

EFFECTIVE BUT LIMITED:  
A CORPUS LINGUISTIC ANALYSIS OF THE ORIGINAL PUBLIC MEANING OF  
EXECUTIVE POWER\*

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*“Nothing since my return to America, has alarmed me so much, as those habits of Fraud, in the use of Language which appear in conversation and in public writings. Words are employed like paper money, to cheat the widow and the fatherless and every honest Man.”—John Adams<sup>1</sup>*

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\*\* Where we quote directly from Founding Era documents, the spelling, punctuation, capitalization, and typeface (where practicable) has been maintained from the original. It should be noted that eighteenth-century writers and publishers generally did not abide by any universal standards in spelling, punctuation, capitalization, and typeface. In the preface to his dictionary, Samuel Johnson lamented that, when he set about the task of compiling entries for his dictionary, he found contemporary speech to be “copious without order, and energetick without rules . . . there was perplexity to be disentangled, and confusion to be regulated; choice was to be made out of boundless variety, without any established principle of selection.” SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 7 (London 1785). A guide to English grammar published at the end of the eighteenth century explained that

Punctuation is the art of marking in writing the several pauses, or rests, between sentences, and the parts of sentences. . . . So the doctrine of punctuation must needs be very imperfect: few precise rules can be given which will hold without exception in all cases; but much must be left to the judgment and taste of the writer.

## INTRODUCTION

“Article II allows me to do whatever I want,” President Donald Trump claimed, without even a whiff of irony.<sup>2</sup> And though even the most fledgling of armchair constitutional scholars will recognize that this statement does not comport with the reality of our constitution or system of governance, exactly what is meant by Article II’s vestment of the “executive power” in the President is a different matter. Though this question may have received more attention as of late, it certainly is not novel. Within a year of the Constitution’s ratification, John Adams opined that “Executive Power is uncertain.”<sup>3</sup> And indeed, of the three branches of the American government, the limits and scope of the executive branch have proven to be the most elusive to scholars and jurists alike. President Barack Obama’s enlistment of the executive order to implement policies that Congress declined to pass, led Congressional Republicans to label him “a dictator who abused his power and disregarded the Constitution.”<sup>4</sup> More recently, President Donald Trump has claimed that he, as President, has a “complete power to pardon,” setting off yet another firestorm of questions surrounding the extent of executive power.<sup>5</sup>

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ROBERT LOWTH, *A SHORT INTRODUCTION TO ENGLISH GRAMMAR* 114–15 (Philadelphia, R. Aitken 1799). For a significantly more comprehensive elucidation on Founding Era punctuation conventions, see Michael Nardella, *Knowing When to Stop: Is the Punctuation of the Constitution Based on Sound or Sense?*, 59 FL. L. REV. 667 (2007).

<sup>1</sup> Nat’l Archives, *From John Adams to Benjamin Lincoln, 19 June 1789*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Adams/99-02-02-0629> (last modified Feb. 1, 2018).

<sup>2</sup> Jason Lemon, *Trump Insists the Constitution’s Article II ‘Allows Me to Do Whatever I Want,’* NEWSWEEK (June 16, 2019), <https://www.newsweek.com/trump-insists-constitution-allows-do-whatever-want-1444235> (last visited Sept. 27, 2019).

<sup>3</sup> Nat’l Archives, *Notes of Debates in the United States Senate July 15, 1789*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Adams/01-03-02-0008-0001> (last modified Feb. 1, 2018).

<sup>4</sup> Carl Hulse, *Trump Follows Obama’s Lead in Flexing Executive Muscle*, N.Y. TIMES (Jan. 26, 2017), <https://www.nytimes.com/2017/01/26/us/politics/donald-trump-barack-obama-executive-orders.html>. During the Obama presidency, House Speaker Paul Ryan remarked, “We have an increasingly lawless presidency where [Obama] is actually doing the job of Congress, writing new policies and laws without going through Congress.” *Id.*

<sup>5</sup> Doug Stanglin, *In 2-hour Tweetstorm, Trump Claims a President’s ‘Complete Power to Pardon,’* USA TODAY (July 22, 2017), <https://www.usatoday.com/story/news/politics/2017/07/22/2-hour-tweetstorm-trump-claims-presidents-complete-power-pardon/501887001/>.

And the question remains: what really *is* executive power? One answer lies in the original meaning of the phrase itself. Importantly, original meaning is not the same as original intent. Put more eloquently by the late Justice Antonin Scalia, “[i]t is the law that governs, not the intent of the lawgiver. . . . Men may intend what they will; but it is only the laws that they enact which bind us.”<sup>6</sup> Whereas the original intent inquiry focuses on the Framers’ expectations and desires, original meaning concerns itself with the “common meaning of the enacted text.”<sup>7</sup> This relatively new form of originalist thinking, dubbed “public meaning originalism,” acknowledges the inherent difficulty (and arguable futility) in attempting to ascertain the Framers’ intentions and instead focuses on analyzing the “communicative content” or linguistic meaning of constitutional text.<sup>8</sup> In the past, scholars have been forced to rely heavily on Founding Era dictionaries and legal texts when analyzing the public meaning of a constitutional phrase.<sup>9</sup> Despite its appeal, this method has been the subject of significant criticism, as neither dictionaries nor legal texts accurately reflect generalized public meaning.<sup>10</sup> However, modern linguistic tools, such as large-scale electronic databases comprised of searchable texts known as corpora, provide a unique opportunity for updated originalist interpretations.<sup>11</sup>

This paper will engage linguistic and historical analysis in an effort to discern the original public meaning of the phrase *executive power* as used in Article II of the United States Constitution. In light of significant modern controversy surrounding the proper limits of executive authority, an original meaning interpretation of this critical phrase will illuminate the executive’s

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<sup>6</sup> Antonin Scalia, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (1997).

<sup>7</sup> *Original Meaning and Its Limits*, 120 HARV. L. REV. 1279, 1279 (2007).

<sup>8</sup> Thomas R. Lee & James C. Phillips, Data-Driven Originalism 7 (Jan. 27, 2018) (unpublished draft) ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3036206](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3036206)); Lawrence B. Solum, *Originalist Methodology*, 84 U. Chi. L. Rev. 269, 275 (2017) (“The key idea is that the participants in the complex process of [constitutional] authorship intended to make the communicative content of the constitutional text accessible to the public at the time the text went through the ratification process.”).

<sup>9</sup> Lee & Phillips, *supra* note 8, at 1.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 1–2. See also *Corpus Linguistics: Readings in a Widening Discipline 1* (Geoffrey Sampson & Diana McCarthy, eds., 2005) (defining “corpus” as “a collection of specimens of a language as used in real life, in speech or writing, selected as a sizeable ‘fair sample’ of the language as a whole or of some linguistic genre, and hence as a useful source of evidence for research on language”). This paper will primarily rely on the beta version of Brigham Young University’s Corpus of Founding Era American English (COFEA). The first of its kind, the COFEA combines a wide variety of Founding Era texts of all genres and contains approximately 150 million searchable words from over 118 thousand texts dating from 1750 to 1800. Lee & Phillips, *supra* note 8, at 1; BYU LAW CORPORA, <https://lawnc1.byu.edu/> (last visited Feb. 26, 2018).

function as it was commonly understood at the time of constitutional ratification. Part I will engage in a linguistic analysis of the phrase *executive power*, drawing primarily on corpus linguistic methodology surrounding the phrase's Founding Era usage. Part II will analyze the history of Article II, with particular attention to the public discourse concerning the scope and reach of the king's powers. Part III will fuse these areas of analysis and propose a synthesized original meaning of the phrase *executive power*. And, finally, Part IV will consider the Supreme Court cases of *Myers v. United States* and *Steel Seizure*, seminal cases of executive power jurisprudence, as well as the public discourse surrounding those cases at the time of their decision.

## I. LINGUISTIC ANALYSIS

Corpus linguistics provides an empirical framework for original meaning analysis. Namely, the extensive word-based data collections allow researchers to track trends in word usage during the Founding Era and beyond. By reviewing lines of text from both sophisticated legal documents and more general writings from the era, researchers can potentially gain insight into the original meaning of a word by tracking the frequency and contextual usages most commonly associated with historical words and phrases across all genres of text. This feature is particularly important in light of "linguistic drift," the idea that the meaning of a word shifts subtly over time, fundamentally altering the way that the word or phrase is perceived by one generation as compared to another.<sup>12</sup> Importantly, linguistic drift may be responsible for disparities between the original meaning of a constitutional phrase and the way that the phrase has been interpreted by courts and scholars in modern times.

The following corpus linguistic research is premised on the hypothesis that the word *executive* has experienced linguistic drift since the 1700s, coloring the modern understanding of executive power as it pertains to the President and creating an ambiguity in the term. Tables 1 and 2 below are illustrative of the shift:

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<sup>12</sup> Solum, *supra* note 8, at 279 ("When a word or phrase is used in its conventional sense, the relevant patterns of usage are those of the linguistic community to which the author belongs at the time the text is written.").

**Table 1**

COFEA: Executive Collocates Left 1

#	Collocates	Freq.	%	All
1	The	10,079	0.11%	9,266,006
2	Supreme	982	7.08%	13,873
3	An	462	0.10%	446,941
4	Legislative	387	3.89%	9,945
5	Whole	93	0.11%	80,994
6	National	92	0.60%	15,222
7	Single	47	0.35%	13,268
8	Chief	45	0.20%	23,046
9	Federal	36	0.46%	7805
10	Hereditary	17	0.91%	1,864
11	Separate	16	0.17%	9,685
12	Natl.	15	7.18%	209
13	Merely	14	0.15%	9,598
14	Judicial	12	0.23%	5,245
15	Provisory	12	30.00%	40
16	Mere	11	0.13%	8,743
17	Correspondent	10	0.67%	1,492
18	Independent	10	0.12%	8,097
19	Provisional	10	0.77%	1,294
20	Supreme	9	5.08%	177
21	Plural	8	3.96%	202
22	Judiciary	7	0.30%	2,368
23	Subordinate	7	0.40%	1,739
24	Tile	7	0.12%	5,957
25	Vigorous	5	0.20%	2,479

**Table 2**

COCA: Executive Collocates Left 1

#	Collocates	Freq.	%	All
1	Chief	8329	11.42%	72,904
2	An	2837	0.15%	1,852,478
3	Former	522	0.40%	131,738
4	County	392	0.41%	94,554
5	Senior	345	0.63%	54,538
6	Top	288	0.18%	159,423
7	Marketing	216	1.00%	21,682
8	Advertising	215	1.24%	17,394
9	Business	196	0.11%	183,197
10	Account	193	0.41%	46,940
11	Company	193	0.11%	178,414
12	Corporate	175	0.56%	31,115
13	Deputy	117	0.71%	16,545
14	Named	113	0.21%	53,603
15	Relations	105	0.26%	40,114
16	Insurance	90	0.18%	48,816
17	Sales	82	0.18%	46,553
18	Industry	77	0.09%	81,294
19	Studio	73	0.28%	26,451
20	Record	73	0.09%	79,454
21	Associate	68	0.42%	16,102
22	Network	67	0.14%	48,168
23	Assistant	61	0.21%	29,113
24	Co-Chief	58	47.54%	122
25	Bank	57	0.09%	63,520

The above tables map collocates of the word *executive*—words that frequently co-occur with the word *executive*.<sup>13</sup> Table 1 provides a list of words that immediately precede the word *executive* in Founding Era texts,<sup>14</sup> whereas Table 2 tracks the same for modern usage.<sup>15</sup> The only word that appears in both lists—*chief*—is highlighted in blue. Although a very simple comparison,

<sup>13</sup> The choice was made to limit the search to the collocates one to the left of *executive* in order to pull modifying adjectives.

<sup>14</sup> Table 1 presents data from the COFEA.

