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ABSTRACT

ORIGINS OF THE AMERICAN PRESIDENCY: A STUDY IN EXECUTIVE THEORY

By

Joseph Addison Warren III

For nearly two hundred years scholars and politicians have been debating what the Founding Fathers intended when they created the presidency. Few have taken the time to examine in depth the nearly two centuries of experience the Americans had with executive theory prior to writing the Constitution. While a number of monographs have been written on various aspects of that experience, there has been no extensive integration of primary and secondary sources to see whether there was any consistent patterns from which the delegates to the Constitutional Convention fashioned the presidency. This study undertakes to do that by examining the period from the founding of the American colonies to Washington's first appearance before Congress under the new government.

The conclusions of this study indicate three distinct periods of executive experience from which the Americans established the principle of a limited responsible executive. The first era comprised the seventeenth century in which commercial companies were transformed into political entities under strong governors possessing extensive powers. In spite of the wide range of power given to the governor, the Americans

legitimatized the principles of executive unity, a written delegation of powers, and the belief that the executive was responsible for his actions. His discretionary authority in this period was tempered more by his superiors in London than by popular restraint, except in the case of Massachusetts.

In the eighteenth century the colonial assembly reduced the political power of the royal governors by forcing them to bargain for their salary and other measures of support. When the political differences between England and the colonists became insurmountable, the Americans formed their own provincial governments, which made the governor irrelevant. Even though the governor's constitutional powers were still basically intact, his political ability to carry them out was irreparably destroyed.

In the century preceding the Revolution, numerous attempts were made to unite one or more colonies under a common executive. Aside from the various political or military factors which militated against such unions, there was the problem of having a common executive over colonies with different constitutions. While the executive's military powers could be delegated to another officer, Americans were unwilling to let an outside civilian executive operate without the requisite constitutional safeguards.

During the second phase in the development of American executive theory, between the Declaration of Independence and the Constitution, the executive and legislative roles were reversed. Now the legislature was the engine of government, not the executive. Since the state constitutions were considered to be temporary expedients

until the war was settled, the governor was given just enough constitutional authority to protect the state during the course of the war. The framers thought it best to err on the side of too little authority, since it could always be increased by statute or constitutional amendment. The state constitutions were the first experiments the Americans had in formulating their own executives. As such, they were modeled on the principles developed in the previous century and they later served as the source for most of the provisions of the presidency.

On the national level, several important developments took place in executive theory. The Continental Congress underwent a number of reorganizations finally culminating in the establishment of the major executive departments under unitary heads who were not members of Congress. Attempts to create a national executive by the Committee of States failed. Also the President of Congress never attained much power.

The most significant development in this period was the office of commander-in-chief. General Washington became the de facto national executive since he was the central cog in the apparatus which tied military and civilian, national and state organizations together. His experiences not only showed the need for a national unitary executive, but also provided him with invaluable training for his future presidency.

The third phase in the development of American executive theory came with the Constitutional Convention. Using their historical experience, the delegates fashioned the presidency in such a way as to

protect it from legislative encroachments, yet give it sufficient energy to carry out its duties within a well defined and limited sphere. More importantly, the phrase "The executive power shall be vested in a President" was not meant to be a general grant of power, but it merely identified where the executive power resided. This followed the eighteenth-century American practice of constitution writing whereby the authors identified who held the power followed by a specific enumeration of powers. The few important powers granted to the President were to be shared with the legislature which required him to seek "the advice and consent" of the Senate. Thus the presidency envisioned by the Founding Fathers was well within the American tradition of a limited responsible executive. His powers and duties were clearly and precisely enumerated, not, as some writers contend, vaguely written, thereby justifying an expansive interpretation of the President's power.

While Washington did exert some influence over the Convention's deliberation on the nature of how the executive ought to be written, the delegates were far too practical to commit the nation's future to one man without providing the necessary safeguards to protect the people from the presidents who might come after Washington.

The ratification debate over the presidency was carried on in the context of whether the people were properly protected from executive abuses. The anti-Federalists argued that human nature was such that extensive checks had to be written in the Constitution, while the Federalists argued that the President's power was sufficiently checked and limited to be well within the American tradition of a responsible executive.

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To My Parents

In grateful appreciation for their many
years of encouragement and support

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PREFACE

For nearly two hundred years the American Presidency has been an enigma to scholars and politicians alike. There have been literally thousands of books and articles written about the office and its occupants. Yet the presidency continues to be the source of vigorous debate over what was intended by the founding fathers. Presidents have tried to stretch the constitutional provisions of the office to fit their policies and programs, while critics have been just as eager to check the office and its occupants. The scholars are caught between. Many of their writings are influenced by presidential actions while their conclusions are used as justification for one side or the other in the various disputes over the office.¹

The issues raised by the continued debate over the nature of the presidency focus on the very heart of the present-day American political system. The urgency with which various advocates raise their concerns suggests what is at stake. As one observer noted, "it is upon the American President more than any other figure in the world, are

¹Two examples of this phenomenon are Edward S. Corwin, The President: Office and Powers, 1787-1957 (New York: 1959) and Arthur Schlesinger, Jr., The Imperial Presidency (Boston: 1973).

centered man's hopes and fears for survival, freedom, and the good life."²

Yet, in all the controversy which surrounds the debate over the nature of the presidency, few writers have taken the time to examine in depth the origins of the office. Many relegate that aspect of its history to a few well worn assumptions and move on to other topics. Those few writers who have addressed themselves to the problem of origins invariably disagree. It is therefore important for someone to survey the existing literature, sort out the essential issues, reexamine the era in which the office was established, and draw some conclusions as to its intended nature. It is the purpose of this dissertation to lay the groundwork for what the author hopes will be renewed interest in this area of presidential scholarship.

Traditionally disputes between scholars over the presidency have centered on five major areas. The first concerns the general nature of the presidency. Did the Constitutional Convention of 1787 have a definite expectation or did they intend for experience to define the basic nature and function of the presidency?

The second area concerns the institutional and organizational structure of the presidency. Did the Convention assume the constitutional provisions of the office to be reasonably complete or did they

²Louis W. Koenig, "More Power to the President, Not Less," New York Times Magazine (January 3, 1965), reprinted in The American President, Sidney Warren, ed. (Englewood Cliffs, N. J.: 1967), pp. 102-103.

loosely organize the presidential provisions in Article II leaving experience to solidify the structure?

The third area of disagreement is over the powers and duties of the president. Did the delegates have a common and definite conception of what executive power included prior to, during, and at the close of the Convention? Did the Convention intend for the president to be limited only to the powers outlined in Article II plus the veto power in Article I? Additionally, did the Convention intend a grant of power in the phrases, "The executive power shall be vested in a President," and "The President shall take care that the laws be faithfully executed"? That is to say, was the president given a general grant of executive power with its limits to be decided by either Congress or experience? Or was the president limited to exercising only those powers specifically stated in the Constitution? And, finally, what limits did the Convention intend to place on the commander-in-chief and treaty-making powers?

Allied to the questions raised in the third area of concern are the ones related to the relationship between the three branches of government. For example, did the Convention provide for a specific relationship between the president and Congress? If so, was the relationship to be one of equal standing or was the president to be subordinate to Congress to act merely as its instrument to carry out its policies? Finally, was the presidency designed to be the counter balance to legislative supremacy?

The fourth area of disagreement between scholars is over the models used by the Convention in creating the presidency. Some contend that the Convention used the English monarchy as the basic model,

adapting its features to the American experience. Those who argue this approach disagree among themselves as to whose concept of the monarchy was used. On the other hand, another group insists that the presidency is based on the American experience, citing examples from the colonial to the Revolutionary War governor. Others believe that the presidency is a hybrid of the Anglo-American experience. Still others assert that the presidency was modeled on, and created for, George Washington, who, they maintain, was expected to be its first occupant. Finally, there are those who contend that the Convention created a novel experiment in executive organization.

The final major area of disagreement is over the function of the president. Was the creation of the office a response to the administrative problems faced by the Congress under the Articles of Confederation? If so, what was the intended relationship between the president and the administrative heads of government? Additionally, was the president's primary areas of responsibility considered to be the handling of foreign affairs and executing the law? Or did they intend for him to have a more general policymaking role within the government?

Related to the above significant points of difference are two collateral issues. The first is whether the method of electing the president was intended to be democratic or undemocratic. The second is whether the presidency was itself intended to be democratic or undemocratic in its organization and operation.

This dissertation discusses the foregoing points of contention by a chronological examination of the events from the granting of the charter establishing Jamestown in 1606 to the beginning of George

Washington's first administration. The purpose is to establish what experiences and precedents comprise the development of American executive theory and how that might be used to explain the creation of the presidency in 1787. The organization of the dissertation is, therefore, along the following format.

Chapter I examines the development of American executive theory in the seventeenth century. A detailed discussion of the Virginia and Massachusetts experience provides the two basic examples of how governorship emerged from being primarily a manager of a corporate enterprise to a political institution in that century. A briefer discussion of the proprietary governorship is offered since it followed the same general pattern experienced by Virginia and the other royal colonies.

Chapter II continues the development of executive theory to the reorganization of the empire in 1763 by discussing the interaction of the constitutional elements of the governorship with the political environment in which it operated.

Chapter III discusses the various plans of colonial union proposed during the period from the Glorious Revolution to the reorganization of the British empire in 1763. The main emphasis is on the problems of uniting two or more colonies under a single executive.

Chapter IV analyzes the colonial governorship in the period from 1763 to the eve of the American Revolution. These years saw the political climate in which the governor operated change drastically. This era also produced some definitive ideas about the executive in the minds of Americans which they later incorporated into the first state constitutions.

Chapter V continues the discussion of colonial union from the reorganization of British Empire through the organization of the Continental Congress to the year 1781. In this period Americans were forced to unite, establish a central government, and provide for a national military leader to fight the Revolution. General George Washington's role in national affairs during this period provided a unique insight into the problems of creating a national executive.

Chapter VI examines the writing of the first state constitutions. This was an extremely important period as Americans incorporated their experiences and theorizing into written documents establishing their state governments for the first time. The purpose of this chapter is to identify and analyze the various factors used by the framers of these constitutions to construct the executive power.

Chapter VII discusses the problems of the Confederation period as Congress tried to reorganize itself to meet the peacetime needs of the nation. It examines the development of the administrative arm of Congress and the office of President of Congress as models of executive organization on the national level.

Chapter VIII analyzes the preliminary considerations and fundamental assumptions of the delegates prior to the constitutional convention debates over the organization of the executive branch. George Washington's influence on the convention is also considered.

Chapter IX develops the creation of the presidency in the Constitutional Convention. It looks at the step-by-step deliberations of the delegates to identify their train of thought as to what they intended the office to be in light of the questions raised earlier.

Chapter X discusses the ratification debates to establish the Federalist and anti-Federalist interpretations of the office. Also Washington's initial concept of the office is developed and examined during this period as he came to realize and accept that he would be the first president under the new Constitution.

Chapter XI summarizes the nearly two centuries of American executive theory and its final culmination in the creation of the presidency in an effort to answer the questions discussed above as to the intention of the founding fathers.

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CHAPTER I

AMERICAN EXECUTIVE THEORY:

The Seventeenth Century Foundations

The foundation of American Executive Theory began with charting of a joint stock company in 1606. Several charters later this commercial venture formed a pattern of executive organization and power which laid the foundation for future development of executive theory throughout the colonial period.

The English joint stock company concept reached a point of maturity during the reign of the Tudor's. The charter of Elizabeth I for the East India Company in 1600 marked a refinement of a precise nomenclature for joint stock companies which lasted until the end of the reign of Charles I. For the most part, companies chartered after 1600 granted power to the "Governor and Company" or the "Governor and Society" to undertake specific enterprises. The East India Company's charter, for example, provided no more than the legal basis for its trading activities since its continued existence depended not on its trading capital but on its annual election of the governor, the court of committees, and the other corporate officials. The assumption was that if the state could guarantee a continued constitutional framework of adequate and legitimate power the company's merchants could be expected to organize the details of trade. Additionally the governor

and court were given a wide range of discretionary powers to regulate the internal affairs of the company as was the case with most other companies chartered at this time.¹

The accession of the Stuarts to the throne marked a general tightening of royal control over joint stock companies. The charter that James I granted to the London Company in 1606 kept the company and colony directly under the control of the Crown, and not the Crown and Parliament together, as was the case with England itself. James decreed that the reigning monarch or his "heirs and successors" retain the power to "ordain and give" such additional instructions, laws, and constitutions as they thought necessary, unless they saw fit to delegate their power to others.²

The London Company's first charter provided for two councils. The first was appointed by and was directly responsible to the king, and its membership could be altered by him at will. This thirteen-man body resided in England and was responsible for "the superior managing and direction only of and for all matters that shall concern the government" of the colony. It was authorized to appoint a second thirteen-man council to reside in the colony "to govern and order all matters and

¹See K. N. Chaudhuri, The English East India Company: The Study of an Early Joint-Stock Company, 1600-1640 (London, 1965); W. E. Lingelback, The Merchant Adventures of England: Their Laws and Ordinances with Other Documents (New York, 1971); and William Rovert Scott, The Constitution and Finance of English, Scottish, and Irish Joint Stock Companies to 1720, 2 Vols. (Gloucester, Mass., 1968).

²Bennjamin Perley Poore, The Federal and State Constitutions, Colonial Charters, and other Organic Laws of the United States (Washington, 1878), II, 1889.

causes which shall arise, grow, or happen to or within the same several colonies," according to the laws, ordinances, and instructions, given and signed "under the Privy Seal of our realm of England."³

The council in Virginia was in turn authorized to elect a president for a term of one year. He could be removed by a majority vote by either council "upon any just cause, either absence or otherwise." On the death or removal of a president or council member, the council in Virginia was authorized to elect another so that there would always be a president and thirteen council members. The president was specifically prohibited from serving more than one consecutive term, but could be reelected after an intervening year.⁴ He had one vote on the council as governor, and a second vote as a council member in case of a tie.⁵

The president was required to see that all the orders and instructions from the king, privy council, and London Company were faithfully and thoroughly carried out. He also was authorized to "rule and command" all officers, soldiers, and citizens in the colony in conformity with the regulations established for him by the king and council

³Ibid.

⁴This could be circumvented as Captain John Smith did by having a successor elected and then resign immediately. See Philip Alexander Bruce, Institutional History of Virginia in the Seventeenth Century (Gloucester, Mass., 1964), I, 300.

⁵Instructions reprinted in The Early Charters of the Virginia Company with Seven Related Documents: 1606-1621, Samuel M. Bemiss, ed. (Williamsburg, Virginia, 1957), p. 15.

in London. Additionally, he was, with the help of the council, to prevent him from severing allegiance to England.⁶

The president and council were given judicial authority to hear, try, and punish offenders in the colony. The article of instructions and orders specifically listed crimes of "tumults, rebellion, conspiracies, mutiny, and seditions in those parts which may be dangerous to the estates there, together with murder, manslaughter, incest, rapes, and adultery" which were punishable by death.⁷

The instructions also laid down the procedure by which the president and council were to conduct these judicial proceedings. Twelve "honest, and indifferent persons sworn [sic] upon the Evangelists," were to act as a jury appointed by the president and a majority of the council. Upon conviction or confession of guilt, the president and a majority of the council "shall have full power and authority by these presents to give judgment of death upon every such [offender]."⁸

The president and council were given general authority to try and punish all other crimes and civil offenses not specifically listed in the instructions. In these cases the president and a majority of the council could punish offenders "either by reasonable corporal punishment and imprisonment or else by a convenient fine, awarding damages, or other satisfaction to the party grieved." Additionally, the president and majority of the council were empowered to punish "all manner of

⁶Ibid.

⁷Ibid., p. 16.

⁸Ibid.

excess, through drunkenness or otherwise, and all idle, loitering and vagrant persons" in the colony.⁹

The other powers granted to the president and council concerned the economic conditions of the colony. This included the appointment of various local officials, whose terms of office were generally longer than that of the president himself.¹⁰

Finally, the president and council possessed legislative discretion to cover contingencies not listed in the charter or instructions. A majority of the council with the president could "lawfully . . . constitute, make and ordain such constitutions, ordinances, and offices for the better order, government, and peace of the people . . ." in the colony. The only prohibition was that the laws did not touch any "party in life and member and were within the scope of the legislative power granted to the London Company by its charter." Otherwise, they would remain in effect until overruled by the council in England.¹¹

The distribution of powers under the first charter was extremely awkward. The colonists, for example, were under three specific areas of authority. They were equally subject to the personal authority of the king, the regulation of a distant commercial company, and finally to the immediate supervision of a president and council not of their choosing. At all levels the colonists themselves had no formal voice in their fate. Additionally, this structure denied even the stock holders

⁹Ibid., pp. 17-18.

¹⁰Ibid., p. 19.

¹¹Ibid., p. 21.

of the company direct control over many important aspects of the company's operation.¹²

The final undoing of this colonial venture resulted from the continuous quarreling of the members of the first council appointed in Virginia as they tried to increase their personal power at the expense of the colony. After this dismal beginning the members of the company were forced to apply for a new charter.

The failure of the company's first colony venture was ascribed as much to the form of government as it was to the acrimonious behavior of the council members. A broadside published in 1609 to stimulate further emigration to the colony noted the previous failure. "Experience of error in the equality of Governors, and some out-rages, and follies committed by them, had a little shaken so tender a body," it claimed. The source of the problem came from two "roots," it concluded, "The Form of Government, and length and danger of the passage."¹³ A sermon preached before the company council in 1610 also concluded that "the

¹²One historian, over a century later, observed the following about the arrangement of authority in the colony: "It seemed certain, that though such exertions of prerogative were common in that age, a king of England could not more exercise a legislative authority over English subjects, because they had removed to a distant territory of the state, than over Englishmen within the realm. For the privilege of both had been derived from the same great charter. Such then was the rotten foundation where upon was erected, with no great skill, the superstructure of the Virginian immunities and laws." George Chambers, Political Annals of the Present Colonies. . . . (London, 1780, reprinted New York, 1868), p. 17.

¹³"A True and Sincere Declaration of the Purpose and Ends of the Plantation begun in Virginia. . . .", reprinted in Alexander Brown, Genesis of the United States (Boston, 1890), I, 342.

principle (if not the only) wound in this business hath been the want of government."¹⁴

The Charter of 1609 ended the imperial form of organization and passed political management of Virginia to the London Company. James I was not pleased at the transition, but the only alternative was to sustain the colony from his own treasury or let it fall into total ruin. In return for delegating his power, James expected a substantial return from customs paid on imports from the colony. To induce investment in the company he agreed to allow greater participation by its members through a more liberalized charter.

The 1609 Charter established "a corporation and body politic" under the direction of a "Treasurer and Council." This time they were primarily agents of the company and not the king, as he had delegated to the company his right to draw up all the orders, instructions, and constitutions for the administration of the colony's affairs. However, the king retained the right to veto any appointment and continued to require an oath of allegiance on the pain of disqualification, which proved troublesome for the company later on. The company's rights and powers over the colony were broadened far beyond those granted in the

¹⁴"Crashaw's Sermon" reprinted in Brown, Genesis, I, 365. See also John Smith's "Testimony to the Commission Appointed to Investigate the Affairs of the Virginia Company," on the defects of the government. "The multiplicity of opinions here, and officers there, makes such dealings by question and formality, that as much time is spent in compement as in action. . . ." Jack Lankfor, Captain John Smith's America (New York, 1967), p. 159. Also George Chambers concluded, "Alteration of systems is sufficiently pernicious in the best established government; but, in an infant colony, frequent change of government is extremely destructive: And owing to this, among other causes, the prosperity of Virginia was greatly retarded," Political Annals, p. 35.

1606 charter. They were authorized, in essence, to "correct, punish, pardon, govern, and rule" all people who were to settle in Virginia.¹⁵

The colonial plan of government was completely altered. The former president and council were replaced by an all-powerful governor, elected for life, who ruled under the authority of martial law. He was authorized to "have full and absolute power and authority to correct, punish, pardon, govern and rule all such subjects [of the colony] according to such order, ordinances, constitution, directions and instructions by our said Council." The governor was also given discretionary power to cover defects or omissions in his office in capital, criminal, civil offenses, so long as they were agreeable to the laws, statutes, and governmental policies of England. Additionally, the governor was given full power and authority to "use and exercise marshal law in cases of rebellion or mutiny in as large and ample manner as our lieutenant in our counties within our realm of England. . . ."¹⁶

The instructions required the governor to play the part of the chancellor rather than a judge when he exercised his judicial authority.¹⁷ In capital and criminal cases of rebellion and mutiny he was required to invoke martial law "according to your commission as of most dispatch and terror and fittest for this government (sic)." In all other cases of criminal or civil authority the instructions stated

¹⁵Bemiss, Early Charters of Virginia, p. 27.

¹⁶Ibid., p. 53.

¹⁷The term chancellor, as used in this context, probably meant that the governor was to be the chief justice, rather than a trial judge.

that

you shall find it proper and useful for your government to proceede rather as a chancellor than as a judge, rather upon the natural right and equity than upon the nicenes and letter of the law which perloexeth in this tender body. . . .

It went on to admonish the governor to

dispatch all causes so that a summary and arbitrary way of justice discretely mingled with those gravities and forms of majesty as shall in your discretion seem [most] apt for you and that place, [and] will be of most use both for expedition and for example.¹⁸

The governor was also required to maintain and disseminate the symbols of his authority.

You shall for the more regard and respect of your place, to beget reverence to your authority and to refresh their minds that obey the graviety of those laws under which they were borne; at your discretion use such forms and ensigns of government as by our letters-patents we are enabled unto you.

Additionally, the instructions gave the governor the "power to make, add or distinguish any laws or ordinances at your discretion . . ." necessary to the maintenance of respect for the governor's authority. He was admonished to listen to all opinions and complaints, but once he had decided upon a course of action

do not impart [it] to any [one] whatsoever, but to such only as shall execute it, and to them also under the seal of your commandment and but at the instant of their parting from you or the execution of your will.

Finally, the governor was authorized to have "the attendance of a guard upon your person."¹⁹

¹⁸Bemiss, Early Charters of Virginia, p. 58.

¹⁹Ibid.

Contemporary records indicate a belief that one of the reasons that the original colonial experiment failed was because the colonists lacked discipline. This would explain why the governor's instructions combined both a civil and military code designed to keep freedom of action to an absolute minimum. One observer noted that the instructions given to Governor Dale, for example, were intended to order the colonists' activities along a military routine. This, company officials argued, would create necessary direction of labor to make the colony successful.²⁰

Lord Bacon, a member of the council in London, expressed his opinion on the wisdom of limiting authority to the governor and a few advisors in his essay "Of Plantations." He said that

For government, let it be in the hands of one, assisted with some counsel; and let them have commission to exercise martial laws, with some limitation, and above all, let men make that profit of being in the wilderness, as they have God always and his service before their eyes: let not the government of the plantation depend upon too many counsellors and undertakers in the country that planteth, but upon a temperate number: and let those be rather noblemen and gentlemen, than merchants; for they look ever to the present gain.²¹

Additionally, the governor had the power to appoint and remove a council of advisors. His instructions required him to summon and consult the council in all matters of importance and to "proceede therein with their advice." The governor was also authorized to appoint and

²⁰For example see "A True Declaration of Virginia," reprinted in Peter Force, Tracks and Other Papers (Gloucester, Mass., 1947), III, No. 5. Also see "Council in Virginia to Virginia Company," reprinted in Brown, Genesis, I, 402-3.

²¹Brown, Genesis, II, 801.

remove any other officer that was needed and was not otherwise provided for by the council in London.²²

Finally, the instructions gave a detailed list of non-political duties the governor was required to perform. These included specific orders on organization of the colonial economy, defenses, and peace treaties with the local Indians. The governor was especially advised to keep the council in London informed as to all the mail sent and received by the colonists as well as what was shipped into or out of the colony so that "our fleets come not home empty nor laden with useless merchandise."²³

The function of the governor up to this point was basically to manage a large commercial venture. The failure of past efforts to make a profit necessitated this drastic alteration of management methods. However, as the colony increased in size the governor's political function began to supersede his commercial functions as he delegated the latter to subordinate officers.

Not long after the 1609 Charter took effect it became evident that further changes were necessary. Economic crisis turned into political problems for the company and they were forced into a third revision of the charter. The Charter of 1612 expanded the colonial territory and made a number of changes which "our said former letterspatent do not extend so far as time and experience hath found to be need[ed] and convenient." Among these were new laws and administrative procedures which

²²Bemiss, Early Charters of Virginia, p. 52.

²³Ibid., p. 66.

began to pull the colony together into a more cohesive political unit.²⁴

A number of significant changes were made in the governing of colonial affairs by the Charter of 1612. The power of the general assembly of adventurers was broadened to give them a greater voice in governing the company and colonial affairs. Prior to the 1612 Charter they were primarily limited to electing members of the council and determining the apportionment of land. Under the new charter they were authorized to elect all officers of either company or colony, to admit new members to the company, and to draft laws and ordinances for the colony's welfare. More significant was the fact that the general court of adventurers displaced the council as the governing body and turned the former council into the court's executive agent.

By 1618 events again conspired to force a change in the company's charter. Governor Argall had grossly abused his powers which brought to the fore much of the resentment with the way the colony had been operating. Additionally, political disputes between the Crown and Parliament were mirrored in the governing councils of the company. Finally, Sir Edwin Sandys, an outspoken critic of the king's prerogative, led a faction which seized control of the company in 1618. While the colony could have continued to operate with its system of governor and council, Sandys wanted to remove the remaining effects of Governor Argall's misrule. Moreover, he wanted to abandon the monopolistic policy of the company and its plantation type colony. In its place he sought

²⁴Ibid., p. 77.

to establish a colony which could grant land under easy conditions to stimulate emigration while at the same time give the colonists the widest possible freedom of trade. This, he hoped, would secure the full cooperation of the colonists and assure the colony's success.

Under Sandys' guidance the general court of the company reorganized the colonial government. The instructions sent with Governor Yeardley in 1618, which was sometimes known as the "Great Charter,"²⁵ called for an equal and uniform government consisting of "two supreme councils." The first was chosen by the company in England and consisted of a governor and council. The governor and lieutenant governor were nominated and elected by members of the company assembled in a quarter court for a term of three years, which could be extended to six at the company's pleasure.²⁶ The second was a council of state in which two burgesses were chosen by the planters from each town and colony. The governor and council met with the representatives in a joint assembly presided over by the secretary of the colony. The governor had the power to summon the burgesses "once yearly and no oftener but for very

²⁵Ibid., p. 95.

²⁶One author noted the need to "season" a governor, hence a reason to give him a longer term. "The General Assembly, writing to the Privy Council in 1623, protested against the limitation of the term to three years--the period adopted in actual practice--on the ground that, during the first year, this officer was almost invariably disabled more or less by the sickness incidental to his 'seasoning'; and that during his third, he was making preparations for his departure for England, and, in consequence, was not disposed to give the strictest attention to the performance of his duties." Bruce, Institutional History of Virginia, III, 310-311.

extraordinary and important occasions." Additionally, he possessed veto power over acts of the assembly.²⁷

The events between 1618 and 1621 were not only important for the Virginia company, but they marked a significant period for American constitutional history. Governor Yeardley's instructions authorizing the first representative assembly was the beginning of representative democracy in the colonies. Two years later the company codified a series of rules for the permanent administration of the colony's affairs. This was considered by some to be the first rudimentary constitution in American history.²⁸

From 1621 to 1624 the experiment in Virginia colonial government came full circle. The instructions given to Governor Wyatt in 1621 created a model form of government designed by the ablest minds of the company. It included a governor and council of state who were appointed by the company, and a general assembly to be convened at least once annually, which was composed of the governor, council, and bur-gesses.²⁹

The powers conferred upon the governor became a model for future executive grants. Like past instructions he was given "absolute power and authority . . . to direct, determine and punish at his good

²⁷Bemiss, Early Charters of Virginia, p. 95.

²⁸See Bruce, Institutional History of Virginia, II, 248; Alexander Brown, English Politics in Early Virginia History (Boston, 1901), p. 41; and Alexander Brown, First Republic in America (Boston, 1898), p. xix.

²⁹Bemiss, Early Charters of Virginia, pp. 109-125.

discretion any emergency business, neglect or contempt of authority" Again, like past instructions, the governor had the veto power over acts of the assembly. Moreover, the governor had his power in the council reduced from two votes to just "a casting voice if the number of councilors should be even or should be equally divided in opinion." However, it was not clear whether the company intended the governor to be independent or merely the first member of the council.³⁰

Additionally, the instructions created a new executive office known as the treasurer of the colony. His responsibility was to oversee the production of staple commodities necessary to the survival of the colony. In the past this duty was assigned to the governor, but repeated problems led the company to reevaluate the governor's role. The instructions noted that past failures were caused "in part by our charging the governor with too much business."³¹ Relieved from responsibility for specific economic concerns, the governor could devote more time to solving political problems. This marked an important step in the transition of the governor from a manager or supervisor of an essentially commercial venture to an executive head of a settled political community.

The company's awareness of the need for a responsible executive to head the colony is demonstrated in the detailed instructions for the immediate replacement of a governor who failed to fulfill his term of office for one reason or another. Upon the death or removal of

³⁰Ibid., p. 123.

³¹Ibid., p. 112.

the governor the council had fourteen days to elect one of their members as acting governor. If a majority could not agree, the instructions established a line of succession. First came the lieutenant governor, then the marshal, treasurer, and finally "one of the two deputies . . . until the place of governor be settled on [one] of our said chief officers."³²

Thus, by 1621 Virginia was governed by a code creating a rudimentary form of popular government. The executive power established by that charter became, in retrospect, an important milestone in establishing what was considered to be within the purview of executive power and how that power ought to be organized.

However, the political problems of the company in London were far from over. Debts and political feuds finally forced the king to dissolve the company and bring the colony under his direct control again. James, angered when the company refused to select a treasurer from the list of names he had supplied, ordered his attorney general to prepare a quo warranto and bring the case before the King's Bench. The company lost its charter, through an error in pleading, in spite of impassioned pleading from the colonists themselves. James, it seemed, was determined to keep popular government from gaining a foothold in Virginia.³³

In 1624 King James I issued a new charter for Virginia. The document retained Governor Wyatt and the power granted in the instructions

³²Ibid., pp. 121-122.

³³For a discussion of the problems of the final dissolution of the company see Frank Wesley Craven, Dissolution of the Virginia Company: The Failure of a Colonial Experiment (Gloucester, Mass., 1964).

to former Governor Yeardley, but made no mention of the assembly. Moreover, the commissions of 1624 and 1625 were granted to the governor and council which led to confusion over their intended relationship. The governor claimed to possess the real executive authority while being advised and checked to a limited degree by the council, while the council laid claim to a larger share of the executive power than they had in the past. However, before the commission that James had appointed to supervise the changeover of the colonial government could finish their work, James died.³⁴

The accession of Charles I placed the future of Virginia before the Privy Council.³⁵ The council refused to recharter the company, in spite of pleading by some former members of the London company to resurrect it. Instead, the king reappointed Sir George Yeardley governor with the same powers set forth in Wyatt's commission. Charles then issued a proclamation which outlined his intention "to render this (the Virginia) government into such a right course as might best agree with the forms [of government] held in the rest of his monarchy." He then proceeded to outline a form of government that was substantially the same as the one his father had issued for the original colony in 1606.³⁶

³⁴See Brown, First Republic in America, pp. 585-609.

³⁵Throughout most of the seventeenth century the colonial affairs were handled as an undifferentiated part of the Privy Council's business. See Louise Phelps Kellogg, "The American Colonial Charter. Study of English Administration in Relation Thereto, Chiefly after 1688." Annual Report of the American Historical Association (Washington, 1903), I, 185-341.

³⁶For documents relating to Charles I and his relations with Virginia see The Virginia Magazine of History and Biography, II, (1900),

Prior to the arrival of Yeardley with the new set of instructions, Wyatt faced a dilemma of what to do about the assembly. The temporary commission under which he was acting was silent as to his power to call it into session. Since the former letters-patent granting the governor this power was cancelled, the assembly could not legally be called until the governor was so authorized to summon it by the king. However, Wyatt was reluctant to administer the colony's affairs with the council along. On specific occasions he would invite the leading citizens to take part in the council's deliberations when practical. Formal documents resulting from these deliberations would appear in the name of "Governor, Council, and Colony of Virginia Assembled Together."³⁷

By the time Governor Yeardley arrived in Virginia in 1626 it was clear that the governor faced an impossible work load. The colony had grown considerably and the governor was given the legislative duties in addition to his traditional executive and judicial responsibilities. This concentration of power in the hands of one branch of government was not only a tremendous burden for the governor and council, but was also extremely inefficient. Yeardley was quick to request the king to authorize him to summon the assembly. After much hesitation, Charles finally agreed on the royal instructions of 1628.

Thus, the year 1628 marked the end of corporate control of Virginia. Hereafter the Crown, not the company, would direct the affairs

pp. 368-386. Also see Wilcomb E. Washburn, Virginia Under Charles I and Cromwell, 1625-1660 (Williamsburg, Va., 1957).

³⁷Brown, First Republic in America, p. 647.

of the colony. Under the instructions the new government would consist of the governor, members of his council, the treasurer, and the secretary of state, who were appointed by the king, and the House of Burgesses, who were chosen by the people. This was to be the established form for the Virginia Government through the end of the colonial period, except for the brief period of the commonwealth. There were, however, many changes which took place within that time which affected the development of executive theory.

The charter experiments in Virginia colonial government prior to 1628 established a number of significant principles which were important to the later development of American executive theory. This experience created a reasonably independent and strong executive, whose powers, for the most part, remained intact throughout the seventeenth century.³⁸

The first principle established in these early years of Virginia colonial government was executive unity. In all charters the executive authority was vested in one person called either president or governor. Though the charter of 1606 created a combined unit of president and council, the president was responsible for seeing that the London council's decisions were administered to their and the king's satisfaction. The other charters created an executive head called the governor who did not share his authority equally with a council, but rather, in theory, used the council in an advisory capacity. However,

³⁸See Thomas J. Wertenbaker, Give Me Liberty: The Struggle for Self-Government in Virginia (Philadelphia, 1958).

in actuality the governors were sometimes at the mercy of the council. For example, a newly arrived governor would be heavily dependent upon the council for advice until he had been exposed to conditions in the colony long enough for him to render judgments about the situation himself.

The second principle of executive theory was written delegation of powers. While the powers and duties of the governor varied from time to time, depending on the political situation in England, they were nevertheless contained within a written document whether it came from the king or the company.³⁹ Governors were, for the most part, hesitant to go beyond their formally delegated powers fearing their recall by the king or council in London. Governor Wyatt's refusal, for example, to summon the colonial assembly without specific authority from the king, even in the face of his hesitancy to rule without their advice, indicated how strongly he felt about transcending his authority.

Executive responsibility was the third principle established in this period. No matter how powerful a governor was, he was still responsible for his actions to someone other than himself, generally to either the king or the council in London. Even under the 1609 Charter, which gave the governor "full and absolute power," he was limited to

³⁹The significance of the charter as a fundamental constitution was noted by George Chambers in 1780 when he said, "It is a singular circumstance, in the history of these colonies, that there is not an instance of emigration without the permission of the supreme magistrate of the state first applied for and obtained. The anxiety with which all prayed for charters, under the great seal of England, shew (sic) that they deemed them extremely essential to the ultimate success of their designs." Political Annals of the Colonies, p. 26.

exercising his power within the defined limits of the charter and instructions, and even then he was subject to review by the company and king.

The fourth principle of executive theory granted the governor a degree of executive discretion, which made him more than a mere administrator carrying out directives. The council in London realized that the charter and instructions could not foresee all eventualities and granted the governor power to meet most problems as he saw fit, but subject to any limitations within his grant of authority and subject to review by the London council. The governor therefore had political policy-making power which made him more than just an administrator.

The experience of these early Virginia charters helped to establish the general scope and purview of executive power. For example, the colonial executive was charged with both political and administrative responsibilities. As the colony grew the council in London began to delegate various administrative tasks to specially created assistants to lighten the governor's work load and allow him more time for his political duties.

The governor was also given a number of specifically enumerated powers to carry out his duties and responsibilities in this period. Among the more significant ones were his veto and appointing powers, tie breaking votes in the council meetings, the authority to summon and dissolve the legislative assembly, and lastly, to be commander-in-chief of the military. These powers formed the core around which future colonial executive theory developed. Moreover, the governor also had within his jurisdiction the legislative power. However, it was finally

given to the assembly, not for reasons of constitutional theory, but because it was overburdening the governor's already heavy work load.

Finally, the importance of having a designated executive for the colony was established by a specific line of succession when a governor could not complete his term for one reason or another.

Upon the foundations laid in these first twenty-eight years the governorship of colonial Virginia grew into a powerful political institution by the end of the seventeenth century. How successfully its powers were used depended upon the personal idiosyncrasies of the individual governors who varied considerably in character and ability. Even the Lords of Trade were aware of this when they wrote:

All things are made so entirely dependent on the Governor's single will and pleasure, that whenever there may happen an ill man in that post, it cannot reasonably be expected [that] any person . . . should either oppose such [a] one, in whatever he may attempt or so much as give any advice.⁴⁰

Another case reported to the board in 1667 noted that there were "injuries done in the courts through the governor's passion, age, or weakness . . . [and] the governor licensing some to trade with the Indians: and not timely suppressive [of] their insurrections."⁴¹ Another report put it more succinctly when it concluded that "young colonies are made or ruined by their governors."⁴²

⁴⁰Cited by Thomas J. Wertenbaker, Give Me Liberty: The Struggle for Self-Government (Philadelphia, 1958), p. 19. Taken from the British Public Records Office, America and West Indies, C.O. 5-1359, p. 255.

⁴¹Calendar of State Papers, Colonial Series, America and West Indies, 1661-1668 (London, 1880), V, doc. 1532, p. 484.

⁴²Ibid., VII, doc. 1066, p. 479.

Governors could and did augment their grants of power by a judicious use of patronage. The most sought after office was a seat on the governor's council. In a report to the Lords of Trade an observer noted that the councillors "have all along held the places of profit in Virginia by the governor's gift and during his pleasure."⁴³ Once a member of the council, a person would be next in line for a commission in the colonial militia or navy, or be eligible for the lucrative position as a tax collector. Additionally, the governor appointed justices of the peace, sheriffs, and other local officials which helped insure acceptance of his policies on the local level. However, the governor's power was restricted in cases where the office received its commission under the royal seal from England. Then, only when the office was vacant due to death, resignation, or removal, could the governor appoint a temporary incumbent until a replacement was commissioned from England.⁴⁴ The governor's relationship with the colonial assembly was often stormy, but it was not until the middle of the eighteenth century that the assembly gained the upper hand.

On questions where the burgesses were not unified against the governor's policy, the governor could bring to bear his patronage to secure passage of his legislation. As one observer lamented:

⁴³Cited by Wertenbaker, Give Me Liberty, p. 21, from C.O. 5-1359, pp. 95-96.

⁴⁴See Bruce, Institutional History of Virginia, II, 323. Also Governor Berkeley's Instructions, 1641-1642, Colonial Entry Book, 1606-1662, p. 222.

Places are now shifted as often as the occasion requires, to put out or in, as men will or will not serve a turn. . . . I need not tell you what men too many of our House of Burgesses are, how greedy they are to catch at any little place of profit, without considering the ill consequence that attends it. [They are] like the poor harmless fish that eagerly catches at the bait without considering the hook of destruction is under it.⁴⁵

The governor possessed an absolute veto over legislation though in many cases he rarely had to use it. If a bill displeased him, he could exercise his influence on the council to dispose of it. Failing that, his signature and a message to the king advising him to overturn it, would, in effect, allow the governor to maintain his political standing within the colony and yet all but veto the legislation.

The governor's power to summon, prorogue, and dissolve the assembly was also a powerful weapon that he could invoke to influence legislation. Most instructions required him to convene the assembly at least once a year. However, if the governor found cooperative burgesses, he could continue them in session indefinitely, though the arrival of a new governor, or the accession of a new monarch automatically dissolved the assembly.

The governor's relationship with his council was sometimes strained as they vied for political influence. In 1631, when the governor and council clashed over their respective powers, Governor Harvey lamented that he was limited to carrying out the council's recommendations, while having the influence of only one vote on the council. The

⁴⁵Cited by Wertenbaker, Give Me Liberty, p. 20, from C.O. 5-13414, doc. 15 G. Also see Richard L. Morton, Struggle Against Tyranny, and the Beginning of A New Era, 1677-1699 (Williamsburg, Va., 1957).

council, on the other hand, complained bitterly about Harvey's overbearing usurpation of power.⁴⁶ By the end of the century, however, the governor had clearly separated himself from the council and gained considerable power over it, even to the point of the Crown regularly appointing his nominees to the council.⁴⁷ As will be seen later, this arrangement became the model for other royal colonies as well as most of the proprietary colonies.

As the representative of the king, the governor was eager to maintain the pomp and circumstances which surrounded such an office. In addition to his much heralded body guards, used as much for show as for protection, the governor was quick to subdue any threat to his power or person. Records indicate that men were severely punished for uttering words which the governor thought might incite seditious behavior among the colonists.⁴⁸

Specifically, then, the Virginia governor in the seventeenth century possessed about eighteen distinct powers which can be classified into eight basic areas.⁴⁹ First, he was the personal representative of

⁴⁶Calendar of State Papers, Colonial Series, I, April 2, 1663, p. 129.

⁴⁷Henry Hartwell, James Blair, and Edward Chilton, The Present State of Virginia, and the College, Hunter D. Farish, ed. (Charlottesville, Va., 1964), pp. 22-24.

⁴⁸Calendar of State Papers, Colonial Series, VII, doc. 1390, p. 624. Also see Bruce, Institutional History of Virginia, II, 353-7 for other examples.

⁴⁹His powers were: (1) appoint members of his council and, with cause, suspend them; (2) to approve legislation; (3) to veto legislation; (4) to summon, prorogue, and dissolve the general assembly; (5) act as chief justice, and establish courts and appoint judges; (6)

the king and empowered to do those things which the king would normally do if the monarch were personally looking after the affairs of the colony. Second was his control over the military. Third was his regulation of the colonial maritime trade. Fourth was his control over treasury matters. Fifth and sixth were his control over the use of the colonial seal and his responsibilities as the chief judicial officer. Seventh was his influence in matters under the jurisdiction of the council. And finally, the governor was the king's de facto ecclesiastical representative in the colony.

The exception to the previous development of executive theory in Virginia came under the commonwealth. During that period the burgesses appointed the governor, council and other executive officers. Under the authority of the convention of 1652, which empowered them to elect "all the officers" of the colony, they exercised only such powers as the assembly might from time to time delegate to them. Cromwell apparently thought he still possessed the authority to appoint colonial executives when he declared in December, 1653, that he "thought [it] fit to continue colonel Bennet" as governor until he should "further signify his pleasures." However, Cromwell, distracted by greater problems, said nothing more about the matter and the assembly continued

to validate with his signature all warrants to withdraw money from the treasury; (7) to pardon offenders, except treason and willful murder; (8) to grant reprieves and remit fines; (9) to head the church; (10) to muster the militia; (11) to execute martial law; (12) to fill the office of the Vice-Admiral; (13) to administer oaths of allegiance; (14) to appoint shipmasters and empower them; (15) to grant patents to public lands; (16) to designate cities for public buildings; (17) to issue proclamations; (18) to naturalize foreigners. See Bruce, Institutional History of Virginia, II, 320-321.

to elect governors until the Restoration. These eight years of self rule provided the assembly with some valuable lessons which they were to use against future governors.⁵⁰

In summary, then, the experience of the seventeenth century Virginia government established a tradition of strong executive leadership which did much to lay the groundwork for the development of American executive theory on a national scale.

Virginia, however, was not the only colony from which the precedents were drawn. New England provides another major illustration of the evolution of executive theory in the seventeenth century. The experiences in this region established many of the same principles that Virginia did but from a different approach.

The first colony in the New England area was Plymouth. Like many of the later New England settlers which were to follow, the colonists at Plymouth came to America for religious reasons. They were part of the Puritan movement which attempted to reform the Church of England. However, they soon found that the church was not amenable to reform from within and separated from it by migrating to Leyden, Holland. It was from this group of "Separatists" that the colonists which eventually founded Plymouth were drawn. As in the case of Jamestown, the Plymouth colony was dependent upon profit minded investors to finance their endeavor, though after the first disastrous winter in Massachusetts, investments gradually declined. In spite of this, the colony began to prosper and within five years was self-sufficient.

⁵⁰W. W. Henning, ed., The Statutes at Large (1809-1823), I, 406-412.

When the Pilgrims landed in America they were not within the area described by their charter. This necessitated the formulation of an agreement to carry on the basic functions of government which became known as the Mayflower Compact. It demanded that the signers obey all the laws and ordinances drafted by the leaders of the enterprise. Its purpose was to "covenant and combine our selves together into a civill body politick. . . ." The government it created was authorized:

by virtue hearof to enacte, constitute, and frame such just and equall lawes, ordinances, acts, constitutions, and offices, from time to time, as shall be thought most meete and convenient for the general good of the Colonie, unto which we promise all due submission and obedience.⁵¹

The settlers then chose, "or rather confirmed," as historian-governor William Bradford noted, John Carver as the first governor of the colony. Carver had been informally appointed governor of the Mayflower when it sailed from England. Once the Mayflower Compact was signed it was necessary to elect a governor and therefore the colonists chose to confirm Carver, their previous choice.⁵²

For the first three years the governor and one assistant, elected by the general court, comprised the executive branch. They were empowered to make laws as they saw fit. In 1624 the number of governor's assistants was raised to five and a short time later to seven.⁵³

⁵¹William T. Davis, ed., Bradford's History of Plymouth Plantation, 1606-1646 (New York, 1923), p. 107.

⁵²Ibid.

⁵³Poore, The Federal and State Constitutions, I, 932-942.

During the first year a number of settlers challenged Governor Carver's authority to rule the colony. A similar situation occurred in Jamestown in 1608 which forced Captain John Smith to assume dictatorial powers to save the colony from collapsing. Likewise, as Bradford reported, the situation in Plymouth was brought under control by the majority of settlers supporting the wisdom, patience, and "just and equall carrage of things by the Gov[erno]r and the better part, which cleave faithfully togeather in maine."⁵⁴ Unfortunately for Carver, he died a short time later, living only long enough to guide the fledgling colony through its first political crisis. Bradford then succeeded him as governor.

In the early years of the Plymouth colony, decision-making was in the hands of the elected officials. In 1623 rumors circulated to the home company that Plymouth had become a democracy. Bradford replied that women and children could not vote. Moreover, he stated that he seldom submitted policy decisions to the voters. That the colonists agreed with this procedure was indicated by an incident in 1623. Bradford had requested the General Court to outline a policy toward the Massachusetts Indians. However, the Court returned the matter to the governor and his assistants for their disposition.⁵⁵

⁵⁴Davis, ed., Bradford's History, pp. 107-108.

⁵⁵William Bradford and Isaac Allerton, Plymouth, September 8, 1623, printed in American Historical Review, VIII (1902-1903), 299; George D. Langdon, Jr., Pilgrim Colony: A History of New Plymouth, 1620-1691 (New Haven, 1966), p. 91.

This episode was an example of the early seventeenth century Puritan concept of government which required that leaders rule and the citizens obey. John Robinson counseled the Pilgrims that they owed "all due honour and obedience in their lawfull administrations; not behoulding in them the ordinarinesse of their persons but gods ordinance for your good." Moreover, he said, you know "that the image of the Lords power and authoritie which the magistrate beareth, is honourable, in how meane persons soever." Finally, he concluded, "this dutie you both may the more willingly and ought the more conscionably to performe because you are at least for the present to have only them for your ordinarie governours, which your selves shall make choyse of for that worke."⁵⁶ If the people did not like the way a magistrate ruled, they could vote him out of office at the next election. Until that time, however, the magistrate was the ruler.

Historian George D. Langdon concluded about this period of Plymouth's history that the people were probably content to let Bradford rule without curtailing his power. In 1625 when the first threat to his power occurred, the majority of the colonists backed the governor. In Langdon's words, so long as the people "could look up from their planting and see him working in the adjacent field, it seemed foolish to worry over the extent of his power."⁵⁷ As in the case of the Virginia settlements, when Plymouth grew to a size where people were unfamiliar

⁵⁶Davis, ed., Bradford's History, p. 86.

⁵⁷Langdon, Pilgrim Colony, p. 91.

with Bradford personally, then they began to worry about restraining his power.

Until 1636 the governor and his assistants, sitting as the court of assistants, were the ruling magistrates in colonial policy-making. Gradually the general court supplanted the former group until it became the sole governing authority in the colony. By 1639 the colony had grown to the point where the general court was convened in which the governor and his seven assistants comprised the upper house, and elected town deputies composed the lower house. The general court met four times a year, and at one session elected the governor, his assistants, and later the treasurer of the colony.⁵⁸

In October, 1636 a major milestone occurred in limiting the power of the magistrates. The general court gave the governor and seven assistants power to rule the colony, but their authority did not include the power to enact legislation as before. By 1639 the governor and assistants had their power to grant lands limited. Seven years later this was followed by limiting these officials, when they sat as a court, to consideration of judicial concerns only.⁵⁹

Under the general court the most important official was the governor. He could summon the court into session when he felt it necessary, and once convened, he presided over its deliberations, casting a vote in case of a tie. He also held the power to arrest and commit to

⁵⁸Ibid.

⁵⁹Ibid., p. 92.

prison as well as the authority to execute all colonial laws. Other than these, he held no other statutory powers.⁶⁰

The governor could, if he chose, exercise a tremendous influence on the direction of policy through the prestige of his person and office. The governor and his assistants carried great weight in the general court deliberations inasmuch as "the notion that every person is equally capable of declaring policy was not yet part of the popular creed."⁶¹ Their articulate enunciation of colonial needs more often than not carried the day.

In summary, the early years of the Plymouth colony, like those of the Virginia settlements, saw a tradition of strong executive leadership emerge as an essential element necessary to move to a representative form of government which led to a curtailment of the governor's powers. This also meant that the colonial government had become less immediate and responsive to the needs of the people in comparison to the early days of the settlement when governor and citizen worked side by side for the survival of the colony.

The success at Plymouth led to further colonizing efforts. The next was the establishment of the Massachusetts Bay colony in 1629. Like the colonists at Plymouth, the settlers at Massachusetts Bay came for religious reasons. The charter granted to "The Governor and Company of the Massachusetts Bay in New England" in 1629 created a trading

⁶⁰Ibid., p. 95.

⁶¹Poore, The Federal and State Constitutions, I, 932-942.

company which soon proved to be an important element in the evolution of executive theory in the seventeenth century.

Unlike the Virginia Company, the Massachusetts Bay Company had an underlying religious motivation for colonization in addition to its commercial activity. While both colonies began with charters which were quite similar, the Massachusetts Bay experience was significantly altered by the removal of the charter from England to America. John Winthrop, Thomas Dudley, and others, "who were dissatisfied with the arbitrary proceedings both in church and state, pleased themselves with the prospect of liberty in both, to be enjoyed in America," undertook to move the company from London to the colony, but only on the condition "that the patent and charter should [be] remove[d] with them." Since there had been no profit "and [the company] had no rational prospect of any profit from the plantation in the way" as it was presently constituted, the company voted to transfer the charter to New England.⁶² Management of the company was given to five individuals, among whom was Winthrop, who shortly became governor and exerted a powerful influence over the direction of both company and colony.

With the company now residing in the colony, a new series of problems emerged, which further set the Massachusetts experiment apart from the Virginia experience. In Virginia, the colonial government was separate and subordinate to the company's operations in London. In Massachusetts, the problem was to integrate the charter provisions for

⁶²Thomas Hutchinson, The History of the Colony and Province of Massachusetts Bay (Cambridge, Massachusetts, 1936), I, 13.

operating the company into a political mechanism for governing the colony. The only restriction placed on the company by the king when he granted the charter was that the company should make no laws that were repugnant to the laws of England. Otherwise, the settlers were to enjoy "all liberties and immunities" as any other citizen of England. However, in the 1630's English birth did not confer the right to participate in government. Therefore, since the charter did not specify that the laws passed by the company had to have the approval of the settlers before taking effect, the company had full power to legislate, organize the government, and carry out its policies in any manner the company officers saw fit.⁶³

The mechanism for policy making within the company was spelled out in the charter in fairly complete detail. The members of the company, known as freemen, were to meet four times a year in a "Great and General Court" to make laws for both the company and colony. At one of these meetings they were to elect a governor, deputy governor, and eighteen assistants to manage company and colonial affairs between sessions of the general court. These officials comprised an executive council which met once a month. The charter required that the governor or deputy governor and at least six assistants had to be present at each general court. Since the charter did not mention the necessity of any other members being present, this meant that these seven officers

⁶³Edmund S. Morgan, The Puritan Dilemma (Boston, 1958), p. 85.

could presumably exercise the full powers of the general court.⁶⁴ In essence, Winthrop and the other members of the company had unlimited authority to govern the colony in any manner they saw fit so long as they met the charter requirements of meeting once a month as a court of assistants, four times a year in a general court and provided no laws were passed repugnant to the laws of England.

Given Winthrop's background and religious beliefs, he could not be satisfied with any government that did not have biblical sanction. On the voyage to America he preached that

God Almightye in his most holy and wise providence hath soe disposed of the Condicion of mankinde, as in all times some must be rich some poore, some highe and eminent in power and dignitie; others meane and in subjeccion.⁶⁵

Therefore, he concluded, government could not be trusted to the people at large but must be kept in the hands of the elite who had the necessary background and training to lead. At a later time, he noted that in any community the "best" part of the people was always the smallest part, "and of that best part the wiser part is always the lesser."⁶⁶

When the first general court met on October 19, 1630, Winthrop violated the terms of the charter by setting up an elite system in transforming the company charter into the constitution for governing the colony. The company records described the proceedings as follows:

⁶⁴Ibid., pp. 85-86.

⁶⁵Cited, Ibid., p. 88.

⁶⁶Cited by James Kendall Hosmer, ed., Winthrop's Journal "History of New England" 1630-1649 (New York, 1908), I, 125n.

For the establishinge of the government. (sic) It was propounded if it were not the best course that the Freemen should have the power of chuseing Assistants when there are to be chosen, and the Assistants from amongst themselves to chuse a Governor and Deputy Governor, who with the Assistants should have the power of makeing lawes and chuseing officers to execute the same.⁶⁷

Apparently Winthrop had opened the meeting to all the settlers and had used the occasion to transform the company's executive council into the colony's legislative body whereby they had the power to pass laws and appoint officers. The records indicate that "this was fully assented unto by the generall vote of the people, and errection of hands."⁶⁸ Moreover, the term freeman was altered to mean not only a member of the commercial company, but was now used as a term of citizenship. Shortly thereafter a large number of new freemen were admitted, presumably most of the adult males in the colony. Thus, Winthrop succeeded in keeping power in the hands of the elite by limiting the power of the freemen to choosing the assistants only. Additionally, by allowing only church members to be freemen he had violated the charter a second time.

Historian Edmund S. Morgan explains this action as formalizing the Puritan belief in organizing society around a covenant. He cited Winthrop's assumption that "It is of the nature and essence of every society to be knitt together by some Covenant, either expressed or implied." The agreement to come to the new world was, he said, the

⁶⁷ Reprinted in The Founding of Massachusetts: Historians and the Sources, Edmund S. Morgan, ed. (Indianapolis, 1964), pp. 398-398.

⁶⁸ Ibid., p. 398.

implied covenant to live within the laws of God. However, a second covenant was necessary to establish the "due form of government." Though the king's authority gave the company power to rule the colony, this was insufficient, Winthrop thought. There had to be a specific covenant between the rulers and the ruled, thus the action of the general court on October 19 and the subsequent admission of the enlarged freemanship.⁶⁹

Winthrop believed he had established a government run by the elite. The executive and legislative powers belonged to a select group who derived their authority not from the people, but from God, irrespective of their method of election. Therefore, he argued, the rulers were accountable to God and not to the people. Their function was to enforce the covenant between God and the community as they thought best during their term. If a ruler failed to enforce the laws of God he could be turned out of office before the next election. However, so long as he continued to perform his duty, "his authority was absolute, and, regardless of any errors of judgment he might make, the people were obliged to submit. Indeed, anything less than submission would be rebellion against the authority of God."⁷⁰

The freemen did not always see the situation in the same light as Winthrop did. A few weeks prior to the election of 1632, some residents of Watertown had questioned the power of the government "to

⁶⁹Morgan, The Puritan Dilemma, pp. 93-94.

⁷⁰Ibid., pp. 93-95.

make laws or raise taxations without the people." Winthrop responded that

this government was in the nature of a parliament [and not that of a mayor and altermen who did not have such powers], and that no assistant could be chosen but by the freemen, who had power likewise to remove the assistants and put in others, and therefore at every general court . . . they had free liberty to consider and propound anything concerning the same, and to declare their grievances, without being subject to question, or, etc., [until] they were fully satisfied.⁷¹

Thus, the peoples' power, in Winthrop's opinion, was limited only to the election of assistants who were accountable only by election, which was a violation of the charter.

The freemen at that year's election also voted to extend their power of election. They passed a resolution that they could not only elect the assistants, but the governor and deputy governor as well. However, they agreed to restrict their choice of governor to those among the assistants. Also, they voted to hold annual elections thereby making the elected officials accountable to the people at least once yearly. Winthrop also reported that "the people" proposed "that every company of trained men might choose their own captain and officers." After he explained his opposition "they were satisfied without it," he said. Finally, the court agreed that every town should choose "two men to be at the next court, to advise with the governor and assistants about the raising of a public stock, so as what they should agree upon should

⁷¹Hosmer, ed., Winthrop's Journal, I, 75.

bind all."⁷² Thus the freemen were beginning to expand their role in governmental decision-making.

That same year a dispute arose over the extent of the governor's power. Deputy governor Thomas Dudley accused Winthrop of exceeding his power and demanded to know the "grounds and limits" of Winthrop's authority. Dudley argued that the governor had no more power than "every assistant (except power to call courts, and precedence, for honor and order.)" Winthrop responded that he had more authority than that because the patent "making him a governor, gave him whatsoever power belonged to a governor by common law or the statutes." Dudley then listed seven areas where he believed Winthrop had exceeded his authority. Winthrop, the adroit politician, noted that he was accountable to no one except the assistants who elected him. However, to keep the peace and show that he did not wish "to make himself popular, that he might gain absolute power, and bring all the assistants under his subjection" he agreed to submit to the judgment of the ministers, who managed to cool the dispute without formally defining the governor's powers.⁷³ Thus, Winthrop had argued a concept of executive power limited only by statute, common law, and his own sense of justice in its use. This was not to go unchallenged.

In 1634 another incident occurred where Winthrop was forced to reiterate the Puritan concept of leadership. At the general court of April a number of freemen:

⁷²Ibid., p. 19.

⁷³Ibid., pp. 84-89.

desired a sight of the patent, and conceiving thereby that all their laws should be made at the general court, repaired to the governour to advise with him about it, and about the abrogating of some orders formerly made, as for killing of swine in corn, etc.

Winthrop responded that

when the patent was granted, the number of freemen was supposed to be (as in like corporations) so few, as they might well join in making laws; but now they were grown to so great a body, as it was not possible for them to make or execute laws, but they must choose others for that purpose.

Moreover, he said,

it would be necessary hereafter to have a select company to intend that work, yet for the present they were not furnished with a sufficient number of men qualified for such a business, neither could the commonwealth bear the loss of time of so many as must intend it.

As a compromise, Winthrop offered a plan whereby the general court would appoint "a certain number" of individuals:

to revise all laws, etc., and to reform what they found amiss therein; but not to make any new laws, but refer their grievances to the court of assistants; and that no assessment should be laid upon the country without the consent of such a committee, nor any lands disposed of.⁷⁴

Thus, Winthrop was unwilling to let any power slip from the magistrates' hands for fear that it would fall into the hands of those unqualified to make the necessary decisions for the good of the colony. One of Winthrop's biographers characterized the episode as a case where "Winthrop seems to have spoken like an absolute sovereign, designing (sic) to grant a favor to his subjects, by admitting them to a representation at court."⁷⁵

⁷⁴Ibid., pp. 122-123.

⁷⁵Cited, Ibid., p123n.

Winthrop's compromise did not satisfy the freemen. At the general court they ordered that the freemen of every plantation could select two or three representatives "of each town, before every general court, to confer of and prepare such public business as by them shall be thought fit to consider of at the next general court." Moreover, they empowered the representatives to "deal in their behalf in the public affairs of the commonwealth," and gave them "full power and voice of all the said freemen derived to them for the making and establishing of laws, granting of lands, etc., and to deal in all other affairs of the commonwealth, wherein the freemen have to do," except in the election of the magistrates, "wherein every freeman is to give his own voice."⁷⁶ Thus, Winthrop's attempt to keep power in the hands of the elite who were responsible only to God between elections led the freemen to expand and enlarge their role in the development of colonial policy.

Winthrop's acquiescence in the election of popular deputies marked a significant step in the adjustment of relations between magistrates and freemen. The function of government was to curb the human depravity of its citizens, he argued. If the government was subject to every corrupt public whim, how could it enforce the laws of God? It needed to have those responsible for carrying out this vital function insulated from public accountability. Therefore, he contended, the magistrates derived their authority from God, not the people. The representatives of the people ought not to have power over the

⁷⁶Ibid.

magistrates, but only serve the function of keeping the "government in touch with public opinion."⁷⁷

Another incident in conjunction with the events described above led to Winthrop's defeat as governor at the 1634 general court. As became the custom, a minister preached an election sermon. The minister, John Cotton, used the occasion to reinforce the idea that magistrates ought not to be removed from office because of a change in public attitude. Cotton argued that

a magistrate ought not to be turned into the condition of a private man without just cause, and to be publicly convict [ed], no more than the magistrates may not turn a private man out of his freehold, etc., without like public trial, etc.⁷⁸

Thus, a ruler possessed his office as a freeholder possessed his freehold, neither of which ought to lose their title to it without just cause and public trial.

Another time Cotton spelled this doctrine out more precisely. He wrote Lord Say that

Democracy . . . [was not ordained by God] as a fit government either for church or commonwealth. If the people be governor who shall be governed: As for monarchy and aristocracy, they are both of them clearly approved and directed in scripture, yet so as referreth the sovereignty to himself and setteth up theocracy in both, as the best form of government in the commonwealth as in the church.⁷⁹

After his second defeat five years later, Winthrop began pushing for veto power by the magistrates over legislation passed in

⁷⁷Morgan, The Puritan Dilemma, p. 156.

⁷⁸Hosmer, ed., Winthrop's Journal, I, 124-125.

⁷⁹Hutchinson, History of Massachusetts-Bay, I, 497, Appendix

the general court in an effort to reduce the power of the deputies. Since the deputies outnumbered the magistrates, they might interfere with the work of those chosen by God to enforce His laws in the community. In the September, 1634 general court, the issue came to the crisis point. In the vote there were only two magistrates and the governor voting for the proposition. Winthrop contended that the issue could not pass since the patent required the assent of six assistants. "Upon this grew a great difference between the governor and assistants, and the deputies," he reported. Moreover, he continued,

They would not yield the assistant a negative voice, and the others (considering how dangerous it might be to the commonwealth, if they should not keep that strength to balance the greater number of the deputies) thought it safe to stand upon it.⁸⁰

Thus Winthrop used the quorum requirement of the charter to base his argument that no action of the general court was valid without the approval of the governor or deputy governor and six assistants. This view was strongly opposed by Israel Stoughton the following year. Stoughton contended that the governor's power was only "ministerial" in nature and went on to oppose the negative power of the magistrates. Winthrop used influence with the court to have Stoughton "disabled for three years from bearing any public office." Not until 1636 did the general court finally confirm the negative power of the assistants by passing a law

that noe lawe, order, or sentence shall passe as an act of the Court, without the consent of the greater parte of the

⁸⁰Ibid., p. 133.

magistrates on the one parte, and the greater number of the deputyes on the other parte.⁸¹

In 1636, the general court created a standing council of magistrates with broad executive powers, with the governor acting as president, to serve for life terms.⁸² This council raised so many popular passions that it lasted only three years. The dispute reached a climax in May, 1639 when the general court, fearing that this might be interpreted and used as a precedent for other executive officers, passed a resolution reaffirming executive accountability through election.

That, whereas, our sovereign lord, King Charles, etc., had, by his patent, established a governor, deputy, assistants, that therefore no person, chosen councillor for life, should have any authority as a magistrate, except he were chosen in the annual elections to one of the said places of magistracy established by the patent.

Winthrop noted that council finally did yield to the deputies, "because it concerned themselves, and they did more study to remove these jealousies out the people's heads, than to preserve any power or dignity to themselves above others."⁸³

By 1635 the concept of unlimited administrative discretion was under increased attack by the freemen. Winthrop reported in his diary that "The deputies having conceived great danger to our state, in regard that our magistrates, for want of positive laws, in many cases, might proceed according to their discretions. . . ."⁸⁴ At another

⁸¹Cited in Morgan, The Puritan Dilemma, p. 160.

⁸²Hosmer, ed., Winthrop's Journal, I, 178.

⁸³Ibid., p. 304.

⁸⁴Ibid., p. 151.

point he noted that the people "thought their condition very unsafe, which so much power rested in the discretions of the magistrates." To remedy this, a group of individuals were appointed "to frame a body . . . of laws, in resemblance to a Magna Charta . . . [which] should be received for fundamental laws."⁸⁵ In 1641 "The Massachusetts Body of Liberties" was enacted. The code, written in the form of a bill of rights, concluded that it was

therefore our dutie and safetie, whilst we are about the further establishing of his Government to collect and express all such freedoms as for present we foresee may concern us, and our posteritie after us. . . ."⁸⁶

The Body of Liberties was more than just a bill of rights. It embodied the fundamental concepts of the Puritan experiment in Massachusetts. In addition to listing what rights were protected, it established the principle that no law or custom would exist "that can be proved to bee morallie sinfull by the word of God."⁸⁷ It thus affirmed the basic premise that the Massachusetts Bay colony would be a biblical commonwealth.

Also, this code established the church's authority over civil officers, but did not empower the church to tamper with their authority. At the same time it gave the state power to establish "Christ's religion in every church." The state could "deale with any Church member in a

⁸⁵Ibid., p. 323.

⁸⁶William H. Whitmore, ed., The Colonial Laws of Massachusetts Reprinted From the Edition of 1660, with Supplement of 1672. Containing also the Body of Liberties of 1641 (Boston, 1889), pp. 32-61.

⁸⁷Cited in Morgan, The Puritan Dilemma, p. 171.

way of Civill Justice, notwithstanding any Church relation, office or interest." On the other hand, the church could deal with any "officer what so ever that is a member in a church . . . in case of apparent and just offence given in their places, so it be done with due observance and respect." However "no church censure shall degrade or depose any man from any Civill dignities, office, or Authoritie he shall have in the Commonwealth."⁸⁸ In essence, then, the church could discipline by censure or excommunication a governmental official who was a member of the church for improper actions, but the church's action could not affect his authority or the validity of that official's action.

While the Body of Liberties listed the principles of government, it did not describe in specifics the organization of government. That had been established by a decade and a half of experience. A number of problems still remained, however. One area that was still a source of dispute was the relative authority of the magistrates and deputies.

Under the Body of Liberties, the governor possessed certain rights and responsibilities, while having several checks placed on his power. In the section entitled "Liberties more peculiarie concerning the free men" the governor, other executive officers, and court members "shall . . . [have] their necessary expences defrayed. . . ." Several items later the freemen were guaranteed the right to choose "all the general officers of this jurisdiction" at the yearly court of election. It went on to prohibit office holding on good behavior stating that "If

⁸⁸Cited in Ibid., pp. 171-172.

they please to discharge them at the day of Election by way of vote . . . They may do so without shewing (sic) cause." It then established an impeachment process whereby the removal of an executive officer, at any court other than the election one, required that "the reasons be alleged and proved."⁸⁹

With respect to the governor's powers, the Body gave the governor a tie-breaking vote and a limited pardon power. "The Governor shall have a casting voice whensoever an Equi (sic) vote shall fall out in the Court of Assistants, or general assembly. . . ." The pardon power was given to the "Governor and Deputy Governor joyntly (sic) consenting or any three Assistants concurring in consent. . . ." However, they possessed the power to reprieve "a condemned malefactour, till the next quarter or general Court . . . [because] the general Court onely shall have power to pardon a condemned malefactor."⁹⁰

There were a number of other practices established in this period which helped to develop the role of the executive power. One such example occurred in 1636 after one of the numerous disputes Winthrop had with his rivals in the court of assistants. After reconciling their relationship they agreed on a list of ten items to help smooth future administrative operations. First they agreed to hold executive sessions whenever possible "That the magistrates should (as far as might be) ripen their consultations beforehand, that their vote in public might bear (as the voice of God)." Additionally the governor was to be

⁸⁹Whitmore, ed., The Colonial Laws of Massachusetts, p. 58.

⁹⁰Ibid., pp. 58-59.

honored by "submitting to him the main direction and ordering the business of the court."⁹¹ Thus, the governor would have the court's agenda before him.

Another dispute, which occurred in June, 1644 again raised the issue of inherent power within the executive authority. The deputies sought to create a commission to handle the affairs of the colony between sessions of the general court. The governor and magistrates traditionally had continued to carry on their administrative functions until the next quarter court. However, the deputies feared that the continued exercise of administrative and judicial powers in cases where the general court had not as yet established a law or policy might set an unhealthy precedent. They therefore proposed a joint committee of magistrates and deputies to undertake all of the affairs of the commonwealth during the recess of the general court.

In the magistrates' response opposing the idea, Winthrop offered his theory of executive power. He noted,

that to make a man a governor over a people, gives him, by necessary consequence, power to govern that people, otherwise there were not power in any commonwealth to order, dispose, or punish in any case where it might fall out, that there were no positive law declared in.⁹²

The dispute with the deputies carried over into the October court where the power of the governor and magistrates was further clarified, especially in judicial matters. The general issue was

⁹¹Hosmer, ed., Winthrop's Journal, II, 171-172.

⁹²Ibid., p. 171.

Whether the magistrates are by patent and election of the people, the standing council of this commonwealth in the vacancy of the general court, and have the power accordingly to act in all cases subject to government, according to the said patent and laws of this jurisdiction.

In response to the specific question of whether the deputies in the general court had "judicial and magistratical authority," the elders, acting as a constitutional review board, responded that "The patent, in express words, giveth full power and authority, as to the governor and assistants, so to the freemen also assembled in general court." They further argued a threefold division of powers: legislative, judicial, and "consultative or directive of the public affairs of the country for provision and protection." The first and last were held jointly by the freemen and the magistrates. The judicial power, however, rested jointly in these two bodies only in impeachment cases, or as an appellate review board. Otherwise the governor and magistrates held the judicial power.⁹³

The elders further elaborated on the issues raised at the previous court. The deputies asked whether the "governor and assistants have any power by patent to dispense justice in the vacancy of the general court, without some law or order of the same to declare the rule?" The elders concluded that they did not have such power and further contended that the rules governing their actions should be as specific as possible, "and where such cannot be had, [it was] to be supplied by general rules." Additionally, the elders reaffirmed the

⁹³Ibid., II, 211. Also see Emory Washburn, Sketches of the Judicial History of Massachusetts From 1630 to the Revolution in 1775 (Boston, 1840), pp. 1-26.

general court as "The chief civil power of this commonwealth" and specifically noted its powers in the "orderly impeaching, removing, and sentencing any officers, even the highest, according to law. . . ." ⁹⁴

The elders concluded their clarification of the patent by upholding Winthrop's view of the governor's power. The deputies had asked "whether the titles of governor, deputy, and assistants do necessarily imply magistratical authority, in the patent?" They concluded that the title did confer power. However, in response to the question of whether the patent gave magistratical power to the people, who in turn gave it to the governor, the elders concluded that the "magistratical power is given to the governor, etc., by the patent." To the people, they noted, was given the power to select their magistrates, and "to the general court power is given to make laws, as the rules of their administration." The opinion of the elders proved decisive and the role of the assistants as an executive board was never again seriously questioned. ⁹⁵

In May of 1645 Winthrop, then deputy governor, was accused of acting arbitrarily in a dispute with the militia officers of the town of Hingham. Upon his acquittal he delivered a speech which further clarified his conception of executive authority. "I entreat you to consider," he said,

that when you choose magistrates, you take them from among yourselves, men subject to like passions as you are. Therefore when you see infirmities in us, you should reflect upon

⁹⁴Hosmer, ed., Winthrop's Journal, II, pp. 214-215.

⁹⁵Ibid., pp. 216-217.

your own, and that would make you bear the more with us. . . . The covenant between you and us is the oath you have taken of us, which is to this purpose, that shall govern you and judge your causes by the rules of God's laws and our own, according to our best skill. . . . When you call one to be a magistrate, he doth not profess nor undertake to have sufficient skill for that office, nor can you furnish him with gifts, etc., therefore you must run the hazard of his skill and ability. But if he fail in faithfulness, which by his oath he is bound unto, that he must answer for.

However, if he failed in his judgment because a rule was not clear, "yourselves must bear it," he concluded.⁹⁶

Winthrop further argued that there were two types of liberty. The first is the natural state of "man and beast" before the advent of the second, which he called civil or federal. Civil liberty referred to the "Covenant between God and man, in the moral law, and the politic covenants and constitutions, amongst men themselves." This liberty, he contended,

is the proper end and object of authority. . . . [It] is maintained and exercised in a way of subjection to authority. [And] . . . it will be between you and your magistrates. If you stand for your natural corrupt liberties, and will do what is good in your own eyes, you will not endure the least weight of authority, but will murmur (sic) and oppose, and be always striving to shake off that yoke; but if you will be satisfied to enjoy such civil and lawful liberties, such as Christ allows you, then will you quietly and cheerfully submit unto that authority which is set over you, in all the administrations of it, for your own good.⁹⁷

After his speech to the court, Winthrop noted that not everyone agreed with his interpretation. Some individuals were so convinced that

⁹⁶Ibid., pp. 237-238.

⁹⁷Ibid., pp. 238-239.

the magistrates affected an arbitrary government . . . [that] this caused them to interpret all the magistrates' actions and speeches (not complying exactly with their own principles) as tending that way, by which occasions their fears and jealousies increased daily.

Nothing Winthrop or his fellow magistrates could do would allay the fears of these individuals, whose actions, he noted, served "to weaken the authority of the magistrates, and their reputation with the people."⁹⁸

One of the most interesting documents which came out of this whole dispute was Winthrop's treatise on arbitrary government. He concluded it with a summarized opinion on the nature and operation of the Massachusetts Colonial government as it then existed:

The Government of Massachusetts consists of Magistrates and Freemen: in the one is placed the Aut[horit]ye, in the other the Liberty of the Comm[on] W[ealth] either hath power to Acte, both alone, and both together (sic), yet by a distinct power the one of Liberty, the other of Aut[horit]ye: the Freeman Act of them selves in Electinge their magistrates and Officers: the magistrates Acte together (sic) in the General Court: yet all limited by certaine Rules, bothe in the greater and smaller affairs: so as the Government is Regular in a mixt Aristocratie, and no waye Arbitrary.⁹⁹

Winthrop was not alone in defending the form and actions of the Massachusetts Colonial government. John Cotton, a minister and political theorist, was quick to take up the pen to explain and defend the colonial government. Though he once argued for life-time tenure for magistrates, he was no defender of arbitrary government. His

⁹⁸Ibid., pp. 240-241.

⁹⁹Winthrop Papers, 1638-1641, Massachusetts Historical Society (Boston, 1944), IV, 482. Also see B. Katherine Brown, "A Note on the Puritan Concept of Aristocracy," The Mississippi Valley Historical Review, XLI, no. 1 (June, 1954), pp. 105-112, for a discussion of the meaning of the political terms used by the Puritans.

"Exposition upon the Thirteenth Chapter of the Revelation" discussed the need for limitation upon those who exercise authority.

There is a straine in a man's heart that will sometime or other runne out to excesse, unlesse the Lord restraine it. . . . It is necessary, therefore, that all power that is on earth be limited, Church-power or other. . . . It is counted a matter of danger to the State to limit Prerogatives; but it is a further danger, not to have them limited. They will be like a Tempest, if they be not limited: A Prince himselfe cannot tell where hee will confine himself, nor can the people tell. . . . It is therefore fit for every man to be studious of the bounds which the Lord hath set: and for the People, in whom fundamentally all power lyes, to give as much power as God in his word gives to man: And it is meet that Magistrattes in the Common-wealth, as so Officers in Churches should desire to know the utmost bounds of their own power, and it is safe for both: All intrenchment upon the bounds which God hath not given, they are not enlargements, but burdens and snares. . . ."100

Thus, Cotton recognized that there must be limits placed upon the exercise of power to protect society from the evils and excesses of human nature.

In 1643, four colonies formed a union called the United Colonies of New England. The union of Massachusetts, Plymouth, Connecticut, and New Haven created a confederation under an executive whose authority would not threaten the governor's position within any of the respective colonies. Each colony sent two representatives from which the confederation council elected one as their executive head. His principle function was that of a presiding officer, "whose office and work shall be to take care and direct for order and a comely carrying on of all proceedings in

¹⁰⁰John Cotton, An Exposition Upon the Thirteenth Chapter of the Revelation (London, 1965), p. 72.

their present meeting. . . ." However, the articles of union went on to specifically deny him any special political power or authority:

He shall be invested with no such power or respect, as by which he shall hinder the propounding or progress of any business, or any way cast the scales otherwise than in the preceding articles is agreed.

In other words he had no veto or other powers which would raise him above the others, which indicated a reluctance to create an office that might interfere in any way with the internal affairs of a colony. That view is further reinforced by the fact that in a dispute among the council members, three fourths (six out of eight) had to agree before any action could be taken. Thus, the New England union foreshadowed the fear of an independent executive power that proved to be a stumbling block to American union over a century later.¹⁰¹

In the latter half of the seventeenth century Massachusetts underwent a series of political crises which culminated in the loss of its charter. After the Stuart Restoration in 1660, Charles II undertook to convert Massachusetts into a royal colony. Once the Massachusetts charter was annulled in 1683 the way was cleared for the king to consolidate the entire New England area under one royally appointed governor and to eliminate the assembly. However, his death ended that prospect temporarily.¹⁰²

¹⁰¹ Kellogg, "The American Colonial Charter," pp. 203-204.

¹⁰² For documents relating to the vacating of the Massachusetts Charter see Robert N. Toppan, ed., Edward Randolph: Including His Letters . . . With Other Documents Relating Chiefly to the Vacating of the Royal Charter of the Colony of Massachusetts Bay, 1676-1703, 7 Vols. (New York, 1967).

Charles' successor, James II, continued the plan to bring Massachusetts under royal control. In October, 1685 a temporary government for New England was established by granting Joseph Dudley a commission "As President of the Council for New England." He was empowered to select one council member to act as his deputy. Seven members of the council constituted a quorum, and together with the governor, the council was to act as the general administrative body for the Dominion of New England until a new government could be established.¹⁰³

In June of 1686, Edmund Andros was appointed "Captain General and Governor in Chief" for the Dominion of New England, which was enlarged to include New York and New Jersey. His brief tenure caused a major upheaval within the colony which set the stage for the future drama leading to the American Revolution in the eighteenth century. Andros had been the governor of New York, a colony with traditions far different from those of Massachusetts. Unlike the New England experience, New York had no legislative assemblies. There the governor and council legislated for the colony, levied and collected the taxes, and spent the revenue. The English crown and its concept of prerogative were firmly inculcated into its colonial tradition. When Andros tried to apply the lessons of New York's executive controlled colony to the

¹⁰³"Joseph Dudley's Commission as President of the Council for New England," Publications of the Colonial Society of Massachusetts (Boston, 1913), II, 37. The title given here was assigned by the editor Albert Matthews. See his note on page 37.

self-governing tradition of Massachusetts it was only natural that it touched off a political crisis.¹⁰⁴

The king's plan was to consolidate all the colonies within the New England area under an all-encompassing executive power similar to the French and Spanish pattern of colonial organization. To administer this territory Andros was given five exclusive areas of authority and three joint areas of power to be shared with the councillors. In the first category he was given the power to suspend council members on just cause, to judge and pardon offenders in capital and criminal matters, treason and willful murder excepted, to appoint judicial officers, to raise an army, to declare martial law, and to establish courts of admiralty. Powers shared jointly with the council were the authority to legislate, to impose, assess, raise and levy rates and taxes, and to establish courts.¹⁰⁵

The commission under which Andros assumed control over the Dominion of New England was alien to the tradition which had developed within that region during the seventeenth century. To force the inhabitants of the Massachusetts area to submit to an autocratic form of government, imposed solely by the will of the executive who obeyed commands from some other remote executive power, would eventually lead to a political confrontation.

¹⁰⁴"Sir Edmund Andros's First Commission as Governor of the Territory and Dominion of New England," *Ibid.*, pp. 44-56. Also see pages 57-68 for his second commission of April 7, 1688 entitled, "Sir Edmund Andros's Second Commission as Governor of the Territory and Dominion of New England."

¹⁰⁵*Ibid.*, pp. 57-68. Also see Calendar of State Papers, Colonial Series 1685-1688, XII, doc. 857, p. 242.

On taking office, Andros ordered life to carry on as usual. Judges were instructed to "administer justice according to the custom of the place." Taxes were to follow the "former established rules," and laws not inconsistent with his commission were to be enforced. In short, as colonial historian Thomas Hutchinson noted, "his administration gave great encouragement."¹⁰⁶

Soon, however, problems appeared. When some residents who felt themselves oppressed appealed for redress, a member of the council "told them they must not think the privileges of Englishmen would follow them to the end of the world." Hutchinson wrote that "This gave an alarm through the government, and it was never forgotten." Then an attempt was made to establish the Church of England which threatened to interfere with "worship in the congregational way." This was followed by "Swearing by the book, which had never been practised (sic) and such as scrupled it were fined and imprisoned." Fees "to all officers" were raised to a burdensome rate. Finally, the people were told that because of the new charter the "titles to their estates were of no value."¹⁰⁷

In England James II was facing a political crisis of his own. The birth of a Catholic heir to the English throne and his appointment of Catholics to civil and military offices in disregard to the Test Act of 1673 was pushing England to a political crisis. In a move to protect their interests, Parliament invited William and Mary of Orange to take the throne in what became known as the Glorious Revolution.

¹⁰⁶Hutchinson, The History of Massachusetts-Bay, I, 300.

¹⁰⁷Ibid., pp. 302-305.

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The overthrow of James II by the Glorious Revolution added a new element in the struggle with Andros, which caused one observer of the events in Massachusetts to comment: "I fear whether or not the matter of settling things under a new Government may not prove far more difficult than the getting from under the power of the former. . . ." ¹⁰⁸

The revolt against Andros which followed quickly on the news of the Glorious Revolution was accomplished with relative ease. However, as predicted, establishment of a new government presented a number of problems. The first solution was to create a Council of Safety to act as an executive body to take charge of the immediate problems of government until an interim government could be agreed upon. Finally, in May of 1689, the old government of 1685 was called back into service until matters could be clarified in England. ¹⁰⁹

Colonial agent Increase Mather, when sent to England, failed in his attempt to gain the restoration of the old charter. King William wanted a government for Massachusetts modeled after that of Barbados, whereby the king would appoint the governor who would have full veto power. Mather, on the other hand, wanted to confine the governor's veto power to laws only, and not to cover elections and other acts of the assembly. However, he was overruled by the Crown's advisors and the governor was given full veto power over all acts of the assembly. In

¹⁰⁸Charles M. Andrews, ed., Narratives of the Insurrections (New York, 1915), p. 190; Samuel Prince to Thomas Hinkley, Boston, April 22, 1689.

¹⁰⁹See the Calendar of State Papers, Colonial Series, 1689-1692, XIII, doc. 152, pp. 45-47; doc. 181, pp. 60-61; doc. 196, pp. 67-68; doc. 261, pp. 92-95; doc. 1, 276, p. 375.

addition, the governor had the power to appoint judges and sheriffs, and the right to probate wills. The king concurred, and Massachusetts was granted a new charter in 1691.¹¹⁰

The 1691 charter permanently altered the future direction of executive experience in Massachusetts. On the whole, the new charter granted a broader scope of powers than did the charter of 1629. It is significant that it was the only royal charter to systematically set forth a provincial constitution. Its provisions expressed a clear legal basis for the legislative and judicial powers whereby the power to tax and issue judgments was firmly established. Subject to the governor's veto, the former assistants became the upper house of the legislature. The assembly, on the other hand, was no longer absolute. Its powers were subject to the veto of a royally appointed, not elected, governor. Additionally, behind the governor was a royally appointed deputy governor and secretary.¹¹¹

Like the previous charter, the governor was given specific powers of appointment and other responsibilities. He had "full power" to summon, "prorogue and dissolve" the 'general' Court of Assembly" whenever "he shall think fitt," but at least once annually. He could also appoint "Judges, Commissioners of Oyer and Terminer Sheriffs,

¹¹⁰For a discussion of the events surrounding the charter dispute see M. G. Hall, ed., "The Autobiography of Increase Mather," Proceedings of the American Antiquarian Society, LXXI (October, 1961), pp. 271-360. Also see Calendar of State Papers, Colonial Series, 1689-1692, XIII, doc. 11, p. 4; doc. 18, p. 6; doc. 28, p. 8; doc. 37, p. 11.

¹¹¹"Sir William Phips's Commission as Governor of the Province of the Massachusetts Bay, 12 December, 1691," Publications of the Colonial Society of Massachusetts, II, 69-75.

Provosts Marshalls Justices of the Peace and other Officers to Our Councill and Courts of Justice. . . ." ¹¹² The governor's specific responsibilities on how to administer these powers were included in his instructions upon his appointment.

The charter divided the bulk of the powers between the governor and the two houses of the legislative branch, which was a compromise between the two factions vying for control of Massachusetts since the Restoration. A royally appointed executive branch, and a popularly elected legislative branch made Massachusetts basically a commonwealth with a provincial executive grafted on as its executive head. To assert its control over Massachusetts and to counter the tradition of popular government, the English monarch had to destroy the concept of an executive responsible to the people and impose one responsible to him alone. This ended an era in which the concept of a limited, elected, and responsible executive was shown to be a workable alternative to a royally appointed and controlled colonial executive.

The proprietary colonies developed their executive theory along lines similar to those of the royal colonies, the major difference being that a proprietor stood between the king and governor. From the governor's point of view, the proprietor assumed the function of the Crown as he possessed "the jurisdictions, liberties, immunities, regalities, and franchises, which were enjoyed by the Bishop of Durham, including the right to grant lands, appoint officers, erect tribunals, establish militia, control the church, incorporate towns, designate

¹¹²Ibid.

ports, and assess customs."¹¹³ Lord Baltimore received the charter for Maryland in 1632, which granted him all rights, privileges, and immunities.¹¹⁴ He held the land in free and common socage and made a token payment to the king of two Indian arrows and one fifth of the gold and silver found in the colony. However, the proprietors of the New York and Pennsylvania colonies were restricted in several ways. In the grant to the Duke of York, the king reserved the right to receive appeals resulting from judgments within the colony.¹¹⁵ In Pennsylvania the king reserved the right to veto all acts passed by the freemen and supported by the proprietor for a limited time after their transmission to the Crown.¹¹⁶

The relationship between the king and proprietor was feudal in nature, inasmuch as it associated the rights of land with the rights of government. The proprietary grants were, in essence, private jurisdictions in which the normal operation of royal sovereignty was generally exempted. The purpose of the proprietary grant, in the words of one historian, was to

found a landed estate, [and] the statute of 'quia emptores' was in every case suspended and the proprietor given the power of erecting manors and of selling and alienating lands. The proprietary, therefore, was a vast estate, and the relationship between the colonists and the head of the province

¹¹³Kellogg, "The American Colonial Charter," p. 193.

¹¹⁴Poore, The Federal and State Constitutions, I, 811-817.

¹¹⁵Ibid., II, 783-785.

¹¹⁶Ibid., pp. 1509-1515.

was complicated because of this twofold relationship as governor and landlord.¹¹⁷

In matters of organization and power the royal and proprietary colonies had much in common. Each had a governor appointed by an outside source (the king or proprietor) who governed with a nominated council and an elected assembly.¹¹⁸ However, as one historian concluded about the proprietary governor, he was,

in a sense, not even a public officer at all, but the agent of a private person or group of persons instructed, it is true, with the powers and duties of an officer of State, but charged also with the defence and promotion of distinctly private interests.¹¹⁹

Though the proprietary colony offered the chance for numerous experimental concepts of government, by the end of the seventeenth century the tendency was for the proprietary colonies to fall within the concepts embodied by the royal colonies. Thus, the governors of the proprietary and royal colonies essentially differed only in the fact that the royal governor received his authority directly from the Crown while the proprietary governor received his from the individual or body of proprietors. It therefore became relatively simple to convert the

¹¹⁷Kellogg, "The American Colonial Charter," p. 193.

¹¹⁸In the case of Carolina "the distinction of the Governor from the rest of their Deputies is a thing of order than of overruling power, and he has not more freedom than any one of the council to swerve from those rules commissions and instructions which his lordship expects his Deputy exactly to follow." The Earl of Shaftesbury to Maurice Mathews, June 20, 1672, Calendar of State Papers, Colonial Series, VII, doc. 867, pp. 377-378 provides a comprehensive discussion of the governors powers and how the Fundamental Constitutions were to operate.

¹¹⁹Evarts B. Greene, The Provincial Governor in the English Colonies of North America (Gloucester, Massachusetts, 1966), p. 9.

proprietary to royal colonies without major political upheavals by simply transferring the prerogatives from the proprietor back to the king.

In retrospect the seventeenth century established a body of experience and precedents which laid the foundation of American executive theory. The early colonial charters were for commercial ventures which later matured into political communities. One of the key elements in this transition was the colonial governor. At first his political functions were dependent upon his commercial obligations to a parent company or proprietor. His powers, therefore, appeared to be based more upon commercial expediency than any particular constitutional or political theory.

However, as the colonies grew in size and their operation became more complex, the role of the governor underwent a series of changes which altered his power and functions. Thus, as a general rule the governor's authority and organization was not established fully developed, but rather it was altered periodically to meet the needs of changing circumstances. Many of the changes that did occur emerged from a common body of experience that resulted from the necessity of creating a political community from a commercial venture. Where the results differed, it was due, in part, to the different circumstances under which the various companies were established. For example, where the company remained in England, as in the case of Virginia, the problems of operating a colony so far removed from the parent company created a variety of administrative experiments which were different from the Massachusetts model in which the company and colony were merged into

the same entity. Nevertheless, by the end of the seventeenth century the similarities outnumbered the differences with respect to the organization and empowering of the executive within each of the colonies.

The source of executive authority came from four basic areas in the seventeenth century. The first was the charter which created and empowered joint stock companies to delegate certain powers to a president or governor. As noted before, these grants of power were by and large general in nature. Additionally, the charter listed certain obligations the governor was required to carry out from which he implied various other powers. Upon conversion to a royal colony the governor's power derived mainly from the commissions and instructions which were the second significant source of executive power. In addition to his powers contained within the commissions and instructions he carried the weight of the royal prerogative behind him as personal representative of the king. This gave the royal governor a vice-regal position, which gradually influenced and finally determined the scope of powers exercised by the colonial governors.

The third source of executive power came from commissions and instructions issued by proprietors, who stood between the king and the governors. Unlike the royal governor, the proprietary governor could not effectively use the weight of royal prerogative to augment his power. However, the proprietary governor was by no means powerless. Often the proprietor granted the governor virtually the same powers he himself had received as was the case with Governor Nicoll's commission

from the Duke of York.¹²⁰ More often than not, though, the proprietary governor developed along the same lines as the royal governor.

