PUBLIUS AS PROPHET?

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The Federalist Papers have been described as the Framers' "message to mankind." They have been lauded by Presidents, scholars, and world leaders. Jefferson described them as "the best commentary on the principles which was ever written."[1] The eighty-five essays (comprising about 75,000 words) were published initially in New York but later in other states beginning in late October of 1787 and were completed in the Spring of 1788 (although their publication was not completed until that Fall). The idea for the series of essays came from Hamilton after publication of a severe criticism of the Framers in the New York newspapers by the anonymous Cato. Decided what was needed was a series of essay explaining and justifying the proposed Constitution, he recruited John Jay and James Madison to be a part of the project. Due to illness Jay ended up only authoring five of the essays. Hamilton authored 55 with Madison authoring 25.[2]

While the essays have been nearly universally lauded for their insight, this paper attempts to determine how accurate they were in predicting how the Presidency would function. There were eleven essays devoted to the Executive Branch, all authored by Hamilton. Those essays (Numbered 67 through 77) were chosen for this study.

FEDERALIST NO. 67: Recess Appointments

Federalist 67 is about recess appointments. If that seems like an esoteric subject, it was the subject of a rather important U.S. Supreme Court case as recently as the Obama Presidency.[3] Before discussing that case, what does Publius have to say concerning recess appointments?

The Constitution stipulates that Presidents will have the authority to appoint certain officers. Article II, Section 2 stipulates that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. But it continues, stipulating that the Congress may by Law vest the appointment of such inferior Officers, as they think proper, in the President alone.[4]

Since the Brownlow Commission ended its report in 1937 with "The President needs help," the executive branch has grown considerably and with it a great number of presidential appointments. Indeed, the Committee's recommendations formed the basis of the Reorganization Act of 1939 and the creation of the Executive Office of the President.[5] One of Political Scientist and Presidential expert Fred Greenstein's traits of the modern presidency is that the presidential office has become an extensive bureaucracy designed to enable presidents to

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[1] *The Federalist Papers*, Introduction and Notes by Charles R. Kesler (Signet Classics, 2003), p. ix.

[2] There has always been some dispute about the number of essay written by each of the contributors. These numbers are based on the Madison scholar, Irving Brant. Brant authored a six-volume biography of Madison.

[3] The case was

[4] It continues, "…in the Courts of Law, or in the Heads of Departments."

[5] https://en.wikipedia.org/wiki/Brownlow_Committee

undertake a legislative program and to regularly engage in direct policymaking (with the need for congressional approval).[6]

One would think that with the vast expansion of the Executive branch, the number of recess appointments would also increase. They have. As several presidential scholars have pointed out, "Recent presidents have made surprisingly frequent use of recess appointments.[7] However, since that conclusion the U.S. Supreme Court has legitimized a process whereby the opposition political Party, if controlling the Senate, has devised a plan for thwarting such appointments. It is done by having a Senator enter the empty chamber every three days, bang the gavel, and then continue this process till the Senate returns. This process was challenged by the Obama administration, but the challenge was unsuccessful with the Supreme Court. The Court gave its approval to the strategy.[8] The Court, in accepting the three-day "bang-the gavel" strategy, argued that this was too short a time to evaluate nominees.[9]

WHAT WOULD PUBLIUS SAY?

Of course, Publius states nothing relating to the facts of Canning decision. However, there is a connection between the Supreme Court's decision in *Canning* and *Federalist* No. 67.

In *Federalist* 67 Publius debunks a bizarre and misguided interpretation of what we today refer to as a recess appointment. A few of the characterizations made of Cato's argument are "supercilious," "exaggerated," "counterfeit," and "fallacy." To what are these referring? They are referring to the Anti-Federalist argument that the language we today refer to as the recess appointment clause, would allow the President to fill (by appointment) vacancies in the U.S. Senate. Yet, as Publius points out, that power belongs to state Governors, AS SPECIFED IN THE ORIGINAL DOCUMENT (Article I, Section 3)![10]

Here is how Publius made the point concerning how Cato described what the proposed Constitution specified concerning vacancies in the U.S. Senate: ". . . the temerity has proceeded so far as to ascribe to the President of the United States a power which by the instrument reported is expressly allotted to the executives of the individual states." Cato was obviously incorrect. Although Publius thinks the error is intentional.

This is obvious by what he writes later in the essay. He refers to the "error" as a "misrepresentation," which is "unequivocal proof of the unwarrantable arts which are practiced to prevent a fair and impartial judgment of the real merits of the Constitution submitted to the consideration of the people."[11]

FEDERALIST NO. 68: Electing the President

This essay is devoted exclusively to the electoral college. Unlike the preceding essay, in this one Hamilton takes more of an "informative" approach seeking to spell out how the method of electing the President (the electoral college) will work. As such, is a good primer on that

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[6] Joseph A Pika, John Anthony Maltese, and Andrew Rudalevige, *The Politics of the Presidency*, 10th Edition (Sage, 2021), p. 25.

[7] Ibid., p. 356.

[8] *National Labor Relations Board* v. *Noel Canning*, 573 U.S. 513 (2014).

[9] GET QUOTE

[10] "…if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies." Of course, prior to the Seventeenth Amendment (1913) U.S. Senators were chosen by state legislature.

[11] The quote if from the last paragraph of *Federalist* No 67.

subject, except for the rather significant changes that were made with the Twelfth Amendment (ratified in 1804).

Hamilton opens the essay on a very positive note. "The mode of appointment of the Chief Magistrate is almost the only part of the system, of any consequence, which has escaped without severe censure or which has received the slightest mark of approbation from its opponents." He goes further and states if "it be not perfect, it is at least excellent."

