles by providing that the executive (he favored a plural one) serve without pay.⁴

Other delegates preferred to ground the Constitution on the baser motives of the citizenry, but few—apart from James Wilson, whose ideas about the executive were drawn largely from study of the New York governorship—had thought the matter through. Thach is particularly hard on James Madison, who, whatever the merits of the claim that he was the father of the Constitution, was muddled in his ideas about the executive branch. He wrote to Washington just six weeks before the Convention, “I have scarcely ventured as yet to form my own opinion either of the manner in which [the executive] ought to be constituted or of the authorities with which it ought to be clothed.”⁵ From the proposals Madison made during the first half of the Convention, Thach concludes that Madison saw, in a vague sort of way, the executive as being subordinate to the legislative, except for having a qualified veto power.

The biggest problem, one on which the delegates went around and around, was how to choose the president and for how long a term. The general assumption was that Washington would be the first president if he agreed to serve, but Washington obviously could not serve forever. Popular election was out of the question; given the size of the country and the primitive means of communication, most voters doubtless could not even name someone from another state aside from Washing-

3. *Ibid.*, 1:112–13.

4. *Ibid.*, 1:83–85.

5. Robert A. Rutland et al., ed., *The Papers of James Madison* (Chicago: Chicago University Press, 1975), 9:385.

ton and perhaps Franklin. That meant that a select body must make the choice, and the only body anyone could think of—apart from the state governors if they were constituted as a group—was Congress. But if Congress elected the president, he would be dependent on Congress for his reelection. He could be made ineligible for reelection, but that would necessitate having him serve a dangerously long term.

Again and again the delegates voted to make the president a single person elected by Congress for a term of seven years. Again and again, a few days would go by and the electing body and the terms would change, and then the delegates would go back to Congress and seven years.

As the deadlock about the election of the executive continued, delegates grew loath to clothe the office with serious powers. First they decided that the power to declare war should be vested in Congress. Next they determined that the conduct of foreign relations should be the province of the Senate and empowered the Senate to appoint foreign ministers and to negotiate and ratify treaties. They further agreed that the power to appoint federal judges should be vested in the Senate. These allocations of powers would have left the president with little to do if the office were created.

The breakthrough came early in September. A catchall committee of one delegate from each state had been appointed to settle subjects that had been postponed and reconsider reports that had not been acted upon. In it, delegate Pierce Butler of South Carolina hatched a complex plan for electing the president that accommodated the objections that had been made against every other method. It called for a president and a vice president, which satisfied the delegates who had been concerned about succession in the event of a vacancy in the presidency. It provided that electors be chosen in each state in any way its legislature determined. This overcame fears of popular elections, for the legislatures could elect the electors themselves if they chose. A state would have a number of electors equal to the combined number of its senators and representatives, this being a compromise between proportional and equal representation. The electors would meet in their respective states, which minimized the danger of foreign intrigue, and vote for two candidates, at least one of whom must be a resident of another state. Whoever got the most votes, if a majority, would become

president, and whoever came in second would be vice president. Special provisions were made for elections that ended in a tie or in which no candidate got a majority. In the expectation that this arrangement would render the president independent of Congress, the president was given a share in the executive powers previously assigned to the Senate. This cumbersome scheme overcame previous objections, and after three days the Convention adopted it.

By that time, the Convention was nearing an end, and the delegates were tired, irritable, and eager to go home. As a consequence, they became a bit careless in finishing their work. Article II, establishing the executive branch, was therefore put together in slipshod fashion. It begins, “The executive Power shall be vested in a President of the United States,” as if that were a complete and satisfactory statement. The article proceeds to enumerate certain powers, but not others, and it fails to mention that some traditional executive powers—or, at least, traditional in the United Kingdom—were specifically vested in the Congress or denied to be exercised by anyone.

Thach accommodates these ambiguities, but, according to him, one required additional treatment by the First Congress in 1789. This concerns the removal power. Article II empowers the president to make certain appointments with the approval of the Senate. Nothing is said about removals except in cases of impeachment. Indeed, Alexander Hamilton had argued in *Federalist* 77 that the approval of the Senate would be necessary for removals. William Laughton Smith of South Carolina raised the matter in the First Congress, and a complex debate ensued, as Thach shows. In the end the president’s removal power was declared unilateral.