The people were the fourth source of executive power, as evidenced by the development of the Massachusetts Bay colony. Like the early Virginia experience, Massachusetts developed its executive power from a commercial company. However, since the company itself was in the new world the stockholders took an active part in determining the direction the development of executive power was to take. As seen in the 1634 resolutions of the general court, the freemen claimed the right to elect and define the role that executive officials were to play, in spite of Governor Winthrop's claims of general executive authority under the charter and existing common law. Thus, the freemen claimed the right to interpret and develop to their own satisfaction the grant of executive power found in the charter. Connecticut and Rhode Island were the other New England colonies which experimented with elected

¹²⁰See the administration of Governor Nicolls in Alexander C. Flick, History of the State of New York (New York, 1933), II, 76-86. The case of Carolina provided another good example of the relationship between the governor and proprietor. "He sent his deputy and put into his hands all the power and share in the government Shaftesburg should have himself, were he in Carolina. We find their Fundamental Constitutions, temporary laws, and instructions the compass he is to steer by, wherein, if not deceived, the safety and prosperity of the people has been better provided for than ever was done in any other plantation. He is therefore obstinately to stick to those rules and oppose all deviations, since by their frame no body, power, or any of the Proprietors themselves is able to hurt the meanest man in the county if their Deputies have but honesty and resolution enough to keep things tight to those ends." Earl of Shaftesbury to Maurice Mathews, June 20, 1672, Calendar of State Papers, Colonial Series, VII, doc. 867, p. 375.

governors.¹²¹ However, these governors appeared to be more administrators than policy makers as was the case with Massachusetts.

The power granted the governors in the early part of the seventeenth century was usually of a general nature, and described in the briefest of terms in their commissions. Most commissions contained a formal grant of power, a statement of the governor's military powers and obligations as commander-in-chief, directions on the formation of the council, and a few specific instructions designed to meet local problems. At first, little attention was given to any exact description of the governor's powers since he was given the responsibility of managing a commercial venture, not creating a political entity. Only when the colony became too large for personal management did the necessity arise for a stricter definition of his powers in light of the need to delegate some of his power to specially created executive officers. Even then, general descriptions were still preferred. It was not until the latter part of the century that the commissions provided a more detailed description of the governor's power.

While the commissions granted power to the governor, his instructions often limited it by describing how he was to use it. For example, a governor's commission would empower him to create courts and appoint justices. However, his instructions might limit his ability to

¹²¹The elections procedure outlined in the "Fundamental Orders of Connecticut" (1639) provided for a rudimentary electoral college. "Euery (sic) p[e]rson present and qualified for choyse shall bring in(to the p[e]rsons deputed to receaue (sic) the) one single pap[e]r w[i]th the name of his written in y[e]t whom he desires to haue (sic), Governor, and he that hath the greates nu[m]ber of papers shall be Governor for that yeare." Poore, Federal and State Constitutions, I, 249.

create courts to only those warranted by the Crown, and even then, require the council's consent to confirm his appointments to fill them.

One of the governor's foremost powers was his role as commander-in-chief. Generally the governor's commission would authorize him to appoint officers, raise armies, and use those powers normally belonging to the commander-in-chief to protect and defend the colony. The governor did, however, have limits on his military powers. The Massachusetts charter of 1691, for example, limited his power in two ways. First, he could not take the militia out of the colony without the consent of the general court. Second, he could not declare or execute martial law without the approval of the council.¹²²

In actual practice the governor's military powers varied according to the extent of danger posed by the possibility of an invasion or insurrection. The Maryland charter, for example, gave the governor power to make war upon the neighboring Indians when they endangered the colony.¹²³ The Pennsylvania charter prohibited the governor from corresponding with an enemy of the king, or making war upon friendly neighbors.¹²⁴ Aside from the problems with the Indians, the royal and proprietary governors, as subordinate officials to the Crown, were prevented from embroiling the colony, and therefore England, in an unwanted war. Later in the eighteenth century the assemblies

¹²²"The Massachusetts Charter of 1691," Publications of the Colonial Society of Massachusetts, II, 69-75.

¹²³Poore, Federal and State Constitutions, I, 811-817.

¹²⁴Ibid., II, 1527-1531.

would try to further limit the governor's military power by denying him the necessary funds to support the militia when they opposed his actions.

Allied with the governor's role as commander-in-chief was his responsibility for the foreign affairs of the colony. This was generally limited to handling problems with the Indians and communicating with other colonies over common problems. The significance of the governor's role in this area did not come fully into play until later in the eighteenth century.¹²⁵

Another important power possessed by the governor was that of filling colonial offices. Appointment to the council, the courts, or the numerous other local offices gave the governor a useful weapon to enhance his power as noted previously. However, the assemblies responded by trying to restrict his power by statutes and later on, by limiting or withholding appropriations and salaries to nominees they did not like.

The governor was entrusted with certain other powers, among which was the power to pardon. As a rule, most commissions gave the

¹²⁵See the following examples of the futile attempt by Governor Sloughter to formulate a military alliance and union among the colonies to resist the French. Calendar of State Papers, Colonial Series, XIII, doc. 1593, p. 477; doc. 1638, p. 503; doc. 1647, p. 508; doc. 1673, p. 515; doc. 1681, p. 517; doc. 1708, p. 525. These are all examples indicating that the colonies were too engrossed with their own problems to think of union for their common defense. In 1693 Governor Fletcher of New York tried and failed to form a colonial congress to discuss common military problems and raise an army to defend New York's borders. Calendar of State Papers, Colonial Series, XIV, doc. 578, p. 165; doc. 582, p. 166; doc. 590, p. 167; doc. 664, p. 203; doc. 794, p. 227. In short, from 1693-1696 the colonies refused to face common problems of defense. England came forward and provided the necessary defense and the colonies paid the price by giving more control to the English bureaucratic structure over them.

governor the power to pardon in all cases except treason and willful murder. In those areas he had the power of reprieve until the case could be reviewed by a higher authority. For the most part the governor exercised his pardon power independently and he did not require the concurrence of the council.

Finally, the governor was granted provisional discretionary power to cover problems not specifically outlined in the commission or instructions. In most cases the governor had to have the concurrence of the council and had to inform immediately his superiors in England of what actions were taken.

Above all, the royal governor's greatest influence came as the representative of the king. One historian summed up the seventeenth century experience in Virginia when he said,

In the days of Charles I, in the Restoration period, and under James II, when the Stuarts were combating liberal institutions, both in England and in the colonies, the governor exercised a powerful and dangerous control over affairs in Virginia. But after the English Revolution his power declined. As the people of England no longer dreaded a monarch whose authority now rested solely upon acts of Parliament, so the Virginians ceased to fear his viceroy.¹²⁶

Another feature of the early seventeenth century colonial governments was the initial concentration of power in the hands of the executive branch. The separation of powers doctrine was not as yet an established constitutional doctrine. In most colonies political necessity did, however, give it a nudge in that direction since the governor was overburdened with work as the colony increased in size. The

¹²⁶Thomas J. Wertenbaker, Virginia Under the Stuarts, 1607-1688 (New York, 1958), p. 42.

legislative powers were the first to be taken away from the executive via an assembly or general court. However, as evidenced by the Virginia and Massachusetts experience, it was not without considerable trouble.¹²⁷ This struggle was generally repeated in virtually every other colony. Even after the existence of the assemblies was assured, it was not uncommon for the governor to attempt to circumvent the assembly by the means of proclamations. Nevertheless, the New England government outlined in Governor Andros' commission was the last attempt of that century to give the governor absolute legislative authority.

When the governor lost his legislative power to an assembly, it did not mean that he lost his ability to influence legislation. Aside from his veto, the governor often possessed other influences. The 1682 royal instructions for Virginia, for example, directed the governor and council to draft all legislative bills.¹²⁸ The Maryland, Pennsylvania, and Carolina constitutions all provided for executive preparation of legislation for assembly approval. These claims of

¹²⁷In response to a series of questions sent by the Commission on Plantations in 1670, Governor Berkley noted the separation of powers. "Where [is] the legislative and executive powers in your government?" Answer. In the governor, council and assembly, and officers substituted by them." Calendar of State Papers, Colonial Series, VII, doc. 565, p. 232. George Chambers noted that the failure of Parliament to develop the machinery to legislate for all the details of colonial government necessitated the creation of local legislatures. He concluded that "the security and freedom of the colonists arose . . . from the mixed nature of the government, which necessarily produces opposition to the executive power; from the excellent balance of the constitution, which offers so many checks to the spirit of domination; from the responsibility of ministers, which, in modern times, forms the best barrier of any against oppression. Political Annals, p. 45.

¹²⁸Leonard Woods Labaree, Royal Instructions to the British Colonial Governors, 1670-1776 (New York, 1967), I, 125.

executive prerogative were, however, generally resisted by the assemblies.

Also, the governor's council gradually assumed an independent role to become, in most cases, the upper house of the legislative branch. The governor then became either a member of the upper house or its presiding officer. However, the governor, along with his council, sought to maintain a firm hold on the judicial functions assigned to them by the commissions and instructions. In the case of Virginia, for example, this relationship had its political advantages. First, the governor and council had extraordinary power over the judiciary since they appointed the judges and they possessed the final appellate review over their judgments. Second, "the close connection between the executive and the courts at this time made it quite possible for the governor to obtain from a jury whatever verdict he desired. In fact, it became the custom for a new administration, as soon as it was installed in power, to take revenge upon its enemies by means of the courts."¹²⁹ This power was somewhat limited later by the organization of the colonial courts, but the governor and council continued to be, in most cases, the highest court of appeal, which still gave them tremendous power.

¹²⁹ A complaint against the system of justice was voiced by Benjamin Harrison in 1698. "The same men of the council also constitute the Supreme Court of Judicature in all causes whatsoever, so that there is not relief against any judgments that they choose to give, so that the most prudential method for every man is to submit patiently and to make the best terms with them that he can. For they will always look so carefully to their own interest as to stand by each other in opposition to all persons, and if one of them chancs to speak a little freely of the miscarriages of one of his brethern, though perhapse there may be truth enough in it, yet among themselves and generally let such things sleep. Calendar of State Papers, Colonial Series, XVI, doc. 656, p. 330.

The seventeenth century governor was therefore not strictly or exclusively an executive officer since he still possessed important legislative and judicial functions. It was left to the eighteenth century to complete the task of a more thorough division of powers.

In short, the theory of executive power began in the seventeenth century with a strong independent governor. Part of that resulted from the initial concentration of most governmental power in his hands. Gradually as the commercial companies matured into complex political communities the scope of the governor's power was divided and limited. He lost, for example, the legislative power to representative assemblies, though he was far from powerless to influence legislation. As experience dictated, his powers were further defined and limited.

The seventeenth century established and reinforced a number of principles around which developed the basic institution of American executive power. The first was executive unity. Every colony vested the ultimate executive authority in one person. He may have shared his powers with a council at various times, but responsibility generally devolved upon one person to see that policies were properly administered.¹³⁰

The second principle was the written delegation of powers. The governor's authority came from a written instrument, be it a charter, a commission, a set of instructions, or laws passed by an assembly.

¹³⁰Wertenbaker, Virginia Under the Stuarts, p. 66. Also see William C. Morey, "The Genesis of A Written Constitution," Annals of the American Academy of Political and Social Science, April, 1891, pp. 529-557; Andrew C. McLaughlin, Foundations of American Constitutionalism (New York, 1966), Chapter II, pp. 38-65; Thomas Ludwell, "A Description of the Government of Virginia," Virginia Magazine of History and Biography, V, 56-57.

Though the royal governor viewed himself as the embodiment of the royal prerogative, he was still subject to the limits of those documents. Even in the charter colonies, like Massachusetts, the deputies in the general court were quick to protest a claim of executive authority which was not recognized by the charter or granted by laws enacted under it. Thus the governor had the scope of his authority confined to a written instrument, though he had other means, like patronage, to augment his written grants of power.

The third principle was executive responsibility. The documents which empowered the governor also created a hierarchy of authority which established executive responsibility. The governor was not a divine right monarch. His actions were subject to review by king, proprietor, or assembly, as in the case of a charter colony. He may have been a powerful political figure in the colony, but the exercise of that power was tempered by the fact that he was not entirely his own man. His actions directly affected the king, or proprietor, or the people who elected him. In the latter case, as noted earlier, the people of Massachusetts were quick to oppose the idea of life-time appointment for the governor, preferring to make him subject to annual election to keep him responsible to their wishes. Additionally, the governor was required to take an oath of office before he could begin his duties, and he was subject to recall or impeachment if he violated it.¹³¹

In Virginia, however, the governor developed ways to counter the checks placed upon him. Hartwell, Blair, and Chilton, in their

¹³¹Labaree, Royal Instructions, I, 33-34.

century end report on The Present State of Virginia, and the College, listed three checks on the governor--the king's instructions, the council, and the general assembly. The governors, they reported, "have since found out ways to evade them all!" He first kept the instructions secret. Then he maneuvered appointments to the council into his hands and maintained their loyalty by patronage. Finally, after 1680, with Culpepper's appointment as governor, he convinced the king to remove the appellate power from the assembly and to lodge it with the king, which effectively ended the assembly's power to override the governor. These and a host of other minor ways made the governorship a powerful political institution in relation to the council and the assembly toward the end of the century.¹³²

The fourth principle involved was executive discretion. As long as the governor was accountable to those responsible for his tenure, most were willing to grant a degree of discretion in the execution of his duties. At first, the degree of discretion was extremely broad. However, as the governor's duties became more political and less concerned with management of a commercial venture, the degree of discretion allowed was significantly narrowed. Additionally, as the operation of the colony became more complex, the governor's powers were increasingly defined in more precise terms which tended to limit his discretion even further. Nevertheless, commission and instructions could not foresee every eventuality that might arise, and therefore,

¹³²Hartwell, Blair, and Chilton, The Present State of Virginia, pp. 21-30. Calendar of State Papers, Colonial Series, V, doc. 1250, pp. 400-401.

did leave the governor some discretion. In areas of extreme importance, like military matters, the governor was required to proceed only with consent of the council.

As the seventeenth century drew to a close, England began to take steps to consolidate its power over the colonies. The king's old executive board, known as the Committee of the Privy Council on Trade and Plantations, established under Charles II, was reorganized into the Board of Commissioners for Trade and Plantations, better known as the Board of Trade. The Board was responsible for the development and enforcement of imperial controls over the colonies. Since the Restoration, England had slowly built up an apparatus which tried to bring the colonies into a more ordered system of administrative control under the English executive.¹³³

The Board's major tool for enforcement of its policies was the colonial governor, who was controlled through the means of his commission and instructions. The other significant means of control was the supervision of colonial legislation. The right of the king to suspend or disallow provincial legislation in the royal colonies had long been conceded. However, in 1681 England began to extend this to the proprietary colonies as evidenced by the Pennsylvania charter.¹³⁴ Especially after the Glorious Revolution, the disallowance of colonial legislation became one of the major weapons the Board used to bring the colonies

¹³³Kellogg, "The American Colonial Charter," pp. 207-229, for a discussion of the Board's role.

¹³⁴Poore, Federal and State Constitutions, I, 1527-1531.

into conformity with imperial policies. In the polarization that followed between England and the colonists, the governor became the focal point as he tried to maintain the royal prerogative against assemblies which were viewing themselves more and more as miniature Parliaments. This was to have a decisive influence on the development of American executive theory in the eighteenth century.

Thus, from 1685 to 1720 the Crown exerted its greatest efforts to reduce the colonial charters to forms consistent with their aim of imperial control. The major instrument in accomplishing this was the Board of Trade whose hostility toward the seventeenth century colonial charter was directed at the establishment of a uniform system of government which would allow it to exercise a more complete bureaucratic control over the development of American institutions.¹³⁵ The implication of this process on American executive theory will be discussed in Chapter II.

Additionally, the political experience among the colonies was remarkably uniform by the end of the seventeenth century. Many common experiences had developed out of the divergent origins of charter, proprietary, and royal colonies which, in spite of the geographic isolation, formed the basis for common solutions. This was especially true after the Board of Trade began to institute uniform policies for the colonies under its jurisdiction.

In summary, the American colonial experience of the seventeenth century saw, for the most part, a tradition of strong executive

¹³⁵Kellogg, "The American Colonial Charter," p. 319.

leadership. However, the means by which a governor maintained his strength became, in part, his undoing. As the governor came to be identified more with an external authority, the more precarious his position became within the colony. The American colonial governor's fall from power soon became one of the major themes of the eighteenth century.

CHAPTER II

DOMESTICATING THE EXECUTIVE:

The Eighteenth Century Colonial Governor To the Reorganization of the Empire in 1763

The century between the Glorious and American Revolutions was a period of great significance for the development of American executive theory. The experiences, precedents, and theorizing which took place in this era established a foundation upon which the revolutionary generation built the structure of the national executive power in the succeeding two decades. This chapter examines the role of the eighteenth century colonial governorship in the development of American executive theory by analyzing the interaction between its constitutional structure and colonial politics prior to the reorganization of the British Empire in 1763.

The Stuart Restoration in 1660 saw an attempt by Charles II and James II to bring some order to the haphazard organization of English colonial efforts by the consolidation of the colonies into dominions. However, this plan was cut short by the Glorious Revolution in 1688. Colonial reaction to the events in England led the new policy makers to abandon the dominion concept and return to the establishment of individual colonies. Additionally, England undertook a major review of its colonial administrative methods and overhauled its machinery for supervising colonial affairs. Oddly enough, the Revolution which established

Parliamentary supremacy in English political life did not carry over the same result into the colonial policy making. There the Revolution was followed by an attempted increase of prerogative control over the colonies.¹

The transition from the Stuart monarchy to William and Mary saw a significant restructuring of colonial administration. To prevent Parliament from interfering with colonial operations, William established the Lords of Trade and Plantations in 1696, often called the Board of Trade. Prior to that time colonial affairs were handled by various committees of the Privy Council. However, the Board of Trade did not have the power to act independently, but only to recommend actions for Privy Council consideration, e.g., whether to approve or veto colonial legislation. The Privy Council was therefore the ultimate constitutional authority over the colonies, limited only by the fact that once a colonial charter was granted, it could only be revoked by due process in English courts. The Board of Trade, for the most part, became the conduit for communications between England and the colonies. This latter function was shared with the Secretary of State for the Southern Department to whom the colonists frequently appealed to circumvent the Board of Trade recommendations inimical to their interests, since the Secretary could overrule the Board at his pleasure.²

¹George Chalmers, Political Annals of the Present Colonies from the Settlement to the Peace of 1763 (New York, 1968), and Michael G. Hall, et al., The Glorious Revolution in America: Documents on the Colonial Crisis of 1689 (New York, 1963).

²Louise P. Kellogg, "The American Colonial Charter, A Study of English Administration in Relation Thereto, Chiefly After 1688,"

The Board of Trade's primary function was to further British mercantile interests. Its policy makers were therefore more concerned with economic than administrative aspects of colonial relations. Accordingly, the Board's administrative work was limited to a few basic functions: examining governors' instructions; preparing annual reports on a governor's actions; recommending persons for various colonial offices; analyzing colonial legislation for possible veto; writing legislation for governors to present to their colonial assemblies; and finally, accounting for all funds raised and dispersed within the colonies. In short, the function of the Board was to gather information and prepare advice for the direct action of the King in Council.³

The Secretary of State for the Southern Department, on the other hand, represented the Crown's prerogative in colonial relations. He appointed the governors and other royal officials within the colonies, directed colonial military operation, and corresponded with colonial officials. His interference prevented the Board of Trade from carrying out a definite and consistent plan of colonial administration. Additionally, the ability of the men appointed as secretary also affected

Annual Reports of the American Historical Association, 1903, I, pp. 184-341; Peter Laslett, "John Locke, the Great Recoinage, and the Origins of the Board of Trade: 1695-1698, William and Mary Quarterly, 3d ser., XIV (July, 1957), 370-402; I. K. Steele, Politics of Colonial Policy: The Board of Trade in Colonial Administration 1696-1720 (Oxford, 1968).

³Kellogg, "The American Colonial Charter," pp. 207-214; Arthur H. Bayse, The Lords Commissioners of Trade and Plantation . . . 1748-1782 (New Haven, 1925); Michael Kannen, Empire and Interest: The American Colonies and the Politics of Mercantilism (Philadelphia, 1970); George Louis Beer, The Commercial Policy of England Toward the American Colonies (New York, 1893).

the development of policy. From 1696 to 1724, thirteen men occupied this office until the Duke of Newcastle was appointed at the age of thirty. Under his leadership, which lasted until 1748, colonial relations fell into a period of inattention, which allowed precedents to become so strongly established that an attempt to undo them created a major political crisis. This is known as the period of "salutory neglect."⁴

From its inception to 1702, the Board of Trade acted as an adjunct to the King in Council, which accounted for its initial successes. However, after that point it suffered from fragmented administrative control as senior ministers of the Crown plundered the colonial office in search of lucrative patronage prizes to bolster their own position within the English government. Moreover, American affairs for the most part were on the periphery of English political concerns, which resulted in colonial policy fashioned to fit private interests. So long as there was no one agency in charge of coordinating the development and enforcement of colonial policy, Americans would enjoy the benefits of virtually governing themselves. As one official observed, "It is found by experience that whatsoever Council (sic) is not enabled as well to execute as advise, must needs produce very imperfect and weak effects."⁵ That was the position the Board of Trade found itself in during the crucial years of American colonial development.

⁴James A. Henretta "Salutory Neglect": Colonial Administration Under the Duke of Newcastle (Princeton, 1972).

⁵Quoted in Steele, Politics of Colonial Policy, p. 8.

By 1752, the Board of Trade convinced the Privy Council to direct the colonial governors to deal with it alone except in cases requiring the Crown's immediate attention, e.g., questions of foreign policy and military action. However, the Board of Trade was unable to surmount the bureaucratic and political problems caused by the reorganization of colonial administration and was finally abolished in 1768. A secretary of state was appointed to conduct all colonial business, which indicated an attempt to centralize colonial administration in the hands of an official directly responsible to the king.⁶

Under the Duke of Newcastle, colonial administration suffered from a number of problems which affected the internal operation of the colonies. One of the more serious ones was Newcastle's use of the colonial office as a source of patronage to increase his influence within the British government. By the 1730's the colonial office had "become a repository for sterile placemen and shabby politicians."⁷ Newcastle's success at bringing colonial affairs under his control, however, was not used to strengthen British control over the colonies. This was due, in part, to the fact that American affairs did not carry the political impact necessary to bring down a ministry when something went wrong. The lack of competent administrators and the low priority of American affairs in British politics further weakened British control over the colonies in this period.

⁶Kellogg, "The American Colonial Charter," p. 225; Henretta, "Salutory Neglect," pp. 308-309; Franklin B. Wickwire, British Sub-Ministers and Colonial America, 1763-1783 (Princeton, 1966).

⁷Henretta, "Salutory Neglect," p. 140.

Bureaucratic rivalry among the major departments connected with colonial policy accounted for another problem. The Board of Trade's major concern was to further British mercantile interests. As such, they were concerned with the efficient administration of the empire, even if it had to be financed to some degree by the homeland. The additional cost would be more than offset by the increased trade, they argued.⁸ Treasury, on the other hand, was more concerned with finding additional sources of revenue to meet the drain on the national treasury. The colonies, they argued, were a source of potential revenue and they should therefore pay the costs of imperial administration and send the surplus to the English treasury. The conflict between these views was evident in the dispute over whether to pay the salaries of colonial officials to keep them dependent on England and not the colonial assemblies. The result was that "it hath always been esteemed good policy," the Board of Trade concluded,

that the officers of the Crown in the American colonies should be maintained and supported in a reasonable degree that the people may by their means be restrained and kept in due obedience to the king, and in a just and requisite subordination and dependence on their Mother Country.⁹

This attitude turned out to be one of the major undoings of British colonial policy.

⁸Ibid., pp. 64-65. Also see Dora Mae Clark, The Rise of the British Treasury: Colonial Administration in the Eighteenth Century (New Haven, 1960); Dora Mae Clark, "The Office of Secretary to the Treasury in the Eighteenth Century," American Historical Review, XLII, (October, 1965), pp. 22-45.

⁹Calendar of State Papers: Colonial Office, XXXVII, p. xxxviii.

Also, English domestic politics were another factor in colonial policy-making in the first half of the eighteenth century. The Walpole government, for example, wanted to avoid any issues which might prove divisive to the political stability of England. So long as imperial trade continued to increase English commercial prosperity, he was content not to interfere with colonial administration. By the second decade of the century "colonial administration had come to run itself, subject only to the demands of domestic patronage," one historian concluded.¹⁰

By mid-century the military and financial needs of the empire forced a change in colonial policy and a reform of its administrative machinery. However, the lax policies of the past half century were not easily altered without causing considerable damage to colonial relations.

Additionally, the relationship between Parliament and the monarchy was undergoing a fundamental revision. The weakness of the first two Georges allowed Parliament to dominate English politics. With the accession of George III, who was determined to regain the dominant role, there was a fundamental revision of the constitutional relationship between the various parts of the empire. How this affected the colonies is discussed later. In short, the colonial policy developed in the first half of the eighteenth century, irrespective of its intrinsic merits, faced formidable obstacles in its enforcement from conditions in the bureaucratic structure of the colonial administrative apparatus.

¹⁰Henretta, "Salutory Neglect," p. 268.

In addition to the late seventeenth century revision of colonial administrative machinery, there was an attempt to bring the American colonies into a uniform pattern of government aimed at maximizing the Crown's control over them. This was done in part by standardizing the charters and commissions granted to each colony and its governor. Moreover, the various experimental forms of government which existed prior to the Glorious Revolution were replaced by a common structure which included an appointed governor, except in Connecticut and Rhode Island where they were elected; an appointed council, except in Massachusetts where it was elective; and a popularly elected assembly. These divisions remained in effect until the American Revolution and produced similar experiences through the colonies when they tried to cope with the English colonial policies. Moreover, while it is difficult to gauge the full impact that colonial rebellions after the Glorious Revolution had on the English policy-makers, they did, in some way, stem the aggressive tendencies of the Crown to centralize control over the colonies and dominate their constitutions by the English executive bureaucracy.¹¹

A second factor in the enforcement of colonial policy was the role played by the colonial assemblies, which were firm fixtures in colonial constitutions by the 1690's. Adopting tactics used by Parliament to control the king in the seventeenth century, the colonial assemblies were often very successful in frustrating royal intentions in the eighteenth century. In the final analysis, as discussed later, the

¹¹Kellogg, "American Colonial Charter."

trend toward local representative government played a decisive role in finally preventing the total executive domination of the colonies.¹²

Before England could begin to develop programs for the enforcement of colonial policy, the major obstacles to their enforcement had to be eliminated. King William, for example, attempted to remedy the deplorable state of colonial policy by extending his prerogative to charter and proprietary colonies to bring them into line with the royal colonies. The House of Lords in 1698 sought to increase the Crown's prerogative over the colonies by three measures. First, they expanded vice-admiralty court jurisdiction over the Navigation Acts to combat the failure of colonial courts to enforce them. As branches of the High Court of Admiralty at London, the vice-admiralty courts were prerogative courts and therefore did not follow common-law procedure or precedent. Their establishment signaled a victory of prerogative over the common-law tradition in the colonies and indicated a significant revision of the governing powers granted in the colonial charters whereby a novel form was created to replace an established English tradition. As the eighteenth century progressed, these courts were to become an important point of contention.¹³

The second measure was directed at the charter and proprietary colonies to force their compliance with the Navigation Acts. It gave

¹²Mary Patterson Clark, Parliamentary Privilege in the American Colonies (New Haven, 1943); S. M. Pargellis, "The Procedure of the Virginia House of Burgesses," William and Mary Quarterly, 2d ser., VII (April, 1927), pp. 73-86, 143-157.

¹³Michael Hall, "The Navigation Act of 1696," William and Mary Quarterly, 3d ser., XIV (October, 1957), pp. 494-515. See note 73 for further sources.

the Crown the right to approve any governor appointed in those colonies. In Connecticut and Rhode Island, where governors were elected annually, this procedure proved too cumbersome and was allowed to lapse. In the proprietary colonies its enforcement gave the Crown a chance to examine the proprietary records and the qualifications of the candidates.¹⁴

The third measure required the governors of all the colonies to take an oath to support the trade laws in addition to posting a security bond. This gave the Crown some measure of control over the charter colonies which it did not otherwise possess.¹⁵

These measures helped cement the notion that the colonies were creatures of the Crown and tightened prerogative control over them. Thus, the beginning of the eighteenth century saw an attempt to shore up and remedy some of the major defects in the administration of British colonial policy.

The colonial governor played center stage in this extension of prerogative control over the colonies at the end of the seventeenth century. He was the connecting link between the colony and the colonial

¹⁴Kellogg, "American Colonial Charter," pp. 257-258. For additional information see the following: M. Eugene Sirmans, "Politics in Colonial South Carolina: The Failure of Proprietary Reform, 1682-1694," William and Mary Quarterly, 3d ser., XXII (January, 1966), pp. 33-55; I. K. Steele, "The Board of Trade, The Quakers, and the Resumption of Colonial Charters, 1699-1702," William and Mary Quarterly, 3d ser., XXIII (October, 1966), pp. 596-619; D. D. Wallace, Constitutional History of S. Carolina From 1725-1755 (Abbeville, S. C., 1899); Charles C. Crittenden, "The Surrender of the Charter of South Carolina," North Carolina Historical Review, I (October, 1924), pp. 384-400; M. Eugene Sirmans, Colonial South Carolina: A Political History, 1663-1763 (Chapel Hill, 1966).

¹⁵Ibid., p. 255.

administration in London. Furthermore, he was the administrative cornerstone of English policy within the colony. As a royal appointee, he was the personal representative of the Crown and carried all the weight and prestige of a royal agent. In that capacity he was responsible for defending the royal prerogative, enforcing the commercial policies and Parliamentary acts of the realm, and acting as commander-in-chief in times of war.

The governor's authority, like his seventeenth century predecessor, came from two sources, his commission and instructions. The commission generally contained a general grant of authority and the instructions were detailed directions on its use. These documents comprised the quasi-constitution of the colony which defined not only the governor's responsibilities, but the colonial assembly's role as well. Additionally, the instructions outlined the policies that the colonial government was to pursue and the manner in which it was to be done. As colonial historian William Smith noted, the instructions "are changeable at the king's pleasure, but rarely undergo any very considerable alteration."¹⁶

The governor's executive authority can be divided into two basic categories, legislative and administrative, with the latter comprising his judicial functions as well. In the first instance, he was empowered to summon the assembly, and with the assent of the legislature

¹⁶William Smith, Jr., The History of the Province of New York, Michael Kannen, ed. (Cambridge, 1952), I, p. 254. Also see L.F.S. Upton, The Loyal Whig, William Smith of New York and Quebec (Toronto, 1969).

"to make, constitute and ordain Laws Statutes and Ordinances for the public Peace, Welfare and good Government" of the province; to exercise an absolute veto over laws, statutes, and ordinances enacted by the assembly, contrary to the prerogative, interest, or policy of the Crown; and to summon, adjourn, prorogue, or dissolve the assembly when he deemed it necessary. His administrative duties were to execute the laws and all things under his command and trust, "to erect, constitute and appoint such and so many Courts of Judicature and publick justice" for hearing "all causes, . . . Criminal as Civil, according to Law and Equity," to appoint judges, justices of the peace, and commissioners of oyer and terminer "for the better Administration of Justice," to grant pardons for criminal offenses, but only temporary reprieves to traitors and willful murderers, to command military and naval forces to repel attack from land or sea, to appoint military officers, and, when necessary, to execute martial law; to issue warrants for the expenditure of public monies, to create fairs, markets, ports, and harbors, and finally, to collate ministers of the Church to ecclesiastical benefices.¹⁷

The governor's grant of power gave him tremendous influence on the direction of colonial affairs and made him a powerful political figure. As one eighteenth century historian noted, the colonial governor enjoyed "a vast plenitude of power."¹⁸ Another contemporary declared that the

¹⁷Based on the commission given to Francis Bernard, Governor of New Jersey, reprinted in George Dargo, The Roots of the Republic: A New Perspective on American Constitutionalism (New York, 1974), pp. 31-32.

¹⁸Smith, History, I, 245.

king's Governours in the Plantations either have, or pretend to have very large Powers with their Provinces, which with . . . [their patronage] render them so absolute, that it is almost impossible to lay any sort of Restraint upon them.¹⁹

It was thought necessary to empower the governor to such a degree so that he could administer and enforce the colonial policies more easily.

However, the colonial governor was not a miniature absolute monarch. He had only delegated administrative authority, which did not place him on the same constitutional basis with the colonial legislature as the Crown was to Parliament. As an agent of the Crown he held only that authority which facilitated administration of established policy. In theory, he possessed no discretion in the establishment or execution of policy. His function was to administer those policies given to him in the manner prescribed in his instructions or included within the policy. The New Hampshire assembly neatly summarized the distinction between king and governor when it said,

However much he may be exalted above us by the honor he receives from His Majesty's commission, [he] is yet liable to mistakes and errors in his conduct, and may do wrong though his royal master cannot.²⁰

Citing the contrary constitutional assumptions of both England and the colonies another contemporary said,

It is impossible that the Supreme Legislature, that the King, Lords, & Commons can be guilty of High Treason; but it cannot

¹⁹Anonymous, "An Essay Upon the Government of the English Plantations on the Continent of America," Louis B. Wright, ed. (San Marine, California, 1945), p. 36.

²⁰Quoted in Jere R. Daniell, Experiment in Republicanism, New Hampshire Politics and the American Revolution, 1741-1794 (Cambridge, 1970), p. 26.

be doubted, that a Governor, Council, & Assembly may be guilty. It is an illegal usurpation in a subordinate power to claim the same rights & privillieges with the supreme.

That, he concluded, "would at least be a solecism in politicks."²¹ Thus, the governor, like the other component parts of the colonial government, was viewed as being subordinate to, but not equal to, their respective counterparts in England. Though the colonial assemblies never admitted that the royal governor was anything more than a royal agent, they were quick to identify their authority as being the same as Parliament's with respect to internal colonial affairs. This is discussed further in regard to the disputes between the governor and assembly.

Empowering a colonial executive with vast authority was reasonably easy; it was quite another problem to control his use of that authority from such a distance. To accomplish this, English officials devised two methods to help them maintain control over the governor's actions. The first was the set of instructions given to each governor with his commission. These contained detailed discussions of the policies and procedures he was to follow in carrying out his duties. The Board of Trade did not consider them to be mere guidelines, but rather cautioned the governors "to strictly . . . adhere to your instructions and not to deviate from them in any point but upon evident necessity justified by the particular circumstances of the case."²² The Privy

²¹Cadwallader Colden to Alexander Colden, July 5, 1759, Smith, History, Appendix B, p. 295.

²²Quoted in Leonard Woods Labaree, Royal Government in America: A Study of the British Colonial System before 1783, reprinted ed. (New York, 1964), p. 435.

Council, under the presidency of Lord Grenville, put the matter much more bluntly when it said,

. . . those Instructions are not like little Pocket Instructions given to an Ambassador or Envoy, in which may be left to Discretions; . . . The King in the Council is THE LEGISLATOR of the Colonies; and when his Majesty's Instructions come there, they are the LAW OF THE LAND: . . . and as such ought to be OBEYED.²³

The significant point was that they theoretically denied the governor virtually any discretion in carrying them out.

The fact that the instructions were not basically altered in the seventy-five years preceding the American Revolution shows the determination of the English policy-makers to enforce a uniform policy irrespective of the changing conditions. Proposals to bring the instructions into line with new developments in the colonies were resisted as being contrary to the "true principles of a provincial constitution."²⁴ The inflexibility of the instructions, however, more often than not caused the governor significant hardship in trying to deal with the assembly by tying him to an inflexible position.

The second restriction placed on the governor's exercise of his power was the built-in checks in the colonial constitution. He was forced to deal with a council, which was sometimes appointed without his knowledge or approval. His veto power was weakened by the enumerated categories of legislation listed in his instructions that

²³ Benjamin Franklin to Robert Norris, March 19, 1759, Franklin Papers, VIII, 291-297.

²⁴ Quoted in Labaree, Royal Government, p. 447. Also see Percy Scott Flippen, The Royal Government in Virginia 1624-1775 (New York, 1919), p. 364.

he was required to veto to protect the royal prerogative and English interests, which further eliminated any discretion he could use in dealing with the assembly. Moreover, his veto was also weakened by the Crown's review of colonial legislation and the demand that he force the colonial legislature to add suspending clauses to certain types of legislation. Finally, his judicial power was tempered by allowing appeals to be taken to England for final disposition.²⁵ Thus, in key areas the governor often did not have the final word in provincial decision-making, but was only one step in the continual process of negotiations between the Crown and colonists.

Throughout the eighteenth century the colonial constitution, as outlined in the commission and instructions of the governor, did not change significantly. However, the political realities under which it operated were altered considerably. As the century progressed, the royal governor found himself caught between the demands of British officials to enforce policies on unwilling subjects and the changing political conditions of the people he was supposed to govern. In that matrix prerogative government underwent its greatest challenge in the colonies.

At the end of the eighteenth century there was a demand from numerous individuals to reform many of the practices and procedures and put the colonies on a proper footing. One of the most serious problems was the lack of competent appointments to the governorships. As royal official William Blathayt noted early in the century,

²⁵See Kellogg, "The American Colonial Charter," pp. 259-272.

The sending of good Governors to the Plantations is much insisted on with good reason, for where his Majesty has so few officers of his own appointment they ought to be more careful of their Duty and at so great a distance from his Majesty's eye great Temptations happen whereby his Majesty's service does often suffer.²⁶

Ideally, a governor ought to be schooled in the law, military science, and governmental administration. Generally they were totally devoid of these prerequisites.

Many governors were appointed on the basis of patronage. One observer contended that "the Court of England hath hitherto gone upon wrong Principles, in appointing Governours . . . as the last Rewards for past Services." This resulted in their "expecting nothing after that . . . which necessitated, them to make Provision for their whole Lives, whereby they were in a manner forced upon such Methods (whether good or evil) as would compass those Ends."²⁷

By a judicious selling or renting of colonial offices a governor or Crown official could return a profit to himself, since the lesser offices were considered private property to be "rented out" to deputies who performed the actual work at a fraction of the salary. Of the ten governorships appointed by patronage, five were worth more than 1,000 pounds sterling annually, with the most lucrative worth more than 8,000 pounds.²⁸ Prior to the 1730's American posts were given to those

²⁶Quoted in Stanley N. Katz, Newcastle's New York: Anglo-American Politics, 1732-1753 (Cambridge, 1968), p. 37.

²⁷"An Essay Upon the Government of the English Plantations," Wright, ed., p. 37.

²⁸See Beverly McAnear, The Income of the Colonial Governor (New York, 1967).

individuals whose fortunes were expended in the "national" interest, e.g., those in the military or diplomatic service, from noble birth, or influential connections were usually the priority criteria. After 1730 exploitation of the colonial administration was used as a reward for political loyalty, which tied colonial administration with English politics.²⁹ In short, as one disgruntled New Yorker argued,

That state or Kingdom must be Very ill-governed, whose officers are chose (sic) because they are relations to this or that great man or because they are able to give a large sum of money for their employment (sic), where a meritorious man has no Chance if he has not a good friend.³⁰

Other governors just did not have the personal ability to carry out their tasks or were too busy trying to make their fortunes. "Governments were heretofore too often bestowed upon men of mean parts, and indigent circumstances," New York historian William Smith concluded. "The former were incapable of the task, and the latter too deeply engrossed by the sordid views of private interest, either to pursue or study our commonwealth."³¹ The New York assembly roundly condemned the practice of fortune seeking governors because "as they know the Time of the Continuance in their Government to be uncertain, all Methods are used, and all Engines set to work to raise Estates to themselves."³²

²⁹See Henretta, "Salutory Neglect," Chapters III, IV.

³⁰Quoted in Katz, Newcastle's New York, p. 7.

³¹Smith, History, I, 3.

³²Quoted in Katz, Newcastle's New York, p. 28.

Governors also lobbied the home government for promotion to more lucrative governorships for various reasons. Francis Bernard, then governor of New Jersey, requested a larger colony explaining,

If the peculiar circumstances of my family did not require an uncommon exertion to make a provision for them, I should condemn myself for thinking of another Government. But till Nature sets bounds to the Number of my Children, which is not done yet I know not how to limit my wants or desires.³³

Another source of governors was the military. Early in the eighteenth century governorships were viewed in many cases as paramilitary positions. Their function was to unite the civil and military authority in the interests of advancing the royal prerogative and enforcing the Navigation Acts. Their military experience in administering garrison towns gave them the practical background which they applied to the colonies with vigor. Additionally, their military spirit gave them an anti-legislative bias, which the Crown found quite congenial to its ends in its battles with the colonial assemblies. The House of Commons was quick to note that attitude when one of its committees concluded that "in the army it has grown into a principle that Parliaments are roots of rebellion and Magna Charta sprung out of them."³⁴ Francis Nicholson, one of the prime examples of the military governor, saw trade as a vital factor in England's strength and therefore enforced the Navigation Acts with a vigor which was more mercantile than most of the

³³Quoted in Donald L. Kemmerer, Path to Freedom: The Struggle for Self-Government in Colonial New Jersey 1703-1776 (Princeton, 1940), p. 263.

³⁴Stephen S. Webb, "The Strange Career of Francis Nicholson . . .," William and Mary Quarterly, 3d. ser., XXIII (October, 1966), p. 529.

merchants themselves, though his goal was not directed at profit as much as it was toward increasing the royal customs revenue and strengthening the Crown's prerogative.

Not all governors could be characterized as lacking in general abilities or were overly hostile to colonial interests. New Hampshire's governor Benning Wentworth, for example, was one of a number of meritorious governors who served the Crown and yet completed his service without continual strife between himself and the colonists, though he did have his differences with them at times.³⁵ Another was Governor Hunter of New York who, upon leaving his post, was eulogized by the assembly who said in part,

We have seen many Governors, and may see more: and as none of those, who had the Honour to serve in your Station, were ever so justly fixed in the Affections of the Governed, so those to come will acquire no mean Reputation, when it can be said of them, their Conduct has been like yours.³⁶

Apparently the affection was one sided, since Hunter was reported to have said just before announcing his departure from the colony, "People think it a fine thing to be a governor. A governor by-----a Tom

³⁵J. R. Daniell, Experiment in Republicanism, Chapter I; J. R. Daniell, "Politics in New Hampshire Under Governor Benning Wentworth, 1741-1767," William and Mary Quarterly, 3d ser., XXIII (January, 1966), pp. 76-105; Lawrence H. Leder, Robert Livingston 1654-1728 and the Politics of Colonial New York (Chapel Hill, 1961); John A. Schutz, William Shirley, King's Governor of Massachusetts (Chapel Hill, 1961); Robert Zemsky, "William Shirley and the Politics of Persuasion," Merchants, Farmers, and River Gods (Boston, 1971); George Wood, William Shirley (New York, 1920).

³⁶Smith, History, I, 157.

Turdman's is a better office than to rake in the dunghill of these people's affections."³⁷

Unfortunately, from the Crown's point of view, the colonial governor was too often sadly lacking in the necessary abilities to carry out his functions with the degree of skill and finesse required in such a tenuous position. A governor's attitude toward the colony complicated things still further, as evidenced by Alexander Spotswood's complaint about giving up his career in the army "to go be buried in obscurity in America."³⁸ In short, many colonists might conclude, after looking at their long line of governors, that the following description did not miss the mark by much.

A faithful description of our Provincial governors . . . would be little better than a portrait of artifice, duplicity, haughtiness, violence, rapine, avarice, meanness, rancour and dishonesty, ranged in succession, with a very small portion of honour, justice and magnanimity here and there intermixed, to lessen the disgust, which, otherwise, the eye must feel in the contemplation of so horrid a group.³⁹

Personnel problems were not the only defects in colonial administration. Many of the administrative procedures and practices frustrated those attempting to conscientiously enforce colonial policy. More often than not a governor's initial zeal was crushed by the intractable attitudes of the colonists and the indifference of the home office.

³⁷Cadwallader Colden to Alexander Colden, October 15, 1755, Smith, History, Appendix B, p. 308.

³⁸Spotswood to Board of Trade, August 18, 1719, Virginia Historical Society, Collections, II, 328-335.

³⁹Edward Long, History of Jamaica (London, 1774), I, 4.

Governor Gabriel Johnson of North Carolina wrote after only three years in office:

I imagined like most young beginners, that with a little assistance from home, I should be able to make a mighty change in the face of affairs, but a little experience of the people, and reflection on the situation of things at home has absolutely cur'd me of this mistake, I now confine my care entirely, to do nothing, which upon a fair hearing . . . can be reasonably blamed, and leave the rest to time, and a new set of inhabitants.⁴⁰

One of the ways governors overcame some of their difficulties was to seek patrons or use agents to plead their case to officials in London. As Governor Belcher noted, "you will observe that a Governor can't have too many friends at Court."⁴¹ The development of a system of colonial agents created a series of informal relationships between various segments of the empire. However, it was a two-sided weapon which could be used to promote the private as well as the public interest. Informal agreements between parties tended to undermine the power and authority of the regular bureaucratic channels and smother debates over policy principles under a maze of private understandings among the various parties. From the 1730's to the eve of the French and Indian Wars, this system of informal government reached a point where the various agents acted as buffers to mitigate the antagonisms between England and the colonies. With Newcastle's departure as Southern

⁴⁰Quoted in Henretta, "Salutory Neglect," p. 324.

⁴¹Quoted in John Schultz, "Succession Politics in Massachusetts, 1730-1741," William and Mary Quarterly, 3d ser., XV (October, 1958), p. 509n.

Secretary of State this elaborate system of informal government crumbled leaving no buffer to cushion the clash of interests within the empire.⁴²

Another way that colonial officials undercut the governor's position in the colony was to reduce his patronage positions. By a judicious use of colonial offices at his disposal, a governor could increase his power over the assembly. However, Newcastle's political ambitions within the English government forced him to raid the colonial administration to augment his own patronage power. Governor Gooch argued that to do this "would be subverting the fundamental Principles of Government to take away from the Chief Officiating magistrate the Power of rewarding Merit."⁴³ Governor Clinton warned the home government that his lack of patronage was threatening the loyalty of those he relied on for support of the prerogative especially after Newcastle

⁴²See Henretta, "Salutory Neglect," pp. 142-147; James Burns, The Colonial Agents of New England (Washington, D.C., 1935); Michael Kammen, A Rope of Sand: The Colonial Agents, British Politics and the American Revolution (Ithaca, 1968); Michael Kammen, "The Colonial Agents, English Politics and the American Revolution," William and Mary Quarterly, 3d ser., XXII (April, 1965), pp. 244-263; Edward P. Lilly, The Colonial Agents of New York and New Jersey (Washington, D.C., 1936); Edwin Tanner, "Colonial Agencies in During the Eighteenth Century," Political Science Quarterly, XVI (March, 1901), pp. 24-49; Mabel P. Wolff, The Colonial Agency of Pennsylvania, 1712-1757 (Philadelphia, 1933); also see Henretta, "Salutory Neglect," pp. 35-39 for a discussion of the governor's involvement in English politics; Beverly Bond, "The Colonial Agent as a Popular Representative," Political Science Quarterly, XXXV (1920), pp. 372-392.

⁴³Quoted in Henretta, "Salutory Neglect," p. 250. Also see B. D. Barger, "Lord Dartmouth's Patronage, 1772-1775," William and Mary Quarterly, 3d ser., XV (April, 1958), pp. 191-200; Philip Haffenden, "Colonial Appointments and Patronage Under the Duke of Newcastle, 1724-1739," English Historical Review, LXXVII (July, 1963), pp. 412-435; Donnell MacClure Owings, His Lordship's Patronage Offices of Profit in Colonial Maryland (Baltimore, 1953).

nominated his own choice for a council post. "Mr. Rutherford," he said, "is but a Stranger in the Country, and his appointment has greatly alarm'd the People, particularly those of the better sort who expect to be advanced to that preferment, as Vacancies happen."⁴⁴

The loss of patronage also diminished the governor's control over the administration of the colony. Governor Partridge of Rhode Island despaired of his inability to appoint naval officers because the Crown thought they would be more diligent in the prosecution of their duties if they were not subject to the governor, even though "by Act of Parliament the right is in the Govr."⁴⁵

Complaints against the enforcement procedures had to be handled by officials in London and not the governor, which eliminated one more political weapon from his arsenal. Not only did this undercut the governor's position, but it served to weaken the Crown's control over the colonies. One contemporary observed in hindsight that

Bestowing [of] almost every lucrative office in America, that could be exercised by Deputy, on some person residing in Great Britain, who employed a Deputy, with a slender allowance, to execute the office for him: this Deputy had neither weight in the Province, nor any interest in the Government under which he lived.

This resulted in the governor being "deprived of every appointment of consequence . . . [who had] nothing in their power therewith to stop the mouths of the demagogues that endeavored to throw the Country into

⁴⁴Ibid., p. 260.

⁴⁵Richard Partridge to Governor Ward, March 3, 1743, The Correspondence of the Colonial Governor's of Rhode Island, Gertrude S. Kimball, ed. (Boston, 1902), I, 266-268, and Partridge to The Lord's Justice in Council, May 28, 1743, p. 229.

confusion."⁴⁶ Governor Belcher put it more succinctly when he wrote the Board of Trade in May, 1733:

How is it possible . . . to support the King's power and authority if such insults upon it must be indured, and how can the hands of the King's Governor be strengthened if men so diametrically opposed to him must be let into the government to clog every thing he proposes for the King's service and for the good of his subjects.⁴⁷

Thus, the loss of key patronage offices not only undermined the governor's authority within the colony, but also diminished his authority as the chief administrator of colonial policy.

The royal governor's role as colonial administrator was encompassed within two basic requirements. The first was to protect and defend the royal prerogative and English interests. The second was to enforce and administer Parliamentary acts and colonial legislation. The means by which he was to carry this out were contained in his instructions which "regulated the governors conduct in almost every contingency."⁴⁸ In his first speech to the Massachusetts assembly Governor Burnet stated that the "governor is but . . . [the Crown's] officer, to act by his instructions and to have not inclinations, no temptations, no bias, they may divest him from obeying his royal masters commands."⁴⁹ Paramount in his duties was the protection of the royal prerogative, which he was to pass unimpaired to his successor. However, this was

⁴⁶Anthony Stokes, A View of the Constitution of the British Colonies . . . (London, 1783), p. 138.

⁴⁷Quoted in Schultz, "Succession Politics in Massachusetts," p. 511.

⁴⁸Smith, History, I, 245.

⁴⁹Quoted in Labaree, Royal Government, p. 98.

not an easy task when faced with a recalcitrant assembly and apathy from the home government. As Governor Shute noted in a letter to the Board of Trade:

I have the Royal Prerogative (for which I have not a little suffered as to my own private interest) and cannot say H. M. Council have in a great measure assisted me in it.⁵⁰

The other requirement was to veto all legislation detrimental to the interests of the Crown. The governor's veto gave him power virtually denied the monarchy after 1707. However, the governor did not have discretionary use of the veto. As colonial assemblies learned how to pursue effectively their own aims, governors were ordered to exercise their veto over an increasing number of areas, which meant that "whole categories of legislation declared in advance, without reference to the reasoning of the colonial Assemblies . . . [was made] inadmissible."⁵¹ Moreover, colonial legislatures were required to include "suspending clauses" in certain pieces of legislation to prevent the law from taking effect until the Crown's "Pleasure shall be made known concerning the same."⁵² This strengthened the governor's hand in bargaining with the assembly over pending legislation. It also "drew the Crown itself directly rather than indirectly into the business of executive negation,"

⁵⁰Calendar of State Papers: Colonial Office, XXXII, doc. 514, p. 329.

⁵¹Bernard Bailyn, The Origin of American Politics (New York, 1968), p. 67.

⁵²Leonard W. Labaree, ed., Royal Instructions to British Colonial Governors, 1670-1776 (New York, 1967), I, 131.

which, late in the colonial period, gave the colonists an excuse to blame the Crown for their problems.⁵³

British insistence that the governors adhere strictly to their instructions in the enforcement of laws often caused more problems than it prevented. The governors perennially complained about the lack of discretion in carrying out their duties, especially in the years just prior to the American Revolution. Governor Franklin of New Jersey summarized the problem when he said:

I do not mean, however, that governors have, or ought to have a power of dispensing with acts of parliament, but only that they may be at liberty, where circumstances render it necessary, to consent to some small deviation from the mode, provided the principal end of the act is obtain'd, and the deviation is not contrary or repugnant to that. . . ."⁵⁴

The fact the instructions were not always rigidly adhered to was attested to in a Board of Trade report in 1752, which noted that "the experiences of late years furnished too frequently instances in which many of those instructions have been dispensed with and neglected upon slight and unwarrantable pretenses."⁵⁵ One historian noted in the case of Virginia that "two-thirds of the governors choose to meet the needs of the colonists over a strict enforcement of the instructions," while the "remaining third who showed strenuous activity in executing royal instructions, and in seeking their own aggrandizement" were removed because of their

⁵³Bailyn, Origin of American Politics, p. 67.

⁵⁴Quoted in Catherine Fennelly, "William Franklin of New Jersey," William and Mary Quarterly, 3rd ser., VI (July, 1949), p. 376.

⁵⁵Quoted in Labaree, Royal Government, pp. 434-435.

"inability to administer the affairs of the colony with satisfaction to the colonists and the approval of the home government." Thus, he concluded,

. . . so long as a governor could keep the colony quiet and prosperous, and trade with England was successful . . . nothing was said about the royal instructions, the royal prerogative or the popular spirit of the colonists.⁵⁶

However, this was not always the case after the reorganization of the empire began in 1763.

The governor was aided in the administration of the colony by a council, which was designed to augment and check his powers. The council was appointed in all colonies except Massachusetts where it was elected, though in that case the governor could veto any member nominated. The council had a dual function. As one writer described it,

The King's Councillors in the Colonies have a double capacity; they are not only a branch of the Legislature, but are likewise as the King's Privy Council entitled to a considerable show in the administration and execution of the laws there.⁵⁷

The more significant powers of the governor were tempered with the council's involvement; for example, the governor's commission would use the phrase "full Power and Authority by and with the Advice and Consent of our said Council" to preface a specific power. In Francis Bernard's

⁵⁶Persey Flippin, The Royal Government in Virginia, p. 149.

⁵⁷Calendar of State Papers: Colonial Office, XXXVII, doc. 500, p. 327. For further discussions of the role of the council see H. H. Bellot's "Council and Cabinet in the Mainland Colonies," Royal Historical Society Transactions, 5th ser., V, 1955, pp. 161-176, and Rex M. Naylor, "The Royal Prerogative in New York, 1691-1775," Quarterly Journal of the New York State Historical Association, V (1924), pp. 221-255.

commission, he was required to have council approval to summon the assembly, write legislation, establish courts, grant land, and establish ports, fairs, and markets.⁵⁸

The council was responsible for the administrative functions of government when the governor died or was absent from the colony. If there were no lieutenant governor present, then either the council was to take up "the Administration of the Government and that the eldest Counsellor do preside (sic)."⁵⁹ Often, when this clause was invoked, it touched off a dispute between the president of the council and the eldest member over who had the actual authority to administer the colony. However, the president's power, as one wag noted, was only "to sit at the upper end of the table."⁶⁰

The role the council played in colonial affairs depended on its relationship to the governor. For example, a newly appointed governor who "knows nothing of the country must rely upon the council for his first governing."⁶¹ In the end, though, councils dependent on the governor's appointment and patronage tended to support the governor's position in political disputes. Councils elected or appointed by England wavered in their support of the governor. In the case of Massachusetts, whose council was elected, an observer noted that "sometimes they are under the awe of a negative. This precarious situation makes their

⁵⁸Dargo, Roots of the Republic, pp. 31-32.

⁵⁹Calendar of State Papers: Colonial Office, XXIII, doc. 859, p. 1707.

⁶⁰Ibid., XIX, doc. 389, p. 194.

⁶¹Ibid., XXIII, doc. 859, p. 420.

conduct fickle, uncertain and inconsistent."⁶² Governor Nicholson, given his military attitudes, found the council a nuisance and recommended to the Board of Trade that a lieutenant governor be appointed. Aside from the fact that many of its members were "old and very infirm and lived a great distance from the seat of Government" which made it difficult to assemble them, that when they succeeded in establishing a quorum they had "great disputes about the person of the President and his power singly." Moreover, when the council members are "all natives self-interest may sway them to act in a manner prejudicial to H. M. interest." The only reason against sending a lieutenant governor, he argued, would be that "it may disoblige the Council and the people, because none of them may ever be Governors in Chief." However, he continued, "this need not be made public, but the Lieutenant Governor may be supposed to be sent upon some other present exigency."⁶³

The council exercised three basic functions in the colonial government: executive, legislative, and judicial. In its executive capacity, as noted before, it advised and checked the governor since he could not officially act in many areas without the council's approval. This prevented the governor from abusing what little discretionary power he had or from stretching his constitutional authority beyond its limits. Governors sometimes found ways to manipulate the council by summoning only those councillors who supported their position. A group of

⁶²Quoted in Ellen E. Brennan, Plural Office Holding in Massachusetts 1760-1780 (Chapel Hill, 1945), p. 20.

⁶³Calendar of State Papers: Colonial Office, XVII, doc. 579, p. 311.

disgruntled colonists once complained that "where the advice of the Council has been thought necessary, you have not given general summonses, but have only summoned so small a number as would constitute a Quorum in which you were sure of a majority."⁶⁴

The governor presided over the council in executive session, which made it a unit of the executive power. The recall of Georgia's Governor Reynolds for his abuse of the council indicated that the English authorities intended for the broad executive authority to be exercised by the governor in council and not the governor exclusively.⁶⁵ However, in protecting the royal prerogative and administering colonial policy, the Board of Trade made it clear that the governor did not share that responsibility. Governor Bernard was told that "it is you to whom the Crown had delegated its authority, and you alone are responsible for the due exercise of it."⁶⁶ This served to fix executive responsibility even though creation of local policy was a joint venture with the council and assembly. Thus, what policies the Crown could not immediately control from England by prescription were created by a body

⁶⁴Ibid., XL, doc. 441, p. 258.

⁶⁵Trevor Richard Reese, Colonial Georgia: A Study of British Imperial Policy in the Eighteenth Century (Athens, Ga., 1963), p. 24. Also see Richard S. Dunn, "The Trustees of Georgia and the House of Commons 1732-1752," William and Mary Quarterly, 3rd ser., XI (October, 1954), pp. 551-565, for the background on Georgia as a conscious attempt to put the lessons of English colonial theory into practice. The following works are also helpful: William Wright Abbot, The Royal Governors of Georgia (Chapel Hill, N.C., 1959); Amos A. Ettinger, James E. Oglethorpe: Imperial Idealist (Oxford, 1936); and James R. McCain, "The Executive in Proprietary Georgia," Ph.D. Dissertation, Columbia, published 1914.

⁶⁶Quoted in Labaree, Royal Government, p. 171.

whose power derived from separate grants within the governor's commission, but were jointed in a manner designed to check each other's excesses. This meant that certain areas of executive authority could not be exercised until both parts of the executive branch were in agreement. The phrase that the governor was empowered to act with the advice and consent of the council was intended to mean that he would be in danger of exceeding his authority if he acted without the council's consent in those areas of his commission and instructions requiring him to seek their consent. In this manner the governor's actions could be held in check in those areas where it was impossible for the Crown to predefine what the governor's actions ought to be. However, in practice this theory did not always work, especially when the governor controlled the council.⁶⁷

The governor also presided over the council's judicial function as he did with the council's executive function. Generally, the governor and council were the highest appellate court for civil cases in the colony. Criminal cases of treason and willful murder were usually appealed to the English courts. Additionally, the governor was empowered by his commission to erect courts, and with the advice and consent of the council, appoint justices, which were often selected from members of the council. However, this authority was frequently limited to erecting only those courts sanctioned by writ from the Crown. Also, the provincial assemblies gradually increased their power to

⁶⁷See Brennan, Plural Office Holding in Massachusetts, p. 35 ff.

create courts and define their jurisdiction, which caused a great deal of friction with the executive branch. As Thomas Pownall noted, the power of a governor to erect courts was a "universally disputed" authority in the first half of the eighteenth century.⁶⁸ Unlike the seventeenth century where the governor was considered the chief justice, the eighteenth century development of separate courts led to the Crown appointment of the chief justice during the latter part of the colonial era.⁶⁹

In legislative areas the governor and council acted as separate entities. At the beginning of the eighteenth century the governor sat with the council in its legislative session. However, his presence caused many problems which eventually led to a clarification of his role. One group of dissatisfied councillors wrote to London complaining that the council

humbly conceives that they ought to be left to the freedom of their own debates, without being swayed and overawed by the governor's interposition; he is not only constantly present, but takes upon him to preside and debate, and state the question, and overrule as if he were still in council, which the said house takes to be a great encroachment of their liberties and privileges.⁷⁰

The Board of Trade sought a ruling on this matter from the Crown's attorney general who concluded that "it is inconsistent with the nature of

⁶⁸Thomas Pownall, The Administration of the Colonies (London, 1765), p. 75. Also see G. H. Guttridge, "Thomas Pownall's The Administration of the Colonies, and the Six Editions," William and Mary Quarterly, 3rd ser., XXVL (January, 1969), pp. 130-146.

⁶⁹See Evarts B. Greene, The Provincial Governor in the English Colonies in North America (First published New York, 1898, reprinted Gloucester, Mass., 1966), pp. 133-144.

⁷⁰Quoted in Labaree, Royal Government, p. 160.

this government, with the governor's commission, and his Majesty's instructions that governors should in any case whatsoever sit and vote as a member of the council" in its legislative capacity.⁷¹ This ruling was significant since it established that the governor was a separate but unique part of the legislative process quite distinct from the other two branches.

Relations between the governor and council in their legislative capacity were tenuous at best. In many disputes between the governor and assembly, who the council sided with often determined the outcome. At other times the governor was left to fend for himself in protecting the royal prerogative, especially when the council's interests did not coincide with his need to defend the prerogative. One councillor explained his colleagues' actions by saying that they

chose to give way to the necessity of the times and leave the supporting [of] the king's instructions to the king's ministers, who had the framing of them, and who have sufficient power to do it, had they leisure for such remote considerations; and the visible want of that encourages these men in their insolence.⁷²

The organization of the colonial judiciary severely limited its ability to check the governor. As noted previously, he was part of the system which he had a hand in creating as well as staffing. In addition to these roles the governor, as chief executive, was responsible for enforcement of laws and judicial decisions. The governor, through his agents, especially the attorney general, was the chief prosecutor

⁷¹Ibid., pp. 406-419.

⁷²Ibid., p. 438.

for the colony. What laws, rulings, or decisions he might or might not choose to enforce would all have a bearing on the administration of justice. Also, the governor's possession of the provincial seal made him chancellor with jurisdiction in equity cases. In some instances he was the chancery court and in other cases he and the council, each of whom possessed an equal vote, comprised the court. This judicial form was generally distrusted by the colonists as it was easily subject to abuse.⁷³

However, judicial tenure was one of the constant sources of irritation between the Crown and colonists. Appointment of justices during good behavior would reinforce an independent judiciary, and that was what the Crown sought to avoid since it might place prerogative control of colonial affairs in jeopardy. When Jamaica enacted legislation granting all judges of the supreme court tenure on good behavior, the Crown's legal advisor ruled that it was not "advisable, either for the interest of the plantations themselves, or of great Britain" that the judges be granted that form of tenure.⁷⁴

⁷³See Greene, The Provincial Governor, pp. 139-141. Also see Labaree, Royal Government, pp. 373-419.

⁷⁴Ibid., p. 135. Also see the following: William J. Curren, "The Struggle for Equity Jurisdiction in Massachusetts," Boston University Law Review, XXXI (1951), pp. 269-296; Milton M. Klein, "The Rise of the New York Bar: The Legal Career of William Livingston," William and Mary Quarterly, 3rd. ser., XV (July, 1958), pp. 334-358; Milton M. Klein, "Prelude to Revolution in New York: Jury Trials and Judicial Tenure," William and Mary Quarterly, XVII (October, 1960), pp. 439-462; Jerome J. Nadelhaft, "Politics and the Judicial Tenure Fight in Colonial New Jersey," William and Mary Quarterly, 3rd ser., XXVIII (January, 1967), pp. 46-63. For an analysis of the colonial courts and the problems with the governor see Erwin C. Surrency, "The Courts in the American

Although governor's instructions began to require that justices be appointed during pleasure only, colonial assemblies continued to pass acts granting justices tenure for good behavior which led the Board of Trade to demand that governors, on the pain of removal from their positions, follow what has been agreeable to "the Ancient Practice and Usage in our said Colonies and Plantations."⁷⁵ The assemblies' control over executive and judicial salaries, however, made this provision most difficult to enforce in the manner prescribed. England feared, with good reason, that the failure to keep judicial tenure in the hands of royal officials would lead the judiciary to become completely subservient to the demands of the assembly.⁷⁶ As John Dickinson summarized the situation, "If the commission of judges are during the pleasure of the Crown, [and] yet if their salaries are during the pleasure of the people there will be some check upon their conduct." Moreover, he concluded after the Stamp Act crisis, "few men will consent to draw on

Colonies," American Journal of Legal History, XI (July, 1967), pp. 253-276, 347-376; Stanley Katz, "The Politics of Law in Colonial America: Controversies Over Chancery Courts and Equity Law in the 18th Century," Perspectives in American History, V (1971), pp. 257-284; Joseph H. Smith and George Hershkowitz, "Courts of Equity in the Province of New York: The Crosby Controversy, 1732-1736," American Journal of Legal History, XVI (1922), pp. 1-50; Emory Washburn, Sketches of the Judicial History of Massachusetts From 1630 to the Revolution in 1775 (Boston, 1840); Edmund Woodruff "Chancery in Massachusetts," Boston University Law Review, IX (1929), pp. 168-192.

⁷⁵Ibid.

⁷⁶See Labaree, Royal Government, pp. 379-380, 390-405.

themselves the hatred and contempt of those among whom they live for the empty honour of being judges."⁷⁷

The greatest threat to the governor and prerogative government came from the colonial assembly. By the 1690's the assembly was a fixed feature of all colonial constitutions. Originally conceived as a ratifying body for legislation proposed by the governor, it steadily carved out an independent role in colonial politics during the eighteenth century. But, the British and American views of the nature and functions of its role in the legislative process were never reconciled prior to the American Revolution.

Although British officials conceded the right of all Englishmen to participate in the legislative process, the Crown contended that Parliament was the main body responsible for legislating for all British subjects. The colonial assembly was only created to meet local needs and was the result of an act of royal grace. As such, the Crown claimed the right to define and limit the assembly's authority as it saw fit. Moreover, the British position argued that the assembly was only the equivalent of an English municipal council or corporation and not a miniature Parliament. This view was taken by Archibald Kennedy in his An Essay on the Government of the Colonies in 1752. He wrote that

We are no more than a little Corporation.--I would advise these Gentlemen (Assemblies) for the Future, to drop those Parliamentary Aims and Style about Liberty and Property, and keep within their Sphere, and make the best Use they can of his Majesty's Instructions and Commission; because it would be high Treason to sit and act without it.--This is our Charter,

⁷⁷ John Dickinson, Letters of A Pennsylvania Farmer, p. 96.

If we abuse or make a wicked Use of his Majesty's Favours,
 we are, of them, but Tenants at Will; we only hold them
 during Pleasure and good Behaviour.⁷⁸

Since, according to the British, the assembly's authority was based on the governor's commission and instructions, England argued that it could be altered at the pleasure of the Crown. Moreover, that power could not be exercised until the governor had summoned it, and the governor had to approve any assembly action before it could take effect. Thus, the British viewed the assembly as being founded on the prerogative and its power was exercised only on executive command.⁷⁹

The colonial assembly had a much different view of its nature and function in colonial government. In the latter half of the seventeenth century the provincial assemblies began to view themselves as operating in the same manner that Parliament did, especially after Jamaica won the right to initiate legislation in 1680. In the eighteenth century the parliamentary tradition was a firmly rooted aspect of colonial legislation. New England took the lead in this area and had a marked influence on the other colonies. As one frustrated governor pointed out, "in one word, this part of the world is infected with the maxims of the representatives in New England; they put themselves upon the very same foot with Parliament in Great Britain."⁸⁰

⁷⁸Smith, History, I, 257n.

⁷⁹See Labaree, Royal Government, pp. 174-175 for a further discussion.

⁸⁰Calendar of State Papers: Colonial Office, 35, doc. 655, p. 325.

The Board of Trade had contradictory statements on the role of parliamentary tradition in the lower houses of the provincial assemblies. In 1705 it said that

no assembly in the plantations ought to pretend to all the privileges of the House of Commons in England, which will no more be allowed them, than it would be to the council, if they should pretend to all the privileges of the House of Lords.⁸¹

In another instance it said that

we must observe to you that it certainly was in all times the intention of the Crown that the constitution of the several Colonies abroad, immediately under H. M. Government, should resemble as much as might be the constitution of the Mother Country, to whom laws and customs the said Colonies are directed to conform themselves, as far as they may be applicable to their circumstances.

Moreover, they continued, the Crown had established the assembly on "the British model; the Governor representing the King, the Council, the House of Lords and the Assembly the House of Commons. . . ." This meant that

every legislative act of theirs, like those of Great Britain, might pass a threefold approbation, and that each branch of their legislature subsisting upon an independent and distinct footing might be reciprocally checks upon the other two. . . ."⁸²

The assembly's authority, as listed in the governor's instructions, was not to exceed that of Parliament, the Board of Trade noted. However, "the Law of Parliament in England is properly the usage of Parliament." This posed a problem for defining the limits of the

⁸¹Quoted in Oliver Mortan Dickerson, American Colonial Government, 1696-1765 (Cleveland, 1912), p. 16.

⁸²Calendar of State Papers: Colonial Office, XXXVII, doc. 500, pp. 327-328.

assembly's authority. It was, perhaps, "what has usually been done by [colonial] Assemblies may have by that usage acquired a sanction in matters not directly repugnant to the authority and prerogative of the Crown."⁸³ Thus, the Board of Trade recognized past precedent as a valid claim of power only in those matters not contrary to the prerogative.

The provincial assemblies concluded otherwise. Every practice not challenged by the Crown was considered to be a binding precedent and therefore a valid exercise of their authority. As precedents accumulated, an assembly's power and influence increased in its disputes with the governor. The American attitude toward the role of the assembly in colonial politics is essential to understanding the history of the disputes between it and the governor. It is probably best summarized by William Smith, who wrote:

Our representatives, agreeable to the general sense of their constituents, are tenacious in their opinion, that the inhabitants of this colony are entitled to all the privileges of Englishmen; that they have a right to participate in the legislative power, and that the session of Assemblies here, is wisely substituted instead of a representation in Parliament, which all things considered, would, at this remote distance, be extremely inconvenient and dangerous.

This, he said, was in contradistinction to the governor's position, who claimed that "all the immunities we enjoy . . . not only flow from, but absolutely depend upon, the mere grace and will of the Crown." Given these contradictory sentiments, it is only natural that there were conflicts, he concluded.⁸⁴

⁸³Ibid.

⁸⁴Smith, History, I, 256-257.

Moreover, Smith noted that most disputes between the governor and assembly revolved around revenue issues, "for the support of government." For example, before one of New York's governors, Lord Cornbury, embezzled revenue from the treasury, the assembly enacted long term revenue bills. After that, they were cut to a few years at most. However, continued abuse of the colonists' trust led them to conclude that no long term funds would ever again be raised, "or put what we shall raise into the Power of a Governour to misapply, if we can prevent it." Therefore future revenue bills would be limited to a year, but only after laws were passed, "as we conceive necessary for the Safety of the Inhabitants of this Colony, who have reposed a Trust in use for that only purpose. . . ." ⁸⁵

Repeated attempts by British officials to force the colonists into enacting permanent revenue bills forced them to digress from parliamentary custom. "The particular state of this Province differs so widely from that of their mother country, that we ought not in this respect to follow the custom of the Commons," the New York assembly concluded. The colonial constitution "is so imperfect in numberless instances," historian Smith concluded, "that the rights of the people lie, even now, at the mere mercy of their Governors; and granting a perpetual support, it is thought, would be in reality little less, than the loss of everything dear to them." Then he concluded with what must be regarded as the key to understanding the conflict between the governor and the assembly: "A Governor has numberless opportunities, not proper

⁸⁵Ibid., p. 258.

to be mentioned, for invading the rights of the people, and insuperable difficulties would necessarily attend all the means of redress." Therefore, when the assembly controlled the raising and spending of revenue, especially the salaries of governmental officials, it could bargain with the governor for the protection of its rights.⁸⁶ As discussed later, this was a fundamental issue which helped to split the empire after 1763.

The function of the assembly as the protector of colonial rights was a dominant theme throughout the century after the revolution against the Stuart tyranny in 1688. Jeremiah Dummer touched on this point in his defense of the New England charter: "Governours are apt to abuse their Power and grow rich by Oppression, Experience shows us. To enlarge the powers of the Governours," he said, "is to give them greater Power to oppress." That was the case in those colonies in which the governor exercised both the legislative and executive power, "or at least [had] so great an Influence on the constituent Parts of the Former, as leaves them little more than Nominal Sharers, serving rather as Screens to the Governour than a Defence to the People." Therefore, he concluded, in those governments where there was a charter that required "all Officers Civil and Military . . . to be annually elected by the People . . . nothing under Heaven can be a stronger Barrier against arbitrary Rule."⁸⁷ Lieutenant Governor George Clarke repeated this

⁸⁶Ibid.

⁸⁷Jeremiah Dummer, A Defense of the New England Charter (Boston, 1765), pp. 35, 69, 71.

sentiment when he said that the colonists "look upon frequent assemblies as the best and surest protection of their liberties and properties."⁸⁸

The second aspect of the assembly's function was to guard against the arbitrary use of executive authority. As one observer noted early in the century, the claim that

a Governour of any Colony . . . so far distant from the Seat of Redress . . . should be vested with a Power to govern, in a more absolute and unlimited manner there, than even the Queen [Anne] herself can, according to Law, or ever did attempt to exercise in Great Britain,

was dangerous since the provincial assembly had "less Sway and Weight . . . than the House of Commons had in Great Britain."⁸⁹

The control of colonial revenue proved to be the most important weapon that assemblies possessed in their struggle with the governor, especially the control of salaries. As noted previously, the colonial bureaucrats in London thought it sound policy to make the colonists bear the expenses of colonial administration. Yet, for over half a century they were unwilling and unable, because of economic and military problems with France, to devise a scheme to force the colonists to pay under British terms. In the end, however, assembly control of the governor's salary was by far one of the most common complaints among the royal governors.

⁸⁸Calendar of State Papers: Colonial Office, XLIV, doc. 73, pp. 32-33.

⁸⁹Quoted in Jack P. Greene, "Political Mimesis: A Consideration of the Historical and Cultural Roots of Legislative Behavior in the British Colonies of the Eighteenth Century," American Historical Review, LXXV, No. 2 (December, 1969), p. 352.

By the end of the first half of the eighteenth century the colonial assemblies had gained a significant degree of control over the governor by manipulating his salary. Cadwallader Colden summarized the governor's dilemma when he said that the "unreasonable increase of popular power by which the balance of power essential to the English Constitution is destroy'd in the Colonies is wholly owing to the Governours having no subsistence but from the Assembly." He further noted that "Governours have for several years stood firm to the Kings Instructions in Support of his prerogative & . . . after all were obliged to comply with the humours of the Assembly or starve or be sunk in debt."⁹⁰ One example of this was Governor Shute of Massachusetts who wrote:

that since the people had, in opposition to the royal instruction, reduced the governor to an avowed dependence, it would be proper that he should be paid a salary by His Majesty at home, till the inhabitants of Massachusetts can be brought to a better temper.⁹¹

Governor Burnet, Shute's successor, was determined to force the assembly into giving him a fixed salary. He outlined his position in a message to the assembly by pointing to the British constitution, noting especially the provisions for the independence of each department of state based on a permanent civil list. Since the governor was kept dependent on the assembly by means of a temporary salary, he reasoned, it prevented the executive branch of government from being independent to act freely according to his own judgments on pending

⁹⁰Quoted in Alice M. Keys, Cadwallader Colden: A Representative Eighteenth Century Official (New York, 1906), p. 235.

⁹¹Quoted in Spencer, Constitutional Conflict in Provincial Massachusetts, pp. 74-75.

legislation. As evidence that this was the real reason, he cited the assembly's withholding the governor's salary bill until the governor had signed the other bills approved by the assembly.⁹²

The assembly responded that no part of the government ought to be wholly independent, since the balance of government could only be maintained by a mutual dependence. Furthermore, the assembly was dependent upon the governor in many ways so that the assembly needed some way to counterbalance that. Moreover, since the governor's tenure was of such short duration, his stake in the province was not like that of the king's to England. Therefore, to keep him dependent on the assembly for his salary would keep him loyal to the interests of the province.

The Massachusetts assembly then reiterated its position by listing the four reasons why "we can neither come into an act for fixing a salary on the governor forever nor for a limited time." First, "it is an untrodden path," fraught with many unseen dangers; second, it has been the right of Englishmen since the Magna Charta to raise and dispose of public money without compulsion; third, it will destroy the balance of the constitution and lessen the dignity of the house of representatives; and finally, the house cannot betray the privileges of the province since it is their duty to make only such laws they judge to be for its "good and welfare."⁹³

⁹²Thomas Hutchinson, History of the Colony and Province of Massachusetts Bay (Cambridge, 1936), II, 301-320.

⁹³Ibid.

The reasons the provincial assemblies dealt with the governor in this manner was not difficult to understand in light of the policies of many of the governors they were forced to live under. Benjamin Franklin justified the colonists' actions on the basis that the governors

are generally strangers to the Provinces they are sent to govern, have no estate, natural connexion (sic) or relation there; that they come only to make money as fast as they can; are sometimes men of vicious characters and broken fortunes, sent by a Minister to get them out of the way.⁹⁴

The most significant reason for the assembly to control the governor's salary was that it was the means to protect the colony from arbitrary executive action. When the rights of the colonists conflicted with British interests or prerogative, governors, by the nature of their authority, placed provincial interests in the subordinate position. Additionally, governors were under constant pressure to expand the prerogative as far as they could over the colonists. Early in the eighteenth century, one observer noted the trend which became more pronounced throughout the century: "Instances may be given that Governors have usurped more Authority than belonged to them, as well as in the Proprieties as in the Kings Colonies," he claimed. Moreover, "It is no Advantage to the King, that his Governors should have it in their Power to grip and squeeze the People in the Plantations, nor is it ever done, for any other reasons, than their own private Gain."

⁹⁴ Benjamin Franklin, Works (Smyth, ed.), V, 83.

After stating that he often heard complaints that many governors "and their Officers and Creatures, have been guilty of ill things to raise **E**states for themselves, or to gratify their own Revenge, or some other **P**assion," he concluded that,

I think it is past Dispute, that the King's and Plantations Interest is the same, and that those who pretend, the King hath, or ought to have an unlimited Power in the Plantations, are a sort of People, whose Designs make their Interests run counter to that both of the King and Plantations.⁹⁵

Another writer placed the blame for the colonists' problems squarely on the governors' abuse of their authority. It was the governors who always acted the "offensive Part," and set up "unwarrantable Claims . . . [and employed] Snares, Menaces, Aspersions, Tumults, and every other unfair Practice . . . [in an attempt to force] the Inhabitants out of the Privileges they were born to."⁹⁶

Governors' abuse of their executive power forced the assembly to act to protect the provincial interests in the same manner the House of Commons had done with the Stuart monarchy. The assembly always acted "on the defensive only," one writer noted, as its members struggled against the machinations of "hungry, ignorant, or extravagant" governors whose "crafty, active, knavish . . . servile, fawning" adherents were the "trash of mankind," as ones who entered into such ill conceived alliances against the people's rights and liberties.⁹⁷

⁹⁵"An Essay Upon the Government of English Plantations," Wright, ed., pp. 11, 21.

⁹⁶Quoted in Greene, "Political Mimesis," p. 352.

⁹⁷Ibid.

The failure of most governors to gain an ample fixed salary for a reasonable length of time forced them to bargain away some of their powers. Governor Lewis Morris wrote the London officials that something must be done to "prevent the Governours from bartering the Kings Prerogatives or Lands for bread." He proposed that England make the governors and other royal officials independent of the assembly and "give the Councils a greater weight and Influence than they at present have . . . [to keep the] Assemblies within their Just and proper limmits (sic)."⁹⁸ Another time, he wrote that the

rendering of governors and all other officers intirely (sic) dependent on the people is the general inclination and endeavor of all the plantations in America, and no where pursued with more Steadinesse and less decency than in New Jersie (sic)."⁹⁹

Another governor complained that "Whilst Governors are dependent on their Assemblies, the Acts of Trade will never be observed." Moreover, "if you knew who were the leading men in the several Assemblies you would [be] convinced that Governors ought to have better salaries, and not be permitted to take any presents from the people." When they do, he argued, "there will be illegal indulgences in point of trade, justice will be bought and sold, Chancery suits protracted, and the poor oppressed."¹⁰⁰ Benjamin Franklin noted that

⁹⁸Quoted in Kemmerer, Path to Freedom, pp. 162-163.

⁹⁹Quoted by Greene, Provincial Governor, pp. 173-174.

¹⁰⁰Calendar of State Papers: Colonial Office, XIX, doc. 26, pp. 27-28.

every proprietary and Royal Governor has two Masters, one who gives him his Commission, and one who gives him his Pay. . . . The Subject Money is never so well disposed of as the Maintenance of Order and Tranquility, and Purchase of good Laws.¹⁰¹

For example, Governor Clark of New York was accused of selling his approval of the Triennial Act in return for his salary.¹⁰²

The Board of Trade recognized that the governors' salaries should be fixed "to prevent the inconvenience and clamour of presents," often granted to governors, which rendered them "precarious and dependent on the people."¹⁰³ However, finding a proper solution was more difficult than recognizing the problem.

New Hampshire Governor Benning Wentworth provided one solution. In the twenty-six years as governor his personal fortune increased to the point where he was financially independent of the assembly. This allowed him once to go four years without a salary, and even meant that he could afford to pay his nominee as chief justice of the superior court when the assembly refused to appropriate his salary. However, this did not deter him from seeking an adequate salary besides. The availability of vast amounts of land, which the governor could grant to assembly members eased his situation considerably. A cynic observed:

I suppose, our Assembly expect to be landlords of thousands and thousands of acres, esteeming it reasonable, for generous grants of money, to have a return of as generous grants of land, huzza, huzza, huzza.¹⁰⁴

¹⁰¹Quoted in Greene, Provincial Governor, p. 175.

¹⁰²Ibid., p. 173.

¹⁰³Calendar of State Papers: Colonial Office, XIX, doc. 112, p. 181.

¹⁰⁴Quoted in Daniel, Experiment in Republicanism, p. 26.

Numerous other solutions were offered by both governors and Board of Trade members. Governor Lewis Morris suggested that the Crown take over the loan-office system used in New Jersey and apply it to the rest of the colonies. The interest earned could be used to pay the cost of colonial government.¹⁰⁵ Another solution was proposed in a report to the Board of Trade which recommended that Massachusetts and New York be reunited in the Dominion of New England. This was to be done not in response to military needs or as a result of complaints about the governor's actions, but purely on the grounds of financial and constitutional expediency. The weakness of the Massachusetts governor would therefore be strengthened if he could be sustained by the guaranteed revenue previously established in New York. This appeared to be the easiest solution to the constitutional dilemma posed by the Massachusetts assembly's control of the governor's salary, in the face of the Board of Trade's avowed opposition to the Crown's paying the salary on the grounds that it might set a precedent for other colonies to agitate for the same.¹⁰⁶

When the assemblies failed to appropriate a governor's salary he would often threaten to seek aid from Parliament. Governor Morris of New Jersey recommended that Parliament pass an annual allotment for governors' salaries, which he said, "would put an end to the constant

¹⁰⁵See Kemmerer, Path to Freedom, p. 162.

¹⁰⁶See James S. Leamon, "Governor Fletcher's Recall," William and Mary Quarterly, 3rd Ser., XX (October, 1963), pp. 527-542. Also see Charles W. Spencer, Phases of Royal Government in New York 1691-1719 (Columbus, Ohio, 1905), especially Chapter II.

wraggings (sic) between governors and assemblies."¹⁰⁷ When Governor Hunter requested the Crown to settle the matter of salaries, the Board of Trade unsuccessfully sought a Parliamentary revenue act. By 1755 the Board of Trade seemed to give up as hopeless the idea of Parliamentary grants as a way to settle the disputes between governor and assemblies.¹⁰⁸ However, not until after the attempt to reorganize the empire in 1763 did the assemblies take these threats to have Parliament pay the officials salaries seriously.

The salary question was not the only financial problem plaguing relations between the governor and assembly. Virtually all other areas of revenue caused problems most of which the Crown considered as infringements on its prerogatives. Robert Morris wrote the Board of Trade saying

it has been proposed to raise and appropriate [funds] . . . sufficient to answer the ends of Government the wheels of which have been often stopt (sic), upon trifling quarrels that have arrisen (sic) between the governors and the people.

Moreover, he noted that colonists "in their turn too often expect and insist upon some right of the Crown's being given up before they will consent to the giving any money." Since the assemblies usually appropriated funds for a year's duration,

they may have frequent opportunity of gaining such points . . . from whence it has happened that the Crown having no more rights for their governors to Barter away, they are now striking at the very right of government itself.

¹⁰⁷Morris to Newcastle and to Board of Trade, October 4, 10, 1739, New Jersey Historical Society, Collections, V, 58-63.

¹⁰⁸See Greene, Provincial Governor, pp. 169-170.

Furthermore, they are in "a fair way of taking from the British officers the very frame & shadows of government having long ago seized the substance." The failure of England to look after colonial government properly, he rightly predicted, would find the British government unable to

check the disobedience of a set of people who with them (if they have not already) have it in their power to turn the Balance of trade and Consequently of Riches and power into the scale of almost any Nation in Europe.¹⁰⁹

At the heart of the revenue disputes was a conflict between constitutional interpretations. Governor Hunter of New York addressed the assembly noting that

giving Money for the Support of Government, and disposing of it at your Pleasure, is the same with giving none at all. Her Majesty is the sole Judge of the Merits of her Servants. This Right has never yet been disputed at Home, and should I consent to give it up abroad, I should render myself unworthy.¹¹⁰

Like the Crown, he contended, the governor had the sole right to determine how the money was to be spent for the administration of the colony. He then went on to ask if the assembly was ready to undertake the administration of the province if they continued to refuse him any appropriations. As noted previously in the salary disputes, the assemblies claimed the right to appropriate and dispose of money as they saw fit in the same manner as did Parliament. Under Governor Clinton the New

¹⁰⁹ R. H. Morris, "Some Consequences of the Crown's Not Having Revenue in America," reprinted in Kemmerer, Path to Freedom, p. XVIII.

¹¹⁰ Smith, History, I, 141. Also see J. M. Gitterman, "Council of Appointment in New York," Political Science Quarterly, VII, 1892, pp. 83-84.

York assembly refused to accept amendment to money bills they had passed, appropriated salaries of governmental officials by name and not their office, which limited the governor's appointing power, attached salary bills to measures the governor could not afford to veto, such as military appropriations, and finally, provided for the issuance of money from the provincial treasury without a warrant from the governor.¹¹¹

The Massachusetts assembly addressed the revenue problem from a different approach. They provided money or supplies for a year by a vote or resolve instead of an act of the assembly, which eliminated the need for the sanction of the governor and council. It also meant that the assembly would keep in their hands the power to determine which accounts were to be paid, even after the services had been performed. This kept the Massachusetts governor completely independent of and isolated from the area of colonial finances. England retaliated by issuing a further instruction to the governor declaring that no money was to be raised by bills of credit issued except by an official act of the assembly.¹¹²

It was evident that England needed to develop alternate sources of revenue to overcome the royal officials' dependence on the colonial assemblies. Governor Quarry summarized the ideal approach from the British point of view when he said,

¹¹¹See Labaree, Royal Government, p. 287.

¹¹²Calendar of State Papers: Colonial Office, XXXVII, doc.

a Governor ought to have his support as well as dependence from the Crown, though at the same time the fund should come from the people, but by such means as ought first to settle it in the Crown.¹¹³

However, the attempts to tax the colonist for revenue to pay royal officials backfired, especially after 1763. The power to tax and appropriate funds was a right of Englishmen too fundamental to be given up, the colonists contended. Moreover, assembly control of the taxing and appropriations process was politically too advantageous to allow the governor much, if any, control over expenditures especially when the assemblies could use them to keep the governor responsible to the interests of the province. In short, the colonists would not admit the right of the governor to dispense public funds because it was "impossible, unless the Representatives betray the Trust reposed in them by the People that chose them." Moreover, it was "against their Constituents Instructions, [to] prostitute the Money in the Treasury to the unaccountable and consequently uncontrollable Will and Pleasure of the Governor." Nevertheless, they argued,

the Taxing of the People, and Putting Money in the Treasury, is what more peculiarly belongs to the House of Representatives, as their Constituents pay it, and therefore what prevents and hinders them in what they are the most peculiar and proper Judges of seems not only to bear upon their Rights by Charter; but also as Englishmen and rational Creatures.¹¹⁴

As John Dickinson later argued in his Letters From A Pennsylvania Farmer,

¹¹³ New York Colonial Documents, IV, 1050.

¹¹⁴ Quoted in Albert Southwick, "The Molasses Act--Source of Precedents," William and Mary Quarterly, 3rd ser., VIII (July, 1951), p. 403.

no free people ever existed, or ever can exist, without, keeping, to use a common but strong expression, 'the purse strings' in their own hands. Where this is the case, they have a constitutional check upon the administration, which may therefore be brought into order without violence, but where such a power is not lodged in the people, oppression proceeds uncontrolled (sic) in its career, till the governed, transported into a rage, seeks redress in the midst of blood and confusion.¹¹⁵

Thus, to allow Parliament to do what they would not allow the governor to do would not only be a contradiction, but a violation of English constitutional principles. As noted later, this argument becomes extremely significant in colonial protests as the Revolution approaches.

Detailed appropriation bills also increased the assemblies' control over the governor by limiting his discretion. In some cases the governor was reduced to the position of an accounting officer directed to issue his warrants in accordance with the detailed instructions provided for by the assemblies. While this part of the governor's prerogative was invaded to varying extents in each colony, on the whole it was regarded as the exception rather than the rule in most instances.¹¹⁶

The power to appoint revenue officers grew out of the idea that the assemblies were the guardians of public money. Except for New Hampshire, New Jersey, and Georgia, assemblies were successful in gaining the right to appoint the provincial treasurer. In the case of New York, the financial irregularities of Governor Cornbury's administration led the assembly to request the appointment of a treasurer "for the receiving

¹¹⁵John Dickinson, Letters of A Pennsylvania Farmer, Letter IX, pp. 87-88.

¹¹⁶See Greene, Provincial Governor, p. 180.

and paying of such Monies now intended to be raised for the publick Use as a Means to obstruct the like Misapplication for the future."¹¹⁷ When assemblies gained the right to appoint the treasurer it generally meant that the governor was effectively barred from any control over the provincial finances, which was then placed in the hands of a person "solely and entirely a servant of the assembly." Thus, "almost every executive power of the Crown lodged in its governor, where money is necessary, [is] thus exercised by the assembly and its commissioners."¹¹⁸

The threat to the governor's position was further illustrated by Virginia's practice of combining the offices of speaker of the house and provincial treasurer. Governor Fauquier reported to the Board of Trade: "I am thoroughly convinced that no alteration can be made in this long established custom . . . without manifest prejudice to his Majesty's service."¹¹⁹ William Knox also wrote to the British officials about the problem of revenue officers not being dependent on the British government, though he saw little hope of overcoming it.