One point about the operation of the electoral college, however, stands out in a rather surprising way. It has to do with how the electors will be chosen. Under the Constitution of 1787 the manner of choosing electors is not specified. It is no surprise, therefore, to learn that various methods of doing this have been used throughout U.S. history. For example, early in the nation's history it was not unusual to assign the choosing of electors to be done by the state legislature. Indeed, in Section II the Constitution assigns each state legislature the authority to determine how the electors shall be chosen. Yet, during the early portion of the Constitution's history, four states allowed voters to choose the electors.[12] By the end of the Civil War, however, each state legislature had given the power of choosing the electors to the voters.

Another issue, independent of who chose the electors was how the electoral votes would be allocated. In the period following the Civil War the preferred method was the General Ticket System. Under this system whichever presidential ticket got the most popular votes in a state was awarded all of the state's electoral votes. However, since the 1960s two states have allocated their state's electoral votes using the District Plan. Under this Plan, the popular votes for the presidential tickets are broken down by congressional districts with one electoral vote awarded for each congressional district. Two additional electoral votes are allocated based on the statewide popular vote. An alternative method known as the Proportional Plan was put to a vote in Colorado in 2016. Had it passed it would have allowed the state's electoral vote to be proportioned to each candidate based on the percentage of popular votes received. It didn't pass.

While the Constitution is silent concerning how the electoral votes are determined, *Federalist* No. 68 isn't. Publius does something in this essay that is not that uncommon in the 85 essays. Publius will sometimes give a hint as to how he would like for "things" that are not clearly delineated in the Constitution to work. This he does concerning the selecting of electors in No. 68. He "hints" that states will allow the people to select the electors. As already mentioned, this may explain why originally four states did so. Here are some examples of these "hints".

In the second paragraph he writes, "It was desirable that a sense of the people would operate in the choice of [the President]." In the next paragraph he refers to the electors as being "selected by their fellow citizens. . . ." In paragraph five he refers to an "act of the people of America, to be exerted in the choice of [the electors]." In paragraph six he writes, "Another and no less important desideratum was that the executive should be independent for his continuance in office on all but the people themselves." And in paragraph seven he seems to throw all caution to the wind and assert, "All these advantages will be happily combined in the plan devised by the convention, which is, THAT THE PEOPLE OF EACH STATE SHALL CHOOSE A NUMBER OF PERSONS AS ELECTORS . . . who shall assemble within the State, and vote for some fit person as President (emphasis added). In short, while specifying that voters will

[12] Neil Peirce and Lawrence Longley, *The People's President: The Electoral College in American History and the Direct Vote Alternative* (Yale University Press, 1981), p. 32.

chose the electors was not specified in the Constitution, Publius treats the subject as settled—the people should be allowed to choose them!

As indicated, .

FEDERALIST NO. 69: Commander-in-Chief

Federalist No. 69 is not devoted to a single constitutional provision pertaining to the Executive Branch. It touches on every provision pertaining to the Executive Branch. In this essay Publius compares each provision with what the New York constitution stipulates concerning its governor, and also compares the U.S. presidency with the King of England. That is the "good news" concerning the essay. The "bad news" is that because of this, Publius does not go into depth concerning any one constitutional provision.

Publius does highlight, in paragraph three, that the Framers did not put a limit on the number of terms a president could serve. That, of course, was modified by the Twenty-second Amendment which limits a president to two elected terms. That Amendment was a result of Republicans, then in control of Congress, of proposing a two-term limit following the fourth term for Franklin Roosevelt. In *Federalist* No. 72 Publius devotes an entire essay to the rationale for not relying on term limits. That essay will be discussed later.

Concerning the Constitution's assigning of the President to be Commander-in-Chief of the army and navy, but points out that "this would amount to *nothing more than* supreme command of the [military]…as first general.[13] Given the tremendous power the Commander-in-Chief title as lent to past Presidents, it would seem that Publius viewed the role (with the "nothing more" comment) as being much less powerful than Presidents historically have viewed it. Even today, when debating a subject, if a person adds, "I mean nothing more than" they tend to be downplaying their point rather than enhancing it.

Finally, later in the essay Publius emphasizes that while the King of England may declare war, the President cannot. Under the U.S. Constitution only Congress may constitutionally take our nation from a state of peace to a state of war.

FEDERALIST NO. 70: Singular v. Plural

The notion of having a plural executive was rather hotly debated at the Constitutional Convention. This explains why Publius devoted an entire essay to why the Framers rejected this proposal.[14] Publius introduces this topic by asserting that the Framers saw the need for a "vigorous" executive. Apparently, Publius would agree with the adage "divide and conquer" arguing that a plural executive would be much easier, for example, for Congress to dominate the Executive Branch composed of a plural executive. Concerning this, he introduces a logical syllogism. It goes like this:

A plural executive is a feeble executive.
A feeble executive results in a feeble government.
A feeble government is another name for bad execution.
A government ill executed is a bad government.

Having made his "feeble" argument concerning a plural Executive, the question for Publius then becomes, how vigorous should the office of President be? To address this question Publius asks another question: What are the "ingredients" of energy in the Executive? He answers that they

[13] See paragraph 6 of *Federalist* 69. Emphasis added.

[14] The major proposal was to have three executives: one representing the nothern section, one the middle section, and one the southern section.

are: (1) unity; (2) duration; (3) adequate provision for its support; and (4) competent powers. He follows by asserting what "ingredients" constitute "safety" in a republic. They are (1) a due dependence on the people and (2) a due responsibility.

The rest of *Federalist* No. 70 is devoted to a discussion of "unity". By this Publius meant a single executive instead of a plural executive. In announcing this Publius credits the Framers with wisdom of knowing that "energy" is a necessary quality in the executive and is most likely to be found in one individual. Not only is "unity" in the executive conducive to energy, it is also conducive to "decision, activity, secrecy, and dispatch." A plural executive, which was proposed at the Constitutional Convention, would have destroyed these traits.