The creation of the presidency was an unprecedented achievement. In the book you are about to read, Charles Thach has done full justice to his subject. Rather than close on that note, let me add a few words about the history of the book. It was written as a doctoral dissertation in 1922 and first published by Johns Hopkins Press the next year. The timing was significant, coming as it did after the vigorous presidencies of Theodore Roosevelt and Woodrow Wilson and during Warren G. Harding’s “return to normalcy.” Chief Justice William Howard Taft, whose one term as president had come between Roosevelt’s and Wilson’s, had argued strenuously against Roosevelt’s contention that the president

had powers outside the boundaries of the Constitution. Thach's study placed him more or less in Taft's interpretive camp and in opposition to the Progressive historians and political scientists of the day. Inasmuch as a succession of strong presidents would begin just nine years later, that might have doomed Thach's book to obscurity.

Instead, it survived as the influential work on its topic and was republished as late as 1969 (introduction by Herbert J. Storing). To cite a few examples of its ongoing reception, Sidney Milkis and Michael Nelson, in *The American Presidency, 1776–1998* (Washington, D.C., 1999), refer to Thach repeatedly, as do Joseph M. Bessette and Jeffrey Tulis in *The Presidency in the Constitutional Order* (Baton Rouge, 1981). James Hart, in *The American Presidency in Action: 1789* (New York, 1948), devotes 52 of his 256 pages to recapitulating Thach's arguments. Edward S. Corwin, in his classic *The President: Office and Powers* (New York, 1940), refers to Thach's work as an "excellent volume" (p. 318), and Eugene Rostow, in *The Encyclopedia of the Presidency* (ed. Leonard W. Levy and Louis Fisher, 4 vols., New York, 1994), describes it as an "important study of the presidency" (2:802). Raymond Tatalovich and Thomas E. Engeman, in *The Presidency and Political Science: Two Hundred Years of Constitutional Debate* (Baltimore, 2003), summarize the consensus view: this volume is "the definitive statement of Original Intent with respect to Article 2" (p. 89).

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I

General Political Tendencies, 1776–1787

It has been said that “the one great problem which every politically organized people has to solve is to establish and maintain a form of government which will be strong enough to perform the duties which are laid upon it and yet so organized that those who obtain the possession of its powers should not be disposed, or, if so disposed, should not be able, to use that authority which they have to advance their own selfish interests in disregard of, or contrary to, the welfare of the governed.”¹

The ascertainment of the point of view from which this central problem of the balance between governmental strength and individual liberty and security is approached is a primary requisite for a true understanding of the work of any given body of constitution makers. The Constitution of the United States is no exception to this general truth, nor to the equally valid historical maxim that “ideal constructions are doubtless the psychic precipitates of social experience.”²

It is consequently necessary, by way of introduction to the present study, to consider briefly the recent social experiences of the men who slowly gathered in Philadelphia in 1787, in order to obtain an insight into that political psychology which so profoundly influenced the finished instrument of government which was to be submitted to an anxious country four months later.³ It will be understood, of course,

1. W. W. Willoughby, unpublished ms.

2. C. L. Becker, *Beginnings of the American People*, p. 83.

3. The most complete and satisfactory study of this period remains Bancroft, *History of the Formation of the Constitution of the United States*. Channing's *History of the United States*, vol. iii, chaps. xiii–xvi, is especially valuable on economic conditions. C. A. Beard, *Supreme Court and the Constitution and Economic Interpretation*

that we are concerned with the political psychology of a relatively limited class. There can be no doubt that the constitutional history of the United States begins with the establishment of the "government of the masses by the classes,"⁴ and especially that class "denominated 'gentlemen,' who, by reason of their wealth, their talents, their education, their families, or the offices they hold, aspire[d] to a preeminence which the people refuse[d] to grant them," as a disinterested French observer described it.⁵

Within that class there were variations, to be sure. Not all its members reacted in the same fashion to their social experiences. Their differences in this respect explain, indeed, much of the history of the making of the Constitution. But for the present, while the object is to determine general tendencies, it will be proper to consider this gentry, either ruling or seeking to rule, as a whole.

At the beginning of independent American political life these leaders were primarily revolutionists, conservatives at heart, but in rebellion against constituted political authority. As a consequence, the emphasis of their political thought was laid on the element of liberty and political security. Government, as manifested in Great Britain's system of imperial control, had proved an evil. Consequently, it was easy for the men of 1776 to accept the principle that the best of governments was but a necessary evil. Their position forced them to seek for a theoretical justification of the principle of revolution, and they found it in the doctrines of natural rights, the contractual origin of government, the consent of the governed, and the right of resistance.⁶

Immediately, however, they were subjected to another force, the necessity of conducting a war. But the efficient conduct of war demands a

of the Constitution, are valuable and suggestive, especially the former. The latter suffers from overemphasis of the direct pecuniary interest of the Framers in the redemption of the certificates. H. J. Ford, *Rise and Growth of American Politics*, is a stimulating study.