The Independency of the Revenue Officers on (sic) the Governours, for the Governours have no power over them, they are very little attentive to their Conduct, and the Officers knowing themselves to be accountable to only one another in America, and to the Lords of the Treasury here, they agree

¹¹⁷Ibid., p. 184.

¹¹⁸Pownall, Administration of the Colonies, pp. 52-53.

¹¹⁹Quoted in Flippin, Royal Government in Virginia, pp. 212-213. Also see Persey S. Flippin, The Financial Administration of the Colony of Virginia (Baltimore, 1915).

amongst themselves what liberties they shall take, without any regard to the Duties of their Offices.¹²⁰

The provincial treasurer was not the only appointment made by the assembly. In all colonies, to varying degrees, the assembly acquired the power to appoint most key administrative officers, which significantly reduced the governor's power. Governor James Glen of South Carolina wrote in 1748 that "almost all the places of profit or of trust are disposed of by the General Assembly. . . . The executive part of the government is lodged in different sets of Commissioners." Moreover, he noted, "they are named by the General Assembly, and are responsible to them alone," which means that "the people have the whole of the administration in their hands." Thus, he concluded, the governor was "cloathed (sic) with Authority," but "is stripped Naked of Power to carry out his duties."¹²¹

Another inroad made by the assemblies on the executive authority was in the area of military affairs. Assemblies would appropriate funds for military supplies, prescribing in minute detail the purposes they were to be used for, which was tantamount to dictating the course of military operations. Additionally, committees of the assembly, or commissioners appointed by them, were responsible for overseeing the disposition of funds, which involved them in the conduct of military

¹²⁰William Knox, "Hints Respecting the Settlement of Our American Provinces," reprinted in "A Project for Imperial Form: 'Hints Respecting the Settlement for Our American Provinces' 1763," Thomas C. Barrows, ed., William and Mary Quarterly, 3rd ser., XXIV (January, 1967), p. 119.

¹²¹South Carolina Historical Society, Collections, II, 303-304.

operations. Furthermore, the assembly's power to appoint and remove officers tended to interfere with the military discipline.¹²² As historian Chalmers remarked, "the King's representative acted merely as the correspondent of his ministers. The war was conducted by committees of assembly."¹²³

Thus, by the middle of the eighteenth century the provincial assemblies had succeeded in carving out a significant, if not a dominant, role in the determination of policy in those areas which directly affected local provincial interests. The Board of Trade's characterization of Massachusetts in 1757 applies to the other colonies in varying degrees as well. It observed that

almost every act of executive and legislative power, whether it be political, judicial, or military, is order[ed] and directed by Votes and Resolves of the General Court, in most cases originating in the House of Representatives.¹²⁴

Many of these alleged usurpations of the executive prerogatives were done in response to the abuse of governors or the indifference of

¹²³George Chambers, An Introduction to the History of the Revolt of American Colonies, II, 300-301.

¹²⁴Quoted in Greene, Provincial Governor, pp. 193-194. For further discussion of the assemblies encroachments see the following: Jack P. Greene, "Foundations of Political Power in the Virginia House of Burgesses, 1720-1776," William and Mary Quarterly, 3rd ser., XVI (October, 1959), pp. 485-506; Jack P. Greene, The Quest for Power: The Lower Houses of the Assembly in the Southern Royal Colonies, 1689-1776 (Chapel Hill, 1963); Dickerson, American Colonial Government, pp. 158-179; George E. Frakes, Laboratory for Liberty: The South Carolina Legislative Committee System 1719-1776 (Lexington, 1970); Evarts Greene, Provincial Governor, Chapters IX, X; Labaree, Royal Government, Chapters V, X; J. R. Pole, Political Representation and the Origins of the American Republic (New York, 1960); Elmer I. Miller, The Legislative of the Province of Virginia: Its Internal Development (New York, 1907); Stanley Pargellis, "The Proceedings of the Virginia House of Burgesses," William and Mary Quarterly, 2nd ser., VII (April, 1927), pp. 73-86, 143-157.

British colonial officials to the needs and rights of the American colonists. Moreover, many of the prerogatives claimed by the Crown and granted to the governors, were, in the opinion of the colonists, a violation of their rights as Englishmen. Most notable was the right to raise and disperse provincial funds in the interests of the colonists. The impact this had on the development of American executive theory was to turn an appointed governor, over whose appointment the colonists had little control, into an executive responsible to provincial needs. So long as the assembly could exercise an effective counterweight to the authority granted in the governor's commission and instructions, the legislative branch could protect the province from arbitrary and capricious royal administrators, bent on serving their own interests, be they financial or political.

Furthermore, the techniques developed by the assemblies to check the royal prerogative and frustrate the policies of the colonial bureaucracy in London served to protect the colonies from feeling the full burden of programs which clearly placed their interests subordinate to the dictates of British imperial and mercantile interests. Aided by England's problems with France, the colonies were able to stave off effective enforcement of British colonial policies for over half a century, which enabled the development of precedents and practices to become firmly established in the colonial political tradition. By the time the British were finally able to undertake a major revision of the empire in the 1760's, the provincial assemblies were more than able opponents to the chief provincial administrator of British policy. In this capacity, the provincial governor, after 1763, was overloaded

trying to enforce colonial policies in the face of such wholesale opposition with the meager arsenal of political weapons left at his disposal.

In spite of the inroads made by the provincial assemblies, the governor was not totally destitute of power to influence their actions. First and foremost was his power to summon the assembly, with the advice and consent of the council, subject to any restrictions or limitations listed in his commission and instructions. Massachusetts and Pennsylvania both required that there be annual elections and sessions at fixed dates. A number of provinces passed biennial, triennial, and septennial acts which would limit the governor's power over calling sessions. North Carolina passed a biennial act in 1715-1716 which was finally disallowed in 1737, on the advice of the royal governors that it deprived them of prerogatives granted to them.¹²⁵ In 1762 Virginia passed a septennial act calling for legislative assemblies at least once every three years. These were only two cases of the numerous and often unsuccessful attempts to regulate the governor's power over the assembly. Finally the Board of Trade issued its policy on the subject in 1767, which said that no governor could assent to any act fixing the duration of the assembly.¹²⁶

¹²⁵See Charles Rapier, North Carolina: A Study in English Colonial Government (New York, 1904). Also see Blackwell P. Robinson, The Five Royal Governors of N. Carolina (Raleigh, 1963). For Pennsylvania see William Shepherd, History of Proprietary Government in Pennsylvania (New York, 1896).

¹²⁶See Greene, Provincial Governor, p. 153.

The governor's authority to summon, prorogue, and dissolve the house gave him tremendous power to influence legislation. Governor Belcher was accused of proroguing the Massachusetts assembly to prevent the house from intervening in the boundary dispute with New Hampshire.¹²⁷ Later, during the Stamp Act crisis, governors in New York and Georgia used this method to prevent action by their assemblies to interfere with its enforcement.¹²⁸ Moreover, a governor could keep assemblies in session against their will when it suited his interests.¹²⁹

Finally, all governors possessed the right to dissolve the assembly, except in Pennsylvania where it was disputed. This method was often effective in dealing with an obstinate assembly, in the hopes that the governor could summon another, at a later date, more to his liking.

Another power the governor possessed over the assembly was the right to issue writs of election, though this was also disputed by the assemblies. These were generally granted by the governor to the sheriffs listing the number of representatives from each district. The issue arose over whether the governor had any discretion in determining the number of representatives from each district and his ability to grant representation to a new district. At first the assembly apportioned representatives by act, though in the later colonial period the

¹²⁷See Hutchinson, History of Massachusetts, II, 349-350.

¹²⁸Greene, Provincial Governor, p. 153.

¹²⁹Hutchinson, History of Massachusetts, II, 306-309.

governors were forbidden to assent to any act increasing the number of representatives in the assembly.¹³⁰

Once the assembly met, the governor claimed power to control its organization. Through their power to administer oaths to the members of the government, two governors maintained that they possessed the authority to determine who was qualified to sit in the assembly. Governor Cornbury of New Jersey refused to administer the oaths to several members of the assembly until overruled by the Board of Trade who told him he would "do well to leave the Determination about Elections of Representatives to that House, and not to intermeddle therewith."¹³¹ Governor Belcher of New Hampshire also refused to swear in several members and the assembly refused to do any business until the disputed members were seated, whereupon he relented.¹³²

Additionally, some governors tried to influence the assembly by interfering with the choice of house speaker. Presenting the newly elected speaker to the governor was generally a formality. However, a governor would occasionally object, leading to a confrontation with the assembly. Early in the eighteenth century Governor Dudley of Massachusetts rejected Thomas Oakes, whom he had previously vetoed for a seat on the council. The assembly refused to elect another and the council backed its action. Dudley finally relented because his "just sense of pressing Affairs of the War that demanded a very Sudden dispatch of this

¹³⁰Greene, Provincial Governor, pp. 146-148.

¹³¹Ibid., p. 49.

¹³²Ibid.

Session . . . Saving to Her Sacred Majesty her just Right . . . at all times."¹³³ Thus, he did not view his expediency as an encroachment on the prerogative. However, it did set a precedent. Later, Governor Shute, with the backing of the home government, dissolved the house rather than accept their choice of speaker. The house later chose another speaker, which Shute approved, though the representatives objected saying it was unnecessary.¹³⁴ Governor Benning Wentworth also successfully used his veto power in the house in this matter, which forced a deadlock in the house from 1749-1752, when a new speaker was finally elected who was acceptable to him.¹³⁵

Another power that the governor possessed to influence legislation was the use of patronage. The seventeenth century royal governor had numerous patronage positions at his disposal. However, as noted previously, the eighteenth century saw the governor's power in this area gradually diminished, especially after the Duke of Newcastle began to raid the colonial administration for the patronage he might use to support his own political ends within the British government. The provincial assemblies also countered the governor's patronage by taking over appointment to some offices, as noted before, and barring former receivers of patronage from sitting in the house for a certain number

¹³³Quoted in Wesley F. Craven, The Colonies in Transition, 1660-1713 (New York, 1968), p. 321.

¹³⁴Hutchinson, History of Massachusetts, II, 211, 214-215.

¹³⁵See Daniel, Experiment in Republicanism, pp. 27-32.

of years after their commission expired. The Maryland assembly forbade anyone, on the pain of fine, to solicit offices for their friends.¹³⁶

Finally, the governor was a member of the legislative process himself. No act passed by the assembly could take effect until he had approved it. If he vetoed an act, there was no chance for the assembly to override his negative. Moreover, the governor's instructions required that suspending clauses be included in certain bills giving England the final right of review. As noted previously, the growing number of mandatory vetoes and areas requiring suspending clauses limited the governor's discretion and weakened his ability to deal with the assembly. His other legislative role was to recommend legislation. How much power this authority contained depended upon his relationship with the assembly.

In short, the American colonial governor in the first half of the eighteenth century retained much of the authority possessed by the strong seventeenth century governors. However, his power to implement that authority had slipped away from him for a number of reasons.

Foremost among the British causes of the governor's decline in power was the failure of colonial administrators to follow up on the extension of prerogative control over the colonies undertaken by William III. Many of his reforms fell victim to bureaucratic indifference or political rivalry, especially when colonial affairs came under the direction of one man, the Duke of Newcastle. In that period of "salutary neglect" colonial policy was stretched between national and private interests, neither of which was able to exert enough pressure to develop

¹³⁶See Greene, Provincial Governor, p. 158.

and implement a consistent colonial policy. Furthermore, the failure of colonial officials to work out adequate methods to administer the colonies led to confusion and conflicting policies. Part of this was due to the fact that American affairs were on the periphery of British politics with insufficient political impact to gain the attention they deserved. Moreover, the British officials sought to maintain the status quo in the face of changing conditions within the colonies. This put the governor under tremendous pressure to bargain away his power and authority to maintain some semblance of control within the colonial government.

Furthermore, the governor's dual role as chief colonial administrator for the English and chief executive for the colonists was fraught with built-in conflicts. He was given broad authority derived from his position as representative of the royal prerogative, but was limited in his use of it by his instructions. Moreover, the Crown appointed by commission other royal officials designed to check the governor's use of his authority, but more often than not they were a source of friction and made colonial administration quite inefficient.

The governor's dual role also made him subject to two masters, the Crown and the people. Without the colonists' good will the governor had difficulty maintaining his administration. As one governor noted

If a governor lies under the fatal necessity of disobliging a majority of representatives by doing his duty on one hand, or on the other of gaining their favor by breach of his duty, his doom is fixed, since he must either fall a victim to the

unjust rage of those men for what is right, or to his Majesty's just displeasure for doing what is wrong.¹³⁷

In the words of one historian, "it was a supreme failure of leadership to earn the opposition of the Assembly, the Council, and one's subordinates without winning any increase in the prerogative of the Crown."¹³⁸

In summary, the colonial governor was granted extensive authority in his commission and instructions to carry out his duties. That authority was tempered by his instructions on how to use it, the built-in constitutional checks like the council, and an increasingly powerful assembly. While the governor's authority basically remained unchanged throughout this period his power to carry it out was severely eroded. The major factor was the assemblies' control of the governor's salary and their ability to force the governor to bargain his powers and prerogatives in return for their support. By mid-century the assemblies had managed to devise the techniques and mechanisms to make the governor responsive to colonial interests. In short, appointed governors whose basic function was to protect English interests and administer colonial policy within the colonies found himself facing a significant counterweight to his power and authority in the assembly as it sought to make him accountable to colonial interests.

¹³⁷Quoted in Labaree, Royal Government, pp. 31-32.

¹³⁸Henretta, "Salutory Neglect," p. 152.

CHAPTER III

THE QUEST FOR UNION:

The Idea of a Continental Executive, 1688-1760

From the Glorious Revolution to the outbreak of the American Revolution many proposals were discussed on the feasibility of uniting two or more colonies under one common executive. Other plans developed the idea of continental associations. Taken together these discussions raised many of the problems which confronted the Americans once they had declared their independence and were attempting to establish their own national government. This chapter examines these plans and proposals from 1688 to the years just preceding the re-organization of the empire in 1763 in an effort to sort out the various problems, experiences, and methods used in an attempt to unify two or more colonies.

Until the end of the first quarter of the eighteenth century military concerns dominated the various plans of colonial union. For example, on orders from the Crown, Governor Fletcher of New York tried unsuccessfully to organize a meeting of colonial representatives in 1693 to discuss matters of common defense. However, several colonies did not feel sufficiently threatened to see the need for such a conference while others resented Fletcher and the manner in which he called the conference. The following year British officials assigned troop quotas to each colony under the united command of Fletcher. This

offended several colonies who ordered their agents in London to take matters before the Crown. In response, the attorney general issued his opinion which declared in part that the charters gave "Ordinary Powers of the Militia to the respective Governments thereof." He argued, however, that

their Majesties may [also] constitute a Chief commander, who may have authority at all times to Command or order such portions of the Forces of each Colony . . . [as the Crown sees fit], And forther (sic) in times of Invasion and approach of the Enemy with ye advice and assistance of the Governors of the Colonies to Conduct and Command the rest of the Forces for the preservation and defense of such of those Colonies as shall most stand in need thereof not leaving the rest unprovided of a competent force for their defense and safety.

But in peace time the militia "within each of the said Provinces ought as we humbly conceive to be under the Government and disposition of the respective Governors of the Colonies according to their Charters."¹

Though the British and many Americans agreed that some form of united military action was needed in time of crisis, the Americans were not about to give that much power to a governor like Fletcher whom they mistrusted.

The following year William Penn received a letter from New York resident P. D. LaNoy, which outlined one of the fundamental problems of establishing a union over such disparate colonies. He began by criticizing Fletcher but noted that it would be a great convenience to have "a Union under one Govern[o]r," especially in time of war, and it would

¹New York Colonial Documents, IV, 103-105.

be a terrour (sic) to the french of Canada who assume a boldness purely from our divisions into separate bodyes and the piques that are to common amongst the several govern[o]rs of which the French don't want [of] a constant intelligence.

However, if such a union between New England, New York, and the Jerseys under one governor did take place it would have to be done in such a manner that

the Assembly's, Courts of Judicature and Laws of the respective colonys (sic) may remaine and be kept separate and entire as they now are; for our laws & manner of trade are different from one another and the distance betwixt us would make very uneasie for the rest of the Provinces to resort to any one common justice.²

In December, 1696 William Penn recommended to the Lords of trade that the colonies elect delegates to a common assembly for the purposes of solving continental problems. The following February he presented his detailed plan of colonial union. It called for two delegates from each of the then ten colonies to meet at least once annually. The Crown would appoint a commissioner to "preside in the said Congress," who would probably be the governor of New York since it was the most centrally located colony. Aside from his role as presiding officer, he would "be general or chief commander of the . . . [troops raised by the congress] against the common enemy, for the good and benefit of the whole."³

Later in February the Board of Trade made its own recommendation for a union between New York and the other colonies listed by Penn. The Board was careful to note the various objections of the colonial

²Ibid., p. 224. Also see II, 58.

³Penn's plan reprinted in Frederick Tolles and E. Gordon Alderfer, The Witness of William Penn (New York, 1957), pp. 136-137.

agents to combining the colonies under a common civil government. If the union's executive was to be either the governor of New York or Massachusetts, it would be a hardship on those who had to travel long distances to conduct their business with him. Moreover, the colonies would be required to raise money to support some other colony's governor. In light of these and other problems, the Board of Trade noted that the union would only be feasible under a military command separate from the civil government entirely. Since the previous quotas established by the Crown for colonial defense had not been complied with, the Board of Trade concluded that "it requires the exertion of a more vigorous power than hath thitherto been practiced, to make it produce the desired effect." Therefore, the Board of Trade recommended that the Crown appoint an official to coordinate military affairs within the colonies. Additionally, they recommended that the rest of the colonies outside of the New England-New York area be made to realize

their own true interests and thereby [be] induced to enact such laws in their respective governments as shall be necessary to enable the said Captain General to execute Your Majesty's Commissions, so as shall be most for Your Majesty's service, their own defense and general advantage."

The result was the appointment of the Earl of Bellomont as the captain-general and governor of New York and the surrounding territory.⁴

In 1698 Charles D'Avenant published "Discourses on the Public Revenues and of the Trade of England" in which he outlined a plan similar to the one proposed by William Penn. In comparing the proposals he noted that

⁴New York Colonial Documents, IV, 259.

this constitution has some resemblance with the court of the Amphictiones, which was a kind of council where the general affairs of Greece were debated; which if they could have preserved in its original purity, and to the first design of it, that country had not been so easy a conquest to the Romans.⁵

D'Avenant's plan of colonial union came under heavy attack by an anonymous Virginian who wrote "An Essay Upon the Government of the English Plantations on the Continent of America," in 1701. One of this author's strongest objections was the making of the New York governor "so much advanced in Dignity above the rest of the Colonies and their governors." Moreover, he objected to always holding the council meetings at New York. Instead,

it would be much more convenient and useful too, if they met by turns, sometimes in one Province, and sometimes in another; and the chief Governour in the Province were they meet, being commissioned by his Majesty, may preside as the High Commissioner amongst them.

He went on to recommend that the continent be divided into "five Circuits or Divisions" with each taking its turn as host for the grand council meetings. Moreover, he said, "there was a fundamental constitutional principle involved which allowed the people to remedy the Grievances that may happen to the Plantations by their Governours." As proposed by D'Avenant's plan, "the last resort of Justice in any Province, may not be to the chief Governour there," he contended. Furthermore, it was "very dangerous to establish any Judicature, which cannot be called to Account for male-administrations (sic)." Instead, he called for an

⁵Charles D'Avenant, "Discourses on the Public Revenues and on Trade," in The Political and Commercial Works of Charles D'Avenant, Charles Whitworth, ed. (London, 1771), II, 29.

act of Parliament to make all the colonial government uniform in structure lest "some . . . Tricks . . . be plaid (sic) by the Charter Governments." This was an allusion to the use of New England ports as a haven for "Pyrates" who had not been captured until the Government of the Earl of Bellamont, who may properly be called the first Governor of the English Interest in that Province. In the end, however, he concluded that

it is necessary for all the Colonies to be united under one Head, for their common Defence; and that it will be much more so, if the French or any other Nation, possess themselves of the River Messachippe (sic), and the Lakes to the Westward.⁶

That same year Robert Livingston of New York wrote the Lords of Trade and outlined his plan of union. He recommended that "one form of government be establish'd in all the neighbouring Colonies" and that they be refashioned into three "distinct governments." Each government would be assessed 5,000 pounds annually for ten years to support continental expenditures. Representatives from each of the three governments would then meet annually at Albany to "oversee the management and disposition of the money to those uses and not otherwise." No mention was made of an independent executive head.⁷

The Earl of Stair proposed "A Scheme Towards the Better Government of the West Indies" in 1721. His paramount suggestion was

⁶"An Essay Upon the Government of the English Plantations on the Continent of America (1701): An Anonymous Virginian's Proposals for Liberty Under the British Crown, with Two Memoranda by William Byrd," Louis B. Wright, ed. (San Marino, California, 1945), pp. 68-86.

⁷New York Colonial Documents, IV, 87.

that there be a Captain General or Governor in Chief appointed over all the Continent of [the] West Indies, whose Commission [was] to supersede all other Gouvernors (sic) of Province, in which he shall go on occasion of defense or other necessity, and his Residence to be in the middlemost Province upon the Continent from North to South, for the being more at hand to succour any that shall want.⁸

Stair's plan was far more explicit in outlining the powers of executive than previous plans. Specifically, the proposed executive was required to maintain the form of government and "to exercise the same powers only" of the governor of the colony he replaced. He was to have a "general Council" consisting of "two Members from the Assembly of each Province" and one of the two representatives be "changed or re-elected every year to keep the council better informed as to conditions within the respective colonies." The major duty of Captain General and Council was "to allot the portion of Men and Money, which shall be the Appointment of each Province, to be fixed in gross, and the Assembly of the Province to direct by a law the ways of raising it."⁹

Stair's plan of intercolonial government specifically barred the council from interfering with the form or operation of any particular member colony. All actions were on a "majority of voices present," and "not an act of Decree." Provision was to be made for an adequate salary for the members by their respective provinces and "that there be a reasonable allowance settled from each province, as a competent salary

⁸Ibid.

⁹Ibid.

to the Captain General, over and above the Allowance of his Government, where he resides."¹⁰

Most interesting, however, was the scope of Stair's grant of executive power. He recommended that the "Captain General have all Powers proper for his Office, and needful for his Service, even the suspension of Governors, where His Majesty's Commands by him are disputed without being causelessly neglected, or willfully disregarded." Moreover, he was to have the power to fill vacancies in the standing military force, "to be confirmed by His Majesty's Commission." Additionally, he had the power to remove any officer in the Militia of any province, "when under his Command upon service; but to fill up the Vacancies with persons only of the Province, to which the said Militia belonged." Furthermore, the executive was to have the power "to order and march the Militia of any Province to the defense of another (this Article to be settled under reasonable Rules, Allowances, and restrictions)." Finally, Stair would require the executive to transmit copies of all council proceedings to the Board of Trade, and where the Crown's pleasure was not known, "to suspend acting till His royal pleasure be known." Thus, Stair would have the "Captin General" take over the provincial governor's military powers on every military occasion except local matters.¹¹

¹⁰Earl of Stair, "Proposals for a Scheme Towards the Better Governments of the West Indies," reprinted in "Plans for the Union of the British Colonies of North America, 1643-1776," Frederick D. Stone, ed.; History of the Celebration of the One Hundredth Anniversary of the Promulgation of the Constitution of the United States, Hampton L. Carson, ed. (Philadelphia, 1889), II, 461.

¹¹Ibid., pp. 461-462.

A final interesting note was Stair's recommendation that Parliament pass a revenue act "or as such as shall be thought proper and worthy the acceptance of able, honest Men for the maintenance of Governors and other officers in several Provinces, especially in the proprietary Governments." Moreover, under severe penalty, no governor be allowed to act, whether he was "nominated, elected, chosen or appointed," until

he shall have obtained the Royal Approbation for his so acting, as Governor . . . and that he hath first qualified himself according to Law, and shall have given proper security for his dutiful behaviour, his observance of all the Laws of Trade and navigation, and of all such orders as from time to time be sent unto him.

Thus, Stair recognized and sought to avoid the problems of a governor's salary not being fixed and assured.¹²

Later that year the Lords of Trade proposed a similar plan for colonial union. Under this proposal the whole continent would be placed under a

Lord Lieutenant or Captain General from whom all other Governors of particular Provinces should receive their Orders in all cases for Your Majesty's Service, & Cease to have any Command respectively in such province where the said Captain General shall at any time reside, as is presently practiced in the Leeward Islands where each Island has a particular Gover[nor], but one General over the whole.

Like previous plans, he was to have a council of two or more deputies from each province. Moreover, they recommended that

he should have a fixed salary sufficient to support the Dignity of so Important and Employment, independent of the Pleasure of the Inhabitants; and in our humble opinion ought to be a person of good Fortune; Distinction and Experience.

¹²Ibid., pp. 462-463.

This plan went further than the previous ones in its recommendation that the executive have not only military power, but civil power as well over the respective governors.¹³

The idea of a general executive power over the colonies was picked up the following year by Daniel Coxe of New Jersey. In his work "A Description of the English Province of Carolina" he proposed that a "Lieutenant, or Supreme Governour" be constituted "and appointed to preside on the spot, to whom the Governours of each colony shall be subordinate." A "great council or general convention of the estates of the colonies . . . by order, consent or approbation of the Lieutenant or Governour General, shall meet together, consult and advise for the good of the whole." Unlike the other proposals, this one specifically noted that "in all cases the Governour General or Lieutenant is to have a negative; but not enact anything without their [the council's] concurrence, or that of a majority of them." Since this plan was a "general" proposal, "other jurisdictions, powers, and authorities . . . may be vested in and cognizable by the above said Governor General or Lieutenant, and council in accordance with the laws of England."¹⁴

By the mid 1720's the problems of colonial defense were yielding to the problems of colonial administration. Some feared that colonial union would be detrimental to English interests. One such person was Governor William Keith of Pennsylvania. Citing the jealousies

¹³New York Colonial Documents, V, 629.

¹⁴Daniel Coxe, "A Description of the English Province of Carolina," (London, 1722), reprinted in Stone, ed., "Plans. . .," pp. 465-467.

and rivalries between the colonies over trade and other matters, he noted that

the wisdom of the Crown of Great Britain therefore by keeping its colonies in such a situation is very much to be applauded; for while they continue so it is morally impossible that any dangerous Union can be form'd among them.

Moreover, he was concerned whether it was "good policy to accustom all the able men in the colonies to be well exercised in arms."¹⁵

British official Martin Bladen changed his mind several times on the question of colonial union. In 1721 he and two other members of the Board of Trade recommended a "Captain-General" to preside over a loose confederation of all the American colonies. However, in 1726 he was more concerned with colonial administration. He then saw the need to keep the colonies divided and therefore dependent on England. By 1739 military concerns were again paramount and he accordingly recommended a military governor with a bi-cameral legislature to oversee American interests. He wanted this executive to be the governor of New York and Massachusetts "so that he might constantly subject . . . [the latter colony to] a very narrow Inspection." The problem in Bladen's plan was that the executive depended on voluntary grants from the colonies for his salaries which, given past experience, was bound to cause problems. Moreover, Bladen recommended that the executive be given "full powers to do all such Acts as may be requisite, for the due execution of his commission." This undefined and unlimited executive would

¹⁵Sir William Keith, "Collection of Papers and Other Tracts," reprinted in Stone, ed., "Plans. . . ," p. 467.

have been very difficult for most Americans to accept had he finally been appointed.¹⁶

The defense aspects of colonial union quickly surfaced when hostilities broke out at mid-century with the French and Indian Wars. In 1751 Archibald Kennedy wrote a pamphlet entitled "The Importance of Gaining and Preserving the Friendship of the Indians to the British Interest Considered," which called for a number of commissioners representing the various colonies to meet annually at Albany to discuss common defense needs. There was no discussion of any particular executive power over all the colonies.¹⁷

However, the French threat was great enough to cause serious discussion of a possible union which finally culminated in the conference at Albany in 1754. In May of that year Benjamin Franklin published in his newspaper an article entitled "Short Hints Towards a Scheme for Uniting the Northern Colonies." Three years earlier Franklin began thinking about the problem of union as evidenced by a letter to James Parker who had asked Franklin to comment on Kennedy's pamphlet. Franklin agreed that a union was necessary though he believed it "not [to] be brought about by the Means that have hitherto been used for that Purpose." The squabbles between the governors and their assemblies, he noted, would cause it to be dropped. However, he predicted success,

¹⁶Jack P. Greene, ed., "Martin Bladen's Plan for Colonial Union," William and Mary Quarterly, 3rd ser., XVII (October, 1960), pp. 517-529.

¹⁷Archibald Kennedy, "The Importance of Gaining and Preserving the Friendship of the Indians to the British Interest Considered," (New York, 1751), pp. 27-31.

if you were to pick out half a Dozen (sic) Men of good Understanding and Address, and furnish them with a reasonable Scheme and proper Instructions, and sent them in the Nature of Ambassadors to the other Colonies, where they might apply particularly to all the leading Men, and by proper Management get them to engage in promoting the Scheme. . . . For reasonable sensible Men, can always make a reasonable Scheme appear such to other reasonable Men, if they take Pains, and have Time and Opportunity for it, unless from some Circumstances their Honesty and good Intentions are suspected.

He concluded that a

voluntary Union entered into by the Colonies themselves . . . would be preferable to one impos'd by Parliament; for it would be perhaps not much more difficult to procure, and more easy to alter and improve, as Circumstances should require, and Experience direct.

Moreover, "it would be a very strange thing," he wrote,

if six Nations of ignorant Savages should be capable of forming a Scheme for such an Union, and be able to execute it in such a Manner, as that it has subsisted [for] Ages, and appears indissoluble; and yet that a like Union should be impracticable for ten or a Dozen English Colonies, to whom it is more necessary, and must be more advantageous, and who cannot be supposed to want an equal understanding of their Interests.¹⁸

Franklin's thoughts on the organization of such a union included a "general Council form'd by all the Colonies" and "a Governor general appointed by the Crown to preside in that Council, or in some Manner to concur with and confirm their Acts, and take Care of the Execution." Their authority was limited to "every Thing relating to Indian Affairs and the Defense of the Colonies." Franklin did not elaborate at this time on the powers of the executive.¹⁹

¹⁸ Benjamin Franklin to James Parker, March 20, 1750/1, Franklin Papers, Leonard W. Labaree, ed. (New Haven, 1961), IV, 117-118.

¹⁹ Ibid., p. 119.

By June of 1754 Franklin had drawn together his thoughts on the organization of the executive. In a letter to James Alexander and Cadwallader Colden, in which he enclosed a copy of his "Hints," he noted that the "Governor General" ought to be appointed by the king, be a military man, have "a Salary from the Crown," and possess a "Negative on all acts of the Grand Council, and carry into execution whatever is agreed on by him and the Council." Together with the "Governor General" and "Grand Council," Franklin would empower them to do "everything that shall be found necessary for the defense and support of the Colonies in General, and increasing and extending their settlements."²⁰

In a letter to Cadwallader Colden, James Alexander discussed several problems left unsolved by Franklin's plan. Most serious was the difficulty of finding men "skilled in Warlike affairs" to comprise the "Grand Council," and the difficulty of communicating with them on confidential matters of state over such a wide area. He proposed that a "Council of State" be created to consist of

a few persons to be chosen by the Grand Council at their stated meetings which Council of State to be allways (sic) attending the Governour General, and with him to degest (sic) before hand all matter to be laid before the next Grand Council, and only the General but not the Particular plans of Operation.

This "Council of State" was "to be something like that of the United provinces; and the Grand Council to resemble the States General."

²⁰ Benjamin Franklin to James Alexander and Cadwallader Colden, May [June] 8, 1754, *Ibid.*, V, pp. 337-339. For a discussion of these and other mid-century plans of union prior to the Albany Conference see Lawrence Henry Gipson, "Massachusetts Bay and American Colonial Union, 1754," *Proceedings of the American Antiquarian Society*, April 19, 1961, pp. 63-92.

Alexander sought therefore to create a continental form of government along the lines of the government in the royal colonies.²¹

Shortly afterwards delegates from each colony met at Albany to discuss the problem and terms of union. The plan they adopted was similar to Franklin's proposal. The union would be governed by a "President-General" appointed and supported by the Crown and a "Grand Council" whose members were chosen by the colonial assemblies. The President-General had the power to call the council to session in emergencies other than the annual required meeting, so long as "he having first obtained in writing the consent of seven of the members to such call, and sent due and timely notice to the whole." Additionally, the executive had to assent to "all acts of the Grand Council, and that it be his office and duty to cause them to be carried into execution." A quorum consisted of twenty-five members plus the "President-General" so long as there was "one or more from a majority of the colonies." All powers of the continental government were to be shared between the "Council and President-General." However, the power of appointing military offices was granted to the President-General with Council Approbation, while civil offices were to be nominated by the Council and were "to receive the President-General's approbation before they officiate." Upon the death of the executive, "the Speaker of the Grand Council for

²¹James Alexander to Cadwallader Colden, May [June] 9, 1754, Franklin Papers (Labaree, ed.), V, pp. 339-340.

the time being shall succeed, and be vested with the same powers and authorities, to continue till the King's Pleasure be known."²²

The Albany Plan for colonial union was a significant model for the development of a continental executive. The proposed office combined a military head with the chief Indian agent, gave him a veto, and made his salary independent of American control. However, the plan limited his power to interfere with its proposed legislative functions by denying him the power to prorogue or dissolve the "Grand Council" or participate in the selection of its speaker. Moreover, the plan envisioned a union in which the legislative branch possessed more power than the provincial legislatures had in relation to their governors, though less than Parliament retained in relation to the Crown. Finally, the President-General's salary was to be paid by the Crown, because, as Franklin later noted, that

all disputes between him and the Grand Council concerning his salary might be prevented; as such disputes have been frequently of mischievous consequences in particular colonies, especially in time of public danger.²³

When the Albany Plan was presented to the provincial assemblies, there were objections to it. The New York council wanted the governors and councils involved in the selection process for members of the "Grand Council." Franklin contended that this would violate English constitutional theory inasmuch as it would upset the balance created by

²²"Proceedings of the Albany Congress," reprinted in the Massachusetts Historical Society, Collections, 3rd ser., V, 1836, pp. 70-74.

²³Labaree, ed., Franklin Papers, V, 402.

the plan. Under the proposed plan as adopted by the convention, one half of the government would be in British hands and one half would be responsible to the American people, since they or their assemblies would elect the delegates, which he said "is the same thing." In the British constitution, he continued, the Crown only had one third of the power, while the Albany Plan provided that "the council chosen by the people can effect nothing without the consent of the President General appointed by the Crown; the Crown possesses therefore full[y] one half of the power of this constitution." Moreover, he continued,

if the governors and councils therefore were to have a share in the choice of any that are to conduct this general government, it should seem more proper that they choose the President General. But this being an office of great trust and importance to the nation, it was thought better to be filled by the immediate appointment of the Crown.

Overall, he concluded, the power given "to the grand council is only a concentration of the powers of the several assemblies in certain points for the general welfare; as the power of the President General of the several governors in the same points."²⁴

Franklin viewed the function of the president general as the key link between England and the colonies. He noted that the assent of the executive

to all acts of the grand council was made necessary, in order to give the Crown its due share of influence in this government, and connect it with that of Great Britain.

²⁴Ibid., pp. 403-405.

Moreover, he concluded, the "President General, besides one half of the legislative power, hath in his hands the whole executive power."²⁵

As time dragged on after the meeting at Albany, Franklin despaired of any action toward union being taken by the provincial assemblies. In a letter to Peter Collinson six months after the convention he wrote,

all the Assemblies in the Colonies, I suppose, had the Union Plan laid before them; but it is not likely, in my Opinion, that any of them will act upon it so as to agree to it, or to propose any Amendments to it. Every Body cries, a Union is absolutely necessary; but when they come to the Manner and Form of the Union, their weak Noodles are presently distracted. So if ever there be a Union, it must be form'd at home by the Ministry and Parliament. I doubt not but they will make a good one, and I wish it may be done this Winter.²⁶

In the end, however, both the British and Americans rejected the Albany Plan as an unacceptable solution to colonial union. Franklin argued that it was rejected because the British thought it gave too much control to the democratic part of the government, while the Americans rejected because it gave too much power to the prerogative.²⁷ Thomas Hutchinson contended that it was rejected by the colonists since no colony was "inclined to part with so great a share of power" as proposed for the new government. He went on to note that Massachusetts' Governor Shirley proposed a central government composed of

all the governors of the colonies, and a certain number of the council of each colony, with powers to agree upon measures for the defense of the colonies, and to draw upon the treasury

²⁵Ibid., p. 409.

²⁶Ibid., p. 454. Also see editors discussion of the events surrounding the Albany Conference, pp. 374-392.

²⁷Smith, ed., Franklin Works, III, pp. 226-227.

in England for money necessary to carry such measures into execution; for the reimbursement whereof, a tax should be laid on each colony by an act of Parliament.²⁸

That was patently unacceptable to the colonies. In any case, John Adams later recalled, that by the following year the British, out of their fear of colonial union, took "the war into their own hands."²⁹

Franklin mentioned that several other plans for colonial union were discussed about the time he presented his. Though there is no way of telling which ones he was referring to, one of them was probably written by Rev. Richard Peters, a delegate to the Albany Congress. He proposed that a "Colonel, Lieutenant Coll. & Major" be appointed and paid by the Crown to supervise a company of one hundred men, exclusive of officers to be called "the Union Regiment." This military organization would also be responsible for building and maintaining forts, roads, and the like.³⁰

Another plan was likely that of Thomas Hutchinson who also provided an extensive outline for the Albany convention's consideration. His provisions for an executive head corresponds almost exactly to Franklin's with respect to his duties and powers, which were shared with the council. However, Hutchinson's plan stated that the powers of the president and council were limited to a term of six years "from their first meeting, unless at the expiration of said six years there

²⁸Thomas Hutchinson, History of Massachusetts Bay, III, 17.

²⁹John Adams, Works (Charles F. Adams, ed.), IX, 592.

³⁰Pennsylvania Archives, II, 197.

should be war between Great Britain and France in which case the said powers shall continue until the end of said war and then expire."³¹

About the same time that the Albany Plan was being discussed, Lord Halifax, president of the Board of Trade, recommended a plan of colonial union to the Privy Council. Though similar to previous plans proposed by other British officials, it did not overcome the problem of how to appoint a civilian executive over all the colonies that would not violate the charters of the proprietary and charter colonies. In line with the attorney general's ruling on the subject, that the Crown could appoint a commander-in-chief but not a civilian head over all the colonies, Halifax proposed that the union be accomplished under a military structure making the governor of New York the commander-in-chief over all the colonies. Halifax's motive for offering his plan was part of a calculated effort to increase his standing within the British government. Moreover, if he could make the commander-in-chief for America responsible to the Board of Trade, it would increase the Board's prestige in relation to the other departments handling colonial affairs. At any rate, British policy-makers had already decided that colonial union was detrimental to their interests at that time.³²

In summary, the initial attempts at colonial union were complicated by two basic problems. The first was the legal difficulty in

³¹Hutchinson's plan reprinted in Richard Frothingham's The Rise of the Republic of the United States (Boston, 1886), p. 613.

³²See Alison Gilbert Olson, "The British Government and Colonial Union, 1754," William and Mary Quarterly, 3rd ser., XVII (January, 1960), pp. 23-34.

trying to combine two or more distinct constitutional entities under one civilian executive. Given the conflicting provisions of the charters, it would be hard for him to govern without first trying to reconcile the charters by integrating the existing machinery of government into one general unit empowered to act for the combined area of the colonies. Moreover, the colonists would find it difficult to hold the governor accountable for his actions if one charter granted him the authority to carry out actions that the other charters did not allow. For the most part, however, this was not a problem in military matters inasmuch as the colonial militia could be delegated to any commanding officer necessary for the colony's defense. The second problem was the inability of the various colonies to overcome their attachments to local interests in favor of a united solution to their common problems. This was partly a reaction to England's wavering over whether colonial union was in its best interests in light of the French threat. At other times it was a function of regional disputes. At any rate, colonial union prior to 1760 was fraught with too many difficulties for either the Americans or British officials to overcome.

CHAPTER IV

THE ROAD TO REVOLUTION:

The Colonial Governor and the Reorganization of the British Empire

During the period from 1763 to the outbreak of the American Revolution, the British tried to restructure the empire and the Americans strongly reacted. The ensuing crisis placed colonial governors in an extremely untenable position as they tried to carry out British policy in the face of growing American hostility. This resulted in an increased assault on the governors' position by the assembly. In many ways these were crucial years as the conflict between the governor and assembly served to create and fix certain fundamental attitudes toward executive power that carried over into the Revolutionary era. On another level the conflict stimulated American writers to examine the various problems of political theory as they applied to the American situation. These ideas helped set the stage for the writers of the first state constitutions in the initial years of the Revolution.

Until 1763 British efforts to administer colonial policy were continually frustrated by the French presence in Canada. The Peace of Paris in 1763 brought Canada under British control, which now allowed England to undertake a major reform of colonial administration. The purpose of British intentions remained the same, i.e., to enforce the mercantile policies of the last century for the benefit of England.

What emerged after 1763 was a change of methods directed toward a restructuring of imperial relations. As noted previously, governors and other colonial officials continually pointed to the fact that as long as they were dependent on the assembly for their salaries, they could not enforce British colonial policy. The aim of imperial reform was therefore primarily directed at breaking the stranglehold of the assemblies over the salaries of royal officials. Former Governor Thomas Pownall recommended that the priority reform be directed at the salary question. "I will further venture to suggest," he wrote, "that, whatever revenues, are raised, the first and special appropriations of them ought to be the paying the governors and all other Crown officers independent of the legislature's of the colonies."¹ However, it soon became clear that the trends and precedents in the American colonies were too strongly established to be undone without causing a major political crisis.

The major difficulty of imperial reform in the colonies, especially the re-establishment of the governor's position in provincial politics, was colonial democracy. The precedents and traditions established by the provincial assemblies, especially the control of the governor's salary, made the governor more dependent on American than British interests. British customs agent Comptroller Weare analyzed

¹Thomas Pownall, The Administration of the Colonies, p. 128. Also see the following works on Pownall's perceptive observations: Charles A. W. Pownall, Thomas Pownall . . . (London, 1908); John A. Schutz, Thomas Pownall: British Defender of American Liberty: A Study in Anglo-American Relations in the Eighteenth Century (Glendale, California, 1951); William Otis Sawtelle, Thomas Pownall, Colonial Governor and Some of his Activities in the American Colonies (Boston, 1930).

the situation and recommended a number of significant changes. He noted that the provincial charters were necessary expedients at first, but had "become nuisances pregnant with mischief." In any future reorganization of the colonial governments, he declared, "it will be necessary to check [the] licentiousness of a democracy, by reducing the present exorbitant power of [the] assemblies." To eliminate the impact of democracy on the governor, Weare recommended that the Crown pay the salaries of all governors and appoint the councils or upper houses of the colonial legislatures. In addition to other reforms, he noted that England must rule the colonies justly because British authority depended on the wisdom and caliber of the officials sent to the colonies. If the people saw the public officials using their power and authority for private gain, they might well revolt.²

William Knox commented on the impact of democracy on royal government in his suggestions for imperial reform. The charter and proprietary colonies, he wrote, "have not only injured the Civil Authority in the Kings Government, but they have also proved highly detrimental to the Commerce of Great Britain." He noted that "where the Governor and all Civil Officers canvass for Votes, and are Annually Elected by the People, it will scarcely be expected that the Laws of Trade, will be carried into strict execution."³

²Comptroller Weare, "Observations on the British Colonies on the Continent of America. . . .," Massachusetts Historical Society, Collections, 1st ser., I, 66-84.

³Thomas C. Barrow, ed., "A Project for Imperial Reform: 'Hints Respecting the Settlement for our American Provinces,' 1763," William and Mary Quarterly, 3rd ser., XXIV (January, 1967), p. 118.

William Smith's analysis of British-American relations also pointed out that the provincial assembly was too close to the people to represent the empire over local interests. "It may be said of every one of the Colonies," he wrote, "that our Assemblies are unequal to the Task, of entering into the Views of so wise, and so great a Nation as Great Britain is, and from which we are so far removed." He continued by noting that the responsibility could

not be expected from an Infant Country, many of whose Assembly-men represent little obscure Counties. . . . Besides, the scant Districts of the respective Provinces, bring the several Branches of the Legislature into too great a Familiarity, for the Purposes of good Government; and open the Door to frequent Bickerings and Discords, in which the common Interest will be too often sacrificed, to private Piques or partial Aims, and the Royal Voice drowned in the Dinn of Faction, or the Clamors (sic) against an obnoxious Governor.⁴

On the eve of the American Revolution Edmund Burke pointed to the democratic nature of the provincial assembly as well. "Their governments," he said,

are popular in a high degree; some are merely popular; in all, the popular representative is the most weighty; and this share of the people in their ordinary government never fails to inspire them with lofty sentiments, and will a strong aversion⁵ from whatever tends to deprive them of their chief importance.

Contemporary historians of the American Revolution also pointed to the problem of democracy in the colonies as a stumbling block to British interests. William Knox's explanation of the Revolution noted

⁴Robert M. Calhoon, ed., "William Smith Jr.'s Alternative to the American Revolution," William and Mary Quarterly, 3rd ser., XXII (January, 1965), pp. 115-

⁵Edmund Burke, "Speech on the Conciliation with America," March 22, 1775, reprinted in The American Revolution, 1763-1783, Richard B. Morris, ed. (New York, 1970), p. 153.

that in spite of the tremendous authority granted to the royal governors, it was to little avail in the face of colonial democracy.

While the Crown appoints the "principal Civil Officers" and

can abrogate or repeal their laws at any time . . . Democracy had the leading influence, and the general tendency is to Republicanism, a tendency which increases with their Wealth, and in a little time, if their prosperity had continued, must have swallowed up the Monarchic powers.

He concluded that the origin of this colonial democracy was "inherent in the Constitutions . . . [and was] owing to the delinquency of the King's Servants." Moreover, to promote "the speedy settlement and culture of the soil" small tracts of land were given out at the founding of each colony, which made "every Male Inhabitant . . . a Freeholder, and by consequence entitled to a share in the Government of the Province." "This mode," he concluded, "excluded all ideas of subordination and dependence."⁶

Tory John Randolph sought to find a "plan of accommodation" between England and the colonies after the Revolution had begun. In his proposal for reconciliation he noted the role of colonial democracy in undermining British authority. "The want of Consequences and authority in the Kings Representatives," he wrote

has been a capital Defect in the Government of the Colonies. It has strengthen'd Democracy, and produced neglect in the People. The Prospect of Favour and the Motives of Fear, had but little operation amongst them. They knew that the Governors had few Things in their Gift; and that Punishment depended on the Law, which was in a great Degree, subject

⁶Jack P. Greene, ed., "William Knox's Explanation for the American Revolution," William and Mary Quarterly, 3rd ser., XXX (April, 1973), pp. 299-300.

to their Construction of it. This led them to consider their chief as no more than a Cypher, and to rely on their own strength and unanimity, for support.⁷

Thus, colonial democracy continually frustrated British attempts to establish total prerogative control over the provincial governments prior to 1763. Fear of potential and actual abuse of the prerogative led the provincial assemblies to gradually establish measures by which they made the governor, and hence the prerogative, subject to colonial restraint to protect colonial interests. As noted time and again, control of the government and other royal officials' salaries accomplished this more consistently than any other act. Combined with the other inroads of the governor's power and authority, the provincial assemblies had gone far in achieving a responsible executive power within the framework of prerogative government. However, this was all threatened by the renewed interest of England in reforming colonial government after 1760 and especially after 1763. With the French threat safely disposed of, reform began in earnest. The heart of this effort was to eliminate the governor's dependency on the assembly.

The colonial governor, caught between Parliament and the provincial assembly, was gradually overwhelmed by the rush of events after 1763. Prior to this time the governor and assembly were mutually interdependent, each relying on the other for the exercise of their powers. While there were many disputes between the two, and though the assembly had acquired control over a number of the functions originally reserved

⁷Mary Beth Norton, "John Randolph's 'Plan of Accommodation,'" William and Mary Quarterly, 3rd ser., XXX (January, 1970), p. 119.

for the governor, the executive authority within the royal colonies was still a significant power to contend with overall.

After 1763 Parliament undertook an all-out assault on the provincial assemblies' power, which drastically altered the political climate in which the governors worked. Thomas Hutchinson's characterization of Massachusetts Governor Bernard's dilemma illustrated the problem. He wrote that

no governor, before Mr. Bernard, had been obliged to propose measures against which, not only the people of his own government, but of every other government on the continent, were united. . . . It requires great fortitude to advise and assist to the carrying such measures into execution.

Moreover, he pointed to the significance of Canada as a check on the colonies by saying,

before the reduction of Canada, which gave to the colonies a new idea of their power and importance, a dread of an exertion of the power of the kingdom in support of the supremacy of parliament, would have restrained the people from that opposition which, afterwards, they did not scruple to make, and the council would have had little to fear from their resentment.

Now, "they had much to fear."⁸

The political pressure generated by colonial reaction to Parliament's acts adversely affected the other department of government as well. One council member claimed "that he did not now enter the council chamber with the free mind he used to have." Justice Peter Oliver was quoted as saying that he was "under duress." This led Hutchinson to conclude that

⁸Thomas Hutchinson, History of Massachusetts, III, 165.

to this general alteration in the state of affairs, we may well enough attribute the opposition made by the council to the measures proposed by the governor; and any irregularities in the course of the controversy, on one side or the other, may be charged to those frailties of human nature, which are more prevalent in political, than other disputes.⁹

Hutchinson went on to compare how, at the turn of the century, Massachusetts Governor Dudley would not hesitate to veto any nominee to the council not in accord with his principles. However, this was no longer the case, because "the power of the house had been gradually increasing, and some parts of the prerogative, which had been disused, could not now be resumed." Moreover, Governor Bernard had wanted to veto eight nominees to the Massachusetts council, but "in the disordered state of the province, it was not thought advisable to irritate the people to the degree that this exertion of power would have done." It was clear, then, that in the altered circumstances, no governor could continue to operate as he had done prior to 1763.¹⁰

The events after 1760 touched off numerous debates about the nature of the colonial constitutions, especially the relationship between the legislative and executive branches. In 1762, an incident in Massachusetts prefaced the great debate over the right to tax touched off by the Stamp Act three years later. Governor Bernard requested the council to make provision for the extra men needed to outfit a sloop for the protection of Salem and Marblehead's fishermen. Hutchinson noted that "this exercise of authority, by the governor and council, was to be

¹⁰Ibid.

justified as far as precedents, from the date of the charter, could justify it."¹¹

However, the House of Representatives took strong exception to the governor's action. James Otis composed a remonstrance outlining their position. The attempt to remove from the house "their most darling privilege, the right of originating all taxes," was tantamount to "annihilating one branch of the legislature," he wrote. "It would be of little consequence to the people," he noted, "whether they were subject to George or Louis the King of Great Britain and or the French King, if both were as arbitrary as both could be, if both could levy taxes without parliament." This was a warning to the governor "as he regards the peace and welfare of the province, that no measures of this nature be taken for the future, let the advice of the council be what it may."¹² Thus, the people's, and hence the assembly's, power to tax was their power to prevent tyranny and arbitrary rule.

The following year the colonists were alarmed to hear that England had decided to enforce the Molasses Act in an attempt to raise revenue. Mr. Otis again took up the pen and wrote The Rights of the British Colonies Asserted and Proved. To allow Parliament the right to tax colonial trade, he argued, would admit their right to tax everything the colonists possess.

This, we apprehend, annihilates our charter rights to govern and tax ourselves. It strikes at our British privileges, which, as we have never forfeited them, we hold in common with our fellow subjects who are natives of Britain.

¹¹ Ibid., p. 71.

¹² Ibid.

Moreover, "if taxes are laid upon us in any shape, without our having a legal representative when they are made, are we not reduced from the character of free subjects to the miserable state of tributary slaves?"¹³

Since governments were necessary "by the law of nature," there must be "a supreme legislative and supreme executive power," and they must remain in the "whole body of the people," Otis argued. Irrespective of the organization of those powers, be they democratic, aristocratic, or monarchical, "the same law of nature and of reason is equally obligatory." That

whenever the administrators, in any of those forms, deviate from truth, justice, and equity, they verge towards tyranny, and are to be opposed; and if they prove incorrigible, they will be deposed by the people if the people are not rendered too abject,

he concluded. Here he was just repeating the assumption the colonists had operated on in their struggles with corrupt and arbitrary governors. Put another way,

power of legislation without a power of execution in the same or other hands, would be futile and in vain: on the other hand, a power of execution, supreme or subordinate, without an independent legislature would be perfect despotism.

In other words, the key to liberty was an independent legislature. Once that was achieved it does not matter whether the executive power was within or separate from the legislative power, since its function is

¹³James Otis, The Rights of the British Colonies Asserted and Proved (Boston, 1764), reprinted in The Debate on the American Revolution, 1761-1783, Max Beloff, ed. (New York, 1960), pp. 47-72. Also see Jack P. Greene and Richard M. Jellison, "The Currency Act 1764 in Imperial Colonial Relations, 1764-1776," William and Mary Quarterly, 3rd ser., XVIII (October, 1961), pp. 484-518 for another act which was a source of irritation to the colonists.

merely to execute the law. Most important to Otis was that legislation emanate from the people, not a source separate from them. "The first principle and great end of government being to provide for the best government of all the people," he said, can only be achieved "by a supreme legislature and executive ultimately in the people." For convenience the people "have made it necessary to transfer the power of the whole to a few: This necessity gave rise to deputation, proxy or a right of representation."¹⁴

Once that was assured, Otis faced "the grand[est] political problem in all ages," which was how to "invent the best combination or distribution of the supreme powers of legislation and execution." The most successful states were those "in which these powers have not only been separated from each other, but placed each in more hands than one, or a few." He concluded that

British Constitution in theory and in the present administration of it, in general, comes nearest the idea of perfection, of any that has been reduced to practice; and if the principles of it are adhered to . . . [it will] always keep the Britons uppermost in Europe.¹⁵

Once Otis established his theory of government he went on to outline what was the fundamental constitutional dispute between England and the colonies. "Every British subject born on the continent of America or in any other of the British dominions," he wrote,

is by the law of God and nature, by the common law, and by act of parliament (exclusive of all charters from the Crown) entitled to all the natural, essential, inherent, and inseparable rights of our fellow subjects in Great Britain.

¹⁴Ibid.

¹⁵Ibid.

Furthermore, to protect those rights "God and nature" had fixed certain limitation on the supreme legislative power: "To govern by stated laws . . . [which] have no other end ultimately but the good of the people Taxes are not to be laid on the people, but by their consent in person, or by deputation," and finally, the legislature cannot transfer its lawmaking power to any other hands.¹⁶ Thus, Otis and his contemporaries contended that they were full citizens of England with all the rights and privileges therein.

When the following year Parliament passed another revenue bill called the Stamp Act, colonial reaction was swift and violent. The people refused to buy the hated stamps and threatened bodily harm to any stamp agent attempting to collect the revenue. The act was clearly interpreted as an attack on the rights of the colonists and the foundation of their government. Letters were sent to all provincial assemblies urging united opposition. South Carolina proposed a congress "to consider of (sic) a general, united, dutiful, loyal, and humble representation of their condition to his majesty, and the parliament; and to implore relief," which resulted in the Stamp Act congress.¹⁷

The civil disorders alarmed the colonial officials, especially Governor Bernard of Massachusetts. In his speech to the assembly he noted that the disorders rendered

the ordinary executive authority of this government . . . much too weak to contradict such declarations, or oppose the force by which they are supported: it has therefore been found

¹⁶Ibid.

¹⁷Hutchinson, History of Massachusetts, III, 85.

necessary to call the whole legislative power in aid of the executive government.

The assembly replied that

we indeed could not have thought that a weakness in the executive power of the province had been any part of our danger, had not your excellency made such a declaration in your speech: certainly the general assembly have done every thing incumbent on them; and the laws are already in being for the support of his majesty's authority in the province.

They then noted that the governor did not point out any deficiencies in the present laws, "and yet you are pleased to say, that the executive authority is much too weak." Moreover, they hoped that the governor did not intend "any new and extraordinary kind of power should by law be constituted, to oppose such act of violence," because, as they noted, "there were sufficient laws and magistrates for the preservation of peace."¹⁸

The assembly's answer to the governor went on to outline the colonists' relation to the Crown.

Our duty to the King, who holds the rights of all his subjects sacred as his own prerogative, and our love to our constituents, and concern for their dearest interest, constrains us to be explicit upon this very important occasion.

After reiterating their loyalty to the Crown they noted that their disagreement was only with Parliament, whose actions were

totally subversive of the happiest frame of subordinate civil government expressed in our charter, which amply secures to the government our allegiance, to the nation our connection, and to ourselves the indefeasible rights of Britons.¹⁹

¹⁸Ibid., Appendix D, p. 338.

¹⁹Ibid., pp. 340-341.

The New York assembly summed up the Stamp Act crisis as a violation of two essential constitutional rights. To

this constitution these two principles are essential, the right of your faithful subjects freely to grant to your majesty such aids as are required for the support of your government over them, and other public exigencies, and trials by their peers; by the one they are secured from unreasonable impositions, and by the other from arbitrary decisions of the executive power.²⁰

By violating the colonists' right to tax themselves for the support of the provincial government, Parliament attacked the very core of the system the colonists used to maintain a responsible executive branch, i.e., control of royal officials' salaries. Moreover, removing cases involving violations of the acts of trade from common law courts to executive-controlled admiralty courts meant another infringement of fundamental rights over which they possessed no redress from arbitrary actions detrimental to American interests.

Parliament responded to the American reaction by suspending the New York assembly for its failure to comply with the letter of the law. The colonists replied by claiming that this was unconstitutional because charters were considered sacred. "Powers and authorities, once granted by the Crown for the rule of government in a colony, were deemed equivalent to charters," the colonists argued. The king, the Lords, and the commons, form the legislature of Great Britain, but in America "the king, by his governor, with the council and assemblies, form the legislatures," they contended. The American argument against

²⁰Ibid., Appendix G, p. 347.

Parliamentary intervention was outlined as follows: Since the provincial assembly

cannot make laws to extend further than their respective limits . . . it becomes absolutely necessary for the parliament of Great Britain to interpose, in all cases where the legislative power of the colonies is ineffectual.

There, the colonists claimed, was "the line of authority of the parliament" to be drawn. "All beyond it is an encroachment upon the constitutional power of the legislature of their fellow subjects in America." This, historian Hutchinson wrote, "was asserted to be the constitution of the colonies, and it was held out to the people in newspapers and pamphlets, in every colony from Virginia to Massachusetts Bay, as early as the year 1767."²¹

Attempts to limit the "supreme authority can never be admissible under any form of government," Hutchinson declared.

The effect of neglecting them appeared in annulling the constitutional powers of government within each colony, so far as related to the support of the supreme authority of parliament, while, in all other matters, they continued in full force and vigour.

This, Hutchinson concluded, ought to be the date of the colonial revolt, "rather than from the declaration of independence."²²

Supporters of the British viewed the situation much differently. Soame Jenyns played down the colonists' argument that their fundamental rights were being violated, asserting that the

²¹Ibid., pp. 124-125.

²²Ibid., p. 125.

liberty of an Englishman is a phrase of so various a signification, having within these few years been used as a synonymous term for blasphemy, bawdy, treason, libels, strong beer and cyder, that I shall not here presume to define its meaning.

No one, he claimed, was exempt from the authority of Parliament, especially the colonists. "Their charters," he noted, were "derived from the Crown, and no charter from the Crown can possibly supersede the right of the whole legislature." Moreover,

their charters are undoubtedly no more than those of all corporations, which empower (sic) them to make bye-laws (sic), and raise duties for the purposes of their own police, for every subject, to the superior authority of Parliament.

Furthermore,

in some of their charters the manner of exercising those powers is specified in these express words, according to the course of other corporations in Great Britain, and therefore they can have no more pretense to plead an exemption from this parliamentary authority, than any other corporation in England.²³

Governor Bernard repeated virtually the same sentiment.

In Britain the American Governments are considered as corporations empowered to make by-laws, existing only during the pleasure of parliament, who have never yet done anything to confirm their establishment and hath at any time a power to dissolve them.

The Americans, he noted,

claim (I mean in public papers) to be perfect States, not otherwise dependent upon Great Britain than by having the same king, which having complete legislatures within themselves are no ways subject to that of Great Britain.

²³Soame Jenyns, "The Objections to the Taxation of Our American Colonies by the Legislature of Great Britain, briefly considered," (London, 1765), reprinted in The Debate on the American Revolution, 1761-1783, Beloff, ed., pp. 77-85.

"In a difference so very wide," he concluded, "who shall determine?"²⁴

In the opinion of Governor Bernard, the Stamp Act crisis pointed to the need for a major reorganization of the provincial structure of government. "So much is America altered by the late financial acts, that a new system of policy and of a more refined kind than was wanted heretofore, has now become needful." The "patchwork" colonial governments "will last no longer," he wrote. That Parliament must establish "a government upon fixed constitutional principles" was evident "with a precipitation which could not have been foreseen but a year ago, and is become more urgent by the very incidents which make it more difficult." He then recommended that England take the Americans at their word and give them representatives in Parliament, "30 for the Continent and 15 for the islands," and then "let the affairs of the American governments be canvassed to the bottom." Once the relationship between Parliament and the colonies was settled, the "American representatives may be dismissed and left to attend their own legislatures which will then know the bounds of their own authority."²⁵

The Stamp Act crisis dealt a blow to the power of the provincial governor and illustrated the pressing need for colonial reform. South Carolina chief justice William Drayton wrote that Lieutenant Governor Thomas Boone, then acting governor, was sworn to enforce the

²⁴Sir Francis Bernard to Lord Barrington, November 23, 1765, Barrington-Bernard Correspondence, ed. E. Channing and A. C. Coolidge (Cambridge, 1912), pp. 93-102.

²⁵Ibid., pp. 99-101. Also see Edmund S. and Helen M. Morgan, The Stamp Act Crisis; Prologue to Revolution, rev. ed. (New York, 1963).

Act, "but his powers at that time were insufficient to effectuate the same." The assembly took the pressure off him by saying

that while Mr. Boone was out of the bounds of his government they could not consider him in any other light than a private gentleman; and the act being received through such a channel, was not sufficiently authentic, to place the lieutenant governor under the obligation of enforcing it.²⁶

Arguments were raised on both sides of the ocean that it was the improper time to initiate such a fundamental reform in government relations. However, Soame Jenyns scoffed at that contention. Citing all the reasons for taxing the colonists then, and not postponing it, he asked when "can any time be more proper?" Among other reasons, he noted,

can any time be more proper to oblige them to settle handsome incomes on their Governor's, than when we find them unable to procure a subsistence on any other terms than those of breaking all their instructions, and betraying the rights of their sovereign?

Moreover, "can there be a more proper time to compel them to fix certain salaries on their judges, than when we see them so dependent on the humours of their Assemblies?"²⁷ It was clear that the British thought that the provincial governments needed a major revision to keep them in line with English interests. Standing in the way was the colonial assembly, whose control over provincial revenue and officials' salaries

²⁶William Drayton, Memoirs of William Drayton, portion reprinted in Chronicles of the American Revolution, Alden T. Vaughan, ed. (New York, 1965), pp. 23-24.

²⁷Soame Jenyns, "The Objections to the Taxation of Our American Colonies. . . ," pp. 82-83.

rendered the royal prerogative void when it conflicted with American interests.

Parliament ignored the advice of more moderate voices and plunged ahead with a new round of legislation to replace the Stamp Act, which they were forced to repeal, arguing that it was harmful to British trade. In its place they passed the Declaratory Act reaffirming their right to tax the colonists. Next came the Townshend Acts which touched off another round of debate and colonial resistance, culminating in the Boston Massacre in 1770.

Townshend proposed taxes on glass, paper, lead, tea, and paint, and a Board of Commissioners of Customs in America to prevent smuggling. The revenues raised were to be used to raise the governors and judges salaries to 2,000 and 500 pounds respectively, sufficient to make them independent of provincial assemblies. As Hutchinson noted, "It was thought necessary to free the civil officers in the colonies from the restraint they had been under, by means of their dependence upon the assemblies there for their support." Moreover, "it was . . . thought reasonable that the charge of supporting such officers should be borne by the colonies."²⁸

Like reaction to the Stamp Act, colonial response was again swift and vigorous. The Massachusetts assembly instructed their agent to protest Americans having to appropriate money for the "maintenance of swarms of officers and pensioners in idleness and luxury, whose

²⁸Hutchinson, History of Massachusetts, III, 130.

example has a tendency to corrupt our morals, and whose arbitrary dispositions will trample on our rights." Moreover,

a multitude of placemen and pensioners, and an enormous train of underlings and dependents, all novel in this country, we have seen already. . . . Their imperious tempers, their rash, inconsiderate, and weak behavior, are well known,

the assembly noted. Thus, the colonists thought that they were about to be overwhelmed with a hoard of new royal officials "to suck the life-blood of the body politick while it is streaming from the veins" in revenue raising taxes.²⁹

Boston, not content with that action, moved to call a convention of towns to discuss these developments since the governor had dissolved the assembly. In their circular letter the town noted that "the late house, has been pleased to say, 'proper care will be taken for the support of the dignity of government'; the meaning of which it was too plain to be misunderstood."³⁰

Moreover, rumors indicated that British troops were about to enter the province.

The design of these troops is everyone's apprehension; nothing short of enforcing, by military power, the execution of acts of parliament, in the forming of which the colonies have not, and cannot have any constitutional influence. This is one of the greatest distresses to which a free people can be reduced, the circular letter concluded.³¹

²⁹Ibid., Appendix K, p. 355.

³⁰Ibid., Appendix L, p. 357.

³¹Ibid.

Hutchinson noted that the members of the convention were uneasy about their proceedings when the governor accused them of criminal activity. "They hope the governor will be sparing of his power . . . [not from a] fear of personal punishment, as from a fixed aversion to anything inconsistent with the dignity of their sovereign."³² This indicated that the governors were not as weak as they claimed to be at times, since they still carried the weight and dignity as the king's personal representative.

The dispute between the Massachusetts convention and Governor Bernard over the quartering of troops illustrated the colonists' fear that the military forces might go beyond the ability of the governor to control them. The Americans admitted the right of the Crown to send troops "to any part of the world . . . for the defence (sic) and preservation of the society." However,

it is impossible to believe that a standing army,--stationed here, in consequence of misrepresentations,--quartered contrary to act of parliament,--accompanied with every mark of contempt, reproach, and insult,--can be uncontrollable by the supreme executive of the province; which, within the limits of the same, is the just and full representative of the whole empire.

Moreover, the doctrine advanced by the governor "establishes a military power, uncontrollable by any civil power in the province." They resolved, therefore,

that the establishment of a standing army in this colony in a time of peace, without the consent of the general assembly of the same, is an invasion of the natural rights of the people, which they claim as free-born Englishmen.³³

³²Ibid., p. 152.

³³Ibid., pp. 169-170.

Moreover, they asked that the Crown and its ministers "inquire whether the disorders complained of have not arisen from an arbitrary disposition in the government, rather than from too great a spirit of democracy in the constitution." Furthermore, they expressed a deep concern over persons in power who "are indefatigable in their endeavor to render the monarchy absolute and the administration arbitrary in every part of the British empire." These then were the twin pillars on which the colonists dealt with the governor: to make him accountable to the people and to protect themselves from arbitrary use of the executive power in the hands of the governor and his prerogative courts. They concluded that "nothing remains in such a state, if no redress can be had from the king's lieutenant in the province, but that the oppressed people unite in laying their ferment and humble petitions before their gracious sovereign."³⁴ Once again, the colonial protest was based on the theory that no policy, office, or institution ought to be allowed which was not responsible to the people or their representatives.

Besides the colonial reaction, a comment by Hutchinson indicated the soundness of the British strategy of trying to make the royal officials dependent on the Crown for their salary. When he received a warrant for an additional 200 pounds annually, in addition to his regular salary, he noted, "I am more than ever obliged to exert myself in His Majesty's service."³⁵ However, the more England freed the royal

³⁴Ibid., p. 170.

³⁵Quoted in Robert E. Brown, Middle Class Democracy and the Revolution in Massachusetts, 1691-1780 (New York, 1955), p. 247.

officials from dependence on the assemblies, the more difficulty they had carrying out their duties. Suspicion of British motives were fast depleting the reservoir of colonial goodwill toward the mother country. In that climate few governors, irrespective of their political or administrative abilities, could maintain an effective working relationship with the colonies. Hutchinson noted the major theme of what happened to the colonial governor after 1763 when he referred to Governor Bernard's case.

When the opposition to the authority of parliament began in the province, he was obliged, by duty of his office, to counteract this opposition. This lost him the esteem of the people, and enabled those persons, who, for other reasons, had taken offence (sic), to gratify their private resentment, by heightening the public resentment against him throughout the province.³⁶

Hutchinson described the end of the Governor Bernard's administration as having had "the satisfaction of being informed . . . that his conduct was approved by the king, and by his ministers." However, the "rage against him became, at length, so violent, that it was judged necessary to recall him" as a means of placating the people. Then Hutchinson described the fundamental dilemma of the colonial governor.

It was well known in America, that the surest way for a governor to keep from the hazard of removal was by keeping upon good terms with the people of his government. . . . But there have been times, and this was one, when it has not been possible for a governor to preserve the favour of the people, and the approbation of his own conscience, at the same time.³⁷

³⁶Hutchinson, History of Massachusetts, III, 134.

³⁷Ibid.

Ironically, the climax of sentiment against British actions, the Boston Massacre, happened at the same time England was in the process of repealing the hated Townshend Acts. The new head of government, Lord North, ordered their repeal on the grounds of expediency. However, he refused to repeal the preamble of the tea tax, which he claimed as a fundamental Parliamentary right. Moreover, the Townshend Acts failed to accomplish the goal of making the colonists more dependent on England. They had done just the opposite by raising more doubts about the relationships between the various elements of the empire.

After 1770, England backed off from a massive frontal assault on the provincial assemblies' power and turned to a piecemeal approach to prevent the colonies from uniting as they had done previously. Hutchinson observed the change when he wrote: "from the appearance of a determination to pursue vigorous measures, in order to secure the colonies from separating themselves from the rest of the dominions, lenient measures were suddenly thought more proper for that purpose."³⁸

When Governor Bernard left Massachusetts, the governorship devolved upon Thomas Hutchinson. Since Massachusetts was in the forefront of revolutionary activity, the remainder of this chapter concentrates on the developments there with relation to what happened to the executive. As Hutchinson noted, he "entered upon his office under circumstances peculiarly difficult and discouraging." By oath, and "the nature of his office," he was bound to "support an authority to

³⁸Ibid.

which the body of the people refused to submit, and he had no aid from any of the executive power of government under him."³⁹

Popular opinion was running high against former Governor Bernard as he left for England. A grand jury brought a bill of indictment against him, in spite of the English laws, which made governors liable for crimes committed within their government. The fact that the grand jury proceeded anyway indicated the low level of confidence possessed by the colonists in England's interest to redress their grievances. Moreover, Hutchinson reported, "it is now very evident, that, without a further exertion of power and authority from the kingdom, acts of parliament for raising money by taxes from the . . . colonists could never be carried into execution." The democratic tide was so strong that "there was no power, legislative or executive, within the colonies, which would exert itself in checking this resistance." Even a military force was to no avail, he wrote, because "without the direction of a civil magistrate, it remained perfectly inactive in all times of tumult and riot." Furthermore, "it was perfectly despised, seeing that nothing short of actual rebellion and the people's taking up arms, would justify the military, without the civil power, in any offensive acts."⁴⁰

³⁹Ibid., p. 184. Also see Malcolm Freiberg, "Thomas Hutchinson: The First Fifty Years," William and Mary Quarterly, 3rd ser., XV (January, 1958), pp. 35-55.

⁴⁰Hutchinson, History of Massachusetts, III, 189-190.

Hutchinson complained that the deteriorated relations between the governors and the people had reached a point where they each mistrusted the others' motives. "Governors in the colonies," he wrote:

could not dispense with communicating the state of their governments to the king through his ministers. The facts spoke for themselves . . . the plain narratives . . . were nevertheless pronounced misrepresentations with a view to bring[ing] on vindictive measures, and to increase a flame in the colonies, which, in truth, it was the interest of the governors, beyond that of all other men, to extinguish.⁴¹

Against this background, the final years of the colonial period saw the development of attitudes toward the executive that carried over into the Revolutionary state constitutions.

One dispute which touched off a major discussion of the governor's power was Hutchinson's decision to move the assembly from Boston to Cambridge on orders from the Crown. When a similar dispute arose in Governor Burnet's administration, the council sided with the governor. In the dispute with Hutchinson, "the council had become equally zealous with the house, not only in declaring against the authority of the king's instructions, [especially] when they did not correspond with his own judgment."⁴² From this time on the governor stood isolated from the other two branches of the Massachusetts government as they vented their wrath on him for Parliament's actions.

The colonists' objection to Hutchinson's removal of the assembly from Boston rested on two arguments: that it was contrary to the charter and that it violated the laws of the province. While they

⁴¹ Ibid., p. 191.

⁴² Ibid., p. 215.

admitted that the charter was silent on where the assembly was to meet, they thought it a breach of the charter that Hutchinson should follow the king's instructions, since they assumed that it was not the king's pleasure, but "a deep-laid and desperate plan of imperial despotism . . . for the extinction of all civil liberty" by the ministry for American affairs. Even if it was the king's pleasure, the grant to the governor in the charter of "'the sole power of dissolving, &c.' is devolved entirely 'upon,' and exclusively vested 'in the governor.'" Since the governor has the sole power, the Crown cannot force the governor to exercise it by an instruction.⁴³

The colonists took pains to point out that they would like to have seen the Crown lawyers' opinion of the case, but were emphatic about their right to determine whether their charter was violated. "As we always expect to defend our own rights and liberties, so we are unalterably fixed to judge for ourselves of their real existence, agreeable to law." Moreover,

let it be recorded, that we enter upon this task, protesting against the pretended right or power of any Crown lawyer, or any exterior authority upon earth, to determine, limit, or ascertain all or any of our constitutional or charteral (sic), natural or civil, political or sacred, rights, liberties, privileges, or immunities.

With that statement they launched into an extended discussion of the Crown's prerogative,

a topick too delicate and sacred to be profaned by the pen of a subject; that it was ranked among the arcana imperii; and like the mysteries of the bona dea, was not suffered to be pried into by any but such as were initiated in its service:

⁴³Ibid., Appendix R, p. 372.

because, perhaps, the exertion of the one, like the solemnities of the other, would not bear the inspection of a rational and sober inquiry.⁴⁴

The Americans contended that the Crown's prerogative was subject to the limitation of law. As only a third of the total legislative power, it was "intrusted with the execution of laws already in being." As the law was the measure of the king's power, it was also the measure of the

subject's obedience: for as the laws assert and bound the just rights of the king; so they likewise declared and maintained the rights and liberties of the people: hence it is adjusted law, that all prerogatives must be for the advantage and good of the people; otherwise, such pretended prerogatives are not to be allowed by law.

They cited Sir Henry Finch, lawyer to Charles I, who defended the prerogative as the power to do those things "'that are not injurious to the subject; in them all it must be remembered that the king's prerogative stretcheth not to the doing of any wrong.'" Finally, they cited their own lawbook definition of prerogative, which was

'that discretionary power of acting for the publick good, where the positive laws are silent;--and if this discretionary power be abused to the publick detriment, such prerogative is exercised in an unconstitutional manner.'⁴⁵

Since no one had argued what good would come from removing the assembly from Boston, the colonists contended that its removal violated prerogative law as they had defined it. Moreover, even waiving provincial law as to the seat of government, "the holding [of] the

⁴⁴Ibid.

⁴⁵Ibid., pp. 373-374.

general court, from its ancient and proper station, is unwarrantable, unconstitutional, illegal, and oppressive." Therefore, they concluded,

the prime and only reason which originated all law, but more particularly and expressly the prerogative, was the general emolument to the state; and, therefore, when any pretended prerogatives do not advance this grand purpose, they have no legal obligation; and when any strictly just prerogatives are exerted to promote any different design, they also cease to be binding.⁴⁶

In summary, the colonists viewed this incident as the latest example of ministerial abuse of power.

We have, for a long time, beheld, with grief and astonishment, the unwarrantable practice of ministerial instructions to the commander-in-chief of this province. . . . Such an enormous stretch of power, if much longer unchecked, will eventually annihilate the essentials of all civil liberty.

Furthermore, they requested their representatives to check into the state of criminal prosecutions in the executive courts, "and endeavor to revive the ancient method of appointing the attorney-general, agreeable to the charter."⁴⁷

The council joined the House of Representatives in denouncing Hutchinson's action. They supported the assembly's contention that the power to remove the assembly from one place to another rested with the colonial executive alone, since it was inherent in the power to prorogue and adjourn the assembly. Moreover, the king was too far away to know the circumstances of how this power should be used. The council's letter reiterated the assembly's arguments and discussion of the prerogative, adding that so long as the

⁴⁶Ibid., p. 374.

⁴⁷Ibid., p. 375.

prerogative is exercised for the real good of the community, the community must feel and will always acknowledge, it is seldom examined, whether that exercise be strictly legal or not: but that omission does not take away the right of examining, whenever prerogative is exercised for a different purpose.⁴⁸

Moreover, the governor's instructions were subordinate to the charter, the council contended. To be otherwise, "the charter would be annihilable at pleasure." Since the charters granted perpetual rights and privileges, the Crown was not able to abridge them with instructions to the governor. Hutchinson replied that if he had removed the assembly from Boston on his own, he would not be obliged to tell them his reasons.

You admit it to be a part of the prerogative, that I should convene the court at such time and place as I judge to be most fit, you have a reserve, for you have explained away all the prerogative, and removed it from the king and his representative, and have made yourselves and the people judges when it shall be exercised, and in the present case have determined that it is not fit that it should be exercised.⁴⁹

The matter did not die there, but was revived when Hutchinson responded to the assembly's arguments in his next speech. He reiterated his duties under the charter and noted that

instructions relative to any matter not unconstitutional must be obligatory upon me. My commission makes them so. I have no authority to act, but what I derive from this commission, and I must act in conformity to my instructions, or not at all.⁵⁰

The assembly countered by citing John Locke on the relationship of the executive and legislative power to the people with respect

⁴⁸Ibid., Appendix S, p. 381.

⁴⁹Ibid., p. 383.

⁵⁰Ibid., p. 384.

to who was to judge the proper use of the prerogative. They noted Locke's answer that

'between an executive power in being with such a prerogative, and a legislative that depends upon his will for their convening, there can be no judge upon earth, as there can be none between the legislative and the people, should either the executive or legislative, when they have got the power in their hands, design or go about to enslave or destroy them.'

The only remedy left to the people is "an appeal to heaven," though the assembly was quick to add, that they would "by no means be understood to suggest, that this people have occasion at present to proceed to such extremity." Moreover,

we shall never except to the proper use of the prerogative. We hold it sacred as liberty of the subject. But every abuse of it will always be excepted to, so long as the love of liberty or any publick virtue remains.

When the prerogative was abused, "the house will not fail to judge for themselves of the grievance, nor to exert every power with which the constitution hath intrusted them, to check the abuse of it, and redress the grievance."⁵¹

The assembly concluded their response to Hutchinson reciting the encroachments on the Massachusetts charter.

Courts of admiralty extended from the high sea whereby the compact in the charter they are confined, to numberless important cases upon land; multitudes of civil officers, the appointment of which is by charter confined to the governor and council, sent here from abroad by the ministry;--a revenue, not granted by us, but torn from us;--armies stationed here without our consent;--and the streets

⁵¹Ibid., p. 388.

of our metropolis crimsoned with the blood of our fellow subjects,

plus numerous other grievances too many to "be enumerated."⁵²

Hutchinson ended the debate over his authority by attacking the premises of the colonial argument.

You speak of times when there has been a corrupt and profligate administration, of daring encroachment of wicked ministers, of devices of ministers of state; and you suppose instructions to governors to acts of ministers, and not of the king; . . . It may be presumed that you would have not done this, if you had known it to be an order from his majesty: I wish, however, that you had spared this coarse and indecent epithet.

He said he knew of no "ministerial instructions" and that the king was well aware of the happenings in America. Furthermore, he accused the assembly of quoting Locke out of context and was at a loss to see why the people would have to appeal to heaven. Moreover, he noted that the assembly had used the term sole instead of full, as listed in the charter, to refer to the governor's power of proroging and adjourning the assembly, and could not understand how they could adduce that this "was granted to the governor in favour to the commons." "I am not contending," he said,

for a right to do wrong, and I am very willing to understand the maxim, that his servants alone shall be punished for the wrong they do, and not avail themselves of a royal order or instruction for their justification.

Until he understood that there was an encroachment on the charter, the assembly's claim that they had the right to judge an abuse of prerogative

⁵²Ibid., p. 393.

was unanswerable. "In all controversies, as soon as one party is allowed to be the sole judge, the knot is cut, and there must be an end of strife."⁵³

This controversy is quoted at length to illustrate several points. First, the colonies viewed the charter as the source of executive power, which was a fixed grant of authority, unchangeable except by due process in the English courts. The authority it granted to the governor took precedence over any additional instructions the Crown might add at a later time. Moreover, what discretion the governor possessed as a result of his prerogatives could only be exercised for the well-being of the community, or at least not against the interests of the province. The colonial assembly would be the judge as to whether the prerogative was properly used. In short, the assembly was expressing the culmination of a century of precedent and tradition by which the colonists fashioned the ways and means of colonial revenue to make an appointed governor accountable to the people by using his salary to curb the use of his power to carry out his authority.

Secondly, British attempts to raise revenue for the payment of royal officials' salaries was a direct attack on the democratic colonial government. Before England could enforce its long-standing mercantile policies, it had to pry its officials away from their dependence on the assembly. The more England stepped up its efforts to accomplish this, the more strongly the colonists resented British interference. Hence, the assault on the assemblies' power backfired,

⁵³Ibid., pp. 394-399.

because the more pressure placed on the assembly the more the Americans resisted, causing the political situation to deteriorate so that the royal agents in the colonies were rendered increasingly helpless, especially the governor, who was the most prominent symbol of British authority within the colony. The colonists, at this stage, attacked Parliament and the Crown's ministers, while appealing to the king for protection of their rights against parliamentary usurpation. Gradually, as George III failed to take those steps the colonists thought necessary to protect their rights, he came under the same attack.⁵⁴

Finally, British attempts to strengthen the governor's authority were met by colonial arguments about the governor's accountability to the people and the provincial interests. By defining the scope of the prerogative in a limited sense, i.e., making it subject to existing law, and its exercise to the "good of the community," the assembly could then argue that they had the power to judge its abuse as representatives of the people. Thus, the governor came to be regarded less as an agent of the Crown than an executive subject to the rights and limitations within the colonial charter. When prerogative and charter conflicted, the charter would take precedence. Where they did not conflict, and

⁵⁴See Stella F. Duff, who based her work on Virginia's experience, argued that the colonists were blaming George III in the 1760's. "The Case Against the King: The Virginia Gazettes Indict George III," William and Mary Quarterly, 3rd ser., VI (July, 1949), pp. 383-397. For other aspects of this argument see Pauline Maier, "John Wilkes and American Disillusionment with Britain," William and Mary Quarterly, 3rd ser., XX (July, 1963), pp. 373-395. Also see Jack P. Greene, ed., The Nature of the Colonial Constitutions: Two Pamphlets on the Wilkes Fund Controversy in S. Carolina by Sir Egerton Leigh and Arthur Lea (Columbia, S. Carolina, 1970).

the prerogative was deemed to be a threat to colonial interests, the assembly, as representatives of the people, would determine its proper use. Either way, by the end of the 1760's the governor was considered by Americans to be an executive confined and limited to exercising his powers in the colonial interests. If, for example, a governor annually convened a general assembly, and shortly before or after the election of councillors, dissolved the assembly, this would be an abuse of the prerogative. That the assembly was called to meet at Cambridge was, in the assembly's opinion,

an abuse of the power vested by charter in the governor of this province, for him, from time to time, unnecessarily, or merely in obedience to an instruction, without exercising that judgment and discretion of his own, which by charter he is empowered and is duty bound to exercise for the good of the province, and not for the preservation of his place.⁵⁵

In the final analysis, the governor's accountability rested on one check, the assembly's control of his salary. "The safety of the people requires that every power should have a check," the assembly wrote. In the case of convening, adjourning, proroguing, and dissolving the assembly this power was vested in a governor, who resided in the province, "and is and ought to be supported by the free grants of the people." Since the king gave the governor that power to exercise "as he shall think fit or judge necessary," for the Crown to interfere by directing the governor to use it in a prescribed manner "is clearly an attempt to infringe and violate the charter." Thus, the Crown's interference was deemed an effort to undermine the popular check on the

⁵⁵Hutchinson, History of Massachusetts, III, Appendix T, pp. 400-401.

executive power, which led the assembly to conclude that if this grievance was not remedied soon, "it will then become plain and obvious that the power vested in the governor by the charter for the good of the province is willingly perverted to a very different end."⁵⁶

As the constitutional battle lines became more closely drawn, the governor felt increasing pressure from his dual role as colonial chief executive and chief defender of the prerogative. In the past, the mitigating influences of British neglect, informal relations via agents in the home government, and a general laxness in enforcement procedures prevented a total breakdown of Anglo-American relations. However, as the British increased their pressure on the governor to uphold their interests, the colonists responded with counter-pressure to maintain their hold over him to protect their own interests. Hutchinson, caught between, noted that "His majesty expects from me, on the one hand, that I make no invasion upon any of your rights; but then, on the other hand, he enjoins me to give up no part of his prerogative."⁵⁷ At the heart of the problem was the perennial problem of who was to pay the governor's salary, which came to a head two years later.

The Crown finally moved to pay the governor's salary in 1772, and, as expected, the Massachusetts assembly protested that it was another infringement on their rights. In July of that year the assembly outlined their arguments by noting that "the support of his majesty's governor of the province [was] . . . the most important part of the

⁵⁶Ibid., p. 401.

⁵⁷Ibid., p. 403.

support of his majesty's government." The fact that the governor received his support "independent of the grants and acts of the general assembly, is a dangerous innovation; which renders the governor not dependent on the people, as the charter prescribed." Therefore, it altered the charter which the colonists agreed to in 1691 without the due process of law in the courts the colonists were entitled to receive. Moreover, it destroys that "mutual check and dependence which each branch of the legislature ought to have upon the other, and the balance of power which is essential to all free governments." This change, they concluded, was an important alteration of the constitution, and "exposes the province to a despotick administration of government."⁵⁸

Hutchinson responded by saying that the colonial assumptions about the origins of the charter were in error, noting that the colonies were independent states, but subordinate units like corporations. Moreover, he reiterated the British conception of the check and balance theory which required the concurrence of the three branches, i.e., governor, council, and assembly, for a governmental action to be valid. However, "when any one branch withholds this concurrence, it is properly a check upon the other two." He then pointed to the governor's dependence upon the assembly as destroying the independence of the three branches, "which is the glory of the English constitution, and which will not admit that any one should be compelled by the other to any act against its judgment." Since the governor could not violate the freedom and independence of the council or assembly, "is it not reasonable that

⁵⁸Ibid., pp. 404-405.

the governor should be entitled to the like share of freedom and independence, in the exercise of his judgment?" Furthermore, he contended,

that independence, which cannot consist with a free government, and which the English constitution abhors, and which may properly be termed despotism, is a freedom in those who are vested with executive and judicial powers, from the restraint of known established laws, and a liberty of acting according to their own will and pleasure.

Irrespective of who pays the governor's salary, restraints on this independence will remain the provincial constitution, he concluded.⁵⁹

Hutchinson then cited the civil lists granted to the Crown for the duration of a monarch's reign as a possible course of permanent revenue for the governor. He noted that he had "reason to think, that if the governors of this colony [can] may be made equally secure of an adequate provision for their support, the Crown will never interpose." The colonists would have nothing to fear because

so tender has been our most gracious sovereign of the rights of his subjects, that although I should humbly hope for royal forgiveness, in the case of inattention to some point of no great importance, which might affect the prerogative, yet I may not expect the forgiveness of any willful invasion of your liberties.⁶⁰

The colonists were not mollified with those words, especially when a short time later an attempt was made to pay the salaries of the judges. Nothing Hutchinson could say would quiet the colonists fears.

They are more and more convinced of the designs of administration totally to subvert the constitution, and to introduce an arbitrary government into the province: they cannot wonder

⁵⁹Ibid., p. 408.

⁶⁰Ibid., pp. 408-409.

that the apprehensions of the people are thoroughly awakened; they wait with impatience to know whether the justices will utterly refuse ever to accept of support (sic) in a manner so justly obnoxious.⁶¹

Before matters could settle, Parliament passed the Tea Act, which inflamed an already volatile political situation, since the colonies believed it to be a devious way to impose taxes. The Massachusetts response was the famous Boston Tea Party. This, in turn, led Parliament to pass a series of acts designed to punish Boston and destroy the heart of their imperial problem, colonial democracy. The Port Act, Government Act, Justice Act, Quartering Act, and the Quebec Act, better known as the Coercive or Intolerable Acts, evoked a spirit of unity and resistance throughout the colonies. Soon the situation degenerated to the point where "all legislative, as well as executive power, was gone, and the danger of revolt was daily increasing."⁶²

The commemoration of the Boston Massacre gave rise to many discussions of the colonial constitution and the need for checks on the arbitrary use of the executive power. Dr. Joseph Warren compared the similarities of the Massachusetts charter to the British constitutional formulation of monarchy, aristocracy, and democracy, noting especially that the colonial executive, like the king, "is supposed to have a just sense of his own interest, which is that of all the subjects in general." Therefore, his assent is required to all acts of the legislature based

⁶¹Ibid., p. 278.

⁶²Ibid., p. 320.

on the colony's best interests.⁶³ Dr. Benjamin Church noted,

as in every government there must exist a power superior to the laws, viz, the power that makes those laws, and from which they derive their authority: therefore, the liberty of the people is exactly proportional to the share the body of the people have in the legislature; and the check placed in the constitution, on the executive power.⁶⁴

John Hancock raised the old salary dispute noting that the

people will never be enslaved with their eyes open. The moment they knew that the governor was not such a governor as the charter of the province points out, he lost his power of hurting them. They were alarmed; they suspected him, have guarded against him, and he has found that a wise and a brave people, when they know their danger, are fruitful in expedients to escape it.⁶⁵

Pamphleteers, frustrated and enraged by recent events, increased their discussions of the deteriorating political situation. In 1773 Benjamin Franklin wrote an essay entitled "Rules By Which A Great Empire May Be Reduced To A Small One, . . ." which summarized, in part, colonial sentiment toward the provincial governor. After listing the colonial grievances created by Parliament's legislation since the Stamp Act, he turned his attention to the royal officials in the colonies. He wrote that remote provinces must have governors and judges to represent the "delegated parts" of the monarchy. However, "much of the strength

⁶³Joseph Warren, "Oration Delivered at Boston, March 5, 1772," reprinted in Principles and Acts of the Revolution in America, H. Niles, ed. (Baltimore, 1822), p. 21.

⁶⁴Benjamin Church, "Oration Delivered at Boston, March 5, 1773," reprinted Niles, ed., Principles and Acts . . ., p. 36.

