

## The Powers and Duties of the President

### *Recovering the Logic and Meaning of Article II*

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IN HIS AUTHORITATIVE TEXT on the constitutional and legal foundations for executive power in the United States, Edward Corwin describes Article II on the presidency as “the most loosely drawn chapter of the Constitution.”<sup>1</sup> Similarly, in his well-known intellectual history of the presidency, Forest McDonald calls the article “imprecise, even muddled.”<sup>2</sup> And in his famous concurring opinion in the Korean War case *Youngstown Sheet and Tube Co. v. Sawyer*, U.S. Supreme Court Justice Robert Jackson describes the effort to understand the president’s constitutional powers as relying on “materials” (apparently including the text of the Constitution) “almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.”<sup>3</sup>

These characterizations reflect, at least in part, a frustration that many have experienced when trying to find in the Constitution answers to questions about the reach of executive power, especially during crises. May a president, for example, order troops into combat overseas without prior congressional approval? Once war is upon us, may the president suspend the writ of habeas corpus on his own authority, seize private industries vital to the war effort, or establish military tribunals to try “unlawful combatants”? May a president abrogate a treaty with a foreign nation without Congress’s (or at least the Senate’s) approval? May the president legitimately withhold information requested by Congress or the courts to protect national security secrets or to preserve the confidentiality of communications with aides?

When such questions arise, we naturally turn first to Article II. Does the vagueness of its language render such an exercise pointless? Are the president’s constitutional powers, then, whatever the temporary occupant

wishes or what current public opinion will accept? We think not. We believe that Article II is more tightly drawn, more precise, and less enigmatic than is often thought and is thus a more reliable guide to the reach and limits of the president's constitutional authority than many recognize. In particular, we argue here that Article II is structured, or organized, around the distinction between powers and duties; that, broadly speaking, the former are the means, or instruments, for achieving the latter; and that consequently it is duty that lies at the heart of the constitutional presidency.

Modern political science has much to say about presidential powers but rather little to say about presidential duty. One might usefully ask, for example, what a book, or series of books, on presidential duty would look like. What topics would be covered? How would presidential performance be assessed? How would such a treatment differ from those that focus on power? We dwell a lot on assessing presidential success at wielding power; but how often do we ask how successful presidents are at fulfilling their constitutional duties? If we had to choose between a president who was very good at getting his way and one who was very good at meeting his constitutional obligations, wouldn't we prefer the latter?<sup>4</sup> Something important is missing in our treatment and understanding of the constitutional presidency, something that a careful analysis of Article II can help us uncover and recover.

## An Office of Powers and Duties

Article II begins with the well-known "vesting clause": "The executive Power shall be vested in a President of the United States of America." At least since Alexander Hamilton made the argument in 1793, many have noted that this differs from the opening of Article I: "All legislative Powers herein granted shall be vested in a Congress of the United States."<sup>5</sup> To many, this is strong textual support for the view that Congress possesses only enumerated powers—those "herein granted"—while the president possesses a general executive power. Indeed, in the famous "removal power" debate in the House of Representatives in 1789, just weeks after the new Congress first convened, James Madison and others argued successfully that the vesting clause implicitly gave the president the power to fire heads of executive departments, because this was by its very nature an executive power.<sup>6</sup>

In the second sentence of Article II, the Constitution stipulates that the president “shall hold his Office during the Term of four Years, and, together with the Vice-President, chosen for the same Term, be elected, as follows.” Six more times in Section 1 the Constitution refers to the “Office” of the president. It specifies, for example, that if a president is removed from office, dies during his term, resigns, or is unable “to discharge the *Powers* and *Duties* of the said Office, the same shall devolve on the Vice President” (emphasis added). And two paragraphs later the Constitution requires that before the president “enter on the Execution of his Office,” he take an oath, in part, to “faithfully execute the Office of President of the United States.” We know from the previous provision on vice-presidential succession that to faithfully execute the office of president is to faithfully discharge its powers and duties.

Although American constitutional history is replete with references to the “powers and duties” of the president, there has been a marked tendency to refer to the authorities vested in Article II principally as “powers.” If, for example, we speak of the “constitutional powers of the president,” this would be understood to include whatever authority the Constitution vests in the office. This tendency to collapse “powers and duties” into “powers” simply is at odds with the fact that both historically and etymologically an office is more directly associated with duty than power. Indeed, the Latin word, *officium*, from which the English word “office” derives, meant duty. As Edward Corwin noted,

etymologically, an “office” is an *officium*, a duty; and an “officer” was simply one whom the King had charged with a duty. In the course of time certain frequently recurrent and naturally coherent duties came to be assigned more or less permanently, and so emerged the concept of “office” as an *institution* distinct from the person holding it and capable of persisting beyond his incumbency.<sup>7</sup>

If at its core an office is best understood as a duty or set of duties, then the powers assigned to an office are essentially instrumental: means to accomplish the assigned duties. Thus, within an office powers and duties are related to each other like the convex and concave sides of a curve. Duties require, or perhaps imply, powers; powers exist not for their own sake but to serve duties.

It is our contention that this powers-duties distinction, though over-

looked by modern commentators, is an extremely powerful conceptual tool for analyzing and understanding the authorities vested in the president by the Constitution, as the following discussion will try to demonstrate.<sup>8</sup> (Despite the slight awkwardness, we will use the term *authority* to refer generically to either a constitutional “power” or “duty,” preserving as best we can the distinction between a “power” and a “duty” throughout.)

## The Work of the Constitutional Convention

The Constitutional Convention met in Philadelphia in 1787 between Friday, May 25, and Monday, September 17. Fifty-five men from twelve states (Rhode Island did not send delegates) attended at least some part of the deliberations. Forty-two delegates were present at the end, thirty-nine of whom signed the document.