<sup>15</sup> Table 2 presents data from the Corpus of Contemporary American English (COCA), which contains approximately 560 million words from spoken, fiction, popular magazines, newspapers, and academic texts from 1990–2017. CORPUS OF CONTEMPORARY AMERICAN ENGLISH, <https://corpus.byu.edu/coca/> (last visited Feb. 26, 2018) [hereinafter COCA].

potential linguistic drift is immediately apparent from the data. In Table 1, executive’s collocates largely bear governmental connotations, for example: *supreme, independent, national, and federal*. However, the COCA data appear to be dominated by a private sphere connotation, with collocates such as *senior, marketing, advertising, and corporate*. Moreover, a search of *chief executive officer* in the COFEA yields only seven results, all of which refer to the leader of a governmental body.<sup>16</sup> On the other hand, the same phrase in the COCA returns 2,050 results, with the vast majority of hits referencing leaders of private businesses.<sup>17</sup> In fact, in a random sample of 100 COCA hits, 96% referenced leaders of business entities.<sup>18</sup>

This linguistic dichotomy suggests that the modern understanding of executive power as it pertains to presidential power is perhaps colored by a usage of the term *executive* that is exclusive to the modern age—an understanding that is exemplified by the popular campaign catchphrase suggesting that the President should “run the government like a business.”<sup>19</sup> In fact, a corpus-based analysis using Google’s book scanning tool<sup>20</sup> shows that the first recorded use of the phrase “government like a business” appears in the 1920s, with the phrase gaining popularity under President Ronald Reagan in the 1980s.<sup>21</sup> Despite modern political rhetoric’s conflating these two distinct understandings, or senses, of *executive*, the original public meaning of executive power was likely something quite different. And although the thrust of this paper is not an outright comparison of the modern framing of *executive power* with its Founding Era understanding, this shift in meaning is nevertheless relevant to demonstrating why an empirical original meaning analysis of *executive power* is necessary to fully understand the scope of Article II. To that end, the following presents data on the frequency and usage of the phrase *executive power* during the Founding Era as supporting evidence of the phrase’s original public meaning.

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<sup>16</sup> CORPUS OF FOUNDING ERA AMERICAN ENGLISH, <https://lawncf.byu.edu/> (last visited Oct. 1, 2019) (search “chief executive officer”) [hereinafter COFEA].

<sup>17</sup> COCA, *supra* note 15 (search “chief executive officer”).

<sup>18</sup> *Id.* (filter for random sample of 100).

<sup>19</sup> See Philip Bump, *Trump’s Idea to Run the Government Like a Business Is an Old One in American Politics*, WASH. POST (Mar. 27, 2017), [https://www.washingtonpost.com/news/politics/wp/2017/03/27/trumps-idea-to-run-the-government-like-a-business-is-an-old-one-in-american-politics/?utm\\_term=.1b4a3feff9fc](https://www.washingtonpost.com/news/politics/wp/2017/03/27/trumps-idea-to-run-the-government-like-a-business-is-an-old-one-in-american-politics/?utm_term=.1b4a3feff9fc) (tracking the use of the phrase “government like a business” between 1800 and the present).

<sup>20</sup> The Google Book Ngram Viewer searches a corpus of books over user-selected years. GOOGLE BOOK NGRAM VIEWER, <https://books.google.com/ngrams/info> (last visited Sept. 30, 2019).

<sup>21</sup> *Id.*

### A. *Linguistic Methodology*

As a preliminary matter, and as is evidenced by the previous discussion, *executive power* is a polysemous phrase; thus, any meaningful analysis of its usage must recognize and distinguish its various meanings.<sup>22</sup> Corpus linguists differentiate the senses associated with polysemous words and phrases through a process called coding. During the coding process, a word or phrase is searched in an electronic database known as a corpus. The corpus search produces key word in context (KWIC) concordance lines showing snapshots of text containing the searched phrase, thereby allowing the linguistic researcher to glean the sense of the phrase from the words around it. This method is based on the idea that the meaning of a word or phrase is dependent on the context in which it is used—similar to the *noscitur a sociis* rule of statutory construction in law.<sup>23</sup> Based on review of the KWIC concordance lines, different senses are assigned numbers and search results are categorized according to which sense they implicate.

Here, the senses of the phrase *executive power* were coded pursuant to grounded theory methodology—instead of predetermining set categories of senses and conforming the data to those categories, the senses used in this analysis were coded based on the prevailing meanings that emerged during the data review itself.<sup>24</sup> Because of the amorphous nature of the phrase, and in order to record the most nuanced results possible while at the same time avoiding confirmation bias, grounded theory’s more flexible methods were preferable to rigidly pre-set categories based on either dictionary definitions or researcher expectations.<sup>25</sup> In particular, permitting the addition of sense codes proved instrumental in pinpointing the introduction of new applications and uses of *executive power* and matching those developments to historical events.

### B. “*Executive Power*” Frequency Data

Accordingly, the COFEA results for *executive power* were coded according to the following six sense categories based on usage patterns that emerged through ongoing KWIC concordance line review:

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<sup>22</sup> Lee & Phillips, *supra* note 8, at 37. Polysemy occurs when a word is attributed with more than one sense or meaning. *Id.*

<sup>23</sup> NOSCITUR A SOCIIS, BLACK’S LAW DICTIONARY.

<sup>24</sup> See James C. Phillips & Jesse Egbert, *Advancing Law and Corpus Linguistics: Importing Principles and Practices from Survey and Content-Analysis Methodologies to Improve Corpus Design and Analysis*, 2017 BYU L. REV. (forthcoming 2018) (manuscript at 123), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3057415](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3057415). Consistent with accepted methodology, and as a means of quality assurance, should a new category be created, the previous results were reviewed anew to ensure that they did not fit better within the newly created sense code.

<sup>25</sup> *Id.* (comparing methods of linguistic sense coding).

- (1) As belonging to a single elected governmental leader (such as a governor or a President);<sup>26</sup>
- (2) As belonging to the head of a private company;<sup>27</sup>
- (3) As referring to one's autonomy over oneself (akin to willpower);<sup>28</sup>
- (4) As belonging to a body of governmental leaders (such as a council or a legislature);<sup>29</sup>
- (5) As belonging to a king or a hereditary leader;<sup>30</sup>
- (6) As a division of finite governmental power relating to the allocation of responsibilities between governmental branches.<sup>31</sup>

In addition to sense and frequency, the register, or type of source, and year were also recorded for comparison.

The following chart depicts the normalized frequency results across registers of the above described sense coding between 1755 and 1789, displayed by date in five-year increments.<sup>32</sup>

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<sup>26</sup> THOMAS REESE, AN ESSAY ON THE INFLUENCE OF RELIGION IN CIVIL SOCIETY 20 (1788) (“The chief magistrate, who is invested with the supreme executive power, is bound by oath, faithfully and impartially to execute the laws, and govern agreeably to them.”).

<sup>27</sup> Although this connotation did not emerge as a prevailing sense in the COFEA data, it was nevertheless included as a possibility in light of the modern usage of the term and the notion of linguistic drift discussed *supra*.

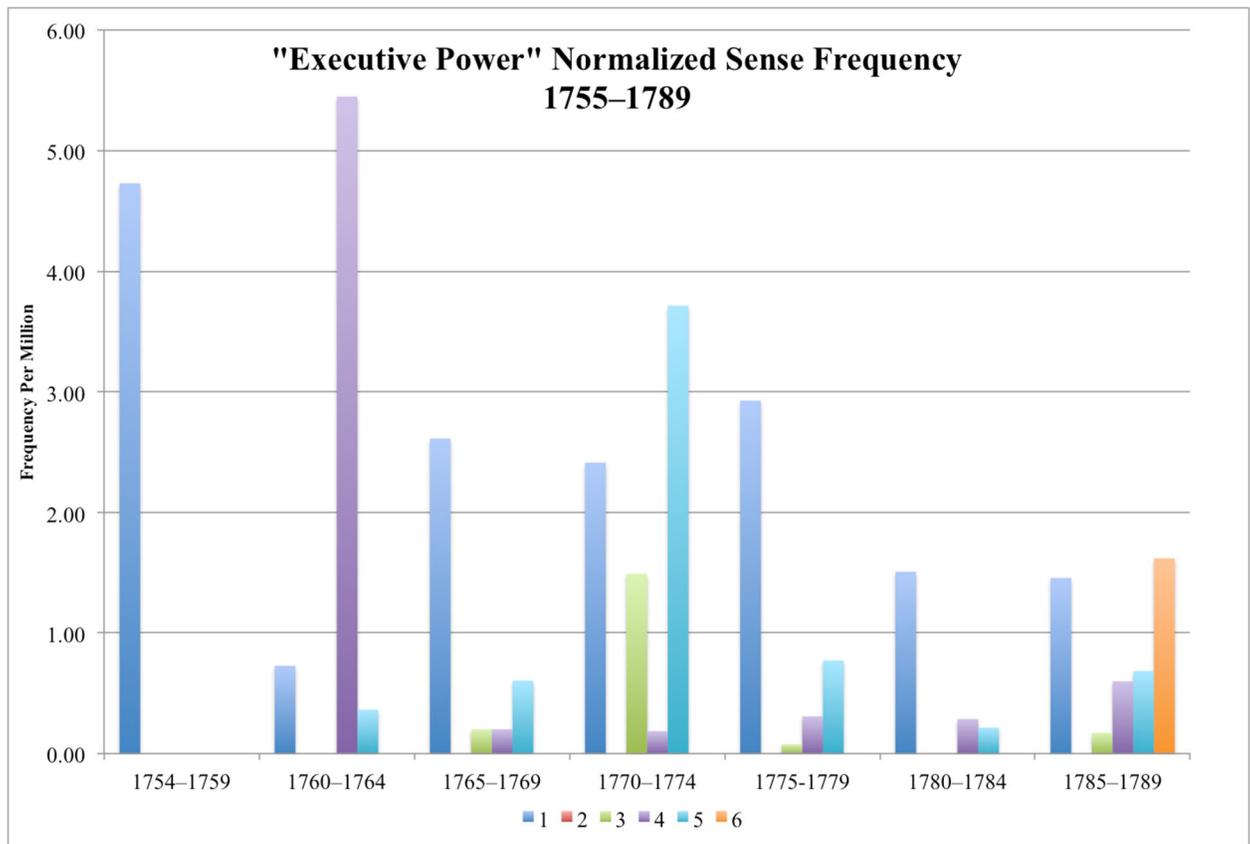
<sup>28</sup> See, e.g., MOSES HEMMENWAY, SEVEN SERMONS, ON THE OBLIGATION AND ENCOURAGEMENT OF THE UNREGENERATE, TO LABOUR FOR THE MEAT WHICH ENDURETH TO EVERLASTING LIFE 19 (1767) (“For in this respect, there is no essential difference, between the unregenerate and the regenerate. The same faculties of understanding and will, and executive power, physically considered, belong to both. No one I think can or will pretend, that these duties are beyond the natural ability of a sinner, provided he has a disposition or will to observe them.”).

<sup>29</sup> See, e.g., JAMES OTIS, A VINDICATION OF THE CONDUCT OF THE HOUSE OF REPRESENTATIVES OF THE PROVINCE OF THE MASSACHUSETTS-BAY: MORE PARTICULARLY, IN THE LAST SESSION OF THE GENERAL ASSEMBLY (1762), <http://name.umdl.umich.edu/N07231.0001.001> (referring to the executive power of the “Governor and Council,” “However, if this was the only instance that ever had happened of such an exertion of the executive power by the Governor and Council, it seems to be very applicable to the right of originating taxes . . .”).

<sup>30</sup> See, e.g., JOSEPH GALLOWAY, A CANDID EXAMINATION OF THE MUTUAL CLAIMS OF GREAT-BRITAIN, AND THE COLONIES: WITH A PLAN OF ACCOMMODATION ON CONSTITUTIONAL PRINCIPLES 7 (1775) (“The King is that representative; and as such is vested with the executive power of the British government.”).

<sup>31</sup> See, e.g., Nat'l Archives, *To Thomas Jefferson from John Adams, 1 March 1789*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Jefferson/01-14-02-0355> (last modified Feb. 1, 2018) (“That greatest and most necessary of all Amendments, the Separation of the Executive Power, from the Legislative seems to be better understood than it once was.”).

<sup>32</sup> A corresponding table displaying the raw results of this review is attached as Appendix 1. Additionally, Appendix 2 displays frequency per million in chart form.



Consistently, sense (1) experienced a relatively high rate of usage as compared to other senses. However, the data show three notable exceptions. First, between 1760 and 1764, sense (4), referring to a body of governmental leaders, dominated the usage of executive power. This usage spike is especially stark when compared to the sense (4) usage frequency in other time periods, which was often among the lowest out of the six senses recorded. Second, between 1770 and 1774, sense (5), referring to the executive power of a king, likewise saw a spike in usage frequency as compared to other senses during that timeframe. And between 1785 and 1789, sense (6), referring to the division and allocation of a finite amount of governmental power, emerged as a new, discrete sense and was used slightly more frequently than sense (1). Finally, the absence of any sense (2) use in Founding Era text is noteworthy, further supporting the notion that “executive power” has experienced linguistic drift in the modern age.