⁶⁵John Hancock, "Oration Delivered at Boston, March 5, 1774," reprinted in Niles, ed., Principles and Acts . . ., p. 41.

of government depends on the opinion of the people; and much of that opinion on the choice of rulers placed immediately over them." Moreover, if the Crown sent "wise and good men for governors, who study the interests of the colonists, and advance, their prosperity, they will think their King wise and good, and that he wishes the welfare of his subjects." Therefore, he cautioned England, "be careful whom you recommend for those offices." Franklin continued in a sarcastic tone by saying, "if you can find prodigals, who have ruined their fortunes, broken gamesters of stockjobbers, these may do well as governors, for they will probably be rapacious, and provoke the people by their extortions." Furthermore,

wrangling proctors and pettifogging lawyers, too, are not amiss; for they will be for ever disputing and quarrelling with their little parliaments. If withal they should be ignorant, wrong headed, and insolent, so much the better.⁶⁶

Franklin's essay encouraged England to continue to ignore American complaints of "mal-administration, oppression, or injustice." Added to long delays, "enormous expence, and a final judgment in favor of the oppressor," England would prevent "future complaints" and "Governors and judges will be encouraged to farther (sic) acts of oppression and injustice; and thence the people may become more disaffected, and at length desperate." Finally,

⁶⁶Benjamin Franklin, "Rules By Which A Great Empire May Be Reduced To A Small One Presented To A Minister, When He Entered Upon His Ministry, 1774," reprinted in The Political Thought of Benjamin Franklin, Ralph Ketcham, ed. (Indianapolis, 1965), pp. 257-258.

when such Governors have crammed their coffers, and made themselves so odious to the people that they can no longer remain among them, with safety to their persons, recall and reward them with pensions. You may make them baronets too, if that respectable order should not think fit to resent it. All will contribute to encourage new governors in the same practice, and make the supreme government, detestable.⁶⁷

At a later point in the essay, Franklin noted the perennial problems of the governor's salary.

If the people of any province have been accustomed to support their own Governors and Judges to satisfaction, you are to apprehend that such Governors and Judges may be thereby influenced to treat the people kindly, and do them justice.

For that reason, he wrote, England desired to apply

part of that revenue in larger salaries to such Governors and Judges, given, as their commissions are, during your pleasure only; forbidding them to take any salaries from their provinces; that thus the people may no longer hope any kindness from their Governors.⁶⁸

Franklin concluded his essay by criticizing the appointment of a commander-in-chief in the provinces superior to the civil magistrates. "Lastly," he wrote, "invest the General of your army . . . with great and unconstitutional powers and free him from the controul (sic) of even your own Civil Governors." If England followed these and the other rules he laid down, "you will that day (if you have not done it sooner) get rid of the trouble of governing [the colonies], and all the plagues attending their commerce and connection from henceforth and forever."⁶⁹

⁶⁷Ibid., p. 258.

⁶⁸Ibid.

⁶⁹Ibid., p. 264.

Thomas Jefferson picked up the theme and reiterated the American concept of executive power. The king, he wrote,

is not more than the chief officer of the people, appointed by the laws, and circumscribed with definite powers, to assist in working the great machine of government, erected for their use, and consequently subject to their superintendence.

However, the recent policies of England had created "a new executive power, unheard of till then, that of a British parliament," which, in its attempt to shut down Boston's ports, gave the Crown power to open "two wharfs . . . when his majesty shall think proper." This exception, he noted, "seems to have been thrown in for no other purpose than that of setting a precedent for investing his majesty with legislative powers."⁷⁰

Later in the same essay, Jefferson discussed the king's "deviations from the line of duty." The British and colonial constitutions, he wrote, give the Crown the right to veto any law passed by the other two branches. However, since the monarchs,

conscious of the impropriety of opposing their single opinion to the united wisdom of two houses of parliament, while their proceedings were unbiased by interested principles, for several ages past have modestly declined the exercise of this power in that part of his empire called Great Britain.

Yet, Americans had seen "the wanton exercise of this power . . . on the laws of the American legislatures . . . for the most trifling reasons, and sometimes for no conceivable reason at all."⁷¹

⁷⁰Thomas Jefferson, "A Summary View of the Rights of British America, . . ." (Williamsburg, 1774), reprinted in Tracts of the American Revolution, 1763-1776, Merrill Jensen, ed. (Indianapolis, 1967), pp. 258-267.

⁷¹Ibid., pp. 268-269.

Moreover, the power to dissolve the legislature was carried "beyond every limit known, or provided for, by the laws," Jefferson argued. This led to a situation where the "feelings of human nature revolt against the supposition of a state so situated as that it may not in any emergency provide against the dangers which perhaps threaten immediate ruin." So long as the bodies "to whom the people have delegated the powers of legislation" were dissolved, "the power reverts to the people, who may exercise it to [an] unlimited extent, either assembling together in person, sending deputies, or in any other way they may think proper."⁷²

Furthermore, Jefferson contended, subjection of the civil authority to the military was unconstitutional. Can the monarch "erect a power superior to that which erected himself?" he asked. "He has done it indeed by force; but let him remember that force cannot give right." Then Jefferson laid down a challenge and warning to George III.

Let not the name of George the third be a blot in the page of history. You are surrounded by British counsellors, but remember that they are parties. You have no ministers for American affairs, because you have none taken from among us, nor amenable to the laws on which they are to give you advice. It behooves you, therefore, to think and to act for yourself and your people.

Moreover, he contended, "the whole art of government consists in the art of being honest. Only do your duty, and mankind will give you credit where you fail."⁷³

⁷²Ibid., pp. 271-272.

⁷³Ibid., p. 275.

Jefferson concluded his essay by noting that

these are our grievances which we have thus laid before his majesty, with that freedom of language and sentiment which becomes a free people claiming their rights, as derived from the laws of nature, and not as the gift of their chief magistrate.

In short, Americans believed that "kings are the servants, not the proprietors, of the people." Thus, Jefferson reiterated one of the fundamental points of American executive theory that all executive power was ultimately derived from and was responsible to the people irrespective of its agent be he governor or monarch.⁷⁴

The same year Daniel Leonard and John Adams began to publish installments of their essays "Massachusettensis and Novanglus," which further amplified these sentiments. In one segment Leonard noted that

it was not the person of a Bernard or Hutchinson that made them obnoxious; any other governors would have met with the same fate, had they discharged their duties with equal fidelity; that is, had they strenuously opposed the principles and practices of the whigs.

When they found that the government would not support them, they wrote home for support from the Crown. Had matters been attended to then, "we [would have] . . . now been as happy a people as good government could make us." Though Hutchinson was "amiable and exemplary in private life" and

his abilities and integrity, added to his thorough knowledge of the province, in all its interests and conexions (sic), were insufficient in this case, the constitution was gone, though the ancient form remained; the spirit was truly republican.

⁷⁴Ibid.

Slowly the poison of "disaffection" spread throughout the body politic.⁷⁵

John Adams compared the strength of the executive branch of government to the legislative prior to the Stamp Act as being weighted in favor of the former. "The art and power of governors, and especially the negative, have been a stronger motive on the one hand, than the annual election of the two houses on the other hand." However, popular pressure afterwards slowly brought the council over to the side of the assembly. He concluded that the council was not to blame for their previous support of the governor, because

if those, over whom the governor had the most absolute authority and decisive influence, refused obedience, does not this show how deeply rooted in all mens minds was the abhorrence of that unconstitutional power which was usurping over them?"⁷⁶

The pressure on Governor Hutchinson reached the point where he wanted to end his term as governor, but was prevented from doing so by the death of the lieutenant governor. If he left for even "a temporary relief . . . from so heavy a burden as that of being at the head of government," the council would become the executive power. "This consideration alone," he wrote, "was sufficient to cause him to lay aside all thought of quitting his station, until another lieutenant-governor should be appointed." Soon he received notification that

⁷⁵Daniel Leonard and John Adams, "Massachusetts and Novanglus," reprinted in Tracts of the American Revolution, Jensen, ed., pp. 291-293.

⁷⁶Ibid., p. 331. Also see Francis G. Walett, "The Massachusetts Council, 1766-1774; The Transformation of a Conservative Institution," William and Mary Quarterly, 3rd ser., VI (October, 1949), pp. 605-627.

General Gage would succeed him until the political problems were settled, whereupon "it was the king's intention that he should be reinstated." However, that chance never came, since, as he reported, the people had on their own authority formed a legislative body, and "from that time all pacifick (sic) measures for restoring their former dependence upon the supreme authority of the British dominions, were in vain and to no purpose."⁷⁷

The impact of events in Massachusetts had spread to other colonies in varying degrees. The failure of the British official to head off a confrontation by addressing themselves to the American grievances widened the split between governors and the assemblies. Governors who tried to squelch the growing resentment against England by dissolving the assemblies found to their dismay that the colonists would continue to meet in the extra-constitutional provincial assemblies. Without the assembly the governor could only rely on his powers as commander-in-chief and these were undermined by a hostile militia.

Since the colonial constitution depended upon the governor to activate its authority, the colonists looked first to the governor to carry their grievances to the Crown. However, when the governors' opinions differed with the colonists, the latter were forced to seek other means of redress. Samuel Adams noted the dilemma in a letter to Governor Hutchinson in January, 1774. He wrote that

⁷⁷Hutchinson, History of Massachusetts, III, 329-330.

it has been the practice . . . for the Governor . . . of this province . . . at all times to correspond with ministers of State and persons of influence . . . in the nation, in order to concert and carry on such measures of the British administration as have been deemed by the Colonists to be grievous to them, [so] it cannot be thought unreasonable . . . for the Colonists to correspond with their agents as well as with each other, to the end that their grievances may be so explained to His Majesty, as that, in his justice, he may afford them necessary relief.⁷⁸

This justified the establishment of extra-legal bodies, Adams thought, to carry out the function of government when the governor refused to do so in a manner consistent with the views of the colonists. The mechanism was the provincial congress and its various committees, which are discussed in detail in another chapter.

The provincial congresses with their committees of correspondence and safety were in effect setting up a dual form of government parallel to colonial form. As the dispute worsened the latter form came to exercise the functions of government, making the former all but irrelevant. General Gage's letters chronicled this change starting in September, 1774. Then he wrote that "Civil Government is near its end" and recommended that "a very respectable force should take the field." Two months later he reported that the colonists were about "to form as complete a government as they can." Moreover, he continued, he would "not be surprised . . . if persons should be authorized . . . to grant Commissions and assume every power of a legal government." The following month he concluded that the colonists' aim was "to usurp the

⁷⁸"Instructions from the Provincial Legislature of Virginia, Meeting at Williamsburg to its Delegates to the First Continental, 1774," reprinted in Niles, Principles and Acts, p. 275.

Government entirely as the surest means to procure both money and troops by their own authority." Within six months Gage's fears were confirmed as the colonies began issuing resolutions asserting that

the Provincial Congress, under the Continental Congress, is invested with all legislative and executive powers within their respective provinces and . . . no other legislative or executive power does . . . exist at this time in any of these Colonies.⁷⁹

As these dual forms of government began to solidify, governors expressed their growing helplessness. Referring to activities of the provincial congresses, Georgia's Governor Sir James Wright observed that

As long as these kind[s] of summonses and meetings are suffered, a private man takes upon him to summons (sic) a whole province, to consult upon and redress public grievances, I apprehend there will be nothing but cabals . . . and the peace of the Province . . . continually is termed arbitrary and oppressive.

"If these calls and meetings are considered as illegal and improper," he concluded, "it will require the interposition of higher authority to remedy the evil, for the Executive powers of government in the Colonies are too weak to rectify such abuses."⁸⁰

If a governor did manage to keep the affections of the colonists during all the turmoil he was often criticized by his fellow governors for making their job more difficult. One such case was Governor Bull of South Carolina who refused to use harsh or retaliatory tactics to force colonial compliance with British policy. His actions

⁷⁹"Resolutions of the Massachusetts Provincial Congress, May 5, 1775," reprinted in Niles, ed., Principles and Acts, 118.

⁸⁰Quoted in Margaret Burnham MacMillan, The War Governors in the American Revolution (Gloucester, Mass., 1965), p. 19.

earned him a stinging criticism from neighboring Georgia Governor Wright who wrote Lord Dartmouth in 1774 that

now again my Lord, as in the time of the Stamp Act, I am to be Reflected upon and abused for opposing the Licentiousness of the People and its (sic) thrown out 'Why should our Governor do so and so, when the People in Carolina have gone Greater Lengths than we have and the Governor has not taken any notice of it.'⁸¹

In the end, however, the governors were fighting a losing battle. Lieutenant Governor Golden of New York expressed the frustration of many British officials in America. He wrote that the selection of delegates to the Continental Congress was

dangerous and illegal, but by what means shall Government prevent them? An attempt by the power of Civil Magistrates would only show their weakness and it is not easy to say upon what foundation a military aid should be called in; such a measure would involve us in troubles which it is thought much more prudent to avoid, and to shun all extremes while it is yet possible things may take a favorable turn.⁸²

By October, 1775 the situation had deteriorated to the point where Thomas Jefferson observed that "Not a governor of the Continent has the real power, but some have the shadow of it,"⁸³ three months before General Gage had come to the same conclusion. In all the colonies, he said, "not one seems in a better situation than Another, and Government can never recover itself, but by using determined Measures."⁸⁴

⁸¹Quoted in Louise B. Dunbar, "The Royal Governors in the Middle and Southern Colonies on the Eve of the Revolution: A Study in Imperial Personnel," in The Era of the American Revolution, Richard B. Morris, ed. (New York, 1965), p. 257.

⁸²Lieutenant Governor Colden to Lord Dartmouth, July 6, 1774, reprinted in Peter Force, American Archives, 4th ser., I, 517.

⁸³Journals of the Continental Congress, III, 482.

⁸⁴Quoted in Dunbar, "The Royal Governors, . . ." p. 245.

Georgia Governor Wright summed up his and the other governors' situations when he said that he was "a mere Nominal Governor" since "the Powers of Government" had been removed from his hands and "Law and Government . . . [was] nearly if not quite annihilated."⁸⁵

From 1763 to the outbreak of the Revolution Americans perceived their dispute to be primarily with England. The colonial governors were not considered to be the chief targets but only the agents in charge of enforcing policy though they often received the brunt of American hostility. The failure of British officials to resolve American grievances caused the governors' power base to erode within the colony. Since the provincial government was dependent on the governor calling the legislature into action the governors often used this to try to block or counter American reaction to British policy. The only way the colonists could vent their frustration was through extra-constitutional arrangements like the provincial congresses. The Americans soon found that they could duplicate the governmental functions as well under their own authority as they could under the previous provincial constitutions. As discussed in a later chapter, many viewed this as only a temporary phenomenon until the problems were resolved with England and the governors were replaced with ones who would follow the principles laid down in the colonial constitutions.

The continued failure of England to head off a confrontation solidified this temporary form of government making the governors irrelevant. Thus, the royal governors still possessed significant

⁸⁵Quoted, Ibid., p. 264.

constitutional grants of authority, but lacked the political power and respect necessary to carry out their duties. Once the Americans saw that the governor would be of no use in their effort to persuade England to change its policy, the governor lost what little political power he had left.

Historian Louise B. Dunbar's study of the middle and southern governors on the eve of the Revolution provides an interesting insight into this period. She noted that all the governors suffered large property losses, though none lost his life, which was amazing in a revolutionary situation. Her explanation was the British choice of personnel and the American reaction to their position. The governors she studied possessed military training, "Some degree of prestige, with notable connections in Great Britain or America, or some useful governmental experience" all calculated to win American acceptance. Moreover, since most had some degree of wealth they had much to lose in the event of an armed insurrection. However, each of them inherited burdens generated by the past conflicts between governor and colonists. Additionally, each was deeply involved in public and private affairs to the point that few had the time nor the desire to lobby thoughtfully for fundamental constitutional change.⁸⁶

On the other hand, the provincial political leaders realized that the governor was merely an imperial agent and not the author of those measures which the colonists found objectionable. In short,

⁸⁶Ibid., p. 267.

this made possible an absence of vindictiveness toward representatives of the old regime, unusual in revolution. Heads did not roll: instead, the royal governors were at best treated with continued deference and at worst subjected to petty insults or temporary imprisonment until they departed from the scene, incidental casualties in the collapse of the Old Empire.⁸⁷

The Americans during this period articulated their theories on Government and especially on the executive. They contended that they were Englishmen with all the rights and privileges which belonged to any English citizen. Moreover, the charters granted to the colonies were embodiments of their rights as colonists and could not be changed by the Crown without due process of law. While the colonists recognized that the Crown and his agent, the colonial governor, possessed certain prerogatives, they contended that they were subject to the limitations of the law and could only be exercised to benefit society. Furthermore, the executive power was limited by the English constitution and the colonial charter or constitution. The king could not issue instructions to the governor which violated either of these documents. These sentiments were outlined in a report by James Wilson to the members of the Continental Congress in 1776. He wrote that

all Power was originally in the People--that all the Powers of Government are derived from them--that all Power, which they have not disposed of, still continues theirs--are Maxims of the English Constitution, which, we presume, will not be disputed. The Share of Power, which the King derives from the People, or, in other Words, the Prerogative of the Crown, is well known and precisely ascertained: It is the same in Great Britain and in the Colonies. The Share of Power, which the House of Commons derives from the People, is likewise well known. The Manner in which it is conveyed is by Election. But the House of Commons

⁸⁷Ibid., p. 268.

is not elected by the Colonists; and, therefore, from them that Body can derive no Authority.⁸⁸

Benjamin Franklin neatly summarized the American attitude toward the various levels of executive power when he wrote that

. . . all the colonies acknowledge the King as their sovereign; his Governors there represent his person: Laws are made by their Assemblies or little Parliaments, with the Governors' assent, subject still to the King's pleasure to confirm or annul them: Suits arising in the Colonies, and difference between Colony and Colony, are determined by the King in Council. In this view, they seem so many separate little states, subject to the same Prince. The sovereignty of the King is therefore easily understood. . . .

The sovereignty of Parliament in the empire, he contended, was limited to the power "to regulate its general commerce."⁸⁹ Thus, the Crown was the uniting force which held together the empire, but the king was limited by the English constitution and was required to protect the rights of all English subjects. The governor, as his representative, was expected to do the same.

⁸⁸James Wilson, "Draft of An Address of the Continental Congress to the People of the United States, 1776," reprinted in American Historical Review, Vol. I, July, 1886, 686-687.

⁸⁹Benjamin Franklin to Lord Kames, April 11, 1767, Franklin, Works (Bigelow, ed.), (New York, 1904), IV, 285-286.

CHAPTER V

AT THE POINT OF UNION:

The Idea Of A Continental Executive 1760-1781

The French and Indian Wars during the middle of the eighteenth century forced the British to reassess the whole relationship between England and the American colonies. This led to an attempt to reorganize the empire, which raised the whole question of colonial union but in a context quite different than that prior to 1760. This chapter examines the plans and proposals for colonial union after 1760 through the establishment of the Continental Congress to the year 1781. In that period the Americans were forced to unite and face the problems of centralized leadership during the most difficult period of American history to that date.

By the 1760's a new series of schemes for colonial union were offered to settle the deteriorating relations between England and the colonies. Dr. Samuel Johnson outlined a comprehensive program of colonial reorganization. He contended that all the colonies should have the same type of government, imposed by an act of Parliament, designed to reduce colonial democracy, which, he wrote was

pernicious to them, as the people are nearly rampant in their high notions of liberty, and thence perpetually running into intrigue and faction and the rulers so dependent on them that they in many cases, are afraid to do what is best and right for fear of disobliging them.

Moreover, since the king was "the head of the Legislature and the fountain of all executive power," he ought to appoint all colonial governors. Once that was accomplished, then unite the colonies under

some gentlemen of great dignity and worth, [who] should be appointed by the King to be in the nature of a Vice Roi (sic), or Lord L[ieutenant] to reside at New York, as being best situated, to preside over and inspect the whole, with a commission to continue only for three years.

He was to be assisted by a council composed of a representative from each colonial council and assembly who had the power to discuss and pass on matters of "war, trade, &c." Also they would have the power to confirm or veto "the Laws passed in each government, and the result to be confirmed or negatived by the King." The only problem he foresaw for such a union was the possibility of "an affection of independency" on the part of the colonies. He did not think that the colonies could overcome the barriers of distance between them to pose that much of a threat to British interests.¹

The end of the French and Indian Wars and the acquisition of Canada by the British led colonial policy-makers to undertake a major reorganization of the empire. As discussed previously, the new policies touched off a storm of protest throughout the colonies, which culminated in a series of American-initiated attempts at union. The first was the Stamp Act Congress, which met in 1765.² Though it did not propose a continental plan of government, it was instrumental in helping to focus

¹New York Colonial Documents, VII, 441.

²See Edmund S. and Helen M. Morgan, The Stamp Act Crisis: Prologue to Revolution, rev. ed. (New York, 1963).

attention on the need for a workable union among the colonies. Prior to 1763 the vast majority of proposals for union were concerned with the military aspect since that was the overriding concern, and the fact that civil union could not be accomplished without a massive restructuring of colonial governments which would in all likelihood violate the colonial charters. After 1763 England found it almost impossible to alter any of the colonial traditions or institutions without causing a far-reaching crisis within the empire. Any effort to consolidate the colonies under one government was therefore not in the interests of English colonial policy. As Governor Bernard summed up the situation in the 1760's:

There is in my opinion no System of Government in North America that is fit to be made a module of. The royal Governments are faulty in their constitution. . . . If therefore there should be a new establishment of the government in North America [it] should be upon a true English constitutional bottom, it must be upon a new plan. . . .³

As hostilities between England and the colonies increased after 1763, the office of the British commander-in-chief began to take on added significance. This office was originally created to coordinate American military actions in the French and Indian Wars, but took on the responsibility of overseeing Indian affairs and supervising the remaining British military units in America. Moreover, the office was destined to play a significant role in post-war politics since the

³Governor Bernard to Lord Barrington, December 15, 1761, The Bernard-Barrington Correspondence, 1760-1761, ed., E. Channing and A. C. Coolidge (Cambridge, 1962), p. 43.

various plans of imperial reform invariably included a standing army to keep the colonists subservient to British interests. As William Knox was quick to point out, however,

where troops might be particularly necessary for awing the colonists, none could be stationed, because it is easy to suppose an Assembly in such a Province would refuse to provide for them: and where the probabilities of Indian irruptions, or attacks from other Enemies would make Troops much wanted, it would be impossible for the Commander-in-chief to station any considerable Number because a Colony in such a situation could hardly be expected to be of ability to maintain many Troops.⁴

A year later Thomas Pownall raised the problem of a commander-in-chief over all the colonies. He first discussed how the military powers granted to the governors came to be viewed as being limited under the terms of the various provincial charters. In essence, once a colonial constitution had been established

it cannot, in its essential parts, be altered or destroyed by any royal instructions or proclamation, or by letters from secretaries of state: It cannot be superceded, or in part annulled, by the issuing out of any other commissions not known to this constitution,"

he wrote. However, at the outbreak of the hostilities in the French and Indian Wars the British commander-in-chief was given power "superior to those constitutional commanders in chief [the governors], with a jurisdiction extending over the whole of the British empire in America." That, he thought, was a dangerous precedent to have established. The colonial governor possessed no power which was not "specified and

⁴Thomas Barrow, "A Project for Imperial Reform: 'Hints Respecting the Settlement for our American Provinces,' 1763," William and Mary Quarterly, 3rd ser., XXIV (January, 1967), p. 123.

defined by the nature of the constitution." Therefore, he argued, the military powers were limited to only those

persons as are within the jurisdiction of the province, who derived their powers from the supreme powers are amenable to the laws of the province, and to the governor, who is himself specially responsible for the trust.

Moreover, when "this military branch of the governor's office is established and received as part of the constitution, the King may safely grant and the people safely act under" the extensive range of military powers outlined in the governor's commission, because of the limited jurisdiction.⁵

Pownall argued that the commission granted to the British commander-in-chief derived its power directly from the Crown and was not subject to the same constitutional tradition and limitations. He noted that at the time of the establishment of this office, great care was taken to spell out the lines of authority. In times of crisis this individual would

command all military operations, and preside in general over all military establishments for the general service, independent of, and superior to, the powers and authorities already granted to the governors and captains general of the provinces.

Moreover,

it was suggested, that no commissions under the private seal and sign manual could supersede, revoke, or take precedence of these powers granted by letters patent under the great seal, and it was determined accordingly, that the military commander in chief must have his commission patent under the great seal.

⁵Thomas Pownall, Administration of the Colonies (London, 1760), pp. 55-58.

Nevertheless, Pownall pointed out, the precision with which the commission was granted was not carried over into the drafting of his powers, which were given in "general and indefinite terms." Citing the commission, he was especially critical of the passage which gave to the commander-in-chief the power

to have, hold, exercise, and enjoy the said office during pleasure, together with all the powers, authorities, rights and privileges, thereunto belonging, subject however to such restrictions, limitations, and instructions, as are given, or to be given, from time to time, under the royal sign manual, and charging and requiring all the governors, lieutenant governors, deputy governors, and presidents of the council of the respective colonies and provinces of North America, and all other officers civil or military within the same, to be aiding and assisting in this command.

These powers, he pointed out, were "such as no minister who advises the issuing [of] such [a] commission will venture to describe, these general words, power, and command." Either they are very dangerous or "nugatory." When compared with the provincial governor, the British command-in-chief is granted "dictatorial power," while the governor possessed only "consular power."⁶

Pownall went on to question the maintenance of such an office as commander-in-chief in time of peace, irrespective of its legality in the British constitutional tradition. On the one hand, its existence was dangerous to the liberties of the subjects and the constitutions of the colonies. On the other, "there are no people in the whole world, when their liberties shall become infected and undermined, so liable to become the instruments of dominion, as a people who have lived under a

⁶Ibid., pp. 60-61.

free and popular government." While there may have been no danger to liberty at that time, he noted, "once planted when it comes to grow . . . when it has taken root, and has spread its branches through the land, it will soon overtop and overshadow all the weaker, humbler shoots of civil liberty." In the final analysis, "once this lord of the forest [is placed] on a permanent footing, it will soon have, as Mr. Harrington says, 'Toes that have roots, and arms that will bring forth what fruit you please.'"⁷

Moreover, Pownall noted, the continuance of the office of commander-in-chief was also a dangerous precedent whenever there was the danger of colonial revolts. In their present state the colonists found it difficult to unite since

they have neither legislative nor executive powers, that extend to more than one; the laws of one extend not to the other; they have no common magistracy no common command, in short, no one principle of association among them.

In the end, he concluded, if England furnishes the colonies with "a principle of union" and "if ever the colonies revolt, and set up an empire in America, here begins the history of it."⁸

By the fourth edition of his work in 1768, Pownall was advocating a parliamentary union of the colonies with England. He envisioned "A Grand Marine Dominion, consisting of our possessions in the Atlantic, and in America, united into a one Empire (sic) in one center, where the seat of Government is." Giving the colonies representation in Parliament

⁷Ibid., pp. 62-63.

⁸Ibid., pp. 63-64.

was the only way he thought a separate American empire could be avoided, given the increasing diversity of the colonial economy. He summarized his argument by saying that "a general and intire (sic) union of the British dominions, is the only measure by which Great Britain can be continued in its political liberty, and commercial prosperity, perhaps in its existence."⁹

The British commander-in-chief, as Pownall pointed out, was significant not only as an executive model, but played an important political role as well in the development of American attitudes toward the English. His basic functions were to direct, police, and administer the British imperial domain in America. He had to keep in constant communication with the various segments of the empire from Montreal to Detroit, to St. Augustine, while keeping a wary eye on the remaining French and Spanish territory. From his vantage point he could view the entire range of problems better than anyone else, including the British officials in London. Since he was mainly a military administrator, he was faced with a never-ending series of delicate political questions in which the military and civilian jurisdictions might overlap. To add to his burdens, there were no previous models and very few past precedents which could help guide him through such an uncertain terrain. Moreover, he generally received very little guidance from the home officials which allowed a wide latitude of discretion on his part.¹⁰

⁹Ibid., p. 164, p. xvi (fourth edition).

¹⁰See Clarence E. Carter, "The Significance of the Military Office in America, 1763-1775," American Historical Review, Vol. XXVIII (1922-1923), pp. 475-488.

Beneath the commander-in-chief were two superintendencies corresponding with the northern and southern military districts. At any rate, the relationship between the levels of command were not without considerable conflict at times. In 1766 Lord Shelburne was forced to remind the superintendents of their position in the chain of command with the following words:

As to what you propose of Instructions to be given to the Government to correspond with the Superintendents, His Majesty thinks it will answer sufficiently that your regular and fixed correspondence be with the Commander-in-Chief of His Majesty's Forces, the System of Indian Affairs are as managed by the Superintendents must ultimately be under his Direction.

Moreover, since

the different Governors can scarcely be supposed to coincide in opinion, nor is it possible for so many to act in Concert. You are therefore to take the Orders of the Commander in Chief on all interesting Occasions, who, being settled in the Center of the Colonies, will carry on the Correspondence with the Governors on all such Points . . . and as he will be very particularly instructed by Administration; you are to look upon him as a proper Medium of material Intelligence either to or from England of the Colonies.

Thus, the commander-in-chief became the coordinating point for all significant information affecting the far-flung activities of the empire. As one historian noted about his responsibility for monitoring the Indian trade, this "brought his office into immediate contact with many powerful interests, which, up to this time, had felt only the rather loose control of the provincial governments."¹¹

Placed at the center of communication between England and the colonies, the commander-in-chief occupied a powerful position which

¹¹Quoted, Ibid., p. 480.

exerted a significant influence on the development of colonial policy. Lord Shelburne described his position as being by "the nature of his commission and his Trust [one who] holds by equal Ties to all the Provinces and watches equally over the safety of the whole." His functions were threefold in nature: management of the Indians and their trade; responsibility for the troops in North America; and the reduction of expenses in the operation of royal government on the continent, which included raising money to defray these costs. The freedom he had in carrying out these duties was a function of the lack of any prior civil authority with which he had to compete. Overall, however, the office survived for a relatively long period without a definitive authorization, "though royal direction and parliamentary enactment at times gave impetus to the growth of its power."¹²

On the other hand, as the office of commander-in-chief became more settled and carved out its position within the colonial framework, it helped to undermine the effectiveness of the royal provincial governor who was more and more being squeezed between the hostile assemblies and the dictates of overall colonial policy as administered by the home government and the commander-in-chief. Whichever way the royal governor chose to throw his lot would invariably reduce his effectiveness with the other.¹³

It was clear that Americans viewed the commander-in-chief as a distinct threat to their political well-being. The concerns expressed

¹²Ibid., pp. 481, 487.

¹³Ibid., pp. 485-486.

by private persons throughout the 1760's and into the 1770's culminated in the Continental Congress resolution laying the American grievances before the Crown. The committee's draft contained a paragraph which expressed the fear:

And whereas since the conclusion of the last war, orders have been issued by the King, that the authority of the commander-in-chief, and under him, of the Brigadier-General in the Northern and Southern departments, in all military affairs shall be supreme, and must be obeyed by the troops as such, in all the civil governments in America.

Later in the report it requested Congress to resolve "that the orders aforesaid for rendering the authority of the Commander-in-chief, and under him, of the Brigadiers-General, supreme, are illegal and void."¹⁴

In the case of Massachusetts, the appointment of General Gage to replace Governor Hutchinson signaled the end of civil government in the colonists' eyes. As Anglo-American relations worsened, Gage refused to summon the assembly and prohibited the meeting of colonists in any other form. Virginia recognized the problem this caused when it instructed its delegates to the First Continental Congress. They resolved that

The proclamation issued by General Gage . . . declaring it treason for the inhabitants of that province to assemble themselves to consider . . . their grievances . . . is the most alarming process that ever appeared in a British government; that he . . . hath thereby assumed and taken upon himself power denied by the constitution to our legal sovereign; that he, not having condescended to disclose by what authority he exercises such extensive and unheard of powers we are at a loss to determine whether he intends to justify himself as the representative of the king, or as the commander-in-chief

¹⁴Paul L. Ford, ed., Journals of the Continental Congress, October 14, 1774, I, 64, 69.

of his majesty's forces in North America. . . . If [he] conceives he is empowered to act . . . [in the latter capacity] this odious and illegal proclamation must be considered as a plain and full declaration that this despotic viceroy will be bound by no law, nor regard the constitutional rights of his majesty's subjects, whenever they interfere with the plan he had formed for oppressing the good people of Massachusetts Bay; and therefore, that the executing or attempting to execute, such proclamation, will justify resistance and reprisal.

Once again Americans argued that executive authority not restrained within the boundaries of law was despotic.¹⁵

The following year Dr. Joseph Warren, president of the Massachusetts provincial congress reaffirmed this doctrine. He issued a declaration which said in part:

That . . . general Gage hath . . . utterly disqualified himself to serve to this colony as a governor . . . in every capacity; and that no obedience ought, in future, to be paid by the several towns and districts in this colony to his writs for calling an assembly, or to his proclamation, or any other of his acts or doings; but that on the other hand, he ought to be considered and guarded against, as an unnatural and inverte enemy to the country.¹⁶

In the final analysis the office of commander-in-chief for North America proved to be a viable model for organizing and administering British colonial policy on a continental scale. It was created out of the colonists' inability to unite in the face of a common enemy and the need for a unified continental command to coordinate and execute the war effort. However, at the end of the war the Crown expanded its duties, by an extension of the prerogative, to act as a unifying agent

¹⁵"Instructions to the Delegates to Congress," Williamsburg, 1774, reprinted in Niles, ed., Principles and Acts of the Revolution, p. 276.

¹⁶Ibid.

for the reorganization of the empire. In the words of one historian, "this institution turned out to be the most cohesive element that had yet appeared in the American colonies."¹⁷

Partly because of the prestige the office attained during the war and partly due to the new responsibilities given it during the post-war period, the commander-in-chief came to play a significant role in administering British colonial policy. It was this aspect of the office that Americans came to fear most. Although, as historian C. F. Carter contended, there was no evidence that the British sought to establish

a jurisdiction in America superior to the civil power . . . nevertheless, a mechanism was in the process of development which undoubtedly facilitated the assumption of such power in the latter crisis, a concurrent power which loomed larger as the years passed and as revolutionary disorders increased.¹⁸

As Anglo-American relations continued to deteriorate this office was looked upon as an increasing threat to the colonists' liberty. This may well be one of the reasons why the Continental Congress was reluctant to approve any national executive and why it granted power and authority to George Washington as the American commander-in-chief for only a limited time which had to be periodically renewed.

By 1774 it was evident that the Americans needed some organization to give a united response to British colonial policy. On June 1, 1774, the Virginia House of Burgesses met in defiance of the royal

¹⁷Clarence E. Carter, "The Office of Commander in Chief: A Phase of Imperial Unity on the Eve of the Revolution," in The Era of the American Revolution, Richard B. Morris, ed. (New York, 1965), p. 176.

¹⁸Carter, "The Significance of the Military Office in America," p. 488.

governor and recommended that all colonies send delegates to a Continental Congress. Three months later delegates from every colony except Georgia met at Carpenters' Hall in Philadelphia. After electing a chairman and secretary, the delegates voted to name the body "The Congress" and the chairman "The President"; titles which were used in the new government over a decade later.¹⁹

The reasons for assembling such a Congress were spelled out in varying degrees by the credentials presented to it from each of the delegations. The Pennsylvania delegates' credentials noted that the purpose of the Congress was

to consult together upon the unhappy State of the Colonies, and to form and adopt a plan for the purpose of obtaining redress of American grievances, ascertaining American rights upon the most solid and constitutional principles, and for establishing that Union and harmony between Great Britain and the Colonies, which is indispensably necessary to the welfare and happiness of both.²⁰

Before any final plan could be adopted a number of questions had to be sorted out and examined. One of the committees established to do this was the "Committee to State The Rights of the Colonies." During its discussions, James Duane outlined his theory of the English monarchy and its relation to the people which helps shed some light on how Americans viewed the fundamental concept of executive power. The

¹⁹See James Duane, "Notes on Proceedings," in Letters of the Members of the Continental Congress, Edmund C. Burnett, ed., I, 8; hereafter cited as Letters.

²⁰Quoted in Edmund S. Burnett, The Continental Congress (New York, 1964), p. 35.

first principle, he contended, was that "England is governed by a limited Monarchy and free Constitution." If, however, a

Subject is bound by a law to which he does not assent, either personally or by his Representative, he is no longer free, but under an arbitrary power, which may oppress or ruin him at pleasure.

Moreover, he pointed out, it was admitted

by the English judicatories and has been solemnly resolved by the King in privy Council, that the Common Law of England and such Statutes as existed prior to our Emigration are fundamentals in our Colony (sic) Constitution.

Therefore, he concluded, it was "upon this grand Basis the prerogatives of the Crown and the Rights of the Subjects are as fully ascertained in the Plantations as in the parent State." Furthermore,

by the same Constitution the King has the Executive Power, and is the Foundation of Title[s], offices and Honors. Hence arises his royal Prerogative in the formation of Colonies to establish a System of Govern^t (sic), legislative, judicial and executive, suitable to the Circumstances of a People who are blessed with the Privileges which they never meant, nor were supposed, nor could (sic) forfeit by altering their local situation within the same Empire.

Thus, Duane argued that the supreme executive power was limited and subject to the restraints imposed by law and the constitution for the protection of the subjects. Like previous comments on executive power throughout the eighteenth century, Duane echoed the American fear of unrestrained and unchecked executive power.²¹

In spite of the deteriorating state of relations between England and the colonies, few persons thought of independence as the solution. The cautious New Yorker, John Jay, said it was not for this

²¹ Burnett, Letters, I, 24-25.

Congress to set about framing a new system of government for America. "The measure of arbitrary power is not full, and I think it must run over, before we undertake to frame a new constitution," he said. Rather, the Congress must try "to correct the faults in the old one."²² For days the Congress debated the question until the Suffolk resolves galvanized them into action. General Gage's indication that he proposed to enforce the Intolerable acts brought a vote from Congress to resist. The crisis in Boston injected a new urgency into the deliberations over finding a way to resolve the dispute with England.

Joseph Galloway proposed a plan to solve the dispute within the framework of the British empire. His plan was similar to the one proposed at the Albany conference twenty years before. He outlined "a British and American legislature, for regulating the administration of the general affairs of America," in which each colony would retain "its present constitution, and powers of regulating and governing its own internal police, in all cases whatsoever." The proposed government would be administered by a "President General" appointed by the Crown and a "Grand Council" to be chosen by the representatives of the people of the several Colonies in their respective Assemblies, once in every three years. The "President General" had the power to summon the council as soon after the election as practical. Moreover, he was to hold office at the pleasure of the Crown, and "his assent shall be requisite to all acts of the Grand Council, and it shall be his office and duty

²²Ibid., p. 15.

to cause them to be carried into execution." Additionally, with the advice and consent of the "Grand Council" he would

hold and exercise all the legislative rights, powers, and authorities, necessary for regulating and administering all the general police (sic) and affairs of the Colonies in which Great Britain and the Colonies, or any of them, the Colonies in general, or more than one Colony, are in any manner concerned, as well civil and criminal as commercial.

The executive and council proposed by Galloway would be "an inferior [and] distinct branch of the British Legislature, united and incorporated with it for the aforesaid general purposes." Finally, in time of war any bills which granted aid to the Crown, "prepared by the Grand Council, and approved by the President General, shall be valid and passed into law, without the assent of the British Parliament."²³ When the plan was finally put to the delegates, it was defeated by one vote. It was clear that while all the delegates agreed that there were problems with England, there was no unanimity of opinion on what ought to be done.

In addition to Galloway, others discussed alternative proposals. One such plan was outlined in Jefferson's Summary of the Rights of British America. As noted in the previous chapter, Jefferson voiced the American contentions that no one held absolute power be it king, Parliament, governor, or colonial legislature. All those who held power were subject to the higher law as embodied in positive law in the British Constitution or colonial charters, or the laws of nature. The proper

²³Journals of the Continental Congress, I, 43-48. Also see Julian P. Bond, Anglo-American Union: Joseph Galloway's Plans to Preserve the British Empire 1774-1788 (Philadelphia, 1941).

task of political communication, therefore, was to describe the distribution of power among the agencies of government. With respect to union between England and the colonies it was to revolve around the king as "Chief Magistrate" with each state being units of the whole. Thus, the monarch was the unifying force tying them all together. Within that context the Crown was "circumscribed with definite powers" and was assisted by legislatures "in working the great machine of government" while all were subject to the "superintendence" of the people. The king held the "executive powers" within each state while exercising the same for the whole empire. He was the only agency of government outside each colony and within his sphere of circumscribed powers he was to protect and defend their interest by the use of his veto. However, the full legislative powers remained "at all times" within each colonial assembly. Parliament could not interfere in the internal affairs of the colonies but only regulate commerce between them and other parts of the empire. Thus, Jefferson viewed the empire in its fragmented units as being tied together under a limited and circumscribed executive who was responsible to the people to exercise his powers for their protection and well-being.²⁴

A year later Benjamin Franklin proposed his "Articles of Confederation and Perpetual Union" for the Continental Congress to consider. Article IX outlined an executive council appointed from the

²⁴Boyd, ed., *Papers of Jefferson* (Princeton, New Jersey, 1952), I, 121-137. Also see Anthony M. Lewis, "Jefferson's 'Summary View' as a Charter of Political Union," *William and Mary Quarterly*, 3rd ser., V (January, 1948), pp. 34-51.

general Congress which consisted of twelve members, a third of which were changed annually and two-thirds were required for a quorum. Its function was to

manage general Continental business and interests; to receive applications from foreign countries; to prepare matters for the consideration of the Congress; and to fill up, pro tem pore, continental offices. . . ; and to draw on the general treasure for such moneys (sic) as may be necessary for general services, and appropriated by Congress to such services.²⁵

While the whole plan was never adopted, the executive council concept was seen as a definite necessity during congressional recesses. Together with similar ideas discussed by John Dickinson and Jefferson, a committee of states was adopted in 1784.

Congress, in 1774, was faced with a series of organizational problems which continually hampered attempts to reach a common understanding. The Connecticut delegations' letter to their governor illustrates a number of these. They wrote that while

we have the pleasure of finding the whole Congress, and through them the whole continent, of the same sentiment and opinion of the late proceedings and acts of the British parliament; but at the same time confess our anxiety for greater dispatch of the business before us, than it is in our power, or perhaps in the nature of the subject, to effect.

They went on to describe how

an assembly, like this, though it consists of less than sixty members, yet, coming from remote colonies, each of which has some modes of transacting publick business peculiar to itself, some particular provincial rights and interests to guard and secure, must take some time to become so acquainted with each

²⁵Franklin's proposed Articles of Union are printed in the Journals, July 21, 1775, II, 195-199. Dickinson's draft is found under July 12 and August 20, 1776, V, 546-555, 674-689. His executive council was called a council of state.

one's situations and connexions, (sic) as to be able to give an united assent to the ways and means proposed for effecting, what we are ardently desirous of.

Moreover, given the circumstances of such an assembly,

our President, though a gentleman of great worth, and one who fills and supports the dignity of his station to universal acceptance, yet cannot urge forward matters to an issue with that despatch, which, he might in a different assembly.²⁶

It was not until the next congress that an attempt was made to resolve these internal problems.

By late 1774, the First Continental Congress had completed its work and adjourned. Members had agreed upon the "Articles of Association" recommending that the colonies pursue a stringent policy of non-intercourse with Great Britain until the grievances outlined were redressed. Its preamble opened with avowals of loyalty to the King, but closed with a finger pointed at a "wicked ministry." More important, however, was the mechanism for its enforcement. It called for

a committee [to] be chosen in every county, city, and town . . . whose business it shall be attentively to observe the conduct of all persons touching this association; and when it shall be made to appear . . . that any person within the limits of their appointment has violated this association, that they cause the truth of the case to be published in the gazette; to the end, that all such foes to the rights of British-America may be publically known, and universally contemned (sic) as the enemies of American liberty.²⁷

Though the association was not a frame of government, aside from the mechanism for its enforcement, it was a significant step in the direction of union since it was the first unified action of all the colonies

²⁶Burnett, Letters, I, 70.

²⁷Ibid., p. 57.

participating and the basis for a number of lasting contacts and friendships among the participants who were to play an instrumental role in the American Revolution during the following decade.

It was clear to some delegates like James Duane, however, that the association would not be enough to solve the future problems he envisioned. In December he wrote a long letter to Samuel Chase, a critic of the plan, outlining his reasons why Chase and his fellow critics should support it. He noted that

the plan is calculated to secure to every colony its own exclusive interest, Legislation and form of Government except in matters which respect Great Britain and the Colonies jointly . . . [and] the new Council were to have no authority; and in all cases the Representatives of the people were to be vested with a complete negative.

Moreover, England ought to be involved in the "great Council" because

there may be but one supreme head in the State to conduct events which regard the whole Empire and upon which its very existence may depend . . . [and] because it is just that Great Britain should be guarded against all attempts of the Sovereign to unite with one part of the Empire which must soon be the most important, to oppress or injure her.

He went on to point out that if "the rights of regulating Trade is to be rejected or pared away to nothing Some Plan of Union must be seriously thought of." He then requested Chase

and the other delegates appointed for your Colony to take this subject into serious consideration . . . [because] if you cannot approve of something like the above mentioned plan devise one which you will support. Think in time of the conditions of union to which you will accede, and communicate them with candour.²⁸

²⁸Ibid., p. 88.

To men like Duane it was becoming evident that the colonies stood at an important juncture and they must be ready to proceed in one of two directions, a speedy resolution of the conflict with England, or independence.

With their work complete, the delegates to the First Continental Congress adjourned but agreed to meet the following May. A major step in the direction of union was accomplished in the face of strong fear against a national government, however weak, which might be as oppressive as England was accused of being. This fear presented a constant obstacle to those advocating union, and later, a revised and strengthened federal government.

In England, the king ignored the petition outlining the colonists' grievances, while the ministry viewed the Articles of Association as a direct challenge to their authority. The colonists themselves continued to meet in the extra-legal assemblies known as provincial congresses when governors attempted to silence rebellious assemblies by refusing to call them into session. The conventions provided the mechanism for deliberation and legislative action in much the same fashion as the provincial assemblies had done. In the words of the Massachusetts provincial assembly which noted that

the distressed and miserable state of the province, occasioned by the intolerable grievances and oppressions to which the people are subjected, and the danger and destruction to which they are exposed, of which your excellency must be sensible, and the want of a general assembly, have rendered it indispensably necessary to collect the wisdom of the province, by

their delegates, in this congress, to concern some adequate remedy for preventing impending ruin, and providing for the public safety.²⁹

The provincial congress was generally too large and unwieldy to carry into execution its directives. Committees of safety were therefore created to take over the executive function and administer the policies, resolves, and other enactments. These committees were further responsible for keeping the functions and momentum of government going between sessions of the provincial congress. In short, the committees of safety were the chief executives during the transition from colony to state and therefore comprise an important link in the development of American executive theory.

The mechanism of committees acting in an executive capacity was not new to the colonies. Throughout the previous century assemblies had acquired various executive duties, roles, and responsibilities, as they tried to make an appointed governor more responsible to provincial interests. The assemblies did not exercise these functions as a committee of the whole, but delegated them to various special committees. Only in New England was there not an extensive tradition of legislative committees exercising executive functions with the possible exception of the Grand Committee or the Councils of War in Connecticut. However, all colonies had a tradition of commissions, appointed by the assembly, to carry out executive functions. In many cases, they made appointments

²⁹"From the Provincial Congress, Sitting at Concord, To His Excellency Governor Gage," Niles, ed., Principles and Acts of the Revolution, p. 99.

and supervised the conduct of military operations in line with assembly appropriations, as discussed in the previous chapter.³⁰

The governor's council provided another source of precedents. Since executive power was to a great extent shared by the governor and council, with the council acting as governor in his absence if there was no deputy lieutenant governor, it was consistent with past precedent that executive power be handled by a committee. This might explain why it was referred to as committee of safety since it was designed to function as a temporary expedient, like the former councils, in the absence of the governor. Since few people thought in terms of independence at this point, the committees were considered only in a temporary light.³¹

Further precedents were offered by English Parliamentary traditions in which committees exercised executive functions. Thus, the provincial congresses had a wealth of precedents to draw upon when establishing the committees of safety to undertake the necessary executive responsibilities until the difficulties with England could be resolved. In the words of one historian on the subject, the colonists "did not create an institution out of hand but adapted familiar materials in its construction."³² In short, the committees of safety carried out

³⁰See J. Franklin Jameson, "Standing Committee System in the American Legislature," American Political Science Quarterly, IX, No. 2, pp. 246-267.

³¹See Chapter IV.

³²Agnes Hunt, The Provincial Committees of Safety of the American Revolution (Cleveland, 1904).

the work for the provincial congresses in a manner long familiar to members of the legislatures, with the major difference being that they now comprised the entire executive branch once the royal governors left the colonies.

In the years preceding American independence, committees of correspondence took an active role in coordinating colonial resistance. The committees of correspondence kept other colonies informed as to developments within their respective province and fanned the fires of agitation against the royal governors. While local committees of correspondence were more active than the provincial ones, it was the latter that tied the colonies together and acted as the primary channel of communication between the colonies and the Continental Congress. As the threat of war increased, the committees of correspondence were generally supplanted by committees which were more concerned with colonial defense. However, the committees of correspondence did provide a valuable function in promoting colonial unity and bridging the transitional period between the preliminary events and the actual outbreak of the Revolution. One historian suggested that the founding of the Continental Congress was the logical outgrowth of the committee system on the provincial level raised to one on the continental level when New York pointed to the need for coordinating and directing provincial activities.³³

³³See Edward D. Collins, "Committees of Correspondence of the American Revolution," *American Historical Association Annual Reports*, 1901, pp. 245-271.

As the committees of safety began to replace the committees of correspondence, they assumed the role as the executive agent for the provincial congresses. Generally they were given wide and undefined authority to act in whatever manner they deemed necessary for the public safety when the provincial congress was not in session. Since there was no constitution to define and regulate their behavior, they could do whatever was not contrary to a resolution of the provincial congress. However, this tremendous latitude was not without its checks. First they were creations of the provincial congresses and elected or appointed for very short terms. This alone prevented them from undertaking much that was not approved by the legislature since their frequent changes of membership prevented them from developing into permanent bodies with goals and ambitions apart from the assembly itself. Moreover, these were at the absolute mercy of the provincial congresses who could alter or abolish them at any time, creating whatever form they might choose. Additionally, the committees' acts and decrees were subject to suspension or abrogation at any time while dependent on local committees to carry them into action. In short, the provincial congress was the source of all governmental authority, power, and prestige with a colony. The committee of safety was merely an organ for carrying its policies into execution on a provincial seal. The primary concern of the committee of safety was the safety and defense of the colonies, though they were responsible for other areas as well.

³⁴See Hunt, The Provincial Committees.

The committees of safety were handicapped by their size, which sometimes led to inefficient activities and made it difficult to carry out military policy. The reason for their large size was the desire of the provincial congress to make it as representative as possible of the whole province. In spite of their inefficiency, when compared to a single executive, they were, by and large, successful in carrying out their functions. It must be remembered that until the Declaration of Independence there was great uncertainty as to which course of action to take. The extra-constitutional organs of government set up to meet the emergency of 1774 were not meant to be permanent forms of government. Rather, they were temporary expedients to meet the needs of the moment until the problems with England had been resolved. Only when it became evident that the old provincial forms of government were not going to be reinstated did the Americans cast off the temporary forms in favor of new and permanent constitutions based on a tripartite division of government into legislative, executive, and judicial branches.³⁵

In May, 1775 the Second Continental Congress met in Philadelphia after the outbreak of fighting at Lexington and Concord the previous month. The king had not replied to their list of grievances and the ministry looked upon the Articles of Association as a direct challenge to British authority. On the 16th of May, the provincial congress of Massachusetts requested guidance on whether to take up and exercise the civil powers of government. Congress responded that no obedience was due to the act of Parliament altering the constitution of the province,

³⁵Ibid.

nor to a Governor, or a lieutenant-Governor (sic), who will not observe the directions of, but endeavour to subvert that charter . . . [they were therefore] to be considered as absent, and these offices vacant.

Since the

inconveniences, arising from the suspension of the powers of Government, are intollerable (sic), especially at a time when Genl. Gage hath actually levied war, and is carrying on hostilities, against his Majesty's peaceable and loyal subjects

it was therefore necessary that the citizens of Massachusetts summon an assembly of representatives to elect councillors "in order to conform, as near as may be, to the spirit and substance of the charter" until such time as "a Governor, of his Majesty's appointment, will consent to govern the colony according to its charter."³⁶ Thus, Congress did not as yet see the necessity for altering Massachusetts' form of government.

On June 15 the Congress elected George Washington to be commander-in-chief of the colonial forces. John Adams nominated him to "compell" the members of Congress "to declare themselves for or against something" in an effort to move the members off dead center.³⁷ Washington received no serious objection and his successful confirmation was viewed as overcoming the sectional jealousies so prevalent in that body. The following day Washington gave his acceptance speech and Congress responded by establishing the organizational structure of the army. The creations of the subordinate offices in the military structure gave a significant patronage power to Congress which resulted in the expected bickering over who would receive which offices. However, Congress left

³⁶Journals, II, 83-84.

³⁷Adams, Works, II, 415.

the appointment of the officers below the general officers to the provincial congresses to present nominees to General Washington who would fill the commissions authorized by Congress. This in a sense gave the commander-in-chief the semblance of a patronage power also.

Washington's commission gave him a general grant of power. It noted that for the "Defense of American liberty . . . you are hereby vested with full power and authority to act as you shall think for the good and welfare of the service." Moreover, he was

to be careful in executing the great trust reposed in you, by causing strict discipline and order to be observed in the army. . . . And you are to regulate your conduct in every respect by the rules and discipline of war (as herewith given you) and punctually to observe and follow such orders and directions, from time to time, as you shall receive from this, or a future Congress of the United Colonies, or committee of Congress.

This commission was to continue "until revoked by this, or a future Congress."³⁸ Thus, Congress broke with the committee tradition and placed the supreme field command in the hands of one person with no apparent strong opposition from anyone in Congress.

Washington provided Congress with other valuable services in addition to his duties as commander-in-chief. He realized that Americans were fearful of a standing army and any military leader who possessed power enough to endanger their liberty. These fears were especially evident in Congress as many members were reluctant to grant him any more than the barest minimum of authority to carry out his managing and directing of the military forces in the field. To

³⁸Journals, II, 96.

Washington's credit, he understood these motivations and his letters to Congress indicate a great patience with their misgivings though at times he lamented the effect they were having on the success of the military effort. For example, in December of 1775 Washington prudently asked for the authority to call forth the state militias, which was granted in general terms. However, the opponents of Washington seized on this, raising the spectre of a military dictator kept fresh in American minds by the British commander-in-chief's actions in Massachusetts. To allay these fears, Congress amended Washington's authority to require him to seek the approval of the executive in each state before calling the militia. Sensitive to these fears, Washington had taken pains to see that this had been done before it became an issue in Congress, thereby averting any question of his actions personally.³⁹

Washington's letters were read to the Congress in full session, his advice on military matters was given careful consideration, and his judgment carried much weight in the final decision. In a sense he was the central cog around which the complex military and civilian organization revolved in the conduct of the war. On the one hand, he would provide the necessary information for Congress to make policy and on the other he would be the vehicle for carrying it into execution. By anticipating difficulties which might arise, he could prod Congress into beginning the long deliberative process so that a decision might be reached before he was faced with the crisis, thereby lessening his

³⁹See Jared Sparks, The Life of George Washington (Boston, 1844), pp. 151-152.

inconvenience which too often resulted from Congress' disorganization and lack of direction.

A second area in which Washington provided executive leadership and organization was in his relationships with the various state governments. Congress would authorize the raising of troops and supplies which the states would provide through various acts of the legislature. Washington was continually forced with graphic representations of the armies' needs to prod the states into fulfilling their quotas. Since the state executives in the early period of the Revolution possessed most of the executive power in America, Washington's correspondence with them brought him into direct contact with the source of power where he could gain an overall view of the problems and have a direct input of his ideas where they might be most effective.⁴⁰ Moreover, Washington was forced to deal with maritime affairs since Congress was slow in organizing and establishing policies in this area. He assumed that it was included in his authority as commander-in-chief to arm and equip vessels to protect coastal areas, shipping, and to harass the British navy.

Thus, Washington became a de facto national executive in his position as commander-in-chief. Not only did he provide the bridge between Congress and the military, but he acted as a significant link between the states and Congress as well. In short, he was one of the few individuals, if not the only one, who possessed a unique vantage point from which to view the problems and solutions facing the Americans

⁴⁰See MacMillan, The War Governors, pp. 149-163.

during the Revolution. His contacts and correspondence gave him a wide-ranging source of information as well as the opportunities to inject ideas into the various levels of government. This not only helped the American cause during the Revolution, but it provided Washington with a wealth of valuable experience upon which he could draw during his years as president when he was trying to place the new government on a firm foundation.

Centralization of executive authority was not the pattern followed by Congress for its role in the conduct of the military effort. Throughout 1775 Congress jealously guarded its power and refused to delegate any of it to committees to oversee the conduct of military policy. Benjamin Harrison recommended that such a committee be established, "but the Gentlemen [of Congress] could not think of parting with the least particle of their power."⁴¹ As early as May, 1775 Silas Deane had raised the question of appointment of a committee during the adjournment of Congress to "sit constantly at Hartford or elsewhere near the scene of action."⁴² It was not until the early part of 1776, however, that the delegates began to move in the direction of an executive committee which eventually became the Board of War and Ordinance. Even then Congress did not grant it general powers, but provided it with barely enough power to meet specific problems as they arose. By December, 1776 it was evident to some that the committee system needed a

⁴¹ Benjamin Harrison to George Washington, July 21, 1775, Burnett, Letters, I, 170-171.

⁴² Ibid., pp. 105-106.

drastic revision if the Americans were to prosecute the war effort successfully. Samuel Chase noted the "impropriety of . . . [the] military system" and sought to restructure it. "If we expect to succeed in the present war, we must change our mode of conduct," he said. "Distinct and precise departments ought to be established. [Moreover] a Gentleman of the military must be of the Board of War," he concluded.⁴³

In spite of these recommendations the committee system lumbered on for another year. Congress chose to establish numerous specialized committees to handle specific problems as they arose. For example, one committee was established for the purpose of explaining to the state governments why additional powers had been given to General Washington, "and requesting them to cooperate with him, and give him all the aid in their power."⁴⁴ In the end, however, it was not until 1780 when Congress finally consented to a full review of the administrative procedure in the face of the glaring defects manifest over the past four years. At that point another special committee was formulated to consider "the revision and new arrangement of the civil executive departments of the United States."⁴⁵

Another crucial area that suffered from the lack of organized administrative procedures was foreign affairs. In November, 1775 Congress authorized the establishment of The Committee of Secret Correspondence,

⁴³Samuel Chase to John Sullivan, December 24, 1776, Ibid., II, 186.

⁴⁴Journals, VI, 1041. Also see pages 1043, 1047, 1153.

⁴⁵Ibid., XVII, 791.

which was the forerunner of the later State Department. Its function was to correspond with nations and persons friendly to the American cause through trusted agents abroad. Unfortunately, the committee could not maintain its secrecy, causing John Jay to remark that he wished

the secret (Commercial) committee would communicate no other intelligence to the Congress at large than what may be necessary to promote the common weal, not gratify the curiosity of individuals.⁴⁶

In spite of these and other problems, Congress refused to authorize one committee to handle foreign affairs. In December, 1778 they resolved to meet each evening for at least two hours "until the present state of our foreign affairs shall be fully considered."⁴⁷ However, it was John Jay, a former member of the committee, who put the dilemma so aptly. He said that

one good private correspondent would be worth twenty standing committees, made of the wisest heads in America, for the purpose of intelligence. What with clever wives, or pretty girls, or pleasant walks, or too tired, or too busy, or do you do it, very little is done, much postponed, and more neglected. If you who are naturally industrious and love your country, would frequently take up your pen and your ciphers and tell me how the wheel of politics runs and what measures it is from time to time turning out, I should be better informed and Congress better served. I now get more intelligence of your affairs from the French ambassador than from all the members of Congress put together.⁴⁸

Agent Benjamin Franklin was so exasperated over his dealings with the Secret Committee that he vowed to deal only with the president.

⁴⁶Francis Wharton, ed., Revolutionary Diplomatic Correspondence (Washington, 1889), II, 165.

⁴⁷Journals, XII, 1181.

⁴⁸John Jay to James Lovell, October 27, 1780, Wharton, Revolutionary Diplomatic Correspondence, IV, 105.

I write fully to the President. The frequent hindrances the committee of correspondence meet with in writing as a committee, which appear from the excuses in your particular letters and the many parts of my letters that have long been unanswered, incline me to think that your foreign correspondence would be best managed by one secretary, who could write when he had an opportunity, without waiting for the concurrence of opinions of his brethren, who can not always be got conveniently together. My chief letters will therefore, for the future, be addressed to the President till further orders.⁴⁹

In the period from 1775-1781, Congress was hampered by the lack of efficient organization in its executive functions. The examples cited above applied to the other areas of administration within Congress as well. As the governmental operations increased in complexity, it became clear to more members that the committee system under which Congress was operating needed a drastic overhaul and the major committees had to be placed on a more permanent basis. The revolutionary committee system that functioned so well on the provincial level was breaking down under the load of the national government.⁵⁰

During the same period the presidency of the Congress found itself involved in a number of internal squabbles. The Second Continental Congress elected Peyton Randolph to the presidency. He was described by Silas Deane as a man "designed by nature for the business," as "affable, open, and a majestic deportment, large in size, though not

⁴⁹ Benjamin Franklin to James Lovell, Ibid., pp. 26-27.

⁵⁰ See the following for a detailed account of the development of the committee system, Edmund C. Burnett, The Continental Congress (New York, 1964); Jennings B. Sanders, Evolution of the Executive Departments of the Continental Congress, 1774-1789 (Gloucester, Mass., 1971).

out of proportion, he commands respect and esteem by his very aspect, independent of the high character he sustained."⁵¹ Unfortunately, less than two months later he was forced to resign because of ill health. He was succeeded by Henry Middleton, a prominent politician from South Carolina who had served as Speaker of the House and was a member of the council in the provincial government. He served until Congress adjourned five days later.

The Second Continental Congress also had problems with its president. It re-elected Randolph, who again had to leave the chair to attend pressing matters at home. Middleton declined to succeed him on the grounds of ill health. At this point, John and Samuel Adams steered the nomination to their colleague, John Hancock, who was President of the Massachusetts provincial congress. They soon regretted their decision, however, as they accused him of keeping the company of individuals not noted for their revolutionary fervor. When Randolph returned to Congress, Hancock declined to surrender his chair in favor of Randolph. As Abigail Adams wrote to Mercy Warren:

How well might some folks have saved their credit and their Bacon too (as the phrase is) by a resignation of a certain place. O Ambition, how many inconsistent actions dost thou make poor mortals commit.⁵²

Hancock's insensitivities further irked the Adams' and others when he requested a respite from his duties and made a farewell speech

⁵¹Burnett, Letters, I, 11.

⁵²Abigail Adams to Mercy Warren, Warren-Adams Letters . . ., Massachusetts Historical Society, Collections (Boston, 1917-1925), I, 181.

upon being granted such a leave. He complimented himself by noting that "my health being much impaired, I find some relaxation absolutely necessary, after such constant application [to my duties]; I must therefore request your indulgence for leave of absence for two months." He went on to say that

As to my conduct, both in and out of Congress, in the execution of your business it is improper for me to say anything. You are the best judges. But I think I shall be forgiven if I say that I have spared no pains, expense, or labor, to gratify your wishes, and to accomplish the views of Congress.⁵³

It was moved to thank Hancock for his services but the motion to do so was side-tracked by a motion that it was "improper" to thank an officer for discharging his duties. On that motion, the Congress split evenly. The original motion passed six states to four, with one divided and Massachusetts voting no. Samuel Adams wrote with alarm that this whole episode "labored 'a whole Afternoon,'" and the "Principle was objected to, it was urged to be unprecedented, impolitick (sic), [and] dangerous."⁵⁴ Moreover, neither of Hancock's predecessors had been so honored, he noted. The final insult occurred when Hancock requested an escort to guard his return to Massachusetts. Two weeks before Hancock left Congress, Henry Laurens moved "the House to intreat (sic) and solicit Hancock's continuance," and to his surprise "I was seconded and no more."⁵⁵ Shortly thereafter, he himself was elected to the post.

⁵³ Journals, IX, 852-853.

⁵⁴ Sam Adams to James Warren, October 30, 1777, Burnett, Letters, II, 537.

⁵⁵ Henry Laurens to John Gervais, October 16, 1777, Ibid., p. 522.

Laurens' term as President also saw many complaints about his actions. His pre-presidential correspondence was filled with scorn for Congress and many of the men who served in it. For example, he wrote that "Congress is not the respectable body which I expected to have found."⁵⁶ Another time he "threatened to kick [Secretary Charles] Thompson from the President's platform upon which they both happened to be standing."⁵⁷ Furthermore, he participated in congressional debates, which was justifiable on the basis that he was a delegate and at times the sole representative from his state.⁵⁸ However, his uncomplimentary statements from the chair about members of Congress were difficult for his colleagues to understand. As the anniversary of his election approached, Laurens tendered his resignation. The Journal recorded the event in the following manner: "Having assigned sundry reasons why he could not continue longer to execute the office of President," he resigned and left the chair.⁵⁹ Not to be outdone by Hancock's farewell address, however, Laurens delivered an even more extensive one, complimenting himself on his patriotism for remaining at his post for six weeks after his year expired. Laurens' apparent reason for his abrupt

⁵⁶Laurens to Gervais, September 5, 1777, Ibid., p. 476.

⁵⁷See Herbert Friedenwald, "The Journals and Papers of the Continental Congress," Pennsylvania Magazine of History, XXI, 183.

⁵⁸See Jennings B. Sanders, The Presidency of the Continental Congress, 1774-1789: A Study in American Institutional History (Gloucester, Mass., 1971), p. 18.

⁵⁹Journals, XII, 1202.

departure was an affront to Congress by its agent, Silas Deane, which Congress, he complained, suffered in silence. "I had antecedently to the appearance of Mr. Deane's insult been exceedingly Chagrined by the tame submission of the great Representatives of the United States to the most gross affronts."⁶⁰ Laurens hoped his resignation and re-election would vindicate his position, but the delegates were content to see him resign.

After Laurens stepped down as President, Congress found itself embroiled once again in the controversy over whether to thank him for his services. In the end, however, such a resolution was not passed until six days after his resignation and not before he demanded "in modest terms . . . a testimonial of my Conduct, intimating the honor and interest of Congress and the States were as nearly concerned as my own." After the resolution passed, Laurens characterized Congress' actions as "the acknowledgments with which after mature deliberation you have been pleased to honor me. . . ."⁶¹ Seven months later he was still suffering from his defeat when he wrote to John Laurens requesting that he "tell my friends they will find, that my resignation on the 9th December was, as I then said to them, the greatest act of my Life."⁶² Fortunately for Congress, Lauren was the last president to lecture them on his retirement.

⁶⁰ Laurens to Rawlings Loundes, December 16, 1778, Burnett, Letters, III, 537-538.

⁶¹ Ibid., p. 538.

⁶² Ibid., IV, 327.

In the next election for President, the delegates decided to choose someone from New York to allow each geographical area to be represented in the post. The choice was General William Schuyler who was not present at the time. John Jay was appointed to fill in until Schuyler's arrival. By the time that happened, Jay had resigned to represent Congress as Minister Plenipotentiary, and Schuyler never occupied the chair. Interestingly enough, Jay continued as Chief Justice of New York while acting as President of the Congress, resigning the office shortly before his appointment to Spain. As with his predecessors, Congress split over whether to thank him for his services. James Lovell noted that

I declare openly that I did not approve Mr. J's conduct in the Chair--some others followed me in like declarations, but I would not go to the dirty work of Yeas and Nays and urged that, if a Majority were so disposed, he might receive a Formality. . . .⁶³

Samuel Huntington of Connecticut was elected President on September 28, 1779, and continued in office until July of 1781. In the summer of 1780, he suffered a severe case of smallpox and offered his resignation. The Journals recorded that on July 6, 1781 "The President having informed the United States in Congress assembled, that his ill state of health" would "not permit him to continue longer in the exercise of the duties of that office," requested a leave of absence.⁶⁴ Samuel Johnston of South Carolina was elected to replace him but declined to serve, citing his ill health. The Journals noted that his reasons "were satisfactory" and proceeded to elect Thomas McKean, then a delegate

⁶³Ibid., p. 474.

⁶⁴Journals, XX, 724.

from Delaware.⁶⁵ Privately Johnson gave several other reasons for declining the office. In a letter to Governor Burke, he wrote that

having no prospect of being relieved or supplied with money for my expenses and my disorder, which abated a little on the first approach of warm weather, returning so as to render me of little use in Congress. . . .

Moreover, his youngest son had just died and he wished to return home to attend to family matters.⁶⁶

Thomas McKean's troubles revolved around the question of concentration of power in the hands of one man. While a delegate from Delaware, he was simultaneously Chief Justice of Pennsylvania. His election to the presidency caused a storm of protest from the Pennsylvania assembly who contended that if restrictions were not placed on office holding "some one man will at length arise too powerful to be resisted."⁶⁷ McKean countered by noting that his position in Congress was a function of his being a delegate from Delaware, not as an office holder in Pennsylvania, and that the assembly had no jurisdiction over this matter as it was the function of Pennsylvania Board of Censors to remedy any supposed wrong. McKean retired from the presidency in November, 1781 citing the fact that he had agreed to take the position with the stipulation that he would have to attend the Pennsylvania Supreme

⁶⁵Ibid., p. 733.

⁶⁶Quoted in Sanders, The Presidency of the Continental Congress, p. 21.

⁶⁷Ibid.

Court sometime in September or October. Since Congress was about to adjourn, he agreed to remain until that time in November.⁶⁸

In the seven years after its inception, seven men occupied the presidency of the Continental Congress. Geographically, three presidents were from the south and the remainder from the central and New England states. With respect to the term of office, there was no regularity, the shortest being five days and the longest two years and five months. The two individuals who resigned to become more involved with provincial matters, Randolph and Henry (under the ostensible excuse that his gout was bothering him),⁶⁹ apparently saw the chance for more prestigious involvement with state politics than national affairs. This was some indication of the prestige attached to the office. Others often showed a reluctance to assume its responsibilities, and no one actively and openly campaigned for the office, though Laurens used what little leverage he could muster with his resignation to try unsuccessfully to influence a congressional action.

One of the reasons men may have been reluctant to take on the responsibilities of the presidency was the fact that Congress was reluctant to cover their expenses. For example, on July 31, 1778 a committee of three was appointed "to direct and superintend an entertainment to be given by Congress for Ambassador Sieur Gerad." The report which followed recommended that

⁶⁸Ibid., p. 22.

⁶⁹See General W. H. Sumner, "Some Recollections of Washington's Visit to Boston," The New England Historical and Genealogical Register, XIV, 164-165 for an account of Hancock's use of illness for political purposes.

it will be necessary to the Reception of Ambassadors and other Foreigners of Importance, that the President of the Congress for the Time being should be allowed a House and Table at the Public Expense, and that a Master of the Ceremonies and the like

ought to be appointed. The report further recommended that the master of ceremonies be given a military rank, but this was crossed out in the final report.⁷⁰ Not until December of that year did Congress consider the report and then requested that the committee collect a record of expenses from the past presidents for reimbursement and voted to provide "a convenient furnished dwelling house . . . a table, carriage and servants at the public expense, for the President of Congress for the time being." Moreover, Congress voted that the President be provided at public expense with "a steward, who shall have the superintendence of the household of the President."⁷¹

In September, 1780 the question of the President's term was again raised. John Henry wanted "the rule laid down in the Articles of Confederation respecting the election of the President of Congress be henceforward (sic) observed," and so moved. Samuel Adams countered with a motion to delay which carried, with Maryland, Virginia, South Carolina, and Georgia voting against and New Jersey split. Then James Lovell moved that

the President having informed Congress that one year was elapsed since his election. Resolved, That no rule or practice of the house limits the term for which the President is elected.

⁷⁰Journals, XI, 733-734.

⁷¹Ibid., XII, 1222-1223.

This carried unanimously. With the parliamentary maneuvering out of the way to allow the incumbent a chance for re-election under the new rules, the Congress resolved "that the continuance of the President in office shall not be longer than one year from this day forth, and that all future elections shall be agreeable to the rule marked out by the Confederation."⁷² Thus, Samuel Huntington was the first president to serve under this change of rules as he was confirmed for another term of one year.

The executive role played by the President of Congress and the one played by the commander-in-chief provided an interesting contrast in the delegates' thinking about the organization of executive powers. On the state level, Americans were forced to fashion new governments to fill the vacuum created by the demise of the royal governments. Instead of discarding the old system altogether, they relied on reshaping familiar institutions to meet various problems as they arose. Only when it was clear that there would be no reconciliation between England and America did the colonists begin to create permanent institutions of government.

On the national level, however, there were no precedents aside from the ones created by the British empire. Moreover, few individuals in the early years of the Revolution were advocating a strong central government. In fact, one of the prevalent concerns of the delegates and the states they represented was to prevent the creation of an association

⁷²Ibid., XVIII, 869-871.

that might threaten the status of the individual states. Even John Adams echoed this sentiment when he said in January, 1776 that

We have heard much of a continental constitution; I see no occasion for any but a congress. Let that be made an equal and fair representative of the Colonies; and let its authority be confined to three cases,--war trade, and controversies between colony and colony.⁷³

Thus, Congress was given barely enough power to carry out its duties and was constantly asking for increased authority.

Furthermore, Congress jealously guarded what little power it had when it came to rationing it out to the various specialized committees created to carry out congressional policies. Robert Morris noted this in December, 1776 in a letter to the American delegation in Paris.

I will not enter into any detail of our conduct in Congress, but you may depend on this, that so long as that respectable body persist in the attempt to execute, as well as to deliberate on their business, it never will be done as it ought, and this has been urged many and many a time, by myself and others, but some of them do not like to part with power, or to pay others for doing what they cannot do themselves.⁷⁴

Given that frame of mind, it was not difficult to understand why Congress was reluctant to create an executive office with any significant powers other than to preside over meetings and represent Congress at diplomatic functions.

When it came to empowering the commander-in-chief, Congress was faced with a specific problem and realized that significant authority must be placed in one person. For example, on a matter of staffing,

⁷³Adams, Works, IV, 208.

⁷⁴Burnett, Letters, IV, 184.

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Congress was willing to let Washington's judgment stand. James Deane wrote to Washington that Congress was "determined not to weaken your Hands in a Branch that may be essentially injured by the Retirement of all the Gentlemen skilled in it."⁷⁵ When Washington recommended the establishment of a "Department of Inspector General" Congress, however, was wary of allowing that much power to slip out of its grasp. Duane again wrote to Washington as representative of the Committee of Conference which was the chief link between the commander-in-chief and Congress. He noted that Congress regarded this proposal as holding

up the Idea too strongly of separate departments which, as they have been conducted, imply an Independence of the Commander-in-Chief, and are in other respects productive of Inconvenience and Experience.⁷⁶

Thus, Congress was willing to grant power to Washington to conduct the war but wanted to keep his actions under close supervision, granting him as little control as possible over areas not immediately necessary to that objective. Yet in 1783 Congress took pains to clarify his authority by resolving

That the president inform General Washington, that Congress never intended by any commission hitherto granted by them, or by the establishment of any department whatever, to supersede or circumscribe the power of General Washington as the commander in chief of all the continental land forces within the United States.⁷⁷

⁷⁵Ibid., p. 22.

⁷⁶Ibid., p. 47.

⁷⁷Journals, VIII, 668.

By 1778 Congress' inability to raise sufficient funding for the war led to talk of creating a grand council to review public affairs.

Henry Laurens called for a council

composed of men renowned for Integrity and Abilities from each state assisted by the Commander-in-chief and a few selected General Officers to take under their consideration the state of the nation to sit either in or out of Congress (in the latter case to call upon Congress for every necessary information). . . .

He went on to express fear of the committee structure then in operation.

These Committees which we see rising every day are Epitomes of the work I have in mind, but however good their views and intentions may be their Authority is usurped and may become dangerous to the safety of the People.

The council Laurens proposed would act as a clearinghouse for a discussion of the problems in each state to the end that "from their representations wholesome coincident Laws would be enacted in each state, without which it will be impossible for Congress to proceed in the discharge of public business." This proposal grew partly out of a fear of the central government and partly out of the frustration of Congress' inability to "intimate to the States the necessity for passing such laws." The other point was Laurens' argument for need of the commander-in-chief to be involved in the council's deliberations. This indicated at least the embryonic notion that he ought to have a voice in policy-making rather than being just the instrument to carry out congressional war policies.

Since Washington's appointment as commander-in-chief was made in part to satisfy regional politics and cement together the tenuous

⁷⁸Burnett, Letters, pp. 298-299.

union of states, the question arises as to how much influence he had on development of American attitudes toward a national executive during the Revolution. As noted earlier, Washington was given a general grant of power as commander-in-chief to conduct the war effort. Two years later the military effort had deteriorated to the point where Congress was forced to give him a further extensive grant, which some members characterized as dictatorial though they went along with it out of necessity. John Hancock, then President of Congress, justified this by saying that

ever attentive to the Security of Civil Liberty, Congress would not have consented to Vesting such Powers in the Military Department as those, which the Inclosed Resolves convey to the Continental Commander-in-chief, if the Scituation (sic) of Publick Affairs did not Require at this Crisis a Decision and Vigour, which Distance and Numbers Deny to Assemblies far Remov'd from each other, and from the immediate Seat of War.⁷⁹

This special authority granted to Washington was to last for six months only. It included the power to raise troops and supplies, but more important than the military authority was his power to arrest and confine persons who refused to receive the continental currency or who were otherwise disaffected with the American cause for trial in states where they were citizens. This authorized Washington to become a virtual dictator.

Congress noted in the preamble to the resolution, however, that the powers they granted were in consequence of a perfect reliance on his wisdom, vigor, and uprightness. Washington did not disappoint Congress in his use of that authority. As in all other cases where

⁷⁹Journals, VI, 1053.

power and authority was delegated to him, he was careful to exercise it no further than to accomplish the end for which it had been granted.

As the committee who conveyed these new powers to Washington noted:

We find by these resolves your Excellencys hands will be strengthened with very ample powers . . . [and] happy it is for this Country that the General of their Forces can safely be entrusted with the most unlimited Power and neither personal security, liberty or property be in the least degree endangered thereby. . . .⁸⁰

Washington himself was very reluctant to exercise the full military power granted to him. In 1777 he wrote to the President of Congress:

I confess I have felt myself greatly embarrassed with respect to a vigorous exercise of military power. An ill-placed humanity, perhaps, and a reluctance to give distress, may have restrained me too far; but these were not all. I have been well aware of the prevalent jealousy of military power, and that this has been considered as an evil much to be apprehended, even by the best and most sensible among us. Under this idea, I have been cautious, and wished to avoid as much as possible any act that might increase it.

He went on to assure Congress

that no exertions of mine, as far as circumstances will admit, shall be wanting to provide our own groups with supplies on the one hand, and to prevent the enemy from getting them on the other.

He then lamented the failure of the state to act with dispatch in granting the army necessary supplies ascribing it to the peoples' fear of the military. "The people at large are governed much by custom," he wrote.

To acts of legislation or civil authority they have ever been taught to yield a willing obedience, without reasoning about their propriety; on those of military power, whether immediate

⁸⁰Burnett, Letters, II, 198.

or derived originally from another source, they have ever looked with a jealous or suspicious eye.⁸¹

Thus, Washington was fully aware of the power and responsibility placed in him and acted in a manner to raise as little suspicion as possible.

Washington was not without his critics. The Conway affair was probably the most famous of the attacks on his position as commander-in-chief. General Conway and his friends on the newly created Board of War sought to undermine and discredit Washington through a series of letters circulated among members of Congress and the military. Once Washington found out about the cabal he wrote the President of Congress to request a full investigation of the charges, saying: "I would not desire in the least degree to suppress a free spirit of inquiry into any party (sic) of my conduct." Further, he declared

my enemies take an ungenerous advantage of me. They know the delicacy of my situation, and that motives of policy deprive me of the defense I might otherwise make against their insidious attacks. They know I cannot combat their insinuations, however injurious, without disclosing secrets, which it is of the utmost moment to conceal.⁸²

Fortunately for Washington, when the conspiracy was made public it soon dissipated.

In 1778 Washington's proposal for recruitment of officers at half pay for life encountered heavy opposition from congressional members who were extremely fearful of the military. Washington lobbied

⁸¹Washington to Congress, December 15, 1777, reprinted in Sparks, Life of Washington, p. 243.

⁸²Washington to Congress, January 31, 1778, Ibid., p. 253.

hard for this plan and in a letter to a member expressed his thoughts on the relationship between the military and civilian authority. He wrote that

if we would pursue a right system of policy there should be none of the distinctions. We should all, Congress and the army, be considered as one people, embarked in one cause, in one interest; acting on the same principle, and to the same end. The distinction, the jealousies . . . are impolitic in the extreme. . . . The very jealousy, which the narrow politics of some may effect to entertain of the army, in order to a due subordination to the supreme civil authority, is a likely means to produce a contrary effect; to incline it to the pursuit of those measures, which they may wish it to avoid. It is unjust, because no order of men in the Thirteen States has paid a more sacred regard to the proceedings of Congress than the army; for without arrogance of the smallest deviation from truth it may be said, that no history now extant can furnish an instance of an army's suffering such uncommon hardships as ours ⁸³ had done, and bearing them with the same patience and fortitude.

By December of that year, Washington was expressing concern over the collapse of the civil authority of the central government. In a letter to Benjamin Harrison, he wrote that the

States, separately, are too much engaged in their local concerns, and have too many of their ablest men withdrawn from the general council, for the good of the common weal. In a word, I think our political system may be compared to the mechanism of a clock, and that we should derive a lesson from it; for it answers no good purpose to keep the smaller wheels in order, if the greater one, which is the support and prime mover of the whole, is neglected.

He went on to note the failure of the states to speedily frame constitutions, provide laws, and fill state offices with their ablest minds.

⁸³Washington to Congress, 1778, cited by Sparks, p. 262.

He then concluded that "if the great whole is mismanaged, the states . . . must sink in the general wreck."⁸⁴

For the next three years Washington continued to press for a strengthened central government, fearing an imminent collapse of the war effort if Congress could not raise troops and supplies. In February, 1781 he wrote that

the great business of war can never be well constructed, if it can be conducted at all, while the powers of Congress are only recommendatory. While one State yields obedience, and another refuses it, while a third mutilates and adopts the measure in part only, and all vary in time and manner, it is scarcely possible that our affairs should prosper or that anything but disappointment can follow the best concerted plan.

He went on to note the continued American mistrust of a central government.

The fear of giving sufficient powers to Congress, for the [military] purposes I have mentioned, is futile. A nominal head, which at present is but another name for Congress, will no longer do. That honorable body, after hearing the interest and views of the several States fairly discussed and explained by their representatives, must dictate, and not merely recommend and leave it to the States to do afterwards as they please, which, as I have observed before, is in many cases to do nothing at all.⁸⁵

Even as the war ended, Washington continued to push for a stronger central government, an idea he wrote about with increased frequency to the eve of the Constitutional Convention in 1787.

In the period from the First Continental Congress to the final adoption of the Articles of Confederation in 1781, what can be said

⁸⁴Washington to Benjamin Harrison, December 13, reprinted, *Ibid.*, p. 286.

⁸⁵February 23, 1781, cited by Sparks, *Ibid.*, p 324.

about the American conceptions of executive power on a national scale? The Congress, as the body charged with the formulation and execution of continental policy, was extremely inefficient in its operation. As previously noted, Americans were fearful of any central government which might threaten their liberties. The states therefore empowered their delegates to enact only measures which affected the continent as a whole. For example, Congress declared independence, made war, formed treaties, sent ministers to foreign courts, created paper currency and pledged credit to support it, and on several occasions, conferred dictatorial powers on the commander-in-chief. On the other hand, Congress only recommended to the states that they raise troops, levy taxes, send supplies to the army, and enact and execute laws for the purpose of carrying on internal government. In these areas, Congress and the commander-in-chief were at the mercy of the states.

In the execution of its policies Congress reluctantly chose to delegate only limited power to special committees to meet individual problems as they arose. In the initial stages, this can be explained by the fact that for over two years the question of independence had not been settled. Even after the Declaration of Independence had been approved, there were those who thought some reconciliation might be reached with England. As such, it would serve no purpose to establish a national constitution and create a whole new government. Committees would be sufficient to handle the problems as they arose.

Once it became evident that there would be no reconciliation with England, Americans were still reluctant to create a permanent

national government as evidenced by the debate over, and the length of time it took to ratify, the Articles of Confederation. Internally, Congress was even more reluctant to give up any of its power to committees fearing they might usurp their delegated powers and pose a threat to Congress and the states. However, in the seven years since the First Continental Congress a growing number of Individuals came to the conclusion that Congress had to be restructured internally for it to effectively carry out its policies. This led to the development of permanent standing committees who were charged with the execution of policy in their respective areas. Eventually these executive committees were staffed with non-members of Congress charged exclusively with administrative responsibilities. These committees carried on the executive functions of Congress until the establishment of the new government under the Constitution of 1787 where they ultimately became part of the President's cabinet.

The President of Congress functioned primarily to preside over its sessions and receive foreign ambassadors. Moreover, he became the conduit through which much of the congressional correspondence flowed to both state executives and American foreign agents. His power was rarely more than the combination of his personal influence, the authority granted to the presiding officer, and the influence he chose to exercise over policy via his housekeeping chores as spokesman for Congress and as its chief correspondent and diplomatic representative. His term in office was indefinite until Congress adopted the year limit proposed in the Articles of Confederation. In short, the importance of this office in the period prior to the adoption of the Constitution of

1787 was to centralize in one person the function of acting as a spokesman for Congress.

The important office for the development of American executive theory in this period was the commander-in-chief. Here the weaknesses of Congress acted to strengthen Washington's role. Since Congress could not compel state compliance with its quotas for troops and supplies, Washington was forced to intercede. In doing so, he developed a significant line of communication with all levels of government acting as both a clearing house for information and as a central executive agent coordinating and directing the whole operation. Moreover, he provided the link between the military organization and civilian government which additionally involved him in shipping and various other commercial matters connected with naval operations. Had Congress been more effectively organized in all probability Washington's role might have been confined to just military matters. As it was, it fell to Washington to become the vital connecting link to keep the various elements together. Washington was ideally suited to such a role given his ability to handle a wide range of complex problems, his sensitivity to American fears of the military, and his refusal to abuse or to go beyond the powers granted to him even though at times they were virtually dictatorial in nature. In short, this period was in a sense a training mission for both Washington and the nation on the necessity of a well-organized and empowered executive. However, neither Congress nor the nation was ready for such a step except in the area of military affairs.

The adoption of the Articles of Confederation marked the transition of the central government from an advisory body to the states

into the early semblance of a true national government. The Articles prescribed the union and defined the powers Congress could exercise. It was not a sharp break with the past since Congress had generally confined itself within the limits outlined when the proposal was first presented to the states for ratification five years earlier. The designation for the new body was "The United States in Congress Assembled" with its membership the same as those elected in the last election. There was no significant change in the organizational structure. Even the President remained the same since the length of his term had been fixed at one year within a three-year period prior to the final adoption of the Articles.

The Articles of Confederation provided for a committee of states to sit during the recess of Congress and act as an executive head. This committee was made up of one delegate from each state and was authorized

to execute . . . such of the powers of congress as the united states in congress assembled, by the consent of nine states, shall from time to time think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the articles of confederation,⁸⁶ the voice of nine states in the congress . . . is requisite.

Thus, the Articles strictly adhered to the policy that on the national level civilian executive power was to be exercised only by committee.

Few individuals were satisfied with the government outlined by the Articles. An increasing number of the delegates were calling

⁸⁶Articles of Confederation, reprinted in Documents Illustrative of the Formation of the Union of the American States, Charles Tansill, ed. (Washington, D.C., 1927), p. 33.

for a stronger government or at least increased power for Congress. In April, 1781 James M. Varnum proposed calling a constitutional convention. He argued that the object of their deliberation ought to be a revision of the Articles to form the "kind of Government sufficiently energetic to obtain the Objects of Peace when free from invasion." To accomplish this, the delegates ought not be "composed of Members of Congress, especially those whose political Sentiments have become interwoven with their Habits, from a long Train of thinking in the same way." Once assembled, they ought "to define the aggregate powers of the United States in Congress assembled; fix the Executive Department, and ascertain their Authorities." Varnum proposed that the convention's power include even the right to ratify the document they drew up, but only if the system "should expire at a given or limited Time."⁸⁷

These sentiments were voiced by numerous other individuals in Congress who saw that Congress must have coercive power over the states. Others who saw the same need questioned the wisdom of trying to increase the power of Congress so soon after the adoption of the Articles. Thomas Burke noted that such an attempt "not expressly given by that Charter . . . would give a dreadfull alarm to their Constituents who are so jealous of their Liberty."⁸⁸ Joseph Jones wrote that "such a Recommendation coming from Congress wo[ul]d excite fears in the States, that there was a disposition in Congress to grasp dangerous powers."⁸⁹

⁸⁷Burnett, Letters, VI, 42.

⁸⁸Cited by Burnett, The Continental Congress, p. 505.

⁸⁹Burnett, Letters, VI, 58.

It would finally take six years for a significant number of individuals to successfully gain the necessary support for such a move, and then only after a number of failures.

CHAPTER VI

THE REVOLUTIONARY GOVERNOR:

A Transitional Executive In Crisis

The transition from the colonial era to the early state governments was fraught with uncertainty. For the first time Americans were faced with having to create their own constitutions. In most states, the executive power was for the first time exclusively in the hands of the Americans. The writers of the state constitutions were therefore forced to experiment with a variety of constitutional arrangements derived from the colonial experience. This chapter examines that transition with special attention to the framing of the Massachusetts constitutions of 1778 and 1780 as examples of the political theories discussed in the revolutionary period.

During the early years of Revolution, the states underwent the transition from temporary to permanent governments. As noted previously, the committees of correspondence and safety fulfilled most, if not all, of the executive responsibilities of the provincial congresses which were established to carry out the functions of government in the last months of the colonial governments. On May 5, 1775, the Massachusetts Provincial Congress refused to acknowledge the authority of General Gage as governor and turned to the Second Continental Congress to seek direction on the establishment of civil government. Congress

was reluctant to advise anything more than a temporary expediency, however, since a major remodeling of the constitution was too irrevocable a measure when a reconciliation with England might still be made. Congress finally urged Massachusetts to elect a new House of Representatives which would select a new council to exercise the power of government until "a Governor, of his Majesty's appointment, will consent to govern the colony according to its charter."¹

On October 18, 1775, Congress received a similar request from New Hampshire, and recommended that the people call a convention to establish, if they thought necessary,

such a form of government, as in their judgment, will best produce the happiness of the people, and most effectually secure the peace and good order in the province, during the continuance of the present dispute between G[reat] Britain and the colonies.²

Later the same language was used in response to a request from South Carolina. By November, 1775 it was evident to Congress that the provincial governments had to be put on a firm foundation until it was clear what course the dispute with England might take.

John Adams later recalled in his autobiography the various questions discussed by the Americans during these initial stages of constitution making. One of the key areas was the executive power. He noted that

Kings we never had among us. Nobles we never had. Nothing hereditary ever existed in the country; nor will the country

¹Journals of the Continental Congress, II, 83-84.

²Ibid., III, 319.

require or admit of any such thing. But governors and councils we have always had, as well as representatives. A legislature in three branches ought to be preserved, and independent judges.

He went on to answer the query "where and how will you get your governors and councils?" By election, he replied. "How,--who shall elect?" He responded that "the representatives of the people in a convention will be the best qualified to contrive a mode." He then concluded:

I knew that every one of my friends, and all those who were the most zealous for assuming governments, had at that time no idea of any other government but a contemptible legislature in one assembly, with committees for executive magistrates and judges.