We sometimes forget just how much executive experience the delegates brought to the task of building a more effective national government for the new nation. Nearly all (fifty of the fifty-five) had served in one or more executive positions at the national, state, or local level. Fully two-thirds (thirty-seven of the fifty-five) had held a position of considerable executive responsibility, especially for public safety: nine as a state governor; nine as a member of a governor’s council (in their state or colonial government); ten on a state’s committee of safety during the early revolutionary period; and fourteen as an officer in the Continental Army.<sup>9</sup> Keenly aware of how both the Articles of Confederation, with no independent executive branch, and the state governments, with mainly weak governors, failed to provide for effective government, these men would have been especially alert to the need to provide a sturdy structure and ample authorities to the nation’s new chief executive.

Article II was their response to this need. The nature of the specific executive authorities and the form in which they were vested were the result principally of two key committees of the Constitutional Convention: the Committee of Detail and the Committee of Style. The former, which met from July 27 to August 6 (during a recess of the convention) took the various and sundry measures passed to that point and formed them into a draft constitution. The latter, which did its work from September 8 to 12, provided the final form and style to the document. Both committees were quite small: just five members each. On the Committee

of Detail served Oliver Ellsworth of Connecticut, Nathaniel Gorham of Massachusetts, Edmund Randolph of Virginia, John Rutledge of South Carolina (chair), and James Wilson of Pennsylvania. On the Committee of Style were Alexander Hamilton of New York, William Johnson of Connecticut (chair), Rufus King of Massachusetts, James Madison of Virginia, and Gouverneur Morris of Pennsylvania.

In its first two months of deliberations, the convention devoted little time or effort to the question of what authorities to vest in the new chief executive. When it created the Committee on Detail in late July and charged it with producing a draft constitution, it had agreed on only three: “to carry into execution the national laws”; “to appoint to offices in cases not otherwise provided for”; and the authority to veto legislative acts, subject to override by a two-thirds vote of both houses of the legislature.<sup>10</sup> The delegates also submitted to the committee two other sets of propositions, which they had not formally approved, with additional language on executive power: a draft constitution introduced by Charles Pinckney of South Carolina and what was known as the “New Jersey Plan,” formally proposed by William Paterson and around which many small state delegates had rallied.<sup>11</sup>

Paterson’s proposal vested four authorities in the new “federal Executive”: (1) a “general authority to execute the federal acts”; (2) “to appoint all federal officers not otherwise provided for”; (3) “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”; and (4) the authority to “call forth [the] power of the Confederate States . . . to enforce and compel an obedience to [federal laws and treaties].”<sup>12</sup> The New Jersey Plan did not include a veto power.

Pinckney’s proposal, by contrast, went well beyond the three executive authorities approved by the convention or the four in the New Jersey Plan. Although Pinckney’s original plan does not survive, historians have reconstructed it from documents found among James Wilson’s papers related to the work of the Committee of Detail. It set forth a lengthy list of authorities to be vested in the new president:

In the Presidt. the executive Authority of the U.S. shall be vested.

It shall be his Duty to inform the Legislature at every session of the condition of the United States, so far as may respect his Depart-

ment—to recommend Matters to their Consideration such as shall appear to him to concern their good government, welfare and prosperity—to correspond with the Executives of the several States—to attend to the Execution of the Laws of the U S by the several States—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 acquire from time to time, as perfect a knowledge of the situation of the Union, as he possibly can, and to be charged with all the business of the home department. He will be empowered, whenever he conceives it necessary to inspect the Department of foreign Affairs—War—Treasury—and when instituted of the Admiralty—to reside where the Legislature shall sit—to commission all Officers, and keep the Great Seal of the United States.

He shall, by Virtue of his Office, be Commander in chief of the Land Forces of the U.S. and Admiral of their Navy.

He shall have Power to convene the Legislature on extraordinary occasions—to prorogue them, when they cannot agree as to the time of their adjournment, provided such Prorogation shall not exceed —Days in the space of any — He may suspend Officers, civil and military.

He shall have a Right to advise with the Heads of the different Departments as his Council.

Council of Revision, consisting of the Presidt. S.[ecretary] for for. Affairs, S.[ecretary] of War, Heads of the Departments of Treasury and Admiralty or any two of them togr wt the Presidt.<sup>13</sup>

Here for the first time at the convention we see both a detailed list of executive authorities and a distinction between the powers and duties assigned to the president. After vesting “the executive Authority” in the president, Pinckney’s proposal listed eight specific “Dut[ies].” Then in the same paragraph it “empowered” the president to carry out four distinct functions. It followed this with a short paragraph making the president, “by Virtue of his Office,” the “Commander in chief” of the nation’s military forces. The next paragraph gave the president the “Power” to convene and prorogue the legislature and to suspend officers of the government. The penultimate paragraph gave him the “Right” to consult with his department heads. The final paragraph created a “Council of Revi-

sion” (which would have the power to veto acts of the national legislature).<sup>14</sup>

On August 6, the Committee of Detail made its report to the convention, distributing a printed copy of its draft constitution to every member. In twenty-three articles, it laid out a detailed plan of government including a bicameral legislature, an executive power vested in “a single person,” and a judicial power headed by a Supreme Court. Article X established and empowered the new executive office. Section 1 opened with the words, “The Executive Power of the United States shall be vested in a single person. His title shall be ‘The President of the United States of America;’ and his title shall be, ‘His Excellency.’” It then reaffirmed the delegates’ prior decisions to have the national legislature elect the president for a single seven-year term.