Publius notes that a plural executive destroyed the Roman government. Likewise with governments having a single executive with strong councils assisting them (namely, New York and New Jersey). Both, Publius argues, destroy unity in the government. Both result in dissensions in the government. Both teach this lesson in government: do not be enamored with plurality in the executive. The public may split, aligning themselves with the quarreling executives. Also, while disagreements are somewhat natural in the legislative branch, they counteract the most important traits of the executive: vigor and expedition.

Yet, perhaps the strongest argument for opposing a plural executive (either type) is that it tends to conceal faults and destroy responsibility. Near the end of the 1960s a scholar of the U.S. Presidency wrote an article about the "swelling of the Presidency"?[15] Publius' point seems well taken considering the enormous amount of time the hearings in Congress took investigating two of the most significant scandals of the modern era: Watergate and Iran-Contra.
Anyone familiar with these two major scandals knows that most of the investigation into them was in sorting out all the "finger-pointing" concerning who did what and how involved each of the actors were. Without the logic supplied by Publius at the beginning of this essay it would have been all but impossible to assign responsibility for what was clearly scandalous, if not illegal, behavior. As it was, Watergate lead to the resignation of a President. Iran-contra lead to prison sentences.

FEDERALIST NO. 71: Term of Office

In this essay Publius discusses the second trait needed for an energetic executive: duration (or a sufficiently lengthy term of office). According to Publius a proper length of time to serve provides a firmness and results in an interest in the job. He argues that it is a fact of human nature that people are more interested in and more willing to risk more for things securely held.

These views are summarized in what might be considered the best quote from the essay.

> The republican principle demands that the deliberate sense of the Community should govern the conduct of those to whom they intrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the

[15] This was a kind of play on words by sounding similar to an earlier book (by a differ author) concerning the role of money in presidential politics. That book's title was *The Selling of the Presidency*. The author of the "swelling" of the presidency was Tom Cronin.

> arts of men, who flatter their prejudices to betray their interests. It is a just observation that the people commonly intend the PUBLIC GOOD. This often applies to their very errors. But their good sense would despise the adulator who should pretend that they always reason right about the *means* of promoting it. The know from experience that they sometimes err; and the wonder is that they so seldom err as they do, beset as they continually are by the wiles of parasites and sycophants, by the snares of the ambitious, the avaricious, the desperate, by the artifices of men who posses their confidence more than they deserve it.

Publius compares the policies that might emerge from the House of Representatives which might be popular, especially at first, with the voters. After all, House members have two year terms (and would therefore be more susceptible to such policies). As such the House could be thought of as a "hot" institution: give the people what they want when they want it.[16] Hence, the importance in providing the President has with a longer term of office. As Publius puts it this is a greater guarantee that he will provide a more "cool and deliberate" sense of the community. For he has to calculate how the people will react to his leadership up to possibly four years after he has acted.

Showing one of his greatest traits, Publius then turns the tables and asks if maybe a four year term is too short, so why not go ahead and make it even shorter to at least guard against an overly ambitious President? He responds by arguing that a four year term is long enough for a president to be deliberative in his actions without worrying about constant re-election, but not so long as to infractions on individual liberty.

It has already been pointed out that James Madison was the Father of the Constitution. One study has determined that of those issues on which Madison took a "strong" position, his position was successful (in becoming a part of the Constitution) 77 percent of the time.[17] One of the reasons Madison had such a large on the writing of the Constitution was the fact that he authored the so-called "Randolph Plan." This Plan was introduced on day three of the Convention by Edmund Randolph of Virginia. Although Mr. Randolph *introduced* this Plan it was *authored* by Madison! It became the agenda for the Conventions proceedings for the rest of the summer.[18]

Why was Virginia Plan so successful? Primarily because of the political savvy and wisdom of Madison in writing it. Yet, another reason for the Plan's success resulted from Madison's wisdom or political savvy in proposing the Virginia Plan.

Madison at times left details unspecified in that Plan. For example, initially Resolution 7 read: "Resolved that a National Executive be instituted; to be chosen by the National Legislature for the term of _____ Years …. ." Notice what Madison does here. Instead of specifying the term, he left it blank for the delegates to decide. This reduced the number of times he might have been wrong, and also demonstrated that it was something Madison was willing to rely on the suggestions of other delegates.

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[16] This is the characterization provided by Joseph Bessett in *How Democratic is the U.S. Constitution* . . . .

[17] See, Danny M. Adkison, "Madison's Sphere," in *Creative Breakthroughs in Leadership*, edited by William D. Pederson and Frank J. Williams (Pencraft International, 2007), Chapter 1.

[18] Of course, an alternative Plan (the New Jersey or Paterson Plan) was introduced as an alternative on June 15.

As it turned out, the Presidential term of office was a rather controversial subject at the Convention.

THE CONSTITUTIONAL CONVENTON: A Plethora of Suggestions

This is clearly demonstrated by examining the debate surrounding what number would be inserted in the blank concerning the number of years a President's term of office would be. The first time a number was introduced to replace the blank was on June 1. It was then when James Wilson, Madison's protégé moved that the blank be replaced by the words, "three years." Wilson also noted that he assumed that the President would also be eligible for reelection. Wilson's motion was supported by some delegates, but Mr. Pinckney moved to replace it with a single (i.e. not eligible for reelection) seven-year term which was supported by Mr. Mason. However, Mr. Bedford "was strongly opposed to so long a term. He favored a three year term with an ineligibility after serving nine years."

