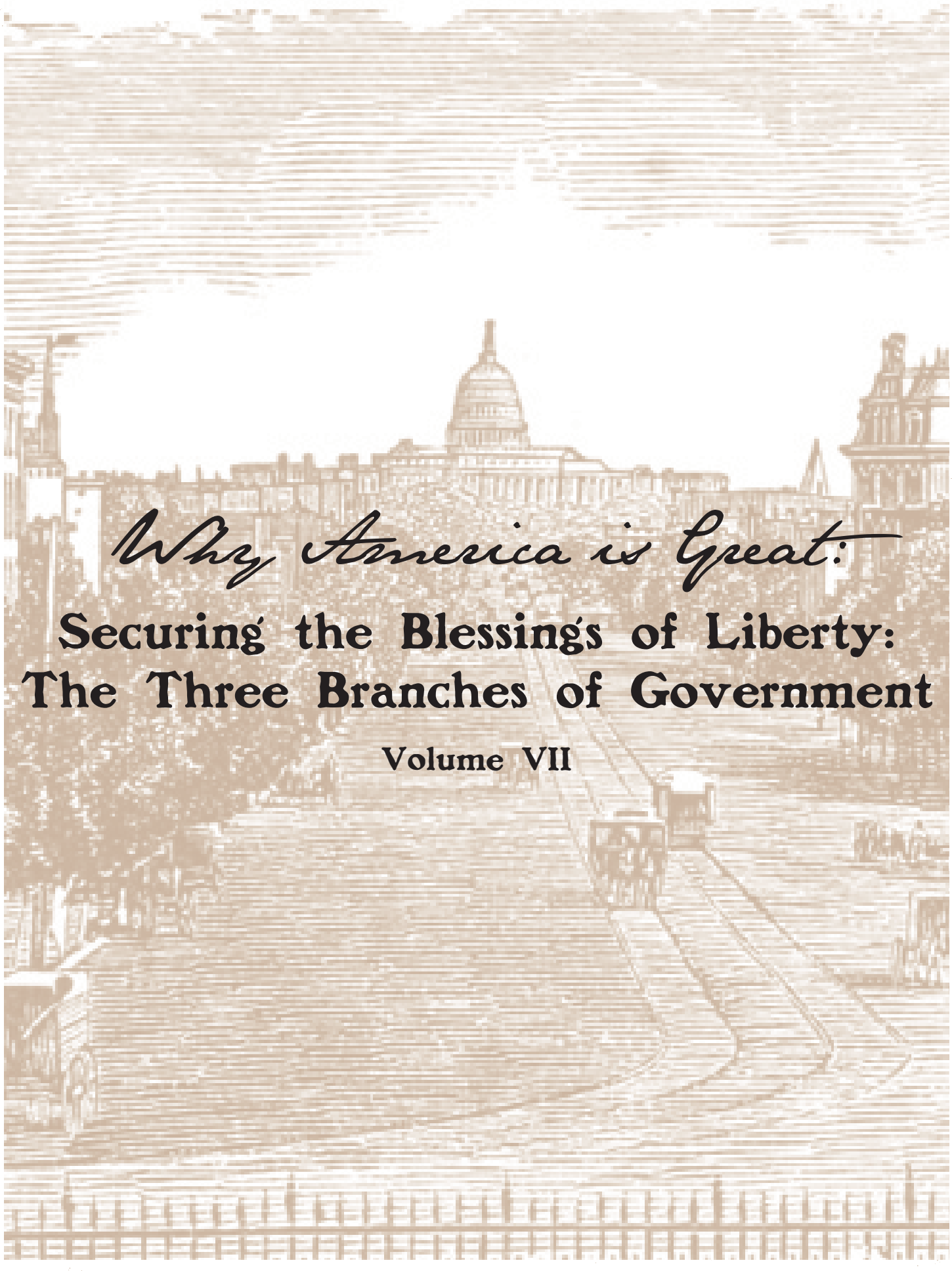


Why America is Great:

Securing the Blessings of Liberty: The Three Branches of Government

Volume VII

Securing the Blessings of Liberty: The Three Branches of Government (Pamphlet #7)

The great challenge to the members of the Constitutional Convention was to design a national government both strong and ordered enough to maintain the welfare of a large continent, but also gentle enough that it would never encroach upon the liberties of the people. Indeed, the federal government had to be designed in such a way that it would not merely *allow* the people to be free, but would in fact *preserve* their sovereignty by its very operation.