Then, Article X, Section 2, the draft constitution, like Pinckney’s plan, vested in the new president numerous specific authorities:

He shall, from time to time, give information to the Legislature, of the state of the Union: he may recommend to their consideration such measures as he shall judge necessary, and expedient: he may convene them on extraordinary occasions. In case of disagreement between the two Houses, with regard to the time of adjournment, he may adjourn them to such time as he thinks proper: he shall take care that the laws of the United States be duly and faithfully executed: he shall commission all the officers of the United States; and shall appoint officers in all cases not otherwise provided for by this Constitution. He shall receive Ambassadors, and may correspond with the supreme Executives of the several States. 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.<sup>15</sup>

The veto power approved by the convention survived in Article VI.

Having preserved the convention’s decisions to vest the executive with the appointment and veto powers, the committee dramatically expanded (or added to) the authority “to carry into execution the national laws” by including such potentially significant authorities as recommending measures to Congress, convening the legislature on extraordinary occasions,

receiving ambassadors, granting reprieves and pardons, and serving as commander in chief of the army and navy and of the state militia. While we do not know whether the Committee of Detail believed that this was a comprehensive list, it began its provisions on the presidency with language that could reasonably be read as itself a grant of authority: “The Executive Power of the United States shall be vested in a single person.” However one interprets the vesting clause of the committee’s proposal, it is clear that the essential authorities of the office would rest not on congressional will, but on a constitutional grant.

Although the list of executive authorities in the draft constitution does not, like Pinckney’s, formally distinguish “duties” from “powers” or “rights,” it captures some sense of this distinction by its varied use of “shall” and “may” in introducing all but two of the specific authorities. Some of the authorities read like discretionary powers: he “may” recommend measures, convene Congress on extraordinary occasions, adjourn the House and Senate if they cannot agree when to adjourn, and correspond with state governors. And others read like mandatory duties: he “shall” give information to the legislature, take care that the laws are faithfully executed, commission and appoint officers, and receive ambassadors. Moreover, the authority to grant reprieves and pardons is specifically identified as a “power,” suggesting a discretionary authority, not a mandated duty: that is to say, the president *may* grant a reprieve or pardon, but need not. The one exception to this pattern is the commander-in-chief authority: “he shall be commander in chief.” Whatever duties might inhere in such an office (more on this below), it is obviously a position of real power, vesting significant discretion, over the operations of the military.

Some of the concluding language of Article X is also relevant to the powers–duties distinction. The president must swear (or affirm) to “faithfully execute the office of the President . . . before he shall enter on the duties of his department.” Why not write, “before he shall exercise the powers of the presidency”? Oaths, it appears, are more naturally connected to duties than to powers. One takes an oath to fulfill one’s duties, employing powers as appropriate. Indeed, one might think of the oath of office as imposing an overarching duty that supervenes or informs the more specific “duties of his department.”

Immediately following is the language making the president removable from office if impeached by the House of Representatives and convicted

by the Supreme Court of “treason, bribery, or corruption.” Any of these offenses would, of course, be a violation of the president’s duty to “faithfully execute” his office. Then, if the president is removed from office, dies, resigns, or is unable “to discharge the powers and duties of his office, the President of the Senate shall exercise those powers and duties.”

In a broad sense we might say that the executive article of the Committee of Detail’s constitution begins with power—“The Executive Power of the United States shall be vested in a single person”—and ends with his overarching duty to “faithfully execute” his office and with the consequences that befall him if he fails to do so. In between the broad power and the encompassing duty come a variety of specific powers and duties, all of which devolve upon the President of the Senate in the case of a vacancy in the office or an inability to carry them out.

During the month between the report of the Committee of Detail and the appointment of the Committee of Style, the delegates made several, mostly minor, changes in the executive authority. Most importantly, they withdrew from the Senate the sole authority “to make treaties” and to appoint ambassadors, other public ministers, and judges of the Supreme Court and made these shared powers with the president, with two-thirds of the Senate required to ratify treaties and a majority to confirm presidential nominations to high office.

Two relatively minor changes, both pushed by Gouverneur Morris, bear on our understanding of the powers-duty distinction. On August 24 Morris moved that the word “may” in the clause, “he may recommend to [the legislature] . . . such measures as he shall judge necessary, and expedient,” be replaced with “shall.” This was done “in order to make it the *duty* of the President to recommend, & thence prevent umbrage or cavil at his doing it.”<sup>16</sup> Here is an explicit recognition of the difference between a discretionary power and a positive duty.

The other change of note is the one case where the convention deleted a power from the draft constitution. On August 25 Morris moved “to strike out the section—‘and may correspond with the supreme Executives of the several States’ as unnecessary and implying that he could not correspond with others.”<sup>17</sup> There was no debate and the motion passed, nine states to one. Apparently, the vast majority of delegates agreed that the president would be fully authorized to correspond with the chief executives of the states (as well as with others) without a specific grant of power to this effect.

One could hardly find clearer evidence of the notion of implied executive powers. As the possessor of the “Executive Power of the United States,” the president possessed at least some powers not specifically enumerated.

Strikingly, throughout this phase of the deliberations no one rose to oppose in general the apparent enlargement of executive authority introduced in the draft constitution, despite the contrast between the impressive list of authorities in the committee’s draft and the three general provisions formally approved by the convention in its first two months. Indeed, the debate on the specifics of the executive powers, though occurring on parts of three separate days (August 24, 25, and 27), appears to have filled no more than one day’s worth of discussion. There were a few efforts to trim specific powers, but these were easily defeated. By a vote of nine states to one the delegates turned down a proposal to allow Congress by statute to determine what appointments the president could make on his own authority; and by a vote of eight states to one they defeated a motion to replace the general authority to grant pardons and reprieves with a more limited power to grant reprieves until the next session of the Senate and to require senatorial consent for pardons.