4. H. J. Ford, *Rise and Growth*, p. 59.

5. Otto to Vergennes, Oct. 10, 1786, in Bancroft, *History of the Formation of the Constitution of the United States*, vol. i, p. 399.

6. C. E. Merriam, *History of American Political Theories*, chap. ii. This is the standard authority on general political theory for both the colonial and the early constitutional period.

theory of government diametrically opposed to those just mentioned, one whose chief tenet is rather the necessity of governmental energy and of obedience of individuals to governmental mandates. The conduct of war entails, whether rightly or wrongly, an abridgment of personal liberty, a subordination of the security of individuals against government to the dominant purpose of bringing the war to a successful issue. Military considerations tend to dominate civil. The final result, which, when not reached, is at least tended toward, is the dictator who shall see to it that the state suffer no harm.

To this principle the war of the Revolution was no exception. The patriot cause was saved time and time again by the patience and resourcefulness of a single man. American successes flowed from governmental and military vigor, and this vigor came from the exercise of power. On the contrary, American difficulties, of which there were myriads, and American reverses flowed from lack of power.

The conflict of these two sets of principles is apparent throughout the war. On the one hand, there is a struggle for extending government power, conducted by an increasingly influential group of politicians. On the other, there are the efforts of the adherents to the older doctrines to retain the principles of "liberty."⁷ The result is a modification of the older views, a gain in importance of the element of authority. The concrete gains of the "authority" school were small. But their failure to achieve anything more substantial strengthened their position. Had government in fact been able to control the individual, to make itself felt throughout the continent, there would very probably have been a reaction. But the cessation of war marked a collapse of government, and found some of the leaders ready even to seek a solution in an appeal to the military powers of the commander-in-chief.⁸

Events subsequent to the war contributed no less strongly than the war itself to heighten the importance of the authority factor in the governmental problem. The overshadowing fact in governmental history was the complete inability of the government set up by the Articles

7. F. Wharton, *Revolutionary Diplomatic Correspondence of the United States*, vol. i, p. 252ff.

8. The so-called Newburgh conspiracy. See Gouverneur Morris to Jay, Jan. 1783; Jared Sparks, *Life of Gouverneur Morris*, vol. i, p. 289. Quoted in Bancroft, *Formation of the Constitution*, vol. i, p. 87.

of Confederation to function. Efforts to patch up the system were thwarted, once by Rhode Island, again by New York. It was easily seen that its fundamental defect was the lack of coercive power. As John Jay somewhat satirically told the people of New York, the framers of the first body of fundamental national law seemed “not to have been sensible that mere advice is a sad substitute for laws; nor to have recollected that the advice of the all wise and best of Beings has been always disregarded by a great majority of all the men that ever lived.”⁹

But of far more importance than this abstract governmental fact were the social forces that brought home in a number of very inconvenient ways to the minds of the gentry the truth that governmental strength, and especially national governmental strength, was desirable. Washington described the situation accurately when he wrote:

The truth is, the people must *feel* before they will *see*; consequently they are brought slowly into measures of public utility. Past experiences, or the admonition of a few, have but little weight.¹⁰

The most important of these practical influences which were operative during the six uneasy years following the termination of actual hostilities were the nonpayment of the national debt, the general commercial depression, and the rising discontent of the poorer classes, which threatened the political control of the gentry, manifested itself in legal tender and stay laws, and, when denied a legal outlet, precipitated disturbances such as those in Connecticut, New Hampshire, and, especially, Massachusetts.

It is not within the scope of the present study to trace the history of these events. Their relation to the contemporary view of the problem of government is, however, of evident significance. The payment of the debt required a government strong enough to levy and collect taxes. Lack of authority in Congress to pass retaliatory commercial measures against British trade was, rightly or wrongly, believed fatal to the restoration of commercial prosperity. Laws violating the obligation

9. John Jay, “Address to the People of the State of New York, on the subject of the Constitution. By a Citizen of New York,” in P. L. Ford, *Pamphlets on the Constitution of the United States*, p. 72.

10. John Marshall, *Life of George Washington*, vol. v, p. 79.

of contracts could be curbed only by a national organization properly equipped with power for the purpose. Insurrectionary movements, too strong for the individual states to quell, must be put down by the strong arm of a national armed force.