For their edification he put together his Thoughts on Government.³

Adams' pamphlet outlined a government based on a well-ordered division of powers aligned to prevent any branch from usurping or abusing its authority. His fundamental premise was that the best form of government was republican in nature which he defined as "an empire of laws, and not of men." The best of all republics was one "contrived to secure an impartial and exact execution of the laws." If good government was based on laws, by what means ought the laws to be made and administered? He prescribed an assembly which was "in miniature an exact portrait of the people at large." Moreover, he wrote, "a people cannot be long free, nor ever happy, whose government is in one assembly." He therefore proposed two branches of the legislature because

if the legislative power is wholly in one assembly, and the executive in another, or in a single person, these two powers will oppose and encroach upon each other, until the contest shall end in war, and the whole power, legislative and executive, be usurped by the strongest.

³Adams, Works, III, 19-23.

There should be a mediator between these two powers, a council or senate which ought to be independent from the assembly and be vested with a negative over legislation. These two bodies ought then to unite to elect a governor "who, after being stripped of most of these badges of domination, should have a free and independent exercise of his judgment, and be made also an integral part of the legislature."⁴

Adams was aware that the proposal for the executive would be "liable to objections." Nevertheless, he continued,

if you please, you may make him only president of the council, as in Connecticut. But as the governor is to be invested with the executive power, with the consent of council, I think he ought to have a negative upon the legislature. If he is annually elected, as he ought to be, he will always have so much reverence and affection for the people, their representatives and counsellors, that, although you give him an independent exercise of his judgment, he will seldom use it in opposition to the two houses, except in cases the public utility of which would be conspicuous; and some such cases would happen.⁵

The key to protecting the people from despotic executive officers was their annual election. Adams cited the maxim that "'where annual elections end, there slavery begins.'" Moreover, annual election will teach these men "the great political virtues of humility, patience, and moderation, without which every man in power becomes a ravenous beast of prey."⁶

⁴Ibid., pp. 194-196.

⁵Ibid., p. 197.

⁶Ibid.

Adams realized that this was an experimental period as Americans tried to find a workable formulation of governmental powers. He concluded that the election of the executive offices

will answer very well for the present; but if by experiment it should be found inconvenient, the legislature may, at its leisure, devise other methods of creating, by elections of the people at large . . . or it may enlarge the term for which they shall be chosen to seven years, or for life, or make any other alterations, which the society shall find productive of its ease, its safety, its freedom, or in one word, its happiness.⁷

The provisions Adams sought for the Massachusetts executive would have given him command of the militia, a limited veto, and some opportunity for "a free and independent exercise of his judgment." He would also have a small privy council for advising and sharing the appointing and pardoning powers.⁸

Over all, Adams viewed the executive as the best counter-balance to the assembly. To carry out this function required that he possess sufficient powers to check the assembly and protect himself from legislative domination. Moreover, he was to serve as the public spokesman to protect the general welfare against the appeals of special interests. This strong executive could be made safe by annual election and by placing a limit on the number of years any one person could serve. Thus, for Adams a strong executive became a fundamental principle to a well-written constitution.⁹

⁷Ibid.

⁸Ibid., p. 200.

⁹See John R. Howe, Jr., The Changing Political Thought of John Adams (Princeton, 1966), pp. 93-98.

Another pamphlet which appeared about the time that Adams' did was one entitled The PEOPLE The Best GOVERNORS: Or A PLAN Of GOVERNMENT Founded On The Just PRINCIPLES Of Natural FREEDOM. The author's purpose was to "help in some measure to eradicate the notion of arbitrary power, heretofore drank in, and to establish the liberties of the people of this country upon a more generous footing." He based his theory on the principle that "the people best know their own wants and necessities, and therefore are best able to rule themselves." He went on to argue that the

just power of a free people respects first the making and secondly the executing of laws. The liberties of a people are chiefly, I may say entirely guarded by having the controul (sic) of these two branches in their own hands.¹⁰

After discussing the theory of representative democracy, the author turned to answering questions about the construction of the executive branch. He opposed the notion that the legislative representatives were more qualified to select the executive officers than the people. If the legislators were to do so they might "assume to themselves a lasting, unlimited power" since they would combine the supreme legislative authority with a power to control the executive branch through appointments. Moreover, he said, if the people can choose good legislators why can they not choose good executive officers? It was, he pointed out, "much easier to execute, than to make or regulate the system of laws." Therefore, he concluded, "the more simple, and the

¹⁰Pamphlet reprinted in Frederick Chase, A History of Dartmouth College (Cambridge, 1891), I, 655.

more immediately dependent . . . the authority is upon the people the better, because it must be granted that they themselves are the best guardians of their own liberties."¹¹

The author further argued that if there was to be a "negative power over those who enact the law" it could be derived from the legislature. When the people give the power to legislate to the representatives they do not authorize them to give it to any one else. "Therefore, . . . for the representatives to appoint a council with a negative authority, is to give away . . . that power, which they have no right to do, because they themselves derived it from the people." Moreover, he contended a negative in the legislature was

a palpable contradiction. . . . For this negative power, if it cannot be called legislative, has at least such weight in the legislature as to be the unlimited sine qua non (a restraining power). Those therefore who act as a council or negative body make use of a power in the room of the people, and consequently represent them so far as their power extends.

In short, "to say that the legislative body can appoint them is as absurd as to say that the representatives have a right to appoint the representatives of the people."¹²

Once the author concluded his discussion of the theory of the legislative and executive authority, he turned to a practical framework of government. He cautioned that "A government is not founded for a day or a year, and for that very reason should be erected upon some invariable principles." Moreover,

¹¹Ibid., p. 656.

¹²Ibid.

Now is the time for the people to be critical in establishing a plan of government, For they are now planting a seed which will arise with boughs, either extended to shelter the liberty of succeeding ages, or only to skreen (sic) the designs of crafty usurpers.¹³

He recommended that the executive be elected annually, "without any concern in the legislature." His function was

to transact such occasional business as the assembly may devolve upon him; And he may be the general commander of the militia, and in these capacities the people, if they please, may stile (sic) him a governor--and in case of his incapacity a lieutenant, &c., may be appointed as before, to act occasionally in his stead.¹⁴

The governor with the advice of "any three of his council" could call a special assembly in emergencies. Officers of government could not hold more than one office at a time and had to take a religious oath. Any freeman could lodge a complaint against any officer of government and if twelve members of the "assembly think there is just grounds for the said complaint, they may suspend the person so complained of in his office, appoint another for the present in his stead." Any officer so removed was subject to punishment by the courts.¹⁵

The author concluded his discussion by noting that "the forms of government that have hitherto been proposed since the breach with Great Britain, by the friends of the American States, have been rather too arbitrary." His proposal was directed at securing "the liberties of former ages . . . [by keeping] a just notion of them [which] has

¹³Ibid., p. 660.

¹⁴Ibid.

¹⁵Ibid., p. 662.

guarded the people against the sly insinuations and proposals of these of a more arbitrary turn, whose schemes have a tendency to deprive mankind of their natural rights."¹⁶

Most authors of the pamphlets which discussed governmental theory agreed that power in the hands of any one individual or group without checks was dangerous. Moreover, they found little agreement over how best to construct the executive in the state constitutions. Opposed to Adams strong executive was Thomas Paine's argument that "Assemblies" ought to "be annual, with a President only."¹⁷ Massachusetts was to go without a governor for five years, which led one writer to advocate that it not establish one in the proposed constitution of 1780, but leave the executive power in the hands of the council. An anonymous Virginia pamphleteer advocated that the governor be appointed for life, made independent of the legislative and judiciary branches, and be given a wide range of administrative authority.¹⁸

In spite of the extensive political discussion that took place in the last years before independence, most of the new state constitutions were written with considerable haste in a time of crisis. This led to many difficulties when the governments attempted to operate under them once they had been ratified. Most political writers could agree upon a few fundamental principles, but the problem came when they

¹⁶ Ibid., pp. 662-663.

¹⁷ Thomas Paine, Common Sense, reprinted in Peter Force, American Archives, 4th ser., IV, 1555.

¹⁸ Force, American Archives, 4th ser., VI, 730-732.

tried to construct the specific provisions of a constitution to carry them out. One such example was the state of Massachusetts, which was a leader in establishing a temporary or provisional government before the break with England.

Shortly after the provisional government of Massachusetts had been established, it came under attack from dissatisfied citizens. A petition from the town of Pittsfield complained, among other things, about "the dangerous Effects of nominating to office by those in power." In their opinion this was the "most defective discordant & ruinous System of Government of any that has come under our Observation." Moreover,

The Government of our respective Committees is lenient & efficacious. But if it is necessary for the carrying into more effectual Execution the means of our Common safety that some Mode of government should be adopted we pray it may be one De nove agreeable to that formentioned Advice of the Continental Congress & no more of our ancient form be retained than what is Just & reasonable.¹⁹

Those supporting the provisional government sought to show how this was different in its operation than it had been under the Crown, specifically in the combination of executive and legislative branches. An article which appeared in the Massachusetts Spy on May 18, 1776 outlined the arguments. The significant point the author noted was that under the old system the citizens had "the misfortune of placing our confidence in men of weak and contracted minds, in men of sordid and selfish spirits, in cursing and designing men and in pretending patriots." With the new elections the citizens had the "opportunity . . . to

¹⁹ Reprinted in The Popular Sources of Political Authority, Oscar and Mary F. Handlin, eds. (Cambridge, 1966), pp. 63-64.

delegate the powers of government to those, and to those only, who will act upon the genuine, the unadulterated principles of the constitution" and who will "promote the greatest happiness of the greatest numbers."²⁰

From the adoption of the Declaration of Independence to the rejection of the Massachusetts constitution of 1778, frequent discussions took place in that state on the formulation of government. Many agreed with the citizens of Boston who instructed their Representatives that it was

essential to Liberty that the legislative, judicial & executive Powers of Government be, as nearly as possible, independent of & separate from each other; for where they are united in the same Persons, there will be wanting that natural Check, which is the principal Security against the enacting of arbitrary Laws, and a want on Exercise of Power in the Execution of them.²¹

Few, however, voted as the town of Ashfield did. They noted

that it is our Opinion that we Do not want any Goviner (sic) but the Goviner of the univarse (sic), and under him a States Ginerall (sic) to Consult with the wrest (sic) of the united Stats (sic) for the Good of the whole.²²

The proposed constitution of 1778 provided for a general court divided into a House of Representatives and Senate with a governor and lieutenant-governor, both of whom had a seat in the Senate. The qualifications of the governor and his lieutenant were a five-year residency prior to their selection and an estate valued at one thousand pounds,

²⁰ Reprinted in Massachusetts, Colony to Commonwealth, Documents on the Formation of its Constitution, 1775-1780, Robert J. Taylor, ed. (Williamsburg, Virginia, 1961), p. 30.

²¹ Handlin, ed., Political Authority, p. 95.

²² Ibid., p. 111.

of which five hundred had to be in Massachusetts real estate. For the lieutenant governor it was five hundred pounds, half of which was to be in real estate. This compared with the requirement for representatives of two hundred pounds, half in land in the town he represented. Any citizen who possessed sixty pounds was entitled to vote for the executive offices and senators. The executive officers also had to be of the protestant faith.²³

The responsibilities of the governor included those of commander-in-chief of the army and navy and certain enumerated duties. He had the authority, with the advice of the Senate, to recess or prorogue the general court "not exceeding forty days in any one recess of said Court." Except for all "civil officers annually chosen, with salaries annually granted for their services," who were chosen by the general Court, the governor and Senate appointed all others. The governor and his lieutenant plus the speaker of the house, or any two of them, had the authority of granting pardons "for the time being."

The governor had no negative "in any matter pointed out by this Constitution to be done by the Governor and the Senate, but shall have an equal voice with any Senator, on any question before them." On the question of impeachment, the "executive officers and the Senate comprised the court of impeachment unless any one of them was impeached." Moreover, the power to impeach all officers for "malconduct in their respective offices, shall be vested in the House of Representatives."

²³Ibid., p. 192.

The remainder of the impeachment clause read very much like the one adopted in the Federal Constitution of 1787.²⁴

When the Constitution was presented for public consideration, it was voted down for a variety of reasons. In the process of considering the Constitution many towns provided a detailed analysis of the provisions they objected to the most. These comments offer an interesting index to American thinking about executive theory on the state level.

One of the most frequently mentioned objections was to the property requirements both for voting and holding executive offices. The town of Lennox thought it was a violation of the articles governing the national union which guaranteed that all free citizens "shall be intitled (sic) to all privileges and immunities of Free Citizens."²⁵ The town of Mendon argued that it was unfair to be governed by laws created by persons who some might be denied having the right to vote on.²⁶ Others thought the property requirement for the executive offices so low as to be meaningless. In short, few towns were satisfied with any of the property requirements.

Mendon was adamantly opposed to the proposed governors' military powers. Specifically, they objected to his power to "Imbody the Militia." A governor who was "Enemical (sic) to the people" might march the troops to the opposite end of the state from where the enemy was attacking. They cited the case where the "Publick Stoars (sic) Seized

²⁴ Ibid., pp. 197-201.

²⁵ Ibid., p. 254.

²⁶ Ibid., p. 267.

in the Year 1774" resulted from the people's failure to take them before the governor did since he could "Remove them at his pleasure." They **therefore** wanted the governor to be denied the power to "Imbody (sic) the **Militia**" without the approval of the legislature. This was a clear case of fear of the executive power based on colonial experience. This was by no means the case with other towns.²⁷

By far one of the most sophisticated analyses of executive power in the whole revolutionary area was the study contained in the **Essex Result**, a report from twelve out of the twenty-one towns in that county. They voted eighteen objections to the Constitution, five of which **were** in reference to the executive. Most objectionable was the failure of the Constitution to sufficiently separate the executive and legislative powers. In their third objection, they argued that the executive ought not to have "any share or voice in the legislative power in framing the laws." They also objected to the seventeenth and twenty-second articles on the same grounds, which made the governor president of the Senate and gave him veto power as a member of the Senate in addition to his executive veto. The twentieth article evoked protest because **the** governor was required to be a member of the impeachment court. **The** twenty-third article was objectionable because it did not vest the pardoning authority "solely . . . in the supreme executive power of the **State**."²⁸

²⁷Ibid.

²⁸Ibid., pp. 324-326.

Once they had voted their objections, they formed a committee to "attempt the ascertaining of the true principles of government . . . and to delineate the general outlines of a constitution conformable thereto." In their analysis of executive power, they noted that it was "sometimes divided into external, and internal executive." The former deals with "whatever concerns the transactions of the state with any other independent state." In this case the national government "hath lopped off this branch of the executive, and placed it in Congress."

The internal executive power concerns

the peace, security and protection of the subject and his property, and the defense of the state. The executive power is to marshal and command her militia and armies for her defense, to enforce the law, and to carry into execution all the orders of the legislative powers.

That being the case, it was clear to them that these powers "ought to be in different hands, and independent of one another, and so ballanced, (sic) and each having that check upon the other, that their independence shall be preserved." If these powers are in the same branch "the government will be absolute, whether these powers are in the hands of one or a large number." Moreover, if these powers were united, "mischiefs the most terrible would follow." The executive "would enact those laws it pleased to execute, and no others" and it would set aside the judiciary "as inconvenient and tardy" which would end the protection of citizens and make the executive "absolute, and the government [would] end in tyranny." If the executive and judiciary were united

the subject would then have no permanent security of his person and property. The executive power would interpret the laws and bend them to his will; and, as he is the judge,

he may leap over them by artful constructions, and gratify, with impunity, the most rapacious passions.²⁹

The committee concluded that any new constitution ought to be based on certain general principles of organization. Among these included the notion that the supreme power was limited; that is, it cannot violate the natural and inalienable rights of mankind; that the three powers of government were

to be lodged in different hands, that each branch is to be independent, and further, to be balanced, and be able to exert such checks upon the others, as will preserve it from a dependence on, or a union with them,

and finally, the government "can exert the greatest power when its supreme authority is vested in the hands of one or a few." The rest of the principles referred to the legislative powers.³⁰

Once they had agreed to these general principles of government, the Essex Result discussed the specific principles needed to establish each branch. With respect to the executive, they argued that

it ought to be conducted with vigour and dispatch. It should be able to execute the laws without opposition, and to controul all the turbulent spirits in the state, who should infringe [on] them. If the laws are not obeyed, the legislative power is vain, and the judicial is mere pagentry. . . . The executive power ought therefore . . . be exerted with union, vigour, and dispatch.³¹

The military aspect of the executive was also significant, they argued. "In this department, union, vigour, secrecy, and dispatch are more peculiarly necessary." Therefore, to protect the citizens from

²⁹Ibid., pp. 332, 337-338.

³⁰Ibid., pp. 339-340.

³¹Ibid., p. 344.

abuse "the armies should always be composed of the militia or [a] body [of] the people [since] standing armies are a tremendous curse to a state." Moreover, the executive ought to have the power to appoint and promote officers because "if it is in his power immediately to promote or disgrace them, they will be induced to noble exertions." If the legislature retains this power it would be an "undue influence over the executive which will amount to a controul (sic) for the latter will be *their* creatures, and will fear their creators." Furthermore, legislators *would* be more prone to appoint their friends but if this power was kept *in the* hands of a small number of individuals, as with the management of a department,

their conduct is accurately noticed. On any miscarriage of imprudence the public resentment lies with weight. All the eyes of the people are converted to a point, and produce that attention to their censure, and that fear of misbehaviour, which are the greatest security the state can have, of the wisdom and prudence of its servants.

Therefore the "supreme executive power should be vested in the hands of one or of a small number, who should have the appointment of all subordinate executive officers." However, "should the supreme executive officer be elected by the legislative body, there would be a dependence of the executive power upon the legislature." The same was true "should he be elected by the judicial body." They concluded that the people at large must

designate the person, to whom they will delegate this power. And upon the people, there ought to be a dependence of all the powers in government, for all the officers in the state are but the servants of the people.³²

³²Ibid., pp. 345-346.

After discussing the requirements for the executive officers and their method of election, which they opposed, they went on to discuss the governor's powers. They opposed the combined power of the governor and Senate to hear impeachments as being unwise. Moreover, they failed to find any power of the governor which might be used to prevent the executive from legislative encroachment. "Without this check the legislative power will exercise the executive, and in a series of years the government will be as absolute as that of Holland."³³

In short, the Essex Result provides an interesting summary of ideas on executive power a full decade before the adoption of the Federal Constitution. Many of the ideas and concerns expressed denote an understanding of the issues which were vigorously argued during the debates in the framing of that document. Especially noteworthy was the need to have sufficient power in the executive branch for both carrying out its duties and protecting itself from encroachments by the legislative department. Also significant was the concern expressed for the separation and balancing of the various departments. In the final analysis this document provides an interesting counter to the argument that the Americans during the Revolution were so fearful of executive power that they were willing to strip it to the basic minimum necessary for carrying out government.

Even though the Constitution of 1778 was rejected by the people, the demand for a legitimately constituted government did not subside. Most counties were willing to wait for developments, but a determined

³³Ibid., p. 351.

number of constitutionalists were insistent on adopting a document which firmly grounded the government in the people. The statement adopted by the town of Worcester probably represents the majority opinion of those calling for a new constitution. They noted that it was necessary for the people to take up a temporary government in the crisis atmosphere in the last days of the royal government.

But when we had repelled the fatal blow . . . to those in power that were endeavoring our destruction, and; agreeable to the recommendation of the Continental Congress, assumed the forms and execution of legislative, and executive government the reason and necessity of the [county] Conventions, to advise the general court ceased. . . . At this day, it appears to us, they can do no good, but may be productive of great and lasting mischief and for Committees to take to themselves such power is, we conseive (sic), without the line of their duty; they are made by the Law, and the Law has limited and defined their power and jurisdiction, every step beyond which is an illegal arrogation.

Recalling the reason for their rebellion against England which was not against the laws, "then in being . . . but the executors of the laws, who instead of using them for the end they were designed, prostituted them to flaginous purposes." However, the executive authority was now deposited in "those that have the confidence of the people [and they were] men of virtue and knowledge, whose doings and decisions meet with universal approbation." They then called for obedience to the general court, as opposed to the staunch opposition of the town of Pittsfield, until a new constitution could be framed. This document reaffirms the notion that they were not afraid of executive power when properly made responsible to the people.³⁴

³⁴Ibid., pp. 369-373.

When the new convention was finally called to write the constitution, there were relatively few instructions given the respective delegates regarding the composition of the executive power. Pittsfield cautioned against giving the governor and Senate any veto power over acts of the general court.³⁵ Other towns wanted frequent elections with Williamston calling for popular election of all civil and military offices. Dudley wanted no salary attached to the governor's office.³⁶ Several towns emphatically demanded a total separation of the branches with Williamston suggesting that all branches be given the minimum power necessary to protect the security, safety, and happiness of the inhabitants.

After seven months' work, the convention presented the proposed Constitution before the people on March 2, 1780. In the convention's address to their constituents they noted that

a government without Power to exert itself, is at best, but a useless Piece of Machinery. It is probable, that for the want of Energy, it would speedily lose even the Appearance of Government, and sink into Anarchy. Unless a due Proportion of Weight is given to each of the Powers of Government, there will soon be a Confusion of the whole. . . . The Powers of Government must then be balanced: To do this accurately requires the highest Skill in political Architecture. Those who are to be invested with the Administration, should have such Powers given to them, as are requisite to render them useful in their respective Places; and such checks should be added to every Branch of Power as may be sufficient to prevent its becoming formidable and injurious to the Commonwealth.³⁷

³⁵Ibid., p. 411.

³⁶Ibid., p. 415.

³⁷Ibid., pp. 435-436.

The convention report pointed out that the office of the governor was "emphatically the Representative of the whole People, being chosen not by one Town or County, but by the People at large." Therefore they thought it safest to rest the executive power in his hands, and

as the Safety of the Commonwealth requires, that there should be one Commander in Chief over the Militia, we have given the Governor that Command for the same reason, that we thought him the only proper Person that could be trusted with the power of revising the Bills and Resolves of the General Assembly; but the People may if they please choose their own Officers.

To prevent the governor from abusing the power

which is necessary to be put into his hands, we have provided that he shall have a Council to advise him at all Times and upon all important Occasions, and he with the advice of his Council is to have the Appointment of Civil Officers . . . for if those Officers who are to interpret and execute the Laws are to be dependent upon the Election of the people, it must forever keep them under the Control of ambitious, artful, and interested men, who can obtain most Votes for them.--If they were to be Appointed by the Two Houses or either of them, the persons appointing them would be too numerous to be accountable for putting weak or wicked Men into Office. Beside the House is designed as the Grand Inquest of the Commonwealth, and are to impeach Officers for malconduct; the Senate are to try the Merits of such impeachments; it would be therefore unfit that they should have the Creation of those Officers . . . but we conceive there is the greatest propriety in vesting the Governor with this Power, he being, as we have before observed, the complete representative of all the People, and at all Times liable to be impeached by the House before the Senate for maladministration. And we would here observe that all the Powers which we have given the Governor are necessary to be lodged in the hands of one Man, as the General of the Army and first Magistrate, and none can be entitled to it by he who has the Annual and United Suffrages of the whole Commonwealth.³⁸

³⁸Ibid., pp. 437-439.

The Massachusetts Constitution of 1780 was a significant document inasmuch as it provided a number of precedents which were later used to fashion the presidency in the Convention of 1787. Chapter II of the Constitution, as it was called, outlined the executive power. It began with a general statement: "there shall be a Supreme Executive Magistrate, who shall be styled, THE GOVERNER OF THE COMMONWEALTH OF MASSACHUSETTS; and whose title shall be--HIS EXCELLENCY." It then enumerated the governor's prerequisites, method of election, power, and duties. He was to be an inhabitant for the preceding seven years, to own property in Massachusetts of at least the value of one thousand pounds, and to be "of the Christian religion."³⁹

The election procedure was similar to the one later adopted as the federal electoral college. It required that each town record the name and number of votes each candidate received. These lists were scaled and transmitted to the general court. If no one received the majority then the general court would elect

two out of four persons who had the highest number of votes, if so many shall have been voted for; but, if otherwise, out of the number voted for; and make return to the Senate of the two persons so elected; on which, the Senate shall proceed, by ballot, to elect one, who shall be declared Governor.

Thus, the town and house votes became a nominating process for the Senate to elect if there were no generally known candidates.⁴⁰

The governor had the authority to convene the general court and together with at least five counsellors "keep a Council, for the

³⁹Ibid., p. 456.

⁴⁰Ibid., pp. 456-457.

orderi ng and directing the affairs of the Commonwealth, agreeably to the Con stitution and the laws of the land." He also had, with the advice of the council, the power to prorogue the legislature within specific bounds as well as adjourn it in cases of disagreement but "not exceeding ninety days."⁴¹

The governor's military authority was that normally given to govern ors as commanders-in-chief. However, when the legislature deemed it necessary the governor was authorized to exercise "the law martial." The governor was

intrusted (sic) with all these and other powers incident to the offices of Captain-General and Commander-in-Chief, and Admiral, to be exercised agreeably to the rules and regulations of the Constitution, and the laws of the land, and not otherwise.

The only exception was that he was not to remove the troops beyond the state borders without

their free and voluntary consent, or the consent of the General Court; except so far as may be necessary to march or transport them by land or water, for the defense of such part of the State, to which they cannot otherwise conveniently have access.⁴²

The pardoning and appointing powers were vested in the governor with the advice of the council. The military officers were variously elected or appointed by the House and Senate and commissioned by the governor. All officers of the continental army were appointed by the governor with the advice of the council. A special clause granted

⁴¹Ibid., pp. 457-458.

⁴²Ibid., p. 459.

the **g**overnor power to nominate and appoint all political officers with the **a**dvice and consent of the council.

The governor also had the power to issue warrants from the **t**reasury with the advice and consent of the council for the purposes of **m**ilitary defense and the execution of the acts and resolves of the **g**eneral court.⁴³ He also had a limited vote. Moreover, since "the **p**ublic good requires that the Governor should not be under the undue **i**nfluence of any of the members of the General Court, by a dependence **o**n them for his support" and that he may

act with freedom for the benefit of the public--that he should not have his attention necessarily diverted from that object to his private concerns--and that he should maintain the dignity of the Commonwealth in the character of its chief magistrate--it is necessary that he should have an honorable stated salary, of a fixed and permanent value, amply sufficient for those purposes, and established by standing law.

The Constitution also directed that this "be among the first acts of the **G**eneral Court, after the Commencement of this Constitution, to establish **s**uch salary by law accordingly."⁴⁴

When the finished document was presented to the people, a **n**umber of doubts were raised as might be expected. However, no town **w**as unwilling to give it a trial realizing that it was not a perfect **d**ocument and could be amended in the future if experience indicated **t**hat some sections needed alteration. Opposition to the executive **p**ortion of the Constitution centered around the appointing power. Given **t**he power over military appointment some feared that it might put too

⁴³Ibid.

⁴⁴Ibid., pp. 459-461.

much power in the governors' hands while others feared that the election of certain officers might make them too independent to take orders from their superior officers. Civilian appointments likewise came in for criticism. Some argued that the governor did not "know in so extensive a State who are proper for Officers" and would be likely "to sell offices to the highest bidder."⁴⁵ Others wanted as many offices elected as possible. Winsor reflected this fear of the governor's patronage power by noting that it was not safe

to put any more athrowity (sic) into one Mans hand than what is of absolute necessity,--and if the Governor should give himself so much Time as would be necessary for that purpose he neglect[s] other business of more importance.⁴⁶

In the final analysis, however, the Massachusetts Constitution of 1780 provided a number of precedents which were very instructive when it came to formulating the presidency later.

The adoption of the Revolutionary constitutions in other states underwent much the same trial-and-error process that Massachusetts did. However, the results were often complicated by the speed and political inexperience with which they were written. Most were written in the confused period during the initial phases of independence where the states looked to the Continental Congress for guidance. As noted previously, Congress requested that the petitioning states draw up constitutions that

⁴⁵Ibid., p. 881.

⁴⁶Ibid., p. 505.

establish such a form of government, as, in their judgment, will best produce the happiness of the people, and most effectually secure peace and good order in the province, the continuance of the present dispute between Great Britain and the colonies.⁴⁷

A year later in May, 1776 Congress passed a resolution urging the remaining states to follow suit. In the words of one historian,

American state government in its essential principles was not designed for efficient, constructive public work, but was the product of temporary and peculiar conditions growing out of the revolt against Great Britain.⁴⁸

The task facing the writers of the new state constitutions was of no small consequence. The debates and controversies over the formation of the new governments consumed American interests like few other events had done. In the words of one contemporary

it is a point generally allowed that internal oppression is more intolerable than that of a foreign enemy: for in this latter case it is at a distance; but in the former the usurping or tyrannical eye is immediately over the oppressed.

Therefore, he concluded, "A bare conquest over our enemy is not enough; and nothing short of a form of government fixed on genuine principles can preserve our liberties inviolate." Furthermore, he continued, "Mistakes and errors in the principles of government eat like a canker. At first they may be but small; but as they grow they will get beyond the power of remedy, and at length destroy the body."⁴⁹ Thus, Americans not only had to contend with the enemy, but put their own house in order

⁴⁷ Journals of the Continental Congress, III, 319.

⁴⁸ Leslie Lipson, The American Governor From Figuehead to Leader (Chicago, 1939), p. 15.

⁴⁹ "The Republican," reprinted in Chase, A History of Dartmouth College, I, 431.

as well. Once they had created their own government, Samuel Adams predicted, they would then "feel their Independence."⁵⁰

George Washington realized the difficulty in writing a new constitution. In a letter to his brother about the Virginia Convention, he declared:

To form a new Government, requires infinite care, and unbounded attention; for if the foundation is badly laid the superstructure must be bad, too much time therefore, cannot be bestowed in weighing and digesting matters well. We have, no doubt, some good parts in our present constitution; many bad ones we know we have, wherefore no time can be mispent that is employed (sic) in separating the Wheat from the Tares. My fear is, that you will all get tired and homesick, the consequence of which will be, that you will patch up some kind of Constitution as defective as the present; this should be avoided, every Man should consider, that he is lending his aid to frame a Constitution which is to render Million's happy, or Miserable, and that a matter of such moment cannot be the Work of a day.⁵¹

Thus, as early as 1776 Washington was deeply aware of the need for a well-grounded constitutional structure before any government could expect to succeed.

The Declaration of Independence was a turning point in the constitutional history of America. One observer noted that the

declaration of independency made the antecedent form of government to be of necessity null and void; and by that act the people of the different colonies slid back into a state of nature, and in that condition they were to begin a new.⁵²

John Jay noted that

⁵⁰Samuel Adams to Samuel Cooper, April 30, 1776, Harry A. Cushing, ed., Writings of Samuel Adams, III, 283.

⁵¹George Washington to John Augustine Washington, May 31, 1776, Writings of George Washington, John C. Fitzpatrick, ed. (Washington, 1932-1937), V, 92.

⁵²"The Republican," Chase, History of Dartmouth College, pp. 431-432.

the Americans are the first people whom heaven has favored with an opportunity of deliberating upon, and choosing the forms of government under which they should live; all other constitutions have derived their existence from violence or accidental circumstance, and are therefore probably more distant from their perfection, which, though beyond our reach, may nevertheless be approached under the guidance of reason and experience.⁵³

Dr. David Ramsay echoed this sentiment when he said

we are the first people in the world who have had it in their power to choose their own form of government. . . . But happily for us, the bands of British government were dissolved at a time when no rank above that of freemen existed among us, and when we were in a capacity to choose for ourselves among the various forms of government, and to adopt that which best suited our country and people.

Moreover, he concluded, "we are in possession of constitutions that contain in them the excellencies of all forms of government, free from the inconveniences of each."⁵⁴

The overriding concern of those who drew up the first state constitution was providing for the defense of the state with a minimal threat to the liberty of the citizens. The sections in each constitution outlining the executive power were therefore primarily concerned with his military role. Each state gave him the title of commander-in-chief or captain-general and, in the case of Georgia, he had both titles to designate his military capacity. In Pennsylvania, where the executive power was vested in a council, the president of the council was given the title of commander-in-chief but was specifically prohibited

⁵³"Judge Jay's Charge, September 9, 1777," Niles, ed., Principles and Acts of the Revolution, p. 181.

⁵⁴"Dr. Ramsay's Oration, July 4, 1778," Ibid., pp. 379-382.

from taking command in person. His function was only that of military advisor to the council unless they saw fit to give him command. By and large, the military powers conferred on the governor were fairly uniform through most of the constitutions. In this area he possessed more independence than any other. With the advice of the council, he could call up the militia but was prohibited from marching them beyond the state line unless they volunteered to do so. He was also empowered to lay embargos and the like for varying lengths of time between legislative sessions. In some instances, with the advice and consent of the council, he could appoint officers not specifically elected or appointed by the legislature. In several instances, he could establish martial law with the advice of the council. In short, the early governors were, for the most part, designed to fulfill first a military function and secondly a civilian function. In this capacity, they wielded significant powers even though checked by a council.⁵⁵

Most of the revolutionary constitutions contained general statements about the executive powers. Delaware allowed the governor to "exercise all the other executive powers of government, limited and restrained as by this constitution . . . and according to the laws of the state."⁵⁶ The Georgia and Virginia constitutions had similar phrases. While the South Carolina Constitution of 1778 stated that the "executive authority be vested in the governor and commander-in-chief,

⁵⁵See Poore, The Federal and State Constitutions, Colonial Charters, and Other Organic Laws (Washington, 1878), II, 1544.

⁵⁶Ibid., I, 274.

in the manner herein mentioned,"⁵⁷ the other constitutions for the most part combined the executive's title with a statement on the nature of the power. The Pennsylvania Constitution noted that "the Supreme Executive power shall be vested in a president and council."⁵⁸ These phrases conferred no power but rather served to identify the ultimate source of executive authority. All executive authority, power, and duties were contained within specific clauses of the constitutions. The Maryland and Virginia Constitutions went so far as to insert a clause which said the executive authority "shall not, under any pretense, exercise any power or prerogative, by virtue of any law, statute or custom of England or Great Britain."⁵⁹ Thus, it was clear that the executive was limited to only that authority found expressly within the constitution or that given by legislative act. This became an issue on the national level when some began to interpret Article II, section one of the Federal Constitution, which grants the executive authority to the President, as conferring power on the President not specifically stated in the rest of the Constitution. The state experience was clear on this subject as not conferring any power.

In most states the chief executive was called a governor. In Delaware he was called president or chief magistrate. In New Hampshire and Pennsylvania he was president of the council. South Carolina used president in the Constitution of 1776 and governor in the Constitution

⁵⁷Ibid., II, 1621.

⁵⁸Ibid., p. 1542.

⁵⁹Ibid., pp. 824, 1911.

of 1778. In the cases where he was president of the council, the executive authority was the weakest.

The prerequisites for holding office as governor included in varying degrees age, residency, property holding, and religious oaths. The North Carolina and New Hampshire Constitution of 1784 both required the governor to be thirty years of age. All other states did not adopt a minimum age until their second or third constitution. Residency requirements ranged from Georgia's three years to South Carolina's ten years with most being from five to seven years. Delaware, New Jersey, New York and Pennsylvania had none. The North Carolina, Massachusetts, and New Hampshire Constitution of 1784 required a freehold of at least a thousand pounds with New Hampshire's being half that. The South Carolina Constitution of 1778 required a settled plantation or freehold valued at least 10,000 pounds clear of debt, while the previous one only required the same amount for the president as a member of the general assembly. All except New York and Georgia required some religious affirmation. Most required that he be Christian with four specifying that he be Protestant. Three states posed other requirements. Maryland wanted a "person of wisdom and virtue," New York a "wise and discreet Freeholder," and New Jersey a "fit person."

Most state constitutions had a one-year term for the executive with varying degrees of re-eligibility. Both of the South Carolina Constitutions had a two-year term with the second stipulating that he would not be eligible for four years. New York provided a three-year term with no statement on re-eligibility, while in Delaware he was not able to serve more than one three-year term out of six years. North

Carolina provided a one-year term in which he was eligible for three out of six successive years. All others had one-year terms with no statement as to re-eligibility. One reason for the short terms was spelled out by the Maryland Constitution which stated that

a long continuance, in the first executive departments of power or trust, is dangerous to liberty; a rotation, therefore, in those departments, is one of the best securities of permanent freedom.⁶⁰

Eleven of the states chose their chief executive by vote of the legislature while Massachusetts and New York had popularly elected executives with the only limitation that the voters be freeholders qualified to vote for senators. Though the majority of the states elected a governor through the legislature, they were careful to include clauses that no one could hold more than one office of public trust and profit at any one time. These were coupled with statements which made it emphatic that no branch was to exercise the powers of any other. Thus, the annual election of most governors and all legislatures put the two branches on an equal footing with respect to their accountability for their previous year's activities. If that were not enough, most states provided an impeachment mechanism to remove the offending party from office and subject him to the punishments of the law. Delaware went so far as to make the executive liable to impeachment a full eighteen months after he left office.

One of the greatest complaints the colonial legislatures had against the royal governor was his power to interfere with the legislative

⁶⁰Ibid., p. 819.

process. The new state constitutions took care to minimize executive interference. No state gave the governor power to dissolve the legislature. Most only had power to prorogue it but only for a limited number of days per year, generally between forty and ninety days. The governors could, however, summon the legislature to meet in emergency sessions and in some states when both houses disagreed over adjournment the governor could then step in. While this was a limitation of the executive authority when compared to the royal governor's authority, it cannot be considered one when compared to the authority vested in the President in the Federal Constitution which was quite similar to that of the Revolutionary state constitutions, only the President cannot prorogue Congress at all except in disputes over adjournment.

One area where there was a significant difference was in the veto power of the early state executives. Only South Carolina's constitutions gave the President absolute veto power over acts of the legislature. Massachusetts gave its governor a veto which could be overridden by two-thirds of the legislature. In New York, the governor was a member of a council of revision. Otherwise, the states were reluctant to grant the executive that much power over the legislature.

The governor's appointing powers varied from state to state. All states required that he share this power with a council which had to advise and consent to his appointments. In some states the senior executive officers were popularly elected or appointed by the legislature and commissioned by the governor. The New York council of appointment was dominated by its war time governor, George Clinton, and never did

provide a successful check on the governor.⁶¹ However, this shared appointive power in and of itself cannot be considered as weakening the governors' power since it was required of both the royal governor and the President under the Federal Constitution, the latter being required to gain Senate approval for major appointments. In these two cases, the potential strength of the appointive power was dependent on the relationship between the executive and those with whom he shared the appointive power.

Another major area of potential conflict between the executive and legislature was over the salary issue. As noted in Chapter II, this was a significant weapon used by the assemblies to make the governor accountable to colonial interest. Under the Revolutionary state constitutions, several states took great care in spelling out the salary provisions. Massachusetts noted that

as the public good requires that the Governor should not be under the undue influence of any of the members of the General Court, by a dependence on them for his support--that he should in all cases, act with freedom for the benefit of the public--that he should not have his attention necessarily diverted from that object to his private concerns--& that he should maintain the dignity of the Commonwealth in the character of its chief magistrate--it is necessary that he should have an honorable stated salary, of fixed & permanent value, amply sufficient for those purposes, & established by standing laws.⁶²

⁶¹See Hugh M. Flick, "The Council of Appointment in New York State, The First Attempt to Regulate Political Patronage, 1777-1822," New York Historical Association, Proceedings, XXXIII, July, 1934, pp. 253-280.

⁶²Poore, Constitutions, I, 274, II, 1910.

Delaware and Virginia both provided that "an adequate but moderate salary shall be settled on him during his continuation in office."⁶³ South Carolina gave him a fixed salary of nine thousand pounds, while New Hampshire granted compensation for service "from time to time by such grants as the general court shall think reasonable though they granted judges a permanent salary."⁶⁴ The other states left that matter to be settled by statute.

Of all the constitutions, that of New York spelled out in the greatest detail the civilian duties of the governor. He was required to inform the legislature at every session the condition of the state so far as it was within the purview of his department to do so. He was to recommend measures for legislative consideration, correspond with the Continental Congress and other states, transact all necessary business with the civilian and military officers of government, take care that the laws were faithfully executed, and expedite all matters as might be resolved by the legislature.⁶⁵ In the final analysis, what general conclusions can be drawn about the constitutional provisions of the executive branch in the early state constitutions? Traditionally, many historians have noted the state executive departments' apparent decline in power and authority when compared to that given the royal governors as being a sudden revolutionary reaction against the royal governors. However, when viewed in the context of the period and in

⁶³Ibid., I, 274, II, 1910.

⁶⁴Ibid., II, 1288.

⁶⁵Ibid., p. 1335.

relation to the other sections of these constitutions, can it really be explained solely as a reaction to the colonial executive?

During the two years between the first meeting of the Continental Congress to the time the order was given to the states to write new constitutions, it must be remembered that there was great confusion over whether or not matters could be resolved between England and the colonies. Since the actions of the royal governors and the British commander-in-chief so inflamed the colonists, colonial government was effectively brought to a standstill until a new government could be formed. The mechanism was the provincial congress, which delegated its executive functions to various committees until England would send a governor who would administer, as in the case of Massachusetts, under the terms of the 1691 charter. Until it was clear that England would not comply with that request, there was no need to form a whole new charter or constitution. When the colonists realized that reconciliation was hopeless, they proceeded to write new constitutions. In the words of the New York Constitution:

Whereas the present government of this colony, by congress and committees, was instituted while the former government, under the Crown of Great Britain, existed in full force, and was intended to expire on a reconciliation with Great Britain, which it was then apprehended would soon take place, but is now considered as remote and uncertain . . . [and] whereas many and great inconveniences attend the said mode of government by congress and committees, as of necessity, in many instances, legislative, judicial, and executive powers have been vested therein, especially since the dissolution of the former government by the abdication of the late governor and the exclusion of this colony from the protection of the King of Great Britain

it was therefore necessary to form a new government.⁶⁶ Thus, this period was viewed as being temporary until one or the other course of action was taken.

Once the decision had been made to establish new governments, many states adopted declarations of their rights which laid down the fundamental principles upon which the constitutions and governments were to be erected. One of the major themes which ran through all these documents was a fear of government. The Constitution of Maryland noted "that all persons invested with the legislative or executive powers of government are the trustees of the public, and as such, accountable for their conduct."⁶⁷ The Virginia Bill of Rights states

that the legislative and executive powers of the State should be separate and distinct from the judiciary; and that the members of the two first may be restrained from oppression, by feeling and participating [in] the burdens of the people . . . by frequent, certain, and regular elections. . . .⁶⁸

"That the right of the people to participate in the Legislature," the Maryland Constitution noted, "is the best security of liberty, and the foundation of all free government," therefore it was necessary to hold frequent elections.⁶⁹ Thus, no government was to be trusted for fear that it might, if not closely supervised by the people, present a threat to their liberty. It was clear that Americans feared not only abuse of the executive authority, but of the legislative authority as well.

⁶⁶Ibid., p. 1329.

⁶⁷Ibid., I, 817.

⁶⁸Ibid.

⁶⁹Ibid.

The key to understanding the early state constitutions is to view them as initial and sometimes temporary experiments adapted from familiar colonial institutions to meet the perceived needs of the time which could be changed or altered as the occasion arose. As John Adams warned in his pamphlet Thoughts on Government, it was "safest to proceed in all the established modes, to which the people have been familiarized by habit."⁷⁰ Furthermore, the state constitutions were written to provide a structure of government to carry out the necessary governmental functions during a military crisis. One committee in New Hampshire noted that the form of government was

far from being perfect; yet as the same was only proposed as temporary, and the exigencies of the war having been, and still continuing such as to leave no opportunity for the people to enter upon forming a plan of Government and representation with that attention and deliberation that matters of so great consequence require, the present model will answer for the purpose of our grand concern, viz., carrying on the war.⁷¹

Since governments were creatures of the people, if any part proved defective or a threat to the public well being, the people could alter or abolish it. In the words of the Massachusetts Constitution,

Government is instituted for the common good, for the protection, safety, prosperity, and happiness of the people, and not for the profit, honor, or private interest of any one man, family, or class of men; therefore the people alone have an incontestable, unalienable, and indefeasible right to institute government, and to reform, alter, or totally change the same

⁷⁰Adams, Works, IV, 195.

⁷¹New Hampshire State Papers, XIII, 764, reprinted in Chase, History of Dartmouth College, p. 457.

when their protection, safety, prosperity, and happiness require it.⁷²

As Jefferson observed, the Virginia Constitution

was formed when we were new and unexperienced in the science of government. It was the first, too, which was formed in the whole United States. No wonder then that time and trial have discovered very capital defects in it.⁷³

What John Adams wrote about the Massachusetts Constitution applied to the other state constitutions as well. He noted that the "government once formed, and having settled its authority, will have leisure enough to make any alterations that time and experience may dictate."⁷⁴

In view of the fact that the Maryland Constitution, as did others, stated that the right of the people to participate in the legislature was the "best security of liberty," it was only natural that these early constitutions placed the bulk of governmental authority in the hands of the legislature. Moreover, outside of the charter colonies of Connecticut and Rhode Island, no state had ever before been forced to create an executive office. Rather, their experience had been one of trying to contain an executive over whose appointment they had little or no control. As noted in Chapter II, Americans had always feared an irresponsible executive and had taken steps to curtail the colonial governors' authority and power within the legislatures' power to do so. Thus, the early state executives were an embodiment of these experiences

⁷²Poore, Constitutions, I, 958.

⁷³Thomas Jefferson, Notes on the State of Virginia (New York, 1964), pp. 111-112.

⁷⁴Adams, Works, IV, 208.

and not the victims of a sudden surge of anti-executive sentiment. This, however, was not the complete picture, for the new executives were quite apart from previous executives.

In the traditional English Constitution, power flowed from the executive, who was the keystone in the three parts of the legislature, the Crown, lords, and commons. It was the Crown who summoned, prorogued, dissolved, and vetoed legislative actions. The royal governors likewise held the power to control the colonial legislatures. For nearly a century Americans sought to limit that power and make the legislative branch as independent of the executive as possible by the passage of triennial and other acts. Once the break with England came, the colonies no longer had constitutions derived from the executive authority, i.e., authority delegated from the Crown to a royal governor who in turn could activate the legislative authority at his will. The new state constitutions now made the legislature the engine of government with the function of the executive to carry the will of the legislature into action. In short, the American Revolution was the culmination of this reversal. No longer would the legislature be considered the satellite to the executive but the executive was, in a sense, the satellite of the legislative branch. Before, the legislature counter-balanced the executive; now, the executive had to counter-balance the legislature within a limited constitutional basis.

An examination of the powers and authority granted to the executives in these early state constitutions indicates three points. First, as noted previously, the bulk of authority granted to these executives was military in nature. This was first in response to the

military crisis facing the states and secondly out of the need to place command in the hands of one individual for the necessary energy and dispatch to carry out military activities. Even the Continental Congress, a body supremely jealous of its authority, found it necessary to do this soon after it first assembled.

Secondly, the major problem with the royal governors was their ability to interfere with the legislative process. The new state constitutions therefore provided that the legislature would meet at regular and fixed intervals unless an emergency arose at which time the governor could call a special session. Moreover, the governor could only prorogue the legislature for a limited number of days each year or settle a dispute between the houses over the question of adjournment. Just three governors had veto power with South Carolina having the only absolute veto. Thus, legislative interference by the executive was kept to a minimum.

Lastly, the governors were made dependent on the people or their representatives for relatively short terms and were given limited constitutional duties. Their primary function, aside from their military roles, was to carry out the policies of the legislative branch. Only in the case of New York does the description of the governor's functions hint of going beyond the role of administrator. Unlike the Crown and his royal governors, the state executives were not intended to rule or govern society. They were confined solely to limited governmental and military spheres. As noted before, both Maryland and Virginia reinforced this position by specifically stating that they were not "under any

pretense [to] exercise any power or prerogative, by virtue of any law, statute or custom of England."⁷⁵ This meant that none of the prerogatives or precedents established by the colonial governors could be used by the state governors. In these two cases, at least, it was a clear break with the past tradition of executive power and the establishment of a new tradition which strictly limited it to the Constitution and the statutes.

An insight into the development of American thinking about the Revolutionary state executive was provided by Thomas Jefferson and George Mason. Jefferson's three drafts and Mason's proposal for the Virginia State Constitution of 1776 provide evidence of an intermediate position between the office of the colonial governor and the executive outlined in the document adopted by the Virginia Convention. In all three drafts, Jefferson called the executive an "Administrator." However, he added that "the Administrator shall possess the powers formerly held by the king: save only that, he shall be bound by acts of the legislature tho' not expressly named." He went on to list fourteen specific powers and prerogatives that the administrator could not exercise. George Mason's proposal called for "a Governour, or chief magistrate . . . With the advice of a Council of State, [to] exercise the executive powers of government. . . ." While Jefferson would not let his Administrator prorogue or dissolve the legislature, Mason's could, with the advice of the council, both prorogue and adjourn the legislature. Thus, Jefferson and Mason in their 1776 drafts were willing

⁷⁵Poore, Constitutions, II, 1911.

to allow the executive to exercise general executive powers with specific limitations or prohibitions enumerated in the Constitution. When the final document was approved, the words "according to the laws of this Commonwealth" were added to the statement that the governor would exercise the executive powers. This was followed by the statement denying him any authority to exercise any power or prerogative not mentioned in the Constitution. Jefferson and Mason were therefore willing to let the executive exercise royal prerogatives unless specifically prohibited, though his function was primarily administrative.⁷⁶

In the summer of 1783 Jefferson, among others, unsuccessfully called for a constitutional convention to rewrite the Virginia Constitution of 1776. Jefferson again drew up a proposed constitution to lay before the convention. The executive power was titled "Governor" instead of "Administrator." "By executive powers," he wrote,

we mean no reference to those powers exercised under our former government by the crown as of its prerogatives, nor that these shall be the standard of what may or may not be deemed the rightful powers of the governor. We give him those powers only, which are necessary to execute the laws (and administer the government), and which are not in their nature either legislative or judiciary.

He went on to list the powers specifically denied his proposed governor. However, "the whole military of the State, whether regular, or of militia, shall be subject to his directions; but he shall leave the execution of those directions to the general officers appointed by the legislature." His salary would be fixed "and it shall not be in the power of the legislature to give him less or more, either during his continuance in office,

⁷⁶Thomas Jefferson, Works (Boyd, ed.), I, 360, 367, 380.

or after he shall have gone out of it."⁷⁷ Thus, Jefferson had clarified his thinking on the governor in those intervening years. While the executive's function remained the same, Jefferson made it clear that he was limited to only those powers specifically granted to him and none of the English executive prerogatives.

William Hopper of North Carolina probably best summed up the sentiment for an administrator-type governor. He wrote that "for the sake of Execution we must have a Magistrate," but one that was "solely executive."⁷⁸ John Sullivan noted that Americans "by no means object to a Governor," however, he contended no one was willing to lodge

too much power in the hands of one person, or suffering an interest in government to exist separate from that of the people, or any man to hold an office, for the execution of which he is not in some way or other answerable to that people to whom he owes his political existence.⁷⁹

It is difficult to gauge the full extent of American fear of the executive because of the wide range of sentiment expressed. The colonial experience was a clear example of executive tyranny to many. However, now that the state constitutions were not dependent upon the executive's grant of authority, and the new executives were dependent upon the legislature and the people, would there be the need to fear them as much as the colonial governor? To answer this question, several factors must be kept in mind.

⁷⁷Jefferson, Notes, pp. 189-190.

⁷⁸Quoted by Gordon S. Wood, The Creation of the American Republic (Williamsburg, 1969), p. 136.

⁷⁹Sullivan to Weare, December 11, 1775, Force, ed., American Archives, 4th ser., IV, 241-243.

First was the fact that the state constitutions were deliberate creations of individuals who conscientiously tried to apply the lessons of the past and the fundamental principles of political society as they understood them to the creation of a frame of government to solve the problems they faced at that time. Few, if any, individuals contended that they were to be permanent unchangeable documents. In fact, many powers were prefaced with the phrase "for the time being," indicating a possible revision if future experience warranted.

The second fact was that this was the first time Americans had been forced to write constitutions. Before they had always been given the constitution through the governor's commission and instructions. In doing so, they sought to eradicate the problems which they perceived had caused the breakdown of colonial government. As noted previously, they thought the most significant cause was the governor's interference with the legislative process. Hence, it was only natural that the newly created executive power would be prevented from doing so in the future. Therefore, the governor's power to terminate the legislative session, veto its actions, and corrupt its proceedings by the use of patronage was severely curtailed. Moreover, in the three-quarters of a century prior to the Revolution, the colonial assemblies had been moving in this direction by limiting as best they could the power of the royal governors to do these things. There was no plausible reason for the writers of the new constitutions to break with this trend.

The third factor was the American's fear of all government. Again, as noted previously, this fear was not limited to the executive. Rather, it applied to all persons who held power. It fell to the

writers of the state constitutions to protect the people from all forms of governmental tyranny, from standing armies to corruptible executives to tyrannical legislatures. James Burgh wrote in his Political Disquisitions in 1774 that the

people ought to provide against their own annihilation. They ought to establish a regular and constitutional method of acting by and from themselves, without, or even in opposition to their representatives, if necessary.⁸⁰

Finally, most state constitutions sought to correct the problems they encountered with the colonial governments by binding not only the executive, but the legislature as well. New York, for example, had one of the strongest, if not the strongest, executives of all the states, but the Constitution spelled out tenure of its various public offices and did not allow either the executive or legislature the exclusive power of appointment.⁸¹

Governors themselves were aware of the suspicions which surrounded their offices and were often careful not to raise undue hostility to the way they exercised power. Governor Livingston of New Jersey responded tartly to the British suggestion that he held some influence over political sentiments within that state. He said that

You have distinguished me by a title which I have neither authority nor ambition to assume. I know of no man who bears sway in this State. It is our peculiar felicity, and our

⁸⁰James Burgh, Political Disquisitions: Or, An Enquiry into Public Errors, Defects, and Abuses. . . . (London, 1774), I, 6.

⁸¹For an extensive discussion see J. M. Gitterman, "The Council of Appointments in New York," Political Science Quarterly, VII, 1892, pp. 88-115.

superiority over the tyrannical system we have discarded that we are not swayed by men--In New Jersey, sir, the laws alone bear sway.⁸²

Livingston was not willing to overstep his authority even for General Washington. In response to Washington's request for removal of some American supplies that might soon fall into British hands, he wrote: "as the governor of this State is a civil magistrate, it cannot be expected that he will act an arbitrary, that is, an illegal part."⁸³

In spite of the safeguards against executive tyranny, some were still fearful of the executive power of the new state constitutions. One Delaware Whig wrote that "the executive power is ever restless, ambitious, and ever grasping at encrease (sic) of power."⁸⁴ However, it was Pennsylvania where the anti-executive sentiment reached its peak. There the governor was totally eliminated and replaced by an executive council. The concept of a governor was apparently "too monarchical" and since Pennsylvania had renounced that form of government there was no longer a "need of a representative of a King, for we have none."⁸⁵

The Frenchman Jean Pierre Brissot de Warville, whose passion for democracy brought him to America, wrote an interesting analysis of the Pennsylvania Constitution. Speaking of the American Revolution he noted that the Americans had given

⁸²Quoted by MacMillan, The War Governors, p. 64.

⁸³Livingston to Washington, November 9, 1776, Force, ed., American Archives, 5th ser., III, 617.

⁸⁴Quoted by Wood, The Creation of the American Republic, p. 135.

⁸⁵Pennsylvania Packet, July 1, 1776, reprinted in Force, ed., American Archives, 4th ser., VI, 843.

oppressive despotism a terrible and memorable lesson. Tyrants will learn from the plains of Saratoga that all power is useless against a people who, in order to be free, know how to face death. They will learn that men must be ruled by reason, and not by force; that the abuse of power embitters and angers the slave, and that he will end by breaking his chains.

The Americans "were tired of subjection" and "they rejected even the laws of their former masters; they were resolved to reform everything, and they were able to back their reform by force."⁸⁶

Turning to the Pennsylvania Constitution, Brissot wrote that "it will prove that America had philosophers and statesmen when she threw off the yoke of Great Britain." "The form of the government," he noted, established in a

precise manner the limits of the legislative and executive powers. There they excluded forever the authority of a single person. There they confine the power to make the laws to a general assembly of the representatives of the state, and give the right to enforce the laws to a removable council.

Given the state of human nature,

it is evident how difficult it is to bring governments to a certain degree of perfection. It is men who govern, and it would be necessary for these governors to be more than men, they would have to be angels. Whatever they do, although nature joins with education to make the leaders well-disposed, they will always be, like the rest of their kind, dominated by passions or confused by errors.

"The Evil" he concluded, was in the fact

that rulers do not consult with the governed, those who necessarily have an interest in being well-governed. They alone can enlighten (sic) the rulers about their common interests-- and unalterable reason why the voice of the people should be listened to, why it should always be represented near the executive power.

⁸⁶J. Paul Selsam, ed., "Brissot de Warville on the Pennsylvania Constitution of 1776," The Pennsylvania Magazine of History and Biography, LXXII, no. 1 (January, 1948), pp. 29-31.

Therefore,

since rulers tend to weaken the constitution in spite of themselves, it is necessary then to erect a barrier to their passions and their prejudices; and such has been the origin of the Tribunes in Rome, of the Parliament in England, of both the legislative and executive powers in America. These bodies balance the authority of the government, not preventing it from doing good, but stopping it when it wishes to do harm. These powers mutually watch over each other. Good is accomplished in fact by mutual distrust; but what difference does it make? good always results.⁸⁷

Moreover, Brissot continued,

despotism, which always ends by swallowing up everything in itself, is found not only in monarchies, but also even creeps into republics. The Americans fearing that, have granted many rights to the people, and have made the executive and the legislative powers check each other. That is the reason for the rules that no one can be a member of the House of Representatives more than four years in seven, that the General Assembly cannot change anything in the present Constitution, that the members cannot hold any other public office, that they can be removed by their constituents, that the records of their sessions shall be published and that their sessions shall be public. And a thousand other precautions to prevent the corruption of its members, which would hasten inevitably the ruin of the Constitution."

Here then was a classic statement about the American fear of human weakness corrupting and destroying the government and constitution.⁸⁸

Brissot then went on to compare the English and American conception of executive power.

The worst abuse in England springs from the fact that the executive power is always in the same hand; in America this power changes like the General Assembly. The source of the trouble in England is especially the too great power of the King. He has the right to appoint the civil and military officials; he distributes favors, he is head of the church,

⁸⁷Ibid., pp. 33, 37-38.

⁸⁸Ibid., p. 38.

&c. In America the people and the militia have the right to choose their officers; the Council has other rights; but it changes, it is watched and it is under the censure of the Council of Censors.

The Crown's interference in the legislative process allowed it to

approve or reject bills without discussion, to prorogue or dissolve Parliament; the result is that the Crown dissolves those which do not please it, and prorogues the Parliament at the moment of fear. In America the convenings, dissolutions and prorogations are fixed by law, and no one is able to violate this law. Finally, in England the chambers do not have the right to prosecute the King when he violates the constitution; they are able to attack only his ministers. . . . In America the abuses are insignificant and censure is more frequent.

In spite of Brissot's enthusiastic endorsement of the Pennsylvania Constitution, its council-type executive proved more injurious than beneficial and was finally abandoned in the Constitution of 1790. However, while his optimism may have been misplaced in the case of the Pennsylvania executive, his characterization of American thinking about government in general and executive power in particular was not far off.⁸⁹

One of the tests of how well a constitution was written was in its operation. Unfortunately, for most state governors during the Revolution the constitutions under which they operated provided too few powers and very little indication of proper procedures they were to follow. One of the most powerful governors of this period was George Clinton of New York who continually searched the Constitution for the necessary authority to adequately carry on his military functions only to find it "altogether silent" on many matters.⁹⁰ When a constitution

⁸⁹Ibid., pp. 41-43.

⁹⁰Hugh Hastings, ed., Public Papers of George Clinton (Albany, 1899-1914), II, 500.

was silent on the proper procedure often the colonial practice was used until a statute was enacted or it was established as a precedent under the new government. For example, most constitutions were silent on the procedures for signing bills calling special sessions.⁹¹

Often the lack of adequate constitutional provisions was offset by the governor's personal prestige. Most governors had served in the assembly and all were well-known local leaders. Their work in legislative committees and leadership positions gave them a degree of political experience and an excellent knowledge of the various political factions within a state. Moreover, a number of them had served as militia officers prior to taking office. These contacts and experiences facilitated the solution to many of the political problems they faced. Furthermore, most governors came from the legal profession which allowed them to exploit the full extent of the constitutional powers and authority they did possess.⁹²

Many states granted additional authority to a governor by statute when military necessity required it, or when he might have to act during a legislative recess. The degree of authority granted to a governor was generally dependent upon the urgency of the military situation. During the seige of Charleston, the South Carolina legislature voted to grant Governor Rutledge the following:

⁹¹See MacMillan, The War Governors, pp. 222-223.

⁹²Ibid., pp. 52-53.

Till ten days after their next session to the Governor John Rutledge Esq. and such of the council, as he could conveniently consult, a power to do everything necessary for the public good except the taking away the life of a citizen without a public trial.⁹³

Soon after the crisis had passed Rutledge, to his credit, reconvened the legislature and surrendered his dictatorial powers.

Virginia, on the other hand, declined to follow the South Carolina example. Instead, it met each crisis with a special statute covering only the circumstances relevant to that case. Thomas Jefferson noted later in his Notes on Virginia that

In December 1776, out [of] circumstances being much distressed, it was proposed in the House of Delegates to create a dictator, invested with every power legislative, executive and judiciary, civil and military, of life and death, over our persons and over our properties; and in June 1781, again under calamity the same proposition was repeated and wanted a few votes only of being passed.⁹⁴

Under similar circumstances, North Carolina adopted the opposite approach. Instead of consolidating power in the governor, it fragmented it by creating a board of war which even excluded the governor from its membership. This caused Governor Abner Nash to remark that the executive authority was so divided that "men not knowing who to obey, obey nobody." He threatened to resign and chastised the legislature because it had "effectually transferred the powers vested by the Constitution in the Governor into the hands of commissioners." This, he said, had rendered the executive "an empty title, neither

⁹³Quoted by McCrady, History of South Carolina in the Revolution 1775-80, p. 43.

⁹⁴Jefferson, Notes, p. 120.

serviceable to the people nor honorable to myself."⁹⁵ However, most states were not this reluctant to grant the governor special authority to meet a crisis. More often than not, however, it was easier to do so in the military field than in the civilian areas.

Some states adopted an alternative measure to granting the governor special emergency powers. New Jersey created a Council of Safety though it was different from any other committee bearing the same name. Unlike some councils which operated throughout the war, New Jersey's was activated only in time of crisis. It consisted of the governor as president, a vice-president, and twelve members, five of whom were a quorum. Its main function was to control the Tories. It acted as a board of justices of the peace empowered to jail or send to enemy lines anyone suspected of being dangerous or hindering the American war effort. It also could fill vacancies during a legislative recess or request the speaker to call a special session. In short, the committee's function was to exercise more power than the Constitution would allow any one individual to possess.⁹⁶

In the non-military areas of legislation, the governor often found himself as restricted as many of the royal governors did in the final days of their governments. Legislators were prone to spell out in great detail the prescribed course of action the governor was to take in executing a bill or severely limit the amount of money he could

⁹⁵Quoted in MacMillan, The War Governors, p. 77.

⁹⁶See MacMillan, The War Governors, for a discussion of the function of the council, pp. 87-88.

withdraw from the treasury without seeking further legislative authorization. However, the governors were often allowed much more freedom and authority especially when there was to be a considerable lapse between legislative sessions.⁹⁷

For whatever reasons, governors generally complained about their lack of power. In 1782, Virginia Governor Benjamin Harrison requested, but was refused, powers equivalent to those of his predecessors in time of crisis. However, because of the impending peace with England and the disastrous state of the economy, the legislature was reluctant to grant them or increase military aid. In his letter to Major General Greene, Governor Harrison lamented that he could not send the needed support.

It is a lucky circumstance indeed that the enemy have not been reinforced, for let the occasion be what it may it is not in my power to send you Aid or the militia out of the State; that liberty was given to former Governors by a particular temporary Act which has been several times continued for short periods and is now extinct, as indeed are all other Laws giving extraordinary powers to the Governor and I am left to the Constitution which may do in Peace but is by no means adapted to war.⁹⁸

The state governors shouldered much of the burden for coordinating the American Revolution in spite of their lack of constitutional authority. They provided not only the central point around which state political and military affairs revolved, but they were the connecting

⁹⁷Ibid., for a discussion on the statutes granting temporary power to the governor, see Chapter V.

⁹⁸H. R. McIlwaine, ed., Official Letters of the Governors of the State of Virginia (Richmond, 1926), III, 169-170.

link between the national and state governments as well. Almost overwhelmed by the work load, Governor Henry wrote to Richard Lee that

As usual I am in a great hurry. . . . I am really so harrassed by the great load of Continental business thrown on me lately that I am ready to sink under my Burden and have thoughts of taking that rest that will I doubt soon become necessary. For my strength will not suffice.⁹⁹

The state legislatures were reluctant to increase the governor's authority even when he was expected to take on added burdens unless there was an obvious military crisis about to endanger the state. Even under the best of conditions, the governor faced what seemed like insurmountable obstacles. For example, the legislature, when not in session, was scattered and difficult to convene to meet emergencies. More distressing was the lack of ready cash or credit the governor needed to carry on the functions of government. Most governors could agree with New York's Governor Clinton who found it difficult to raise fifty-five guineas for clothing for his officers because he had "not one farthing of specie in the Treasury and my own small resources have long since been exhausted."¹⁰⁰ Most frustrating was the governor's lack of information about what was happening outside his immediate area of operation. The letters of the war-time governors were filled with requests for information from the commander-in-chief to private citizens. Often they had to rely on information from other governors who were just as ill informed as they were. Governors Cook and Trumble agreed to exchange information about

⁹⁹Ibid., I, 260-261.

¹⁰⁰Hastings, ed., Clinton Papers, VI, 250.

their respective states of Connecticut and Rhode Island.¹⁰¹ Added to this was the lack of adequate staff, supplies, and numerous other major and minor irritations.¹⁰² One of the most time-consuming was the practice of receiving visitors. Virginia Governor Harrison complained of his added duties and his hating to receive callers on top of it all. His letter to the speaker of the House summed up the governors' overall administrative dilemma when he noted that

The duties of the Commissioner fall to my lot to execute, I earnestly wish I may be able to discharge them in such a Manner to give satisfaction, but it really appears to me impossible that any one Man can go thro' them with propriety who had before a weight of important Business on his shoulders, the eternal interruptions I meet with by being under the necessity of hearing every Man that has Business either with me as Governor or as Commissioner of War are such as often to take up my Time for Several Hours in the Day. The human Mind and body require relaxation and exercise, very little of which have hitherto fallen to my share and I can expect none in the future.¹⁰³

Thomas Jefferson as governor of Virginia expressed the attitude of the governors who kept plodding forward when beset by one obstacle after another. He wrote to General Lafayette that

Mild Laws, a People not used to war and prompt obedience, a want of the provisions of War & means of procuring them render out orders often ineffectual, oblige us to temporise and when we cannot accomplish an object in one way to attempt it in another.¹⁰⁴

¹⁰¹Force, ed., American Archives, 4th ser., IV, 917, 1017.

¹⁰²See MacMillan, The War Governors, p. 94.

¹⁰³McIlwaine, Virginia Governor Letters, III, 409.

¹⁰⁴Ibid., II, 401.

In the final analysis, much of a governor's success in coping with the problems of executive leadership under the state constitutions depended upon personal relations with the legislature, militia, and political factions within the state. George Clinton's successes in New York can, in a large part, be attributed to his rapport with the militia and his domination of the council of appointment, though he was not immune to the political squabbling that afflicted all governors.¹⁰⁵ George Washington often sympathized with the governors' position as a political lightning rod in his correspondence with them. Commenting on the failure of the British attempt to capture Governor Livingston, he wrote:

It is a tax, however severe, which all those must pay who are called to eminent stations of trust, not only to be held up as conspicuous marks or to the enmity of the public adversaries to their country, but to the malice of secret traitors and the envious intrigues of false friends and factions.¹⁰⁶

In summary, the Revolutionary years were not only important militarily for the Americans but constitutionally as well. During this period, a number of differing methods for organizing the executive power were adopted in the various state constitutions. Taken as a whole the state executive can be classified into four general categories. The first was the charter colonies of Connecticut and Rhode Island. In both cases, the Constitution provided for an executive identical to the colonial governorship since only minor modifications were made in the colonial constitution. Though elected by popular vote, they possessed

¹⁰⁵See W. Wilder Spaulding, His Excellency George Clinton: Critic of the Constitution (Port Washington, N. Y., 1964).

¹⁰⁶Washington to Livingston, February 2, 1778, Fitzpatrick, ed., Writings of Washington, X, 415-416.

no independent veto and were required to consult executive councils before taking any action. A second category was the plural executives found in Pennsylvania, Vermont, Georgia until 1777, New Hampshire until 1784, and Massachusetts until 1780. In these cases, the executive was little more than the presiding officer over a council which collectively exercised the executive authority. The third category comprised the strong executives of New York and Massachusetts after 1780. These governors were popularly elected, independent of the legislature and possessed more powers than their counterparts in the other states. The South Carolina governor was the only one to possess an absolute veto which, in this instance, made him fairly powerful. The fourth category was made up of the remaining states which empowered their executives with varying degrees of authority.

The executive experiments outlined in these first state constitutions provided the precedents which were used to create the presidency. Virtually all the elements of the presidency can be found in the state constitutions, though the Constitutional Convention of 1787 brought them together in a unique arrangement.

When assessing the success of the executive provisions in the early state constitutions, several factors must be considered. The constitutions were written in a crisis atmosphere and were designed to place the temporary governments on a more secure footing until the crisis with England could be resolved. Since the Stamp Act, there had been numerous pamphlets circulated which discussed political theories and principles of government. Much of this discussion revolved around the relationship between the various branches outlined in the British

Constitution and their relation to the different segments of the empire. The general principles which evolved out of these discussions concentrated on limiting power of government and protecting citizens' rights. On the provincial level, the surest way to protect the citizen from arbitrary government was through his right to participate in legislation. Thus, the colonial experience reinforced the importance of the legislature as a counter-balance to the executive. However, it must be remembered that the colonial constitution was a function of the executive; that is, the executive was the cornerstone upon which the whole provincial government was built. It was only natural, then, for the Americans to try to limit the colonial governor's power and authority in an attempt to make him responsible to their interests.

When the British attempted to reorganize the empire after 1763, the struggle with the governor added a new dimension. Before England could gain the upper hand within the colonies, the power of the assembly had to be curtailed. In the ensuing effort to by-pass the assembly, Parliament touched off a confrontation with the colonies. The conflict was now between the assemblies and Parliament, with the governor caught between trying to enforce parliamentary acts and yet maintain his own interests as well. In this struggle, the Americans looked to the Crown to protect their interests by requesting that the king exercise his power of veto over those acts which violated their rights as Englishmen. The failure of England to defuse the confrontation created a political climate in which the normal operation of colonial government ground to a halt. In their efforts to enforce unpopular acts of Parliament, the colonial governors generated hostility toward

themselves. The only way they could head off a direct confrontation with the assembly was to dissolve it. This forced the Americans to develop a counter or extra-constitutional government which finally solidified to the point where the colonial governor became irrelevant.

The provincial governments were viewed as being only temporary solutions until the crisis with England could be solved. When it became evident that it would not be resolved in the foreseeable future, the Continental Congress ordered the creation of state constitutions which would "best effect their happiness." Thus, each state wrote a constitution whose function it was to carry on the operation of government until a resolution of the crisis could be worked out. Few Americans viewed these documents as permanent or unchangeable arrangements of governmental powers. They were to be altered as need and experience dictated.

Given the early state constitutions' temporary nature and the Americans' fear of governmental tyranny, it was only natural that their first efforts at writing a constitution would be ones that granted minimal authority to all branches, but especially the executive with whom much of their political history was devoted to checking and limiting as best they could. Moreover, the cornerstone of the state constitution was not the executive but the legislature. In the colonial constitution, the legislature existed to aid the executive in carrying out his duties. In the state constitutions, the executive existed to aid the legislature in carrying out its policies. The role of the state governor was to aid in the direction, coordination and execution of policy. In short, he was to do those things which the legislature found it difficult to do because of its size and cumbersome manner of operation.

Therefore, most constitutional provisions regarding the state executive revolved around his primary duty, i.e., to lead the state through a military crisis. The non-military grants of authority given the governor were primarily administrative in nature and quite limited in scope. Taken as a whole, the executive portions of the early state constitutions were rather meager grants of authority, though many governors had extensive statutory powers granted during a crisis. New York and Massachusetts were exceptions to this rule. When compared to the other constitutions, New York's grant of executive authority created a fairly strong and independent executive which reflected the strong executive tradition of colonial New York. Massachusetts, on the other hand, was one of the last states to write a constitution acceptable to the people. Four years of rule by executive council gave them a number of experiences which took the other states a while longer to incorporate into their constitutions.

In short, the colonial experiences had shown the Americans some of the major pitfalls to avoid in writing their constitutions but did not provide a clear idea of what to include. The result was a number of experiments which reflected the different experiences Americans had had with their colonial governments. Their constitutions' temporary nature and the crisis atmosphere in which they were written offer reasons for the limited constitutional grants of executive authority. Fear of the executive did play a role, but it must be viewed in the context of American fear of all governmental authority. If the executive played a reduced role in state governments when compared to his predecessor, the colonial governor, it was only natural since the new engine of

government in the state constitutions was the legislature, not the governor. The constitutions only reflected this new reality.

That the state executives were short on constitutional authority did not mean that they were not powerful. Here the personality and training of a governor could overcome many of the constitutional shortcomings. Moreover, as the military crisis deepened, many states augmented the governor's constitutional powers with statute authority for a specified duration. In some cases, he was granted dictatorial powers. Furthermore, the lack of a national executive power enhanced the state governor's position politically though it added a tremendous burden to his responsibilities. As noted, General Washington relied heavily upon the state governor to raise troops and supplies in addition to carrying out many of the Continental Congress directives which he could not do himself. In summary, the state governor's constitutional authority remained fairly constant throughout the Revolution, though his actual political and military power varied with the extent and nature of the crisis which beset the states.

CHAPTER VII

THE ROAD TO THE CONVENTION:

Re-Thinking the Executive Power

From the time General Washington disbanded the Continental Army to the eve of the Federal Constitutional Convention in the spring of 1787, a growing number of Americans saw the need to revise drastically the Articles of Confederation. This chapter examines that era with respect to the ideas of executive power which grew out of the frustrations on both the national and state levels with Revolutionary War formulation of the executive authority.

Washington's circular letter to the states in June of 1781 provides a convenient transition from war to peacetime discussions of the problems of the Confederation. He warned Americans that

It is only in our united Character as an Empire, that our Independence is acknowledged, that our power can be regarded, or our Credit supported among Foreign Nations. The Treaties of the European Powers with the United States of America, will have no validity on a dissolution of the Union. We shall be left nearly in a state of Nature, or we may find by our own unhappy experience, that there is a natural and necessary progression, from the extreme of anarchy to the extreme of Tyranny; and that arbitrary power is most easily established on the ruins of Liberty abused to licentiousness.

He then outlined four general considerations which he hoped would guide the debate over public issues in the coming months. He advocated an indissoluble union of states, a sacred regard to public justice, and the adoption of a properly safeguarded military. Finally, he called

for the people and states to overcome their local interests and prejudices for the mutual advantage of the community. On these pillars alone, he contended, could the national character be supported.¹

This was not the first time Washington advocated a strengthened union. Barely two months prior to his circular letter, he wrote to Alexander Hamilton that

No Man in the United States is, or can be more deeply impressed with the necessity of a reform in our present Confederation than myself. No Man perhaps has felt the bad effects of it more sensibly; for the defects thereof, and want of Powers in Congress, may justly be ascribed the prolongation of the War, and consequently the expenses occasioned by it.

Furthermore, he concluded, "More than half the perplexities I have experienced in the course of my command, and almost the whole of the difficulties and distress of the Army" have their origin in the poorly organized Congress.²

The end of the Revolutionary War intensified the problems of government under the Articles of Confederation. The French representative Luzerne noted in a letter to his superior, Rayneval, that

Scarcely had the treaty been ratified when several delegates who had come to Annapolis for that important act returned to their respective states. . . . It is thus that the federal assembly is scattered; and since the ratification has taken place, it has no longer been possible to form a congress of nine states; and yet that number is required to decide the most important affairs.

Congress found it difficult to bring together seven states and "when they do meet, they hardly do any business, because it is rarely that

¹John C. Fitzpatrick, ed., The Writings of George Washington (Washington, 1935), XXVI, 488-489, 487.

²Ibid., p. 277.

the seven states when present vote unanimously."³ Even during the war, Jefferson wrote, the Articles were "found insufficient, as treaties of alliance generally are, to enforce the compliance with their mutual stipulations." However, during peace time "that bond was to expire of itself, & each state [was] to become sovereign and independent in all things." To prevent the states from warring among themselves, they must find "some further bond of union, which would ensure internal peace, and a political system of our own, independent of that of Europe."⁴

Washington's experiences as Commander-in-Chief made him one of the foremost advocates of a strengthened post-war union. In a letter to Dr. William Gordon, Washington hammered home the ideas he was to champion in the years leading to the Constitutional Convention. He wrote that

it now rests with the confederated powers, by the line of conduct they mean to adopt, to make this country great, happy, and respectable, or to sink it into littleness; worse, perhaps, into anarchy and confusion; for certain I am that, unless adequate powers are given to congress for the general purposes of the federal union, we shall soon moulder into dust, and become contemptible in the eyes of Europe, if we are not made the sport of their politics.

Moreover, he continued,

To suppose that the general concerns of this country can be directed by thirteen heads, or one head without competent powers, is a colecism, the bad effects of which every man, who has had the practical knowledge to judge from that I have, is

³George Bancroft, History of the Formation of the Constitution of the United States of America (New York, 1882), I, Letters Appendix, p. 340.

⁴Paul Leicester Ford, ed., The Writings of Thomas Jefferson (New York, 1892), I, 157.

fully convinced of, though none has felt them in so forcible and distressing a degree.⁵

Washington then proceeded to vent his frustration over the lack of national concerns among so many of the states.

Why do congress spend months together in deliberation upon, debating, and digesting plans, which are made as palatable and as wholesome to the Constitution of this country as the nature of things will admit of, when some states will pay no attention to them, and others regard them but partically, by which means all those evils which proceed from delay are felt by the whole, while the complaint states are not only suffering by these neglects, but in many instances are injured most capitally by their own exertions, which are wasted for want of the united effort.

In short, he concluded,

I think the blood and treasure which have been spent on it have been lavished to little purpose unless we can be better cemented, and that is not to be effected while so little is paid to the recommendations of the sovereign power.⁶

Thus Washington, like many of his contemporaries, saw the problems as two-fold: Both Congress and the union had to be strengthened.

In the years preceding the Constitutional Convention of 1787, a number of writers analyzed the problems of the Confederation in various political tracts. One of the earliest and most perceptive was Alexander Hamilton's *Continentalists'* essays. In the first essay, he picked up on the themes discussed in the last chapter by noting the American fear of power in government. He wrote that

An extreme jealousy of power is the attendant on all popular revolutions, and has seldom been without its evils. It is to this source we are to trace many of the fatal mistakes, which

⁵Washington to Dr. William Gordon, July 8, 1783, Bancroft, History of the Constitution, I, 320.

⁶Ibid.

have so deeply endangered the common cause; particularly that defect, which will be the object of these remarks. A WANT OF POWER IN CONGRESS.⁷

Hamilton went on to discuss the need for a balance between liberty and authority. He wrote that

In a government framed for durable liberty, not less regard must be paid to giving the magistrate a proper degree of authority, to make and execute the laws with rigour, than to guarding against encroachments upon the rights of the community. As too much power leads to despotism, too little leads to anarchy, and both eventually to the ruin of the people. These maxims [are] well known, but never sufficiently attended to, in adjusting the frames of governments.⁸

Hamilton then outlined one of the major motivations of those seeking to rewrite the articles. He said that

men who estimate the value of institutions, not from prejudices of the moment, but from experience and reason, must be persuaded, that the same JEALOUSY of POWER has prevented our reaping all the advantages, from the examples of other nations, which we ought to have done, and has rendered our constitutions in many respects feeble and imperfect.⁹

Thus, Hamilton saw the need to use reason and experience to correct the problems of the present constitution. As discussed in the next chapter, this assumption that man can rationally construct a viable government from his experiences was an article of faith of those seeking to revise the Confederation. The significance of this assumption becomes apparent in the next chapter.

⁷Harold C. Syrett, ed., The Papers of Alexander Hamilton (New York, 1962), III, 650.

⁸Ibid.

⁹Ibid., pp. 651-652.

In spite of the state constitutions' "imperfections," Hamilton contended that they "may be made to operate in such a manner, as to answer the purposes of the common defense and the maintenance of order" for some time without revision, since with the "progress of society among us," they contained "the seeds of improvement." However, he argued, this was not the case with respect to the "FOEDERAL GOVERNMENT: if it is too weak at first, it will continually grow weaker" he wrote,

The ambition and local interests of the respective members, will be constantly undermining and usurping upon its prerogatives, till it comes to a dissolution; if a partial combination of some of the more powerful ones does not bring it to a more SPEEDY and VIOLENT END,¹⁰

he concluded.

In the "Continentalist" No. II, Hamilton outlined the constitutional dilemma of organizing a national government. He wrote that in a "single state, where the sovereign power is exercised by delegation, whether it be a limited monarchy or a republic," the danger was that "the sovereign will become too powerful for his constituents; in foederal governments, where different states are represented in a general council," the danger was "that the members will be an overmatch for the common head, or in other words, that it will not have sufficient influence and authority to secure the obedience of the several parts of the confederacy."¹¹ Thus, it was clear that Hamilton and others who thought as he did understood the necessity of having a sufficiently strong but checked national government to carry out and protect the hard-won ideals

¹⁰Ibid., p. 652.

¹¹Ibid., p. 654.

of the Revolution. From the time Hamilton wrote his essays in 1781 to the writing of the Constitution, six years of experience and constant debate finally convinced sufficient numbers that a change had to be made.

By the end of the Revolution, only a very few individuals were advocating a constitutional convention to rewrite the Articles of Confederation. Most politicians, however, were more interested in amending them. The concept of a convention had been sporadically discussed since the outbreak of the Revolution, but no formal action was ever taken. Hamilton, though, began to advocate a convention as early as 1780.¹² In July, 1783 he prepared a draft outlining a proposal for a convention but never submitted it. It would take three more years before the idea gained acceptance.¹³

In the meantime, however, those who advocated a stronger central government were in general agreement about the constitutional and structural deficiencies of the Articles of Confederation, especially as they operated during peace time. The most fundamental constitutional weakness was the lack of authority over the states. Jacob Read characterized the situation quite aptly when he wrote that

. . . the States seem averse to do any Act that has in prospect to assert the dignity of the general Government. We debate, make and hear long and often Spirited Speeches, but when the Moment arrives for a Vote We Adjourn and thus the feelings of Individuals and the Welfare of the Union is trifled with . . . and if in a short time the States do not enable Congress to

¹²See Hamilton to James Duane, September 3, 1780, in Ibid., III, pp. 400-418. Also see Burnett, ed., Letters of the Members of the Continental Congress, VIII, pp. xxxv-i for a discussion of the history of the idea of a convention.

¹³Ibid., III, 420-426.

act with some Vigour and put the power of Compulsion into the head of the Union I am free to Confess I think it almost time to give over the farce of what I cannot consider as an Efficient Government.¹⁴

New York Governor Clinton wrote that

Unless the powers of the national council are enlarged and that body better supported than at present, all its measures will discover such feebleness and want of energy as will strain us with disgrace and expose us to the worst of evils.¹⁵

Luzerne noted that "These states by themselves are sheltered from foreign invasion; but the government, though just, cannot be sure of being obeyed without having at its disposition the means of coercion."¹⁶

A second failing of Congress was its inability to administer its policies in a consistent manner. For example, Luzerne observed that one of the great faults of the system was that "there is nothing of it here for the great objects of administration."¹⁷ James Madison echoed this sentiment and expressed the frustration of those who despaired of the Confederation ever accomplishing much after the peace treaty had been ratified. He noted that

Congress have come to no decision even as yet on any of the great branches of the peace establishment. The military branch is supported and quickened by the presence of the Commander-in-Chief, but without any prospect of a hasty issue. The department of foreign Affairs both internal & external remains as it has long done. The election of a Sec[retary] has been an order of the day for many months without a vote being taken. The importance of the marine department has been diminished by the sale of almost all the Vessels belonging to

¹⁴Burnett, Letters, VIII, 205.

¹⁵Cited by Bancroft, History of the Constitution, I, 122.

¹⁶Ibid., I, 326.

¹⁷Ibid.

the U.S. The department of Finance is an object of almost daily attack and will be reduced to its crisis on the final resignation of Mr. M[orris], which will take place in a few months. The War Office is connected with the Military establishment & will be regulated I suppose in conformity to what that may be. Among other subjects which divide Congress, their Constitutional authority touching such an establishment in time of peace is one. Another still more puzzling is the precise jurisdiction proper for Congress within the limits of their permanent seat.¹⁸

While many believed that something must be done, James Duane was premature in his observation that

the day is at length arrived when dangers and distresses have opened the eyes of the people, and they perceive the want of a common head to draw forth in some just proportion the resources of the several branches of the federal union.¹⁹

However, the reorganization of the major committees of Congress into executive departments elicited a ray of hope from Washington. He wrote to Duane that

Skilful laborers are all that are wanting, and much depends upon a judicious choice of them. Men of abilities at the head of the respective departments will soon introduce system, order, and economy. Our affairs, consequently, will put on a different aspect; but not unless congress is vested with, or will assume, greater powers than they exert at present, and will dispense them freely, upon general principles, to the ministers of state.²⁰

Like Washington, Hamilton was convinced that capable individuals at the head of executive departments were essential to the survival of the Confederation. He wrote to Robert Morris that he

¹⁸Gillard Hunt, The Writings of James Madison (New York, 1901), II, 21-22.

¹⁹Bancroft, The History of the Constitution, I, 283.

²⁰Ibid., p. 285.

was among the first who were convinced, that an administration by single men was essential to the proper management of the affairs of this country. I am persuaded now it is the only resource we have to extricate ourselves from the distresses, which threaten the subversion of our cause.

Later in the same letter he said:

To me it appears evident that an executive ministry composed of men with the qualifications I have described ["individuals of established reputation"] would speedily restore the credit of government abroad and at home. . . .²¹

Thus, the reorganization of the administrative arm of Congress was a major step toward exercising what power Congress did possess.

Unfortunately, faulty organization tended to undermine what strengths each administrator brought with him. Gouverneur Morris expressed the frustration of many administrators when he wrote that

the arduous task before them to govern without power, nay, more, to obtain the power necessary to govern. They must persuade where others command, and the strong phalanx of private interest, with the imperious sallies of private politics and party, encounters them at every step.²²

On the other hand, many looked to these administrative heads as the backbone of Congress. Arthur Lee wrote that "Politics here (Philadelphia) are all comprized (sic) in a few words. We lean entirely on the French and on Mr. R. Morris. I wish they prove neither broken reeds, nor Spears to peirce (sic) us."²³

²¹Syrett, ed., The Papers of Alexander Hamilton, II, 604-605.

²²To General Greene, December 24, 1781, Jared Sparks, The Life of Gouverneur Morris (Boston, 1832), I, 239.

²³Arthur Lee to James Warren, July 27, 1781, Warren Adams Letters, Massachusetts Historical Society, Collections (Boston, 1917), LXXIII, 170.

Yet such a situation elicited concern that the combined department heads would be a threat to liberty. James Warren expressed the fear that they would establish an oligarchy "and by their joint Efforts bear down all Opposition." If this system was not "annihilated," he concluded, then "our Liberties must be."²⁴ Another time he characterized Robert Morris as the "premier, the King, or Grand Monarch of America," or as the "super Intendant of Finance . . . [whose] Office . . . made rapid strides to Dominion. . . ."²⁵ In spite of these fears a number of significant steps were taken to consolidate and centralize the administrative structure of Congress.

The movement from committees to separate executive departments in the administration of congressional affairs greatly improved its efficiency but did not completely solve the problems. A further step was taken by appointing department heads who were not members of Congress. Though the executive departments were technically separate from Congress, they retained close ties as Congress was still the source of all administrative authority. For example, the Secretary for Foreign Affairs was required to "report on all cases expressly referred to him for that purpose by Congress, and on all others touching his department, in which he may conceive it necessary." Moreover, he was to attend all sessions of Congress and to "give information to Congress respecting his department, explain and answer objections to his reports when under

²⁴To John Adams, October 27, 1783, Ibid., pp. 229-232.

²⁵Ibid., January 28, 1785, pp. 229-232.

consideration, if required by a member and no objection be made by Congress," and to

answer such inquiries respecting his department as may be put from the chair by order of Congress, and to questions stated in writing, about matters of fact which lie within his knowledge, when put by the president at the request of a member, and not disapproved of by Congress.²⁶

The superintendent of finance was "to digest and report plans for improving and regulating the finances, and for establishing order and economy in the expenditure of public money."²⁷ The Secretary of War was

to give his opinion on all such subjects as shall be referred to him by Congress; and if, at any time, he shall think a measure necessary, to which his powers are incompetent, he shall communicate the same to Congress, for their direction therein.²⁸

A second major lesson of this period with respect to the executive departments was the necessity of consolidating authority in the hands of one individual. In 1785 when Robert Morris resigned as head of the department of finance, John Jay used the occasion to outline his proposal for restructuring the department. He wrote that

Mr. Morris' resignation is a great loss to this country, and yet I am not without hopes that the department of finance will become properly arranged. The nature of our governments, as well as the circumstances of their being new, exposes our operations to delay, and renders the best systems slow in forming, as well as slow in executing. In my opinion, one superintendent or commissioner of the treasury is preferable to any greater number of them; indeed, I would rather have each department under the direction of one able man than of twenty able ones.

²⁶Journals of the Continental Congress, III, 723.

²⁷Ibid., p. 575.

²⁸Ibid., pp. 8-9.

However, he noted "All things . . . in this world have their bright as well as their dark sides; and there are few systems so imperfect as not to have some conveniences." He then spoke to the fears expressed by some about consolidating so much power in the hands of one person.

"Many reasons," he wrote,

induce me to disapprove of three persons; and yet one very great convenience results from it, viz., that our jealous republicans will have more confidence in three gentlemen coming from different parts of the continent than they would place in any one single man. Confidence, you know, is always followed by credit, and credit is the forerunner of money.²⁹

Thomas Jefferson summarized the difference between a republican and monarchical governments' form of administration as being one of safeguards. He concluded that

A monarchical head should confide the execution of its will to departments consisting each of a plurality of hands, who would warp that will as much as possible towards wisdom and moderation, the two qualities it generally wants. But a republican head, founding its decrees, originally, in these two qualities, should commit them to a single hand for execution, giving them, thereby, a promptitude which republican proceedings generally want.³⁰

Benjamin Franklin wanted to take the development of the executive departments a step further by making them hereditary. In a letter to David Hartley, he wrote,

I am not sure that in reforming the constitution, which is sometimes talked of, it would not be better to make your great officers of state hereditary, than suffer the inconvenience of such frequent and total changes. Much faction

²⁹Henry P. Johnston, ed., The Correspondence and Public Papers of John Jay (New York, 1891), III, 141-142.