Similarly, when the convention held its final debate on the treaty power—which now resided in the president and Senate—no one proposed returning the power to the exclusive control of the Senate. The change had proven remarkably uncontroversial. Madison did, however, move to deny the president authority over treaties of peace, lest a president continue a war longer than he should. But a large majority of his colleagues disagreed, and the motion failed eight states to three. Although Madison did succeed temporarily in authorizing the Senate to ratify peace treaties by a simple majority, the delegates later reversed this decision, placing peace treaties on the same footing as other treaties.

Three other actions completed the list of the president’s authorities. The convention authorized the president to (1) “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) convene either house of Congress separately (so that the Senate, for example, could consider treaties in a timely fashion); and (3) make temporary appointments to fill vacancies that occur during a recess of the Senate.

On September 8 the Convention appointed its final committee, the

five-member Committee of Style, “to revise the stile of and arrange the articles which had been agreed to by the House.”<sup>18</sup> Unlike previous committees, this one was not balanced by region or between the large and small states. The Deep South was not represented, and four committee members came from the most populous states. Presumably, what mattered at this final stage of constitution writing was not a balance of political forces but skill at legal craftsmanship.

The committee, through its chairman William Johnson, made its report to the delegates on September 12.<sup>19</sup> The twenty-three articles of the Committee of Detail’s draft constitution were now reduced to seven, introduced by a revised preamble. The first and longest of the articles was on Congress; the next in order and length was on the presidency; and the third was on the judiciary. Articles IV–VII covered a variety of miscellaneous topics. Other than a few minor modifications, the authorities of the president previously agreed to by the convention were adopted by the committee with at most stylistic changes.

Nonetheless, in fashioning a single executive article, the committee fundamentally restructured the vesting of executive authority. As noted above, the draft constitution of the Committee of Detail had divided Article X on the executive into two sections, with the list of detailed authorities comprising most of Section 2. Then during its subsequent deliberations the convention modified some of these powers and added others. The Committee of Style now reorganized the executive authorities in its new Article II into four sections. The first, and longest, section again began with the vesting clause, rewritten to read, “The executive power shall be vested in a president of the United States of America.” It also included provisions on term of office, mode of appointment for the president and vice president, qualifications for office, succession by the vice president, compensation, and oath of office. The second and third sections listed the specific authorities vested in the executive office. Section 2 included the commander-in-chief power and the powers over opinions in writing, reprieves and pardons, treaties, and appointments. Section 3 included the authority to inform Congress and recommend measures, the limited powers over convening and adjourning Congress, and the provisions governing receiving ambassadors, taking care the laws are faithfully executed, and commissioning officers. Finally, Section 4 stipulated that the president, vice president, and all other civil officers would be removed

upon impeachment and conviction of “treason, bribery, or other high crimes and misdemeanors.”

### Comparison of Article II with the Constitution of New York of 1777

Given the care with which the Committee of Style arranged the numerous and various provisions passed by the convention—historian Clinton Rossiter, for example, called the committee’s product “a masterpiece of draftsmanship”<sup>20</sup>—it seems reasonable to presume that when the committee divided the president’s specific authorities into two distinct sections it did so because of some difference in kind between the items listed in each. (Contrast this with the single lengthy list of Congress’s powers in Article I, Section 8.) Although there is nothing in the convention record itself that addresses this issue, we do have significant circumstantial evidence that this distinction is indeed one between *powers* and *duties*. Most telling is a comparison of the contents and structure of Article II of the Committee of Style’s report with the various state constitutions. This reveals a striking similarity between the form used in the Constitution of New York of 1777 to vest authority in that state’s governor and the form employed by the Committee of Style to empower the U.S. president. Table 2.1 presents a side-by-side comparison of the two.

Of the twelve state constitutions written between independence and the Constitutional Convention (Connecticut and Rhode Island kept their charter governments and South Carolina had two constitutions during this period), only New York’s began its grant of executive authority with a vesting clause in one section (Article XVII) followed by two major sections detailing specific authorities (Articles XVIII and XIX). Other similarities between the New York constitution and the Committee of Style report include the following: beginning the second section with the commander-in-chief power, including the pardoning power in the second section, beginning the third section with the responsibilities for providing information and recommending measures to the legislature, and locating the “take care” clause near the end of the third section.

There are, of course, differences between the documents, mainly because the specific authorities vested in the two executives were not identical. The president, for example, was not specifically granted the authorities, found

TABLE 2.1 Vesting of executive authority in the Constitution of New York (1977) and the Committee of Style report

<i>New York constitution (1777)</i>	<i>Committee of Style report</i>
<p>XVII. the supreme executive power and authority of this State shall be vested in a governor</p>	<p>Article II, Section 1. The executive power shall be vested in a president of the United States of America</p>
<p>XVIII. the governor shall . . . by virtue of his office, be general and commander-in-chief of all the militia, and admiral of the navy of this State;</p> <p>that he shall have power[:]</p> <p>to convene the assembly and senate on extraordinary occasions;</p> <p>to prorogue them from time to time, provided such prorogations shall not exceed sixty days in the space of any one year; and,</p> <p>at his discretion, to grant reprieves and pardons to persons convicted of crimes, other than treason or murder, in which he may suspend the execution of the sentence, until it shall be reported to the legislature at their subsequent meeting; and they shall either pardon or direct the execution of the criminal, or grant a further reprieve.</p>	<p>Section 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 when called into the actual service of the United States:</p> <p>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</p> <p>he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.</p> <p>He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and</p> <p>he shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not otherwise provided for.</p> <p>The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session.</p>
<p>XIX That it shall be the duty of the governor[:]</p> <p>to inform the legislature, at every session, of the condition of the State, so far as may respect his department;</p>	<p>Section 3. He shall from time to time give to the Congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient:</p>