A review of historical events and circumstances helps explain the

statistical anomalies noted above.<sup>33</sup> The high frequency usage of sense (4), occurring in the first part of the 1760s, is possibly attributable to the structure of many colonial governments. For example, Massachusetts' colonial government was comprised of a governor and an executive council, which were jointly endowed with the executive power.<sup>34</sup> Prior to the formation of the Articles of Confederation and, subsequently, the Constitution itself, there appears to have been little discussion of a joint colonial executive power; rather, reference to executive power apart from the British king was largely defined by each colony's governmental structure—some of which were characterized by executive councils, instead of singular governors. This hypothesis is further supported by the fact that many of the early-1760s sources in which *executive power* appeared were election sermons and political speeches geared toward the politics of particular colonies, instead of more sophisticated commentaries on the formation of the American union.<sup>35</sup>

Progressing chronologically, the spike in the early 1770s of sense (5) use, referring to the executive power of the king, correlates to the beginnings of mounting political unrest in the American colonies aimed at Great Britain. Following the Boston Tea Party in 1773 and the passage of the Intolerable Acts, the colonists convened the First Continental Congress in 1774, during which they petitioned King George III for relief from the oppressive acts of Parliament. Thus, colonial leaders during this time purported loyalty to the King while at the same time denouncing the acts and authority of the British Parliament.<sup>36</sup> Accordingly, it follows that the usage frequency of *executive power* referring to the king's authority to address colonial concerns would increase as a result of these historical events.

Finally, sense (6) is not seen until the latter half of the final decade

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<sup>33</sup> The following historical references are meant merely to provide context for the empirical linguistic data. For an in-depth discussion of the significance of these historical events as they relate to the original public meaning of "executive power," see *infra* Part II.

<sup>34</sup> See JAMES OTIS, *supra* note 29, at 28 ("This was an Act which the Governor with the Council had a Right to do; it was a legal and constitutional Exercise of the Powers vested in them; it was an Exertion of the Executive Power of the Government.").

<sup>35</sup> See app. 1.

<sup>36</sup> As an aside, historical debate surrounds whether the rhetoric of "loyalty to the Crown" was merely lip service espoused by colonial leaders in an attempt to manipulate the common people when what the colonial leaders really desired was total independence. See Neil L. York, *The First Continental Congress and the Problem of American Rights*, 122 PENN. MAG. HIST. & BIOGRAPHY 353, 353 (1998) (referencing colonial leader Joseph Galloway's assertion that "[t]he men who had dominated Congress and pushed through the Declaration of Rights were duping the people and manipulating public opinion"). Nevertheless, a focus on the secret, private meaning underlying open, public speak is the job of original intent originalists. To reach the original public meaning, the words must be taken as they would have been understood by their public audience, even if that audience were being manipulated.

surveyed, with the first recorded use in 1785. The emergence of the sixth sense, referring to the allocation of finite governmental power, signifies a shift in the discussion of executive power and the balance of powers more generally. Whereas the prior usages focused largely on the established connotations of executive power as it manifested in a scheme of government—that is, *who* wielded the power—by the late 1780s, the conversation was more focused on the proper scope of the power—that is, *what* is executive power and *how far* does it reach. It is unsurprising then, that this more philosophical use of executive power coincides with the drafting of the Constitution, the beginning of the ratification debates, and the rise of the Federalists and Anti-Federalists.

### C. *The Semantics of Article II*

In addition to the empirical data derived from corpus linguistic studies, linguistic semantics can also provide insight into the original public meaning of constitutional phrases.<sup>37</sup> Although linguists espouse different semantic theories, semantic analysis for the purpose of original meaning in the legal context requires a fact-based inquiry into the “sentence meaning” of the constitutional text.<sup>38</sup> Whereas scholars of original intent originalism are concerned with the speaker’s meaning—that is, what the Framers of the Constitution *wanted* by the phrase *executive power*—the sentence meaning is the primary concern of scholars focused on public meaning—that is, what the Framers *actually said* according to the ordinary rules of grammar and construction when they chose to write Article II in the way that they did.<sup>39</sup> By focusing on objective clues, such as sentence structure and word choice, the resulting linguistic analysis is further removed from normative considerations, and, therefore, arguably more indicative of original public meaning.

Notably, the first sections of Articles I, II, and III provide for the vesting of the legislative, executive, and judicial powers respectively.<sup>40</sup> However, the

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<sup>37</sup> See Lawrence B. Solum, *Semantic Originalism* 28 (Univ. of Ill. Research Paper Series No. 07-24, 2008), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120244](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244). Because the authenticity of constitutional typography and syntax is largely uncontroverted, this paper assumes that the portions of the Constitution discussed *infra* are free from scrivener’s errors, and accurately reflect the original constitutional text. See *id.* at 28–29.

<sup>38</sup> *Id.* at 36–37 (“Meanings in the semantic sense are facts determined by the evidence. They are not courses of action adopted on the basis of normative concerns.”).

<sup>39</sup> See PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 120 (1989); see also Solum, *supra* note 37, at 35 (defining “*sentence meaning*” as “the conventional semantic meaning of the words and phrases that constitute the utterance”).

<sup>40</sup> U.S. CONST. art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1.

structure of each of these sections is decidedly different. For example, only Article I qualifies the scope of the power it vests, stating, “*All legislative Powers herein granted* shall be vested in a Congress of the United States.”<sup>41</sup> The limiting language “*herein granted*” implies that Congress is restricted to exercising only those legislative powers enumerated in the Constitution. Article II on the other hand merely notes that “[t]he executive power shall be vested” without any similarly restrictive language.<sup>42</sup> In fact, Article II’s Section 1 is the only of the three not to include qualifying language, as Article III provides for “the judicial Power of the United States.”<sup>43</sup> Furthermore, the singular form of *power* in Article II is significant. First, the singular form suggests that executive power is viewed collectively as a unit, as opposed to the fragmented or divisible sense of legislative power present in Article I.<sup>44</sup> And, secondly, the singular form in the context of the sentence implies that the entirety of the executive power is vested in the President, again standing in stark contrast to the apportioned grant of legislative power in Article I.

Indeed, these purposeful distinctions are highlighted in some of the earliest Federalist interpretations of the constitutional scope of the executive power. In John Adams’ 1789 notes from a congressional discussion of the President’s removal powers, he noted, “There is an explicit grant of Power to the President . . . The Executive Power is granted—not the Executive Powers hereinafter enumerated and explained.”<sup>45</sup> Similarly, in his 1791 *Pacificus* essays, Alexander Hamilton cited the syntactical composition of Article II in defense of his argument for an expansive executive power, relying heavily on “[t]he different mode of expression employed in the constitution in regard to the [Legislative and the Executive].”<sup>46</sup> This early attention to syntactic and typographical

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<sup>41</sup> U.S. CONST. art. I, § 1 (emphasis added).

<sup>42</sup> *Id.* art II, § 1.

<sup>43</sup> U.S. CONST. art. III, § 1 (emphasis added).

<sup>44</sup> The concept of a singular, natural executive power is reminiscent of early uses of “executive power” to refer to the hereditary power of the King. See discussion *supra* Section I.A.

<sup>45</sup> Nat’l Archives, *[Notes of Debates in the United States Senate] July 15, 1789*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Adams/01-03-02-0008-0001-0001> (last modified Feb. 1, 2018) (discussing the scope of the President’s removal power).

<sup>46</sup> Nat’l Archives, *Pacificus No. 1*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Hamilton/01-15-02-0038> (last modified Feb. 1, 2018). Relevantly, Hamilton explains

It would not consist with the rules of sound construction to consider this enumeration of particular authorities as derogating from the more comprehensive grant contained in the general clause, further than as it may be coupled with express restrictions or qualifications . . . The different mode of

interpretation by the Founders themselves further supports the importance of semantic linguistic analysis in deciphering constitutional meaning.

Interestingly, however, the strict textual reading of Article II avowed by the Federalists in support of their arguments for an expansive executive vested in a singular President seems somewhat at odds with the corpus linguistic data previously discussed, in particular the high frequency usage of sense (4) referring to a shared executive power. Accordingly, although the syntax of the final version of Article II's grant of executive power does facially suggest a general grant of power "subject only to the *exceptions* and *qu[a]lifications* which are expressed in the [Constitution]" as the Federalists argued,<sup>47</sup> the frequency data suggest that the public's understanding of the executive power may not have been limited to such a discrete and compartmentalized allocation.<sup>48</sup> Indeed, the New Jersey Plan presented at the Constitutional Convention in 1787 referred to an elected "federal Executive to consist of [some number of] persons," and consistently refers to a plural number of executives.<sup>49</sup> And, even the competing Virginia Plan, which advocated a single executive, nevertheless suggested a shared executive power. For example, the Virginia Plan outlined an executive council of sorts that would function as a check on the legislature, proposing that "the Executive *and a*

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expression employed in the constitution in regard to the two powers the Legislative and the Executive serves to confirm this inference. In the article which grants the legislative powers of the Govern. the expressions are—"All Legislative powers herein granted shall be vested in a Congress of the UStates;" in that which grants the Executive Power the expressions are, as already quoted "The Executive Po(w)er shall be vested in a President of the UStates of America." The enumeration ought rather therefore to be considered as intended by way of greater caution, to specify and regulate the principal articles implied in the definition of Executive Power; leaving the rest to flow from the general grant of that power, interpreted in conformity to other parts (of) the constitution and to the principles of free government. The general doctrine then of our constitution is, that the Executive Power of the Nation is vested in the President; subject only to the *exceptions* and *qu[a]lifications* which are expressed in the instrument.

*Id.* In addition to expressing his view in political circles, Hamilton's essays were published in newspapers and were, thus, widely available to the public.

<sup>47</sup> *Id.*

<sup>48</sup> See *supra* note 34 and accompanying text.

<sup>49</sup> *Madison Debates: June 15*, AVALON PROJECT, [http://avalon.law.yale.edu/18th\\_century/debates\\_615.asp#9](http://avalon.law.yale.edu/18th_century/debates_615.asp#9) (last visited Mar. 25, 2018).

*convenient number of the National Judiciary, ought to compose a Council of revision with authority to examine every act of the National Legislature before it shall operate.*<sup>50</sup>

Moreover, as noted above, sense (4) usage often aligned with references to colonial governmental structures. Similarly, parallels to these governments were drawn by political leaders at the Constitutional Convention, suggesting that colonial executive structures influenced the way in which the Framers understood the power of the executive. For example, James Madison recorded in his account of the Constitutional Convention debates a commentary on Federalist delegate James Wilson's advocacy of a single executive power, noting the fact that colonial governments often shared executive power between a chief magistrate and a council,

[I]n each State a single magistrate was placed at the head of the Govt. It was so [Mr. Wilson] admitted, and properly so, and he wished the same policy to prevail in the federal Govt. But then it should be also remarked that in all the States there was a Council of advice, without which the first magistrate could not act. A council he thought necessary to make the establishment acceptable to the people. Even in G. B. the King has a Council; and though he appoints it himself, its advice has its weight with him, and attracts the Confidence of the people.<sup>51</sup>

In addition to harkening back to the governmental structures of the colonies, many other iterations of shared executive power were proposed and debated at the Convention.<sup>52</sup> And, interestingly, early versions of Article II contemplating a single executive were often characterized by extremely limited

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<sup>50</sup> *Madison Debates: May 29*, AVALON PROJECT, [http://avalon.law.yale.edu/18th\\_century/debates\\_529.asp#rand](http://avalon.law.yale.edu/18th_century/debates_529.asp#rand) (last visited Mar. 25, 2018) (emphasis added).

<sup>51</sup> *Madison Debates: June 4*, AVALON PROJECT, [http://avalon.law.yale.edu/18th\\_century/debates\\_604.asp](http://avalon.law.yale.edu/18th_century/debates_604.asp) (last visited Mar. 25, 2018). It is of further note that the chief magistrate in these colonial governments lacked significant executive authority and, accordingly, was essentially powerless outside of the authority granted to him by the colony's legislature. Nat'l Archives, *To George Washington From Joseph Reed, 17 May 1781*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/99-01-02-05811> (last modified Feb. 1, 2018) (stating that the legislature's refusal to authorize the colonial executive's emergency power left the executive in a "state of imbecility" and "without powers . . . to answer the publick expectations").