The following description of the political situation is a striking example of the point of view of a representative member of the political upper class, John Marshall:

Two great parties were formed in every state, which were distinctly marked, and pursued distinct objects, with systematic arrangement. The one struggled with unabated zeal for the exact observance of public and private engagements. By those belonging to it the faith of a nation, as of a private man was deemed a sacred pledge, the violation of which was equally forbidden by the principles of moral justice, and of sound policy. The distresses of individuals were, they thought, to be alleviated only by industry and frugality, not by a relaxation of the laws or of a sacrifice of the rights of others. According to the stern principles laid down for their government, the imprudent and idle could not be protected by the legislature from the consequences of their indiscretion; but should be restrained from involving themselves in difficulties by the conviction that a rigid compliance with contracts would be enforced. They were consequently the uniform friends of a regular administration of justice, and of a vigorous course of taxation which would enable the state to comply with its engagements. By a natural association of ideas, they were also, with very few exceptions, in favour of enlarging the powers of the federal government, and of enabling it to protect the dignity and character of the nation abroad, and its interests at home. The other party marked out for itself a more indulgent course. Viewing with extreme tenderness the case of the debtor, their efforts were unceasingly directed to his relief. To exact a faithful compliance with contracts was, in their opinion, a measure too harsh to be insisted upon, and was one which the people would not bear. They were uniformly in favor of relaxing the administration of justice, of affording facilities for the payment of debts, and of suspending their collection, and of remitting taxes. The same course of opinion led them to resist every attempt to transfer from their own

hands into those of Congress, powers which by others were deemed essential to the preservation of the union.”¹¹

Opposition to “relaxation of laws,” advocacy of “a rigid compliance with contracts,” of “a regular administration of justice,” of “enlarging the powers of the federal government,” by such principles were the old revolutionary catchwords replaced. There was now no occasion for an appeal to the inalienable rights of man, to equality, to the philosophy of John Locke in general.

How could this be otherwise at a time when the Massachusetts troubles dominated the political thought of the country, events, too, which seemed to portend the most direfully momentous consequences? The letters of the conservative leaders written during the autumn of 1786 are filled with speculations and fears aroused by these transactions. Nothing could better illustrate the conservative state of mind which produced the Constitution than a few excerpts from these letters which shuttled back and forth as the news spread from New England to the country at large:

“The disturbances in Massachusetts,” Grayson reported to Monroe from New York, “have been considerable and absolutely threaten the most serious consequences. It is supposed that insurgents are encouraged by emissaries of a certain nation, and that Vermont is in the association. How it will end, God only knows; the present prospects are, no doubt, extremely alarming.”¹²

“Dissatisfaction and uneasiness prevail throughout the country,” an English observer wrote to his government, “the greater part of the people poor, and many in desperate circumstances do not, it seems, want any government at all, but had rather have all power and property reduced to a level.”¹³

“We learn,” so Madison wrote to his father, “that great commotions are prevailing in Massachusetts. An appeal to the Sword is exceedingly dreaded. The discontented, it is said, are as numerous as the friends

11. *Ibid.*, p. 85.

12. Grayson to Monroe, Nov. 22, 1756, in Bancroft, *Formation of the Constitution*, vol. i, p. 405.

13. Temple to Carmarthen, Oct. 4, 1786, in Bancroft, *Formation of the Constitution*, vol. i, p. 398.

of Government, and more decided in their measures. Should they get uppermost it is uncertain what may be their effort. They profess to aim only at a reform of their Constitution, and of certain abuses in the public administration; but an abolition of debts, public and private, and a new division of property, are strongly suspected to be in contemplation.”¹⁴

“The troubles in Massachusetts still continue,” a correspondent of Washington’s reported, “Government is prostrated in the West. And it is much to be feared that there is not enough energy in that State to reestablish the civil powers. The leaders of the mob, whose fortunes and measures are desperate, are strengthening themselves daily; and it is expected that they will soon take possession of the Continental magazine at Springfield, in which there are from ten to fifteen thousand stands of arms, in excellent order.”¹⁵

Rufus King confided his fears to Elbridge Gerry as follows:

Be assured that neither you nor I comprehend the combination which these insurgents may in possible events be able to form. Let them shew their condition and numbers and advance a little further in open resistance of the Government, and a scene will then present itself of far more importance than had yet been conjectured.

There will not be wanting leaders of name and consideration to conduct them. We all have our preferences and aversions, and perhaps in general they are both alike unfounded. I confess, however, that with the single exception of one French nobleman, I have always been more willing to confide in the citizens of our Country, novel as their employments have been, than in the most plausible, or experienced Foreigners who have been among us. Although in some instances we may have received benefits from Foreigners in the public service, yet I have rejoiced when the obligation has been discharged and they have quitted America.

Some adventurers yet remain; they have their rendezvous and their Leader. Concerning his *merits and pretensions*, even you and I my friend, have held different opinions. I know that he was a soldier

14. Madison to Madison, Nov. 1786, in *Works* (Cong. ed.), vol. i, p. 253.

15. Humphreys to Washington, Nov. 1, 1786, in Sparks, *Correspondence of the American Revolution*, vol. iv, p. 147.