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TABLE 2.1 *Continued*

<i>New York constitution (1777)</i>	<i>Committee of Style report</i>
to recommend such matters to their consideration as shall appear to him to concern its good government, welfare, and prosperity;	he may, on extraordinary occasions, convene both houses, or either of them, and in the case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper:
to correspond with the Continental Congress, and other States;	he shall receive ambassadors and other public ministers:
to transact all necessary business with the officers of government, civil and military; to take care that the laws are faithfully executed to the best of his ability; and to expedite all such measures as may be resolved upon by the legislature.	he shall take care that the laws be faithfully executed, and  shall commission all the officers of the United States.

in the New York constitution, to prorogue temporarily the legislature, to correspond with the Continental Congress and the states, to transact business with the officers of the government, and to expedite the measures passed by the legislature. Conversely, he was vested with some authorities not granted the New York governor: specifically, to require the opinion in writing of department heads, to make treaties (with the Senate's advice and consent), to settle disputes between the two branches of the legislature regarding adjournment, and to receive ambassadors. (The New York governor's authority to make appointments, shared with the council of appointment, and to commission all the state's officers were vested in Articles XXIII and XXIV, respectively.)

The Committee of Style, however, had no control over the powers themselves, just the style and arrangement of what the delegates had already approved. And here they seemed to follow closely the New York constitution. In every case but one where the national executive had an authority comparable to what could be found in the three principal executive articles of the New York constitution, the committee located such authority in the parallel place in Article II. The one exception is the authority to convene the legislature on extraordinary occasions, which the New York constitution located in the second of the three executive articles and the Committee of Style in the third. The only other structural

deviation between the Committee of Detail's report and the New York constitution was the committee's decision to include the executive's appointment power and his responsibility to commission officers with the other express authorities, which the New York constitution had not done.

If this textual similarity is not enough to demonstrate that the New York constitution was the model for the structure of Article II of the U.S. Constitution, we have strong supporting evidence. Virtually all we know about the work of the Committee of Style is that Gouverneur Morris was the principal architect of its final report. Abraham Baldwin, a delegate from Georgia, made this claim in December of 1787. Morris, himself, in a letter to Timothy Pickering written in 1814, maintained that the Constitution "was written by the fingers, which write this letter." Also in an 1831 letter James Madison reported that "the *finish* given to the style and arrangement of the Constitution fairly belongs to the pen of Mr Morris; the task having, probably, been handed over to him by the chairman of the Committee, himself a highly respectable member, and with the ready concurrence of the others."<sup>21</sup> Morris's preeminent role in preparing the Committee of Style's report is particularly relevant to the comparison with the New York constitution because although Morris served in 1787 as a delegate from Pennsylvania, in 1776–77 he was a member of the New York legislature that prepared that state's constitution. In fact, Morris was a leading figure, second only to John Jay, in formulating the original draft of the New York constitution and guiding it through the legislature.<sup>22</sup>

It can hardly be doubted that, when he put his hand to the executive authorities submitted to the Committee of Style, Morris knew full well that his rearrangement followed the structure of his native state's constitution. And lest we forget, the Committee of Style also included one member, Alexander Hamilton, who represented New York and was presumably familiar with the details of its constitution. Scholars have long noted that the institutional provisions of the New York constitution that made for an unusually strong state governorship—a relatively lengthy three-year term, indefinite re-eligibility, and election by the people rather than by the legislature—were in some broad sense a model for the U.S. presidency.<sup>23</sup> We should not be surprised that that modeling extended to the specific executive authorities and their arrangement in the respective constitutions.

The importance of recognizing the parallel between the New York and U.S. constitutions is that the New York constitution explicitly groups the authorities of the chief executive into *powers* and *duties*. Article XVIII begins by naming the governor “commander-in-chief” and then stipulates that “he shall have power” to convene the legislature on extraordinary occasions, prorogue them temporarily, and grant reprieves and pardons. Article XIX begins “That it shall be the duty of the governor” and follows this with six specific provisions. It seems reasonable to conclude, then, that the provisions of Section 2 of Article II were understood by the Committee of Style as powers and the provisions of Section 3 as duties. It is these “powers and duties” that would now “devolve on the vice-president” in the case of the removal of the president from office, his death, resignation, or “inability to discharge” the responsibilities of office.

In its four days of deliberations on the Committee of Style’s draft, the convention made two changes to the president’s authorities, but both of these changes were in Article I on the role of Congress. Previously the convention had given Congress the power to appoint the nation’s treasurer. Now it removed this power from Congress, thus leaving it to the president, by a vote of eight states to three. The other change, which somewhat reduced presidential power, was a reduction in the ratio of votes needed to overturn a presidential veto from three-fourths to two-thirds.

How, then, does this powers-duties distinction help us in understanding the nature of the specific authorities vested by Article II in the American president?

### Interpreting Specific Presidential Authorities

In interpreting a particular presidential authority, one begins, of course, with the precise words used by the Constitution. We have argued that even at this level the powers-duties distinction is evident, with the use of “he may” or “he shall have power” to designate discretionary powers and “he shall” to designate duties. Yet if we are right that there is a principled distinction between the authorities of Section 2 and those of Section 3, then location within Article II may provide additional guidance. Note, for example, that the “he may,” “he shall have power,” and “he shall” language

vesting executive authorities in Article II corresponds closely, but not perfectly, with the division of specific authorities into Sections 2 (powers) and 3 (duties).