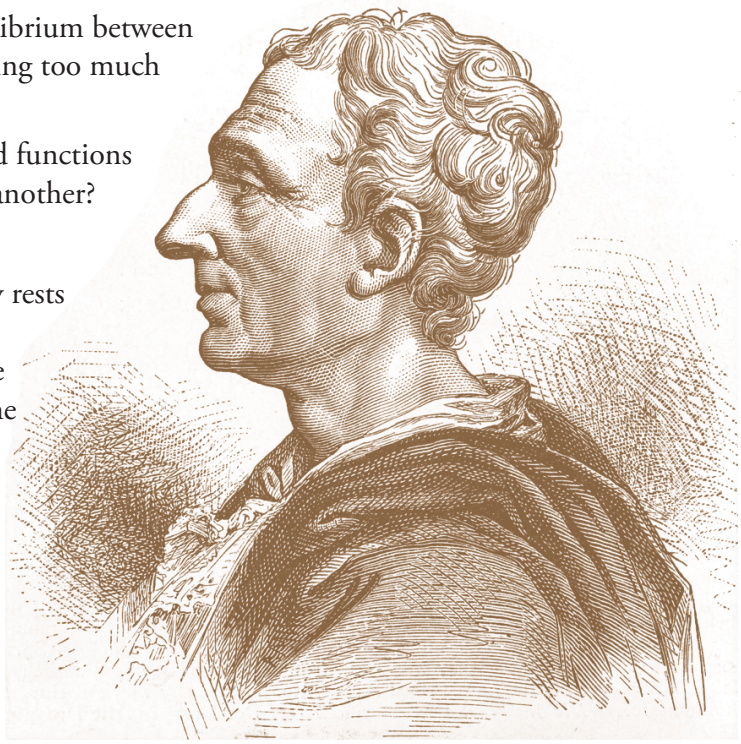
In designing the American government, the Founders were influenced by French political theorist Baron de Montesquieu, whose writings were admired in America. Montesquieu advocated what came to be known as a *separation of powers*—the dividing and allocating of power in such a way that no one entity can amass too much power for itself. While the concept of separation of powers was not new (civilizations going back to the Ancient Greeks and beyond had experimented with "mixed government"), Montesquieu's practical articulation of the theory resounded with the American people.[1] It coincided with their belief that the purpose of government was not to protect the authority of rulers from the people, but to protect the sovereignty of the people from the rulers. Thus, the main goal of the members at the Constitutional Convention was to establish a government in which the three branches of government not only operated within their proper boundaries, but also worked together in such a way as to "produce" liberty for the people.

The first step the Founders took was to separate the powers to *make* law, *enforce* law, and *guard* law, putting each in its own branch. Their second step was to then mingle the powers of the three branches together. James Madison had argued that if the ambition of each branch was fixed in *opposition* to the others, no one branch would dominate. "[T]he great security against a gradual concentration of the several powers in the same department," he wrote, "consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others…. Ambition must be made to counteract ambition."[2] Thus, in addition to separating powers into different branches, the Founders instituted *checks and balances* between the three branches. Consequently, the tension or force that each branch would exert on the other would maintain equilibrium between all three, and keep any one branch from amassing too much power.

So what are the three branches? What form and functions did they assume? And how do they check one another?

The Legislative Branch – Making the Law

The Founders recognized that power ultimately rests in the hands of those who make the law. Thus, in a nation committed to the sovereignty of the people, the power to make law had to rest in the people's hands. For this reason, the Founders first determined that the legislature, called Congress, would be *representative* body chosen by the people. Second, the Founders split Congress into two bodies: the House of Representatives elected directly by the people, and a Senate elected by the state legislatures. This division was meant to strike a balance between the people and the states, ensuring that the interests of



Baron de Montesquieu

both were accurately represented at the national level. The Founders also believed that having two bodies in Congress would generate a productive tension and encourage a rigorous legislative process. They believed that if the legislative process was sufficiently complex, only the most necessary and deserving legislation would emerge as law. The House and Senate each have their own leadership, responsibilities, and functions, and yet no law can be passed without the approval of both assemblies.

The two houses of Congress exercise some of the most significant power in the land. According Article I of the U.S. Constitution, Congress alone has power to collect taxes, regulate commerce, declare war, maintain the armed forces, and establish currency. In addition, Congress is responsible for establishing tribunals, granting patents, establishing post offices, and setting rules of naturalization.[3]

House of Representatives

The Founders believed that the House, as a sort of national repository for public opinion, should correlate with the public as directly as possible. This sentiment influenced how representatives are chosen and how often they have to run for reelection.