The motion for a seven year term passed. The debate over a shorter term with re-eligibility versus a longer single term was revisited several times during July. However, on July 17 Gouverneur Morris appeared to end the debate over a single term. Here is how he argued for re-eligibility:

> "The ineligibility [provision] tended to destroy the great motive to good behavior, the hope of being rewarded by a re-appointment. It was like saying to him, make hay while the sun shines."

In spite of this, one delegate, seemingly moved by the term for federal judges, proposed an executive term of "good behavior". In the end, the delegates reject "good behavior" for the Executive. And then, on July 24, the motions for the President's term became a kind of "bidding" war.

During this debate Davie (North Carolina) suggested an eight year term for the President. Luther Martin (Maryland) moved that the term be eleven years! Gerry (Massachusetts) proposed 15 years! King (Massachusetts) perhaps influenced by his name, was for 20 years(!), arguing that this was "the medium life of princes."[19]

It was the so-called Committee of Eleven on September 4 which proposed the four-year term for the President. It should be kept in mind that many early states were hostile to executive power due to their experiences as colonies. Many state Governors had one year terms. Indeed, this bias kept the delegates from deciding on a single executive until August 6.

For over 200 years the four-year term has rarely been seriously challenged. The first instance of a proposal for a single six-year term occurred in 1826.[20] Since that time there have been 181 such amendments introduced in Congress, but few have been given serious consideration.

There was, during the late 1980's and early 1990's a call for modifying the Constitution to have a single six-year presidential term. These were mainly a reaction to the critics complaining of the "permanent campaign" that seemed to consume politicians during the four-year term. It seemed that no sooner did a candidate win the election than they were visiting New Hampshire to prepare (or merely to become known or to raise funds) for the next

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[19] See, Madison's *Notes of the Debates in the Federal Convention of 1787* (W.W. Norton, 1966, pp. 356-363).

[20] Thomas H. Neale, "Presidential Terms and Tenure: Perspectives and Proposals for Change," CRS Report, 4/15/2019.

presidential election (which began with the New Hampshire Primary).[21] Jimmy Carter endorsed the single six-year term on the grounds that it would free up presidents from being accused of just "playing politics" (so as to get reelected).

Critics of the proposal for a single six-year term argued that it was undemocratic. First, it did not allow candidates (including successful and popular ones) to run for re-election. Second, it made the newly elected President "lame duck" on day one of their term. Perhaps the most succinct criticism was leveled by David C. Nice who argued it was "too long for failed Presidents, and too short for successful ones."[22]

EVALUATION: What is the BEST term?

The fact that since the ratification of the Constitution there have been so few major scandals in the individuals serving as President would seem to affirm the reasoning the Framers used in granting a four-year term for Presidents. Four years has proved to be long enough for Presidents to place their identity on the government, but not so long as to temp them into sordid actions that would spoil their historical imprint. If really liked by the voters, they could be returned to office (until ratification of the 22nd Amendment). With the invention of the modern Presidency (by F.D.R.), there have been fourteen different individuals elected to the Presidency. Of those fourteen Presidents, seven were elected to a second term.[23]

Furthermore, one should be reminded that there was no limit on the number of terms a President could serve. Although President Washington is usually assigned the credit for an informal two-term limit, that was not made official until ratification of the Twenty-second Amendment in 1951). The argument for why the Framers did not include a presidential term limit is the subject of the next *Federalist Paper*.

FEDERALIST PAPER NO. 72: Limiting Terms

Why did the Framers refuse to place any term limit on the President? The answer to that question is the subject of this essay. Publius gives five reasons why the Framers rejected the notion of term limits.

First, Publius asserts that term limits result in a decrease in inducements to good behavior. He argues that few men would act better knowing that at some point their term of office would automatically end than if their service was determined by merit. He based this argument on a fairly strong and reliable factor: human nature. He argues that not even the love of fame (a strong passion) would encourage a man to begin difficult tasks if one knew one must quit before the work is done (and perhaps even undone by his predecessor). In short, the most one could expect (with term limits) is a president trying to keep from doing harm (but no positive or innovative actions).

Second, term limits provide a strong temptation for corrupt acts. A avaricious man might "feel a propensity, not easily resisted by such a man, to make the best use of his opportunities while they lasted, and might not scruple to have recourse to the most corrupt expedients to make the harvest as abundant as it was transitory… ." Likewise, the same man (when no term limits

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[21] It was not lost on candidates for the Presidency that no candidate had been elected without first winning the New Hampshire Primary.

[22] David C. Nice, *Congress and the Presidency*, Vol. 13, 1986, p. 210.

[23] Trump's election in 2024 would make the number eight but there being another President between his two terms, it belongs in its own category.

exist) might seek to continue his honors by his good behavior or "his avarice might be a check on his avarice."

Was Publius correct? In the first century of the Presidency, there was one major presidential scandal: Teapot Dome (involving President Grant whom historians believe to have been a failure as President).[24]

The Twenty-second Amendment (limiting a President to being reelected once) was ratified in 1951. Since then there have been at least three major presidential scandals: Watergate, Iran-Contra, and the Monaca Lewinsky scandal. All three took place at during a second term, or, in the case of Watergate, as a President was seeking (it turned out successfully) a second term.[25]

The third reason Publius gives for endorsing the Framers not placing any term limits on the President is that they would deprive the community of experienced politicians. Publius writes that, "Experience is the parent of wisdom." What comes to mind reading this quote is the one instance in which a President was elected more than twice: the Presidency of Franklin D. Roosevelt. Roosevelt, who is considered by many scholars to be the creator of the modern presidency was elected four times. There would probably be no Twenty-second Amendment without this fact. When Republicans gained control of the Congress in 1946 they wasted little time in proposing that Amendment. Ironically, the first President to be subject to it was Dwight D. Eisenhower, a Republican and one of the most popular Presidents of the modern era.