In Section 2, for example, three of the six grants begin with the statement that the president “shall have Power.” Another begins, “he may require the Opinion in writing,” implying a general discretionary authority to require opinions in writing—the equivalent of saying, “he shall have power to require opinions in writing.” A fifth provision, his military authority, is vested in the form of an office; yet by its own terms it is an office of command—that is, of power. (As noted above, the office of commander in chief may also imply certain duties.) The only grant in this “powers” section that seems to employ “duties” language is the appointment provision: “he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, when Appointments are not herein otherwise provided for, and which shall be established by law.”

Correspondingly, in Section 3 five of the seven grants use the mandatory term “shall” and only two use the more discretionary “may.” The uses of “may” refer to the related functions of convening and adjourning Congress: “he may, on extraordinary Occasions, convene both Houses, or either of them,” and when the branches cannot agree on the time of adjournment, “he may adjourn them to such Time as he shall think proper.” What, then, to make of these few exceptions to the overall scheme?

The inconsistency between the precise language vesting authority over making appointments, convening Congress, and adjourning Congress and the location of these authorities in Sections 2 and 3 may reflect, perhaps, their mixed nature. Consider first appointments. Does the president have a duty, a mandatory responsibility, to appoint the high officers of the government—“he shall nominate, and . . . shall appoint”—or is this a general discretionary power—as suggested by its location in Section 2? Certainly, it seems to be both. The president, for example, is not free not to nominate judges of the Supreme Court. If he were, he (with his successors) could let the institution expire by waiting until the last justice died or resigned. Moreover, were a president to do this, we would rightly say that he had not fulfilled his constitutional duty. The mandatory “shall”

language of the appointment clause drives this home. But the appointment authority gives the president some real discretionary power to shape American national government and especially his own administration. The president retains, of course, broad discretion as to whom to nominate for high office, and at least his appointees within the executive branch act to some degree as extensions of his own power and authority. His subordinates give him the means or ability to carry out his constitutional and legal duties. Without them, he would lack the “power” to fulfill his obligations.

An example from Andrew Jackson’s administration illustrates just how much real power over public policy the appointment authority, combined with the implicit removal power, can give a president. After successfully vetoing an 1832 statute rechartering the Bank of the United States, Jackson sought to hasten the death of the bank, whose charter had four more years to run, by having the federal deposits withdrawn and distributed to state banks. The problem was that legal authority over the federal deposits had been vested not in the president, but in the secretary of the treasury. To effectuate his policy Jackson found it necessary to remove from office two consecutive secretaries of the treasury, both of whom had refused to do his bidding. It took his third appointee, Roger B. Taney, then attorney general and later to become chief justice of the Supreme Court, to consummate Jackson’s desires. Here the “duty” to nominate department heads became the basis for enhancing “power” over public policy.

As for the limited authority to control the convening and adjourning of Congress, we may also ask whether these authorities are best understood as discretionary powers, as implied by the use of “may” in introducing them, or as duties, as suggested by their location in Section 3. These also appear to have a mixed character. If, for example, the authority to convene Congress “on extraordinary occasions” vests a pure discretionary power, then the president would be under no obligation to convene Congress at all during a national emergency, even if Congress were not scheduled to meet for many months. (The early Congresses typically met only three to six months per year.)

Consider in this respect the most “extraordinary Occasion” ever to face the American nation: the attempted secession of southern states and the outbreak of armed hostilities at the beginning of President

Abraham Lincoln's first term. When Lincoln assumed the presidency on March 4, 1861, seven southern states had already voted to secede from the Union. Five weeks later, on April 12, Confederate forces fired upon Fort Sumter in Charleston harbor and the Civil War began. At this critical moment, however, Congress was not in session, having adjourned on March 3, and was not scheduled to reconvene until December 2, 1861.<sup>24</sup> Under a strict reading of the president's convening authority, Lincoln was not required to convene Congress at all; for to say that "he may, on extraordinary Occasions, convene [Congress]" is to imply necessarily that he also "may not" convene them. Lincoln, it would follow, could have governed with a free hand for nearly eight months after war had begun.

The structure of Article II, however, shows us that this is too loose a reading of the President's authority to convene Congress; for its location in Section 3, with the other specific duties, points to the obligatory nature of this authority. The Constitution implies that the president has a positive duty to convene Congress when circumstances seem to warrant. And, indeed, Lincoln did call Congress into special session for July 4, 1861, or five months before the scheduled date. But note that Lincoln issued this call back in mid-April (in his April 15 proclamation that called out a militia force of 75,000 "To cause the laws to be duly executed"), allowing more than two and half months for the members to make their way to Washington. At a time when telegraphs and railroads were common, Congress surely could have been convened sooner. Implicitly obliged to convene Congress to deal with the national crisis, Lincoln used both the independence of his office and the discretion built into the convening authority to give himself a bit more leeway—and thus a bit more power to control the national government's response to the crisis—than would have been the case if Congress had been convened at the earliest possible moment. That said, Lincoln did call Congress back into session, fulfilling his obligation to give Congress the opportunity to fulfill its constitutional role to enact legislation regularizing the government's handling of this unprecedented crisis.

As for the president's apparently discretionary authority to adjourn Congress when the two houses cannot agree—"he may adjourn them to such Time as he shall think proper"—it must be noted that there may well be occasions when it is proper for the House and Senate to adjourn at

different times, when, for example, the Senate wishes to remain in session to consider appointments or treaties. The presumption, however, of locating this clause in Section 3 is that at bottom this is really an obligatory duty: if the House and Senate simply cannot agree when to adjourn, the president must act to settle the matter.