<sup>52</sup> *E.g., Madison Debates: June 6*, AVALON PROJECT, [http://avalon.law.yale.edu/18th\\_century/debates\\_606.asp](http://avalon.law.yale.edu/18th_century/debates_606.asp) (last visited Mar. 25, 2018) (proposing that the executive power be shared "with a convenient number of the National Judiciary").

language, more similar to the final version of Article I. Importantly, the final draft of Article II that was produced by the Constitutional Convention and presented to the Committee of Detail provided,

That a national executive be instituted, to consist of a single person, to be chosen by the national legislature for the term of seven years, to be ineligible a second time, with power to carry into execution the national laws, to appoint to offices in cases not otherwise provided for, to be removable on impeachment and conviction of malpractice or neglect of duty, to receive a fixed compensation for the devotion of his time to the public service, to be paid out of the national treasury.<sup>53</sup>

Here, the structure of the proposal provides for a “national executive . . . with power to [perform certain tasks],” standing in stark contrast to the final version of Article II which vests “the executive power” as a single, all-encompassing unit in the President. Thus, early versions of Article II point out a subtle linguistic tension between the meaning and usage of the word *power*—that is, power meaning the duty to complete specific acts versus power as a grant of discretionary authority. And although the latter meaning is seemingly memorialized in the final text of Article II, the robust debate surrounding the allocation of executive power and the draft produced by the Convention at large calls into question whether, as a matter of *public meaning*, the plain text of Article II created by the Committee of Detail aligns with the way the phrase was understood in Founding Era discourse.<sup>54</sup>

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<sup>53</sup> WILLIAM M. MEIGS, THE GROWTH OF THE CONSTITUTION IN THE FEDERAL CONVENTION OF 1787: AN EFFORT TO TRACE THE ORIGIN AND DEVELOPMENT OF EACH SEPARATE CLAUSE FROM ITS FIRST SUGGESTION IN THAT BODY TO THE FORM FINALLY APPROVED, 197–98 (1900); Other early versions of Article II-like provisions contained similarly limited language. See, e.g., *Madison Debates: June 18*, AVALON PROJECT, [http://avalon.law.yale.edu/18th\\_century/debates\\_618.asp](http://avalon.law.yale.edu/18th_century/debates_618.asp) (last visited Mar. 25, 2018) (stating “[t]he authorities & functions of the Executive to be as follows”); *Madison Debates: June 19*, AVALON PROJECT, [http://avalon.law.yale.edu/18th\\_century/debates\\_619.asp](http://avalon.law.yale.edu/18th_century/debates_619.asp) (last visited Mar. 25, 2018); *Madison Debates: June 13*, AVALON PROJECT, [http://avalon.law.yale.edu/18th\\_century/debates\\_613.asp](http://avalon.law.yale.edu/18th_century/debates_613.asp) (last visited Mar. 25, 2018).

<sup>54</sup> This conclusion is further bolstered by evidence that the final language of Article II is the product of committees, which were heavily influenced by three key Federalists, and not larger Convention-wide debate. Morton J. Frisch, *Executive Power and Republican Government—1787*, 17 PRESIDENTIAL STUD. Q. 281, 282 (1987). Scholars have pointed to this evidence as a means to argue that the seemingly broad language of the vesting clause was a deliberate attempt by

## II. HISTORICAL ANALYSIS

The corpus linguistic data discussed above demonstrates that the meaning of the phrase *executive power* evolved somewhat in the decades before the drafting of the Constitution. The shifting senses of the phrase, as mentioned above, correlate with events and circumstances in the Founding Era, the outcomes of which influenced future meanings of the phrase. Thus, without an understanding of the historical backdrop against which these meanings evolved, the empirical data alone is meaningless.

So, it stands to reason that in attempting to define the phrase, courts and scholars alike generally cannot, and arguably should not, dispense with an analysis of colonial American history leading up to the American Revolution. These analyses often focus on the colonists' supposed rebellion against King George III and the Framers' subsequent attempts to rein in the power of the executive branch to prevent the rise of a king-like executive.<sup>55</sup> However, some historians contend that the colonists rebelled not against the Crown but against Parliament.<sup>56</sup> And of course, convincing evidence exists to support both positions; indeed, it appears that even the delegates to the Constitutional Convention disagreed as to the impetus for the colonial rebellion.<sup>57</sup> The following analysis proceeds on the theory that neither view was ascribed to universally—that some colonists believed they were rebelling against the king, while some believed they were rebelling against Parliament—and argues that the original meaning of *executive power* must be informed not only by the more immediate events leading

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Federalist drafters to sneak in broad language that could later be used to justify an expansive executive authority. Thomas S. Langston & Michael E. Lind, *John Locke and The Limits of Presidential Prerogative*, 24 *POLITY* 49, 53–54 (1991).

<sup>55</sup> Interestingly, some decisions argue the exact opposite—that the Framers had no intention of weakening the power of the executive. *See, e.g.*, *Morrison v. Olson*, 487 U.S. 654, 698–99 (Scalia, J., dissenting) (“The major ‘fortification’ provided [to the executive branch], of course, was the veto power. But in addition to providing fortification, the Founders conspicuously and very consciously declined to sap the Executive’s strength in the same way they had weakened the Legislature: by dividing the executive power.”).

<sup>56</sup> *See, e.g.*, ERIC NELSON, *THE ROYALIST REVOLUTION* (2014). Nelson posits that “[t]he American Revolution, unlike the two seventeenth-century English revolutions and the French Revolution, was—for a great many of its protagonists—a revolution against a legislature, not against a king. It was, indeed, a rebellion in favor of royal power.” *Id.* at 2.

<sup>57</sup> *See id.* Edmund Randolph of Virginia, in response to the proposal to vest the executive power in one person, remarked that the Americans, “having just rebelled against the British Crown, had ‘no motive to be governed by the British Government as our prototype.’” *Id.* James Wilson of Pennsylvania responded that “[t]he people of America did not oppose the British King but the parliament—the opposition was not against an Unity but a corrupt multitude.” *Id.*

up to the American Revolution, but also by contemporary political theory and events in British history that shaped early Americans' understanding of the phrase. To that end, it is helpful to briefly consider the relevant theory and events in order to contextualize Founding Era discussions of executive power.

*A. Executive Power in Theory and in Practice*

The Framers and colonial Americans as a whole were certainly familiar with and influenced by the political theorists of the seventeenth and eighteenth centuries, though the works of three such theorists—John Locke, Baron de Montesquieu, and Jean Jacques Rousseau—figure more prominently in the discussion of executive power than others.<sup>58</sup> A more thorough discussion of their writings can be found elsewhere; here, we simply wish to introduce the basic principles of these theorists, focusing on their treatment of the executive power and recurrent themes present in the works that later surfaced in the American discourse.

*1. John Locke's Two Treatises of Government*

First published in 1690, John Locke's *Two Treatises of Government* begins with the proposition that all men are subject to the laws of nature, but within the confines of those laws, men are free to act as they see fit and to do with their property as they wish.<sup>59</sup> However, natural law prohibits any man from harming the life, health, liberty, or possessions of any other man.<sup>60</sup> In the natural state, man has two powers: the power to do whatever is necessary for the preservation of self and of others and the power to punish crimes committed in violation of natural law.<sup>61</sup> Locke describes this power to punish as the means by which the execution of the law of nature is accomplished.<sup>62</sup>

To move from the state of nature into civil society, individuals must

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<sup>58</sup> It is worth noting that the works of William Blackstone were also influential. Indeed, Sir Edmund Burke of the House of Commons, a leading proponent of the colonists' cause in Parliament, commented on the ubiquity of Blackstone's *Commentaries on the Common Law* in the American colonies, asserting that as many copies of the treatise were sold in the colonies as in England. ERIC STOCKDALE & RANDY J. HOLLAND, MIDDLE TEMPLE LAWYERS AND THE AMERICAN REVOLUTION 15 (2007). However, Blackstone was greatly influenced by the works of Montesquieu—so much so that scholars have commented that Blackstone's "plagiarism would be nauseating if it were not comic." M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 112 (Liberty Fund 1998) (1967). Thus, we have elected not to include in this article a separate analysis of Blackstone's influence on the colonists.

<sup>59</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT 122 (Thomas L. Cook ed., Hafner Publishing Company, Inc. 1947) (1690).

<sup>60</sup> *Id.* at 123.

<sup>61</sup> *Id.* at 185.

<sup>62</sup> *Id.* at 124.

relinquish a portion of that power possessed in the natural state; the first power, “he gives up to be regulated by laws made by the society,” and the second he relinquishes in its entirety to “the executive power of the society.”<sup>63</sup> For Locke, laws governing a society cannot be enacted without the consent of that society; the legislative power is derived from the people, who must grant that power voluntarily.<sup>64</sup> The legislature is created by “the first and fundamental law” of any society and has only so much power as the members of that society have conveyed to it.<sup>65</sup> And to ensure that the laws enacted by the legislature have teeth, “there should be a power always in being which should see to the execution of the laws that are made and remain in force.”<sup>66</sup> Locke emphasizes that the legislative and executive powers must be separate in order to prevent those who enact the laws from exempting themselves “from obedience to the laws they make and suit[ing] the law, both in its making and execution, to their own private advantage . . . .”<sup>67</sup>

Thus begins Locke’s earnest analysis of the executive power.<sup>68</sup> At its core, the executive power is simply the power to execute the laws.<sup>69</sup> Ultimately, Locke posits that the executive’s primary aims are to protect the people’s property and to promote the public good. Indeed, when the people turn over their natural executive power to their government, a contract is created, by which the executive agrees to further these goals.<sup>70</sup> Where the executive neglects these aims or otherwise acts contrary to his agreement with the people, then the executive has forfeited his authority, and the executive power reverts to the people.<sup>71</sup>

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<sup>63</sup> *Id.* at 185–86.

<sup>64</sup> *Id.* at 188, 193. “[T]he legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative when they find the legislative act contrary to the trust reposed in them . . . .” *Id.* at 196.

<sup>65</sup> LOCKE, *supra* note 59, at 188–89 (“[F]or [the legislative] being but the joint power of every member of the society given up to that person or assembly which is legislator, it can be no more than those persons had in a state of nature before they entered into society and gave up to the community.”).

<sup>66</sup> *Id.* at 195.

<sup>67</sup> *Id.* at 194.

<sup>68</sup> Locke notes that a third power, which he terms the federative power, exists in every government. This power “contains the power of war and peace, leagues and alliances, and all the transaction with all persons and communities without the commonwealth.” *Id.* at 195. According to Locke, the federative power and the executive power are almost always united; to place the powers in the hands of two distinct persons or bodies runs the risk that those two persons might act separately, resulting in “disorder and ruin.” *Id.*

<sup>69</sup> *Id.* at 195

<sup>70</sup> LOCKE, *supra* note 59, at 246.

<sup>71</sup> *Id.* at 246–47.

## 2. Baron de Montesquieu's Spirit of the Laws

Building on Locke, Montesquieu, in his *Spirit of the Laws*, writes that all men are subject to the laws of nature, although Montesquieu holds that man in his natural state feels nothing but impotence, weakness, and fear.<sup>72</sup> Men lose this weakness and fear upon entering society, which cannot exist absent some form of government.<sup>73</sup> And again, like Locke, Montesquieu identifies two categories of power present in every government: legislative power and executive power. He subdivides executive power into executive power over foreign affairs and executive power to execute laws.<sup>74</sup> The first type of executive power, that over foreign affairs, encompasses the powers to make peace and war, send and receive ambassadors, establish the public security, and protect the society against invasion.<sup>75</sup> Montesquieu further subdivides the latter type of executive power into the power to execute the laws—termed the executive power of the state—which is employed to punish crimes, and the judiciary power, which is used resolve disputes between individuals.<sup>76</sup> While Montesquieu emphasizes the necessity of the separation of these powers to protect against arbitrary action on the part of any one of the three powers,<sup>77</sup> he also proffers that the executive should have, in the form of the legislative veto, the power to stop any encroachments made by the legislature.<sup>78</sup> Interestingly, this power does not cut both ways: Montesquieu posits

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<sup>72</sup> BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS*, VOL. I, at 6 (Dublin, 1761).

<sup>73</sup> *Id.* at 6–7.

<sup>74</sup> *Id.* at 185.

<sup>75</sup> This power is analogous to Locke's federative power. *See* note 68, *supra*.

<sup>76</sup> MONTESQUIEU, *supra* note 72, at 185.

<sup>77</sup> As Montesquieu explains:

When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be then no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave will all the violence of an oppressor.

*Id.* at 185–86.