Mode of election: Members of the House of Representatives are elected by *popular vote* in each state, the number of officials being determined by state population (known as *proportional representation*).

Eligibility for office: The Founders placed few restrictions on eligibility, believing that the representatives of the people ought to be reflective of them. The only requirements were that a candidate be at least 25 years old, that he be no less than 7 years a resident of the United States, and that he dwell in the state he planned to represent at the time of election.

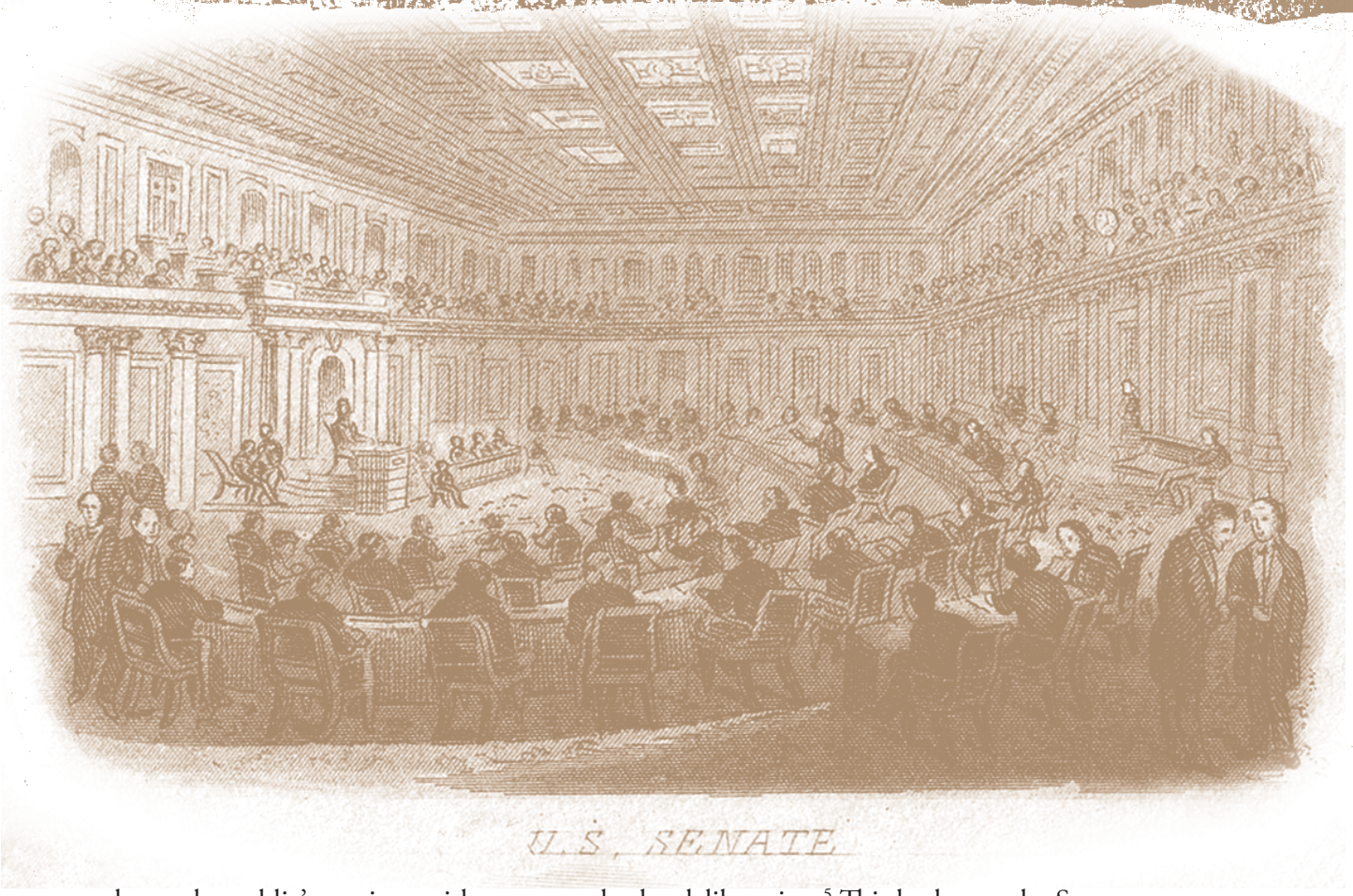
Length of term: Americans, accustomed to keeping a tight rein on their public officials, had traditionally favored one-year terms for state legislators. Some states, such as Connecticut and Rhode Island, allowed representatives to serve no more than six months at a time.[4] While many agreed that federal terms should not be too long, some feared that frequent turnover would create instability at the center and make the country vulnerable. Others also argued that a year, for instance, was too short of a time for a representative to build experience as a statesman. The Founders eventually settled on a term of two years, believing it both short enough to keep representatives dependent upon the people's good opinion, and long enough for them to build their skills and effectively serve their constituents.