³⁰Answers to M. DeMevnier, Writings of Jefferson (Ford, ed.), IV, 247.

and cabal would be prevented by having an hereditary First Lord of the Treasury, an hereditary Lord Chancellor, Privy Seal, President of Council, Secretary of State, First Lord of Admiralty, etc. etc.

Moreover, he concluded,

It will not be said that, the duties of these officers being important, we cannot trust to nature for the chance of requisite talents, since we have an hereditary set of judges in the last resort, the House of Peers; an hereditary king; and, in a certain German university, an hereditary professor of mathematics.³¹

In spite of all the discussion about readjusting the administrative organization, the end of the war brought a general satisfaction with the way the executive departments were organized. Henry Knox remarked that "Congress have rendered the powers and duties of the office respectable."³² The French representative Otto wrote to Vergennes that

The various departments have been arranged in the most perfect manner; a regular system has been introduced into all the branches of the general administration, and, but for the want of permanent revenues, the United States would be one of the best organized of governments. The department of foreign affairs, of war, of finances, are in the hands of trusty and capable men, whose integrity, wisdom, and circumspection will stand every test. Secrecy is much better observed than during the war. It is especially noticeable that the different branches of the department of finances check each other so ingeniously that the slightest malversation is impossible.³³

However adequate the structuring of the executive departments, there was no way to prevent Congress from meddling in departmental

³¹Bigelow, ed., Works of Franklin, X, 264.

³²Sparks, ed., Diplomatic Correspondence of the Revolution (Boston, 1829), IV, 98.

³³Bancroft, The History of the Constitution, II, 411.

affairs when it chose to do so. Time and again Congress would undertake to inject itself into departmental concerns whenever an issue arose, irrespective of the source. This was especially true in the area of foreign affairs. John Jay complained continually about how this was injuring foreign policy matters and Congress finally resolved that all correspondence must be handled through the secretary.³⁴

James Madison reiterated Jay's problems with Congress in a letter to James Monroe. He concluded that

His feelings are such as every one must possess who is worthy of the station which he holds. If the Office of foreign Affairs be a proper one & properly filled, a reference of all foreign despatches to it in the first instance, is so obvious a course, that any other disposition of them by Congress seems to condemn their own establishment, to affront the Minister in office, and to put on him a label of caution ag[ain] that respect & confidence of the Ministers of foreign powers, which are essential to his usefulness.

He went on to say:

I have always conceived the several ministerial departments of Congress, to be provisions for abiding their Counsels as well as executing their resolutions, & that consequently whilst they retain the right of rejecting the advice which may come from either of them, they ought not to renounce the opportunity of making use of it. The foreign department is I am sensible, in several respects the most difficult to be regulated, but I cannot think the question arising on Mr. Jay's letter is to be numbered among the difficulties. The practice of Congress during the administration of his predecessor was never fixed, & frequently improper, and I always suspected that his indifference to the place resulted in part at least from the mortifications to which this unsteadiness subjected him.³⁵

³⁴Journals of the Continental Congress, IV, 468.

³⁵Hunt, ed., Writings of Madison, II, 127-128.

Unfortunately, Congress refused to give the executive departments a free hand when operating within their departmental jurisdictions, and continued to operate as an administrative as well as a deliberative body until 1789.

One other interesting point to emerge from the development of the executive departments was the influence exerted by Robert Morris and John Jay. Professor Henry B. Learned contends that as Congress declined in power these two individuals "probably exercised large if not directive influence over it," and that Jay "became really what may be called the chief executive of the Confederation."³⁶ This idea was supported by the French representative Otto who observed that the

little stability of congress . . . insensibly gives to the ministers of the different departments a power incompatible with the spirit of liberty and of jealousy which prevails in this country. There is an unwillingness that the members of congress should hold their seats longer than three years, but the secretaries of state can be removed only for bad conduct. It follows that these ministers, being perfectly acquainted with current affairs, enjoy a great superiority over the delegates whom chance has assembled from all parts of the continent, and who are for the most part strangers to their task.

"Mr. Jay," he noted

especially has acquired a peculiar ascendancy over the members of congress. All important business passes through his hands. He makes his report on it, and congress seldom has an opinion different from his. Instead of appointing committees, they will insensibly become accustomed to seeing only through the eyes of Mr. Jay, and, although that minister may be as capable as possible of conducting wisely the measures of the United States, this influence necessarily is hurtful to the freedom and impartiality which ought to prevail in the national senate.³⁷

³⁶Henry B. Learned, The President's Cabinet (New Haven, 1912), p. 59.

³⁷Bancroft, The History of the Constitution, I, 474.

In another report Otto reiterated the power of Jay's influence with respect to settling the problems with France. He complained that

The political importance of Mr. Jay increases daily. Congress seems to me to be guided only by his directions, and it is as difficult to obtain anything without the co-operation of that minister as to bring about the rejection of a measure proposed by him. The indolence of the majority of the members of congress and the ignorance of most of the others cause his superiority. It is found much easier in current business to ask the opinion of the minister of foreign affairs than to form into a committee; hence the prejudices and passions of Mr. Jay insensibly become those of congress, which does not perceive that it ceases to be anything more than the organ of its chief minister. Happily, Mr. Jay is a patriot, and in general well disposed, but his grievances against France render him as obstinate as possible in regard to our demands the most just.

In spite of this, Otto concluded that

whatever the prejudices of this minister toward us may be, I cannot deny that there are few men in America better able to fill the place which he occupies. The veneration with which he has inspired almost all the members of congress proves, more than anything else, that even the jealousy so inseparable from the American character has not prevailed against him, and that he is as prudent in his conduct as he is firm and resolute in his political principles and in his coolness toward France.³⁸

In the final analysis, Professor Learned concluded that the tenure of Morris as director of continental finance from June, 1781 to November, 1784 and Jay's leadership in the area of foreign affairs until March, 1790 helped establish the "idea of an executive chief supported by administrative assistants untrammelled by too intimate and controlling a connection with Congress."³⁹ Thus, the primary lessons learned during the Confederation period with respect to the executive departments were

³⁸Ibid., pp. 479-480.

³⁹Learned, The President's Cabinet, pp. 58-59.

the need for their separation from Congress under independent heads, and the fact that they provided for continuity in the administration of congressional affairs. As Otto noted, however, "this fine structure is, unfortunately, useless on account of the exhaustion of the treasury."⁴⁰

In spite of the fears expressed about the power of these administrators, a growing number of individuals began to see the necessity of uniting and strengthening the administrative arm of Congress. As early as August, 1780 a group met at Boston representing the New England states and urged that the "national Concerns of the United States be under the Superintendency and Direction of one supreme Head."⁴¹

At the close of the war three years later, another writer called for the establishment of a powerful federal executive. The problem he pointed out was highlighted by the army's demands for back pay in what came to be known as the Newburg Affair. They look

to congress, and congress only, as their lawful sovereign for a fullfilment of those things . . . required of a government knowing at the same time that it is as impossible for them to do it as to make bread of stones. There must be a change of government which must create a strict accountability from each other to that head; a change that must disunite the legislative from the executive authority in that federal head (which if they had any power at all would be mischievous, but in their state of imbecility is harmless); and of this monstrous compound, they must draw out two distinct and well-organized

⁴⁰Bancroft, The History of the Constitution, II, 411. Also see Jay Ceasar Guggenheimer, "The Development of the Executive Departments, 1775-1789," in Essays in the Constitutional History of the United States, J. Franklin Jameson, ed. (Boston, 1889), p. 148, who concluded about this whole period that "It is positively pathetic to follow Congress through its aimless wanderings in search of a system for the satisfactory management of its executive departments."

⁴¹F. G. Houg, ed., Proceedings of A Convention of Delegates from Several of the New England States, Held at Boston, August 3-9, 1780 (Albany, 1867), p. 50.

bodies; legislative and executive; whose powers and capacities shall be equal to the task of managing the unruly affairs of America.

With respect to the executive, he concluded that

there must be a great and fearful executive officer to do anything; the power of that officer must be greater than that which is hereditary in the house of Orange, and as nearly like the head of that power we are contending with as can well be imagined, the name only excepted.

He hastened to urge that this new government be formed while America still feared the "enemy and their own army" to prevent a disintegration into "a wanton and riotous spirit." Finally, he concluded, anarchy was more to be feared than a government "formed and established under the influence of an army," for "doubly wretched is that country which has no government at all."⁴² Fortunately, few Americans were ready to adopt a military dictatorship or a strong monarchy at this stage.

On the other hand, some Americans were beginning to see the need for more concentration of power in executive hands. Shortly after Congress created the major executive departments, an anonymous writer in the *Pennsylvania Packet* commended the action noting that Congress "hath determined on a measure which will give life and energy to our proceedings, both in civil and military [areas by] . . . putting a man at the head of each of the great departments." He then recommended that since

⁴²Extract of a letter from a person in Philadelphia to his friend in the New England Provinces, in Sir Guy Carleton's Papers, No. 60, of 15 March, 1783, found in Bancroft, The History of the Constitution, I, 299-300.

persons who shall fill these offices have the fullest information respecting all our affairs, they may render the public essential service and facilitate the business of Congress, if they were frequently to meet together to deliberate on them, and then to lay their opinions and plans before Congress. Much therefore will depend on their having a good understanding and friendly intercourse among themselves.⁴³

A short time later, another writer added that since these department heads were granted significant duties that they

might, if they should be men of general knowledge beyond the line in which they act, be extremely useful in another capacity; for possessing among themselves ample knowledge of everything relative to public affairs, they might meet frequently together, consult what ought to be done, and submit their sentiment to Congress. By this means much time and labor would be saved to Congress; and the public business would be carried on with regularity, vigor and expedition.⁴⁴

These suggestions in all probability were derived not from a theory of government or administration but rather from the common sense notion that Congress needed an executive advisory council.

Two years later, Pelatiah Webster formalized the idea of an executive council. He advocated a bicameral legislature consisting of a "Senate and Commons" and several department heads known as the "great ministers of state." The ministers, he wrote, "will of course have the best information, and most perfect knowledge, of the state of the Nation, as far as it relates to their several departments, and will of course be able to give the best information to Congress." This advice would be submitted to Congress in writing though Congress might admit

⁴³Cited by Learned, The President's Cabinet, p. 60.

⁴⁴Ibid.

the ministers to their sessions to provide information during a debate though they would not be granted a vote. Moreover, he continued,

the aforesaid great ministers of state shall compose a Council of State, to whose number Congress may add three others, viz. one from New England, one from the middle States, and one from the southern States, one of which to be appointed President by Congress;

to all of whom shall be committed "the supreme executive authority of the States . . . [and they] shall superintend all the executive departments, and appoint all executive officers."⁴⁵ Here at least was the embryonic notion of combining the executive authority into a "Council of State," a phrase frequently found in state and colonial constitutions.

Another writer, Noah Webster, continued the line of reasoning by advocating the concentration of all executive power in the hands of one person. He contended that the "power of the whole . . . be brought to a single point and vested in a single person, and the execution of laws still be vigorous and decisive."⁴⁶

While consolidating the executive power in the hands of one or a few administrative heads was not alien to American political theorists, it was far from an accepted political axiom. Yet, an increasing number of individuals began to realize that one of Congress' fundamental weaknesses was the lack of a proper division of powers. By 1786 this was a major topic of discussion among those advocating a restructuring of the federal government. John Jay wrote:

⁴⁵"A Dissertation on the Political Union and Constitution of the Thirteen United States of North America, etc.," in his Political Essays (Philadelphia, 1791), pp. 213-222.

⁴⁶Sketches of American Policy (Hartford, 1785), p. 7.

I have long thought, and become daily more convinced, that the constitution of our federal government is fundamentally wrong. To vest legislative, judicial, and executive powers in one and the same body of men, and that, too, in a body daily changing its members, can never be wise. In my opinion, these three great departments of sovereignty should be forever separated, and so distributed as to serve as checks on each other. But these are subjects that have long been familiar to you, and on which you are too well informed not to anticipate everything that I might say on them.⁴⁷

Several months later in another letter to Jefferson, Jay reiterated his concern. Said he:

I daily become more and more confirmed in the opinion, that government should be divided into executive, legislative, and judicial departments. Congress is unequal to one first, very fit for the second, and but ill calculated for the third; and so much time is spent in deliberation, that the season for action often passes by before they decide on what should be done; nor is there much more secrecy than expedition in their measures. These inconveniences arise not from personal disqualifications, but from the nature and construction of the government.⁴⁸

To Washington he wrote that the "executive business of sovereignty depending on so many wills, and those wills moved by such a variety of contradictory motives and inducements, will in general be but feebly done." He continued by pointing to the fundamental problem of a plural executive. "Such a sovereignty, however theoretically responsible, cannot be effectually so in its departments and officers without adequate judicatories."⁴⁹ And finally to John Adams he wrote the decision

⁴⁷ Bancroft, The History of the Constitution, I, 511.

⁴⁸ Johnston, ed., Correspondence of John Jay, III, 210.

⁴⁹ Ibid., p. 223.

"that Congress should act in these different capacities was, I think, a great mistake in our policy."⁵⁰

Other advocates of constitutional reform in the federal government were coming to the same conclusions. Madison in the spring of 1787 wrote that "the limited powers now vested in Congress are frequently mismanaged from the want of such a distribution of them."⁵¹ To this point few individuals had argued against the proposition that the three basic divisions of government, legislative, executive, and judicial, ought to be separated. That was a political maxim settled in the colonial era. However, the bulk of the discussion applied primarily to the state constitutions. Moreover, while it was an accepted political principle there was still much debate over the mechanical implementation of the theory. The state constitutional experience, as discussed later, did much to influence the thinking within the purview of the executive.

The lack of an executive to coordinate congressional affairs and carry on between sessions was a constant problem. Charles Thompson wrote to Jefferson that "This mode of rambling is neither consistent with dignity nor convenience." He lamented that America "must go the common round of nations before us and learn wisdom from our experience."⁵² In 1784 Jefferson proposed to remedy this situation by establishing a

⁵⁰Ibid., p. 227.

⁵¹Madison, Letters and Other Writings (Philadelphia, 1867), I, 286.

⁵²Burnett, Letters, VII, 557.

committee of states empowered to act for Congress in its absence. He wrote in his autobiography that the committee was

to consist of a member from each state, who should remain in session during the recess of Congress: that the functions of Congress should be divided into Executive and Legislative, the latter to be reserved, and the former, by a general resolution to be delegated to that Committee. This proposition was afterwards agreed to; a Committee appointed, who entered on duty on the subsequent adjournment of Congress, quarrelled very soon, split into two parties, abandoned their posts, and left the government without any visible head until the next meeting of Congress.

This he concluded was to be the fate of "any Executive consisting of a plurality."⁵³

Jefferson's idea was a direct descendant of the ones proposed by Benjamin Franklin and John Dickinson in their drafts for the Articles of Confederation, in 1775 and 1776 respectively. In the fall of 1775, a committee of Congress chaired by Jefferson recommended a recess committee with extensive administrative powers.⁵⁴ Since Congress did not adjourn then, the proposal was never acted upon. Dickinson's plan submitted later followed Jefferson's ideas quite closely. The significant point was that both proposals went beyond the mere establishment of a committee to sit during a congressional recess but rather it was to be a steering committee and was intended to be the chief administrative arm of Congress at all times.⁵⁵

⁵³Ford, ed., The Writings of Thomas Jefferson (New York, 1892), I, 75-76.

⁵⁴Boyd, ed., Writings of Jefferson, VI, 516-518.

⁵⁵See Edmund C. Burnett, "The Committee of States, 1784," Annual Report of the American Historical Association, 1913, I, 141-158.

By 1784 a frustrated Jefferson wrote to Madison that Congress failed to think through the implications of its adjourning. He said that

the question of the location of Congress is put off to be considered with the establishment of a committee of the states, which to my astonishment would have been negatived when first proposed had not the question been staved off (sic). Some of the states . . . were against the measure, I believe because they had never reflected on the consequence of leaving the government without a head.⁵⁶

The final report of the congressional committee, which proposed the Committee of States, stripped the enumerated powers from the committee concept envisioned by Jefferson. In their place, they recommended that the committee be granted the powers which might be exercised by seven states in Congress. They also left most of Jefferson's enumerated prohibitions. In this form, the committee's report passed Congress, though Jefferson cautioned that it was necessary to

define the powers of the committee of states, [so] that if we are left in the lurch again as we have been, there may be some power to place at the head of affairs till the states can be made servicable, of the necessity of sending on full delegation.⁵⁷

Jefferson had also proposed that the President of Congress be a member of the Committee of States and serve as its presiding officer. However, the recommending committee chose to grant the Committee the power to choose its own chairman. Later Congress, by a separate

⁵⁶Ford, ed., Writings of Jefferson, III, 470.

⁵⁷Burnett, Letters, VII, 458.

resolution, specifically prohibited the President from exercising any powers during a congressional recess.⁵⁸

Membership on the Committee of States was originally determined by Congress. In case of vacancy, another member of the absent members' delegation would be appointed by prior arrangement. Moreover, the Committee was empowered to reconvene Congress before the scheduled date to which it stood adjourned if necessary. However, the Committee's power was almost fatally destroyed by the requirement that on every issue, except daily adjournment, it could not act without support of nine states. One member of Congress wrote his state governor noting:

I freely confess I consented to appoint a Committee only with a view to obtain a recess. If they do no good, their powers are too much restricted to admit of their doing much hurt As Congress has made the concurrence of nine voices necessary in every act there is ample Security against the Committee's sitting in Philadelphia, unless infatuated.⁵⁹

James Monroe wrote to Jefferson outlining the breakdown of voting patterns on the Committee and expressed relief that "the powers of the committee are confin'd so that no injury can be effected."⁶⁰

One member, John Francis Mercer, even expressed his contempt for being a member of such a useless body. He wrote:

I am here only since eight o'clock last Evening, but that is long enough to convince me that I am here to no good purpose. A desire that the State of Virginia might shew (sic) her respect for the Confoederal (sic) Government (if it is not a prostitution of the name of Government to apply it to such a vagabond, strolling, contemptible Crew as Congress) will

⁵⁸Burnett, "The Committee of States, 1784," p. 151.

⁵⁹Cited by Ibid., p. 152.

⁶⁰Cited by Ibid.

induce me to spin out a couple of weeks here. . . . If I do not find the ensuing Congress of a very different complexion from the last, and disposed to be very decisive--I will no longer myself degrade the Character of a human being by continuing an useless Cypher among others, who are become as contemptible to the world as they have long been to themselves.⁶¹

When the Committee of States did manage to assemble, they found it difficult to accomplish much. Francis Dana complained to Elbridge Gerry that once they assembled a quorum,

some persons are totally disinclined to do business, and are fatigued at the very sight of it; [yet these individuals are] . . . indispensably necessary, for we have yet only nine states on the floor, [and] every thing must be at a stand. From such causes we have hitherto done very little business.

He went on to note that "the burden of this is so great, that some will insist upon adjourning every Saturday, for the benefit of their health, and because they have not been accustomed to do business on that day." Then he added sarcastically, "nor on any other day." Finally, in exasperation, he concluded that the "barrenness of our journal makes me ashamed. I will soon quit a place where public business cannot be done, and retire home to do my private business."⁶²

A dispute over adjournment to Trenton touched off a confrontation between the delegates, which led to the final breakdown of the Committee. Jonathan Blanchard noted that since there was "nothing to do in the committee" he thought there was no reason to remain.⁶³

⁶¹Cited by Ibid., p. 156.

⁶²James T. Austin, The Life of Elbridge Gerry (New York, 1970), I, 443.

⁶³Ibid., p. 447.

Other delegates viewed the maneuvering for adjournment as an attempt to destroy the Committee. One member argued that

Our New England Members appear determined to prevent the Continuance of the Committee by returning to their homes, . . . the Eastern Gentry opposed the formation of a Comm[itt]ee very Strenuously--being baffled then, they are now Resolved to render the Institution useless--they indeed [endeavored?] to cover a little their real design by propose[ing] an Adjournment for 6 weeks, and a removal of the Public papers to Trenton but the person must be very blind that cannot see in complying with this proposal a dissolution of the Committee, the time between the end of Sept. and the Meeting of Congress being so Short that Members, uncertain of being continued in Congress will not think of Assembling--besides there are at this very time many matters which Should be attended to tho I must confess they are not peculiarly interesting to the Eastern Combination nor altogether conformable to their System of politics.⁶⁴

Richard Spaight explained the final vote by contending that it was an attempt to save the dignity of both the Committee and the United States. Citing the "bad effects the dissolution of the Committee, by the withdrawing of any of its members, would have in the political world on the affairs of the United States," the situation induced him to

vote for . . . [the proposal] thinking it would have a better appearance for the Committee to be dissolved (if it should happen to have that effect by its not being formed again) by its own vote than by the former mode, the one would at least bear the face of unanimity, the other disunion.

The proposal was voted down. Then Spaight and others attempted to persuade those who wished to leave to remain until replacements could be sent, whereupon Blanchard left immobilizing the Committee since there were not nine states. For the next two days the remaining

⁶⁴Quoted by Burnett, "The Committee of States, 1784," p. 154. Also see Dana to Gerry, Burnett, Letters, VII, 555-556.

delegates tried to convince him to return to no avail. Shortly thereafter, delegates Blanchard, Dana, and Dick left for home. This action caused Spaight to conclude that

This unprecedented step of the Eastern Delegates did not surprise me, it was only acting in unison with their former conduct, and seems to me to be a concerted scheme among the Delegates of the four New England States as they opposed the appointing of a Committee during the recess, and would not have agreed to it, could they have had an adjournment of Congress without.⁶⁵

Not all members were so despairing of the significance of the Committee of States. One delegate wrote that

It is conceived of great importance to the Confederacy that the Com[itt]ee should assemble. Whatever little politicians may think, time will evince that it is of no small consequence to save appearances with foreign nations, and not to suffer the federal government to become invisible. A government without a visible head must appear a strange phenomenon to European politicians and will I fear lead them to form no very favorable opinion of our stability, wisdom or union.⁶⁶

Charles Thompson wrote to Ambassador Jefferson that

Though this invisibility of a Federal head will have little effect on our affairs here, or on the minds of the citizens of the United States who can easily reconcile themselves to it and who will view it in no other light than the rising or dissolution of their several Legislatures, to which they have been accustomed, yet I am apprehensive it will have an ill aspect in the eyes of the European nations and give them unfavorable impressions, which require all your address and abilities to remove.⁶⁷

In spite of these arguments, the Committee never again reassembled.

⁶⁵Quoted Ibid., p. 155.

⁶⁶Burnett, Letters, VII, 593.

⁶⁷Ibid., p. 599.

A while later, James Monroe reported that there was a movement among some of the delegates of Congress to investigate the demise of the Committee. However, he argued, the less said about the Committee the better for all concerned. When Madison was asked by Jefferson to explain what happened, he replied:

I am not sure that I am myself possessed fully of the causes different members of Congress having differed in their accounts of the matter. My conception of it is that the abrupt departure of some of the Eastern delegates which destroyed the quorum which Dana is said to have been at the bottom of proceeded partly from irritations among the comm[itt]ee partly from dislike to the place of their session and partly from an impatience to get home, which prevailed over their regard for their private characters, as well as for their duty.⁶⁸

If nothing else the lessons from the Committee of States affair were a pointed lesson to those advocates of Confederation reform. Overall, however, concern over the state of the Committee moved from expressions for the need of an administrative head to concerns over the appearance of the Confederation in diplomatic circles. As James Madison argued:

I am persuaded that there sho'd always be . . . during the recess of Congress [some executive power,] for while there exists a foederal government and any arrangement abroad or within depending on it, any responsible characters acting under it, there sho'd always be a foederal head.

While on the other hand the chairman of the Committee concluded after its demise,

what consequences may result from this ill-judged measure time can only disclose. Though I must confess I anticipate the worst. Its tendency to lessen the dignity of the foederal Government in the Eyes of our own Citizens as well as those of foreigners cannot be denied.

⁶⁸Hunt, ed., Writings of Madison, II, 162.

This, he concluded, exposed the United States "to all the danger that may result from the want of a federal head."⁶⁹ Moreover, this episode not only pointed to the inherent weaknesses of the Confederation, but, in the opinion of Jefferson, proved the futility of a plural executive. The contempt it generated did, however, help to spur the discussion for needed reforms by at least showing what did not work.⁷⁰

As late as the summer of 1787 Jefferson continued to reiterate the need for a separate and well-ordered executive branch. Prior to the adjournment of the Constitutional Convention, he wrote:

I think it very material to separate in the hands of Congress the Executive and Legislative powers, as the judiciary already are in some degree. This I hope will be done. The want of it has been the source of more evil than we have experienced from any other cause. Nothing is so embarrassing as the details of execution. The smallest trifle of that kind occupies as long as the most important act of legislation, and takes place of everything else. Let any man recollect, or look over the files of Congress, he will observe the most important propositions hanging over from week to week and month to month, till the occasion have past them and the thing never done. I have ever viewed the executive details as the greatest cause of evil to us, because they in fact place us as if we had no federal head, by diverting the attention of that head from great to small objects, and should this division of power not be recommended by the Convention, it is my opinion Congress should make it itself by establishing an executive committee.⁷¹

Thus Jefferson, like others, argued for a separate executive branch as a means to facilitate the administration of congressional policy and free Congress from the daily details of administration.

⁷⁰See Ford, ed., Writings of Jefferson, "Jefferson's Biography," I, 75.

⁷¹Ibid., IV, 424.

During the period from 1781 to 1789, the office of President of Congress continued in much the same manner as before. However, the organization of the executive departments relieved the President of most of his official correspondence duties. In spite of the role played by the executive departments, the President's duties continued to revolve around three basic areas. He presided over Congress, represented Congress and the United States in official correspondence not covered by the executive departments, and entertained Americans and foreigners at official functions of state. As noted previously, Congress after much delay finally provided the President with a house, staff, and entertainment expenses. Moreover, in 1781 an unsuccessful attempt was made to provide him with a definite salary. Superintendent of Finance Robert Morris recommended that "a Salary be fixed to the office of President which may be adequate to the Expence (sic) [he incurs]." This, he hoped, would "be more agreeable (sic) to every Gentlemen, who may fill that exalted Station."⁷² Three years later, Morris again argued that the office ought to have a fixed salary in line with sound financial principles as drawing on the treasury to pay expenses as they arose caused administrative problems. He wrote Jefferson regarding the "Expences (sic) of the Presidents Household," and concluded that

the present Mode is certainly objectionable as I have frequently had Occasion to observe and which I now repeat with the more Freedom as Nothing which can be said will bear the least personal Application.

⁷²Quoted by Jennings B. Sanders, The Presidency of the Continental Congress (Gloucester, Massachusetts, 1971), p. 50.

He proceeded to outline his reasons as follows:

1st. No Person not accountable to the United States should be invested with the Right of drawing at Will on the Public Treasury. 2ly. Every Expenditure ought as far as the Reason and Nature of Things will permit to be ascertained with Precision. 3ly. A fixed Salary being annexed to the Office of President of Congress he will be more effectually Master of his own Household and in Consequence a greater Order and OEconomy (sic) may reasonably be expected.⁷³

Again Congress refused to follow his recommendation preferring to pay the President as the need arose.

In 1784 an attempt was made to make the President "a more powerful and serviceable official." It resulted from several individuals advocating the election of Jay, Laurens, and R. H. Lee for the office. South Carolina was reported to have agreed to support Laurens again "provided the position was made more important." However, nothing ever came of the proposal and historian Sanders concluded it was probably part of the general effort to call a constitutional convention to revise the Confederation.⁷⁴ At the time most members of Congress would likely have agreed with Richard H. Lee on what power the President ought to have when he wrote to Samuel Adams in 1785 that "the first maxim of a man who loves liberty should be, never to grant to Rulers an atom of power that is not most clearly & indispensably necessary for the safety and well being of Society."⁷⁵

⁷³Boyd, ed., Papers of Jefferson, VI, 560.

⁷⁴Sanders, The Presidency of the Continental Congress, p. 29.

⁷⁵James C. Ballagh, ed., Letters of Richard Henry Lee (New York, 1911), II, 343-344.

An indication of the President's lack of power to endanger the Congress was illustrated by the election of Thomas Mifflin as President. At the time of his election he had not as yet been re-elected a delegate to Congress from Pennsylvania. Not until nine days after his election as President did he present his credentials indicating that he had indeed been chosen to represent that state. As historian Sanders observed, "It would seem, therefore, that Congress was anticipating a bit in their action. . . , and had the Presidency been a more important office, this would strike one as having been rather hazardous."⁷⁶

In summary, the significance for this study of the Presidency of Congress lies not in its being a political forerunner of the present presidency, but rather that it focused attention on the non-political duties of the President. The President's duty to preside over Congress was given to the Vice-President in the Constitution of 1787 as President or chief presiding officer of the Senate. However, the President of Congress in this period was more than a presiding officer as he had important clerical and social functions to fulfill. It was in these capacities that he could, if he so chose, use what little authority he possessed to influence congressional policy. Moreover, most of the occupants of the office were lawyers and as such they were well educated, and possessed a considerable experience in public affairs. Most important, in the long run, was that the role of spokesman for the United States was passed intact from the congressional office of President to

⁷⁶Sanders, The Presidency of the Continental Congress, p. 25.

the present office of the Presidency. Therein lies the significant continuity between the two institutions.⁷⁷

From the end of the Revolutionary War to the eve of the Constitutional Convention of 1787 there was constant friction between those who saw the problems of the Confederacy from the national viewpoint and those who viewed them from the perspective of the states. Alexander Hamilton noted in 1783 that "There are two classes of men . . . in Congress of very different views--one attached to the state the other to Continental politics."⁷⁸

Four years later John Jay despaired of any fundamental changes being made in the Articles of Confederation because

this country has yet to feel and see a little more before it can be accomplished. A thirst for power, and the bantling--I had like to have said MONSTER--sovereignty, which have taken such fast hold of the States individually, will, when joined by the many whose personal consequence in the line of States politics will in a manner be annihilated, form a strong phalanx against it.

Then there will be the support necessary for reform, but only when the public mind has "matured for such an important change. . . ."⁷⁹

To help in this process, Jefferson recommended "sending our young statesmen . . . [to Congress]. They see the affairs of the Confederacy from a high ground; they learn the importance of the Union and befriend federal measures when they return." "Those who never

⁷⁷Ibid., pp. 70-71.

⁷⁸Burnett, Letters, VII, 129.

⁷⁹Johnston, ed., Correspondence of Jay, III, 238-239.

come here," he concluded, "see our affairs insulated, pursue a system of jealousy and self-interest, and distract the Union as much as they can."⁸⁰

The growth of federal sentiment was urged by Jay and others with increasing urgency in the years between the Revolution and the Convention. To John Adams Jay wrote:

Your letters I am sure are useful; they disseminate those federal ideas which cannot be too forcibly inculcated or too strongly impressed. Our federal government is incompetent to such objects, and as it is in the interest of our country, so it is the duty of her leading characters to co-operate in measures for enlarging and invigorating it. The rage for separation and new States is mischievous; it will, unless checked, scatter our resources, and in every view enfeeble the Union. Your testimony against such licentious, anarchical proceedings would, I am persuaded, have great weight.⁸¹

To Jefferson he wrote that

Among the public papers herewith sent you will find the speech of the Governor of New York to the Legislature, and the answer of the Senate. A spirit more federal seems to prevail than that which marked their proceedings last year.⁸²

In 1786 he mentioned the changing spirit to Adams. He noted that

The public papers will enable you to see the complexion of the times. Federal opinions grow, but it will be some time before they bear fruit; and, what is not the case with most other fruits, they will, to judge from present appearances, ripen slower in the South than in the North.⁸³

⁸⁰Boyd, ed., Papers of Jefferson, VI, 548-549.

⁸¹Johnston, ed., Correspondence of Jay, III, 172.

⁸²Ibid., p. 179.

⁸³Ibid.

Like the growth of federal sentiment the realization of a need for an independent federal executive was painfully slow. Along the way there were a number of incidents which helped formulate public attitudes toward the need for such a national executive.

The Newburg incident showed how vulnerable Congress was in the face of an uncontrolled army. The military officers, angered over not being paid and not having their demands for half pay for life approved, were threatening to take action against Congress. If Washington's presence and diplomatic tact had not defused the army's intentions of forcing congressional compliance, it might well have created a political crisis that would have brought down the already shaky structure of the Confederation. The Maryland delegation in Congress wrote to their governor explaining:

We are truly sorry to inform you that the discontents of our Army have risen to a very alarming height, in so much as to threaten fatal consequences--anonymous addresses calculated to inflame the passions had been industriously and clandestinely circulated through the Army calling a meeting . . . to devise a mode of redressing their own wrongs, while it was yet in their power, declaring at the same time that no reliance was to be placed in the justice of Congress, from whom their unavailing applications had met with only inattention or contempt. The General interposed his authority as soon as he was apprised of this dangerous proceeding . . . and hoped the step he had taken to dissipate a Cloud so hastily collected and which threatened to burst on a sudden [incident] would meet the approbation of Congress. he (sic) has the best disposition to support their Authority with his whole influence and power; at the same time he relies on Congress taking the most efficacious and speedy measures the circumstances will admit of to comply with the reasonable claims of the Army.⁸⁴

⁸⁴Burnett, Letters, VII, 88-89.

Once again Washington had taken the lead and had shown Congress that the lack of an executive head would cause them no end of problems some of which might be fatal to the federal government.

Washington found himself involved in another veterans' problem when he was elected president of The Society of Cincinnati. Washington was drawn to the idea of its founders of establishing a charitable organization to do benevolent work among the widows and orphans of Revolutionary War veterans. However, some Americans interpreted this as an attempt to set up a military aristocracy since it was a fraternal organization with all the trappings and had a hereditary membership which was also open to foreigners who had served in the war. Opposition to the organization spread rapidly and Washington, sensing his predicament, resigned as its president. A letter that General Greene wrote to Washington after this episode summed up the American sentiment toward such organizations. He wrote in part that

The clamor roused against the Cincinnati was far more extensive than I expected. I had no conception that it was so universal. I thought it had been confined to New England alone; but I found afterward our ministers abroad, and all the inhabitants, in general, through out the United States, were opposed to the order. . . . The measures you took seemed to silence all the jealousies (sic) on the subject; but I wish the seeds of discontent may not break out under some other form. However, it is hardly to be expected that perfect tranquility can return at once, after so great a revolution, where the minds of the people have been so long accustomed to conflict and subjects of agitation. In this country many discontents prevail; committees are formed, and correspondencies going on, if not of a treasonable nature, highly derogatory to the dignity of government, as well as subversive of the tranquility of the people. And I wish they may not break out into acts of

violence and open rebellion against the authority of the state.⁸⁵

Many members of Congress were fearful that the Order of Cincinnati was just a guise to establish a military constitution for the present Articles of Confederation. Elbridge Gerry wrote that

as I have endeavoured formerly to shew (sic), some have created this political Wolf and presented it in Sheeps Cloathing (sic), and to recommend the harmless Creature they have christned (sic) it with the venerable Name of Cincinnatus. Should it be suffered to exist in the present form, the constitutional Congress must be soon suspended by the military one; and an Existence in any Form, will furnish an intriguing Court with a fixed order of Men to carry on operations against our Constitution. (sic) let us suppose the Members of the Cincinnati without Funds, Titles, Badges, or hereditary Descents, and only permitted to have innocent Meetings in the States and in a continental Congress once or twice a year. (sic) will they not be instantly an object for intriguing Courts to establish thereby an Influence, to Accomplish the purposes mentioned, or any other that may endanger the Liberties of America?⁸⁶

Jefferson counseled Washington that he

wished to see you standing on ground separated from it, and that the character which will be handed to future ages at the head of our revolution may in no instance be compromised (sic) in subordinate altercations. . . .

He also noted that he had not found one non-military member of Congress who was not opposed to it, "and that with an anguish of mind, tho' covered under a guarded silence, which I have not seen produced by any circumstance before."⁸⁷ Once Washington withdrew from the presidency

⁸⁵Bancroft, The History of the Constitution, I, 382. Also see I, 370.

⁸⁶Burnett, Letters, VII, 522.

⁸⁷Ibid., p. 494. Also see Syrett, ed., Papers of Hamilton, III, 635.

of the organization, its prestige declined, though it still remained a source of political contention for a number of years. Washington's stature and prestige had once again prevented a crisis.

One of the most insidious threats to the republican ideals of the Revolution was the growth of monarchical sentiment. During the Revolution, several plans to establish a monarchy were put forth, the most famous of which was the one outlined by Court de Broglie.⁸⁸ At the close of the war, Colonel Nicola wrote Washington proposing him as America's reigning monarch. In his letter he covered the sorry state of affairs in America and went on to note that

This must have shown to all, and to military men in particular, the weakness of republics, and the exertions the army have been able to make by being under a proper head. Therefore I little doubt, that, when the benefits of a mixed government are pointed out, and duly considered, such will be readily adopted. In this case it will, I believe, be uncontroverted, that the same abilities, which have led us through difficulties, apparently insurmountable by human power, to victory and glory, those qualities, that have merited and obtained the universal esteem and veneration of an army, would be most likely to conduct and direct us in the smoother paths of peace. Some people have so connected the ideas of tyranny and monarchy, therefore, be requisite to give the head of such a constitution, as I propose, some title apparently more moderate; but, if all other things were once adjusted, I believe strong arguments might be produced for admitting the title of KING, which I conceive would be attended with some material advantages.⁸⁹

⁸⁸See Louise Burnham Dunbar, "A Study of 'Monarchical' Tendencies in The United States from 1776 to 1801," University of Illinois Studies in the Social Sciences, X, 1923, Chapter II.

⁸⁹Niccols letter reprinted in Jared Sparks, The Life of Washington (Boston, 1844), p. 354.

Washington's indignant response outlined his aversion to establishing a monarchy in America. He wrote that it was

With a mixture of great surprise and astonishment, I have read with attention the sentiments you have submitted to my perusal. Be assured, Sir, no occurrence in the course of the war has given me more painful sensations, than your information of there being such ideas existing in the army, as you have expressed, and I must view with abhorrence and reprehend with severity. For the present, the communication of them will rest in my own bosom, unless some further agitation of the matter shall make a disclosure necessary.

After disclaiming any feelings for monarchy, he warned that

if you have any regard for your country, concern for yourself or posterity, or respect for me, to banish these thoughts from your mind, and never communicate, as from yourself or any one else, a sentiment of the like nature.⁹⁰

In 1781 Robert Morris, as Superintendent of Finance, was charged with advocating the establishment of a monarchy by use of the military. In a letter to General Nathaniel Greene, he wrote that

Experience must at least induce the people of America, if the war continues to entrust proper powers to the American Sovereign, having compelled that Sovereign reluctantly to relinquish the administration and entrust to their ministers the care of this immense republic. I say if the war continues or does not continue, I have no hope that the Government will acquire force; and I will go further, I have no hope that our Union can subsist except in the form of an absolute monarchy, and this does not seem to consist with the taste and temper of the people. From the same attachment to the happiness of mankind, which prompted my first efforts in this revolution, I am now induced to wish that Congress may be possessed of much more authority than has hitherto been delegated to them.⁹¹

⁹⁰Ibid., p. 355.

⁹¹Letter reprinted in The Diary and Letters of Gouverneur Morris, Ann Carey Morris, ed. (New York, 1888), I, 15.

Thus, Morris was well aware that a monarchical form of government was not acceptable to the American conditions. However, like Washington and others of his time, he saw the need for a centralized government with adequate powers.

As the decade of the 1780's progressed, those advocating republican principles grew alarmed at the talk of establishing a monarchy. Rufus King outlined all the problems of the Confederation and then hastened to add that

It must not be understood that these remarks authorize an opinion that a monarchy would promote happiness of the people of America--far, very far from it. But they show this; if wise and prudent men discerning the imperfections of the present Governments, do not in season and without fear, propose suitable remedies, the causes which changed the Governments alluded to may, and probably will, change those of America.⁹²

King's remarks indicate that there were at least plausible discussions of a monarchy.

Madison turned the discussion of the monarchical form of government to his own ends. Since he was one of the more influential individuals in the forefront of those calling for a revision of the Confederation, he analyzed the monarchical sentiment as stemming from a desire for governmental stability with no viable republican alternative. He wrote that

Those who may lean towards a Monarchical Govt. and who I suspect are swayed by very indigested ideas, will of course abandon an unattainable object whenever a prospect opens of rendering the Republican form competent to its purposes. Those who remain attached to the latter form must soon

⁹²Burnett, Letters, VIII, 459.

perceive that it can not be preserved at all under any modifications which does not redress the ills experienced from our present establishments.⁹³

Later to Edmund Pendleton he wrote that the

late turbulent scenes in Mass'ts and infamous one in Rhode Island, have done inexpressible injury to the republican character in that part of the United States; and a propensity towards Monarchy is said to have been produced in some leading minds.⁹⁴

The Canadians watched events in America with more than just passing interest. An intelligence communication to Lord Sydney noted the discussion of monarchy and though it was a gross overstatement, assessed the national feeling. The report read in part that

At this moment there is not a gentleman in the States from New Hampshire to Georgia, who does not view in the present Government with contempt, who is not convinced of its inefficacy, and who is not desirous of changing it for a monarchy.

It then went on to divide public opinion into three classes.

The first class proposes a federal Government somewhat resembling the Constitution of the State of New York, with an annual Executive, Senate, and House of Assembly. The second wishes to have a sovereign for life with two triennial Houses of Parliament. The third is desirous of establishing an Hereditary Monarchy with a form of Government as nearly resembling Great Britain as possible.

The report then noted that the first class looked

up to General Washington; those of the second and third classes cast their eyes to the House of Hanover for a Sovereign, and they wish for one of the King's sons. The third class is the most powerful, and composed of the ablest men in the States.

Finally, it concluded:

⁹³Hunt, ed., Writings of Madison, II, 315-316.

⁹⁴Ibid., p. 319.

From other sources of information it is understood that men of ability in the States are in general strongly impressed with the necessity of establishing a Monarchy; they find their present Government neither efficient nor respectable; they are greatly divided in opinion upon this subject, whether they shall raise an American to this dignity, or procure a Sovereign from Great Britain or from France. . . .⁹⁵

It was evident that this intelligence report had confused the desire for an adequately endowed national executive by leading advocates for constitutional reform with a desire for a monarchy.

Some sentiment for a monarchy was the result of the search for forms of governmental organization to strengthen the national government. In 1784 a respected New England clergyman, Jeremy Belknap, wrote that

Experiment is the surest and fairest way of coming at knowledge; and I think it will not be much longer before we shall all be convinced that a democratic government, over such a large and increasing number of people, inhabiting so vast an extent of country, is to say the least . . . extremely inconvenient . . . and very inadequate to the purpose.

A short time later, he wrote,

Let it stand as a principle that government originates from the people; but let the people be taught (. . . they will learn it by experience, if no other say) that they are not able to govern themselves. . . . Should even a limited monarchy be erected, our liberties may be as safe as if every man had the keeping of them solely in his own power.⁹⁶

Others disagreed with the feasibility of a monarchy. Richard Henry Lee observed that

⁹⁵Communication reprinted in Burnett, Letters, VIII, 547-548, No. 8.

⁹⁶Jeremy Belknap to Ebenezer Hazard, February 27, March 3, 1784, Belknap Papers (Massachusetts Historical Society, Collections, 5th ser., II), I, 307, 315.

Our territories are far too extensive for a limited monarchy, in which the representatives must frequently assemble, and the laws operate mildly and systematically. The most eligible system is a federal republic, that is, a system in which national concerns may be transacted in the center, and local affairs in state or district governments. . . .⁹⁷

Other individuals were more concerned with governmental stability than the form it assumed. William Plumer claimed that this was representative of the popular sentiment. As he argued:

I am fully resolved to use my power & influence in supporting that form of Government which my country establishes. I do not feel hostile to either democracy, autocracy, or monarchy. I am inclined to think the people are much more interested in the good administration than in the theory or form of the government--Or, as Pope expresses it, 'That government is best which is administered best.'⁹⁸

The fear of monarchy proved to be a powerful spur to those advocating reform of the Confederation. For example, Madison wrote to Edmund Pendleton in January, 1787 that

Our latest information from the Eastw[ar]d has not removed our apprehensions of ominous events in that quarter. It is pretty certain that the seditious party has become formidable in Gov[ernment] and that they have opened a communication with the viceroy of Canada.⁹⁹

George Washington wrote to Jay exclaiming,

What astonishing changes a few years are capable of producing! I am told that even respectable characters speak of a monarchical form of government without horror. From thinking proceeds speaking: thence to action is often but a single step. But how irrevocable and tremendous! What a triumph

⁹⁷Richard Henry Lee, Letters of a Federal Farmer, Letter VI, December 25, 1787 (New York, 1788).

⁹⁸W. Plumer, Jr., The Life of William Plumer (New York, 1969), pp. 53-59.

⁹⁹Hunt, ed., Writings of Madison, II, 307.

for the advocates of despotism to find that we are incapable of governing ourselves, and that systems founded on the basis of equal liberty are merely ideal and fallacious! Would to God that wise measures may be taken in time to avert the consequences we have but too much reason to apprehend.¹⁰⁰

Jay agreed with Washington's assessment and argued in his reply that the functions of government must be divided into legislative, executive, and judicial functions. With respect to the executive he said,

Shall we have a king? Not in my opinion while other experiments remain untried. Might we not have a governor-general (to preserve the balance), with the advice of a council, formed for that only purpose, of the great judicial officers, have a negative on their acts? Our government should in some degree be suited to our manners and circumstances, and they, you know, are not strictly democratical (sic). What powers should be granted to the government so constituted is a question which deserved much thought.¹⁰¹

After Shay's Rebellion, Jay wrote to Jefferson that "If faction should long bear down law and government, tyranny may raise its head, or the more sober part of the people may even think of a king."¹⁰²

Then on the eve of the Constitutional Convention, Washington summed up the public sentiment for monarchy. Said he:

I am fully of the opinion that those who lean to a monarchical government, have either not consulted the public mind, or that they live in a region, which (the leveling principals (sic) in which they were bred being entirely eradicated) is much more productive of monarchical ideas, than are to be found in the southern States. . . . I am also clear, that, even admitting the utility, nay, necessity of the form, yet that the period

¹⁰⁰Johnston, ed., Correspondence of Jay, III, 209.

¹⁰¹Ibid., p. 227.

¹⁰²Ibid., p. 213.

is not arrived for adopting the change without shaking the peace of this country to its foundations.¹⁰³

Throughout 1786 there was rumor of a "monarchical plot," though contemporary evidence is scant. Historian Louise Dunbar sifted the evidence and concluded that "If anybody is to be convicted of promoting a monarchical plan for any or all of the United States it must be on circumstantial evidence." What evidence exists indicated that some persons, mostly from New England, between the end of the Revolution and 1788, did favor the establishment of a monarchy. Especially interested was the governor of Canada, though the available evidence indicated more support for a Prussian rather than an English prince. Finally, "that the known character and public record of the men involved proves the motives to have been a desire for general security of property and 'good government.'" Moreover, their discussions were shrouded with "extreme caution" which indicated that they expected that a monarchy would be established by "coup d'etat" and while the people in general might oppose the movement, "their aversion would in time be overcome by the benefits to be received in peace, order, and prosperity."¹⁰⁴ Historian Samuel Elliot Morrison concluded from his studies that the "Federalists" before 1788 who spoke of monarchy grasped "at the monarchical ideas, as a drowning man grasps at a straw." In his opinion

¹⁰³To Madison, March 31, 1787, Ford, ed., Writings of Washington, XI, 132.

¹⁰⁴Dunbar, "A Study of 'Monarchical' Tendencies," p. 75.

the New England sentiment for a separate "Northern Confederacy" indicated nothing to show that it "should be anything but a republic."¹⁰⁵

Among the men who finally succeeded in replacing the Articles of Confederation, only Alexander Hamilton stands out as indicating any executive ideal which might be construed as favoring a monarchy. However, his proposal for a life-time executive, as discussed in the next chapter, was not given serious consideration. Other individuals like Washington and Madison feared a general drift toward monarchy if republican ideals could not be securely anchored upon a strong and viable national government. To this end, they used the threat of monarchy to warn their colleagues that if actions were not taken soon to remedy the weaknesses of the Confederation, the ideals of the Revolution were in danger of being lost. In the words of Madison, who said that it had fallen to the Americans, as to no other people, the opportunity to justify "Republican government" by their actions.

In this view the citizens of the United States are responsible for the greatest trust ever confided to a political society. If justice, good faith, honor, gratitude and all the other qualities which ennoble the character of a nation, and fulfill the ends of government, be the fruits of our establishments, the cause of liberty will acquire a dignity and lustre which it has never yet enjoyed; and an example will be set which cannot but have the most favourable influence on the rights of mankind. If on the other side, our governments should be unfortunately blotted with the reverse of these cardinal and essential virtues, the great cause which we have engaged to vindicate will be dishonored and betrayed; the last and fairest experiment in favour of the rights of human nature will be turned against them, and their patrons and

¹⁰⁵Quoted in *Ibid.*, p. 75, n 100. This is quoted from a letter Morrison wrote to Dunbar.

friends exposed to be insulted and silenced by the votaries of tyranny and usurpation.¹⁰⁶

While actively pursuing reform of the Confederation, men like Jefferson and Madison also sought to remedy the problems experience had shown to be evident in the state constitutions. Jefferson outlined the need to

make the Executive and Judiciary branches independent of the Legislative; to give them some controul over the laws by forming them into a Council of revision as in New York; to modify the election of the Senate so as to ensure a choice of the wisest men and thus rendering that branch of legislature more useful, the making our constitution paramount the powers of the ordinary legislature so that all acts contradictory to it may be adjudged null; these are objects which to me appear rational and necessary.¹⁰⁷

In lengthy correspondence with Jefferson over his proposed revision of the Virginia Constitution in 1784, Madison outlined and developed his thinking on the nature of the executive power. Jefferson had proposed a constitution for Virginia in 1784 which provided for a governor, council of state, and assembly. The governor was chosen by both houses of the assembly for a maximum of five years. He was barred from holding any other office in state government or any emolument from any other source. His powers excluded all prerogatives formerly associated with the royal governors and included only those powers "which are necessary to carry into execution the laws, and which are not in their nature [either legislative or] Judiciary." The executive was barred from exercising any powers affecting the state beyond its border.

¹⁰⁶Burnett, Letters, VII, p. xviii.

¹⁰⁷Boyd, ed., Works of Jefferson, VII, 292-293.

These were reserved for Congress. Otherwise the governor would only exercise "such laws as the legislature may think it expedient to pass."¹⁰⁸

Madison's response outlined his objections to Jefferson's draft. With respect to the election procedure, he argued that

An election by the Legislature is liable to insuperable objections. It not only tends to faction intrigue and corruption, but leaves the Executive under the influence of an improper obligation to that department.

Instead, he argued for direct popular election or "by Electors as in the appointment of the Senate in Maryland" as being far more preferable. He also thought that the benefits of re-eligibility outweighed the safeguards of making him ineligible. That, he argued, "takes away one powerful motive to a faithful and useful administration, the desire of acquiring that title to a re-appointment." "By rendering a periodical change of men necessary," he continued, "it discourages beneficial undertakings which require perseverance and system, or, as frequently happened in the Roman Consulate, either precipitates or prevents the execution of them." Moreover, he continued,

It may inspire desperate enterprises for the attainment of what is not attainable by legitimate means. It fetters the judgment and inclination of the Community; and in critical moments would produce a violation of the Constitution, or exclude a choice which might be essential to the public Safety. [Moreover] . . . by putting the Executive Magistrate in the situation of the tenant of an unrenovable lease, it would tempt him to neglect the constitutional rights of his department, and to connive at usurpations by the Legislative

¹⁰⁸Ibid., VI, 297-299.

department, with which he may connect his future ambition or interest.¹⁰⁹

The appointing power was the most difficult to protect from abuses, Madison thought. If it was given

to a numerous body, you at once destroy all responsibility, and create a perpetual source of faction and corruption. Give it to the Executive wholly, and it may be made an engine of improper influence and favoritism.

He proposed dividing it between the executive and the upper house of the legislature. The former would alone appoint subordinate offices, while the executive and Senate would appoint "those of the superior order." This was especially necessary for judges that they owe their appointment to the other two branches.¹¹⁰

One of the "most puzzling articles of a republican Constitution" was the impeachment process, Madison thought. He said it was "far more easy to point out defects in any plan, than to supply a cure for them." He cited the fact that there were so many different modes adopted by the various state constitutions which showed "how much the compliers were embarrassed on this subject." The major problem was how to organize a court of impeachment so that the party being impeached could not exert improper influence on the appointment of the court. The second overall consideration was that a court of impeachments maintain "impartiality . . . [and] respectability. The first in order to a right, the second in order to a satisfactory decision." The solution he recommended was to establish the court with "1/3 of

¹⁰⁹Ibid., pp. 311-312.

¹¹⁰Ibid., p. 312.

the members . . . struck out, by alternate nominations of the prosecutors and party impeached; the remaining 2/3 to be the Stamen of the Court." He then outlined the various court combinations.

When the House or Delegates impeach let the Judges or a certain proportion of them and the Council of State be associated in the trial. When the Governor or Council impeaches, let the Judges only be associated: When the Judges impeach let the Council only be associated. But if the party impeached by the House or Delegates be a member of the Executive or Judiciary let that of which he is a member not be associated . . . [and] 2/3 of the Court should in all cases be necessary to a conviction and the chief magistrate at least be exempt from a sentence of perpetual if not of temporary incapacity.

In the end, however, he concluded that

It is extremely probable that a critical discussion of this outline may discover objections which do not occur. Some do occur; but appear not to be greater than are incident to any different modification of the Tribunal.¹¹¹

Madison thought it best to keep the veto power within a council of revision. In this manner it served as a "check to precipitate, to unjust, and to unconstitutional laws." He contended that it must also be fashioned in such a manner so as not to disarm the "Legislature of its requisite authority, by requiring bills to be separately communicated to the Executive and Judiciary department." If either of these departments objected, 2/3 of the legislature would have to repass the bill; and if both objected, then 3/4 of the legislature would have to approve. In the final analysis, "It should not be allowed the Judges or Executive to pronounce a law thus enacted unconstitutional and invalid."¹¹²

¹¹¹Ibid., pp. 313-314.

¹¹²Ibid., p. 315.

The other aspects of Jefferson's proposal for executive organization Madison apparently did not object to since he offered no further observations. However, Madison realized the relationship between practice and theory. He warned Jefferson that he grew

every day more and more solicitous to see this essential work [of reform] begun. Every day's delay settles the Government deeper into habits of the people, and strengthens the prop which their acquiescence give it.¹¹³

A year later Madison reiterated his thinking about the state executive. In a letter to Caleb Wallace he summarized his thinking about the nature and importance of the executive power. He noted that

Though it claims the 2d place is not in my estimation entitled to it by its importance all the great powers which are properly executive being transferred to the federal Government. I have made up no final opinion whether the first Magistrate should be chosen by the Legislature or the people at large or whether the power should be vested in one man assisted by a council or in a council of which the President shall be only primus inter pares. There are examples of each in the United States and probably advantages & disadvantages attending each. It is material I think that the number of members should be small & that their Salaries should be either unalterable by the Legislature or alterable only in such manner as will not affect any individual in place.¹¹⁴

Turning to the Virginia Constitution, Madison concluded that

Our Executive is the worst part of a bad Constitution. The Members of it are dependent on the Legislature not only for their wages but for their reputations and therefore are not likely to withstand usurpations of that branch; they are besides too numerous and expensive, their organization vague & perplexed & to crown the absurdity some of the members may without any new appointment continue in Office for life contrary to one of the Articles of the Declaration of Rights.¹¹⁵

¹¹³Madison, Letters and Other Writings, I, 73.

¹¹⁴Hunt, ed., Writings of Madison, II, 169.

¹¹⁵Ibid., p. 170.

On the question of impeachments, Madison was still not sure how to constitute a court to protect liberty and individual rights.

He wrote that

All the States seem to have seen the necessity of providing for Impeachments but none of them to have hit on an unexceptionable Tribunal. In some the trial is referred to the Senate in others to the Executive, in others to the Judiciary department. (sic) it has been suggested that a tribunal composed of members from each Department would be better than either and I entirely concur in that opinion.¹¹⁶

Madison remained consistent on the question of executive re-eligibility. "With regard to the Executive," he wrote,

if the elections be frequent & particularly if made as to any member of it by the people at large a re-eligibility cannot I think be objected to, if they be unfrequent, a temporary or perpetual incapacitation according to the degree of unfrequency at least in the case of the first Magistrate may not be amiss.¹¹⁷

Madison began to organize his thoughts for a national executive in the spring of 1787. In a letter to Jefferson, he outlined some general thoughts on how a new federal Constitution ought to be organized. One of the major points he thought ought to be included was a separation of powers. He said the Convention must

organize the federal powers in such a manner as not to blend together those which ought to be exercised by separate departments. The limited powers now vested in Congress are frequently mismanaged from want of such a distribution of them.¹¹⁸

In a long letter to Washington, Madison described the relationship between the state and national governments with respect to

¹¹⁶Ibid., p. 171.

¹¹⁷Ibid., p. 174.

¹¹⁸Ibid., p. 286.

the role played by executive power in a monarchy. In addition to the positive powers granted to the national government, e.g., the regulation of trade, taxing exports and imports, etc., he thought it ought to have

a negative in all cases whatsoever on the Legislative acts of the States, as heretofore exercised by the Kingly prerogative, appears to me to be absolutely necessary, and to be the least possible encroachment on the State jurisdictions.

Moreover, he continued, such a negative would be a "controul on the internal vicissitudes of State policy, and the aggressions of interested majorities on the rights of minorities and of individuals."¹¹⁹

Madison then pointed to one of the great weaknesses of republican government for which a solution had not yet been found. That was the need for

some disinterested and dispassionate umpire in disputes between different passions and interests in the State. The majority, who alone have the right of decision, have frequently an interest, real or supposed, in abusing it.

In monarchies, he pointed out, "the Sovereign is more neutral to the interests and views of different parties; but, unfortunately, he too often forms interests of his own, repugnant to those of the whole."

For America, he concluded,

Might not the national prerogative here suggested be found sufficiently disinterested for the decision of local questions of policy, whilst it would itself be sufficiently restrained from pursuit of interests adverse to those of the whole society? There has not been any moment since the peace at which the representatives of the Union would have given an assent to paper money, or any other measure of a kinder nature.¹²⁰

¹¹⁹Madison, Letters and Other Writings, I, 286.

¹²⁰Ibid., p. 288.

Madison then went on to discuss the role of the executive departments. He concluded that the "National supremacy in the Executive departments is liable to some difficulty, unless the officers administering them could be made appointable by the Supreme Government." This was especially true of the militia which "ought certainly to be placed, in some form or other, under the authority which is entrusted with the general protection and defense."¹²¹

After discussing the executive functions that the federal government ought to play in relation to the states, Madison was still unsure of how to organize the executive branch. He noted that

A National executive must also be provided. I have scarcely ventured, as yet, to form my own opinion either of the manner in which it ought to be constituted, or of the authorities (sic) with which it ought to be clothed.¹²²

In preparation for the Convention, Madison undertook to examine the histories of past confederations. He assembled his "Notes of Ancient and Modern Confederacies, preparatory to the federal Convention of 1787." He carefully examined the authority, power, and structure of each of the major confederacies in history and noted their strengths and weaknesses. He concluded that it was doubtful whether a confederation form of government was practical for the American situation.¹²³

In April of 1787, Madison outlined a fairly comprehensive analysis of the American Confederation's weaknesses. He listed eleven

¹²¹Ibid., pp. 288-289.

¹²²Ibid., p. 290.

¹²³Ibid., pp. 293-315.

general shortcomings with extensive commentaries on each. Again he does not mention anything about a proposed structure of an executive. Instead he reiterated his concern over the lack of a neutral judge to moderate the interactions of the various interest groups. The problem he outlined was to modify sovereignty so as to

render it sufficiently neutral between the different interests and factions to controul (sic) one part of the society from invading the rights of another, and, at the same time, sufficiently controul (sic) itself from setting up an interest adverse to that of the whole society.

He then compared the problem in absolute and limited monarchies with that of small and extensive republics.

In absolute monarchies the prince is sufficiently neutral towards his subjects, but frequently sacrifices their happiness to his ambitions or his avarice. In small Republics, the sovereign will is sufficiently controuled (sic) from such a sacrifice of the entire Society, but is not sufficiently neutral towards the parts composing it. As a limited monarchy tempers the evil of an absolute one, so an extensive Republic meliorates the administration of a small Republic,

He concluded.¹²⁴

Madison completed his thoughts on the Confederation by saying that the election process must produce the best minds in the nation.

He wrote:

An auxiliary desideratum for the melioration of the Republican form is such a process of elections as will most certainly extract from the mass of the society the purest and noblest characters which it contains; such as will at once feel most strongly the proper motives to pursue the end of their appointment, and be most capable to devise the proper means of attaining it.¹²⁵

¹²⁴Ibid., pp. 327-328.

¹²⁵Ibid., p. 328.

Apparently while Madison had definite ideas as to the composition of the state executive he was not as yet ready to transfer those ideas in total to a national executive. Also one might infer from his discussion of the executive departments that they were a separate entity from any national executive which might be established though not totally devoid of any contact.

Other individuals were not as constrained about their ideas for a national executive. In a published essay on the problems of the Confederation, Benjamin Rush premised his discussion on the assumption that the American Revolution was not over. "There is nothing more common," he wrote,

than to confound the terms of the American revolution with those of the late American war. The American war is over; but this is far from being the case with the American revolution. On the contrary, nothing but the first act of the great drama is closed. It remains yet to establish and perfect our new forms of government, and to prepare the principles, morals, and manners of our citizens for these forms of government after they are established and brought to perfection.¹²⁶

Rush thought that the Annapolis Convention, convened to discuss problems of commerce, was too limited in its scope and he urged a greater reform of the Confederation than merely giving Congress power over commerce. Rush's plan for a national government consisted of a bicameral legislature, one house of which would be called the Council of States with each state having one representative. The national executive would be called "President" and be chosen annually by both

¹²⁶Quoted by David F. Hawke, Benjamin Rush: Revolutionary Gadfly (Indianapolis, 1971), p. 341.

houses. He would "possess certain powers, in conjunction with a Privy Council, especially the power of appointing most of the officers of the United States." Rush avoided discussing the division of powers within the national government but spent most of his argument on the question of state sovereignty. In the end, however, the false starts and missteps toward reform of the Confederacy led Rush to observe to his friend, Richard Price, that

The kingdoms of Europe have traveled into their present state of boasted tranquility through seas of blood. The republics of America are traveling into order and wise government only through a sea of blunders.¹²⁷

By 1786 the problems facing the Confederacy were reaching such a point that many feared an impending crisis. Otto reported to Vergennes that

The low condition into which congress has fallen since the peace begins to excite the attention of true patriots. They see that the federal government cannot remain in its present inaction without endangering the reputation of the United States, and even their independence.

He went on to note that the

most urgent recommendations of that body are treated by a majority of the states with an indifference which causes lamentations from those who are least susceptible of an interest in public affairs.

He noted that the "department of finance has never been so destitute as at this moment, and one of the commissioners has assured me that he has not the means of meeting current expenses." On the brighter side he reported that the

¹²⁷Ibid., p. 343.

most important members of congress are doing all in their power to add to the act of confederation some articles which the present situation of affairs appears to render indispensable. They propose to give to congress executive powers, and the right to make exclusively emissions of paper money and of regulating commerce. They desire, further, the division of that body into two chambers, to prevent an eloquent and ill-intentioned member from carrying away the majority.

More important, he pointed out, was the lack of an executive power and he concluded that "the confederation will always be unstable until congress shall have carried this important point." Moreover,

the inconsistency of the idea of a sovereign body which has no right but to deliberate and to recommend, in spite of the jealousy of a large number of individuals in America, cannot be concealed. The constant rotation of members of congress is another disadvantage, whose fatal effects are felt more and more; it is difficult for men who merely travel from one end of the continent to the other, and who remain but a few weeks in New York, to master the course of affairs.

"Be this as it may," he concluded, "it will require much time and negotiations to correct these defects, and it is impossible to foresee the end of the present embarrassments."¹²⁸ Thus the problems of the Confederacy were fairly apparent to those with experience in such matters, but the solutions were by no means that clear or readily acceptable.

William Grayson's comments probably represent the thinking of those who realized that the Confederation was in trouble but were uncertain how to proceed with a remedy. He wrote to Madison that

There have been some serious thoughts in the minds of some of the members of congress to recommend to the states the meeting of a general convention, to consider of an alteration of the confederation, and there is a motion to this effect now under consideration.

¹²⁸Bancroft, The History of the Constitution, I, 511.

Moreover, he continued,

It is contended that the present confederation is utterly inefficient, and that, if it remains much longer in its present state of imbecility, we shall be one of the most contemptible nations on the face of the earth. For my own part,

he said,

I have not yet made up my mind on the subject; I am doubtful whether it is not better to bear those ills we have than fly to others that we know not of. I am, however, in no doubt about the weakness of the federal government, if it was weaker notwithstanding, it would answer, if the states had power, as in the United Netherlands. The federal government is weak, but the individual states are strong. It is no wonder our government should not work well, being formed on the Dutch model, where circumstances are so materially different.¹²⁹

George Washington remained consistent in his efforts to revise and strengthen the federal government. To Henry Knox he wrote, "My opinion of the energetic wants of the federal government are well known; publicly and privately I have declared it."¹³⁰

Besides the lack of energy in the federal government, he was concerned most with the failure to separate the various functions of government. However, prior to the Convention, he did not outline in any detailed form what structure the various branches ought to take. Like most of the other delegates, Washington brought to the Convention a familiarity with the problems that needed solution but was uncertain how best to organize the powers.

¹²⁹Ibid., pp. 491-492.

¹³⁰Fitzpatrick, ed., Writings of Washington, XXIX, 152.

The experience with the state constitutions proved to be a continuing source of discussion among those advocating reform of the Confederation. Benjamin Franklin expressed his optimism when he wrote:

We are, I think, on the right Road of Improvement, for we are making Experiments. I do not oppose all that seem wrong, for the Multitude are more effectually set right by Experience, than kept from going wrong by Reasoning with them. And I think we are daily more and more enlightened; so that I have no doubt of our obtaining in a few Years as much public Felicity, as good Government is capable of affording.¹³¹

Others were not so sanguine. Luzerne wrote to Vergennes that the state

governments are as yet scarcely organized. In wishing to put them beyond danger from arbitrary power, their legislatures have gone beyond their object, and have formed constitutions without energy, without vigor, in which the powers are so balanced as to be without action, where the counterpoises, by their heaviness and by continual opposition of forces, keep it in permanent inactivity.¹³²

Edward Bancroft contended that "In every one of the states government is too feeble to command either respect or obedience."¹³³ Madison argued that many of the problems with the Virginia Constitution "may turn the edge of some of the arguments which ought to be laid to its root. . . ."¹³⁴

In discussions about both the state and national constitutions, the main emphasis was over the proper distribution of powers and what

¹³¹ Franklin to Jonathan Shipley, Writings, February 24, 1786 (Bigelow, ed.), IX, 489.

¹³² Bancroft, The History of the Constitution, I, 325-326.

¹³³ Ibid., p. 369.

¹³⁴ Madison, Letters and Other Writings, I, 289.

kind of limitations to place on the legislative branch. For example, John Jay wrote to Francis Hopkinson of Pennsylvania arguing that it was difficult to tell whether that state's single assembly constitution "gets on with one leg, or runs on those of the Executive Council." He preferred the New York Constitution "because in my opinion it is more capable of being well administered, and less capable of being ill administered."¹³⁵

As early as 1782, the state courts began to question the limits of the legislative power. In Virginia, the court ruled in the case of Commonwealth v. Caton, et al. that it had the power to pass on the constitutionality of properly passed legislation. In his opinion, the judge wrote that

I have heard of an English chancellor who said that it was his duty to protect the rights of the subject against the encroachments of the crown; and that he would do it at every hazard. But it was his duty to protect a solitary individual against the rapacity of the sovereign, surely it is equally mine to protect one branch of the legislature and, consequently, the whole community, against the usurpations of the other; and whenever the proper occasion occurs, I shall feel the duty; and fearlessly perform it.

Moreover, he continued,

if the whole legislature, an event to be deprecated, should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the untied powers at my seat in this tribunal; and, point to the constitution, will say to them, here is the limit of your authority; and, hither shall you go, but no further
¹³⁶

¹³⁵Johnston, Correspondence of Jay, III, 188.

¹³⁶Virginia Reports (1782), IV Call 5, reprinted in Confederation and Constitution 1781-1789, Forrest McDonald, ed. (New York, 1968), p. 100.

Thus, it was evident that some restraint independent of the legislature was necessary to protect liberty.

The lack of an adequate executive power to counter-balance the legislature proved to be another major problem. In Pennsylvania the council-type of executive failed so much that it created a political crisis causing Congress to leave the state. Madison observed that the

Legislature of P[ennsylvani]a have taken every possible step to expiate the default of the Executive short of an impeachment of its members, which the rigor of some members of Cong[ress]s included among the terms of reconciliation with the State. They have expressly invited Cong[ress]s back, assured them of honorable protection, and given up the State-House with the appendages for their temporary uses.¹³⁷

However, a year later the Pennsylvania Council of Censors was forced to act against the legislature. Their report concluded, in part, that

In Pennsylvania we have not a sole executive officer of permanency and weight, sufficient to restrain, and whose interest it is to keep those communities in awe; they may, therefore gradually produce an indirect, yet firm aristocracy over the state, before we be aware of the mischief.¹³⁸

Thus, faulty organization of the state constitutions, especially Pennsylvania's, was creating a situation which endangered the ideals of the Revolution.

Madison with his usual perception pinpointed the problem of limiting the legislative branch within the context of the colonial and Revolutionary experience. In a letter to Caleb Wallace on revising the Virginia Constitution, he observed that

¹³⁷Hunt, ed., Writings of Madison, II, 16.

¹³⁸Journal of the Council of Censors, II, August 27, 1784 in the Public Records Division, Harrisburg, Pa., reprinted in Confederation and Constitution, McDonald, ed., p. 102.

The Legislative Department ought by all means, as I think to include a Senate constituted on such principles as will give wisdom and steadiness to legislation. The want of these qualities is the grievance complained of in all our republics. The want of fidelity in the administration of power having been the grievance felt under most Governments, and by the American States themselves under the British Government, it was natural for them to give too exclusive an attention to this primary attribute.¹³⁹

By 1786 the problems with the state constitutions were beginning to affect the stability of the Confederation. Otto reported to Vergennes that

The want of energy in the separate government of the states had till now occasioned few commotions injurious to the repose and to the security of the citizens, and it was hoped that congress would insensibly take the stability that was supposed to be observable in the interior organization of the states; but the licentiousness of a greedy populace has just shaken the basis of the government, which had hitherto been regarded as the most solid and the most perfect of the whole confederation, and it is seen too late that the American constitutions, so generally admired, are far from being exempt from defects.¹⁴⁰

This reference to Shay's Rebellion was indicative of the fear expressed about domestic tranquility.

Though Shay's Rebellion was not a major factor in causing many influential people to change their minds about reform of the Confederacy, it was viewed as a reason for speeding up the process.¹⁴¹

As William Grayson noted, "The disturbances in Massachusetts bay (sic) have been considerable, and absolutely threaten the most serious

¹³⁹Hunt, ed., Writings of Madison, II, 167.

¹⁴⁰Bancroft, The History of the Constitution, II, 395.

¹⁴¹See Robert A. Feer, "Shays Rebellion and the Constitution," New England Quarterly (September, 1969), XLII, 388-410.

consequences."¹⁴² Henry Lee, Jr. wrote to Washington that "We are all in dire apprehension that a beginning of anarchy with all its calamities has approached, and have no means to stop the dreadful work."¹⁴³ Washington concluded that

Our affairs seem to be drawing to an awful crisis; it is necessary, therefore, that the abilities of every man should be drawn into action in a public line, to rescue them, if possible, from impending ruin.¹⁴⁴

Madison perhaps best expressed the reformers' fears of political unrest when he wrote that

The late turbulent scenes in Massachusetts, and infamous ones in Rhode Island, have done inexpressible injury to the republican character in that part of the United States, and a propensity towards monarchy is said to have been produced by it in some leading minds. The bulk of the people will probably prefer the lesser evil of a paction of the Union into three more practicable and energetic governments. The latter idea, I find, after long confinement to individual speculations and private circles, is beginning to shew itself in the newspapers. But though it is a lesser evil, it is so great a one that I hope the danger of it will rouse all the real friends of the Revolution to exert themselves in favor of such an organization of the Confederacy as will perpetuate the Union and redeem the honor of the Republican name.¹⁴⁵

The defect in the state constitutions which allowed this crisis to develop was the lack of energy and an adequate restraint in the legislature. Otto reported to Vergennes the "reflections of the most enlightened patriots on this factious event." He wrote that

¹⁴²Bancroft, The History of the Constitution, II, 405.

¹⁴³Ibid., p. 402.

¹⁴⁴Ibid., p. 404.

¹⁴⁵Madison, Letters and Other Writings, I, 280.

They perceive that in forming the different constitutions they had too great need of the assistance of the common people not to grant to them much more than the repose of the republic, the security of the citizen, and the energy of the government can sustain; that an entire and unlimited liberty is a phantom which has never been able to exist but at the expense of public tranquility; that the theory of the three powers equally distributed is sublime, but the practice offers a thousand difficulties which ought to have been foreseen; that the executive power is much too weak in America; that the simplicity of the chief renders them contemptible in the eyes of the multitude, which judges only by the senses, and that there is need of strokes of authority, of arms, and of lictors (sic), to the government respected. These principles are confirmed by a scene like that in Massachusetts which took place in New Hampshire.¹⁴⁶

Otto went on to show how the weakness of the states severely undermined the Confederation. Episodes like the Massachusetts incident

prove but too much the inability of the United States to fulfill at this time their engagements to France. Not only congress has not power to collect sums called for in its different requisitions, but the separate states are deprived of the vigor necessary to constrain their citizens, and they themselves have not the means of paying in specie the moderate taxes which are imposed on them. The exhaustion of the federal treasury is carried to an inconceivable point. It has not been possible to pay me several infinitely small pittances due to French officers.¹⁴⁷

Moreover, some argued that it was the duty of Congress to guarantee the stability of the state governments and the events in Massachusetts were a further glaring admission of the weakness of the Confederation. Mr. David Humphreys wrote to Washington that

You will have seen the speech by Mr. King before that legislature that congress consider themselves as the guarantees of each state government, and bound to interfere in its support under certain circumstances.¹⁴⁸

¹⁴⁶Bancroft, The History of the Constitution, II, 395-396.

¹⁴⁷Ibid., p. 396.

¹⁴⁸Ibid., p. 403.

A short time later Washington wrote that

The want of energy in the federal government; the pulling of one state and parts of states against another; and the commotions among the eastern people, have sunk our national character much below par, and have brought our politics and credit to the brink of a precipice. A step or two more must plunge us into inextricable ruin. Liberality, justice, and unanimity in those states which do not appear to have drunk so deep of the cup of folly may yet retrieve our affairs, but no time is to be lost in essaying the reparation of them.¹⁴⁹

To David Stuart he wrote:

However delicate the revision of the federal system may appear, it is a work of indispensable necessity. The present constitution is inadequate; the superstructure is tottering to its foundation, and without help will bury us in its ruins.¹⁵⁰

To Jabez Bowen he reported that

the want of power and energy in that body has been severely felt in every part of the United States. The disturbances in New England, the declining state of our commerce, and the general languor which seems to pervade the union, are in a great measure (if not entirely) owing to the want of proper authority in the supreme council.¹⁵¹

Thus, the reformers argued that the key to general stability within the society was a strengthened national government.

Moreover, the federal government needed coercive power over the states. Madison, commenting on New Jersey's withholding her assessments for the Confederation, noted that

In one point of view . . . it furnishes a salutary lesson. Is it possible with such an example before our eyes of impotency in the federal system, to remain skeptical with regard to the necessity of infusing more energy into it? A

¹⁴⁹Ibid.

¹⁵⁰Ibid., p. 404.

¹⁵¹Ibid., p. 408.

Government cannot long stand which is obligated in the ordinary course of its administration to court a compliance with its constitutional acts, from a member not of the most powerful order, situated within the immediate verge of authority, and apprised of every circumstance which should remonstrate against disobedience.

He concluded that the

question whether it be possible and worth while to preserve the Union of the States must be speedily decided some way or other. Those who are indifferent to its preservation would do well to look forward to the consequences of its extinction. The prospect to my eye is a gloomy one indeed.¹⁵²

The problem facing the reformers was twofold in nature. The first was to endow the national government with sufficient powers and secondly to protect the liberty of the citizens. For men like Washington, the latter could only be protected with the former. As he noted that

The extreme jealousy that is observed in vesting the congress with adequate powers has a tendency rather to destroy than confirm our liberties. The wisest resolutions cannot produce any good unless they are supported with energy; they are only applauded, but never followed.¹⁵³

Jay noted to John Adams that "For my own part I am convinced that a national government as strong as may be compatible with liberty, is necessary to give us national security and respectability."¹⁵⁴ French

Representative Otto wrote to Vergennes that

For a very long time . . . the necessity of imparting to the federal government more energy and vigor has been felt, but it has also been felt that the excessive independence granted

¹⁵²Hunt, ed., Writings of Madison, II, 234-235.

¹⁵³Bancroft, The History of the Constitution, II, 408.

¹⁵⁴Johnston, ed., Correspondence of Jay, III, 248-249.

to the citizens, as regards the states, and to the states as regards congress; is too dear to individuals for them to be deprived of it without great precautions.

He went on to add:

It is, however, for the interest of the people to guard as much as possible the absolute freedom granted them in a time when no other law was known but necessity, and when an English army, as it were, laid the foundation of the political constitution.

However, he concluded,

In those stormy times it was necessary to agree that all power ought to emanate only from the people; that everything was subject to its supreme will, and that the magistrates were only its servants.¹⁵⁵

In short, the conditions had changed but the problem remained the same, the protection of liberty.

How to proceed and with what safeguards occupied much of the discussion in the two years prior to the Constitutional Convention. Washington made it clear that any government must have a solid foundation to survive. In response to a request that he exert some influence to help quell the disturbances in Massachusetts, he replied,

You talk, my good sir, of employing influence to appease the present tumults in Massachusetts. I know not where that influence is to be found, or, if attainable, that it would be a proper remedy for the disorders. Influence is no government.¹⁵⁶

Moreover, Washington had called for a thorough restructuring of the federal government. To Madison he wrote,

¹⁵⁵Bancroft, The History of the Constitution, II, 415.

¹⁵⁶Ibid., p. 402, n1.

My wish is that the convention may adopt no temporizing expedients, but probe the defects of the constitution to the bottom and provide a radical cure, whether agreed to or not. A conduct of this kind will stamp wisdom and dignity on their proceedings, and hold up a light which sooner or later will have its influence.¹⁵⁷

In short, the experiences of the Confederation period made it clear to men like Washington that a strengthened national government was paramount to saving the ideals of the Revolution. Most, however, were advancing schemes to strengthen the Articles of Confederation, not reform the government entirely. To others, only a major restructuring of the government would solve the problems. Yet, few were certain how to proceed, or what form a new government should take.

When proposing a new government, few individuals were willing to venture an opinion as to how the executive branch ought to be organized. Most were willing to concede, however, that an executive was an essential part of any new government. What models there were in this period were, for the most part, unsatisfactory. The President of Congress had limited power and was a creature of the legislature. The executive departments of Congress, on the other hand, reached a level of organization that was satisfactory to most. In fact, the evolution into single department heads who were not members of Congress gave that body a degree of administrative efficiency and continuity hitherto unknown. Some even considered one department head, John Jay, the de facto chief executive of Congress. This was a valuable lesson in the administrative efficiency of a unitary executive. Moreover, the model

¹⁵⁷ Sparks, ed., Writings of Washington, IX, 250.

of a plural executive, in the Committee of States, had been an unqualified disaster.

On the state level, many were becoming disenchanted with legislative dominance. Moreover, with the possible exception of New York and Massachusetts, most state governors were inadequately protected from legislative encroachments.

One individual who remained in the national eye was George Washington. Though he considered himself retired from active public involvement, he was nonetheless drawn into the nation's political problems. His stature, presence, and diplomatic tact helped avert a serious problem in the Newburg Affair, and his withdrawal of support from the Society of Cincinnati helped lead to its demise. Moreover, he was in the forefront of those advocating the necessary reforms of Congress or its reorganization into a new national government. As the symbol of the Revolution, Washington would come to play an increasingly important role in the writing of the Constitution and establishing the new government.

Finally, the problems on both the national and state levels were causing some individuals to view favorably the idea of establishing a monarchy. Though there was no reason to suspect that they could possibly have done so, that threat did serve to motivate those seeking reform to act with greater dispatch.

In summary, the Confederation era demonstrated the need to revise the authority and structure of the national government. Most who advocated this change saw the need for a national executive power,

though few ventured to outline its structure and organization. That would have to be left to the Constitutional Convention of 1787.

CHAPTER VIII

THE CONSTITUTIONAL CONVENTION:

The Preliminary Considerations

The Constitutional Convention of 1787 was the culmination of nearly two centuries of American theorizing and experimenting with various forms of political organization. It was an especially important time for American executive theory as this was the first chance that Americans had to fashion a permanent national executive. This chapter examines the preliminary considerations and fundamental assumptions of the delegates prior to the actual Convention debates over the organization of the executive branch. Also, it discusses the role of George Washington in an effort to assess his impact on the Convention as a prelude to an analysis of his influence on the creation of the presidency.

On the eve of the Convention, public expectation was running high that some solution to the nation's problems could be found. David Ramsay wrote to Jefferson explaining that

Our eyes now are fixed on the continental convention to be held in Philadelphia. . . . Unless they make an efficient federal government, I fear that the end of the matter will be an American monarchy, or rather three or more confederacies. In either case we have not labored in vain in

effecting the late revolution, for such arrangements might be made as would secure our happiness.¹

George Mason reflected a similar concern. He noted that the expectations and hopes of all the union centre in this convention. God grant that we may be able to concert effectual means of preserving our country from the evils which threaten us.²

Another time he wrote that

The eyes of the United States are turned upon this assembly, and their expectations raised to a very anxious degree. . . . The revolt from Great Britain and the formations of our new governments at that time, were nothing compared to the great business before us; there was then a certain degree of enthusiasm, which inspired and supported the mind; but to view, through the calm, sedate medium of reason the influence which the establishment now proposed may have upon the happiness or misery of millions yet unborn, is an object of such magnitude, as absorbs, and in a manner suspends the operations of the human understanding. . . .³

Madison, on the other hand, was uncertain as to what the Convention would bring. "What may be the result of this political experiment cannot be foreseen," he informed Jefferson. Moreover, he continued,

The difficulties which present themselves are, on one side, almost sufficient to dismay the most sanguine, whilst on the other side the most timid are compelled to encounter them by the mortal diseases of the existing Constitution. . . . Suffice it to say, that they are at present marked by symptoms which are truly alarming, which have tainted the faith of the most orthodox republicans, and which challenge from the votaries of liberty every concession in favor of stable Government not infringing fundamental principles, as the only security against an opposite extreme of our present situation.⁴

¹Bancroft, The History of the Constitution, II, 417.

²Ibid., p. 421.

³Max Farrand, ed., The Records of the Federal Convention of 1787 (New Haven, 1966), III, 32-33.

⁴Hunt, ed., Writings of Madison, II, 326.

However, one person was instrumental in helping to assure a successful undertaking as George Washington's presence did guarantee a note of gravity to the proceedings. Washington had not originally planned to attend the Convention, wishing instead to retire from public life. Madison wrote to Jefferson saying that "General Washington has prudently authorized no expectations of his attendance, but has not either precluded himself absolutely from stepping into the field if the crisis should demand it."⁵

Later Washington was persuaded that his attendance would be beneficial. Writing to Arthur Lee, he said, "I have yielded to what appeared to be the wishes of many of my friends, and am now here as a delegate to the Convention." To LaFayette Washington wrote that

the pressure of the public voice was so loud, I could not resist the call to the convention of the States which is to determine whether we are to have a Government of respectability under which Life--liberty, and property will be secured to us, or are to submit to one which may result of chance or the moment, springing perhaps by some aspiring demagogue who will not consult the interest of his Country so much as his own ambitious views.⁶

Madison was concerned that Washington not be involved in any abortive undertakings which might jeopardize his esteemed reputation. He wrote to Randolph noting that

the probability of General Washington's coming to Philadelphia is, in one point of view, flattering. Would it not, however, be well for him to postpone his actual attendance, until some judgment can be formed of the result of the meeting? It ought not to be wished by any of his friends that he should participate in any abortive undertaking.

⁵Ibid., p. 325.

⁶Farrand, ed., Records, III, 34.

On the other hand, Madison noted that

It may occur, perhaps that the delay would deprive the Convention of his presiding auspices, and subject him, on his arrival, to a less conspicuous point of view than he ought on all occasions to stand in. Against this difficulty must be weighed the consideration above mentioned, to which may be added the opportunity which Pennsylvania, by the appointment of Doctor Franklin, has afforded of putting sufficient dignity into the Chair.⁷

Once Washington decided to attend the Convention, Madison expressed the expectations of many of the delegates. In a letter to Jefferson, he wrote that

The attendance of Genl. Washington is a proof of the light in which he regards it. The whole Community is big with expectation. And there can be no doubt but that the result will in some way or other have a powerful effect on our destiny.

Soon after the first delegates assembled, Madison noted that

Among the few is Genl. Washington who arrived on sunday (sic) evening amidst the acclamations of the people, as well as more sober marks of the affection and veneration which continues to be felt for his character.⁸

Thus it was clearly anticipated that Washington would play a key role in the success or failure of the Convention.

The question of Washington's influence on the shaping of the presidency during the Convention is an issue that has intrigued scholars since the writing of the Constitution. It was clear that Washington was regarded as the "first citizen" of the United States after the Revolution. Luzerne wrote to Vergennes at the conclusion of the Revolution that

⁷Hunt, ed., Writings of Madison, II, 341.

⁸Farrand, ed., Records, III, 20.

General Washington conducts himself with his usual wisdom. It conciliates to him more and more the respect and affection of the people. After a war of eight years, during which he has scarcely ever left his army, and has never taken any repose, he has received the news of peace with the greatest joy. It made him shed tears, and he said it was the happiest hour of his life. It will be in vain for him to wish to conceal himself and to live as a private man. He will always be the first citizen of the United States; and, although military men are not agreed to his military talents, all the world is agreed . . . [on] his republican virtues, and agreed that there is no character more eminent among those who have taken part in his grand revolution.⁹

As noted in the last chapter, Washington's voluminous correspondence kept his concern for the direction of the country in the forefront of many of the minds of leading political figures of that period. Therefore, when it came time to select the Virginia delegates to the Convention, the problem was how best to use his reputation. In December, 1786 Madison wrote to him discussing the political dilemma Washington found himself in with respect to his recent refusal to stand for re-election as president of the Order of Cincinnati on the grounds of health and his desire to retire from public life. In actuality, he did not want to become involved in a dispute over proposed changes within that organization. For him to attend the Convention in Philadelphia might, in light of his refusal to participate with the Order of Cincinnati, place him in a difficult position politically. Madison counseled that he was

still inclined to think that the posture of our affairs, if it should continue, would prevent every criticism on the situation which the contemporary meetings would place you in; and that at least a door could be kept open for your

⁹Bancroft, The History of the Constitution, I, 301.

acceptance hereafter, in case the gathering clouds became so dark & menacing as to supersede every consideration but that of our national existence & safety.

Moreover, he continued,

A suspence (sic) of your ultimate determination would be nowise (sic) inconvenient in a public view, as the Executive [governors] are authorized to fill vacancies; and can fill them at any time; and, in any event, three out of seven deputies are authorized to represent the State.¹⁰

Thus Washington was regarded as a personality whose opinion and presence carried significant influence prior to the Convention.

A month before the delegates assembled at Carpenters' Hall in Philadelphia, discussions began about electing Washington as the presiding officer if he decided to attend. David Humphreys wrote to him outlining the importance of his presence during the deliberations. "Should you think proper to attend," he noted, "you will indisputably be elected president. This would give the measures a degree of national consequence in Europe and with posterity." Humphreys then refused to assess what influence Washington might exercise over the actual proceedings, by saying

But how far (under some supposable case) your personal influence, unattended with other authority, may compose the jarring interests of a great number of discordant individuals and control events, I will not take upon me to determine.¹¹

Thus prior to the Convention, Washington's presence was viewed as giving the proceedings a legitimacy and weight which they might not otherwise have had if someone of lesser stature were elected presiding officer.

¹⁰Hunt, ed., Writings of Madison, II, 300-301.

¹¹Bancroft, The History of the Constitution, II, 417.

Humphreys' contention about Washington's influence in Europe was supported by the French representative in a letter to Vergennes. He wrote that "General Washington, Doctor Franklin, and a great number of other distinguished personages, though less known in Europe, have been called thither." He concluded by noting that "No doubt the interest of the confederation will be more thoroughly discussed than ever before."¹²

Others agreed that Washington possessed great influence but disagreed as to whether it was sufficient to make the people change their minds. For example, William Grayson suggested to James Monroe that the Convention would ultimately fail because the people were not willing to support substantial changes in the government. He then observed that the "weight of General Washington, as you justly observe, is very great in America, but I hardly think it sufficient to induce the people to pay money or part with power."¹³

Finally, Edward Carrington summed up the factors surrounding the Convention which placed Washington in such a conspicuous position. In a letter to Jefferson, he concluded that the sentiment and the authority for a thorough reform of the Confederation opened the door to Washington's prestige. "The latitude thus given," he contended,

together with the generality of the commission from the states, have doubtless operated to bring General Washington forward. In every public act he hazzards (sic) without a possibility of gaining reputation; he already possesses everything to be

¹²Ibid., pp. 417-418.

¹³Ibid., p. 424.

derived from the love or confidence of a free people, yet it seems that it remained for himself to add a lustre to his character by this patriotic adventure of all for his country's good alone.¹⁴

William Pierce's description of the Convention delegates noted that Washington was

well known as the Commander in chief of the late American Army. Having conducted these states to independence and peace, he now appears to assist in framing a Government to make the People happy. Like Gustavus Vasa, he may be said to be the deliverer of his Country;--like Peter the great he appears as the politician and the States-man; and like Cincinnatus he returned to his farm perfectly contented with being only a plain citizen, after enjoying the highest honor of the Confederacy.--and now only seeks for the approbation of his Country-men by being virtuous and useful. The General was conducted to the Chair as President of the Convention by the unanimous voice of its Members.¹⁵

It was clear that most of Washington's contemporaries considered him to be a significant factor in legitimizing what the Convention accomplished in addition to bringing the necessary gravity to its proceedings. However, what role he played during the proceedings with respect to the formation of the presidency remains in doubt. As discussed later in the next chapter, he did exert a subtle influence over the tone and temper of the debates. His significance for the presidency came primarily after the Convention in helping shape the character of the office as it began its operations.

Before turning to the debates during the Convention, several other points need to be established. As noted in previous chapters, both the state and national experience indicated that a well constructed

¹⁴Ibid., p. 426.

¹⁵Farrand, ed., Records, III, 94.

government needed to have its power divided and balanced to keep any one segment from dominating the others and hence tyrannizing the rights of the citizens. In line with the Enlightenment view of the world, the framers of the Constitution sought to construct a government in which the major departments possessed sufficient power and authority to carry out their functions and yet protect themselves from encroachments by the other branches. The analogy implicit in the debates and discussions was that of a machine or great clock in which each weight would have a counter-weight, each thrust a counter-thrust, and so on.