<sup>78</sup> *Id.* at 193. In Montesquieu's view, this power is necessary to ensure the preservation of the executive's prerogative. *Id.* at 195. However, because the executive should have no share in the legislative power other than the power to veto, Montesquieu notes that the executive should exclude itself from public debates and should not propose legislation. *Id.* at 196.

that “as the execution has its natural limits, it is useless to confine it.”<sup>79</sup> Instead, the legislature has some authority to direct the power of the executive and a right to assess the means by which the executive is executing the laws.<sup>80</sup> He identifies potential danger “[i]f the legislature leaves the executive power in possession of a right to imprison those subjects who can give security for their good behaviour,”<sup>81</sup> thereby implying that, while the executive has the discretion to imprison citizens as it sees fit, the legislature has the right to curb that discretion.<sup>82</sup> Montesquieu also identifies several specific powers, which serve as checks on the other branches, reserved to the executive.<sup>83</sup>

### 3. *Jean Jacques Rousseau’s Social Contract*

Finally, in his *Social Contract*, Rousseau expresses the view that citizens of a society comprise the sovereign power of the society and that people exercise a “general will” to direct the state to further the “common good.”<sup>84</sup> As part of this sovereign power, the people have entered into a social contract, the aim of which is to “defend and protect with the whole common force the person and goods of each associate . . . .”<sup>85</sup> This sovereignty, secured by the social contract, is both inalienable and indivisible.<sup>86</sup> But unlike Locke and Montesquieu, Rousseau rejects the idea of the separation of powers<sup>87</sup>—the sovereign, again, is indivisible—but he accepts the fact that the functions of the government are, in fact, distinguishable.<sup>88</sup> These functions are the executive power and the legislative power.<sup>89</sup>

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<sup>79</sup> *Id.* at 193.

<sup>80</sup> *Id.* at 193. Although the legislature has the power to examine the way in which the executive executes the laws, it has no power to judge the person of the executive himself. *Id.*

<sup>81</sup> *Id.* at 188.

<sup>82</sup> MONTESQUIEU, *supra* note 72, at 188. Montesquieu also holds that the legislature can authorize the executive to imprison persons suspected of conspiring against the state. *Id.*

<sup>83</sup> These powers include the executive’s prerogative to regulate the assemblage of the legislature and to command the society’s army. *Id.* at 192, 196–97. According to Montesquieu, the legislature should not be assembled indefinitely. Such a circumstance, he posits, would deprive the executive of much of its work and leave it with too little to do, resulting in an executive obsessed with consolidating and defending its power. *Id.*

<sup>84</sup> JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 18 (G.D.H. Cole trans., 1762).

<sup>85</sup> *Id.* at 10. Blackstone alluded to the idea of a contract between the executive and the society over which it presides, explaining that, in exchange for the executive’s protecting the community, every individual in that community owes a duty and allegiance. WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND: BOOK THE FIRST* 229 (London, Clarendon Press 1765).

<sup>86</sup> ROUSSEAU, *supra* note 84, at 18–19.

<sup>87</sup> *Id.* at 19.

<sup>88</sup> VILE, *supra* note 58, at 196.

<sup>89</sup> ROUSSEAU, *supra* note 84, at 69.

In Rousseau’s view, the legislative power is supreme;<sup>90</sup> it constitutes the general will of the people, and only from this general will can the law radiate.<sup>91</sup> The executive power, on the other hand, “is only the force that is applied to give the law effect.”<sup>92</sup> Government, then, is “the legitimate exercise of the executive power, and [the] prince or magistrate, the man or the body entrusted with that administration.”<sup>93</sup> Like Montesquieu, Rousseau is emphatic in his belief that the executive should have no part in the functions of the legislature.<sup>94</sup>

These three works share common threads that exerted significant influence on Americans, both before and after the Revolutionary War. First and foremost was the idea that executive power, at its most fundamental, is the power to execute the laws. Americans’ understanding of executive power fused various concepts drawn from these philosophers—most prominently, an aversion to the application of arbitrary power and an acknowledgment of a social contract—shaped and refined by recent events, both in the colonies and at home in Britain. In the eyes of the colonists, the king, in whom the executive power vested, was the father of his people, the guardian of their rights and liberties.<sup>95</sup> The king

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<sup>90</sup> *Id.* “The legislative power is the heart of the State; the executive power is its brain, which causes the movement of all the parts.” *Id.* Rousseau goes on to note that, while a person can survive without his brain, once his heart ceases to function, the person dies. In the same manner, a government can survive with a “paralyzed” brain, i.e., an incapacitated executive, but, without its heart—the legislature—the government is doomed. *Id.*

<sup>91</sup> *Id.* at 70 (“The Sovereign, having no force other than the legislative power, acts only by means of the laws . . .”).

<sup>92</sup> *Id.* at 75. This language appears numerous times in the ratification debates.

<sup>93</sup> *Id.* at 43.

<sup>94</sup> *Id.* at 31. Rousseau echoes those concerns expressed by Montesquieu:

[F]or if he who holds control over men ought not to have command over the laws, he who has command over the laws ought not any more have it over men; or else his laws would be the ministers of his passions and would often merely serve to perpetuate his injustices: his private aims would inevitably mar the sanctity of his work. . . . He, therefore, who draws up the laws has, or should have, no right of legislation, and the people cannot, even if it wishes, deprive itself of this incommunicable right, because, according to the fundamental compact, only the general will can bind the individuals, and there can be no assurance that a particular will is in conformity with the general will, until it has been put to the free vote of the people.

*Id.*

<sup>95</sup> Perhaps drawing from Locke’s idea that fathers exert authority over their children by the vestiges of “that executive power of the law of nature which every free man naturally hath,” the American colonists often analogized the king to a father. LOCKE, *supra* note 59, at 157. As the

derived his power from a contract with the people in which he promised to preserve their laws, rights, and privileges. When the king wielded this power in an arbitrary manner, that is, however he so pleased,<sup>96</sup> the contract between the king and his people was destroyed—the king no longer held the executive power.<sup>97</sup>

#### 4. *A (Brief) History of Monarchical Overreach*

Kings Charles I, James II, and, later, George III shared an experience that makes them unique among British monarchs—a forced relinquishment of power (or at least some of that power). The crux of the charges levied against both Charles and James boiled down to essentially identical accusations—misuse of the executive power and the royal prerogatives<sup>98</sup> in violation of their contract with

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father of his people, the king had a duty to respect the rights and liberties of his people, but, because he wore the crown, his duty extended beyond merely respecting those rights—he was required to defend them. This duty flowed from the king’s compact with his people, as evidenced by his coronation oath. *See* John Hancock, *Oration Delivered at Boston (Mar. 5, 1774)*, in *PRINCIPLES AND ACTS OF THE REVOLUTION IN AMERICA* 12, 13 (H. Niles ed., Baltimore 1822) (“those rights and liberties which, as a father, [King George III] ought ever to regard, and as a king, he is bound, in honor, to defend from violations, even at the risque of his own life”); Moses Mather, *America’s Appeal to the Impartial World (1775)*, in *POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, VOL. I (1730-1788)*, at 305, 311 (Ellis Sandoz ed., Liberty Fund ed. 1998) (“the king’s coronation oath, whereby he swears *to protect his subjects in all their just rights*, to abjure popery, and maintain the protestant religion, to govern the kingdom and administer justice according to the laws of the realm”) (emphasis added); *AMERICAN ALARM* 6 (D. Kneeland & N. Davis, Boston 1773) (“[T]he prosperity of the people intirely depends upon . . . the King’s preserving inviolable firm (according to his coronation oath) the laws, rights, and previledges of the subjects . . .”).

<sup>96</sup> Locke defines the exercise of arbitrary power as “governing without standing laws.” *LOCKE*, *supra* note 59, at 190.

<sup>97</sup> *See, e.g.*, Samuel Sherwood, *Scriptural Instruction to Civil Rulers*, in *POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA*, *supra* note 95, at 264, 268.

Subjects have rights, privileges and properties; and are countenanced and supported by the law of nature, the laws of society, and the law of God; in demanding full protection in the enjoyment of these rights, and the impartial distribution of justice, from their rulers. And when rulers refuse these, and will not comply with such a reasonable and equitable demand from the subject; the society is dissolved; and its fundamental laws violated and broken; and the relation between the ruler and the subject ceases, with all the duties and obligations that arose from it.

*Id.*

<sup>98</sup> *See infra* note 133.

their people—which later served as the framework upon which the Declaration of Independence was based.

In 1626, Charles I invoked his royal prerogative to dissolve Parliament and, seeking funding for a potential war with Spain, to unilaterally levy subsidies against his people in the guise of a forced loan.<sup>99</sup> Those who refused to comply were imprisoned.<sup>100</sup> After a brief reinstatement in 1628, Charles again, pursuant to his prerogative power, dissolved Parliament.<sup>101</sup> When Parliament was recalled in 1640, Charles found himself on the receiving end of significant outrage which culminated in his being accused of treason, tried, found guilty, and subsequently executed. The court's sentence read as a laundry list of Charles' crimes, which he committed ostensibly for "the advancement and upholding of the personal interest of will, power, and pretended prerogative to himself and his family, against the public interest, common right, liberty, justice, and peace of the people."<sup>102</sup> Most of the specific crimes of which Charles was found guilty related to his waging war against his own subjects, resulting in the deaths of thousands and the wastage of both public and private monies.<sup>103</sup> The sentence though focused in large part on Charles' abridgement of his people's rights and liberties, as well as his concurrent failure to protect those rights and liberties in violation of his contract with the people.

Following the eleven-year interlude during which the Commonwealth of England was both established and dissolved, the Stuart monarchy was restored to the throne. This short-lived restoration saw Charles II, son of Charles I, ascend to the throne, followed by his brother James II, who ruled for only three years before

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<sup>99</sup> Nicholas Tyacke, *The Puritan Paradigm of English Politics, 1558-1642*, 53 HIST. J. 527, 545 (2010).

<sup>100</sup> Kenneth Shipps, *The "Political Puritan,"* 45 CHURCH HIST. 196, 201 (1976). This episode resulted in a seminal case in British legal history, the Five Knights Case, so named for the five knights imprisoned on Charles' orders for refusal to submit to the forced loan. The knights petitioned the Court of King's Bench for writs of habeas corpus to secure release from their confinement, which had been accomplished "*per speciale mandatum Domini Regis*," or by special command of the king. *Darnel's Case* (1627) 3 Cobbett's St. Tr. 1, 9 (Eng.). Appearing on behalf of the king, the Attorney General argued that the monarch possessed an unlimited power to imprison people as he saw fit and that "it [was] part of the king's prerogative that he can do no wrong." *Id.* at 44.

<sup>101</sup> Charles offered an explanation for the dissolution, but prefaced this explanation with the now-familiar sentiment that "princes are not bound to give account of their actions, but to God alone . . ." *The King's Declaration Showing the Causes of the Late Dissolution*, in THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION 17, 17 (Samuel Rawson Gardiner ed., Oxford 1889).

<sup>102</sup> Sentence of the High Court of Justice upon Charles I, in SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY 391, 393 (George Burton Adams & H. Morse Stephens eds., London 1901).

<sup>103</sup> *Id.* at 392.

his abdication. But in those three years, James' abuse of the royal prerogatives aroused the disdain of his subjects, specifically in regard to his efforts to reestablish his chosen faith—Roman Catholicism—in Britain. In furtherance of that goal, James exercised the prerogative to suspend all penal laws concerning ecclesiastical matters and to pardon his subjects for crimes committed in violation of those penal laws.<sup>104</sup> Shortly thereafter, James, unlike his father, vacated his throne rather than wait for Parliament to remove him, although his voluntary abdication did nothing to dissuade Parliament from publicly airing its grievances against the former king. Upon the ascension of James' successors, William and Mary of Orange, Parliament passed the English Bill of Rights, which, before asserting the rights and liberties of the British citizens, laid out those offenses of which James was purportedly guilty.<sup>105</sup> These offenses included dispensing and suspending of laws without parliamentary consent; invoking his prerogative to levy money for his own use contrary to the express direction of Parliament; raising and keeping a standing army and quartering soldiers without parliamentary consent; inflicting “illegal and cruel punishments”; and imposing excessive fines, all in support of an effort “to subvert and extirpate the Protestant religion and the laws and liberties of this kingdom.”<sup>106</sup>

*B. Executive Power as Understood by Founding Era Americans*

As explained in Part I, beginning in 1762, the phrase *executive power* appeared with much greater frequency, albeit with fluctuations, in Founding Era publications. Corresponding with greater intrusions upon their rights and liberties by the British government, and with the seventeenth-century abuses of power by the monarchy undergirding the discussion,<sup>107</sup> the colonists became more

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<sup>104</sup> WILLIAM COBBETT, 6 PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 1388–89 (T.C. Hansard, London 1808).

<sup>105</sup> In an earlier resolution, the House of Commons declared that James “endeavoured to subvert the Constitution of the Kingdom, by breaking the original Contract between king and people, and, by the advice of Jesuits, and other wicked persons, having violated the fundamental Laws, and having withdrawn himself out of this Kingdom, has abdicated the Government . . .” WILLIAM COBBETT, 5 PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 50 (T.C. Hansard, London 1809).

<sup>106</sup> The Bill of Rights, *in* SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 102, at 462, 463.