### Powers and Duties in Action: The Whiskey Rebellion

The early history of the presidency affords us an excellent example of the relevance of the powers-duty distinction to the exercise of executive authority: President George Washington's actions during the Whiskey Rebellion.<sup>25</sup> In 1792 resistance in western Pennsylvania to the recently passed excise tax on distilled liquor prompted Washington to consider extraordinary measures to enforce the law. "It is my duty," he wrote his secretary of the treasury, Alexander Hamilton in September, "To see the Law executed: to permit them to be trampled upon with impunity would be repugnant to it."<sup>26</sup> One week later the president, citing "The particular duty of the Executive 'to take care that the laws be faithfully executed,'" issued a formal proclamation exhorting the resisters to obey the law.<sup>27</sup> Although resistance subsided for a while, it flared anew in the summer of 1794.

Washington remained resolute in his determination to enforce the law. He required of his cabinet members written opinions as to what to do, and then, following Hamilton's advice, prepared to call out a militia force of 12,000 men.<sup>28</sup> In accordance with the law of May 2, 1792—"An Act to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections and repel invasions"<sup>29</sup>—the administration transmitted evidence of the resistance to Associate Supreme Court Justice James Wilson for certification that the laws could not be enforced by the ordinary judicial process and Washington issued a new proclamation stating the intentions of the government to enforce the law and calling for an end to the resistance. Before resorting to military measures, however, Washington made one last effort to defuse the insurrection peaceably. He sent a commission of three to the area of resistance to offer concessions to the resisters, including a general pardon for those who had not yet been indicted for violating federal law, in exchange for assurances of future compliance with the excise law.<sup>30</sup>

With the failure of these measures to restore order, the military operation commenced, a fact announced by Washington on September 25, 1794, in his third proclamation on the subject. The president acted, said the proclamation, “in obedience to that high and irresistible duty, consigned to me by the Constitution, ‘to take care that the laws be faithfully executed.’”<sup>31</sup> Washington joined the military force at Carlisle, Pennsylvania, and accompanied it part way to its destination. He supervised the training and organization of the forces, determined the order of command, and labored to instill a due sense of responsibility in the officers and soldiers.<sup>32</sup>

Clearly, Washington believed that the “take Care” clause of Article II, Section 3, imposed on him a duty—“that high and irresistible duty”—to enforce the law. To that end he employed all the powers granted to him in the first paragraph of Section 2: the powers to require opinions in writing, to grant pardons, and to command the military. Constitutionally granted powers, or means, were made to serve a constitutionally imposed duty, or end. The Constitution itself both imposed the duty and provided the means for fulfilling it.

We should note here just how broadly Washington interpreted the duty imposed by the “take Care” clause. At its narrowest, the clause—“he shall take Care that the Laws be faithfully executed”—could be understood as requiring little more than administrative oversight: taking care that those who actually execute the laws do so honestly, consistently, and in conformity with both the letter and spirit of the law. Yet Washington’s reading of the clause went far beyond this to embrace citizen obedience. That Washington so understood the clause and that he publicly announced this understanding on more than one occasion is itself powerful evidence that this broad interpretation was widely accepted at the time. And indeed, this view is quite consistent with the precise meaning of the verb “execute,” which from the Latin *ex* and *sequi* means, “to follow out.” Citizens themselves have a duty to follow out the law. When they obey the laws—by, for example, paying their taxes—they are contributing to the execution of the laws. It was, in fact, an essential element of early American republican thought that the principal way in which the laws are executed in a republic is through voluntary citizen obedience. As the Anti-Federalist Richard Henry Lee wrote, “In free governments the people, or their representatives, make the laws; their execution is principally the

effect of voluntary consent and aid.”<sup>33</sup> In a word, the people execute the laws by freely obeying them.

Thus, when the Constitution authorizes Congress to pass laws “To provide for calling forth the Militia to execute the Laws of the Union,” this has, of course, nothing to do with using military force against recalcitrant or corrupt executive officials and everything to do with enforcing popular obedience to the laws. Similarly, in language even closer to the president’s duty to “take Care that the Laws be faithfully executed,” Congress in 1807 passed a law authorizing the president to use the nation’s military “for the purpose of . . . causing the laws to be duly executed” whenever there was an “obstruction to the laws, either of the United States, or of any individual State or Territory.” It would be odd indeed if the congressional language “causing the laws to be duly executed” referred broadly to ensuring citizen obedience, but the constitutional language “take Care that the Laws be faithfully executed” applied only to administrative oversight.<sup>34</sup>

This interpretation of Washington’s actions during the Whiskey Rebellion in light of the powers-duties distinction of Article II also sheds important light on the commander-in-chief clause. In *Federalist* No. 69 Hamilton argued that the commander-in-chief authority “would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy.” By “nothing more” Hamilton meant that a U.S. president, unlike a British king, could not on his own authority declare war or raise armies and navies, since these authorities were specifically assigned to the Congress by the Constitution. Modern scholars often cite this as evidence that Hamilton understood the commander-in-chief power narrowly. Yet there is nothing in Hamilton’s formulation to deny that a president may properly use his power of military command to serve duties constitutionally assigned to him, such as taking care that the laws are faithfully executed or, from his oath, preserving, protecting, and defending the Constitution.

The opening clause of Section 2 of Article II places the military might of the nation in the hands of the single person who occupies the executive office. This is power in its most obvious, awe-inspiring, and potentially dangerous form. In itself the commander-in-chief clause does not define the ends to which military command may be put, although it may

well imply responsibilities for the proper management of the military forces. In a word, military command is a means, or power, placed in the president's hands to serve the ends, or duties, associated with his office. These duties are found elsewhere in Article II, and are limited, of course, by Congress's constitutional powers to raise and support military forces and to declare war.