This mechanistic conception of government was expressed in the belief that there were certain political principles which, when followed, would provide the desired results of a republican government with adequate power to carry out its functions while protecting liberty. Elizur Goodrich in his book, Principles of Civil Union, argued that God established certain laws "in order to promote . . . true happiness, in . . . transactions and intercourse." "These laws," he continued,

may be considered as principles, in respect of their fixedness and operation; and as maxims, since by the knowledge of them, we discover those rules of conduct, which direct mankind to the highest perfection, and supreme happiness of their nature. They are as fixed and unchangeable as the laws which operate in the natural world.¹⁶

Thus Goodwin was applying the Newtonian model of fixed physical laws which govern the operation of the universe to the idea that there were

¹⁶Elizur Goodrich, Principles of Civil Union (Hartford, 1787), p. 8.

fixed political principles which govern the operation of societies and governments.¹⁷

American writers argued that these principles of government were dependent upon the conditions within each political society. Since the American society was far different from those of Europe, it meant that the principles upon which they operated did not necessarily apply to the American condition. Noah Webster, after comparing the two political environments, concluded in 1785 that Americans

must therefore search for new principles in modeling our political system. The American constitutions are founded on principles different from those of all nations, and we must find new bonds of union to perpetuate the confederation.¹⁸

Many political treatises were written to identify and explain the fundamental political principles upon which a government could be built. For example, Joseph Galloway, after reflecting on the American Revolution, concluded that there were three basic principles necessary to the organization of a civil society.

1. That there must be some supreme will, or legislative authority, competent to the regulation and final decision of every matter susceptible of human direction, which relates to the safety and happiness of the society. 2. That every member and part of the society, whether corporate, official, or individual, must be subordinate and subject to this supreme will and direction. 3. That there must also be a supreme executive power, to superintend and enforce the administration and execution of the laws.¹⁹

¹⁷ See James A. Robinson, "Newtonianism and the Constitution," Mid-West Journal of Politics, I (1957), pp. 252-266; and Martin Landau, "On The Use of Metaphor In Political Analysis," Social Research, XXVIII (1961), pp. 331-353.

¹⁸ Noah Webster, Sketches of American Policy (Hartford, 1785), p. 30.

¹⁹ Joseph Galloway, Political Reflections on the Late Colonial Governments (London, 1783), p. 3.

Noah Webster outlined his principles from a different approach. The greatest "fundamental principle" upon which "a free government can be founded and by which alone the freedom of a nation can be rendered permanent, is an equal distribution of property," he wrote. In other societies three principles have operated to "preserve union and subordination in society." They were "the power of a standing army, the fear of an external force, and the influence of religion." However, in America these principles were not applicable because the conditions were different. He went on to note that American

constitutions of civil government have been framed in the most enlightened period of the world. All other systems of civil policy have been begun in the rude times of ignorance and savage ferocity; fabricated at the voice of necessity, without science and without experience.

However, he concluded, "America, just beginning to exist in an advanced period of human improvement, has the science and the experience of all nations to direct her in forming plans of government." Moreover, he continued, "By this advantage she is enabled to supply the defects and avoid the errors incident to the policy of uncivilized nations, and then lay the broad basis for the perfection of human society."²⁰

These were only two of numerous examples of contemporary discussions which attempted to identify the basic principles of political union. In the latter example, Webster typified the belief among many of his contemporaries that governments could be rationally constructed by a "scientific" use of historical experience. Coupled with the Newtonian view of the universe, as a balanced and ordered mechanical entity,

²⁰ Webster, Sketches of American Policy, pp. 18, 12, 23.

it was not difficult to see how political theorists of that age concluded that the problem before them was to apply the proper political principles, based on past experience, to the conditions of American society to create the great machine of government. The task before the Constitutional Convention was to select and mesh the political principles which proved workable on the state and national levels into one document which would provide the framework for an adequate and workable government within the confines of a durable union.

In spite of the differences of opinion over various political principles, one common assumption was evident in most discussions about the formation of any government. That assumption was that the major function of government was to check the tendencies of human nature toward corruption and selfish interests. Writing to Jay in 1786, Washington probably summarized the sentiment of many when he said,

We have errors to correct. We have, probably, had too good an opinion of human nature in forming our confederation. Experience has taught us, that men will not adopt, and carry into execution, measures the best calculated for their own good, without intervention of a coercive power.²¹

John Jay concluded that "Our Governments want energy, and there is reason to fear that too much has been expected from the virtue and good sense of the people."²² This, then, was one side of the human nature problem; that is, the new government had to have sufficient coercive power to chart and enforce policies beneficial to the well being of the entire union.

²¹Johnston, ed., Correspondence of Jay, III, 208.

²²Ibid., p. 231.

The other side of the problem was how best to frustrate the natural tendencies of people to abuse and corrupt society for their own selfish interests. Elizur Goodwin noted that if the "law of reason and love directed and influenced all the views and actions of mankind, there would be no necessity for the coercion of civil government."

However, he noted,

In the present depraved state of human nature, the various dispositions and the differing pursuits, the jarring interest, and the unruly passions, the jealousies and misapprehensions of the neighbors would spoil their harmony and good agreement; and, when disputes arose, there would be no common judge, to whom they might refer their difference; but every one would be an avenger of his own wrong: This would soon end in a state of hatred and war; and destroy all human peace and happiness.

Therefore, he concluded, the function of government is "to prevent this mischief, and to secure the enjoyment of rational liberty."²³

Another writer claimed that the "general object" of government was "the security and promotion of the temporal interest and happiness of the people," which was "occasioned by the evil dispositions of mankind; (the only source of human misery)." Moreover, he continued, if humans were

suitably disposed, to observe the rules of justice, the principles of humanity and dictates of conscience, government would be unnecessary; but as this is a state of perfection, this world never has, since the apostacy and probably never will enjoy, human authority became necessary, to restrain the turbulent passions of mankind, dispense justice, and support order and regulation in society. . . .²⁴

²³Goodrich, Principles of Civil Union, pp. 10-11.

²⁴Edmund S. Morgan, ed., "The Political Establishments of the United States, 1784," William and Mary Quarterly, 3d ser., XXIII (April, 1966), p. 291.

Even Jefferson blamed the abortive attempt to create a national executive by the Committee of States under the Confederation on the problem of human nature. He recounted the events surrounding the demise of the committee and noted that its failure was "imputed to the temper of two or three individuals; but the wise ascribe it to the nature of man."²⁵

These, then, were a few of the current assumptions which helped set the framework in which the writing of the Constitution must be viewed. First, human nature required that governments be fashioned to protect the society from the selfish and corrupting influences of those not only in power, but from those in the society at large. Secondly, governments could be constructed by rationally applying past experience with certain fundamental principles, such as the separation of the departments of government, to form a government consistent with particular conditions of American society. Finally, that the government created should resemble a well-ordered and balanced machine in which the interaction of the various elements would provide the energy to operate it as well as providing the counter-balance to prevent its excesses.

As discussed in the previous chapters, Americans had been debating the proper formulation of government for the past decade. One anonymous pamphlet published in 1784 neatly summarized the pervading assumptions of those delegates attending the Convention three years later. "With regard to a form of government," the author wrote,

²⁵ Jefferson to M. Destutt Tracy, Writings, Ford, ed., V, 567.

I will only observe, that a democracy appears the most agreeable to the present view of the Citizens of America, and is probably a form, the best calculated to promote the equal good of the people; yet as it is the most difficult to frame, easily disordered, and not readily rectified; so, on these accounts, there are none [that] requires a foundation so judiciously laid,--It is a form which novel-ties and refinements injure; its materials should be calculated to answer their particular purposes, not for ornament, but real use,--The more simple its construction (so it be competent to its purposes) the more secure.--The dignity which is thought to be so essential in government, in this form, does not consist in the splendors of a court, nor terrors of an army, but in the excellency of its constitution, wisdom of its political measures, justice of its laws, and abilities and fidelity of its executive authority. Whenever a democratical government is established, and exercised on the principles of justice and sound policy, it is undoubtedly the best form that can be instituted, because it makes the laws, and not men supreme, and the equal good of the people its object.--Is by being thus founded, in no danger of falling into contempt, and always sure of the best support a government can have, viz. the approbation, and mutual aid of the people.²⁶

Formation of the new government was fraught with many serious problems as the delegates to the Convention soon found. A major problem was the possible over-reaction to the excesses experienced by the states in the past decade. George Mason noted that

Men disappointed in expectations too hastily and sanguinely formed, tired and disgusted with the unexpected evils they have experienced, and anxious to remove them as far as possible, are very apt to run into the opposite extreme.²⁷

Later he observed,

When I first came here [the Convention], judging from casual conversations with gentlemen from the different States, I was very apprehensive that soured and disgusted with the unexpected evils we had experienced from the democratic principles of our governments, we should be apt to run into

²⁶Morgan, ed., "Political Establishments," p. 308.

²⁷Farrand, Records, III, 24.

the opposite extreme and in endeavoring to steer too far from Scylla, we might be drawn into the vortex of Charybdis, of which I still think there is some danger, though I have the pleasure to find in the convention, many men of fine republican principles.

He went on to add that

America has certainly, upon this occasion, drawn forth her first characters; there are upon this Convention many gentlemen of the most respectable abilities, and so far as I can discover, of the purest intentions. The eyes of the United States are turned upon this assembly, and their expectations raised to a very anxious degree.²⁸

Thus, one of the major concerns among some of the delegates was to keep the Convention from adopting any extreme measures, while maintaining a proper balance between liberty and authority.

What ideas the delegates brought to the Convention for revision of the government varied in the specifics though there was common agreement about the general organization they wished to establish. Most, for example, saw the necessity of a division of powers into the three great branches, legislative, executive, and judicial. Other than the authors of the Virginia and New Jersey Plans, which were introduced as proposed models, many of the delegates had read widely in political theory in preparation for the Convention. One work that was especially useful was John Adams' Defense of the Constitutions of the United States.²⁹ As Benjamin Rush wrote to Richard Price, "Mr. Adams's book has diffused such excellent principles among us, that there is little

²⁸Ibid., p. 32.

²⁹Adams, ed., Works of John Adams, IV.

doubt of our adopting a vigorous and compounded federal legislature."³⁰

Since Adams was apparently instrumental in focusing many of the delegates' attention on certain fundamental constitutional principles, it is necessary to examine briefly his major conclusions. Adams summarized the American experience in constitution-making during the Revolutionary era as having clearly established certain principles of governmental organization. He concluded that the

three branches of power have an unalterable foundation in nature; that they exist in every society natural and artificial; and that if all of them are not acknowledged in any constitution of government, it will be found to be imperfect, unstable, and soon enslaved; that the legislative and executive authorities are naturally distinct; and that liberty and the laws depend entirely on a separation of them in the frame of government; that the legislative power is naturally and necessarily sovereign and supreme over the executive; and, therefore, that the latter must be made an essential branch of the former, even with a negative, or it will not be able to defend itself, but will be soon invaded, undermined, attacked, or in some way or other totally ruined and annihilated by the former.

This, he concluded, "is applicable to every state in America, in its individual capacity."³¹

On the national level, the experience was different, Adams observed. There the people and their delegates to the Congress were of the opinion

that a single assembly was every way adequate to the management of all their federal concerns; and with good reason, because congress is not a legislative assembly, nor a representative assembly, but only a diplomatic assembly. A single

³⁰Farrand, ed., Records, III, 33.

³¹Adams, ed., Works of Adams, IV, 579.

council has been found to answer the purposes of confederacies very well. But in all such cases the deputies are responsible to the states; their authority is clearly ascertained; and the states, in their separate capacities, are the checks. These are able to form an effectual balance, and at all times to control their delegates. The security against the dangers of this kind of government will depend upon the accuracy and decision with which the governments of the separate states have their own orders arranged and balanced.

However, when it came to establishing a national government to replace the "diplomatic assembly," Adams strongly advocated adopting three branches, "and a balance by an equal negative, in all the separate governments."³²

Adams continued by discussing the general nature of the executive branch. "The executive power," he observed, "is properly the government; the laws are a dead letter until an administration begins to carry them into execution." An executive chosen by the assembly might make him

liable to daily motions, debates, and votes of censure. Instead of thinking of his duty to the people at large, he will confine his attention chiefly to the assembly, and believe, that if he can satisfy them, or a majority of them, he has done his duty.

Moreover, an assembly-appointed executive deprives the citizens of their "only defense which they or their representatives can have against the avarice and ambition of the rich and distinguished citizens. . . ." Furthermore, people tend to "believe that the evils they feel are brought upon them by the executive power." In short, he concluded,

How easy is it, then, for a few artful men among the aristotical body to make a president, thus appointed and

³²Ibid., pp. 579-580.

supported, unpopular, though he conducts himself with all the integrity and ability which his office requires?³³

In organizing the executive, Adams called for a unitary as opposed to a plural executive.

I had almost ventured to propose a third assembly for the executive power; but the unity, the secrecy, the dispatch of one man has no equal; and the executive power should be watched by all men; the attention of the whole nation should be fixed upon one point, and the blame and censure, as well as the impeachments and vengeance for abuses of this power, should be directed solely to the ministers of one man.³⁴

In closing his work, Adams reiterated the need for a balanced national constitution. He noted that

in the present state of society and manner in America, with a people living chiefly by agriculture, in small numbers, sprinkled over large tracts of land, they are not subject to those panics and transports, those contagions of madness and folly, which are seen in countries where large numbers live in small places, in daily fear of perishing for want.

He observed that people can "live and increase" under any kind of government "or without government at all." However, he argued

it is of great importance to being well; misarrangements now made, will have great, extensive, and distant consequences; and we are now employed, how little soever we may think of it, in making establishments which will affect the happiness of a hundred millions of inhabitants at a time, in a period not very distant.

Finally, he said,

All nations, under all governments, must have parties; the great secret is to control them. There are but two ways, either by a monarchy and standing army, or by a balance in the constitution. Where the people have a voice, and there

³³Ibid., pp. 581-585.

³⁴Ibid., p. 585.

is no balance, there will be everlasting fluctuations, revolutions, and horrors, until a standing army, with a general at its head, commands the peace, or the necessity of an equilibrium is made to appear to all, and is adopted by all.³⁵

These, then, were some of the thoughts which the delegates pondered as they began the task of writing the Constitution. Like Adams, most agreed that any new government must be divided and balanced. However, there was much disagreement over how best to divide and organize specific powers and duties. This was especially true of the executive branch.

³⁵Ibid., pp. 587-588.

CHAPTER IX

CREATION OF THE PRESIDENCY:

The Convention Debates

The Constitutional Convention debates on the creation of the presidency provide a comprehensive summary of American thinking on executive theory in the eighteenth century. This chapter examines the step-by-step process by which the delegates selected and arranged the elements of the executive branch of the Constitution.

Once the Convention delegates decided to scrap the Articles of Confederation and write a whole new constitution, they faced the difficult problem of how to organize the executive branch. The Convention agreed early in its proceedings that an executive was necessary to any well-constructed government. However, past models of the English monarchy, colonial governor, and early state governors each possessed problems which made it unwise to adopt them on a national scale without major modifications.

The initial proposal presented for consideration by the Convention provided for a limited executive. The Virginia Plan outlined an executive elected by the national legislature for an undetermined number of years, ineligible thereafter, with a fixed and unalterable salary, with the "general authority to execute the National laws, [and] . . . to enjoy the Executive rights vested in Congress by the Confederation." Additionally, the executive "and a convenient number of the National Judiciary" would be a council of revision whose veto over

"every act of the National Legislature" or "a particular Legislature" would be final unless repassed by an undetermined number of the legislature. All references to the executive were phrased with the pronoun "it" to avoid the issue of whether the executive ought to be singular or plural in structure.¹

In presenting his plan to the delegates, Edmund Randolph outlined the defects in the past constitutional experience he was trying to remedy. "Our chief danger," he said,

arises from the democratic parts of our constitution. It is a maxim which I hold incontrovertible, that the powers of government exercised by the people swallows up the other branches. None of the constitutions have provided sufficient checks against the democracy. This feeble Senate of Virginia is a phantom. Maryland has a more powerful senate, but the late distractions in that State, have discovered that it is not powerful enough. The check established in the constitution of New York and Massachusetts is yet a stronger barrier against democracy, but they all seem insufficient.

Here, then, was one of the principles, as discussed by Adams and others, that government ought to be balanced so that no part might interfere with the operation of the others to the detriment of society.²

On May 30, the Convention agreed to establish a national government consisting of "a supreme Legislative, Judiciary, and Executive." During the discussion, Gouverneur Morris defined the terms federal and national, as opposed to a supreme government. The former, he said, were mere compacts "resting on the good faith of the parties,"

¹Max Farrand, ed., Records of the Federal Convention of 1787, I, 20.

²Ibid., pp. 26-27.

while the latter had "a complete and compulsive operation."³ Thus, the Convention agreed to give the new government supreme and compulsive power over the states.

Once that was settled, the Convention turned to the problem of how best to constitute the new government. During the debate over the composition of the national legislature, Elbridge Gerry raised the issue of securing the administrative part of government. He cited the problems in Massachusetts whereby "the popular clamour . . . [demanded] the reduction of salaries . . . [and attacked the power of] the Gov-
[erno]r though [it was] secured by the spirit of the Constitution itself." He said that "One principal evil arises from the want of due provision for those employed in the administration of Government." In the past he said that he had been too republican and while he was still republican he "had been taught by experience the danger of the levelling spirit." Madison responded that "we had been too democratic but was afraid we s[houl]d incautiously run into the opposite extreme." He proposed that the Convention protect the rights of "every class of people."⁴ Here again the principles of using the executive to check and balance the legislative branch were outlined. This, as shown later, becomes one of the predominant functions of the executive in the eyes of the Convention.

In the early days of the Convention, discussions about the executive revolved around three interrelated issues. Overall, most

³Ibid., p. 31.

⁴Ibid., pp. 48-49.

agreed that the executive must possess adequate power and authority to act vigorously, defend itself from encroachments, while at the same time not become despotic. Therefore, the Convention was faced with how best to achieve this end by defining and organizing its powers and duties; whether to entrust it to a single or plural executive; and finally, by what mode of election the executive could be best kept responsible.

The Virginia Plan aimed at creation of an executive that would solve the problems inherent in the Articles of Confederation while at the same time not interfering with the supremacy of the legislature. Under this scheme the legislature would make policy and the executive would enforce it. However, as soon as the Convention tried to clarify and define the important elements of the executive, significant divisions appeared among the delegates.

On June 1 the first major discussion of the organization of the national executive occurred. Charles Pinckney wanted a vigorous executive, but one which did not possess the powers of war and peace, which, he said "would render the Executive a Monarchy, of the worst kind, towit an elective one." Then James Wilson moved that the executive consist of one person, which Pinckney seconded. James Madison observed that "A considerable pause" ensued and Benjamin Franklin then requested that the delegates "deliver their sentiments on it before the question was put." The discussion that followed indicated a wide range of opinions concerning the nature of the executive.⁵

⁵Ibid., pp. 64-65.

Both John Rutledge and James Wilson preferred a single executive "as giving the most energy dispatch and responsibility to the office." Wilson went on to disavow using the prerogatives of the British monarch as a model since many of them were legislative in nature. He wanted only those powers which were clearly executive in nature to be included. These he conceived to be execution of the laws and appointing officers not appointed by the legislature.⁶

Roger Sherman thought the executive should be a creature of the legislature. The executive, he said, is

nothing more than an institution for carrying the will of the Legislature into effect, that the person or persons ought to be appointed by and accountable to the Legislature only, which was the depository of the supreme will of the Society.

Since the legislature was the best judge of what ought to be done by the executive, he advocated that the number be left open so that "the legislature should be at liberty to appoint one or more as experience might dictate."⁷

Edmund Randolph also strenuously opposed a single executive as being the "foetus of monarchy." While the English Constitution was an excellent one, he argued, he saw no reason to copy it because the "fixt (sic) genius of the people of America required a different form of Government." He thought the executive ought to be independent and saw no reason why energy, vigor, and dispatch necessary to a

⁶Ibid., p. 41.

⁷Ibid.

strong executive could not be found in three individuals as well as one.⁸

Wilson answered Randolph by disclaiming any comparison with the British Constitution and agreed that American circumstances were far different. However, he said, the single executive was far from "being the foetus of Monarchy," rather it "would be the best safeguard against tyranny." Moreover, the "people of Amer[ica] did not oppose the British King but the parliament--the opposition was not ag[ainst] an Unity but a corrupt multitude--." Then Wilson again moved to adopt a single executive and the Convention deferred action once more.⁹

Madison then recommended that the Convention ought to "fix the extent of the Executive authority" before deciding on a single or plural executive. He contended that since there were certain powers which were executive in nature and "a definition of their extent would assist the judgment in determining how far they might be safely entrusted to a single officer." The powers listed were the same cited by Wilson with the addition of the execution of "such other powers (not Legislative nor Judiciary in their nature) as may from time to time be delegated by the national Legislature."¹⁰ This was approved by the Convention.

⁸Ibid., p. 66.

⁹Ibid., pp. 66, 71.

¹⁰Ibid., pp. 66-67.

The next issue was the method of appointment and duration of the executive's term. Wilson said that in theory he was for people electing the executive. He noted that the

Experience, particularly in N. York & Massts. shewed that an election of the first magistrate by the people at large, was both a convenient & successful mode. The objects of choice in such cases must be persons whose merits have general notoriety.

Later in the debate, he added that election by the people of both the legislature and executive would "make them as independent as possible of each other, as well as of the States."¹¹ He also wanted a short term of three years with re-eligibility. Others wanted a longer term and no re-eligibility. That, George Mason argued, was the

best expedient both for preventing the effect of a false complaisance on the side of the Legislature towards unfit characters; and a temptation on the side of the Executive to intrigue with the Legislature for a re-appointment.

At this stage, the Convention voted to grant the executive a term of seven years by a vote of six to four, with one divided. As the vote indicated, this issue would continue to be the subject of much discussion. The next day the mode of election was temporarily resolved by an eight to two majority in favor of election by the legislature.¹²

Franklin then proposed that the executive not be offered any salary. He based his argument on the two passions that "have a powerful influence of the affairs of men." These were "ambition and avarice; the love of power, and the love of money." When "united in view of the

¹¹Ibid., pp. 68-69.

¹²Ibid.

same object, they have in many minds the most violent effects." If one places before these men "a post of honour that shall at the same time be a place of profit, and they will move heaven and earth to obtain it." That was the problem with the British Constitution, he concluded. He cited the example of Washington serving as commander-in-chief of the army for expense money only. He had no doubts that there would be a sufficient number of "wise and good men to undertake and execute well and faithfully the Office in question." His motion was seconded by Alexander Hamilton and then tabled. No debate ensued and Madison reported that "It was treated with great respect, but rather for the author of it, than from any apparent conviction of its expediency or practicability."¹³

The next point of contention was over the removal of the executive. John Dickinson moved to make him removable by the national legislature on petition of the majority of the state legislatures. This touched off a debate on the principles of government. Those who opposed it argued that it made the executive dependent on the legislature. Moreover, it was unwise to mix the state and national government in such a manner. Finally, it gave to the small states too much power by placing them on an equal footing with the larger ones which might allow for the executive to bribe a minority to prevent the majority from removing him.¹⁴

¹³Ibid., p. 85.

¹⁴Ibid.

Dickinson responded with a lengthy discussion on the nature of government. He agreed that the three branches ought to be as separate as possible, but the executive as envisioned by some delegates was not consistent with a republic. He was convinced that a firm executive could only be found in limited monarchy because of the weight the executive has from his prerogatives and other attachments. However, he noted as before, a monarchy was not consistent with the American experience. Though a limited monarchy might be the best form of government, Americans should not despair but seek solutions to remedy the "diseases" of the ancient republics in an attempt to find an ideal government like a limited monarchy but suited to American circumstances. In the end, Dickinson's motion to have the president removable by the legislature was defeated.¹⁵

The Convention then voted to make the executive ineligible after seven years and "to be removable on impeachment & conviction of mal-practice or neglect of duty." Pinckney followed with a motion to make the executive "one person." As expected, this raised the fears of those opposed to a unitary executive.¹⁶

Randolph again took the lead in opposing the amendment. He felt compelled to oppose any semblance of monarchy and reiterated his plea for a tripartite executive. A unitary executive would never have the public confidence and would more than likely come from the center of the community which would leave the extremes unrepresented. A

¹⁵Ibid., pp. 86-87.

¹⁶Ibid., p. 87.

three-headed executive would represent each region equally. Pierce Butler countered that a single executive would be responsible for all the sections. If there were several executives they would constantly be struggling for local advantages.¹⁷

On June 4 the discussion continued with Wilson answering Randolph. He claimed that there was none of the "alleged antipathy of the people" toward unity in the executive since "All know that a single magistrate is not a King." He then cited the fact that the thirteen state constitutions

tho' agreeing in scarce any other instance, agree in placing a single magistrate at the head of the Government. The idea of three heads has taken place in none. The degree of power is indeed different; but there are no co-ordinate heads.

Moreover, it would add to the "tranquility not less than the vigor of the Govt."¹⁸

Sherman raised the question of a council if there was to be a single executive. Using Wilson's example of the state constitutions he reminded the Convention that all had councils of advice, "without which the first magistrate could not act." He thought a council necessary before the people would accept a single executive, citing the fact that even the king of Great Britain had a council, "and though he appoints it himself, its advice has its weight with him, and attracts the Confidence of the people."¹⁹

¹⁷Ibid., pp. 88-89.

¹⁸Ibid., p. 96.

¹⁹Ibid., p. 97.

The motion for a single executive carried by a vote of seven to three. Washington voted yes in one of the few incidences where the record indicated he did vote. Then the Convention examined the idea of a council, but tabled it to settle the matter of what kind of negative the executive ought to be allowed over the legislature.²⁰

Delegates differed over the type of veto to include. Both Wilson and Hamilton argued for an absolute veto contending that without "such a self-defense the Legislature can at any moment sink it into non-existence." Hamilton contended that there was nothing to fear from such a veto "being too much exercised . . . [since] the King of G[reat] B[ritton] had not exerted his negative since the Revolution." Gerry thought that there was "no necessity for so great a controul over the legislature as the best men in the Community would be comprised in the two branches of it." Franklin was not so sure, arguing that in Pennsylvania the executive had used the threat of the veto to extort money from the legislature for personal gain. If there was a council to temper the executive use of it he might be more favorably disposed to support it. He thought the reason the English monarch did not use the veto was because of the "bribes and emoluments now given to the members of Parliament rendered it unnecessary, everything being done according to the will of the Ministers." Sherman opposed it on the grounds that "No one man could be found so far above all the rest in wisdom." The

²⁰Ibid., pp. 97-98.

executive ought to be listened to in revising legislation, "but not permit him to overrule the decided and cool opinions of the Legislature."²¹

Madison proposed a compromise in which a certain number of each house could overrule the objections of the executive. That, he said, would "answer the same purpose as an absolute negative." Rarely, he concluded, could an executive like the one proposed have the firmness to "resist the Legislature, unless backed by a certain part of the body itself." To give an absolute veto to the executive would certainly be "obnoxious" to the "temper of the country."²²

However, fears of executive tyranny were not so easily dispelled in the minds of a number of delegates. Butler said he would not have supported a single executive had he known how extensive a negative over the legislature some members wanted to grant him. He noted "that in all countries the Executive power is in a constant course of increase Gentlemen seem to think that we had nothing to apprehend from an abuse of the Executive power." Mason continued the attack, arguing that the Convention was going beyond even the British Constitution by setting up an elective monarchy. Franklin concluded the debate over an absolute veto by making a veiled reference to the first executive and problems of his successors. He said, probably referring to Washington, "The first man, put at the helm will be a good one. No body

²¹Ibid., pp. 98-99.

²²Ibid., pp. 99-100.

knows what sort may come afterwards. The Executive will always be increasing here, as elsewhere, till it ends in a monarchy."²³

The resolution for an absolute negative failed unanimously. The proposal to grant the executive power to suspend laws for a limited time also failed, the objection being that it "might do all the mischief dreaded from the negative of useful laws; without answering the salutary purpose of checking unjust or unwise one[s]." The Convention finally settled on the right of two-thirds of the legislature to override.²⁴

During the debate on the veto, Mason raised a number of issues concerning the executive, which he presented to the Convention for their long-term analysis. The most significant one was the question of an executive council. Something must be done to take care of executive incapacity, he argued. He also assumed that any such body would serve as a council of revision. If that were the case, he strongly recommended against using the executive department heads as the council noting that "we can hardly find worse materials out of which to create a council of revision, or more improper or unsafe hands in which to place the power of a negative upon our laws." He recommended that it be composed of members of the judiciary branch along with the executive. That idea found the support of a number of delegates.²⁵

Later in his analysis of the executive power, Mason assessed the Convention's sentiment toward a strong executive. He noted that

²³Ibid., pp. 100-103.

²⁴Ibid., pp. 103-104.

²⁵Ibid., p. 111.

We have not yet been able to define the powers of the Executive, and however moderately some gentlemen may talk or think upon the subject, I believe there is a general tendency to a strong Executive, and I am inclined to think a strong Executive necessary. If strong and extensive powers are vested in the Executive, and that executive consists only of one person, the government will of course degenerate (for I will call it degeneracy) into a monarchy--a government so contrary to the genius of the people that they will reject even the appearance of it.²⁶

Thus, early in the Convention there appears to have been general agreement among many of the delegates that a strong executive was essential to any new government.

On June 6, Wilson again raised the issue of a council composed of the executive and judicial branches. Madison seconded the motion and went on to explain his thinking on the matter. He said that the nature of republican governments made it difficult for a single individual to attain that "settled pre-eminence in the eyes of the rest, that weight of property, that personal interest against betraying the National interest, which appertain to an hereditary magistrate." Moreover, "In a Republic personal merit alone could be the ground of political exaltation, but it would rarely happen that this merit would be so pre-eminent as to produce universal acquiescence." This would leave the executive open to being "envied & assailed by disappointed competitors: His firmness therefore would need support." By combining the executive and judicial branches, it would protect both from legislative encroachment and give the necessary strength and support to the executive, Madison concluded.²⁷

²⁶Ibid., p. 113.

²⁷Ibid., p. 138.

Madison then went on to anticipate some of the objections that might be raised to this combination. He said it was not an "improper mixture of these distinct powers in the present case" because, as in the case of the British Constitution, where the monarch had an absolute veto, and the supreme tribunal of Justice (the House of Lords) was one branch of the legislature, their function was the same. Therefore, he concluded,

whether the object of the revisionary power was to restrain the Legislature from encroaching on the other co-ordinate Departments, or on the rights of the people at large; or from passing laws unwise in their principle, or incorrect in their form, the utility of annexing the wisdom and weight of the Judiciary to the Executive seemed incontestable.²⁸

Gerry, King, Pinckney, and Dickinson all opposed the idea of combining the executive and judiciary in a council of revision. Gerry said that a unitary executive would be more impartial than he could be when "covered by the sanction & seduced by the sophistry of the Judges." King noted that if a single executive gives responsibility, "the policy of it is as applicable to the revisionary as to the Executive power." Pinckney at first wanted the executive heads as the council of revision, but since the executive could call on them at any time, he concluded that the revisionary power ought to be solely in the hands of the executive. Mason argued for

giving all possible weight to the revisionary institution
[because] . . . the Executive power ought to be well secured
ag[ain]st Legislative usurpations on it.

Dickinson noted that

²⁸Ibid., p. 139.

Secrecy, vigor & dispatch are not the principal properties req[ui]red in the Executive. Important as these are, that of responsibility is more so, which can only be preserved; by leaving it singly to discharge its functions.

He, therefore, thought that such a combination was an "improper mixture of powers." To that, Wilson remarked "that the responsibility required belonged to his Executive duties. The revisionary duty was an extraneous one, calculated for collateral purposes." The final vote, however, rested with the opponents who won by an eight-to-three margin.²⁹

Prior to the introduction of the New Jersey Plan on June 15, the Convention had reached several conclusions about the national executive. He was to be "a single person" with the power "to carry into execution the national laws; to appoint offices not otherwise provided for." He was "to be chosen by the national Legislature for a term of seven years . . . to be ineligible a second time; and; to be removable on impeachment and conviction of mal-practice, or neglect of duty." Finally, the Convention resolved that "the national Executive shall have a right to negative any legislative act; which shall not be afterwards passed unless by two thirds parts of each branch of the national Legislature." Thus, in the first two weeks of debate, the Convention had decided on making the executive independent of the other branches, limited to its own sphere of authority which allowed it to be vested in a single individual. Only Sherman, of all the delegates, consistently argued for a dependent executive.³⁰

²⁹Ibid., pp. 139-140.

³⁰Ibid., pp. 225-226.

The one major concern expressed by nearly everyone who had participated in the discussion about the executive was how to prevent past executive excesses from occurring again. The Convention therefore concluded that the executive must have authority limited to purely "executive matters" to maintain the proper division of powers and prevent encroachments on the other branches. On the reverse side was the Convention's concern that the executive be made strong enough to withstand the pressures exerted by the legislative branches. Thus, to this point it was clear that the Convention had reached a consensus about the executive authority. It was to be limited in nature, yet endowed with sufficient power to protect itself from encroachment. This general assumption about executive authority was not seriously questioned for the rest of the debate, though there was extended debate over the specific points to be enumerated, and the general character of the office.

The New Jersey Plan was offered by William Patterson to ensure the rights of the smaller states. With respect to the executive, he called for a plural executive holding power for an undetermined number of years with a fixed salary. Persons in the executive branch would be ineligible for a second term and were barred from "holding any other office or appointment during their time of service" and for an undetermined number of years thereafter. Moreover, they were removable by the legislature "on application by a majority of the Executives of the several States." Their duties were to execute the laws and appoint officers not otherwise provided for. However, unlike the Virginia Plan, they were

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 any other capacity.³¹

In the ensuing debate over the New Jersey Plan, Wilson advanced a single executive. After listing the specific terms of each kind regarding the executive, he concluded that

In order to controul the Legislative authority, you must divide it. In order to controul the Executive you must unite it. One man will be more responsible than three. Three will contend among themselves till one becomes the master of his colleagues.

He cited the "Kings of Sparta, & Consuls of Rome" to prove "the factious consequences of dividing the Executive Magistracy."³²

Before any action was taken on the New Jersey Plan, Hamilton argued against provisions for the executive in both plans. In a lengthy speech he reviewed the major issues before the Convention and concluded that neither the Virginia nor New Jersey Plans adequately resolved them. "As to the Executive," he said, "it seemed to be admitted that no good one could be established on Republican principles." Then he asked, "Was not this giving up the merits of the question; for can there be a good Gov[ernmen]t without a good Executive?" The English model was the only good one on this subject, he concluded.

The Hereditary interest of the King was so interwoven with that of the Nation, and his personal emoluments so great, that he was placed above the danger of being corrupted from abroad--and at the same time was both sufficiently independent and sufficiently controuled, to answer the purpose of the institution at home.

³¹Ibid., p. 244.

³²Ibid., p. 254.

Moreover, he noted, "one of the weak sides of Republics was their being liable to foreign influence & corruption. Men of little character, acquiring great power become easily the tools of intermeddling neighbours (sic)." He cited a number of historical examples, and concluded that

we ought to go as far in order to attain stability and permanency, as republican principles will admit. Let one branch of the Legislature hold their places for life or at least during good behaviour. Let the Executive also be for life.

He questioned whether a seven-year term was sufficient to attract individuals to "induce the sacrifices of private affairs which an acceptance of public trust would require, so . . . as to ensure the services of the best Citizens."³³

Hamilton's comments, like many of his fellow delegates, were directed at securing the maximum degree of responsibility in the executive. Once he presented his proposals to the Convention, he developed the rationale behind them. Human nature, being what it was, would induce the executive to want to "prolong his power," he said, and in case of a war, "he would avail himself of the emergence (sic), to evade or refuse a degradation from his place." However, "An executive for life has not this motive for forgetting his fidelity, and will therefore be a safer depository of power."³⁴

Hamilton then answered what he thought would be the objections to his proposal. On the method of selection, he wanted an

³³Ibid., p. 289.

³⁴Ibid., p. 290.

elective executive. He noted that the phrase "elected Monarchy" conjured up visions of horror among some of his colleagues, but, he said, the term "'Monarch' is an indefinite term. It marks not either the degree or duration of power." He then compared his model executive with the one outlined by the Committee of the Whole. His would be for life, while the Committee's would be for seven years, since "the circumstances of being elective was also applicable to both."³⁵

Then Hamilton attacked the fundamental objection to an elective monarch. He cited the observations by "judicious writers" that elective monarchies would be the best government "if they could be guarded ag[ain]st the tumults excited by the ambition and intrigues of competitors." He doubted whether "tumults were an inseparable evil." Moreover, he thought opinions about an elective monarchy "had been taken rather from particular cases than from general principles." After citing a number of examples he asked, "Might (not) such a mode of election be devised among ourselves as will defend the community ag[ain]st these effects in any dangerous degree?"³⁶

In concluding his remarks, Hamilton presented the Convention with a plan of government not "as a proposition to the Committee," but "only to give a more correct view of his ideas, and to suggest amendment to the plans under discussion." His proposal for the executive power included the following: that

³⁵Ibid.

³⁶Ibid., pp. 290-291.

the supreme Executive authority of the United States be vested in a Governour to be elected to serve during good behaviour--the election to be made by Electors chosen by the people in the Election District aforesaid.

The authority and function of the executive included a

negative on all laws about to be passed, and the execution of all laws passed, to have the direction of war when authorized or begun; to have with the advice and approbation of the Senate the power of making all treaties; to have the sole appointment of the heads of chief officers of the departments of Finance, War and Foreign Affairs; to have the nomination of all other officers (Ambassadors to foreign Nations included) subject to the approbation or rejection of the Senate; to have the power of pardon without the approbation of the Senate.

Moreover, the Governor, Senators, and all officers of government would be "liable to impeachment for mal--and corrupt conduct" by a court consisting of chief judges of the "Superior Court of Law of each State, provided such Judges shall hold his place during good behavior, and have a permanent salary."³⁷

While Hamilton's proposals for an executive for life were not purposefully considered by the Convention, the principles he addressed himself to were taken seriously. His notes used in delivering the speech indicate that he admired the British Constitution for its efficiency in organizing the administrative arm of government. He noted that the effect of the English government was to assure "A vigorous execution of the laws--[which resulted in] a vigorous defence (sic) of the people." Furthermore,

it is said a republican government does not admit a vigorous execution. It is therefore bad; for the goodness of a government consists in a vigorous execution. The principle

³⁷Ibid., pp. 292-293.

chiefly intended to be established is this--that there must be a permanent will.³⁸

Though sympathetic to his objectives, his colleagues were in agreement that any semblance of an executive monarchy would not be accepted by the people as it was against the American temperment.

For the next week the Convention debated the merits of the Virginia and New Jersey Plans. By June 26 the Convention was ready to vote on a number of points that had been under discussion. The day before the voting, Pinckney gave a detailed analysis of the problems before them and the conditions within which the Convention must operate to reach a consensus on a government that would be accepted by the people. He observed that the conditions of American society made it unique among nations because there

are fewer distinctions of fortune & security; and a very moderate share of property entitles them to the possession of all the honors and privileges the public can bestow; hence arises a greater equality, than is to be found among the people of any other country, and an equality which is more likely to continue

because of the immense tracts of unpopulated land. Moreover,

every member of the Society almost, will enjoy an equal power of arriving at the supreme offices & consequently of directing the strength & sentiments of the whole Community. . . . The whole community will enjoy in the fullest sense that kind of political liberty which consists in the power the members of the State reserve to themselves, of arriving at the public offices, or at least, of having votes in the nomination of those who fill them.³⁹

Pinckney then went on to argue that Americans could not use the British Constitution as a model. While he thought it "to be the

³⁸Ibid., p. 310.

³⁹Ibid., p. 598.

best constitution in existence; but at the same time I am confident it is one that will not or can not be introduced into this Country, for many centuries." Specifically, he noted, the

balance between the Crown & the people can not (sic) be made a part of our Constitution.--that we neither have or can have the members to compose it, nor the rights, privileges & properties of so distinct a class of Citizens to guard.--that the materials for forming this balance or check do not exist, nor is there a necessity for having so permanent a part of our Legislative, until the Executive power is so constituted as to have something fixed & dangerous in its principle--By this I mean a sole, hereditary, though limited Executive.⁴⁰

He then recounted a detailed analysis of the conditions in England and how they created the present British system.

Then Pinckney turned his attention to the problem facing the Convention. He noted that they

must as has been observed suit our Government to the people it is to direct. These are I believe as active, intelligent & susceptible of good Gov[ernmen]t as any people in the world. The Confusion which has produced the present relaxed State is not owing to them. It is owing to the weakness & (defects) of a Gov[ernmen]t incapable of combining the various interests it is intended to unite, and destitute of energy.--All that we have to do then is to distribute the powers of Gov[ernmen]t in such a manner, and for such limited periods, as while it gives a proper degree of permanency to the Magistrate, will reserve to the people, the right of election they will not or ought not frequently to part with.--I am of [the] opinion that this may be easily done; and that with some amendments the propositions before the Committee will fully answer this end.⁴¹

For the following few days the Convention labored over construction of the legislative branch. Luther Martin expressed the concern that if the election of that branch were not properly constructed

⁴⁰Ibid., p. 399.

⁴¹Ibid.

it would prove to be a threat to the states. He raised the specter of a combination of ten states which passed a law, only to have the executive veto it. The law is "totally lost, because those states cannot form two thirds of the legislature." He concluded that he was "willing to give up private interest for the public good--but I must be satisfied first, that it is the public interest--and who can decide this point? A majority only of the union."⁴²

The whole question of the role to be played by the states in any new government kept the question of the executive a live issue. George Read was concerned that the large states would "stick together, and carry every thing before them." Moreover, he said, the "Executive also will be chosen under the influence of this partiality, and will betray it in his administration." Therefore, the states must be abolished, he concluded.⁴³

Madison undertook the defense of a mixed system based on both the states and national government. He attacked the notion of a confederacy as a basis of the new government. He feared that the states might individually have too much power, especially a standing army to protect themselves from their stronger neighbors.

The example w[oul]d be followed by others, and w[oul] soon become universal. In time of actual war, great discretionary powers are constantly given to the Executive Magistrate. Constant apprehension of War, has the same tendency to render the head too large for the body. A standing military force, with an over-grown Executive will not long be safe companions

⁴²Ibid., pp. 440-441.

⁴³Ibid., p. 441.

to liberty. The means of defence (sic) ag[ain]st foreign danger, have been always the instruments of tyranny at home.⁴⁴

At a later date Wilson picked up the argument. He said that much has been said of an imaginary combination of three States. Sometimes a danger of monarchy, sometimes of aristocracy has been charged on it. No explanation, however, of the danger has been vouchsafed. It would be easy to prove both from reason & history that rivalships would be more probable than coalitions; and that there are no coinciding interests that could produce the latter.

He went on to ask if the

Executive Magistrate be taken from one of the large States would not the other two be thereby thrown into the scale with the other States? Whence then the danger of monarchy? Are the people of the three large States more aristocratic than those of the small ones? It is all a mere illusion of names.⁴⁵

On July 17 discussion of the executive moved back into the forefront of the Convention's debates. The issue was the method of selection of the executive. The arguments for and against election by the legislature were reiterated. Then they debated the question of election by the people at large. This was objected to on a number of accounts. One was the fact that the people could not know all the candidates, nor, in the words of Mason, could they choose an executive any better than referring "a trial of colours to a blind man. The extent of the Country renders it impossible," he said, "that the people can have the requisite capacity to judge of the respective pretensions of the Candidates." However, what may be the key to understanding the problems was raised by Hugh Williamson. First he said

⁴⁴Ibid., p. 465.

⁴⁵Ibid., p. 483.

There are at present distinguished characters, who are known perhaps to almost every man. This will not always be the case. The people will be sure to vote for some man in their own State, and the largest State will be sure to succeed.

Then he said that this would not be Virginia as "Her slaves will have no suffrage."⁴⁶ Slavery became a major stumbling block not only in the election of the legislature, but the executive as well. If the executive was to be elected by the people at large, then there would have to be some national statement on suffrage requirements. The three-fifths compromise solved the problem for the legislature, but it was not adequate to overcome the problem of popular election of the executive.

Debate over the process of selecting the executive opened the issues of executive tenure and the separation of powers again. After there had been some discussion of the previous debates on the subject, Madison sought to assure the Convention that he had no wish to introduce a monarchy, but rather he wanted to prevent one from being established. He said that

Experience has 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.

Therefore, he concluded, the "preservation of Republican Gov[ernmen]t . . . required evidently at the same time that in devising it, the genuine principles of that form should be kept in view." Morris concurred with Madison's opinion that the only way to prevent a monarchy

⁴⁶Ibid., II, 31-32.

was to create a republican substitute. If a republican government could be established that would "make the people happy" it would "prevent a desire of change," he concluded.⁴⁷

Dr. James McClurg was more cautious in expressing his opinion. He said he was

not so much afraid of the shadow of monarchy as to be unwilling to approach it; nor so wedded to Republican Gov[ernmen]t as not to be sensible of the tyrannies that had been & may be exercised under that form.

However, since the Convention had voted to deny the executive re-eligibility, he thought the only way the executive could maintain his independence was to be appointed "during good behavior."⁴⁸

The next day the Convention tackled the problem of whether the executive or the Senate should make appointments to the judicial branch. Again the discussion revolved around the question of whether the executive or the Senate would be less likely to corrupt the appointment process. They finally rejected exclusive executive appointment by a vote of six to two. Further consideration of this issue was postponed until later.⁴⁹

On July 19 the whole question of the structure of the executive was re-opened. In the extensive debate that followed, many fundamental assumptions about the executive emerged. The first point was on the question of re-eligibility. Gouverneur Morris opened the discussion by saying it was

⁴⁷Ibid., pp. 35-36.

⁴⁸Ibid., p. 36.

⁴⁹Ibid., pp. 43-44.

necessary to take into one view all that relates to the establishment of the Executive; on the due formation of which must depend the efficacy & utility of the Union among the present and future States.

He noted that it had been a maxim in political science that "Republican Government is not adapted to a large extent of Country, because the energy of the Executive Magistracy can not reach the extreme parts of it." Since the United States was an extensive country, he thought the Convention faced two alternatives. "We must either then renounce the blessings of the Union, or provide an Executive with sufficient vigor to pervade every part of it."⁵⁰

Morris then proceeded to examine the function of the executive. He said the

One great object of the Executive is to controul the Legislature. The Legislature will continually seek to aggrandize & perpetuate themselves; and will seize those critical moments produced by war, invasion or convulsion for that purpose. It is necessary then that the Executive Magistrate should be the guardian of the people, even of the lower classes, against Legislative tyranny, against the Great & wealthy who in the course of things will necessarily compose--the Legislative body.

Therefore, he concluded, "The Executive . . . ought to be so constituted as to be the great protector of the Mass of the people." One of the great duties of the executive in protecting the people, Morris contended, was the appointment of individuals to protect and administer the country. The people must therefore ultimately be the judge of how well he did this.⁵¹

⁵⁰Ibid., p. 52.

⁵¹Ibid., pp. 52-53.

Morris further contended that to make the executive ineligible for a second term destroys his ability to protect the people. It reduced the incentive "to merit public esteem by taking away the hope of being rewarded with a reappointment." Moreover, "It may give a dangerous turn to one of the strongest passions in the human breast . . . [for] the love of fame is the great spring to noble & illustrious actions." If denied by civil means, "he may be compelled to seek it by the sword." Finally, "It will tempt him to make the most of the Short space of time allotted him, to accumulate wealth and provide for his friends," and "It will produce violations of the very constitution it is meant to secure." Then in a very insightful observation he said, "In moments of pressing danger the tried abilities and established character of a favorite Magistrate will prevail over respect for forms of the Constitution."⁵² In the last analysis, even the impeachment of the executive destroys his protective functions by making him dependent upon the legislature.

To remedy the defects in the executive structure, Morris offered several specific suggestions. First, the executive should be appointed by the people since he was their guardian. Second, "Let him be of short duration, that he may with propriety be re-eligible." Finally, with respect to candidates being known by the people,

If they be known to the Legislature, they must have such a notoriety and eminence of Character, that they cannot possibly be unknown to the people at large. It cannot be possible that a man shall have sufficiently distinguished

⁵²Ibid., p. 53.

himself to merit this high trust without having his character proclaimed by fame throughout the Empire.⁵³

By making the executive unimpeachable, he could not be regarded as a formidable danger to liberty, Morris contended. Since there must be "certain great officers of State, a minister of finance, of war, of foreign affairs &c who operate in subordination to the executive, and who will be amenable by impeachment to the public Justice," the executive will be adequately checked since "without these ministers the Executive can do nothing of consequence." The only way Morris thought the executive could be made independent was to either make him executive for life "or make him eligible by the people." He recommended a two-year term with re-eligibility as the surest way to make him responsible. Additionally, the "extent of the Country would secure his re-election ag[ain]st the factions & discontents of particular States."⁵⁴

Thus, the two key questions which emerged in the debate over structuring the executive were how to make him independent and responsible. During the July 19 discussion, Wilson noted that there seemed "to be the unanimous sense that the Executive should not be appointed by the Legislature, unless he be rendered in-eligible a 2d time." Moreover, he "perceived with pleasure that the idea was gaining ground, of an election mediately or immediately by the people." Just prior to that, King and Patterson had suggested that "an appointment by electors

⁵³Ibid., p. 53.

⁵⁴Ibid., p. 54.

chosen by the people for the purpose [of electing the executive], would be liable to [the] fewest objections." This was gradually becoming the consensus of the Convention.⁵⁵

Madison then undertook a review of the principles relevant to maintaining the independency of the executive. He said "If it be a fundamental principle of free Gov[ernmen]t that the Legislative, Executive & Judiciary powers should be separately exercised; it is equally so that they be independently exercised." Therefore, he said, "It is essential then that the appointment of the Executive should either be drawn from some source, or held by some tenure, that will give him a free agency with regard to the Legislature." He recommended that the

people at large were . . . [the best solution because] it would be as likely as any [method] that could be devised to produce an Executive Magistrate of distinguished Character. The people generally could only know & vote for some Citizen whose merits had rendered him an object of general attention & esteem.

Then he raised the problem of establishing national voting standards.

He observed that

there was one difficulty, however of a serious nature attending an immediate choice by the people. The right of suffrage was much more diffusive in the Northern than the Southern States; and the latter could have no influence in the election on the score of the Negroes.

Therefore, he concluded the "substitution of electors obviated this difficulty and seemed on the whole to be liable to the fewest objections."⁵⁶

⁵⁵Ibid., p. 56.

⁵⁶Ibid., pp. 56-57.

The next question was how best to choose the electors. Gerry proposed that they be appointed by the state executives. Ellsworth moved they be appointed by the state legislatures on the ratio of one elector for each 100,000 inhabitants. On separate votes, the Convention supported by a six-to-three margin the idea of election by electors. They also approved their election by the state legislatures by an eight-to-two margin. A decision on the number of electors for each state was left to a later date.⁵⁷

Then in a flurry of voting the Convention settled several other matters. They voted down by a margin of eight to two an attempt to make the executive ineligible for a second time. This was followed by defeating a proposal to make his term seven years by a vote of five to three, with two divided. Morris wanted a short term "in order to avoid impeach[men]ts which w[oul]d be otherwise necessary." Ellsworth countered by observing that if elections were too frequent,

the Executive will not be firm eno[ugh]. There must be duties which will make him unpopular for the moment. There will be outs as well as ins. His administration therefore will be attacked and misrepresented.

Williamson supported this idea noting that

The experience will be considerable & ought not to be necessarily repeated. If Elections are too frequent, the best men will not undertake the service and those of an inferior character will be liable to be corrupted.

He therefore recommended that the term be six years. This passed by a majority of nine to one.⁵⁸

⁵⁷Ibid., p. 57.

⁵⁸Ibid., pp. 58-59.

The next day saw another vigorous debate over how best to make the executive responsible. The issue was over whether the executive should be liable to impeachment and under what conditions. Madison summed up the issue by noting that the "limitation of the period of his service, was not a sufficient security . . . for defending the Community ag[ain]st the incapacity, negligence or perfidy of the chief Magistrate." Franklin argued for impeachment as the "best way . . . to provide . . . for the regular punishment of the Executive when his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused."⁵⁹

Those who opposed the inclusion of impeachment contended that it would undermine the independence of the executive. Pinckney argued that the legislature would hold it as "a rod over the Executive and by that means effectually destroy his independence." Moreover, he said, "His revisionary power in particular would be rendered altogether insignificant." King expressed his fear that "extreme caution in favor of liberty might enervate the Government." He argued that the executive ought not to be impeached unless he held his office during good behavior. In either case, he was adamant against the legislature having the power to impeach because this "would be destructive of his independence and of the principles of the Constitution" and advocated and relied "on the vigor of the Executive as a great security for the public liberties."⁶⁰

⁵⁹Ibid., p. 65.

⁶⁰Ibid., pp. 66-67.

Randolph charted a middle course between the extremes. He saw the propriety of impeachments because "Guilt wherever found ought to be punished." The executive, he noted, "will have great opportunities of abusing his power; particularly in time of war when the military force, and in some respects the public money will be in his hands." He saw the need for "proceeding with a cautious hand, and excluding with a cautious hand, and of excluding as much as possible the influence of the Legislature from the business." He supported Hamilton's plan for an impeachment court made up of judges from the state courts.⁶¹

Gerry injected his apprehension of the Convention's adopting the English constitutional maxim that "the chief Magistrate could do (no) wrong." He said a good magistrate will not fear impeachment and a bad one "ought to be kept in fear of them."⁶²

After listening to the debate, Morris changed his opinion on the question of impeachment. He saw the necessity of impeachment for an executive who held power for any length of time. He observed that "Our Executive was not like a Magistrate having a life interest, much less like one having an hereditary interest in his office." He was fearful that he might be bribed by foreign governments citing the example of Charles II, who was bribed by Louis XIV, even though most thought the English monarchy was "well secured ag[ain]st bribery." He thought the executive ought to be impeached for "treachery; Corrupting his electors, and incapacity." For the latter, he should only be

⁶¹Ibid., p. 67.

⁶²Ibid., p. 66.

punished as an officer, not as a man, by removal from office. He concluded by saying that this "Magistrate is not the King but the prime-Minister. The people are the King." Then the Convention voted to make the executive subject to impeachment by a vote of eight to two.⁶³

On July 21 the question of the executive's revisionary power was raised again. Wilson had moved to amend that section to include the judiciary. Even though the Convention had rejected this proposal earlier, Wilson, after reflection, "thought it incumbent on him to make another effort." His reasoning was that the judges ought to have a chance to disapprove a law in a manner other than a case before them, because a law may be "unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect."⁶⁴ Therefore, combining the executive and judiciary in a council of revision would not only give the judges the chance to counteract bad legislation, but would strengthen the defenses of both the executive and judicial branches against legislative encroachments.

Wilson's motion reopened the whole question of checks on the legislature and the separation of powers doctrine. Nathaniel Gorham contended that this was an improper use of the judges. Gerry thought it would establish an improper coalition between the executive and judiciary. Moreover, it was making the judges the guardian of the

⁶³Ibid., p. 69.

⁶⁴Ibid., p. 73.

"Rights of the people." He argued that this function belonged to the "Representatives of the people as guardians of their Rights and interests." Caleb Strong agreed, noting that the "power of making ought to be kept distinct from that of expounding, the laws."⁶⁵

On the supporting side, Madison considered the purpose of the motion to be of "great importance to the meditated Constitution." He said it would give additional weight to the judicial branch to protect itself from the legislature, it would inspire the executive with "additional confidence & firmness in exerting the revisionary power," and it would give the legislature valuable assistance in "preserving a consistency, conciseness, perspicuity & technical propriety in the laws, qualities peculiarly necessary; & yet shamefully wanting in our republican Codes." The only solid argument he could see against such an arrangement was the "supposition that it tended to give too much strength either to the Executive or Judiciary." However, he said, there was "much more to be apprehended that . . . the Legislature would still be an overmatch for them." He noted that "Experience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex." This, he said, "was the real source of danger to the American Constitutions." Therefore, he concluded, there must be given "every defensive authority to the other departments that was consistent with republican principles."⁶⁶

⁶⁵Ibid., p. 75.

⁶⁶Ibid., p. 74.

Gouverneur Morris took a more cautious approach. He argued that there must be some check on the legislature, but "the question is in what hands it should be lodged." He cited the extensive powers lodged in the British monarch for defending himself against encroachment, but noted that the "interest of our Executive is so inconsiderable & so transitory, and his means of defending it so feeble, that there is the justest ground to fear his want of firmness in resisting incroachments." However, he thought the addition of the judiciary was not sufficient weight to remedy the problem. He also thought that the greatest danger to public liberty was from the legislature. The issue was whether "bad laws will be pushed or not." If the legislature is the best guardian of the public liberties, then no check was necessary. If it was not, then "a strong check will be necessary."⁶⁷

Luther Martin considered the union of the executive and judicial departments to be "a dangerous innovation; as well as one which could not produce the particular advantage expected from it." Moreover, he said, "A knowledge of mankind, and of Legislative affairs cannot be presumed to belong in a higher degree to the Judges than to the Legislature." If the judges joined the executive in vetoing laws they would have a double negative, he said. Finally it was necessary "that the Supreme Judiciary should have the confidence of the people. This will soon be lost, if they are employed in the task of remonstrating ag[ain]st popular measures of the Legislature."⁶⁸

⁶⁷Ibid., p. 76.

⁶⁸Ibid., pp. 76-77.

Madison responded that he could find no violation of the principle of the separation of powers. In fact he considered it to be "an auxiliary precaution in favor of the maxim." If a "Constitutional discrimination of the departments on paper were a sufficient security to each ag[ain]st encroachments of the others, all further provisions would indeed be superfluous," he said. However, experience had "taught us a distrust of that security; and that it is necessary to introduce such a balance of powers and interests, as will guarantee the provisions on paper." Therefore, he argued, instead of "contenting ourselves with laying down the Theory in the Constitution that each department ought to be separate & distinct," they ought to add a "defensive power to each which should maintain the Theory in practice." He then cited the British example of admitting judges to legislative and executive councils. He concluded that the objection to uniting the executive and judiciary for negating laws had either "no foundation or was not carried far enough." If this proposal

was inconsistent with the Theory of a free Constitution, it was equally so to admit the Executive to any participation in the making of laws; and the revisionary plan ought to be discarded altogether.⁶⁹

Mason noted that the revisionary power was not solely intended to be an executive check on the legislature. He fully expected the national legislature to do what the state legislatures had a history of doing; that is, frequently passing "unjust and pernicious laws." Thus, the restraining power was essential to prevent demagogues "from

⁶⁹Ibid., p. 77.

attempting to get them passed." Moreover, he agreed with Martin that combination of the executive and judicial departments would undermine the judges' basic function of "considering laws in their true principles, and in all their consequences" and would give them a double negative. Wilson answered that "the separation of the departments did not require that they should have separate objects but that they should act separately tho' on the same object." He cited the fact that the two branches of the legislature are separate, while both acted on legislation.⁷⁰

As the debate continued, Gorham sought to bring it back to the two fundamental objections against combining the executive and judiciary branch. The first was that "Judges ought to carry into the exposition of the laws no prepossessions with regard to them," and secondly, that the judges would outnumber the executive which would take the revisionary check entirely out of the hands of the executive, and instead of enabling him to defend himself, would enable the Judges to sacrifice him." Wilson answered the objections saying that both branches were necessary to counterweight the legislature, and that a system of voting could be established to guard against the executive being outvoted. However, the Convention rejected Wilson's amendment in a four-to-three vote.⁷¹

Then the Convention returned to the question of executive appointment of judges. The motion was to make all nominees appointments

⁷⁰Ibid., p. 78.

⁷¹Ibid., pp. 79-80.

unless two-thirds of the second branch of the legislature disagreed. The debate centered around whether the executive could be trusted to have the knowledge and ability to select competent individuals and how to prevent his abusing that power. As Oliver Ellsworth argued,

The Executive will be regarded by the people with a jealous eye. Every power for augmenting unnecessarily his influence will be disliked. As he will be stationary it was not to be supposed he could have a better knowledge of characters. He will be more open to caresses & intrigues than the Senate.⁷²

Madison and Morris countered that if the Senate had the exclusive power of appointment, more than likely judges would be appointed by the populous states. On the other hand, the "Executive in the necessary intercourse with every part of the U.S. required by the nature of his administration, will or may have the best possible information." Moreover, if the executive can be trusted with command of the army, "there can not surely be any reasonable ground of Jealousy in the present case." In the final analysis, the Convention voted to defeat the proposal for executive appointment of judges with a two-thirds vote by the Senate, in favor of their previous stand.⁷³

On July 24 the Convention returned to the question of selecting the executive. By a vote of seven to four, they rescinded their previous proposal to elect him by electors chosen by the state legislatures in favor of election by the national legislature. Once again the previous arguments respecting both sides of the issue were aired. Wilson, in an attempt to offer a compromise, suggested that the executive

⁷²Ibid., p. 81.

⁷³Ibid., pp. 80-82.

be selected by fifteen members of the legislature chosen by lot. In the middle of the debate Gerry expressed the delegates' frustration. He said "We seem to be entirely at a loss on this head." He suggested that it might be "advisable to refer the clause relating to the Executive to the Committee of detail to be appointed." "Perhaps," he concluded, "they will be able to hit on something that may unite the various opinions which have been thrown out."⁷⁴

Morris reviewed the situation and concluded that "Our President will be the British Minister, yet we are about to make him appointable by the Legislature." He pointed out that "something had been said of the danger of Monarchy--If a good government should not now be formed, if a good organization of the Executive should not be provided," he was doubtful whether "we should not have something worse than a limited Monarchy." To rid the executive of his dependence on the legislature the notion of ineligibility was introduced. He expressed fear that the executive would not quietly turn over power to his successor since he had control of the military, and any civil war that ensued would make the winning general "the despot of America." Therefore, he concluded, the Convention ought to be very careful about constituting the executive. "The vice here," he noted,

would not, as in some other parts of the system be curable-- It is (the) most difficult of all rightly to balance the Executive. Make him too weak: The legislature will usurp his powers: Make him too strong. He will usurp on the Legislature.⁷⁵

⁷⁴Ibid., pp. 97-103.

⁷⁵Ibid., pp. 104-105.

The next day the debate over the selection of the executive continued. Madison reviewed all the proposals so far offered and the objections to each. Then he added that if the executive were elected by the legislature it would give foreign powers a chance to "mix their intrigues & influence with the Election." He noted that

Limited as the powers of the Executive are, it will be an object of great moment with the great rival powers of Europe who have American possessions, to have at the head of our Governm[en]t a man attached to their respective politics & interests. No pains, nor perhaps expence (sic), will be spared, to gain from the Legislature and appointm[en]t.

He cited Germany and Poland as examples of where this happened.⁷⁶

Madison's lengthy discussion narrowed to two alternatives--direct election by the people, or election by electors. He favored the latter, but was concerned that electors would prefer someone from their own state and this would be disadvantageous to the smaller states. The key objection was the disproportionate number of qualified voters in the north and south. He foresaw the increase in republican laws and population in the south and in time he implied that this would equalize the situation. The other concern was inducing states to give up local interest to the national interest. He concluded by saying, "As an individual from the S. States he was willing to make the sacrifice."⁷⁷

The debate continued over the selection of the executive with no resolution. Pinckney moved that no person should "serve in the Executive more than 6 years in 12 years," but the motion was defeated

⁷⁶Ibid., p. 109.

⁷⁷Ibid., pp. 110-111.

six to five. Gerry and Butler moved to refer the proposed section on the executive to the Committee of Detail. Wilson opposed it saying that "so important a branch of the System w[oul]d not be committed until a general principle sh[oul]d be fixed by a vote of the House."⁷⁸

On July 26 the final debate occurred prior to sending the report to the Committee of Detail. Again the discussion revolved around the executive. Mason began the debate by noting that

In every State of the Question relative to the Executive, the difficulty of the subject and the diversity of the opinions concerning it have appeared. Nor have any of the modes of constituting that department been satisfactory.

He then reiterated all of the proposals and the objections to them regarding the selection of the executive. He concluded that election by the legislature was liable to fewest objections. He moved that the executive be appointed for seven years and be ineligible for a second time. This passed by a vote of seven to three.⁷⁹

The final resolution as amended which was sent to the Committee on Detail proposed that executive power be constituted as follows:

that a National Executive be instituted--to consist of a single person--to be chosen by the Natl. legislature--for a term of seven years--to be ineligible a 2d. time--with power to carry into execution that nat[iona]l. laws--to be removeable on impeachment & Conviction of mal-practice or neglect of duty--to receive a fixt compensation for the devotion of his time to the public service, to be paid out of the Nat[iona]l Treasury.

⁷⁸Ibid., p. 115.

⁷⁹Ibid., p. 120.

In this form the resolution passed by a vote of six to three, with one divided and one absent.⁸⁰

Next Mason moved to have the Committee on Detail include property requirements for office holding on the national level, and to exclude individuals "having unsettled accounts" with the government from holding office. During the debate Morris reiterated an experience about General Washington which illustrated his opposition to that practice. When Washington presented his account for "secret service," which he noted was so

moderate that every one was astonished at it; and so simple that no doubt could arise on it. Yet had the Auditor been disposed to delay the settlement, how easily might he have affected it, and how cruel w[oul]d it be in such a case to keep a distinguished & meritorious Citizen under a temporary disability & disfranchisement.

The Convention finally adopted the proposal to require property and citizenship, though declined to limit the property qualification to "landed" property because of the difficulty of "forming any uniform standard that would suit the different circumstances & opinions prevailing in the different States."⁸¹

On the issue of unsettled accounts with the government as a bar to holding office, the Convention was divided. Wilson opposed giving that much power to the "Auditors, who might combine with rivals in delaying settlements in order to prolong the disqualifications of particular men." He cautioned the Convention that they were "providing

⁸⁰Ibid., pp. 120-121.

⁸¹Ibid., pp. 121-124.

a Constitution for future generations, and not merely for the peculiar circumstances of the moment." The Convention finally resolved the issue by voting down the resolution.⁸²

The Convention appointed five members to a Committee of Detail. They were John Rutledge, James Wilson, Oliver Ellsworth, Edmund Randolph, and Nathaniel Gorham. Each had expressed a variety of opinions on the formulation of the executive. However, all except Randolph agreed that the executive branch ought to be a separate, independent, and energetic institution. Randolph had opposed a unitary executive arguing that a three-man executive could be as responsible, effective, and energetic as one. On the other hand, all were concerned about keeping the executive from becoming too powerful.⁸³

Notes from the Committee of Detail indicate two general concerns which guided the Committee's efforts to draft a constitution. The first was to "insert essential principles only, lest the operations of government should be clogged by rendering those provisions permanent and unalterable, which ought to be accommodated to times and events." Secondly, to

use simple and precise language, and general propositions, according to the examples of the (several) constitutions of the several states. (For the construction of a constitution of necessarrily (sic) differs from that of law.)⁸⁴

These two points are essential to understanding the final wording of the language in creating the presidency. They also go far in

⁸²Ibid., p. 125.

⁸³Ibid., p. 129.

⁸⁴Ibid., p. 137.

establishing a useful guideline in interpreting the language of that section.

The first draft the Committee examined was written by Edmund Randolph. The executive he outlined was termed "Governor of the united People & States of America." He would be elected by joint ballot and each house would have a negative on the other. His term was "(six) seven" years and he would be ineligible thereafter. He would be empowered to execute laws, "(command and superintend the militia,) (To be Commander in Chief of the Land & Naval Forces of the Union & of the Militia of the several states)." He was also to supervise their discipline and "to direct the executives of the states to call them or any part for the support of the national government."⁸⁵ He also had the power to "appoint to offices not otherwise provided for" and was required to "Propose to the Legisl[at]ur[e] from Time to Time by Speech or Mess[age] such Mea[sure]s as concern this Union." He was removable on impeachment, "made by the house of representatives and (on) conviction (of malpractice or neglect of duty); before the supreme judiciary (of Treason Bribery or Corruption)." He was to receive a fixed compensation

for the devotion of his time to public service the quantum of which shall be settled by the national legislature to be paid out of the national treasury (no increase or decrease during the Term of Service of the Executive).

He would have a negative on all legislative acts "so as to require repassing by 2/3," and "shall swear fidelity to the union, (as the legislature shall direc[t]) (by taking an oath of office)." Finally,

⁸⁵Ibid., pp. 145-146.

he would be empowered to receive ambassadors, commission officers, convene the legislature, and have the power to pardon, except in cases of impeachment. The President of the Senate would succeed to the "Executive in Case of (death) Vacancy until the Meeting of the Legislature."⁸⁶ Thus, the Randolph draft included the traditional executive duties, i.e., to command and superintend the militia, convene the legislature, receive ambassadors, and commission officers. The amended version gave the executive control over both the state and national military forces, which increased his and the national government's power considerably. Moreover, he had the power to recommend legislation, as found in the commissions of the colonial governor, and in the Constitution of the state of New York.

The second draft produced by the Committee of Detail was written by James Wilson and enumerated the executive powers still further. He called the executive a President, "in which the Executive Authority of the U.S. shall be vested." He then enumerated the specific powers and duties. The phrasing was significant because it was the first time the executive was entitled President in any formal proposal, though it was not a new term to the Convention or state constitutions. Moreover, the way it was phrased helps to understand the thinking of the Committee with respect to their intentions. It appears that the Committee was following the eighteenth-century American constitutional tradition of identifying the source of executive power and then listing his powers and duties. There was no indication that the phrase

⁸⁶Ibid., p. 146.

identifying the source of executive power was intended to be a grant of power in and of itself. This is a significant point to note when comparing each of the successive drafts written by the Committee to understand what was intended in the final draft approved by the Convention.⁸⁷

The second draft further enumerated the executive's powers. It required him to

inform the Legislature of the Condition of [the] U.S. so far as may respect his Department--to recommend Matters to their Consideration--to correspond with the Executives of the several States--to attend to the Execution of the Laws of the U.S.--to transact Affairs with the Officers of Government, civil and military--to expedite all such Measures as may be resolved on by the Legislature--to inspect the Departments of foreign Affairs--War--Treasury--Admiralty--to reside where the Legislature shall sit--to commission all Officers, and keep the Great Seal of the U.S.--He shall, by Virtue of his Office, be Commander in chief of the Land Forces of U.S. and Admiral of their Navy--He shall have Power to convene the Legislature on extraordinary Occasions--to prorogue them, provided such Prorogation shall not exceed ____ Days in the space of any ____--He may suspend Officers, Civil and military.⁸⁸

Many of the specific duties included in this draft were taken from the constitutions of New York and Massachusetts. As in the earlier draft, it included nothing that was not well within the American concept of limited executive authority as outlined in the state constitutions.

The Committee examined Wilson's draft carefully and made several minor changes mostly in the phraseology, but retained the substance established in the first two drafts. The phrase identifying the

⁸⁷Ibid., p. 158.

⁸⁸Ibid.

source of executive power was altered to read "The Executive Power of the United States shall be vested in a single Person. His Stile shall be, 'The President of the United States of America'; and his Title shall be, 'His Excellency.'" Again, it is clear that the Committee intended no grant of power in the title, but merely to identify the source of executive power.⁸⁹

Thus, the Committee of Detail's recommendation to the Convention outlined an executive authority clearly within the guidelines of American executive experience. It was limited in scope by the enumeration of specific duties and responsibilities, all of which appeared in one or more of the state constitutions, but primarily those of New York and Massachusetts. His major duties were execution of the laws and the military duties of commander-in-chief, both of which were the primary requirements of most of the state constitutions. He was elected by the legislature and ineligible for a second term. He was given the power to pardon, except in cases of impeachment, and had control over the national military and state militias. He had a fixed salary unalterable during his term, and was required to take an oath to "faithfully execute the Office of President." He was impeachable by the House of Representatives and subject to "Conviction in the Supreme (National) Court, of Treason (or) Bribery or Corruption."⁹⁰

Discussion of the Committee of Detail's proposed draft revealed that there were still significant areas of strong disagreement

⁸⁹Ibid., p. 172.

⁹⁰Ibid., p. 172.

among the delegates on various fundamental aspects of the executive power. Questions concerning the selection, re-eligibility, term, and removal of the executive caused the most discussion about the structure of the office. The executive's appointing power caused the most difficulty among the various powers assigned him. Underlying both of these areas of concern was the relationship between the executive and the legislature.

Some delegates, like Morris, contended that the proposed arrangement made the executive too dependent on the legislature. He moved that the Convention reverse itself and make the selection of the executive by electors, rather than by the legislature. He feared that the executive might court "popularity in the Legislature by sacrificing his Executive rights; & then he can go into that Body, after the expiration of his Executive Office, and enjoy the fruits of his policy."⁹¹ However, the delegates held fast and defeated his motion by a vote of six to five, indicating that they were still far from totally satisfied with election by the legislature. Debates regarding the rest of the Committee of Detail's proposed draft of the structure of the executive power followed much the same course as they had since the beginning of the Convention, with each side reiterating their arguments.

The Convention, however, did alter the executive's military powers slightly. His command of the state militia was limited to only when they had been called into actual service of the United States. The other area was whether the executive would be allowed to "make war."

⁹¹Ibid., p. 404.

Most opposed vesting this in the legislature because, as Pinckney noted, "Its proceedings were too slow." Madison and Gerry moved to replace the word "make" with "declare" in order "to allow the Executive the power to repel sudden attacks." Sherman said this limited his power too much since the executive should "be able to repel and not to commence war." Gerry responded that he "never expected to hear in a republic a motion to empower the Executive alone to declare war." Ellsworth noted that "there is a material difference between the cases of making war, and making peace." It should "be more easy to get out of war, than into it," he said. "War also is a simple and overt declaration," he observed, but peace is "attended with intricate & secret negotiations(sic)." Madison ended the debate contending that he was against "giving the power of war to the Executive, because [he could] not (safely) . . . be trusted with it; or to the Senate, because [it was] not so constructed as to be entitled to it." He was, he said, "for clogging rather than facilitating war; but for facilitating peace." The amendment was passed by a vote of eight to two. Ellsworth switched his vote to aye when King explained "that 'make' war might be understood to [mean] 'conduct' it which was an Executive function."⁹²

The executive's appointing power remained a controversial point among the delegates. They did not wish to entrust this authority solely to either the executive or the legislature. Morris was opposed to giving it to the Senate contending that "the body was too numerous for the purpose; as subject to cabal; and as devoid of responsibility."

⁹²Ibid., pp. 118-122.

Lodging his power solely in the hands of the executive, he argued, might lead to the corruption of government as had happened in England. Sherman admitted that the executive would have to appoint a number of the executive officers, but the major offices of government and the military ought not to be solely in his hands. Moreover, the wording of the Committee of Detail's proposal raised fears that the executive might be able to appoint individuals to offices that had not been created, thus giving him the power to create offices. This was remedied by changing the phrase "officers" to "officer" and adding the words "in all cases not otherwise provided for by this Constitution, except in cases herein otherwise provided for, and to all offices which may here after be created by law." Some were still not satisfied with the appointing power and the matter was referred to the Committee of Eleven for final analysis.⁹³

The last change made at this stage was to delete the requirement that the executive correspond with the state governors. Morris said this implied "that he could not correspond with others." The Convention agreed and voted nine to one to remove the clause.⁹⁴

Issues that the Convention still had not fully resolved were given to a Committee of Eleven for further study. On September 4 the Committee reported its deliberation to the Convention. It reversed the method of selecting the executive from the legislature to a system of electors, chosen in a manner prescribed by the state legislatures.

⁹³Ibid., pp. 389, 405.

⁹⁴Ibid., p. 419.

They further required the executive be a natural-born citizen, or one who was a citizen at the time of the adoption of the Constitution, thirty-five years of age, and a resident for fourteen years. They divided the treaty-making power between the executive and Senate as well as the appointment of "Ambassadors and other public Ministers, Judges of the supreme (sic) Court, and all other officers of the U.S. whose appointments are not otherwise herein provided for." Thus, the executive would recommend treaties and nominees for the Senate's advice and consent. They also added that no treaties, and later amended it to read "except Treaties of peace," were to be made "without the consent of two thirds of the Members present." Finally, they gave the executive the power to "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."⁹⁵

The Committee also established a vice president whose duties would be to preside over the Senate. He was to be selected from the presidential candidates as the one having the second highest number of votes for president. If no person had a majority of electoral votes for president, the Senate would be empowered to select one to be president, and if two were tied for the second place, then the Senate would select the vice president."⁹⁶

Finally, the Committee clarified the impeachment process. They recommended that the President be

⁹⁵Ibid., p. 495.

⁹⁶Ibid., p. 494.

removed from his office on impeachment by the House of Representatives, and conviction by the Senate, for treason or bribery, and in case of his removal as aforesaid, death, absence, resignation or inability to discharge the powers and duties of his office the Vice President shall exercise those powers and duties of his office until another President be chosen, or until the inability of the President be removed.⁹⁷

In the discussion that followed the presentation of the report to the Convention, members of the Committee tried to justify the changes they had made. In response to a question on making the person with the second highest electoral vote, even though he may have less than a majority, Vice President without a vote by the Senate, Sherman noted that the object was to make the executive independent of the legislature. Since the choice was to be made from the five highest candidates, "obscure characters were sufficiently guarded against." If a candidate had no clear second place standing, he saw no reason why the Senate could not choose the Vice President. Madison was apprehensive that the electors would be more concerned with "making candidates instead of giving their votes in order to a definitive choice. Should his turn be given to the business," he said, "the election would in fact be consigned to the Senate altogether. It would," he concluded, "have the effect at the same . . . of giving the nomination of the candidates to the largest States."⁹⁸

Gouverneur Morris defended the Committee's recommendation and cited their reasoning. He argued that the "dagger of intrigue & faction" in appointment by the legislature required that the president be

⁹⁷ Ibid., pp. 499-500.

⁹⁸ Ibid., p. 499.

ineligible for a second term. Another problem was the difficulty of creating a court of impeachment which would be fair and consistent under a system of legislative appointment. Moreover, "No body (sic) had appeared to be satisfied with an appointment by the Legislature," and finally, "Many were anxious even for an immediate choice by the people." Therefore, making the President independent of the legislature required that he be elected outside of it. If the electors were required to vote at the same time throughout the United States, "and at so great a distance from each other, the great evil of cabal was avoided. It would be impossible to corrupt them."⁹⁹

Mason said the plan removed some of the major objections but that it would more often than not allow the Senate to select the President. That, he said, was "an improper body for the purpose."¹⁰⁰ Others expressed similar concerns.

Wilson probably best expressed the Convention's sentiment when he said that this "subject has greatly divided the House, and will also divide the people out of doors. It is in truth," he confessed, "the most difficult of all on which we had to decide." While he was not totally satisfied with it, he concluded that it was a "valuable" improvement over the other plan. He said that it

gets rid of one great evil, that of cabal & corruption; & Continental Characters will multiply as we more & more coalesce, so as to enable the electors in every part of the Union to know & judge of them.

⁹⁹Ibid., p. 500.

¹⁰⁰Ibid., pp. 500-501.

Moreover, "It clears the way also for a discussion of the question of re-eligibility on its own merits. . . ." He thought it might be improved if the eventual decision, if the election went to the legislature, was handled by the House rather than the Senate. Also, this method would minimize the problems of cabal

as it would be restrained to certain designated objects of choice, and as these must have had the previous sanction of a number of the States: and if the election be made as it ought as soon as the votes of the electors are opened & it is known that no one has a majority of the whole, there can be little danger of corruption.

Moreover, the House would be constantly changing its membership and would therefore be "free from the influence & faction to which the permanence of the Senate may subject that branch."¹⁰¹ The Convention, however, postponed a final decision until the delegates had time to study the proposal.

The next day a motion by Rutledge to re-adopt the original method of selecting the executive was defeated in an eight-to-two vote. Afterwards a discussion ensued on the mathematical combinations the Committee's recommendation might pose. On the question of substituting the House for the Senate as the body selecting the President, the vote went seven against, three for, and one divided. Several other votes to strike a balance between the large and small states' influence in selecting the executive failed. The Convention adjourned for the day without resolving the issue.¹⁰²

¹⁰¹Ibid., pp. 501-502.

¹⁰²Ibid., pp. 511-515.

The debate continued on the following day with the Convention approving a motion to prohibit any member of the legislature or other office holder in the federal government from becoming electors. Then Wilson outlined his objections in a lengthy statement which essentially expressed his concern that the Senate had too much power already without adding selection of the executive to it.¹⁰³

The Convention then voted down attempts to make the executive's term seven and six years respectively. All but North Carolina supported the motion to make it four years. This was followed by several motions clarifying the selection and voting of presidential electors. Then the Convention returned to the difficult question of whether the ultimate choice of President would remain in the hands of the Senate. Sherman moved to substitute "The House of Representatives shall immediately choose by ballot one of them for President, the members from each State having one vote." This passed ten to one. Madison pointed out that it was possible for two states to elect the President if they were the only ones in session and could provide a quorum. This was remedied by adding that the "eventual election of [the] Presid[en]t in case of an equality of the votes of the electors be referred to the House of Rep[resentative]s." This passed eight to three.¹⁰⁴

September 7 was taken up with the question of the nature and function of the Vice President. In spite of those who criticized the concept of making the Vice President, President of the Senate as mixing

¹⁰³Ibid., p. 517.

¹⁰⁴Ibid., pp. 526-527.

the legislative and executive powers too much, the Convention voted to do so by an eight-to-two margin. The same objection was raised by Wilson when the Convention moved to grant the President the power to appoint ambassadors and other high officials with the advice and consent of the Senate. This, he said, would destroy the responsibility for appointments. Morris disagreed, saying that since the President "was to nominate, there would be responsibility, and as the Senate was to concur, there would be security."¹⁰⁵

The Convention then debated the procedure for ratifying treaties. The delegates agreed that there should be a two-thirds majority of those present except in treaties of peace, which, as Madison said, should "be made with less difficulty than other treaties." This carried by an eight-to-three majority. Madison, who feared that the President might retard a peace treaty because the state of war would augment his powers, recommended that the Senate be allowed to conclude peace treaties on their own. Morris thought the power "in this case harmless, and that no peace ought to be made without the concurrence of the President, who was the general Guardian of the National interests." The delegates thought otherwise and defeated the motion eight to three.¹⁰⁶

On the question of the President's power to command written reports from the executive departments, there were mixed feelings over whether the President ought to have a council. Mason said "that in

¹⁰⁵Ibid., pp. 535-539.

¹⁰⁶Ibid., pp. 540-541.

rejecting a Council . . . we were about to try an experiment on which the most despotic Governments had never ventured--even The Grand Signor himself had his Divan." He recommended a six-member council made up of two members from each region. Franklin seconded the motion noting that

We seemed . . . too much to fear cabals in appointments by a number, and to have too much confidence in those of single persons. Experiences, shewed (sic) that caprice, and intrigues of favorites & mistresses, &c were nevertheless the means most prevalent in monarchies.

He cited the number of bad governors appointed by England for the colonies, and concluded that "a Council would not only be a check on a bad President but be a relief to a good one." The idea of a council was defeated by an eight-to-three vote.¹⁰⁷

On September 8 the Convention discussed the impeachment process and defeated a motion to make the Supreme Court the court of impeachment. Also they granted the President the power to convene the legislature "on extraordinary occasions." Then they appointed the "Committee on Style" to "arrange the articles which had been agreed to by the House." Its members were Johnson, Hamilton, Morris, Madison, and King.¹⁰⁸

The Committee on Style presented its report to the Convention on September 12. The letter which accompanied the report outlined the ideas which guided the Committee's deliberations about the arrangement of powers. It noted in part that the

¹⁰⁷Ibid., pp. 541-542.

¹⁰⁸Ibid., pp. 550-553.

Friends of our Country have long seen and desired that the Power of making war Peace and Treaties, that of levying Money & regulating Commerce and the corresponding executive and judicial Authorities should be fully and effectually vested in the general Government of the Union.

However, it continued, "the Impropriety of delegating such extensive Trust to one Body of Men is evident. Hence results the Necessity of different Organizations." It went on to argue that the states must give up some rights for the common good of all. Therefore, the report noted,

In all our Deliberations on this Subject we kept steadily in our view that which appears to us the greatest Interest of every true American The Consolidation of our Union in which is involved our Prosperity Felicity Safety perhaps our national Existence.¹⁰⁹

The Convention first voted to change the number of each branch of the legislature needed to override the executive's veto from three-quarters to two-thirds. Williamson and Sherman both thought the former gave too much power to the President. Morris and Hamilton disagreed, pointing to the experience in New York. Morris said that the "excess rather than the deficiency of laws was to be dreaded," and "the example of N. York shows that 2/3 is not sufficient to answer the purpose." In rebuttal Gerry argued that the "primary object of the revisionary check in the President is not to protect the general interest, but to defend his own department." Madison raised the point that when the three-quarters decision was made, "the President was to be elected by the Legislature and for seven years--He is now to be elected by the people and for four years." He went on to say that the purpose of the

¹⁰⁹Ibid., pp. 583-584.

revisionary check was two-fold. It was designed to "defend the Executive Rights," and "prevent popular or factious injustice." He then went on to discuss the state experience in which "It was an important principle in this & in the State Constitutions to check the legislative injustice and encroachments." Moreover, the "Experience of the States had demonstrated that their checks are insufficient." Therefore, "We must compare the danger from the weakness of 2/3 with the danger from the strength of 3/4." He concluded that "on the whole the former was the greater," and "As to the difficulty of repeals, it was probable that in doubtful cases the policy would soon take the place of limiting the duration of laws so as to require renewal instead of repeal." In the final voting, Washington was listed as voting against the change, which was one of the few times his vote was recorded.¹¹⁰

The Committee on Style reorganized the Convention's thinking about the executive into a format which identified the source of the executive authority, method of selection, requirements for office, method of removal, and his powers and duties. The only change of significance was in the opening paragraph identifying the executive authority. The Committee reduced the original statement that "The Executive power of the United States shall be vested in a single person. His style shall be, 'The President of the United States of America'; and his title shall be, 'His Excellency,'" to the simple declarative sentence that "The executive power shall be vested in a president of the United States of America." Again there was nothing in the Committee's

¹¹⁰Ibid., pp. 585-587.

report or subsequent debate to indicate that the phrase itself was intended to be a grant of power, but rather, only to be a means of identifying the source of executive power.¹¹¹

On September 14 Madison expressed his displeasure on the question of presidential impeachment. He argued that the "President is made too dependent already on the Legislature, by the power of one branch to try him in consequence of an impeachment by the other." On the issue of whether the President should be suspended while under impeachment, he noted that

This intermediate suspension, will put him in the power of one branch only--They can at any moment, in order to make way for the functions of another who will be more favorable to their views, vote a temporary removal of the existing magistrate.

The Convention agreed and voted down any attempt to make suspension mandatory.¹¹²

The next day the Convention voted down an attempt by Randolph to limit the President's power to pardon in cases of treason. Also Pinckney became the first to mount an attack on the proposed final draft for the executive power, citing "the contemptible weakness & dependence of the Executive." Gerry, on the other hand, still opposed making the Vice President head of the Senate as being too dangerous.¹¹³

The most extensive criticism of the proposed Constitution's grant of executive power came from Mason. His major concern was that

¹¹¹Ibid., pp. 573-577.

¹¹²Ibid., p. 612.

¹¹³Ibid., pp. 626-636.

the President had no "Constitutional Council, a thing unknown in any safe and regular government." Without a council, he said, the President will

be unsupported by proper information and advice, and will generally be directed by minions and favorites; or he will become a tool to the Senate--or a Council of State will grow out of the principal (sic) officers of the great departments; the worst and most dangerous of all ingredients for such a Council in a free country; (for they may be induced to join in any dangerous or oppressive measures, to shelter themselves, and prevent an inquiry into their own misconduct in office.

All of this would be avoided had the Convention created a council as recommended earlier. The Vice President could have served as President of such a council. However, he noted,

from this fatal defect has arisen the improper power of the Senate in the appointment of public officers, and the alarming dependence and connection between that branch of the legislature and the supreme Executive.

Moreover, it made the Vice President, "for want of other employment," President of the Senate which again dangerously mixed the executive and legislative powers, "besides always giving to some one of the States an unnecessary and unjust preeminence over the others."¹¹⁴

Mason also objected to the pardon and treaty-making powers as they were established in the Constitution. By giving the President power to pardon treason, he might sometimes exercise that power "to screen from punishment those whom he had secretly instigated to commit the crime, and thereby prevent a discovery of his own guilt." Additionally,

¹¹⁴Ibid., pp. 638-639.

By declaring all treaties supreme laws of the land, the Executive and the Senate have, in many cases, an exclusive power of legislation; which might have been avoided by proper distinctions with respect to treaties, and requiring the assent of the House of Representatives, where it could be done with safety.

In light of these and other criticisms, Mason thought the Convention had created a government by a "moderate aristocracy." At present, he said, it is "impossible to foresee whether it will, in its operation, produce a monarchy, or a corrupt, tyrannical (oppressive) aristocracy." He concluded by contending that "it will most probably vibrate some years between the two, and then terminate in the one or the other."¹¹⁵

On September 17 the Convention convened for the last time. Franklin presented his thoughts on the Convention's accomplishments, noting that

because I think a general Government necessary for us, and there is no form of Government but what may be a blessing to the people if well administered, and [I] believe farther (sic) that this is likely to be well administered for a course of years, and can end in Despotism, as other forms have done before it, when the people shall become so corrupted as to need despotic Government, being incapable of any other.¹¹⁶

One interesting event did take place on this last day. Washington spoke from the chair in support of a motion by Gorham to alter the House of Representatives' representation from forty thousand to thirty thousand. He said that

although his situation had hitherto restrained him from offering his sentiments on questions depending (sic) in the House, and it might be thought, ought now to impose silence

¹¹⁵Ibid., pp. 639-640.

¹¹⁶Ibid., p. 642.

on him, yet he could not forbear expressing his wish that the alteration proposed might take place.

He noted that "the smallness of the proportion of Representatives had been considered by many members of the Convention, an insufficient security for the rights & interests of the people," and he concurred with that opinion. He expressed his wish that the document be amended even at that late date. The Convention approved the motion unanimously.¹¹⁷ Once the final appeals for support were made, all the members signed the document, except for Randolph, Mason, and Gerry.

In the final analysis, what conclusions can be drawn about the Constitutional Convention's effort to create a national executive? Their primary goal in structuring the government was to "unite a proper energy in the Executive, and a proper stability in the Legislative departments."¹¹⁸ Most delegates agreed that the nation needed energy in the executive department for a proper administration of government and as a check against legislative usurpations of the people's liberty. Yet, an energetic executive without the proper safeguards was just as dangerous to society as an unchecked legislature. The problem was how to constrict an executive with the necessary energy and adequate safeguards.

The major disputes among the delegates in the construction of the executive occurred over five basic questions: whether it ought to consist of a singular or plural executive; the method of appointment;

¹¹⁷ Ibid., p. 644.

¹¹⁸ Madison, Writings (Hunt, ed.), V, 19.

the period of duration in office; re-eligibility; and the degree of power it ought to possess. The delegates debated extensively over the first four and then decided to settle the nature and extent of the executive's power and return to structuring the office. On the question of how much power to give the executive, the Convention disagreed about the amount of authority the executive should exert over appointments and control of the legislature. To give the executive absolute power of appointment would lead to corruption of the legislature. To give that power to the legislature would be inefficient. Therefore, it was divided between the executive, who had the power to nominate, and the Senate, the most stable part of the legislature, which had the power to confirm.

Likewise, the executive's negative over legislative acts raised the question of how much control he ought to have over the legislative branch. The veto was necessary to protect the executive from legislative encroachments as well as protect the public from ill-conceived legislation. Again, a compromise was reached giving the executive a qualified veto by allowing two-thirds of each house to override it.

The treaty-making power also proved to be a major point of contention. The delegates did not want to lodge it solely in the executive for fear it might be abused. The legislative body was too inefficient to handle foreign affairs with the secrecy and dispatch needed. Again, they compromised and lodged what could best be done by the President in the executive branch and secured the final approval of treaties in the most stable element of the legislature--the Senate.