To bolster its power, the Founders assigned to the House alone a significant privilege. Patterned in many ways after the British House of Commons, the House retains "power of the purse," or the ability to originate legislation for raising taxes. This prerogative is the assembly's most compelling advantage against the other branches of government.

However, the House (and Congress as a whole) is also checked by other parts of the government. For instance, Congress cannot, by itself, enact a law. Every proposal passed by Congress, before it becomes law, is first sent to the President (in the executive branch) for his approval. Every bill he signs becomes law, but if he objects to a piece of legislation, he has the power to return the bill to Congress unsigned, with an explanation of his disapproval. If Congress wants to override the veto, both the House and the Senate must re-pass the bill at least a two-thirds vote.

Senate

At the same time that they championed the rights of the people, the Founders felt that the public was often inclined toward rash and thoughtless action. In certain societies, the response to a crisis was to give authority to a strongman or a powerful group of politicians. But in America's self-governing society, this could not be an option. Instead, the Founders chose to establish what James Madison described as a "temperate and respectable body of citizens" whose leadership would help



moderate the public's passions with reason and calm deliberation.[5] This body was the Senate.

The Senate, which was originally intended to represent the interests of the *states* (while the House represented the public at large), was to lend a diplomatic tenor to the legislative process and supply a political astuteness that might at times be lacking in the House. The Senate's distinctive character caused it to differ from the House in several ways.

Mode of election: Senators were originally elected by the state legislatures.[6] Each state elected two senators, regardless of population (known as *equal representation*). Because of this, the Senate has always been smaller in size than the House; every state is guaranteed an equal voice in debate, which is meant to provide for calm discussion.

Eligibility for office: To run for a Senate seat, an individual must be a least 30 years old, instead of the House's 25, and must have lived in the United States for 9 years—2 years longer than for the House.

Length of term: The Founders felt that the deliberative character of the Senate called for more permanence than would be appropriate for the House. They believed that senators should be able to attend to such weighty matters as navigating foreign relationships or reviewing candidates for the bench without having to fret about frequent reelection campaigns. For this reason, senators were given 6-year terms of office. These terms were also staggered: a third of the Senate runs for reelection every 2 years in order to prevent wholesale turnover of the body.

While the Founders assigned to the House of Representatives the power of the purse, it reserved to the Senate two different significant powers. The first is the "sole power to try impeachments," up to and including the impeachment of the President of the United States.[7] This itself is an area in which the House and Senate must work together: while only the House of Representatives can initiate impeachment proceedings against a public official, only the Senate has power to *try* impeachments and actually remove an official from office (requires a two-thirds vote). The power of the Senate (and Congress as whole) to impeach provides a check on both the executive and judicial branches, as