The fourth reason Publius gives for why the Framers rejected term limits was that there might be peculiar circumstances (maybe emergencies) when the skills of a particular President were desperately needed. He refers to wars or a crisis when the change of an administration would be "detrimental" to the nation by substituting inexperience for experience.

The fifth and final reason Publius gives is that it might disrupt "stability in the administration." That's because Publius argues it would necessitate a change of men which would "necessitate a mutability of measures." Relying, as he often does, on human nature Publius asserts "It is not generally to be expected that men will vary and measures remain uniform." Indeed, he asserts, "the contrary is the usual course of things."

There was a major legislative "term limit" movement in the U.S. during the 1980s. Oklahoma became the first state to amend its Constitution to place term limits on members of the legislative branch.[26] The movement was rachetted up, however, when Arkansas sought, by amending its state Constitution, to place term limits on its national Representatives and Senators. The amendment was approved by the voters. Still, the maneuver was challenged in court and ultimately reached the U.S. Supreme Court.[27] The Supreme Court, however, ruled that the amendment to Arkansas' Constitution was unconstitutional—that is, it violated the U.S. Constitution. On what grounds?

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[24] See the two Schlesinger Polls which relied on about 100 scholars rating the past presidents. The possible ratings were: Great / Near Great / Average / Below Average and / Failure. Grant was rated a failure in both polls.

[25] Given that Donald Trump is currently President he has been omitted from this list. It should be noted, however, that during his first term he was impeached by the House twice. The only other Presidents impeached were Andrew Johnson in 186? (also acquitted, but by a mere one vote). President Clinton was also impeached but the Senate acquitted him.

[26] Most states already had a two term limit on their Governor.

[27] Get name of case.

The Court pointed out that the U.S. Constitution listed three qualifications for being elected to the House or Senate. They were (1) an age qualification (25 in the House and 30 in the Senate); (2) being a citizen for seven years for the House or nine years for the Senate; and (3) being an inhabitant of the state in which they were elected. The Constitutional problem, from the Court's reasoning, was that Arkansas was seeking to add a fourth requirement (not having served more than two terms already in Congress) without actually amending the U.S. Constitution. This, the Supreme Court reasons Arkansas (or any other State) could not do.[28]

The fifth and final reason Publius gave for why it was wise for the Framers to not include term limits on the Presidency was that limiting a president to a number of terms would produce lack of stability in the administration. Here is how it describe the potential problem:

> By necessitating a change of men, in the first office of the nation, it would necessitate a mutability of measures. It is not generally to be expected that men will vary and measures will remain uniform. The contrary is the usual course of things.

He concludes by continuing to display his savvy concerning political behavior. He notes that there is no need to worry about too much stability when change is possible and voters can place their confidence where they may.

In the final portion of the essay he address the question as to what the advantages of term limits would be. Given that he doesn't see any, he lists what others have argued. They are (1) a greater independence in the Executive and (2) greater security to the people. However, concerning the first, he notes that there may always be something to which he would sacrifice his independence. As to the second reason, he replies that a man of "irregular ambition" might excite the public to join in his disgust with not being allowed to run again, resulting in a greater threat to liberty!

FEDERALIST PAPER No. 73: The Qualified Negative

This *Federalist Paper* is devoted to two presidential topics. The first is "compensation" and the second is the veto. Only two paragraphs are devoted to the first with most of the essay devoted to the second.

Publius introduces the first topic as "adequate support for the executive" which is how he briefly discusses a President's pay. The Constitution (Art. II, Sec. 1, Cl. 7) stipulates that the President shall receive a compensation which shall be neither increased nor decreased during his term of office. Publius argues that this provision will support "vigor" in the office of the Executive. Why? Because this guarantee means the President will have no monetary reason to become the mere "puppet" of the Congress.

Most of first part of *Federalist* 73, however, is devoted the President's qualified veto. Actually, the word "veto" is not used in the Constitution. The Constitution refers to congressional votes being "presented" to the President for his "approval". Continuing, it notes that the President may "sign" it or "return it with his objections" to Congress. The "return" is what is typically called a veto. How did Publius defend giving the President this power?

First, Publius notes that legislatures have a tendency to absorb power. In *Federalist Paper No.*48 Publius describes Congress as "an impetuous vortex of power." Thus, without the

[28] The procedures for amending the U.S Constitution are spelled out in Article V. There are four different methods, of which only two have been used.

veto Congress would eventually absorb the powers of the Executive, and even if this were not true, it is theoretically sound to assign this power to the President. This is so because Congress could strip him of his authorities, and gradually absorb his powers. Again, even were this not a real threat it is only reasonable to take such precautions.

Additionally, the veto serves as a shield against improper laws, by protecting citizens from "an impulse unfriendly to the public good" which might happen to influence a majority in Congress. It has been suggested that no "one" individual is wise enough to be allowed this power. But Publius responds that it is not a matter of wisdom in the Executive but of the possibility that members of Congress will not be infallible. That is the secondary reason for assigning the President the veto. The primary reason is the fact that Congress is not infallible. Granted the veto may be used to stop some good laws, but that is the price to pay for stopping many bad laws. Furthermore, it is assumed that the veto will not be used that frequently (even the Kind of England, Publius states, did not use it that much).

Indeed, some have used the argument that it won't be used that much to say therefore, why stipulate it as a presidential power. That is why the Framers relied on the "qualified" veto (to provide a rationale for more frequent use, since it can be overridden). After all, it is unlikely that 2/3's of the House will typically be united in opposing a presidential initiative. But the real power of the device is in "threatening" to use it.