<sup>107</sup> Colonial American discourse was riddled with cautionary reference to Kings Charles I and James II. For instance, January 30 was observed annually as the execution day of Charles I, and November 5, 1788, the anniversary of William and Mary of Orange's arrival in Britain, was marked with century sermons excoriating governmental abuse of power and praising the vindication of individual rights and liberties. Ellis Sandoz, Foreword, *in* 1 POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, *supra* note 95, at xi, xxi. Moreover, a favorite tack of

concerned with theories of government and personal liberty. As indicated by the corpus linguistic data, discussion of executive power remained confined to a relatively narrow sense of the phrase—as belonging to a single governmental leader—until about 1760. The data show that, around that time, the sense of the phrase expanded to include reference to a body of governmental leaders, and as discussed in Part I, this new sense likely resulted from increased attention to the power wielded by those bodies.

According to John Adams, the year 1761 marked the commencement of the long struggle for American independence, with Boston attorney James Otis firing the (figurative) first shot. The impetus for this mutiny: the exercise of power in a clearly arbitrary manner by the Crown’s colonial representatives. Otis was solicited to represent a number of Boston merchants in regard to their objection to the issuance of a writ of assistance to a customs agent.<sup>108</sup> In the eyes of many American colonists, these writs invaded upon their personal liberties to be secure in their homes, and Otis argued as much to the court. In Otis’ view, such a writ was “the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law.”<sup>109</sup> He also took the opportunity to emphasize that Charles I’s exercise of such arbitrary power had resulted in Charles’ losing his head. The issuance of these writs infringed upon “one of the most essential branches of English liberty[,] the freedom of one’s house,” which Otis implied to be a liberty guaranteed by the British Constitution.<sup>110</sup> Otis concluded his speech with the then-novel but now-familiar argument that an “act against the constitution is void,” in other words, that the legislature lacks the power to pass acts in violation of the constitution.<sup>111</sup> Adams, a firsthand witness to Otis’ masterful oration, declared in later writings that “American independence was then and there born; the seeds of patriots and heroes

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propagandists was to invoke the abuses committed by Charles I and James II while comparing those abuses with those of George III. *Id.*

<sup>108</sup> James M. Farrell, *Writs of Assistance & Public Memory: John Adams and the Legacy of James Otis*, 79 *NEW ENG. Q.* 533, 535 (2006). The Navigation Act passed by the British Parliament prohibited the colonists from engaging in trade with any country besides Great Britain; naturally, the colonists sought to skirt this legislation, and many traders engaged in the smuggling of goods. ROBERT P. ST. JOHN & RAYMOND L. NOONAN, *LANDMARKS OF LIBERTY* 4 (2d ed. 1922). In an effort to combat smuggling, the British employed writs of assistance, which were issued by courts and allowed customs agents to search the homes of persons suspected of smuggling without first demonstrating probable cause to a magistrate. Farrell, *supra*. The controversy surrounding these writs was considered by the Supreme Court and informed its opinion in *Boyd v. United States*, 116 U.S. 616 (1886).

<sup>109</sup> ST. JOHN & NOONAN, *supra* note 108, at 6.

<sup>110</sup> *Id.* at 8; CHARLES FRANCIS ADAMS, *THE WORKS OF JOHN ADAMS*, VOL. II, at 525 (Boston, Charles C. Little & James Brown 1850).

<sup>111</sup> *Id.*

was then and there sown. . . . Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain.”<sup>112</sup> In the words of both Otis and Adams, we can see the development of one of the colonists’ main complaints against Britain—the wielding of power in a plainly arbitrary manner.

In 1762, Otis published his first political pamphlet in which he sought to assert for the legislative body the singular authority to levy taxes and approve expenditures of public funds.<sup>113</sup> He explained that the governor and his council, when the legislature was in recess, asserted that they had “a right to do what they judge ‘the supreme law,’ . . . for ‘the safety of the people being the supreme law, should at all events . . . be provided for.’ This is a short method to put it in the power of the Governor and Council, to do as they please . . . .”<sup>114</sup> In his view, the dogma espoused by the governor was merely a method by which to excuse the arbitrary use of his executive power—akin to the Lockean notion of executive prerogative—which, according to Otis, “in plain English means no more than to do as one pleases.”<sup>115</sup> Essentially, to exercise power arbitrarily is to exercise power without limitation.<sup>116</sup>

Complaints and concerns about the arbitrary use of power found their way into other discussions, both contemporary to Otis and later. Often, the exercise of arbitrary power was referred to as a violation of the fundamental laws.<sup>117</sup> An

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<sup>112</sup> ST. JOHN & NOONAN, *supra* note 108, at 5.

<sup>113</sup> OTIS, *supra* note 29. In Otis’s view, the governor usurped this power when he authorized the expenditure of funds to pay the costs of providing protection to a fishery. *Id.* In response, the Massachusetts House of Representatives issued a Remonstrance to the governor, accusing him of taking from the House “their most darling priviledge, the right of originating all Taxes.” *Id.* As Owens portentously surmised in his preface:

The world ever has been and will be pretty equally divided, between those two great parties, vulgarly called the *winners*, and the *losers*; or to speak more precisely, between those who are discontented that they have no Power, and those who never think they can have enough.

*Id.* at iv.

<sup>114</sup> *Id.* at 38–39.

<sup>115</sup> *Id.*

<sup>116</sup> Charges of tyranny often appeared in conjunction with accusations of arbitrariness. Tyranny invokes an idea of unlimited power. John Phillip Reid, *In Legitimate Strips: The Concept of “Arbitrary,” the Supremacy of Parliament, and the Coming of the American Revolution*, 5 HOFSTRA L. REV. 459, 461–62 (1977).

<sup>117</sup> Fundamental laws are

laws relating to personal liberty, the privileges of the subject, and the powers of the magistrate—to private property and the

executive can violate fundamental laws in numerous ways, but the crux of the violation comes from the executive’s encroachment either upon powers reserved to another branch of government or upon personal liberties the people did not cede to the government:

[I]f people must propose conditions unto kings to be by them acquiesced in, and submitted to, at their admission to the government, which thereupon becomes the fundamental laws of the government, and security for the peoples rights and liberties, giving a law claim to the people to pursue the king, in case of failing in the main and principle thing *covenanted*, as their own covenanted mandatarius, who hath no right or authority of his own, but what he hath from them, and no more power but what is contained in the conditions upon which he undertaketh the government.<sup>118</sup>

In other words, the executive wields only so much power as the people relinquish to him, and, in exchange, he agrees to submit to the people’s conditions, which become the fundamental laws. For the colonists, encroachments on such fundamental laws included levying money, keeping a standing army in time of peace, quartering soldiers in violation of the law and without the legislature’s consent, and interfering with free elections.<sup>119</sup>

As the Revolution drew nearer, colonial discussions of executive power shifted yet again, as indicated by the linguistic data, to center on considerations of

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execution of justice—to the punishment of evil-doers and the preservation of the public peace—to marriage, education, religion, and the rights of conscience—to the public forms, and order of government—and to the revenues and taxes, by which the state is supported.

Elizur Goodrich, *The Principles of Civil Union and Happiness Considered and Recommended* (1787), in *POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA*, *supra* note 95, at 604, 608.

<sup>118</sup> Defensive Arms Vindicated (1783), in *POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA*, *supra* note 95, at 483, 498.

<sup>119</sup> William Henry Drayton, Judge Drayton’s Charge (Apr. 23, 1776), in *PRINCIPLES AND ACTS OF THE REVOLUTION IN AMERICA*, *supra* note 95, at 72, 76. Drayton notes that these encroachments were all committed by King James II prior to his being overthrown, and all amounted to violations of the fundamental laws. As Drayton clarifies, “he did those things without consent of *the legislative assembly* chosen by *the PERSONAL ELECTION of that people*, over whom such doings were exercised.” *Id.*

the king's executive power. The colonists' complaints against King George III were numerous, but the thrust of their argument in favor of independence was a familiar one: the king's abdication of his duty to protect the colonists' rights and liberties in violation of their mutual contract,<sup>120</sup> his abuse of the prerogatives bestowed upon him, and his exercise of arbitrary power. In 1776, these complaints were consolidated in the Declaration of Independence. Among the colonists' grievances were the king's refusal to "assent to laws the most wholesome and necessary for the public good," dissolution of legislative bodies and refusal to call for the election of new representatives, taxation of the colonies without their consent, placement of restrictions on the colonists' trade, maintenance of a standing army without the colonies' consent, and encroachment on the judiciary.<sup>121</sup>

Given the reaction to the perceived abuses of power by the monarch, it is not surprising that, when the time came to develop a new system of government, the conversation's focus shifted from considerations of *who* wielded the executive power to *how* that power should be allocated.<sup>122</sup> By the time this sense appeared in the public discourse, Founding Era Americans understood the executive power to encompass, at its most fundamental, the power to execute those laws. Certain prerogatives were traditionally held by the British executive (that is, the monarch), but unlike the power to execute the law, the executive

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<sup>120</sup> William Henry Drayton, Another—By Judge Drayton (Oct. 15, 1776), in *PRINCIPLES AND ACTS OF THE REVOLUTION IN AMERICA*, *supra* note 95, at 79, 82 (“[T]he British king, by his hostilities, had as far as he personally could, absolved America from that faith, allegiance[,] and subjection she owed him; because the law of our land expressly declares, these are due only in return for his protection, allegiance being *founded* on the benefit of protection.”).

<sup>121</sup> THE DECLARATION OF INDEPENDENCE (U.S. 1776).

<sup>122</sup> This shift is illustrated in a letter penned by John Adams to Thomas Brand Hollis in 1787:

All I can Say is that it appears plain to me that every great Nation must have three Branches or but one. And if it has but one, that one must be a Simple Monarchy or in other Words a Despotism. A Government of one assembly or of two assemblies only in any great nation, cannot exist but in a State of civil War that will soon end in Despotism, of one Man. I am not Solicitous about the Name of the first Magistrate, provided he have the whole Executive Power. call him Podesta, President, Consul, anything, as you will.—Anything Sir! I am not afraid of the Word.

Nat'l Archives, *From John Adams to Thomas Brand Hollis, 18 October 1787*, FOUNDERS ONLINE, <https://founders.archives.gov/?q=podesta&s=1111311111&sa=&r=1&sr=> (last visited Oct. 1, 2019).

prerogative could be both granted and constrained by the people—the people defined the bounds of the prerogative.<sup>123</sup> Prerogative, then, was distinct, and thus divisible, from executive power.<sup>124</sup> Importantly, prerogative should not be

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<sup>123</sup> See THE FEDERALIST NO. 26 (Alexander Hamilton) (“As incident to the undefined power of making war, an acknowledged prerogative of the crown, Charles II had by his own authority kept on foot in time of peace a body of five thousand regular troops. . . . At the revolution, to abolish the exercise of so dangerous an authority, it became an article of the Bill of Rights then framed, that ‘the raising or keeping a standing army within the kingdom in time of peace, *unless with the consent of Parliament*, was against law.”); THE FEDERALIST NO. 84 (Alexander Hamilton) (“It has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgements of prerogative in favor of privilege, reservations of rights not surrendered to the prince.”); LOCKE, *supra* note 59, at 204 (“[T]hey have a very wrong notion of government who say that the people have encroached upon the prerogative when they have got any part of it to be defined by positive laws.”); James Wilson, Vindication of the Colonies, in AMERICAN ELOQUENCE: A COLLECTION OF SPEECHES AND ADDRESSES BY THE MOST EMINENT ORATORS OF AMERICA, VOL. I, at 65, 72 (Frank Moore ed., 1858) (“The measures of [the king’s] power, and the limits beyond which he cannot extend it, are described and regulated by [the British constitution] . . . Liberty is, by the [British] constitution, of equal stability, of equal antiquity, and of equal authority with prerogative. . . . The law is the common standard by which the excess of prerogative, as well as the excesses of liberty, are to be regulated and reformed. . . . [P]rerogative can operate only when the law is silent.”); Mather, *supra* note 95, at 314 (“As there are certain rights of men, which are unalienable even by themselves; and others which they do not mean to alienate, when they enter into civil society. And as power is naturally restless, aspiring and insatiable; it therefore becomes necessary in all civil communities [either at their first formation or by degrees] that certain great first principles be settled and established, determining and bounding the power and prerogative of the ruler, ascertaining and securing the rights and liberties of the subjects, as the foundation stamina of the government . . . .”); Resolutions of the Committee Chosen by the Several Counties in Pennsylvania, in PRINCIPLES AND ACTS OF THE AMERICAN REVOLUTION *supra* note 95, at 175, 175 (“‘The prerogatives are limited,’ as a learned judge observes, ‘by bounds so certain and notorious that it is impossible to exceed them, without the consent of the people on the one hand, or without, on the other, a violation of that *original contract*, which, in all states impliedly, and in ours most expressly, subsists between the prince and subject.’”); VILE, *supra* note 58, at 72 (noting that the legislature ultimately has control of the executive prerogative).