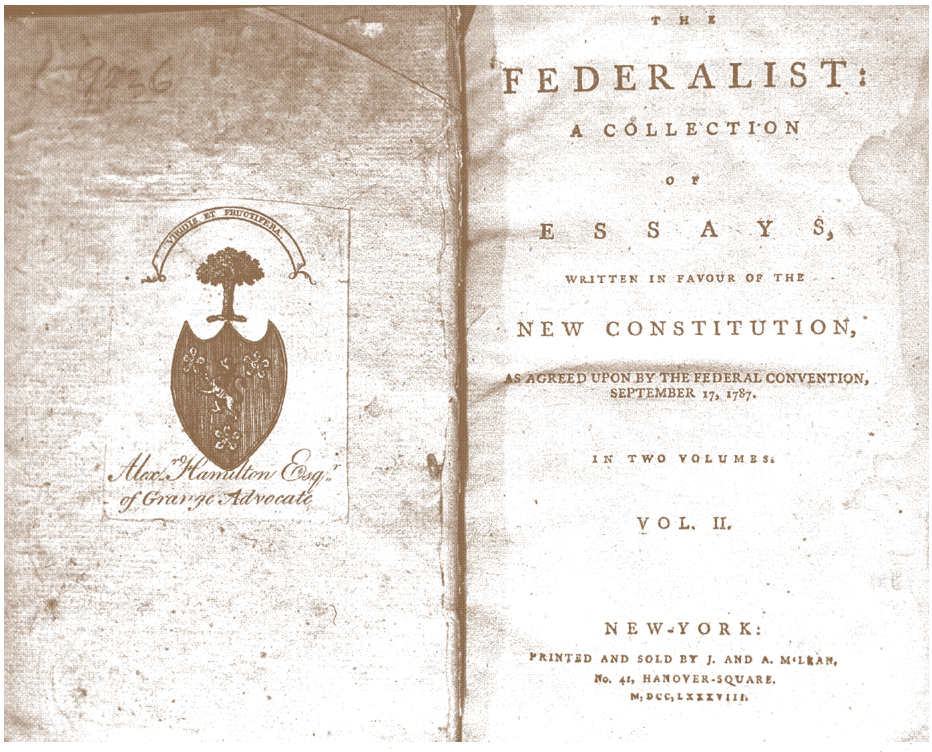
presidents and judges are subject to impeachment for unlawful behavior.

The Executive Branch – Enforcing the Law

Although Congress exercises significant power, the Founders arranged for its influence to be both tempered and complemented by the second branch: the executive. As the name implies, the executive's primary responsibility is to execute and enforce the laws passed by the legislature. According to Article II, Section 1 of the Constitution, executive power is embodied in the office of President of the United States. The president's duties are both domestic and diplomatic. Internally, he implements laws with the assistance of a cabinet, serves as commander-in-chief of the armed forces, nominates judges and ambassadors, and recommends legislation to Congress. Externally, he acts as America's representative to the rest of the world. He is responsible for drafting treaties, conducting foreign negotiations and receiving foreign ministers.

Traditionally, Americans were very wary of giving any single officeholder too much power, as they wanted to avoid anything that might resemble a monarchy. However, the state governments had proved a solid testing ground in developing the federal executive branch, as most of the 13 states had had some form of executive, such as a governor, to counterbalance the state legislatures.[8] The country's experience under the Articles of Confederation, which had no executive, had taught Americans the need for a branch of action and alacrity in the federal government.

There had been some debate among the members of the Constitutional Convention about whether the executive should consist of two or more persons, who form a sort of executive council or board. After all, if the legislative branch had two houses to help check each other, then wouldn't a "plural" executive keep any one person from having too much power? Alexander Hamilton, an author of *The Federalist Papers*, refuted this argument by pointing out the very different needs and functions of the two branches. The legislative branch, tasked with creating law, must have various "checks" on its power in order to provide for a truly deliberative process. The various counterbalances between the houses of Congress ideally prevent the passage of all laws except those that are truly necessary and truly representative of the people's opinion. The executive, in contrast, must have what Hamilton called "dispatch."[9] Commanding the armed forces, conducting diplomatic negotiations, or responding to a crisis all at times require the executive to act quickly and effectively. So while a proper division in the legislature tended to strengthen the quality of its proceedings, division in the executive branch could prove a great weakness, and have dire consequences for the country.