The use of the veto has varied greatly by presidents. Washington, who served two full terms, vetoed two bills (neither of which was overridden by Congress).[29] Grant, the first President to veto a stand-out number of bills vetoed 93! Here are the rates for some other Presidents who seemed use make exertional use of the veto:[30]

Cleveland (1st term) ------ 414
Cleveland (2nd term) ----- 170
T. Roosevelt ---------- 82
F. Roosevelt ---------- 633
Truman ---------- 250
Eisenhower ---------- 181
Kennedy ---------- 21
Johnson ---------- 30
Nixon ---------- 43
Ford ---------- 66
Carter ---------- 31
Reagan ---------- 78
Bush ---------- 44
Obama ---------- 12
Trump ---------- 6

In spite of the above list of abnormal use of the veto, most presidential scholars argue that the real "power" of the veto is the "threat" of issuing a veto.[31] The "threat" is often successful by resulting in Congress changing the legislation such that is becomes palatable to the President. It

[29] P. massive CQ book, p. 451
[30] From Franklin Roosevelt to end, See, Robert E. DiClerico, *The American President* (Prentice-Hall, 1995), p. 90. For earlier Presidents listed, see
[31] Arthur S. Miller, *Presidential Power In A Nutshell*, (West Nutshell Series, 1977), p. 98.

should be pointed out that although Congress passed a line item veto bill in 1997, the Supreme Court declared it unconstitutional in 1998.[32]

Finally, as stipulated in the Constitution, if Congress adjourns during the 10-day period during which a President has the opportunity to veto a bill, the bill is automatically negated by what is called a "pocket veto". In an early "pocket veto" case the Supreme Court ruled that any adjournment that prevented the President from signing a bill (for ten days or more) constituted a "pocket veto" (even if it was not a final adjournment).[33] About a decade later, however, the Supreme Court ruled that during a short recess of Congress, the President could not use the pocket veto.[34]

President Wilson described the veto as a president's most formidable prerogative."[35] However, some have argued that "presidential signing statements" have become an alternative to the veto. These statements, issued by the President when signing a bill, stipulate the President's interpretation concerning controversial provisions of the bill. President George W. Bush made great use of these statements as did President Obama although not as extensively, and so did President Trump.[36] Presidential scholars disagree as to how threatening these signing statements are.[37]

FEDERALIST PAPER NO. 74: The Pardon Power

This *Federalist Paper* is the shortest of the Executive essays, even though Publius touches on three subjects: the Commander-in-Chief role, the Heads of the Departments, and the pardon.

Publius briefly commented on the Commander-in-Chief role in *Federalist* No. 69. While "brief" it was important in that he was down-playing the role by stating *it would amount to nothing more than* supreme command . . . of the military" (emphasis added). Of course, even as early as President Polk, and certainly in the modern (nuclear era) this assessment of the role is demonstrably incorrect.

Concerning the pardon power, Publius asserts a principle: because it is a "kind" power it should have few restrictions. Additionally, the fewer people involved in deciding to pardon, the greater the sense of responsibility; thus, the Framers were wise in assigning the power to pardon to one individual. Publius also address an objection that has been raised to allowing a President to pardon cases of treason without the involvement of Congress. To this objection Publius makes two points. First, he argues that in times of rebellion, a timely pardon to the parties involved could ease the tension (else happen too late to ward off such an act). Second, even were there be a rationale for involving Congress, it would generally act so slowly as to be unable to thwart the event. Finally, Publius engages in a kind of political psychology by arguing that Congress might "harden" a President to resist a pardon and thus lean toward "guilt" to publicly appear strong.

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[32] *Clinton* v. *City of New York* (1998). The case can be found here: 524 U.S. 417 (1998).

[33] *The Pocket Veto Case*, 279 U.S. 655 (1929). See, Sue Davis, *Corwin and Peltason's Understanding the Constitution,* 17th Edition (Thomson, 2008), p. 107.

[34] *Wright v. United States*, 302 U.S. 583 (1938). Ibid.

[35] Joseph Pika, John Maltese, and Andrew Rudalevige, *The Politics of the Presidency* , 10th Ed. (Sage, 2021), pp. 275-276.

[36] Ibid., See, pages 278-279.

[37] Ibid., p. 279.

Prior to the recent pardons issued by President Trump, the most relatable historically memorable example of Publius' argument concerning the pardon power was President Ford's pardon of President Nixon. Ford, in what has become a famous statement in the order in which he pardoned Nixon, in order to end our Nation's long nightmare (i.e. Watergate). As for President Trump's pardon of those who attacked the Capitol in January of 2021, it would appear that the pardons were more for the President's sake than those receiving the pardon. Time will tell.

Finally, Publius merely touches on the "cabinet" by noting that the Constitution stipulates that the President may require the opinion, in writing, of the principal officers of the executive departments on any subject related to their duties. He describes this as a "mere redundancy" since this requirement would be understood by the mere creation of the departments.

FEDERALIST PAPER No. 75: Treaties

This essay is devoted to making treaties. The Constitution stipulates, "[The President] shall have power, by and with the consent of the Senate, to make treaties, provided two thirds of the Senators present concur. . . ." Treaty-making involves a three-step process: (1) the President negotiates a treaty; (2) the Senate may consent to the treaty with a two-thirds vote; and (3) the President (with that consent) may ratify the treaty. One criticism made of this provision was that treaties should be made by either the President alone or the Senate acting alone—but not both. Others, think treating-making should have been assigned to the House of Representatives.

Publius attacks these criticisms by pointing out the uniqueness of treaties. They are unlike laws in that they do not regulate society. They are also not similar to the execution of the laws. Rather, "its object is CONTRACTS with foreign nations that have he force of law but based on "good faith." As such they are "agreements between sovereign and sovereign." And in a moment of complete candor Publius admits that "an avaricious man might be tempted to betray the interests of the state to the acquisition of wealth." Hence the need to add the Senate to the treaty-making authority.