<sup>124</sup> This idea finds support in Thomas Jefferson’s draft of a constitution for Virginia:

The EXECUTIVE powers shall be exercised by a Governor . . . . By Executive powers we mean no reference to those powers exercised under our former government by the crown as of it’s prerogative; nor that these shall be the standard of what may or may not be deemed the rightful powers of the Governor. We give hi those powers only which are necessary to carry into execution the laws, and which are not in their nature [either legislative or] Judiciary.

conflated with discretion; executive power was understood to afford the executive with discretion to execute the laws as he saw fit.<sup>125</sup>

### III. THE ORIGINAL PUBLIC MEANING OF EXECUTIVE POWER

In seeking to discern an original meaning of executive power, it must not be discounted that the American colonists were, at their most basic, British. And as such, they maintained their right to enjoy the liberty and privileges enjoyed by those citizens residing in the mother country.<sup>126</sup> The liberty enjoyed by the British people could be found “[i]n Laws made by the Consent of the People, and the due Execution of those Laws; [the British citizen] is free not from the Law, *but by the Law.*”<sup>127</sup> Importantly, the king was not viewed as being above the law, and because the legislature creates the law, the legislature is the supreme power.<sup>128</sup>

Colonial dissatisfaction with the long line of British monarchs who misused their prerogatives, as well as the colonial perception of Parliament as an oppressive and tyrannical force, led to grave concern about the potential for abuse

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THOMAS JEFFERSON, DRAFT OF A CONSTITUTION FOR VIRGINIA [MAY-JUNE 1783], <https://founders.archives.gov/documents/Jefferson/01-06-02-0255-0004> (last visited Mar. 27, 2018).

<sup>125</sup> Contemporary dictionaries likewise support this distinction. Discretion was defined first as “[p]rudence; knowledge to govern or direct one’s self; skill; wise management” and second as “[l]iberty of acting at pleasure; uncontrolled and unconditional power.” *Discretion*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London 1785). Prerogative was defined as “[a]n exclusive or peculiar privilege.” *Prerogative*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London 1785).

<sup>126</sup> An anonymous pamphlet entitled *The Freeholder’s Political Catechism* explains that a British “Freeholder” is “govern’d by Laws, to which [he] give[s] his Consent, and [his] Life, Liberty, and Goods, cannot be taken from [him], but according to those Laws.” THE FREEHOLDER’S POLITICAL CATECHISM 3 (Dublin 1733).

<sup>127</sup> *Id.* at 4 (emphasis supplied).

<sup>128</sup> *Id.* at 5, 9 (“Q. Why is the Legislative Power Supreme? A. Because what gives Law to all, must be Supreme. . . . Q. Is not then the King above the Laws? A. By no means . . . he can have no Power but what is given him by Law.”). And as Lord Edward Coke, quoting Bracton, declared to King James I, “quod Rex non debet esse sub homine, sed sub Deo et lege.” Prohibitions del Roy (1607) 77 Eng. Rep. 1342, 1343; 12 Co. Rep. 64, 65. Lord Coke borrowed this phrase from the medieval legal scholar Bracton; however, Coke omitted Bracton’s final words of the phrase: “quia lex facit regem.” Translated, the phrase in its entirety reads, “The king ought to be under no man, but under God and the law, because the law makes a king.” HENRY CAMPBELL BLACK, A DICTIONARY OF LAW CONTAINING DEFINITIONS OF THE TERMS AND PHRASES OF AMERICAN AND ENGLISH JURISPRUDENCE, ANCIENT AND MODERN 1043 (11th ed. 2004). Locke, likewise, identified the legislative as the supreme power. LOCKE, *supra* note 59, at 187, 188.

inherent in an unchecked allocation of governmental power.<sup>129</sup> As such, the colonists preserved the fundamental definition of executive power that was imported from Britain, with British history and colonial experience contributing to the development of a distinctly American interpretation of the term.<sup>130</sup> Accordingly, although the Framers declined to define executive power in concrete terms,<sup>131</sup> recurring in the colonial discussion of executive power was the idea that the executive's role should be confined to a discrete function—namely, the power to execute the law.<sup>132</sup>

The text of the Constitution itself reveals the Framers' efforts to thwart the types of abuses committed by the British king and Parliament. The colonists' complaints against Parliament largely related not to the scope of Parliamentary power but to how Parliament used its power to infringe upon the colonists' rights and liberties. On the other hand, the grievances against the king were directly

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<sup>129</sup> See *id.* (“We must as has been observed suit our Governmt. to the people it is to direct.”); see also *Madison Debates: June 1*, AVALON PROJECT, [http://avalon.law.yale.edu/18th\\_century/debates\\_601.asp](http://avalon.law.yale.edu/18th_century/debates_601.asp) (last visited Mar. 26, 2018); *supra* notes 108–112 and accompanying text. Madison noted,

Mr. [James] Wilson preferred a single magistrate, as giving most energy dispatch and responsibility to the office. He did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of Legislative nature. Among others that of war & peace &c. The only powers he conceived strictly Executive were those of executing the laws, and appointing officers, not appertaining to and appointed by the Legislature.

*Madison Debates: June 1, supra.*

<sup>130</sup> Frisch, *supra* note 54, at 281–82 (discussing the “originality of the American regime” as a blend of traditional notions of monarchical power and republicanism); see also, *Madison Debates: June 25*, AVALON PROJECT, [http://avalon.law.yale.edu/18th\\_century/debates\\_625.asp](http://avalon.law.yale.edu/18th_century/debates_625.asp) (last visited Mar. 26, 2018) (Charles Pinckney noted, “[I]t is perhaps not politic to endeavour too close an imitation of a Government calculated for a people whose situation is, & whose views ought to be extremely different. Much has been said of the Constitution of G. Britain. I will confess that I believe it to be the 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. -If it were proper to go here into a historical dissertation on the British Constitution, it might easily be shewn that the peculiar excellence, the distinguishing feature of that Governmt. can not possibly be introduced into our System—that its balance between the Crown & the people can not be made a part of our Constitution.”).

<sup>131</sup> Richard M. Pious, *Inherent War and Executive Powers and Prerogative Politics*, 37 PRESIDENTIAL STUD. Q. 66, 68 (2007).

<sup>132</sup> See Frisch, *supra* note 54, at 281 (“It is clear that at the time of the Constitutional Convention virtually none of the delegates . . . were cognizant of a role for executive power in a republican government beyond that of law enforcement and administration.”).

related to the scope of the power he possessed, particularly his prerogatives.<sup>133</sup> The necessity of a weakened executive was bolstered by seventeenth-century Parliamentary failures to control the abuses of Charles I and James II. As such, the prerogatives granted to the President were significantly constrained in comparison to those held by the king—in fact, the Constitution endowed the President exclusively with only one of the royal prerogatives.<sup>134</sup> The remaining royal prerogatives were “vested completely in Congress, prohibited to the President, [] altogether omitted from the Constitution[, or] . . . more limited or structurally shared with the legislative branch.”<sup>135</sup> The legislature, however, held powers markedly similar to those held by Parliament. The legislative power, in traditional discourse, was the power to make the law,<sup>136</sup> and Congress retained that power. Perhaps most importantly, no power held by Parliament was vested in the American executive.<sup>137</sup> Essentially, the Constitution is the culmination of the

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<sup>133</sup> Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 271 (2009). Professor Reinstein divides these prerogatives into five categories: (1) power over legislation and taxation; (2) power over the execution of laws; (3) control over the legislature; (4) foreign affairs, military, and war powers; and (5) power over commerce. *Id.* at 271. The British monarch held a portion of the legislative power in that no bill could become law without the sanction of the monarch. The Framers maintained the executive veto power but subjected that power to congressional override, greatly weakening the prerogative from that vested in the king. *Id.* at 278. See also THE FEDERALIST NO. 69 (Alexander Hamilton) (“The qualified negative of the President differs widely from this absolute negative of the British sovereign . . .”). Another prerogative the Framers denied the President was the power to suspend or dispense with laws, accomplished through the constitutional requirement that the President “take Care that the Laws be faithfully executed.” Reinstein, *supra* at 280. The President was also deprived of the right to summon and dismiss the legislature, as well as the exclusive power of appointment of government officials. *Id.* at 285, 288. The royal prerogatives to declare war, make treaties, and dispatch ambassadors were divided between the President and the Senate by imposing the requirement of Senatorial approval. *Id.* at 304. See also THE FEDERALIST NO. 69 (Alexander Hamilton) (“The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies; all of which, by the Constitution under consideration, would appertain to the legislature.”).

<sup>134</sup> Namely, the power to receive foreign ambassadors and public ministers. Reinstein, *supra* note 133, at 268. By contrast, “[e]ighteen royal prerogatives were removed entirely from the Executive and delegated to Congress.” *Id.* at 304.

<sup>135</sup> *Id.* at 271.

<sup>136</sup> THE FEDERALIST NO. 74 (Alexander Hamilton) (“The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of society . . .”).

<sup>137</sup> Reinstein, *supra* note 133, at 304. In an effort to prevent legislative tyranny, the Framers divided the branch into two distinct bodies and provided for a check by the way of “interference” by the executive and judicial branches. VILE, *supra* note 58, at 175. The executive holds veto

Framers' efforts to prevent a recurrence of those defects they perceived in the British governmental form. Executive power should be understood as nothing more than the power to execute the law;<sup>138</sup> any other power vested in the executive is synonymous with prerogative, and the President's ability to exercise that prerogative must remain within the bounds set by the Constitution.

The corpus linguistic data likewise support this inference. The prevailing senses alone give credence to the argument that the colonists' understanding of executive power was inherently intertwined with and defined by its British origins. As further evidence of this proposition, among the most frequently used senses in Founding Era texts were senses (4) and (5), pertaining to the executive power of the Crown and to an executive body or council, such as the British Parliament, respectively. It is therefore telling that the colonists resorted to the same phrases used in the same ways as their British predecessors when discussing the formation of a centralized government of states. Moreover, semantically, the reference to a singular executive power, as opposed to the divisible power of the legislature used in Article I, harkens back to the notion of the executive power vested in the Crown. Again, the drafters' syntax and use of language points to the executive's deep roots in British political underpinnings, suggesting that the Framers were deeply invested in not only preserving but also perfecting the British governmental structure that they knew.

Finally, although we have spent considerable time on the isolated phrase *executive power*, that phrase must be considered in context. Indeed, the Framers understood that the Constitution would be interpreted according to the "usual and established" rules of statutory interpretation, which as discussed briefly *supra* Part I, include the *noscitur a sociis* rule—that is, that Article II must be construed in the context of the surrounding text.<sup>139</sup> Thus, the meaning of "executive power" must be considered in light of the Constitution's preamble,<sup>140</sup> which makes clear

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power over the legislature (although, to reiterate, the presidential veto is much weaker than the royal veto), and the judiciary holds the power to invalidate laws. *Id.*

<sup>138</sup> THE FEDERALIST NO. 74 (Alexander Hamilton) ("[T]he execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seem to comprise *all the functions* of the executive magistrate.") (emphasis added).

<sup>139</sup> ALEXANDER HAMILTON, AN OPINION ON THE CONSTITUTIONALITY OF AN ACT TO ESTABLISH A BANK (1791), <https://founders.archives.gov/documents/Hamilton/01-08-02-0060-0003> (last visited Feb. 26, 2018) ("[W]hatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the *usual & established rules of construction*."); ESSAYS OF BRUTUS NO. 11 (1788), <http://press-pubs.uchicago.edu/founders/documents/v1ch8s31.html> (last visited Feb. 26, 2018) ("[I]n construing any of the articles conveying power, the spirit, intent and design of the clause, should be attended to, as well as the words in their common acceptance.").

<sup>140</sup> ESSAYS OF BRUTUS NO. 12 (1788), [http://press-pubs.uchicago.edu/founders/documents/a3\\_2\\_1s20.html](http://press-pubs.uchicago.edu/founders/documents/a3_2_1s20.html) (last visited Feb. 26, 2018) ("[The

that the Constitution was ratified in furtherance of six expansive purposes: “to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity . . . .”<sup>141</sup> Although these purposes are most often reduced to rhetoric, they should be consulted when attempting to define the terms of the Constitution.