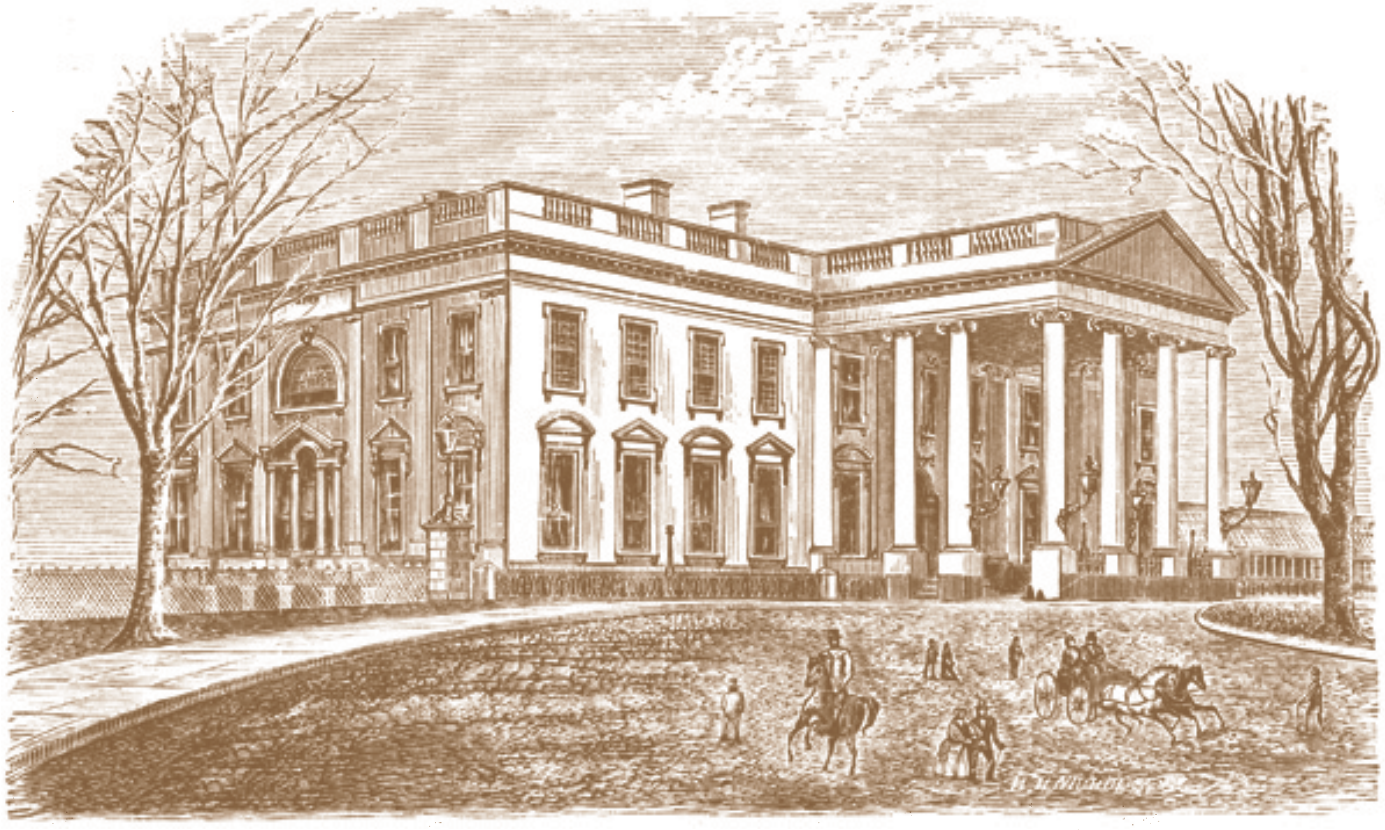


Of course, there was a danger than a single executive would be tempted to misuse his power. Without an equal and opposing force, such an individual could easily become a tyrant. On the contrary, replied Hamilton, the very fact that he holds the power by himself means that he has to take full responsibility for how he uses it—there is no one else to blame, no place to cover up his actions or behavior. If executive power is confined to

an individual, that individual alone must answer to the people for his use of that power. Ideally, the greater the weight of the executive's office, the more he will feel compelled to discharge his duties responsibly.[10]

Mode of election: Who should get to choose the President? Some argued that *Congress* ought to appoint him—this would keep the President dependent upon the legislature for his authority. However, many, like Alexander Hamilton, disagreed, saying that this would give the legislative branch too much power and upset the three-way balance of the government. Some believed that the *people* should elect the President directly. But others worried that the people would be inclined, at various times, to elect a demagogue or a person who simply inspired their passion but was unfit for public office.

These concerns sparked a complex debate during the Constitutional Convention, after which the members emerged with a rather intricate plan for choosing the federal executive. Article II, Section 2 of the Constitution describes this plan, which centers around what has come to be called the electoral college. During a presidential election, each state was to appoint several "electors," amounting to the same number of officials representing the state in Congress (state legislatures were allowed to decide the precise method for appointing these individuals). The electors, none of whom could be a senator, representative, or "person holding an office of trust or profit under the United States," were to gather in their respective states to vote for candidates for President.[11] Each elector was allowed to cast two votes, one of which had to be for a candidate from outside the state. After voting, the electors were to send a record of their ballots to the President of the U.S. Senate. The Senate President would then open the votes before a session of Congress and they would be tallied. If any one candidate received a majority of votes (calculated by the number of electors), he would be named President of the United States. If there was a tie, the House of Representatives would vote between the tied candidates. If no candidate received a majority, the House would take a vote by state between the top five candidates. After the President was chosen, the candidate with the second highest number of votes would be named Vice President.[12]



Though the system was complex, the Founders believed the design was a healthy medium between the sovereignty of the people and the power of the legislature. And as a body created for a specific purpose and for a specified (temporary) length of time, the electoral college would be free of competing and corrupting interests.