Toward the end of the Convention, the delegates rejected the idea of the legislature electing the executive in favor of the electoral college system. By this method the selection of the executive would be based on the people, which would make him independent of the legislature. Moreover, the electoral college would eliminate the need for a national standard of suffrage, which allowed the Convention to by-pass the slavery issue with respect to the executive branch. Finally, the system would insure, they thought, the selection of the best possible persons for the office of President, since the selection would be made by those best qualified from each state. If, however, they were unable to select a candidate, their favored choices would be placed before the House of Representatives, where each state had a vote, thereby eliminating the inequities between the large and small states.

Once the method of selection had been settled, the question of re-eligibility was re-opened. Here the delegates thought the people would be the best judge on whether to re-elect the executive since they now chose him originally. Re-eligibility was thought dangerous under the system of legislative election because the delegates feared the executive might corrupt the legislature into re-election for life. Moreover, an election based on the people with re-eligibility provided an incentive for the executive to earn another term by his proper conduct.

In the end, most of the delegates were satisfied that they had achieved a sufficiently energetic executive within the confines of republican principles. Was there a model the delegates used to fashion the presidency? The debates make it clear that those who supported the

final version of the office looked to the state constitutional experience for examples of what did and did not work. The New York and Massachusetts constitutions appeared to have exerted the most influence on the basic nature of the office the Convention tried to create; that is, they were the best models of unitary, independent and energetic executives. However, they were by no means the exclusive source of precedent. Virtually all the executive articles in the state constitutions were cited to show what ought to be included or avoided.

More importantly, the constitutional experiences of the states were the most significant factor considered by delegates in framing the presidency. Those who later came to oppose the Constitution most often cited the maxims of the great theoreticians like Montesquieu and Locke, and then sought to write constitutional provisions to ensure that they were carried out. The other delegates more often than not looked to the state experiences and inductively drew their conclusions based on American historical precedent. When needed, some delegates cited examples from European or ancient history to bolster the principles which they derived first from the American experience. Then, and only then, did they cite the political maxims of the Montesquieu and other thinkers as added support.

One historical example was continually cited by friend and foe of the Constitution alike, as a model to be avoided at all costs. That was the British monarchy. Throughout the debates, constant reference was made to proposed ideas as being too much like the monarchy in various respects. This was a tactic especially used by those who opposed the final formulation of the executive. The monarchy was

definitely not the model on which the presidency was based, though, as delegates like Wilson pointed out, it did contain elements which were considered to be essential to all executive offices irrespective of the form of the overall government.

What was George Washington's influence on the final form of the presidency? Clearly his role as commander-in-chief during the Revolution had made him a de facto national executive and clearly the most respected symbol of American ideals in that era. His unchallenged selection as the chairman of the Constitutional Convention showed the esteem in which the delegates held him. While it is difficult to determine whether many delegates viewed Washington as the probable first executive of the nation during the Convention, it is not the most important consideration. The delegates were, for the most part, practical politicians who looked beyond the occupant of an office to whether the office possessed the requisite constitutional elements necessary to give it energy and protect the people from abuse of its powers. Thus, while Washington might have been considered the ideal first choice for the office, the delegates were more concerned with what would happen later. Washington's reputation and any precedents he might set were not sufficient to prevent a future occupant from abusing his powers. The prime concern was, therefore, the proper structure of the office, irrespective of who might be the first to occupy it.

Did the Convention provide a guide as to how future generations might interpret the constitutional phrases in Article II? Probably the best answer to this, as noted earlier, were the guidelines used by the Committee of Detail to draft the wording of the various

clauses. They recommended that only essential principles be used to prevent the government from becoming clogged by permanent and unalterable details which would become dated if conditions changed. Secondly, they recommended that simple and precise language phrased in general propositions be used as had been done by the drafters of the state constitutions. The reason for this approach consisted of the fact that constitutions were the embodiment of principles, while laws were written for specific purposes and were meant to be altered to meet changing conditions. Constitutions were designed to be difficult to amend since they embodied general principles which were not expected to change.

Using these ideas as a guide to interpretation, what can be concluded about the most disputed phrase of Article II? The words "The executive power shall be vested in a President of the United States" are considered to be a general grant of executive power by some scholars and politicians. The weight of the evidence is against this interpretation. The phrase appeared to be only used to identify the source of the executive power, in a manner similar to the phrasing of the state constitutions. Thus, the executive's formal authority consisted only in the delegated powers and duties assigned to the President by the Constitution and any additional statute authority Congress saw fit to bestow on him.

In conclusion, the Constitutional Convention intended the President to possess sufficient authority to vigorously carry out his duties and to defend himself and the people against legislative encroachments within the context of a balanced constitution. The elements which made up the institution were drawn from the state constitutions and

arranged in a manner consistent with the successful aspects of the state experience. In short, the presidency was derived from American experience and designed to operate within the American tradition of a limited responsible executive.

CHAPTER X

THE RATIFICATION DEBATE:

Interpreting the Presidency

Once the Constitution was presented to the people for their approval, the major issue became whether or not the Constitutional Convention had succeeded in remedying the defects of the Confederation for the protection of liberty in a manner consistent with republican principles. This chapter examines the ratification debate as it relates to the acceptance of the executive sections of the Constitution. It also examines George Washington's attitudes about the nature and operation of the new government as he realized the likelihood of his becoming its first president with the final adoption of the Constitution.

Opponents of the Constitution, or the anti-Federalists, continued and developed the line of argument enunciated by Mason, Randolph and Gerry, who were strongly opposed to many features of the Constitution as they evolved during the Convention. These men and other anti-Federalists held certain assumptions about government and its operation which help explain why they opposed the Constitution. At the base of the anti-Federalist view of government was their concept of human nature. Like the Federalists they mistrusted people's use of power, fearing that if left to their own devices, they would exert every effort to augment and increase their power in a manner inconsistent with the

common good. Patrick Henry, for example, dreaded "the depravity of human nature," and argued that it must be subject to every possible check. One must "trust nothing to accident or chance," he said. "Since the depraved nature of man is well known," he continued, ". . . [man] has a natural bias towards his own interest, which will prevail over every consideration, unless it be checked."¹ Others referred continually to "the natural lust of power so inherent in man,"² or to the "predominant thirst of dominion which has invariably and uniformly prompted rulers to abuse their power,"³ or to the "ambitions of man, and his lust for domination."⁴ In short, as Samuel Adams concluded, "Few men are contented with less power than they have a right to exercise."⁵

The difference between the anti-Federalists and the Federalists' view of human nature rested in the degree of their mistrust of it. The anti-Federalists saw no hope for a system of government which did not spell out in careful detail all the limitations and checks to be placed on those who held the powers of government. Therefore, as discussed later, they advocated that nothing be left to chance and

¹Johnathan Elliot, ed., The Debates of the Conventions in the Several States on the Adoption of the Federal Constitution (Philadelphia, 1830), III, 326-327.

²Ibid., p. 326.

³Ibid., p. 436.

⁴Paul Leicester Ford, ed., Essays on the Constitution of the United States (Brooklyn, N. Y., 1892), p. 378.

⁵Sam Adams to Richard Henry Lee, April 22, 1789, Writings, Cushington, ed. (New York, 1904), IV, 327.

demanded that all the possible contingencies of rulers abusing their power be provided for in the Constitution. The Federalists, on the other hand, were generally satisfied with the checks placed on the rulers which gave them sufficient latitude to carry out their functions, yet remain within the republican boundaries established by the Constitution. If they should overstep these boundaries, the checks within the system would be sufficient to prevent them from destroying the system entirely. These ideas are developed further in a later discussion.

A second fundamental assumption of the anti-Federalists was their belief that no system of republican government could be devised which would operate on such a large geographic area as the United States. James Winthrop argued that

The idea of an uncompounded republick, on an average one thousand miles in length, and eight hundred in breadth, and containing six millions of white inhabitants all reduced to the same standard of morals, of habits, and of laws, is in itself an absurdity, and contrary to the whole experience of mankind. The attempt by Great Britain to introduce such a system, struck us with horror. . . .

Winthrop concluded that such a diverse nation must of necessity have a diversity of governments. Since "one code of laws" was difficult, if not impossible, to write "to suit Georgia and Massachusetts," and since the diverse but complementary interests of the thirteen states was the principle bond among them, the states "must, therefore, legislate for themselves."⁶

⁶James Winthrop, "Agrippa," Essays, Ford, ed., pp. 64-65.

Instead of a federated or confederated government, the anti-Federalists argued that the Constitution created a consolidated government. The power given to Congress to raise taxes, and in association with the President, the power to raise and maintain a standing army, was an unconscionable threat to liberty, they argued. This, in addition to the "elastic" clause in Article I, Section 8, which gave Congress the power

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof,

caused great alarm among the anti-Federalists. However, the section of the Constitution related to the executive, which caused the most consternation among the anti-Federalists was the one which gave the power to negotiate and ratify treaties to the President and Senate respectively. This section, as discussed later, received the harshest criticism of the anti-Federalists. Given the anti-Federalists' view of the Constitution as creating a consolidated government it is easier to understand their fear that it would threaten the liberty of Americans.

Another major difference between the anti-Federalists and Federalists was their method of analyzing the Constitution. As evidenced in the debates during the Constitutional Convention and ratification period, two thought processes were apparent. The anti-Federalists were in the rationalist tradition, which argued from principles to particulars. They took as gospel truth the political maxims of Harrington, Locke, and Montesquieu. Therefore, the function of those writing a new constitution ought to be the creation of a perfect system of

government. Though it was difficult, it was possible, they argued.

In short, as one historian concluded,

since reason would show that any imperfect form (whether democratic, aristocratic, or monarchistic) would inevitably degenerate into tyranny, it was better to make do without a national government than to create an imperfect one.⁷

However, if a Constitution were to be written, care had to be taken not to leave much to chance. Therefore, they argued, limit discretion by those who held power to a minimum by eliminating vagueness from the language of the Constitution. One critic noted "a certain darkness, duplicity and studied ambiguity of expression running through the whole Constitution,"⁸ while another complained that there did not exist "a social compact on the face of the earth so vague and so indefinite as the one now on the table."⁹

Furthermore, the anti-Federalists were more concerned with what might be than what actually was. When a principle of action was proposed, they were concerned most with what dangerous precedents it might create. This strain of thought was evident throughout the entire colonial-Revolutionary period of American history. For the most part, Americans thought carefully and prudently about the logical implications of policies and principles under consideration. During the ratification debate, the anti-Federalists were most vocal in pointing to the future dangers they perceived the Constitution might create, especially when

⁷Cecelia A. Kenyon, ed., The Antifederalists (Indianapolis, Indiana, 1966), p. 209.

⁸Cited by Ibid., p. lxxv.

⁹Elliot, ed., Debates, III, 583.

they realized, as John Williams of New York was quick to note, that they were debating the establishment "of a constitution which is not only to operate upon us, but upon millions yet unborn."¹⁰

The Federalists, on the other hand, looked to experience as the best guide to future action. John Dickinson probably best summarized this when he said "Experience must be our only guide."¹¹ As such, the Federalists sought to illustrate that the provisions of the Constitution the anti-Federalists criticized were well within the principles established by the constitutional experience of the states. This point is discussed in detail later in the Federalists' response to criticism of the presidency. In short, as historian Forrest McDonald concluded, the "Federalists viewed themselves as friends of the nation; anti-Federalists depicted themselves as friends of the people."¹² It is within that context that the ratification debate can best be understood; that is, the anti-Federalists' greatest concern was that the Constitution as presented to the people was a threat to their liberties unless it was amended in some fundamental ways. The Federalists contended that only when a secure and energetic national government was established could the liberties of the people be protected.

Turning to the ratification debate over the executive section of the Constitution, what were the major points of contention? The general consensus reached at the Convention, as discussed in the last

¹⁰Ibid., II, 339.

¹¹Cited by Forrest McDonald, "The Anti-Federalists, 1781-1789," Wisconsin Magazine of History, XLVI (1963), 209.

¹²Ibid., p. 211.

chapter, provided for an executive headed by a single individual, institutionally independent of the other two major branches of government and operating within its own sphere of authority. Moreover, to secure responsibility within the executive branch, its powers were shared, like the other two branches, so that there was a mixing of powers in an effort to balance and check the ability of any branch to impose or usurp the authority of the other two. Thus, while there was only one executive, the President, he shared his powers with the other two branches while at the same time he played a role in the legislative and judicial processes. The object was for three independent institutions, sharing overlapping powers, to operate in a system which would be mutually balanced in an effort to check the excesses of any one branch while providing the requisite energy to establish a vigorous but republican government. The debate, therefore, revolved around the question of whether the presidency was itself a republican institution and whether its arrangement of powers was consistent with republican principles in such a manner which would prevent it from endangering the people's liberty.

The general criticism of the presidency by the anti-Federalists was that it was basically a monarchy in republican trappings. Elbridge Gerry argued that the whole Constitution was a "Republican form of government, founded on the principles of monarchy."¹³ The author of the "Philadelphiensis" argued that "Our thirteen free commonwealths are to be consolidated into one despotic monarchy," with the President being

¹³Elbridge Gerry, "Observations," Pamphlets, Ford, ed., p. 7.

"a military king."¹⁴ William Findley contended that the "most important branches of the executive department are to be put into the hands of a single magistrate, who will in fact be an elective king."¹⁵ Patrick Henry accused the Convention of creating a "mighty President, with very extensive power--the powers of a king."¹⁶ However, one of the most scathing criticisms of the executive noted that the "President-general . . . who is to be our king . . . is vested with powers exceeding those of the most despotic monarch we know of in modern times."¹⁷

Beneath the general criticism of the presidency, the anti-Federalists enunciated their theory of leadership. Unlike the Federalists, the anti-Federalists never developed or articulated a theory of republican leadership in any consistent manner. Rather, they were more concerned with the possible evils they envisioned under the proposed Constitution. They combined their mistrust of human nature with their general fear of government and added the fears that the new government would be staffed by unknown persons. John DeWitt, writing in the American Herald, said that

In considering the present Government before us, we therefore certainly ought to look upon those who are to put it into motion, as our enemies--to be careful what we give--to see what use it is to be put to--and where to resort for a remedy,

¹⁴Reprinted in Kenyon, The Antifederalists, p. 71.

¹⁵William Findley, "Letter of an Officer of the Late Continental Army," November 3, 1787, reprinted in Anti-Federalists Versus Federalists, edited by John D. Lewis (Scranton, Pa., 1961), 135.

¹⁶Elliot, ed., Debates, III, 56.

¹⁷Workman, "Philadelphiensis," in The Antifederalists, Kenyon, ed., p. 77.

if it is abused.--Every door unguardedly left open, they will take care we never shall thereafter shut--every link in the chain unriveted, they will provide shall always remain so.¹⁸

George Clinton as "Cato" developed the idea further. He noted that

Before the existence of express political compacts it was reasonably implied that the magistrate should govern with wisdom and justice; but mere implication was too feeble to restrain the unbridled ambition of a bad man, or afford security against negligence, cruelty or any other defect of mind.

He disputed the idea that Americans, by their character, "are capable to resist and prevent an extension of prerogative or oppression" because opinions and

manners are mutable, and may not always be a permanent obstruction against the encroachment of government; that the progress of a commercial society begets luxury, the parent of inequality, the foe to virtue, and the enemy to restraint; and that ambition and voluptuousness, aided by flattery, will teach magistrates where limits are not explicitly fixed to have separate and distinct interests from the people.

Therefore, he concluded, "a general presumption that rulers will govern well is not a sufficient security." Society was under "a sacred obligation to provide for the safety of . . . [its] posterity."¹⁹

Clinton then questioned whether Americans could "precipitate" themselves "into a sea of uncertainty, and adopt a system so vague, and which has discarded so many of . . . [their] valuable rights?" Was it because they did not believe "an American can be a tyrant?" If that were the case, he concluded, it was a weak argument because

¹⁸Cited by Kenyon, Ibid., p. lxii.

¹⁹Clinton, "Cato," Essays, Ford, ed., p. 266.

Americans are like other men in similar situations, when the manners and opinions of the community are changed . . . and your political compact inexplicit, your posterity will find that great power connected with ambition, luxury and flattery, will as readily produce a Caesar, Caligula, Nero and Domitian in America, as the same causes did in the Roman Empire.²⁰

Uppermost in the minds of the anti-Federalists was the fear of potential tyranny, irrespective of the method of election or the checks placed on the office holder. As one Massachusetts delegate cautioned, "We ought to be jealous of rulers, All the godly men we read of have failed; nay, he would not trust a 'flock of Moseses (sic).'"²¹

The anti-Federalists' fear of executive tyranny was expressed in numerous ways. Their major concern was that the President might combine with the Senate to upset the balance of power. George Mason noted that it had been "observed that the Constitution has married the President and Senate--has made them man and wife." Moreover, he said, "They will be continually supporting and aiding each other; they will always consider their interest as united."²² This was especially crucial in the area of treaty-making. George Clinton, for example, argued that

Complete acts of legislation, which are to become the supreme law of the land, ought to be the united act of all the branches of government; but there is one of the most important duties, which may be managed by the Senate and executive alone,

²⁰Ibid., p. 267.

²¹Elliot, ed., Debates, II, 28.

²²Ibid., III, 493.

and to have all the force of law paramount without the aid or interference of the House of Representatives; that is the power of making treaties.

He went on to illustrate how this power may be abused "so as to affect your person and property, and even the domain of the nation." "By treaties," he wrote,

you may defalcate part of the empire; engagements may be made to raise an army, and you may be transported to Europe, to fight the wards of ambitious princes; money may be contracted for, and you must pay it; and a thousand other obligations may be entered into; all which will become the supreme law of the land, and you are bound to it.

Moreover,

If treaties are erroneously or wickedly made who is there to punish,--the executive can always cover himself with the plea that he was advised by the senate, and the senate being a collective body are not easily made accountable for mal-administration.

He concluded that all of this is similar to the monarch of England, whereby he was placed in a position where he can do no wrong. However, in the proposed American Constitution, he noted, "infallibility pervades every part of the system, and neither the executive nor his council, who are a collective body, and his advisors, can be brought to punishment for mal-administration."²³

An allied fear of the anti-Federalists was that the treaty-making power would be used to alter or amend the Constitution, thereby endangering liberty. Randolph decried the lack of any limitations on the treaty-making power, asking whether the President and Senate, "Being creatures of that Constitution, can they destroy it?" "Can any

²³"Cato," Essays, Ford, ed., p. 274.

particular body, instituted for a particular purpose," he asked, "destroy the existence of the society for whose benefit it is created?"²⁴ Mason followed by pointing out that "Though the English king can make treaties, yet he cannot make a treaty contrary to the constitution of his country." That, he said, was based "on a number of maxims, which, by long time, are rendered sacred and inviolable." However, he asked, "Where are there such maxims in the American Constitution?"²⁵ Patrick Henry noted the possibilities of treaties being made which violated citizens' rights by citing that

When you yourselves have your necks so low that the President may dispose of your rights as he pleases, the law of nations cannot be applied to relieve you. Sure I am, if treaties are made infringing our liberties, it will be too late to say that our constitutional rights are violated.²⁶

The anti-Federalists cited numerous fears that the treaty-making powers would be abused. Many southern anti-Federalists, for example, feared that a northern president might not call southern Senators to a session to ratify a treaty which adversely affected their interests, or as William Grayson suggested, "If the senators of the Southern States be gone but one hour, a treaty may be made by the rest."²⁷ Another fear was that the treaty power might be used to "make

²⁴Elliot, ed., Debates, III, 504.

²⁵Ibid., p. 508.

²⁶Ibid., p. 503.

²⁷Elliot, ed., Debates, III, 499, 502.

a treaty engaging with foreign powers to adopt the Roman Catholic religion in the United States."²⁸

Probably the greatest fear of the anti-Federalists was that treaty-making power would be used to destroy state laws and constitutions. Richard Lee noted that the

president and two-thirds of the senate will be empowered to make treaties indefinitely, and when these treaties shall be made, they will also abolish all laws and state constitutions incompatible with them.

Moreover, this power in the President and Senate

is absolute, and the judges will be bound to allow full force to whatever rule, article or thing the president and senate shall establish by treaty, whether it be practicable to set any bounds to those who make treaties, I am not able to say; if not, it proves that this power ought to be more safely lodged.²⁹

The Senate was the institution most feared by the anti-Federalists because it was viewed as an aristocracy which controlled not only half the legislative process but the President as well. Lee noted that

when we examine the powers of the president, and the forms of the executive, we shall perceive that the general government, in this part, will have a strong tendency to aristocracy, or the government of the few.

"The executive," he pointed out,

is, in fact, the president and senate in all transactions of any importance; the president is connected with, or tied to the senate; he may always act with the senate, but never can effectually counteract its views: The president can appoint

²⁸Ibid., IV, 191-192.

²⁹R. H. Lee, "Letters of a Federal Farmer, Letter IV," printed in Pamphlets on the Constitution, edited by Paul L. Ford (Brooklyn, 1892), p. 312.

no officer, civil or military, who shall not be agreeable to the senate; and the presumption is, that the will of so important a body will not be very easily controuled, and that it will exercise its powers with great address.³⁰

Throughout the discussion on the relationship between the President and Senate, most anti-Federalists thought the President lacked sufficient strength to be independent of any undue influence by the Senate. Patrick Henry compared the President's power in making treaties "as distinguished from the Senate, is nothing."³¹ The "Centinel" of Pennsylvania argued that the President did not possess enough power to resist pressures from the Senate and would finally join with them as "the head of the aristocratic junto."³² William Grayson argued that the President's lack of weight would force him into an alliance with the "seven Eastern States," whereby "He will accommodate himself to their interest in forming treaties, and they will continue him perpetually in office."³³

George Clinton of New York was one of the few anti-Federalists who did not believe the President possessed less power than the Senate. He argued that the executive had extensive powers, which when combined with his long tenure of office and powers of appointment, "if the President is possessed of ambition," gave him "power and time sufficient to ruin his country." Moreover, since he had no council to give "proper

³⁰Ibid., Letter III, 298.

³¹Elliot, ed., Debates, III, 353.

³²Cited by Kenyon, Antifederalists, p. lxxx.

³³Elliot, ed., Debates, III, 492.

information and advice," he "will generally be directed by minions and favorites, or a council of state will grow out of the principal officers of the great departments, [which is] the most dangerous council in a free country."³⁴

The anti-Federalists also cited the union of the executive and Senate as being a "dangerous mixture of the powers of government" which violated the celebrated maxims of Montesquieu. The minority report in the Pennsylvania Convention, e.g., quoted lengthy passages from his work on the danger and tyranny of such a union and concluded that under the Constitution the "president general is dangerously connected with the senate" since

his coincidence with the views of the ruling junto in that body, is made essential to his weight and importance in the government, which will destroy all independency and purity in the executive department.³⁵

Mason predicted the union between the Senate and executive whereby "They will be continually supporting and aiding each other: they will always consider their interest as united. . . . The executive and legislative powers, thus connected, will destroy all balances."³⁶

Elbridge Gerry claimed that

The Executive and the Legislative branches are so dangerously blended as to give just cause of alarm, and everything relative thereto, is couched in such ambiguous terms--in such

³⁴Printed in Essays, Ford, ed., pp. 261-262.

³⁵"The Address and Reasons of Dissent of the Minority of the Convention of the States of the State of Pennsylvania to their Constituents," reprinted in Kenyon, Antifederalists, pp. 52-53.

³⁶Elliot, ed., Debates, III, 493-494.

vague and indefinite expression, as in a sufficient ground without any objection, for the reprobation of a system, that the authors dare not hazard to a clear investigation.³⁷

Overall, however, re-ordering the balance between the executive and Senate was one of the few structural changes the anti-Federalists wished to see made in the Constitution.

One of the basic safeguards written into most of the state constitutions was the compulsory rotation in office. This concept was an article of faith among the anti-Federalists and they sought to have it part of the Constitution as one check against the dangers arising from any union between the executive and the Senate. As George Mason asserted, "Nothing is so essential to the preservation of a republican government as a periodical rotation [in office]."³⁸ William Findley noted that "Rotation, that noble prerogative of liberty, is entirely excluded from the new system of government, and the great men may and probably will be continued in office during their lives."³⁹ Another writer, probably Gerry, lamented that

There is no provision for a rotation, nor anything to prevent the perpetuity of office in the same hands for life; which by a little well-timed bribery, will probably be done, to the exclusion of men of the best abilities from their share in the offices of government.⁴⁰

George Mason was content with the presidential and senatorial terms, but without rotation the government would become "an elective

³⁷Elbridge Gerry, "Observations," Pamphlets, Ford, ed., p. 9.

³⁸Elliot, ed., Debates, III, 485.

³⁹Reprinted in Anti-Federalists, Lewis, ed., p. 135.

⁴⁰Ibid., p. 184.

monarchy" since the President would be able to perpetuate himself in office indefinitely, as Mason assumed that the election would always be thrown into the House of Representatives. Then with the use of corruption, intrigue, foreign influence and, above all, patronage, the President could make himself executive for life. Moreover, he continued, if the Americans wish to change presidents, "the great powers in Europe will not allow us" as they do not allow kings to be displaced so easily in Europe. This will lead "the powers of Europe to interpose, and we shall have a civil war in the bowels of our country, and be subject to all the horrors and calamities of an elective monarchy." On the other hand, he contended,

Nothing so strongly impels a man to regard the interest of his constituents as the certainty of returning to the general mass of the people, from whence he was taken, where he must participate [in] their burdens.⁴¹

Even Thomas Jefferson was fearful of what elimination of the rotation concept might bring. In a letter to Madison, he wrote: "The second feature I dislike, and greatly dislike, is the abandonment in every instance of the necessity of rotation in office, and most particularly in the case of the President." "Experience concurs with reason," he concluded,

that the first magistrate will always be re-elected if the Constitution permits it. He is then an officer for life. This once observed, it becomes of so much consequence to certain nations to have a friend or a foe at the head of our affairs that they will interfere with money & with arms.

Moreover,

⁴¹ Elliot, ed., Debates, III, 484-485.

if elections are to be attended with these disorders, the seldomer (sic) they are renewed the better. But experience shows that the only way to prevent disorder is to render them uninteresting by frequent changes. An incapacity to be elected a second time would have been the only effectual preventative.⁴²

The failure to include rotation in the Constitution led Edmund Randolph to propose it be amended to make "the president ineligible after a given number of years," though he did not specify how many.⁴³

Allied with the rotation issue was the method of electing the President and the length of his term. The anti-Federalists argued that frequent elections were necessary, in addition to rotation of office, to check the corrupt designs of rulers. As William Findley noted: "Annual elections are abolished, and the people are not to re-assume their rights until the expiration of two, four and six years."⁴⁴ Historian Cecelia M. Kenyon observed that the anti-Federalists were willing, by and large, to concede the difficulty of staging annual elections given the vast distances the representatives would be forced to travel.⁴⁵ However, there were some who staunchly advocated that the President "be chosen annually" and "serve but one year" and "be chosen successively from the different states, changing every year."⁴⁶

⁴²Jefferson, Writings, Ford, ed., IV, 473.

⁴³Ford, ed., Pamphlets, p. 275.

⁴⁴Findley, "Letter," Anti-Federalists, Lewis, ed., pp. 120-121.

⁴⁵Kenyon, ed., The Antifederalists, p. lvi.

⁴⁶"Agrippa," Essays, Ford, ed., p. 119.

One of the most vocal of the anti-Federalists on the length of the President's term was William Grayson. After discussing the method of electing the President and its inherent evils, he asked, "Whence comes this extreme confidence, that we disregard the example of ancient and modern nations?" He contended that "aristocracies never invested their officers with such immense powers," nor had Rome where "consuls were in power only two years." He concluded that

This quadrennial power cannot be justified by ancient history, [and] There is hardly an instance where a republic trusted its executive so long with much power; nor is it warranted by modern republic, [because the] . . . delegation of power is, in most of them, only for one year.

Moreover, he contended, when there was a "strong democratical and a strong aristocratical branch, you may have a strong executive." However, if the first two branches are weak, "the balance will not be preserved, if you give the executive extensive powers for so long a time." Therefore, "As this government is organized, it would be dangerous to trust the President with such powers" for that length of time.⁴⁷

On the whole, the actual election process was greeted with mixed sentiment by the anti-Federalists. On the one hand, Richard Henry Lee concluded that the election of the Vice President and President "seems to be properly secured."⁴⁸ However, Clinton attacked the indirect method of election, though he did not propose direct election. He first pointed out that the section of Article II relating to the election of the President was vague on the question of an election "in

⁴⁷Elliot, ed., Debates, II, 491.

⁴⁸Lee, "Letters," Pamphlets, Ford, ed., p. 298.

case of expiration of their offices, subsequent to the election which is to set this political machine in motion." In the state constitution of New York, he noted, it provided that "once in every four years, and as often as these offices shall become vacant, by expiration or otherwise, as is therein expressed, an election shall be held as follows, &c." He concluded that "this inexplicitness perhaps may lead to an establishment for life."⁴⁹

Clinton then turned to the method of electing the executive officers. He observed that

it is a maxim in republics that the representative of the people should be of their immediate choice; but by the manner in which the president is chosen, he arrives to this office at the fourth or fifth hand, nor does the highest vote, in the way he is elected, determine the choice, for it is only necessary that he should be taken from the highest of five, who may have a plurality of votes.⁵⁰

Elbridge Gerry complained that the electoral college system might be perverted to where the election of the President would be taken away from the people. He wrote that

If the sovereignty of America is designed to be elective, the circumscribing the votes to only ten electors in this State, and the same proportion in all the others, is nearly tantamount to the exclusion of the voice of the people in the choice of their first magistrate.

Moreover, "It is vesting the choice solely in an aristocratic junto, who may easily combine in each State to place at the head of the Union the most convenient instrument for despotic sway."⁵¹

⁴⁹"Cato," Essays, Ford, ed., p. 261.

⁵⁰Ibid., p. 363.

⁵¹Ibid., p. 12.

William Grayson continued the argument by noting that the election principle changes when one individual does not get a majority of electoral votes. The device of the House of Representatives electing the President when that happened was, he said, "founded more on accident than any principle" he had heard of before. In either case, he was convinced that foreign powers would interfere with the process. Additionally, with the President's power of appointment and with his possible collusion with the Senate, he "will be continued in office for life."⁵²

Overall, however, the indirect method of election did not prove to be a major concern of the anti-Federalists as no one called for the direct election of either the President or Senate. Rather it was the lack of a guaranteed rotation or limit to re-eligibility that concerned most writers who criticized the system. Even the term of four years seemed satisfactory to most anti-Federalists as only a few called for annual elections.

On the other hand, the President's powers came under varied attack by the anti-Federalists. As noted, the most feared powers were those he shared with the Senate. Allied with this was his control of the military, especially with congressional power to raise funds for a standing army. As the Albany Manifesto observed,

The power to raise, support, and maintain a standing army in time of peace [is] The bane of a republican government; by a standing army most of the once free nations of the globe have been reduced to bondage; and by this Britain attempted to inforce (sic) her arbitrary measures.

⁵²Elliot, ed., Debates, III, 490-491.

Moreover, it continued, the President was empowered to "call forth the militia to any part of the continent, without any limitation of time or place."⁵³

Patrick Henry argued that a standing army could be used to "execute the execrable (sic) commands of tyranny." He contended that

If your American chief be a man of ambition and abilities, how easy is it for him to render himself absolute! The army is in his hands, and if he be a man of address, it will be attached to him, and it will be the subject of long meditation with him to seize the first auspicious moment to accomplish his design.

If America had a king, it could "prescribe the rules by which he shall rule his people, and interpose such checks as shall prevent him from infringing them." However, a President, "in the field, at the head of his army, can prescribe the terms on which he shall reign as master, so far that it will puzzle any American ever to get his neck from under the galling yoke." Even if the nation tries to punish him he can use the army to "beat down every opposition." Then the record indicated that Mr. Henry "strongly and pathetically expatiated on the probability of the President's enslaving America, and the horrid consequences that must result."⁵⁴

George Clinton characterized the President as the "generalissimo of the nation, and, of course, he has the command and control of the army, navy and militia." How does one protect liberty from the abuse of this power? he asked. In this case, as with the other aspects

⁵³"The Albany Manifesto," reprinted in The Antifederalists, Kenyon, ed., pp. 361-362.

⁵⁴Elliot, ed., Debates, III, 59-60.

of the executive, he concluded, that there were not sufficient checks on a President's possible abuse of power.⁵⁵

The President's veto power also came in for criticism. Most anti-Federalists were not opposed to a veto, but rather questioned the necessary number of each branch of the legislature needed to override it. One delegate to the North Carolina Convention argued a hypothetical case in which a bill passed the House of Representatives unanimously and the Senate by a large majority, whereupon it was vetoed by the President. If it could not get the necessary two-thirds support in the Senate, the House would never have a chance to consider it again. That, he said, "is giving a power to the President to overrule fifteen members of the Senate and every member of the House of Representatives."⁵⁶

Likewise, Richard Henry Lee thought the President's role in legislation was liable to corruption. He wrote that the "power of making any law will be in the president, eight senators, and seventeen representatives, relative to the important objects enumerated in the constitution." Therefore,

Where there is a small representation, a sufficient number to carry any measure, may, with ease, be influenced by bribes, offices and civilities; they easily form private juntoes, and out-door meetings, agree on measures, and carry them by silent votes.⁵⁷

The President's power to pardon was another area the anti-Federalists thought would be greatly abused. What they feared most

⁵⁵"Cato," Essays, Ford, ed., p. 264.

⁵⁶Elliot, ed., Debates, IV, 214.

⁵⁷Lee, "Letters," Pamphlets, Ford, ed., p. 300.

was the President's ability to pardon for treason. Mason, for example, contended that the

President . . . has the unrestrained power of granting pardons for treason; which may be sometimes exercised to screen from punishment those whom he had secretly instigated to commit the crime, and thereby prevent a discovery of his own guilt.⁵⁸

Given the anti-Federalists' overwhelming belief that the executive powers under the proposed Constitution would be used to undermine the security of society, it only followed that they believed that the mechanism designed to keep the executive responsible was hardly adequate to do the job. They saw the impeachment power nullified by the President's connection with the Senate. Samuel Spencer, for example, noted that the Senate,

who are to advise the President, and who, in effect, are possessed of the chief executive powers, let their conduct be what it will, are not amenable to the public justice of their country: if they may be impeached, there is no tribunal invested with jurisdiction to try them.

Likewise, when the President is tried, the Chief Justice presides, but, he said, "I take this to be very little more than a farce." "What can the Senate try him for?" he asked. "For doing that which they have advised him to do, and which, without their advice, he would not have done," he concluded. Therefore, he doubted

that the President can ever be tried by the Senate with any effect, or to any purpose for any misdemeanor in his office, unless it should extend to high treason, or unless they should wish to fix the odium of any measure on him, in order to exculpate themselves.⁵⁹

⁵⁸James Iredell, "Answers," Ibid., p. 350.

⁵⁹Elliot, ed., Debates, IV, 117.

Richard Henry Lee was also doubtful that impeachment would work. Since the process needed two-thirds of the Senators to agree for a conviction, he concluded that

Under these circumstances the right of impeachment, in the house, can be of but little importance; the house cannot expect often to convict the offender; and, therefore, probably, will but seldom or never exercise the right.

Moreover, he added, given the structure of the proposed government, it was "extremely difficult to secure the people against the fatal effects of corruption and influence."⁶⁰ Impeachment was, therefore, hardly adequate to protect the people's liberties.

One way to make the President more responsible was to establish an executive council. On that point most anti-Federalists could agree. George Clinton observed that though the President was assisted

during the sitting of the legislature . . . he is yet without a constitutional council in their recess; he will therefore be unsupported by proper information and advice, and will generally be directed by minions and favorites, or a council of state will grow out of the principal officers of the great departments,

which, he said, was the "most dangerous council in a free country."⁶¹

George Mason was even more emphatic about his fear of an executive without a council. He contended that such a situation was "unknown in any safe and regular government." If a council had been created with the same rotation in office as the Senate, with one representative from each state, then, he claimed, the President "would always have had safe and proper information and advice." Moreover,

⁶⁰Lee, "Letters," Pamphlets, Ford, ed., p. 300.

⁶¹"Cato," Essays, Ford, ed., p. 262.

From this fatal defect of a constitutional council, has arisen the improper power of the Senate, in the appointment of the public officers, and alarming dependence and connexion (sic) between that branch of the legislature and the supreme executive.

It also gave rise to the Vice President,

who, for want of other employment, is made President of the Senate; thereby dangerously blending the executive and legislative powers; besides always giving to some one of the states an unnecessary and unjust pre-eminence over the others.⁶²

The anti-Federalists did not propose to make the council representative of the people, nor were they clear on the method of its selection, which the Federalists were quick to seize on in criticizing the proposal. Its major function was to check the executive and not apparently to make him more responsive to the popular national will.⁶³

In assessing the criticism of the anti-Federalists, what conclusions can be drawn about their conception of the presidency under the Constitution? Most argued that it possessed tremendous power without adequate responsibility. If it was not a monarchy to begin with, it would soon become one once the Constitution went into effect, they concluded. Moreover, structural deficiencies created an improper separation of powers between the President and Senate, which would result in an unholy "marriage" between the two for their mutual aggrandizement to the detriment of liberty. The President could, by use of the military, while protecting himself from impeachment by bribing the Senate,

⁶²George Mason, "Objections," Pamphlets, Ford, ed., p. 330.

⁶³For a full discussion of this, see Kenyon, ed., The Anti-federalists, p. cii.

create a monarchy or dictatorship, and there was no way the people could prevent it. Therefore, they proposed to introduce compulsory rotation in office and add a council to perform the advice and consent functions of the Senate as a way of checking the executive. As historian Cecelia Kenyon concluded, the fear of the executive came not from the fact that it was unrepresentative of the people, "but from doubts about the accountability of the occupant." The anti-Federalists did not view the executive as the "symbol and focus of national sentiment," nor did many of the delegates at the Constitutional Convention. Rather, the anti-Federalists' overriding concern "was to prevent an abuse of power," not to make the President "a great and responsive instrument of the national will." Underlying that was the anti-Federalist belief that it was impossible to create "a single republican government operation over the entire nation."⁶⁴ This also helps explain why they painted the possible presidential abuses of power in such vivid terms.

The author of "Philadelphiensis" captured the spirit and essence of the anti-Federalist attitude toward the presidency in his final essay. He said,

the president is a King to all intents and purposes, and at the same time one of the most dangerous kind too--an elective King, the commander in chief of a standing army, etc, and to these add, that he has a negative over the proceedings of both branches of the legislature: and to complete his uncontrouled sway, he is neither restrained nor assisted by a privy council, which is a novelty in government. I challenge

⁶⁴Ibid.

the politicians of the whole continent to find in any period of history a monarch more absolute.⁶⁵

Not content just to state his objections, the author flamboyantly exhorted his readers to remedy the situation by demanding a second constitutional convention. "Who," he asked,

is so base as not to burn with resentment against the conspirators, who have dared to establish such a tyrant over his life, his liberty and property? Is the flame of liberty so entirely extinguished in the American breast as not to be kindled again? No; you mistaken despots, do not let such a preposterous thought madden you into perseverance, lest your persons fall sacrifice to the resentment of an injured country.

He then called for a second convention to frame a government "fitted to the pure principles of the Revolution" while possessing "ample energy and respectability among the nations of the earth."⁶⁶

Turning to the Federalists, what answers did they offer the critics of the Constitution and what conception of the presidency did they hold? By and large, the Federalists operated from a different set of basic assumptions than the anti-Federalists. As mentioned earlier, the Federalists believed that politics could be discussed rationally and if they applied the principles derived from historical experience, they could construct a government which would protect liberty yet possess the requisite energy necessary to accomplish the ends of government. Like the anti-Federalists, they mistrusted people in power, though to a degree much less than most anti-Federalists.

⁶⁵"Philadelphiensis," reprinted in The Antifederalists, Kenyon, ed., p. 87.

⁶⁶Ibid.

Given adequate checks, significant power could be concentrated or lodged in the hands of those who held office, they argued. In fact, the failure to grant sufficient power to the government in general was just as unwise as granting it too much. George Washington neatly summarized the Federalist sentiment on this point when he wrote,

No man is a warmer advocate for proper restraints and wholesome checks in every department than I am; but I have never yet been able to discover the propriety of placing it absolutely out of the power of men to render essential services, because a possibility remains of their doing ill.⁶⁷

The Federalists contended that the basic task of the Constitutional Convention was to create a government grounded on the citizens directly and not the states. Once this had been decided, the Convention was faced with four tasks, Madison explained. The first was to "unite a proper energy in the Executive, and a proper stability in the Legislative departments, with the essential characters (sic) of Republican Government." Secondly, it had to

draw a line of demarkation which would give to the General Government every power requisite for general purposes, and leave to the States every power which might be most beneficially administered by them.

Thirdly, it had to "provide for the different interests of different parts of the Union." And finally, it had "to adjust the clashing pretensions of the large and small States."⁶⁸

Madison characterized the construction of the executive as being "peculiarly embarrassing" as he reiterated the steps of its

⁶⁷Washington, Writings, Fitzpatrick, ed., XXIX, 312.

⁶⁸Madison, Writings, Hunt, ed., V, 19-20.

formation in a letter to Thomas Jefferson.⁶⁹ However, once the final construction was agreed on, the Federalists were satisfied with its basic outline. It now was their task to explain to the citizens how the office was consistent with republican principles and the established traditions of American executive theory.

The most important writings to appear during the ratification debate were the Federalist Papers, written by Hamilton, Madison, and Jay. Presented as an answer to the critics of the Constitution, these essays expounded the theory and assumptions upon which that document was based. Before examining the Federalist thinking about the executive, it is necessary to identify several major assumptions which serve as a guide to understanding the Federalists' interpretation of the executive clauses in the Constitution.

As noted before, the Federalists held a much different opinion on the basic nature of man than did the anti-Federalists. The latter viewed people in power as not to be trusted and sought ways to check and retard their ability to do evil in as explicit a manner as could be achieved in a written constitution. The Federalists, on the other hand, recognized the potential for evil behavior, but also saw "other qualities in human nature which justify a certain portion of esteem and confidence."⁷⁰ Hamilton, for example, wrote that the "supposition of universal venality in human nature is little less an

⁶⁹Ibid., p. 20.

⁷⁰The Federalist Papers (New York, 1961), Federalists 55, 346.

error . . . than the supposition of universal rectitude." He sought to view "human nature as it is, without flattering its virtues or exaggerating its vices."⁷¹

Since humans have the potential of doing both good and evil, it was necessary to construct a government which offered incentives for the good and check and retard the ability to do evil. Hamilton concluded that "the desire of reward is one of the strongest incentives of human conduct" and if "the best security for the fidelity of mankind is to make their interest coincide with their duty," then "the love of fame, the ruling passion of the noblest minds . . . would prompt a man to plan and undertake extensive and arduous enterprises for the public benefit."⁷² Thus, the well-constructed government provides both the incentives and the checks in the interest of public security.

A second theme running throughout the Federalist Papers is the use of history. As noted before, the anti-Federalists cited the principles of Montesquieu, Locke, and others and then sought to establish the constitutional elements to secure them. The Federalists looked to history and inductively drew their conclusions on what had worked or not worked and then tried to fashion the constitutional language to carry out the desired objective. The constitutional experience of the states was by far the most cited source of experience by the writers of the Federalists. As discussed later, Hamilton, time and

⁷¹Federalist 76, 495-496.

⁷²Federalist 72, 437.

again, showed how practically all the provisions of the executive power under the Constitution were derived from the state experience.

Madison set the stage for Hamilton's analysis of the executive by combining the above two assumptions in his discussion of the separation of powers concept. He noted that the state constitutions "carry the strong marks of the haste, and still stronger [mark] of the inexperience, under which they were framed." In some instances, he said, they violated the principle by "too great a mixture, and even an actual consolidation of the different powers" in some states. While it would be unwise to totally separate the three branches, it also would be unwise to improperly blend them. However, the Constitution, he said, properly blended and balanced them in such a manner as to prevent one branch from usurping the others. No one, he claimed, will deny that "power is of an encroaching nature and that it ought to be effectually restrained from passing the limits assigned to it." That was not to be accomplished by mere "parchment barriers" as "relied on by the compliers of most of the American constitutions." Moreover, "experience assures us that . . . some more adequate defense is indispensably necessary for the more feeble against the most powerful members of the government." This was especially true of the decade prior to the Constitutional Convention where "the legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."⁷³

⁷³Federalist 47, 307.

Madison then summed up the constitutional history of America during the Revolutionary period. "A respect for the truth," he said, "obliges us to remark" that the Revolutionary constitution makers

seem never for a moment to have turned their eyes from the danger, to liberty, from the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority.

They have overlooked "the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations." On the other hand, he said, in a

representative republic where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative is exercised by an assembly, which is inspired by a supposed influence over the people with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.⁷⁴

Madison then went on to document the abuses of the legislative power in the states. However, the legislatures were not the only branch to exceed their proper boundaries. He cited the breaches by the executive branch in Pennsylvania, but cautioned that the criticism must be tempered by three facts. First, "a great proportion of the instances were either immediately produced by the necessities of the war, or recommended by Congress or the commander-in-chief;" and secondly,

⁷⁴Federalist 48, 308-309.

in most of the other instances, they conformed either to the declared or the known sentiments of the legislative department; third, the executive department of Pennsylvania is distinguished from that of the other States by the number of members composing it. In this respect, it has as much affinity to a legislative assembly as to an executive council. And being at once exempt from the restraint of an individual responsibility for the acts of the body, and deriving confidence from mutual example and joint influence, unauthorized measures would, of course, be more freely hazarded, than were the executive department administered by a single hand, or by a few hands.

The principle he drew from all of this was

that a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.

Not only had Madison identified that dilemma, but he had summarized the essential problem of the state constitutions; that is, the imbalance of power between the branches.⁷⁵

In the fifty-first Federalist, Madison outlined the principle remedy to prevent one branch from encroaching on another. He said that

the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.

Then in a key statement, he said: "The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack." This meant that the "interests of the man must be connected with the constitutional rights of the place." This simply reflected human nature, he said, for

⁷⁵Ibid., 312-313.

what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.

When a society frames a government "which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." For that, he concluded, "a dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."⁷⁶

When constructing the frame of government, Madison contended it was impossible to give each branch "equal power of self-defense," since in republican governments "the legislative authority necessarily predominates." Therefore, the legislature must be divided "into different branches" and made as little connected with each other as their separate modes of elections and functions will allow. Since the weight of the legislature requires that it be divided for security, the weakness of the executive must "be fortified," he said.⁷⁷ Thus, Madison argued that a strong executive was an integral and necessary part of any well-balanced constitution which sought to maximize the protection of liberty.

It fell to Hamilton to undertake the major defense of the presidency in the Federalist Papers. In number sixty-seven, he attacked the anti-Federalist characterization of the presidency as a

⁷⁶Federalist 51, 321-322.

⁷⁷Ibid., p. 322.

monarchy. He accused them of "Calculating upon the aversion of the people to monarchy." They tried "to enlist all their jealousies and apprehensions in opposition to the intended President of the United States; not merely as the embryo, but as the full-grown progeny of that detested parent." He then compared the presidency to the office of governor in New York saying that, "the authorities of a magistrate, in few instances greater, in some instances less, than those of a governor of New York, have been magnified into more than royal prerogatives." These remarks were aimed specifically at New York Governor George Clinton, the anti-Federalist who was writing under the name of Cato, and who was especially critical of the executive power in the Constitution. Hamilton cited how Cato and others had, in his opinion, deliberately misrepresented the authority to fill Senate vacancies between elections, in an effort to show how the President could control the Senate. Hamilton quoted the relevant clauses to show that the executive power referred to in the Constitution regarding this power was the state executives, not the President. He then said that Clinton's essays were examples of the "unwarrantable arts which are practiced to prevent a fair and impartial judgment of the real merits of the Constitution."⁷⁸

Hamilton next examined the election procedure to show how its democratic nature operated. He cited the fact that there had been little criticism of the electoral college concept by the opponents of the Constitution, and agreed that while it was not perfect, it was "at

⁷⁸Federalist 67, 407-411.

least excellent." "It was desirable," he noted, "that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided." Therefore, it was wise not to trust such a selection to any pre-existing body of men, but rather, "to men chosen by the people for the special purpose" of electing the President. This would reduce the risk of the executive being able to tamper with the voting procedure since all votes would be cast on one day over a wide geographic area. The other reason this was a desirable method was that it made the executive independent of the legislative branch which made him dependent on the people for his re-election. In short, "the electoral process affords a moral certainty that the office of President will never fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications." While "talents for low intrigue, and the little arts of popularity, may alone suffice to elevate a man to the first honors in a single State," it will take "other talents, and a different kind of merit to establish him in the esteem and confidence of the whole Union."⁷⁹

Hamilton used the next eight essays to develop the Federalist theory of leadership in a democratic society, a task ignored by the anti-Federalists. In this essay, he briefly compared the major powers of the President with those of the British monarch and the New York governor to show that the President was in no way comparable to the monarchy and clearly in line with the state constitutional experience.

⁷⁹Federalist 68, 412-414.

The first attribute of republican executives was unity, he said. However, this was scarcely a point "upon which any comparison can be grounded." The President's four-year term with unlimited re-eligibility was consistent with the state experience given the fact that he thought it was much easier to establish "a dangerous influence in a single State than for establishing a like influence throughout the United States." Therefore, he concluded, the duration of four years was "less to be dreaded in that office, than a duration of three years for a corresponding office" in the states. Moreover, the President was liable to be impeached, tried and upon conviction, removed from office and made subject to the "prosecution and punishment in the ordinary course of law." Unlike the British monarch, who was not amenable to any constitutional body for his actions and could not be punished "without involving the crisis of a national revolution," the President was subject to all the safeguards contained in the state constitutions. Moreover,

in this delicate and important circumstance of personal responsibility, the President of Confederated America would stand upon no better ground than a governor of New York, and upon worse ground than the governors of Maryland and Delaware.⁸⁰

The President's veto power was well within the republican principles established in the states. Even though the British monarchy had not used his absolute veto power over acts of Parliament, it

does affect the reality of its existence and is to be ascribed wholly to the crown's having found the means of

⁸⁰Federalist 69, 415-416.

substituting influence to authority . . . to the necessity of exerting a prerogative which could seldom be exerted without hazarding some degree of national agitation.

Therefore, the President's qualified negative cannot be compared with the monarch's, but "tallies exactly with the revisionary authority of the council of revision of . . . New York of which the governor is a constituent part." However, the President's power exceeds

that of the governor of New York, because the former would possess, singly, what the latter shares with the chancellor and judges; but it would be precisely the same with that of the governor of Massachusetts, whose constitution, as to this article, seems to have been the original from which the convention have copied.⁸¹

Militarily, the President had less power than the monarch or governor of New York, Hamilton contended. Even though he has command of the state militias when called into actual service of the United States, it is only "occasional command of such part of the militia of nation as by legislative provision may be called" in military service. Therefore, the President's authority was "inferior to that of either the monarch or the governor." Moreover, while the President was to be commander-in-chief of the army and navy, a power "nominally the same" as that of the monarch, this authority was actually less than the monarch's, since it means that the President is "first general and admiral of the Confederacy." The monarch's authority extended to both declaring war and raising fleets and armies, powers which are confined to the legislative branch in America. Furthermore,

⁸¹Ibid., p. 417.

the state constitutions declare their governors to be commander-in-chief, as well of the army as navy; and it may well be a question whether those of New Hampshire and Massachusetts, in particular, do not, in this instance, confer larger powers upon their respective governors than could be claimed by a President of the United States.⁸²

The power of impeachment vested in the President was also well within the limits set by the state constitutions. In fact, the governor of New York possessed the power to pardon all cases except treason and murder, but did have the power to pardon impeachments, a power denied the President. Hamilton asked, "is not the power of the governor, in this article, on a calculation of political consequences, greater than that of the President?" If the New York governor led a conspiracy, he had the power to "insure his accomplices and adherents an entire impunity" until it had "ripened into actual hostility." The President, on the other hand, "though he may even pardon treason, when prosecuted in the ordinary course of law, could shelter no offender, in any degree, from the effects of impeachment and conviction."⁸³

Finally, the President is limited to adjourning the legislature only in cases of disagreement between the two houses over the time of their adjournment. The British monarch not only can prorogue but even dissolve the Parliament. Hamilton then pointed to the power of the New York governor to "prorogue the legislature . . . for a limited time; a power which, in certain situations, may be employed to very important purposes."⁸⁴

⁸²Ibid., pp. 417-418.

⁸³Ibid., pp. 418-419.

⁸⁴Ibid., p. 420.

The other powers listed in Article II of the Constitution also were well within the state experience, except the authority to conclude treaties. While the British monarchy could conclude treaties on his own, the American President can only do so with the concurrence of two-thirds of the Senate. Hamilton admitted that "in this instance the power of the federal executive would exceed that of any State executive." This was explained as arising "naturally from the sovereign power which relates to treaties," and if the Confederacy were dissolved, Hamilton noted, "it would become a question whether the executives of the several States were not solely invested with that delicate and important prerogative."⁸⁵

On the question of the President's authority to receive ambassadors, Hamilton thought this "more a matter of dignity than of authority." He predicted that it would be

a circumstance which will be without consequence in the administration of government; and it was more convenient that it should be arranged in this manner than that there should be a necessity of convening the legislature, or one of its branches, upon the arrival of a foreign minister, though it were merely to take the place of a departed predecessor.⁸⁶

Likewise, the President's power to nominate, and with the advice and consent of the Senate, make appointments to major offices was also limited. When compared to the power and authority vested in the British monarch in this area, the President's grant was meager indeed. The monarch was "emphatically and truly styled the

⁸⁵Ibid.

⁸⁶Ibid.

fountain of honor," since he could not only appoint, but create offices, titles, and "church preferments." Even when compared to the governor of New York, the President possessed less authority. In that state the power of appointment was lodged in a council composed of the governor and four members of the Senate, chosen by the assembly. Hamilton noted that the New York governor claimed, and "has frequently exercised, the right of nomination," and was "entitled to a casting vote in the appointment." He concluded that if the governor "has the right of nominating, his authority is in this respect equal to that of the President, and exceeds it in the article of the casting vote."⁸⁷

Hamilton summarized his comparison of the President's powers with those of the British monarch and the governor of New York by concluding that, except for the treaty-making provisions possessed by the President, "it would be difficult to determine whether that magistrate would, in the aggregate, possess more or less power than the governor of New York." Moreover, "it appears yet more unequivocally that there is no pretense for the parallel which has been attempted him and the king of Great Britain." He then reiterated the dissimilarities between the monarch and President and asked, "What answer shall we give to those who would persuade us that things so unlike resemble each other?" He answered it by saying,

The same that ought to be given to those who tell us that a government, the whole power of which would be in the hands of the elective and periodical servants of the people, is an aristocracy, a monarchy, and a despotism.⁸⁸

⁸⁷Ibid., p. 421.

⁸⁸Ibid., pp. 422-423.

The second element in the Federalist concept of leadership in a representative government was the necessity of a vigorous executive. In essay number seventy, Hamilton answered the fears of those who thought "that a vigorous executive is inconsistent with the genius of republican government." His reply was that

Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.

In short, he concluded,

A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill-executed, whatever it may be in theory, must be, in practice, a bad government.⁸⁹

Next Hamilton discussed the ingredients which comprise an energetic executive. They were "unity, duration, an adequate provision for its support; and competent powers." To make the executive safe "in the republican sense," he must have "a due dependence on the people, and a due responsibility."⁹⁰ In those few words, Hamilton had summarized the results of the previous two centuries' experience Americans had had in evolving the essential elements necessary for a model of a republican executive.

It was a fact, Hamilton noted, that "those politicians and statesmen who have been the most celebrated for the soundness of their

⁸⁹Federalist 70, 423.

⁹⁰Ibid., p. 424.

principles and for the justness of their views have declared in favor of a single executive and a numerous legislature." Unity in the executive was essential for energy since

decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.

Unity could be destroyed, he said, by making two magistrates of equal power, as in Rome, or making a single magistrate, in whole or in part, subject "to the controul and cooperation of others, in the capacity of counselors to him." He observed that of all the states only New York and New Jersey were ones "which have intrusted the executive authority wholly to single men."⁹¹ He then illustrated the necessity of unity in the executive by citing historical examples where a plural executive led to problems.

Above all, the most significant objection to a plural executive rested in the inability to make it responsible, because of the tendency of groups "to conceal faults and destroy responsibility." Hamilton outlined two kinds of responsibility, "--to censure and to punish." The most important was the first, "especially in an elective office," since individuals in public trust "will much oftener act in such a manner as to render them unworthy of being any longer trusted, than in such a manner as to make them obnoxious to legal punishment." After citing a number of historical examples, he concluded that executive plurality "tends to deprive the people of the two greatest

⁹¹Ibid.

securities they can have for the faithful exercise of any delegated power." First, the "restraints of public opinion, which lose their efficacy, as well on account of the division of the censure attendant on bad measures among a number as on account of the uncertainty on whom it ought to fall"; and second, "the opportunity of discovering with facility and clearness, the misconduct of the persons they trust, in order either to their removal from office or to their actual punishment in cases which admit of it."⁹²

In answer to those anti-Federalists who wanted a council added to the executive branch to make it more responsible, Hamilton cited the historical reasons behind the need for a council. In the British model of government, the monarch was "a perpetual magistrate" and his person sacred, and therefore, he was not considered accountable for his administration, "for the sake of public peace." A council was therefore necessary which was responsible to the nation for the advice they gave to the king, as a means of guaranteeing some responsibility in the executive branch, even though the monarch was free to ignore their advice. The American state constitutional experience, from which much of the demand for a council is derived, was based on the maxim "of republican jealousy which considers power as safer in the hands of a number of men than of a single man." He then cited DeLoime's maxim that "'the executive power is more easily confined when it is ONE.'" Therefore, he concluded, "it is far more safe there should be a single object for the jealousy and watchfulness of the people; and, in a word,

⁹²Ibid., 427-429.

that all multiplication of the executive is rather dangerous than friendly to liberty." In closing his essay, Hamilton noted that

prior to the appearance of the Constitution I rarely met with an intelligent man from any of the States, who did not admit, as the result of experience, that UNITY of the executive of this State [New York] was of the best of the distinguishing feature of our Constitution.⁹³

In his next essay, Federalist number seventy-one, Hamilton examined the problem of duration in office as the second essential ingredient to energy in the executive office. The question of duration consists of two objects: "to the personal firmness of the executive magistrate in the employment of his constitutional power, and to the stability of the system of administration which may have been adopted under his auspices." With respect to the first, "it must be evident that the longer the duration in office, the greater will be the probability of obtaining so important an advantage." He referred to "the general principle of human nature" which contends that a man will be interested in "whatever he possess, in proportion to the firmness or precariousness of the tenure by which he holds it." The inference he drew was that

the man acting in the capacity of chief magistrate, under a consciousness that in a very short time he must lay down his office, will be apt to feel himself too little interested in it to hazard any material censure or perplexity from the independent exertion of his powers.

Moreover, he continued, the republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they entrust the management of their affairs; but it does not

⁹³Ibid., 429-431.

require an unqualified compliance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interest. While the people "commonly intend the PUBLIC GOOD," they "know from experience that they sometimes err." Therefore, the President must be given adequate duration in office since "it is the duty" of the persons whom the people have "appointed to be the guardians" of their interests "to withstand the temporary delusion in order to give them time and opportunity for more cool and sedate reflection."⁹⁴

A second consideration developed by Hamilton on the question of duration was that of reinforcing the doctrine of the separation of powers. "To what purpose separate the executive or the judiciary from the legislative, if both the executive or the judiciary are so constituted as to be at the absolute devotion of the legislative?" he asked. It was one thing to "subordinate to the laws, and another to be dependent on the legislative body," he said. "The first comports with, the last violates, the fundamental principles of good government; and, whatever may be the forms of the Constitution, unites all power in the same hands." He then went on to reiterate a theme repeated often in the Federalist, that of the "tendency of the legislative authority to absorb every other" branch of the government. This was especially true "in governments purely republican" in which "this tendency is almost irresistible." He noted that

⁹⁴Federalist 71, 431-432.

the representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter; as if the exercise of its rights, by either the executive or judiciary, were a breach of their privilege and an outrage to their dignity.

The actions of the legislative branch were, at times, he said, "such as to make it very difficult for the other members of the government to maintain the balance of the Constitution."⁹⁵

Though a term of four years may not be the final answer in aiding the executive to check the ambitions of the legislative branch, it appeared to satisfy all the basic requirements attendant to a republican executive, Hamilton contended. On the one hand,

a duration of four years will contribute to the firmness of the executive in a sufficient degree to render it a very valuable ingredient in the composition, so, on the other, it is not enough to justify any alarm for the public liberty,

he concluded.⁹⁶

Federalist essay number seventy-two was concerned with the question of re-eligibility. Hamilton begins by describing the nature of the executive function in government. In the broadest sense, the administration of government comprehends "all the operations of the body politic, whether legislative, executive, or judiciary." However, in "its most precise significance" the administration of government "is limited to executive details, and fails peculiarly within the province of the executive department." The executive is charged with

⁹⁵Ibid., p. 433.

⁹⁶Federalist 72, 435.

the actual conduct of foreign negotiations, the preparatory plans of finance, the application and disbursement of the public moneys in conformity to the general appropriations of the legislature, the arrangement of the army and navy, the direction of the operations of war--these, and other matters of a like nature, constitute what seems to be most properly understood by the administration of government.

Since most of these duties will be handled by the President's subordinates, subject to his supervision, it was evident to Hamilton that there was a direct "connection" between the duration of the executive magistrate in office and the stability of the system of administration.⁹⁷

Hamilton illustrated the need for executive re-eligibility by citing five problems attendant to limiting the executive eligibility to a fixed number of years. The first was that "exclusion would be a diminution of the induements to good behavior," whereby the officeholder is deprived of the hope of another term to spark his fidelity to the public good. The second problem a limited re-eligibility brings was that an avaricious man bent on maximizing his use of the office for personal gain would be stimulated to increase his efforts knowing that he would possess the office and its advantages for only a short time. A third problem would be "depriving the community of the advantage of the experience gained by the Chief Magistrate in the exercise of his office," and why deprive the community of good leadership just because the leader has served the maximum number of years allowed by the law? The fourth reason against exclusion was that it would banish "men from stations in which, in certain emergencies of the State, their presence might be of the greatest moment to the public interest or

⁹⁷ Ibid., pp. 435-436.

safety." Lastly, limiting re-eligibility "would operate as a constitutional interdiction of stability in the administration," by "necessitating a change of men, in the first office of the nation," which would "necessitate a mutability of measures," because it was not to be expected that if the men vary the measures will remain uniform. To counterbalance these problems, unlimited re-eligibility would first give greater independence to the executive, and secondly, greatly increase the security of the people, who have the possibility of perpetuating good men in office "by the voluntary suffrages of the community exercising a constitutional privilege."⁹⁸

The next Federalist essay considered the necessity of adequate support for the executive to maintain his independence. Citing the often proved maxim in American colonial history that "in the main it will be found that a power over a man's support is a power over his will." Hamilton defended the Constitution's granting of a fixed salary. Moreover, the President was not at liberty to accept any other emoluments not provided by law so that he has "no pecuniary inducement to renounce or desert the independence intended for him by the Constitution."⁹⁹

Hamilton spent the remainder of that essay on the last requisite necessary for energy in the executive office; that is, that the President possess competent powers. He cited the veto, whose function was to first protect the executive from legislative encroachment and

⁹⁸Ibid., p. 440.

⁹⁹Federalist 73, 442.

secondly to "increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design."

Hamilton thought the executive would use the veto sparingly citing the lack of the British monarch's use of his veto. He argued that

if a magistrate so powerful and so well fortified as a British monarch would have scruples about the exercise of the . . . veto, how much greater caution may be reasonably expected in a President of the United States, clothed for the short period of four years with the executive authority of a government wholly and purely republican?

The Constitutional Convention, he pointed out, sought to pursue

a mean in this business, which will both facilitate the exercise of the power vested in this respect in the executive magistrate, and make its efficacy to depend on the sense of a considerable part of the legislative body.

Thereby they gave two-thirds of the legislature the power to override the President's veto. This figure was adopted because it was "to be hoped that it will not often happen that improper views will govern so large a proportion as two-thirds of both branches of the legislature at the same time."¹⁰⁰

In the next essay, Hamilton examines the military, administrative, and pardoning powers of the President. The commander-in-chief was necessary, he said, since military matters require that power be concentrated in the hands of a single individual, because the "direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority." With respect to the constitutional requirement that department heads be

¹⁰⁰Ibid., pp. 442-446.

required to issue written reports to the President upon demand, Hamilton thought this "a mere redundancy in the plan, as the right for which it provides would result of itself from the office." He noted that the pardoning power was only objected to, by and large, in the area of treason. He contended that it was given to the President because

in seasons of insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall.¹⁰¹

The treaty-making power was the subject of the seventy-fifth Federalist paper. Hamilton declared that this was one of the "best digested and most unexceptional parts of the" Constitution. The anti-Federalists had criticized it for an improper mixture of the executive and legislative powers. However, Hamilton noted treaty-making does not fall exclusively under either the executive or legislative purview, since the function of the legislature was to enact laws and the executive to execute them. Treaties, he said, are

CONTRACTS with foreign nations which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign.

In short, treaty-making forms a "distinct department." On the one side, the executive is best able to manage foreign affairs, "while the vast importance of the trust and the operation of treaties as laws plead strongly for the participation of the whole or a portion of the

¹⁰¹Federalist 74, 447-448.

legislative body in the office of making them." Therefore, it was clear that "the joint possession of the power in question by the President and Senate, would afford a greater prospect of security than the separate possession of it by either of them." In fact, he said, when all the factors are considered,

we shall not hesitate to infer that the people of America would have greater security against an improper use of the power of making treaties, under the new Constitution, than they now enjoy under the Confederation.¹⁰²

John Jay had covered many of the same points in the sixty-fourth Federalist concerning the treaty-making powers. Like Hamilton, he stressed the need for two separate steps in the formation of treaties. The executive offered "that perfect secrecy and immediate dispatch" that were necessary to the negotiation of a treaty and the conduct of foreign affairs, while at the same time he had to "act by the advice and consent of the Senate." This allowed him "to manage the business of intelligence in such a manner as prudence may suggest." Moreover, "should any circumstance occur which requires the advice and consent of the Senate, he may at any time convene them," he said. In short, "the Constitution provides that our negotiations for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigations," on the one hand, "and from secrecy and dispatch on the other."¹⁰³

¹⁰² Federalist 75, 451-452.

¹⁰³ Federalist 64, 392-393.

Jay also pointed out the Constitutional Convention took pains to assure that the treaty-making power "will be exercised by men the best qualified for the purpose, and in the manner most conducive to the public good." The selection of the Senate by the state legislatures was designed to produce the best from each state, as was the electoral college designed to produce the most qualified individual for President. Since these two institutions were to be directed by "those men only who have become the most distinguished by their abilities and virtue, and in whom the people perceive just grounds for confidence," the treaty-making power was guaranteed to be in the hands of those best able to exercise it. Moreover, he said, the Constitution "manifests very particular attention to this object" since it excludes persons under thirty from sitting in the Senate and persons under thirty-five from becoming President. In the case of the latter, "it confines the electors to men of whom the people have had time to form a judgment," and renders them less liable "to be deceived by those brilliant appearances of genius and patriotism" which sometimes appear, "like transient meteors," to mislead the people. In short, a President and Senate so chosen "will always be of the number of those who best understand our national interests, whether considered in relation to the several states or to foreign nations," and who "are best able to promote those interests" by their reputation and integrity. Therefore, he concluded, "with such men the power of making treaties may be safely lodged."¹⁰⁴

¹⁰⁴Ibid., pp. 390-391.

In the seventy-sixth Federalist, Hamilton examined the appointing power. He cited the maxim that "'the true test of a good government is its aptitude and tendency to produce a good administration.'" If this were the case, he said, then the clause empowering the President to nominate men to office, with the advice and consent of the Senate, must "be entitled to particular commendation." Hamilton premised his argument on the belief that "one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices than a body of men of equal or perhaps even of superior discernment." Moreover, he said, "the sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation." Requiring Senate approval of nominees provides "an excellent check upon a spirit of favoritism in the President," while retarding greatly "the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." Finally, the Senate's involvement "would be an efficacious source of stability in the administration" of the nation.¹⁰⁵

Hamilton answered those who argued that the President might corrupt the Senate by pointing to human nature. He said that

A man disposed to view human nature as it is, without either flattering its virtues or exaggerating its vices, will see sufficient ground of confidence in the probity of the Senate to rest satisfied, not only that it will be impracticable to the executive to corrupt or seduce a majority of its members, but that the necessity of its cooperation in the business of

¹⁰⁵ Federalist 76, 455-458.

appointments will be a considerable and salutary restraint upon the conduct of that magistrate.¹⁰⁶

A further restraint was the prohibition outlined in Article I of the Constitution which prohibited the appointment of any senator or representative to any civil office during the time of his election to Congress.

The final Federalist essay devoted to the presidency was concerned with the relationship between the President and Senate. Here Hamilton sought to allay the fears of those who thought each branch would exercise an unhealthy influence over the other. He summarized the opposition by noting its inherent contradictions; "the President would have an improper influence over the Senate, because the Senate would have the power of restraining him." "It cannot," he said, "admit of a doubt that the entire power of appointment would enable him much more effectually to establish a dangerous empire over that body than a mere power of nomination subject to their control." In the end, he said, the public will punish either the President for a bad nomination, or the Senate for confirming him. Giving the President a council will not alleviate the problem, since, "however constituted, it will be a conclave in which cabal and intrigue will have their full scope." On the other extreme, uniting the House of Representatives with the Senate in the nominating process would cause even more hardships, because "a body so fluctuating and at the same time so numerous can never be deemed proper for the exercise of that power." Moreover, "all the advantages

¹⁰⁶Federalist 77, 459.

of the stability, both of the Executive and of the Senate, would be defeated by this union, and infinite delays and embarrassments would be occasioned."¹⁰⁷

The remaining powers listed in Article II of the Constitution were not attacked by the critics of the document and Hamilton merely listed them as necessary to the operation of the executive. These were convening houses of the legislature, receiving ambassadors and the like. Hamilton closed his discussion of the presidency by showing how the institution was a responsible institution in the republican sense. He said that it "combines, as far as republican principles will admit, all the requisites to energy," and also does in a way to insure a "due dependence on the people." The President is elected

by persons immediately chosen by the people for that purpose, and from his being at all times liable to impeachment, trial, dismissal from office, incapacity to serve in any other, and to forfeiture of life and estate by subsequent prosecution in the common course of law.

Moreover, the only areas "which the abuse of the executive authority was materially to be feared," the President was restrained by a branch of the legislative body. In short, he concluded, "What more can an enlightened and reasonable people desire?" Other Federalists, by and large, argued along lines similar to those expressed by the authors of the Federalists Papers.¹⁰⁸

In the final analysis, the ratification debate reflected the conflicting concerns of the anti-Federalist and Federalist with respect

¹⁰⁷Ibid., 462.

¹⁰⁸Ibid., 464.

to the interpretation of executive features of the Constitution. The Federalists argued that the Constitutional Convention had achieved the best possible model of a vigorous and responsible executive within the confines of a republican government. They sought to show that all its features, with the possible exception of the electoral college, were derived from and well within the constitutional experiences of the states. Moreover, it possessed the necessary vigor to protect American interests in the conduct of foreign affairs and internal security, while at the same time its constitutional powers were limited and checked in such a manner as to make it consistent with republican principles. Aside from the executive's administrative duties, his major function was to counter-balance the legislative branch to prevent its excesses from endangering the liberties of the people. In short, the Federalists were pleased with the Constitutional Convention's efforts to provide the country with an adequate and responsible executive.

The anti-Federalists also agreed that there must be an executive in any new form of government that might be proposed to replace the Confederacy. However, their view of human nature led them to mistrust the form it took in the proposed Constitution because they feared it did not possess sufficient checks to prevent it from becoming an elected monarch, the worst of all forms of government in their opinion. No executive would be safe in a republic, they argued, unless his powers were more explicitly limited or checked in the constitutional phraseology. No contingency ought to be left to chance, they maintained, because any vagueness in the constitutional language would lead to executive usurpation which might not be able to be checked.

The fundamental difference between the Federalists and their opponents rested on their view of human nature. The Federalists contended that the Constitution offered the rewards which impelled men to do the public business, while providing sufficient safeguards against their possible abuse of the public trust. The Federalists did not argue that either extreme of the human nature continuum was correct, but that human nature was somewhere between, not wholly good or entirely evil. They were therefore willing to support a Constitution which spelled out in general terms the objects of government and their method of attainment. The anti-Federalists viewed human nature in its worst light. Therefore, man was not to be trusted with any power unless its exact use and limitations were spelled out in detail. That, they argued, was the safest way to protect society from the designs of those who held power. The Federalists disagreed, saying that experience had shown that mere paper delineations or checks were useless unless each branch of government were given adequate powers to check the others in their own self-defense. James Iredell summarized the Federalists' position by saying about the possible abuse of power that it

will reach all delegation of power since all power may be abused when fallible beings are to execute it; but we must take as much caution as we can, being careful at the same time not to be too wise to do any thing at all.¹⁰⁹

Thus, the disagreement over human nature led to opposing answers on the question of whether the Constitutional Convention had succeeded in creating an executive sufficiently empowered to carry out the executive

¹⁰⁹Iredell, "Answers," Pamphlets, Ford, ed., p. 342.

functions within the context of a republican form of government. The Federalists concluded that it did, while the anti-Federalists contended it did not.

Before concluding this study on the origin of the presidency, one final point needs to be clarified; this is, what was George Washington's concept of the presidency prior to his taking office? Some have argued that the office was molded to fit his actions as the de facto leader of the nation during the Revolutionary War. As argued in the previous two chapters, this may have been a subtle influence on the delegates; however, most were too politically sophisticated to base such important an office on so little historical experience. On the other hand, few will argue that Washington did not play a significant role as the first person to hold the presidency under the new government. Too much was left unsaid in the wording of Article II to make it a precise guide for the daily activity of the incumbent. That would be left for experience to fill in the areas not covered in the specific language. It is important, therefore, to see what Washington's expectations for the office were, prior to his being sworn in as President.

It was expected by many that Washington would be the first President. Even before the Convention completed its work, some concluded that Washington would be at the head of any new government. Benjamin Rush wrote to Timothy Pickering that "General Washington it is said will be placed at the head of the new Government, or in the stile of my simile, will drive the new wagon."¹¹⁰ Hardly had the ink

¹¹⁰Farrand, ed., Records of the Federal Convention, IV, 75.

dried at the signing of the Constitution when the speculation began in earnest. By October, Jefferson was concluding that "General Washington lives; & as he will be appointed President, jealousy on this head vanishes, referring to debate over the adoption of the Constitution."¹¹¹ As the Constitution moved toward ratification, more people became convinced that Washington was the logical choice for chief executive of the new nation.

Washington, however, was reluctant to end his retirement and return to active political life. In letter after letter, he repeated this sentiment to his friends. A letter to Henry Lee on September 22, 1788 probably best explains his thinking. He recounted the difficulties that faced the nation since the end of the Revolution and expressed his hope that with the adoption of the Constitution they might at least begin to be resolved. He warned that the opponents of the Constitution might "stifle the government in embryo (sic)." Therefore, "prudence, wisdom, and patriotism were never more essentially necessary than at the present moment."¹¹²

Turning to the problem raised by Lee, of those who wanted to put his name in nomination for the presidency, Washington said that it was "a point of great delicacy; in so much that I can scarcely, without some impropriety touch upon it." He reiterated his "attachment to domestic life" and his wish to "continue in the enjoyment of it,

¹¹¹Ibid., III, 105.

¹¹²Washington, Writings, Fitzpatrick, ed., XXX, 95-96.

solely until my final hour." However, if he was to change his mind, the world would not be "so candidly disposed as to believe me uninfluenced by sinister motives, in case any circumstance should render a deviation from the line of conduct I had prescribed to myself indispensable."¹¹³

Washington then rhetorically asked Lee how this would be viewed by the world. He pondered the fact that

Should the contingency you suggest take place, and (for argument sake alone let me say it) should my unfeigned reluctance to accept the office be overcome by a deference for the reasons and opinions of my friends; might I not, after the Declarations I have made (and Heaven knows they were made in the sincerity of my heart) in the judgment of the impartial World and of Posterity, be chargable with levity and inconsistency; if not with rashness and ambition?

He then offered that "justice to myself and tranquility of conscience require that I should act a part, if not above imputation, at least capable of vindication." Therefore, "if I know myself, I would not seek or retain popularity at the expense of one social duty or moral virtue."¹¹⁴ Thus, Washington was acutely aware of his public standing and sought to avoid any hint of ambition on his part for the presidency.

Yet, in spite of protestations on his part, Washington realized that in all likelihood, he would be the first President. In his letter to Lee, he continued by saying,

While doing what my conscience informed me was right, as it respected my God, my Country and myself, I could despise all the party clamor and unjust censure, which must be expected

¹¹³Ibid., 97.

¹¹⁴Ibid., 98.

from some, whose personal enmity might be occasioned by their hostility to the government.

While he was not afraid of "unmerited reproach," he concluded that his actions ought to be governed as follows: "whensoever I shall be convinced the good of my country requires my reputation to be put in risque (sic); regard for my own fame will not come in competition with an object of so much magnitude." However, if he declined the presidency, it would not be for the number of personal reasons he cited to Lee, "but a belief that some other person, who had less pretense and less inclination to be excused, could execute all the duties full as satisfactorily as myself." Then he said: "To say more would be indiscreet; as a disclosure of a refusal beforehand, might incur the application of the Fable, in which the Fox is represented as undervaluing the grapes he could not reach." He cautioned Lee to keep this letter confidential and concluded that

my inclinations will dispose and decide me to remain as I am; unless a clear and insurmountable conviction should be impressed on my mind that some very disagreeable consequences must in all human probability result from the indulgences of my wishes.¹¹⁵

Thus Washington, the consummate statesman that he was, sought to avoid the political pressures forcing him back into the political arena, but was ready to serve if this was best for the country.

Washington viewed the proposed Constitution with satisfaction though he did admit that it was not perfect. However, it was the "best

¹¹⁵Ibid., XXIX, 278.

that could be obtained at this time." He saw the document as entrusting power

for certain purposes, and for a certain limited period, to representatives of their own choosing (sic); and whenever it is executed contrary to their Interest, or not agreeable to their wishes, their Servants can, and undoubtedly will be, recalled.

He contended that all agreed that "no government can be well-administered without powers."¹¹⁶ Another time he characterized the government as

not invested with more Powers than are indispensably necessary to perform the functions of a good Government; and, consequently . . . no objection ought to be made against the quantity of Power delegated to it.

Moreover, these powers

are so distributed among the Legislative, Executive, and Judicial Branches . . . that it can never be in danger of degenerating into a monarchy, Oligarchy, an Aristocracy, or any other despotic or oppressive form, so long as there shall remain any virtue in the body of the People.

In short, the Constitution was "provided with more checks and barriers against the introduction of Tyranny, and those of a nature less liable to be surmounted, than any Government hitherto instituted among mortals."¹¹⁷

On the composition of the presidency, Washington disagreed with Jefferson's proposal for a rotation in office. He opposed limiting re-eligibility saying that the Constitution was so well guarded against corrupting influences in the selection of the President that there was not the need for limiting re-eligibility. He said that there cannot,

¹¹⁶Ibid., pp. 311-312.

¹¹⁷Ibid., pp. 410-411.

in my judgement, be the least danger that the President will by any practicable intrigue ever be able to continue himself one moment in office, much less perpetuate himself in it; but in the last stage of corrupted morals and political depravity: and even then there is as much danger that any other species of domination would prevail.

In the final analysis, "when a people shall have become incapable of governing themselves and fit for a master, it is of little consequence from what quarter he comes." Therefore, he could see no reason for the nation to preclude "the services of any man, who on some great emergency shall be deemed universally, most capable of serving the public."¹¹⁸

Taken as a whole, Washington's concept of the presidency prior to his taking office was that it was a republican institution responsible to the people, empowered with sufficient energy and authority to carry out the limited objects of government, but not capable of overstepping its bounds without bringing public censure and the checking influences of the other branches into operation. Other than the re-eligibility issue, Washington did not express his thinking on any specific organizational aspect of the office prior to his inauguration. He did, however, express his concern over the influence the first occupants of the office would exert on the future of the government. He wrote that,

I have no doubt but . . . those persons who are chosen to administer it will have wisdom enough to discern the influence which their example as rulers and legislators may have on the body of the people, and will have virtue enough to pursue that line of conduct which will most conduce to the happiness of their Country; as the first transactions of a nation, like those of an individual upon his first entrance into life, make the deepest impression, and are to form the leading traits in its character, they will undoubtedly pursue

¹¹⁸Ibid., p. 479.

those measures which will best tend to the restoration of public and private faith and of consequence promote our national respectability and individual welfare.¹¹⁹

As it became clear that Washington would be the nation's choice for the presidency, he began to face the practical problems of the task. The one he dreaded most was that of filling the posts open to presidential nomination. He feared that "there will be at least a hundred competitors for every office of any kind of importance." However, the

number of offices will, in our oeconomical (sic) management of the affairs of the Republic, be much fewer, as I conceive, and the pretensions of those who may wish to occupy them much more forcible; than many well informed men have imagined.

Then he added that he had "no conception of a more delicate task, than that, which is imposed by the Constitution on the Executive." Since republicans, by nature, were

extremely jealous as to the disposal of all honorary or lucrative appointments . . . I am convinced . . . that, if injudicious or unpopular measures should be taken by the Executive under the New Government with regards to appointments, the Government itself would be in the utmost danger of being utterly subverted by those measures.

He then concluded that it was so necessary at this point "to conciliate the good will of the People," because it was, in his judgment, impossible "to build the edifice of public happiness, but upon their affections." He, therefore, wished to enter the presidency "without being under any pre-engagements, to any person, of any nature whatsoever."¹²⁰

¹¹⁹Ibid., p. 465.

¹²⁰Ibid., XXX, 239-241.

The appointing power troubled Washington considerably. He said he could

conceive that the general principles on which nominations ought in good policy and equity to be made, may be easily ascertained; still I cannot possibly form a conception of a more delicate and arduous task, than the particular application of those principles to practice.

Generally, the "fitness" and the "comparative validity of the claims of different Candidates, together with, perhaps, some political considerations of a local nature," are the objects on which to base the general principles, he concluded. Yet, it was impossible "to give universal satisfaction." To one office seeker he wrote: "I may be under the necessity of adopting a system of public conduct altogether from reasons of State" though he would pay "particular attention to distinguished talents and merits." Later, he said, only one rule would guide him in this matter; that was, "that in all appointments to offices . . . only the fitness of characters and the public good," would be considered, not personal friendships, "however great my inclination towards" my friends.¹²¹

When the call finally came for Washington to take the reigns of government, he began by paying meticulous attention to his actions. On the question of lodging, he declined all offers to reside in private homes seeking "none but hired ones," for it was his wish "and intention to conform to the public desire and expectation, with respect to the style proper for the Chief Magistrate to live in."¹²²

¹²¹Ibid., p. 270.

¹²²Ibid., p. 255.

Washington compared his "movements to the chair of Government" as being "not unlike those of a culprit who is going to the place of his execution." Once again he expressed his reluctance to leave the quiet tranquility of private life "for an Ocean of difficulties, without that competency of political skill, abilities and inclination which is necessary to manage the helm." Then he stated his concern for the task upon which he was about to enter. "I am sensible," he said, "that I am embarking the voice of my Countrymen and a good name of my own, on this voyage, but what returns will be made for them, Heaven alone can foretell." He then promised "Integrity and firmness" whether his voyage "be it long or short."¹²³

When Washington faced the nation for the first time as President, he spoke of his hopes for the new undertaking. His simple eloquent statement honoring those elected to serve in the new government probably best summarized his idea for the role of the presidency. He said:

I behold the surest pledges, that as on one side, no local prejudices, or attachments; no seperate (sic) views, nor party animosities, will misdirect the comprehensive and equal eye which ought to watch over this great assemblage of communities and interests: so, on another, that the foundations of our National policy will be laid in the pure and immutable principles of private morality; and the pre-eminence of a free Government, be exemplified by all the attributes which can win the affections of its Citizens, and command the respect of the world.¹²⁴

¹²³Ibid., p. 268.

¹²⁴Ibid., p. 294.

Thus, the President and the presidency were to be the beacon to guide the nation. Rarely in history would a man so honor an office, or an office so honor a man, as did the figure who symbolized that era.

CHAPTER XI

CONCLUSIONS

From the evidence presented in the foregoing study, what conclusions can be drawn about the evolution of American executive theory and its embodiment in the creation of the presidency? There appear to be three distinguishable periods which contributed to the formulation of basic American attitudes toward the executive power: From the founding of the colonies to the Declaration of Independence; from 1776 to the writing of the Constitution in 1787; and finally, from the Constitutional Convention to the beginning of George Washington's first administration. The common theme predominant in all three eras was the struggle to make the executive accountable and responsible to the people or their representatives. The methods of achieving it differed in each era because of the different circumstances under which the executive operated.

In the first era, the colonial government was a function of the executive; that is, the governmental authority was primarily in the hands of the executive. Early in the seventeenth century the governors possessed wide-ranging grants of general executive authority. For the most part, their powers were based more on commercial expediency than on any political or constitutional theory. Gradually, as the early colonial commercial companies became political entities, and as their

governor's authority was altered to meet changing needs, popular restrictions began to be imposed on a governor's exercise of his powers. Through the development of representative assemblies, the people sought to confine executive discretion and authority within popularly accepted boundaries.

The seventeenth century also established certain fundamental principles regarding the executive which were carried over and reinforced in the eighteenth century. They were: unity in the executive, a written delegation of powers, and the belief that the executive was responsible for his actions.

By and large, however, the seventeenth-century governor was a strong independent executive who possessed the bulk of governmental powers and discretion. He was checked in his use of that power, for the most part, more by his superiors than by popular restraint. Massachusetts was the most notable exception inasmuch as its charter, the source of power, was in the colony, and not England, and the people elected their leaders.

As the colonies were converted into royal colonies, the source of executive power became the governors' commissions and instructions. Again, the primary object of the governors' delegated power was the protection of the king's prerogative and English commercial interests. Colonial concerns came second if there was a conflict. Gradually, the assembly developed as the popular check on the executive. Once they became a firm fixture in the colonial constitutions, they slowly learned how to retard or avoid adverse colonial policies by employing, among other things, various financial restraints on the

governors' power to enforce English colonial policy. By far the most effective measure was control of the governors' salary.

By the reorganization of the British empire in 1763, colonial governors were forced to serve two masters in a manner which doomed them to failure. While they were expected to use their ample authority to defend the prerogative, the Americans had devised methods to keep them restrained and responsible to colonial needs. Throughout this period the royal governors remained powerful in a constitutional sense, but their attempts to enforce British policies, which inflamed the colonists, severely eroded their political power to carry out their constitutional authority.

In the struggle between England and the colonists, the governor became irrelevant. The Americans had developed their own parallel systems of colonial government in the provincial assemblies, which completely bypassed the need for English officials. The committees of correspondence and safety became the acting colonial executive in the transition from colonial governments to the first state constitutions. They were patterned after the legislative committees which had exercised executive functions at various times during the colonial period.

Also, during the period prior to the Revolution, a number of attempts were made to unite two or more colonies under a common executive. Aside from the various political or military factors which militated against such unions, there was the problem of having a common executive over colonies with different constitutions. The executive's military powers could be delegated to another officer, but Americans

were unwilling to let an outside executive operate without the requisite constitutional safeguards.

The second major period in the development of American executive theory, from the Declaration of Independence to the Constitutional Convention, saw the executive and legislative roles reversed. Now the legislative branch was the engine of government and the executive played a secondary role. Constitutionally, the executive was given just enough authority to carry out his duties. In time of crisis, this was augmented with statutory power, which, in some cases, was almost dictatorial in nature. The state constitutions were considered temporary in nature and therefore written to meet the military crisis, which was paramount at the time. Later, it was argued, they could be revised to meet the new conditions. If the writers of the state constitutions erred in organizing the executive sections of the constitutions, the Americans thought it best to err on the side of too little authority, since it could always be increased by amendment or statute. By and large these early attempts at writing constitutions led to legislative dominance. The New York and Massachusetts constitutions were notable exceptions. The first emerged from a tradition of strong executive leadership throughout the colonial period, and the latter, only after four years of experimenting during the Revolution.

On the national level the Continental Congress faced tremendous organizational difficulties. The executive authority was primarily exercised by committees in a very inefficient manner. Gradually the major committees were transformed into the executive departments which were headed by unitary executives who were not members of Congress.

Two department heads, John Jay and Robert Morris, exerted tremendous influence over Congress, and Jay became, in effect, the powerful de facto executive of Congress.

The office of President of Congress had little power, but served to focus attention on one person as the official representative of Congress and the nation. Jefferson's attempt to provide Congress with executive leadership through the Committee of States was an unqualified disaster since Congress would not trust such a committee with the necessary powers without crippling it by restrictions to prevent any abuse of its powers.

The most significant executive in this period was General George Washington in his role as commander-in-chief. He was the de facto national executive because he linked the civilian and military authority, tied the war effort together in the states, and was the major source of communication between the state executives and Congress. At times, Congress granted him dictatorial powers. His restrained use of them provided a model of executive behavior and reinforced Congress' willingness to grant the necessary authority to successfully conclude the war. Moreover, he showed the dispatch and efficiency inherent in a unitary executive.

Peacetime brought only more trouble for Congress. Trade and commercial problems only accentuated its inability to adequately govern the nation with the authority granted under the Articles of Confederation. Finally enough people were concerned to attempt to remedy the defects. After several unsuccessful efforts, the Constitutional Convention of 1787 was called.

The Convention began the third phase in the development of American executive theory. The delegates agreed that the nation needed a fairly strong executive to both administer the laws and to check the excesses of the legislative branch. They looked to the American political-constitutional tradition, especially the state experiences, and selected and arranged the elements they thought would achieve a vigorous but responsible executive within the context of a divided and balanced constitution. All of the elements were taken from the state constitutions, with the possible exception of the electoral college. The essential nature of the office appears to be modeled on the governorships of New York and Massachusetts which were fairly strong and independent. However, these two were by no means the exclusive models, as the elements which comprise the executive authority in the Constitution can be found in the other state constitutions as well. Moreover, the state experience also showed the delegates what to avoid by illustrating what had not worked before. In short, the powers of the presidency were well within the executive experience of the states, but arranged in such a manner as to insure the most vigorous action compatible with maximum responsibility within the republican model of an institution firmly based on the people.

The ratification debate was carried on within the context of whether the Convention had succeeded in achieving the proper balance between vigor and security. The anti-Federalists argued that it had achieved the vigor but was not sufficiently restrained to prevent a president from endangering liberty. The Federalists argued that it had

achieved the proper balance and was completely compatible with the republican principles America had been operating under for over a century.

Finally, even before the Convention had finished its deliberations, it was clear to many that Washington would be the first chief-executive of any new system. His presence had helped legitimize the Convention's deliberations and his influence was now expected to legitimize its results. No other American was as uniquely qualified as he was, given his experience, perspective, temperament, and character. As the symbol of the Revolutionary generation, he served to unite the divisions caused by the ratification struggle and allayed the fears of those who thought the presidency was too powerful an institution to be trusted to one individual. In short, Washington was the ideal choice for President. In the end, his patriotism and devotion to the success of the new nation would provide that element of leadership which could not be guaranteed by constitutional phraseology.

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