Why, then, not assign treaty-making to the Senate alone? This, Publius asserts, "would have been to relinquish the benefits of the constitutional agency of the President in the conduct of foreign negotiations." While the Senate, were it solely assigned the power, could have turned to the President for his input, the would have had the option of not doing so! Furthermore, the Senator or Senators assigned to negotiate the treaty would not have the same "weight or efficacy" as the President. And having two parties involved in treaty-making would be safer for society as a whole.

Finally, Publius explains why the Framers relied on the approval of treaties by 2/3's of the membership of the Senate instead of 2/3's of those present and voting? An absolute 2/3's would discourage attendance, while requiring 2/3/s of those present would encourage attendance.

TREATIES V. EXECUTIVE AGREEMENTS

One modern development that has impacted the Constitution's treaty power is the "executive agreement." Although the office of the Presidency is routinely described as the most powerful office on the planet, the actual powers specified in the Constitution would not seem to lead to that conclusion. Once one gets past the Constitutional and historical role of Presidents as "Commander-in-Chief, and the power to appoint, one is left with such things as the power to pardon and to adjourn Congress if the two houses cannot agree on a time to adjourn.

In the first sentence of Article II there is a reference to "executive power." It is here that the Supreme Court has found the power to "remove" and "executive privilege", "executive immunity," "executive orders", and "executive agreements."[38] Indeed, while Article II begins with "The executive power shall be vested in a President," Article I begins with "All legislative powers herein granted . . . ." The Supreme Court has taken notice of this difference. The Legislative branch powers are "included" in the Constitution and the word "all" is used in referencing them. On the other hand, concerning the Executive, there is just the rather vague reference to "executive powers" and no modifier indicating that one can know them by reading the rest of the Article.

Thus, when President Franklin Roosevelt swapped 50 overage U.S. destroyers to Great Britain in return for that country granting the U.S. 99-year leases to British bases in Newfoundland and Bermuda (and six additional sites from the Bahamas to British Guiana), he did so by announcing it in a message to Congress.[39] In what was clearly a swipe at the authority of President Roosevelt to make this deal, the New York Daily News wrote that the U.S. "has one foot in the war and the other on a banana peel."[40] Of course, unlike treaties, executive agreements are not mentioned in the Constitution and thus there is no need for the President to obtain Senate approval of them. The Supreme Court upheld the constitutionality of executive agreements in *United States* v. *Pink*.[41]

It should be pointed out that Publius justifies the need for Senate consent to treaties with this reasoning in *Federalist* No. 73:

> When men, engaged in in unjustifiable pursuits, are aware that obstructions may come from a quarter which they cannot control, they will often be restrained by the bare apprehension of opposition from doing what they would with eagerness rush into if no such external impediments were to be feared.
>
> *FEDERALIST PAPER* NO. 76

The Constitution grants the appointment power to the President, which is the subject of this *Federalist Paper*. He must do this with the approval of the U.S. Senate.[42] Much like treaty-making (just discussed) it involves a three-step process: (1) the President nominates someone; (2) the Senate exercises "advice and consent," and (3) the President appoints the individual. Why did the Framers grant this power to one individual? Here is Publius' explanation:

> … 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.

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[38] The courts have done this based, at least partially, on the fact that the Framers introduced the powers of Congress and the Presidency differently in their respective Articles in the Constitution.

[39] This was the famous Destroyer-Base Deal of 1940. See, Thomas Bailey, *A Diplomatic History of the American People,* 10th Edition (Prentice-Hall, 1980), pp. 718-719; Also, Louis Fisher, *Supreme Court Expansion of Presidential Power* (University Press of Kansas, 2017), p. 86. The leases were for 99 years.

[40] Bailey, p. 719.

[41] See, Michael Genovese and Robert Spitzer, *The Presidency and the Constitution* (Palgrave, 2005), p. 167.

[42] The Senate gives its approval by a majority vote.

While some objected that the President's nominee could be rejected, Publius points out that while true, the person ultimately selected will still be the choice of the President. Furthermore, Publius predicts that "it is not very probable that the President's nomination would often be overruled. Publius was right.

For the first 200 years of the Republic, only 15 cabinet nominations were rejected by the Senate. Likewise, during this same period only 27 Supreme Court nominees were rejected.[43] So, it is safe to say that typically, the President "gets his man—or woman." Two things would seem to be at work here. First, it appears a safe conclusion to say that historically Presidents have not nominated ideologues or extremists in making appointments to Departments and the Supreme Court. Second, the simple majority requirement for confirmation in the Senate has not been much of a deterrent in making these appointments. Finally, beginning with the Republican/Democrat Party system, the Senate has been controlled by the same political party as the President's 81% of the time.[44]

How well did Publius see this pattern developing? In the latter portions of *Federalist* No. 76, Publius makes this observation (really, a prediction): "It is also not very probable that [a President's] nomination would be often overruled." While rejections of a President's nominee vary from one President to another and from one era to another, a presidential scholar writing about this described Senate rejections of Presidential nominees as "very unusual."[45] Furthermore, no president since Herbert Hoover has been forced to withdraw more than 1 percent of his nominations, and no president since FDR has had more than six nominations rejected by the Senate.[46]

Publius accurately predicted that it was "not likely" that the Senate would often refuse to approve of the President's nominee "where there were not special and strong reasons for the refusal."[47] Should the Framers, then, have place the appointment power in the President alone? Here is Publius's answer: "The possibility of rejection would be a strong motive to care in proposing."[48]

FEDERALIST No. 77: Appointments and Stability

This is the final essay in the series devoted to the Executive Branch. Publius begins with a concern for stability in that Branch. In doing so he touches on a question that has plagued constitutional scholars since its ratification.