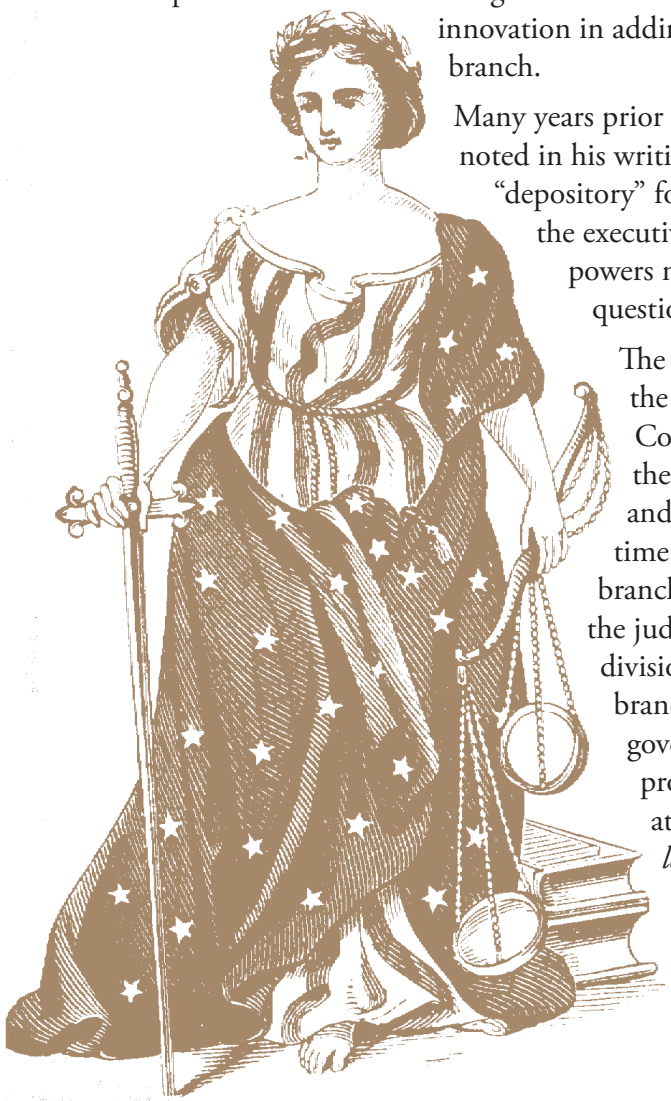
Eligibility for office: The Constitution requires that the President be a "natural born Citizen" of the United States, be at least 35 years old, and have lived in the country for at least 14 years.[13]

Length of term: The members of the Constitutional Convention proposed various term lengths for the President, ranging from a few months to a life term. They finally settled on a term of four years—long enough to attract talented statesmen to the office but brief enough to keep the person elected accountable to the people who put him there.

Two of the President's significant powers are first, the drafting of treaties, and second, the nomination of "ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States."[14] However, as a check on the President's authority, he cannot ratify a treaty or appoint any nominated officials without the consent of the Senate. If the Senate does approve or a treaty or of a nomination, the President cannot move forward with either.

The Judicial Branch – Guarding the Law

In establishing separate branches for the legislative and executive functions of government, the authors of the Constitution were improving upon an old idea. In England, the ancient relationship between King and Parliament had hinted at this concept, but had never fully separated from each other. The Founding Fathers had studied this pattern carefully and had successfully completed this separation in the American government. But after this accomplishment, they designed a true innovation in adding a third department to the government: the judicial branch.



Many years prior to the American Revolution, Montesquieu had noted in his writings the need for all free governments to maintain a "depository" for the laws of the land. The legislature enacted law and the executive enforced it, but who was to ensure that these two powers never rose above it? In American, the answer to this question was the establishment of the American judiciary.[15]

The judicial branch of the United States government is the least defined of the three. Article III, Section 1 of the Constitution simply reads that the "judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may, from time to time, ordain and establish."[16] When the judicial branch was first constructed, Alexander Hamilton declared the judicial branch to be "beyond comparison" the feeblest division of the national government. As with the executive branch, the judiciary was an area in which the state governments—particularly their tribunal systems—had proved a rich developmental testing ground. However, at its inception, it remained to be seen how a *federal-level* judiciary would exert its authority. The Founders' intention in establishing the Supreme Court was to create a body whose sole interest was to protect the Constitution. Thus, dependent neither on Congress nor the states, the Court is qualified to judge all cases

of national import or those involving one or more states. In addition, it maintains jurisdiction over all cases regarding ambassadors, foreign powers, maritime law, disputes between states and any accusation of treason.