### Powers and Duties Writ Large

The centrality of powers and duties to the framers' understanding of the executive office is evident in more than the distinction between Sections 2 and 3 of Article II. Indeed, both Section 1, standing alone, and Article II as a whole begin with considerations of power and end with concern for duty. Section 1, for example, begins with the vesting of the "executive Power," and it ends with the two great duties imposed by the oath of office: to "faithfully execute the Office of the President of the United States" and "to the best of my Ability, preserve, protect and defend the Constitution of the United States." As is well known, the Constitution imposes this second overarching duty on no one but the president. All other federal and state legislators and executive and judicial officers are required to take an oath only "to support this Constitution." The president's unique duty to "preserve" the Constitution might well authorize actions that a less emphatic duty merely to "support" it would not.

Why give this special responsibility to the president? Because he, and only he, possesses the nation's "executive Power." "The power of directing and employing the common strength," Hamilton wrote in *Federalist* No. 74, "forms an usual and essential part in the definition of the executive authority." Once the great executive power has been placed in a single hand, the oath is necessary both to ensure that that power will be safely exercised—that it will not be used to subvert the Constitution—and to stimulate the occupant of the office to use his energies "to the best of [his] Ability" to preserve the constitutional order.

Finally, where Article II as a whole begins by vesting executive power, it ends by defining the price a president may pay for violating his duties: removal from office upon impeachment by the House of Representatives and conviction by the Senate. The specific offenses that can lead to this result are "Treason, Bribery, or other high crimes and Misdemeanors."

When the Committee of Detail drafted its constitution in early August, it revised the standard for impeachable offenses from “malpractice or neglect of duty,” previously passed by the delegates, to “treason, bribery, or corruption.”<sup>35</sup> Some weeks later the Committee on Unfinished Business dropped “corruption,” leaving only “treason” and “bribery.”<sup>36</sup> This is how matters stood as late as September 8, when the issue came before the delegates. Here George Mason objected that as the clause then stood “many great and dangerous offenses” were not covered. Mason noted specifically that the “treason and bribery” standard would not have reached the case of Warren Hastings, the former British governor of India who was then undergoing lengthy and highly contentious impeachment proceedings in the British House of Commons. “Attempts to subvert the Constitution,” Mason argued, ought to be impeachable but might not amount to “treason or bribery.” To broaden the standard to cover such cases, Mason proposed adding “maladministration” as an impeachable offense. In the face of an objection from Madison that this would be “equivalent to a tenure during pleasure of the Senate,” Mason withdrew “maladministration” and substituted “other high crimes and misdemeanors against the State.” This was then changed to “against the United States,” which phrase was dropped entirely a few days later by the Committee of Style.<sup>37</sup>

Although we have very limited evidence as to how the framers understood “high crimes and misdemeanors,”<sup>38</sup> at least this much can be said: All agreed that a president who committed either of the two political crimes, treason and bribery, ought to be subject to removal from office. Yet there appeared to be other dangerous acts, potentially subversive of the Constitution itself, that were not actually treason or bribery but were more serious than general maladministration. Such subversive acts would obviously be contrary to the president’s high duties to faithfully execute his office and to preserve, protect, and defend the Constitution. The duties in the president’s oath of office, imposed on him alone among all those in positions of public trust, constitute the ultimate standard against which to judge his stewardship.

## Conclusion

As we noted at the beginning, many who are otherwise impressed with the framers’ legal craftsmanship tend to withhold their praise from Article

II of the U.S. Constitution. They believe that there is no particular rhyme or reason to its content and structure, that its particular authorities were vague and were assembled more or less randomly. But, on its face, does this make sense? Does it comport with what we know about those who crafted the Constitution?

The framers of the country's second constitution knew perfectly well that in establishing a largely independent, unitary chief executive with a potentially unlimited tenure in office, they were breaking new ground. As men of broad experience in matters of law and government, it seems unlikely that they would have settled for a haphazard construction of the president's essential authorities. That we have forgotten how to read Article II properly probably owes more to the fact that, for the framers, the distinction between powers and duties and the logic connecting them were so obvious that no extended explication or commentary was required. As we have seen in the case of Washington and the Whiskey Rebellion, this understanding of the president's authorities was indeed part of the governing grammar.

Reading Article II as we have remains highly relevant today. Consider, for example, the president's pardon power. On first glance at the Constitution, it appears to be a plenary power; for the Constitution does not limit whom the president may pardon or for what federal crimes (except that he may not pardon in cases of impeachments). But what if a president were found to have granted a pardon to cover up his own role in breaking the law? What if a president opposed to "criminalizing" some behaviors punishable under federal law pardoned everyone convicted under the applicable criminal statute? Wouldn't such a president have violated both his specific duty to "to take Care that the Laws be faithfully executed" and his larger obligation to "faithfully execute the Office of President"? Having violated those duties, wouldn't this president legitimately face impeachment and possible removal from office? It is the logic of Article II that powers serve duties, and that a serious violation of duty may justify impeachment.

The Constitution, as we have pointed out, gives the president a unique oath, and therefore a unique responsibility. Once the new government was functioning in 1789, plans were drawn up to give the president a home to live in—the only constitutional officer so privileged. Both the president's oath and his home point to the exceptional nature of the executive

office. It is the one branch of government that operates, as we say, 24/7. It should be no surprise then that the framers took some care in crafting not only the institutional features of the new “energetic” executive but also the office’s specific authorities. Read as intended, Article II’s interplay of powers and duties should remind us not only of the president’s potentially expansive authorities, but also of the large and specific responsibilities that inform and limit how he should exercise them.