As noted in the previous essay, except for constitutional language to the contrary, President must get the approval of the Senate before making an appointment. The Constitution, however, says nothing about having to obtain the approval of the Senate to remove one of his appointees. This raises some concerns about stability.

This may explain why Publius states the following in the opening to *Federalist* No. 77:

> It has been mentioned as one of the advantages to be

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[43] These calculations were made from, James P. Pfiffner, *The Modern President* (Thomson, 2005), p. 134. They cover the period from 1789-1990.

[44] See, Appendix 7: *Presidents and Congress in Living Democracy* by Daniel Shea, Joanne Green, and Christopher Smith, Living Democracy, 2nd Ed. (Longman, 2011), pp. A39-A40.

[45] Pfiffner, p. 134.

[46] Ibid.

[47] *Federalist* No. 76.

[48] Ibid.

> expected from the co-operation of the Senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as to appoint.

Notice that in the second Publius asserts that just as Presidents are required to get Senate consent to make an appointment, likewise, they would have to get Senate approval to remove an official. Yet, in practice, that has not been the case.

Constitutional scholar Louis Fisher has noted, "From the start it was recognized that all three branches have access to a combination of enumerated and implied powers."[49] Fisher argues that the "power to remove" is one such implied presidential power. The Supreme Court would agree. In a number of cases they have so ruled.

The Supreme Court was involved in the question of presidential removal powers in a 1926 case (*Myers* v. *United States*).[50] President Wilson appointed Myers as Postmaster—his appointment was approved by the Senate. When years later his resignation was demanded he refused and was removed from office on the order of the President. Myers objected, arguing that as the Senate played a role in his appointment, it should have played a role in his removal.

In his opinion upholding President Wilson's removal of Myers, Chief Justice Taft make the following observations. First, he noted that when the first Congress was debating the law affecting all of this it had been pointed out (by Mr. Benson) that as worded it seemed to imply that the Senate approval would be need by a President in removing an official. Benson wanted to reword it so that it did not imply this and who else but Mr. Madison agreed and it was removed. Madison's rationale for agreeing are instructive:

> He wished everything like ambiguity expunged… And therefore seconded the motion. Gentlemen Have all along proceeded on the idea that *the Constitution vests the power in the President …*[51] (emphasis added)

Thus was the precedent established that Presidents did not need Senate approval when removing executive officials.

Following *Myers*, it is clear that the Congress, President Wilson, and the Supreme Court (as indicated in *Myers*) did not agree with Publius' assertion that just as the Senate would be need to appoint, it would likewise be needed to remove.[52] However, in *Humphrey's Executor* v. *United States*, the Supreme Court <u>did</u> require the President getting the Senate's approval before removing an official (see, 295 U.S. 602 (1935). It turns out that Publius was correct, except that for his reasoning to apply, the position involved had to be an important one. The Myers case involved a President removing a Postmaster. In the Humphreys case, it involved a member of an independent regulatory commission (the Federal Trade Commission). The difference between these two case would seem to lie in the word "independent."

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[49] Louis Fisher, *Supreme Court Expansion of Presidential Power* (University Press of Kansas, 2017), p. 17.

[50] 272 U.S. 52 (1926).

[51] Michael Genovese and Robert Spitzer, *The Presidency and the Constitution* (Palgrave, 2005), p. 74.

[52] However, in *Humphrey's Executor* v. *United States*, the Supreme Court did require the President getting the Senate's approval before removing an official (see, 295 U.S. 602 (1935). The distinction made by the Court was that Myers was a lowly Postmaster while Humphrey's was a member of an independent regulatory commission.

Publius also impeached the system used in New York state: combing the Executive with a Council. To this idea, Publius gives four criticisms: (1) it would increase government expense; (2) it would multiply the evils associated with favoritism and intrigue; (3) decrease stability of the administration; and (4) lessen the security against undue executive influence.

As a final thought, Publius addresses the point some have made that he House of Representatives should have had a say in the making of appointments. First, he points out that the House would be too numerous (causing delays and embarrassments) and too fluctuating (due to turnover rates).

FEDERALIST 77: FINAL THOUGHTS

Hamilton must have thought eleven essays on the Executive were enough. So, at the end of the essay he merely refers to the President's remaining powers: (1) giving the State of the Union address; (2) convening Congress upon extraordinary occasions; (3) adjourning Congress when the House and Senate cannot agree on a time for adjournment; (4) receiving ambassadors and other public ministers; (5) faithfully executing the laws; and (6) commissioning all officers of the United States. These, he notes, have caused very little controversy.

In summary, Publius was correct in his predictions 75% of the time and incorrect 25%.

SUMMARY OF PUBLIUS' DESCRIPTION OF PRESIDENTIAL POWERS

Federalist No. 67 – Recess Appointment----------C
Federalist No. 68 – Electoral College----------C+
Federalist No. 69 – "Catch All" (C-in-C)----------I
Federalist No. 70 – Single v. Plural----------C*
Federalist No. 71 – Four-year term ----------C
Federalist No. 72 – Indefinite Re-eligibility----------C
Federalist No. 73 – Pay / Qualified Negative --------C
Federalist No. 74 – Pardon----------C
Federalist No. 75 – Treaties ----------C^
Federalist No. 76 – Appointment----------C
Federalist No. 77 – Removal----------I~

C = Correct
I = Incorrect
-----+ stands for beyond merely correct (in this instance how electors would be chosen)
-----* stands for a "qualified" C due to the modern era "swelling of the presidency"
-----^ stands for the fact that Publius did not anticipate the use of "executive agreements"
-----~ stands for the "removal power" not being specified in the Constitution