Mode of appointment: The President is responsible for nominating justices to the U.S. Supreme Court; his nominees must be approved by the Senate.

Eligibility for office: There are no constitutional requirements for holding the office of a Supreme Court justice.[17]

Length of term: Supreme Court justices are permitted to serve for life, or "during good behaviour."[18] The Founders granted justices this unusual privilege out of concern for their objectivity and independence of judgment, and to prevent conflicts of interest. Hamilton stated that an "inflexible and uniform adherence to the rights of the constitution and of individuals…can certainly not be expected from judges who hold their offices by a temporary commission." Hamilton also argued that permanence of office would allow justices to devote themselves wholly to the study of the law.[19] It would also prevent judges from having their decisions influenced by possible threats of losing their positions or of their salaries being affected (which also increases the temptation to accept bribes).

The judicial branch provides a check on the legislature and executive by acting as a guardian of the Constitution. The Supreme Court exercises the power of judicial review, or the ability to declare void any federal law that it judges to be inconsistent with the Constitution.[20] This reality adds an element of accountability to the legislative process: both Congress and the President know that any law or policy they pursue could potentially be challenged and perhaps overturned by the Supreme Court if it is not judged to be in line with the Constitution.

Although the essential structure established by the Founders remains in place, the American federal government has undergone many significant changes over the years. The *practice* of government can evolve over time into something quite different from what was originally intended. However, to accurate judge what parts of our system have deteriorated, and how, it is essential to understand the original design.

Endnotes

1. Russell Kirk, *The Roots of American Order* (Washington, DC: Regnery Gateway, 1991), 64, 95.
2. Madison, Federalist 51, 262.
3. U.S. Constitution, Art. I, Sec. 8, accessed at http://avalon.law.yale.edu/18th_century/art1.asp.
4. Ibid., Federalist Nos. 52-53; 268, 271.
5. James Madison, Federalist No. 63, *The Federalist Papers*, accessed online at The Avalon Project, Yale Law School, Lillian Goldman Law Library, http://avalon.law.yale.edu/18th_century/fed63.asp (emphasis mine).
6. Amendment 17 to the Constitution, passed in 1913 as part of the reforms of the Progressive Era, transferred senatorial elections from the state legislatures to the people.
7. U.S. Constitution, Art. I, Sec. 3, Clause 6, accessed at http://avalon.law.yale.edu/18th_century/art1.asp.
8. Richard B. Morris, *The Forging of the Union: 1781-1789* (New York: Harper & Row, 1987), 123.
9. Alexander Hamilton, Federalist 70, xx.
10. Ibid., 359, 360.
11. U.S. Constitution, Article II, Sec. 1, Clause 2, accessed at http://avalon.law.yale.edu/18th_century/art2.asp#back12.
12. Amendments to the U.S. Constitution as well as practice have both since affected the precise way the electoral college works and the manner in which the President and Vice President are elected.
13. U.S. Constitution, Art. II, Sec. 1, Clause 4, accessed at http://avalon.law.yale.edu/18th_century/art2.asp.
14. U.S. Constitution, Art. II, Sec. 2, Clause 2, accessed at http://avalon.law.yale.edu/18th_century/art2.asp.
15. Kirk, 356.
16. U.S. Constitution, Art. III, Sec. 1, accessed at http://avalon.law.yale.edu/18th_century/art3.asp.
17. United States Courts, "Frequently Asked Questions: Federal Judges," accessed at http://www.uscourts.gov/Common/FAQS.aspx#FederalJudges.
18. U.S. Constitution, Art. III, Sec. 1. The Constitution provides impeachment as the vehicle of removal for insurgent judges.
19. Hamilton, Federalist 78, 398, 399.
20. The Constitution does not explicitly delegate the power of judicial review. The question of who had power to declare laws unconstitutional remained controversial until the Supreme Court sanctioned judicial review in the case *Marbury v. Madison* in 1803.