A syntactic analysis of the first purpose, “to form a *more* perfect union,” indicates that the Framers sought to draft a constitution providing for a government superior to another. Although, at first glance, this appears to be a reference to the failed union created pursuant to the Articles of Confederation, historical context shows that at several points in its history, Britain was referred to as a “perfect union.”<sup>142</sup> Marrying the plain grammatical reading with the historical context, the phrase then takes on new meaning: to create a form of government superior to that of Britain. Indeed, the Revolution was understood “as the final, violent phase of a sustained effort to vindicate the true meaning of the ancient English constitution.”<sup>143</sup> In *Federalist No. 5*, John Jay quotes Queen Anne, explaining that Britain’s history “gives us many useful lessons. We may profit by their experience without paying the price it cost them.”<sup>144</sup> And the Framers sought to do just that—learn from the failures of the British form of government and establish a reformed government that would secure the life, liberty, and property of the new American citizens.

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courts] would be authorized to give the constitution a construction according to its spirit and reason, and not to confine themselves to its letter. To discover the spirit of the constitution, it is of the first importance to attend to the principal ends and designs it has in view. These are expressed in the preamble . . . .”).

<sup>141</sup> U.S. CONST., preamble.

<sup>142</sup> This phrase was used during the reigns of multiple monarchs, including James I, James II, and Queen Anne. Queen Anne used the phrase herself during a speech to Parliament: “An entire and perfect Union [of England and Scotland] will be the solid foundation of lasting peace: it will secure your religion, liberty and property, remove the animosities among yourselves, and the jealousies and differences betwixt our own two kingdoms . . . .” PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE YEAR 1803, VOL. VI, at cxxix, 356 (London, T.C. Hansard 1810). *See also id.* at 356 (“The kindness and indulgence your majesty [Queen Anne] hath expressed for all your subjects: your care to create a perfect union among us by forewarning us of the mischiefs of divisions . . . .”); T. SMOLLETT, A COMPLETE HISTORY OF ENGLAND 521 (London, 1757) (“[King James II] replied, That he did not expect such a remonstrance from the commons, after he had demonstrated the advantages that would arise from a perfect union between him and his parliament . . . .”); CROWN AND PARLIAMENT IN TUDOR-STUART ENGLAND 164 (Paul L. Hughes & Robert F. Fries, eds., 1959) (“I desire a perfect union of laws and persons, and such a naturalizing as may make one body of both kingdoms under me [James I] your King . . . .”).

<sup>143</sup> H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 888 (1985).

<sup>144</sup> THE FEDERALIST NO. 5 (John Jay).

#### IV. EXECUTIVE POWER: THE SUPREME COURT VS. THE COURT OF PUBLIC OPINION

Despite the compelling historical backdrop and relatively fixed understanding, if not explicit definition, of executive power in Founding Era American discourse, both the courts of law and of public opinion have interpreted Article II in ways that justify a wide variety of presidential (mis)conduct—much of which is only dubiously consistent with early understandings of the phrase.<sup>145</sup> In fact, empirical data collected in the late 1980s shows that the Supreme Court voted to uphold presidential action 66.3% of the time during the postwar era of 1949 to 1984, and federal appellate courts upheld challenged presidential action in 73.4% of votes.<sup>146</sup> Thus, in contrast to the Founding Era public understanding of the executive’s limited role as a check on legislative power, the last half-century has been characterized by a judicial tendency to ratify a broad variety of presidential actions.<sup>147</sup> To that end, the following presents a brief survey of two flagship Supreme Court cases—one upholding the exercise of executive power and one restricting it—and a discussion of the public response to those judgments.

##### A. *Expanding Executive Power Beyond Mere Execution: Myers v. United States*

In 1920, President Woodrow Wilson removed Portland postmaster Frank Myers from office, igniting litigation that eventually made its way to our country’s highest court. Following his dismissal, Myers filed suit in the United States Court of Claims, contending that Wilson had no authority to remove Myers or any other postmaster from office without the consent of the Senate.<sup>148</sup> Chief Justice William Taft, writing for the majority, addressed the question of “whether under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the

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<sup>145</sup> See Saikrishna Bangalore Prakash, *The Imbecilic Executive*, 99 VA. L. REV. 1361, 1364–65 (2013) (noting that the executive has and will continue to claim “extraordinary authority . . . reading the supposed ambiguities of Article II as an invitation to act”).

<sup>146</sup> Craig R. Ducat & Robert L. Dudley, *Federal Judges and Presidential Power: Truman to Reagan*, 22 AKRON L. REV. 561, 565 (1989). Interestingly, the Institute for Policy Integrity at New York University Law School reports that, during the Trump presidency, federal courts have upheld challenged executive action in only four of the fifty-two cases surveyed. See *Roundup: Trump-Era Agency Policy in the Courts*, INST. FOR POLICY INTEGRITY, N.Y. UNIV. SCH. OF LAW, <https://policyintegrity.org/deregulation-roundup> (last visited Sept. 20, 2019).

<sup>147</sup> *Id.* It is also worth noting that judges of both political affiliations overwhelmingly supported presidential action in cases concerning the President’s apparent infringement on the legislative power. Ducat & Dudley, *supra* note 146, at 567 (83.3% of Democratic judges and 88% of Republican judges voting to uphold the presidential action at issue).

<sup>148</sup> *Myers v. United States*, 272 U.S. 52, 106 (1926).

advice and consent of the Senate.”<sup>149</sup>

In an opinion spanning more than seventy pages, the Chief Justice relied heavily on the debates surrounding what he referred to as the decision of 1789 to support his conclusion that the President, in fact, possesses an exclusive power of removal.<sup>150</sup> Focusing on statements made by James Madison, Taft established three theories upon which his holding rested:

- (1) “Article II by vesting the executive power in the President was intended to grant to him the power of appointment and removal of executive officers except as thereafter expressly provided in that Article”;<sup>151</sup>
- (2) “the express recognition of the power of appointment in the second section [of Article II] enforced this view on the well approved principle of constitutional and statutory construction that the power of removal of executive officers was incident to the power of appointment”;<sup>152</sup> and
- (3) it would be unreasonable to assume that the Framers, without express provision, intended to give any part of the legislative branch the ability to direct the executive and, in doing so, potentially hamper the executive’s discharging his duties by saddling him with inefficient or disloyal subordinates or subordinates who maintained different political views than his own.<sup>153</sup>

Taft noted that, consistent with the Founding Era understanding of the phrase, the “vesting of the executive power in the President was essentially a grant of the power to execute the laws.”<sup>154</sup> But he chose not to stop there, opining “that the natural meaning of the term ‘executive power’ granted the President included the

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<sup>149</sup> *Id.* The statute at issue read as follows: “Postmasters of the first, second and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate and shall hold their offices for four years unless sooner removed or suspended according to law.” *Id.* at 107.

<sup>150</sup> This decision concerned the establishment of a Department of Foreign Affairs, and the ensuing debates centered on the question of whether the Secretary of the department should be removable by the President. *Id.* at 111. Taft seems to base his reliance on these debates largely upon the fact that eighteen legislators—eight Representatives and ten Senators—were present at the Constitutional Convention. *Id.* at 114. Taft noted that six of the eight Representatives and six of the ten Senators voted to imbue the President with the removal power. *Id.* at 114–15. Taft glossed over the fact that the bill passed the House by a vote of 29-22 and only passed the Senate after Vice President John Adams cast the deciding vote, breaking a 10-10 tie. *Id.* at 114–15.

<sup>151</sup> *Id.* at 115.

<sup>152</sup> *Id.* at 118.

<sup>153</sup> *Id.* at 131.

<sup>154</sup> *Myers*, 272 U.S. at 117.

appointment and removal of executive subordinates.”<sup>155</sup> In support of this assertion, he looked no further than his Court’s earlier decisions, explaining that his broader view of executive power comported with the phrase’s “natural meaning” because appointments and removals “certainly were not the exercise of legislative or judicial power in government as usually understood.”<sup>156</sup> Ultimately, Taft’s opinion stands for the proposition that any attempts by Congress to limit the presidential power to remove executive officers appointed by the President are unconstitutional. Taft returned to the President one of the prerogatives the Framers chose to deny him: the power of removal.<sup>157</sup>

Three justices—McReynolds, Brandeis, and Holmes—dissented from the majority opinion. Justice McReynolds approached the issue in a manner remarkably similar to that of Taft, going so far as to use many of the same sources as Taft, albeit to reach a different conclusion. McReynolds conceded that removal could be an executive act, if Congress so decreed, but posited that Congress retained the power to direct how that removal could be accomplished.<sup>158</sup> Justice Brandeis took a different tack, choosing to address a significantly narrower question than that addressed by Taft.<sup>159</sup> He focused on the separation of powers and emphasized that the Convention of 1787 adopted the doctrine “not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.”<sup>160</sup> Justice Holmes’ dissent was significantly briefer than those of his fellow dissenters, succinctly emphasizing his belief that “[t]he duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 117–18.

<sup>157</sup> See Reinstein, *supra* note 133, at 294. Professor Reinstein finds significant the exclusion of an expressly enumerated removal power considering how important the removal power was to the British monarch. *Id.* He views the removal power as an implied power subject to congressional restriction. *Id.* at 322, n. 347. Such an interpretation comports with the idea that the legislative power includes the power to direct the executive as to how it should execute the law.

<sup>158</sup> *Myers*, 272 U.S. at 231 (McReynolds, J., dissenting) (“If it be admitted that the Constitution by direct grant vests the President with all executive power, it does not follow that he can proceed in defiance of congressional action. Congress, by clear language, is empowered to make all laws necessary and proper for carrying into execution powers vested in him.”).

<sup>159</sup> *Id.* at 241 (Brandeis, J., dissenting) (“May the President, having acted under the statute in so far as it creates the office and authorizes the appointment, ignore, while the Senate is in session, the provision which prescribes the condition under which a removal may take place? It is this narrow question, and this only, which we are required to decide.”).

<sup>160</sup> *Id.* at 292 (Brandeis, J., dissenting).

power.”<sup>161</sup>

The public immediately recognized and, in most cases, condemned the Court’s expansion of the executive power.<sup>162</sup> The overarching public opinion seemed to be that the *Myers* decision effectively transformed the President of our democratic nation into a despot or at least provided him with the authority to behave as a despot. Senator Hiram W. Johnson of California remarked that “[t]here will be those who exclaim what this country needs is another Mussolini and who rejoice in any extension of executive power; and others who declare that the very liberty of the people is involved in the stability of official tenure.”<sup>163</sup> The headlines in a Nebraska newspaper declared “Can Remove as He Wills,” “New Power to President Granted by Supreme Court,” and “Congress Shorn of Rights,” indicating that the public recognized the gravity of the decision.<sup>164</sup> Still others articles expressed increasingly alarmist views: “[U]nder the supreme court’s latest interpretation, the chief executive can lop off heads right out in public without asking anyone’s permission.”<sup>165</sup> In an effort to emphasize the significance of the *Myers* decision, one article listed all those government officials the President could now dismiss with capriciousness, specifically the Interstate Commerce Commission, the Federal Reserve Board, the Comptroller General, and the Postmaster General, among others.<sup>166</sup> Nevertheless, some support was expressed

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<sup>161</sup> *Id.* at 177 (Holmes, J., dissenting).

<sup>162</sup> The magnitude of this decision was even recognized by our neighbors to the north. *The President’s Powers*, WINNIPEG TRIB., Nov. 11, 1926, at 4 (“Something akin to dismay swept through old-fashioned ‘liberty loving’ Americans last week when the U.S. Supreme Court decided that it was within the power of the President to remove postmasters and other statutory officials without waiting for the Senate’s concurrence.”).

<sup>163</sup> Ruth Finney, *Johnson Says President’s Removal Power is Menace*, PITTSBURGH PRESS, Nov. 6, 1926, at 13.

<sup>164</sup> *Can Remove as He Wills*, NEB. ST. J. (Lincoln, Neb.), Oct. 26, 1926, at 1. *See also Presidential Firing Power*, OXNARD PRESS-COURIER (Oxnard, Cal.), Nov. 13, 1926, at 2 (“The decision does give a President dangerous power over federal commissions and boards created by Congress and, in theory, at least, working independently. . . . There are numerous bodies of this type whose usefulness is greatly lessened if their members hold their jobs only by grace of the President who appointed them. They will tend to lose their individuality and independence and merely reflect the views of the Executive.”).

<sup>165</sup> *Senate Will Fight for Power to Fire*, IRONWOOD DAILY GLOBE (Ironwood, Mich.), Dec. 1, 1926, at 6.

<sup>166</sup> Eliot Harris, *Supreme Court Makes President an Autocrat*, LINCOLN HERALD (Lincoln, Neb.), Nov. 12, 1926, at 1. The article went on to explain the extent of the President’s newly expanded power of removal:

By his control of the Interstate Commerce Commission, the president is made absolute master of the railroads, so far as these come under the government control at all. By his control

for the *Myers* opinion, most of which downplayed the alarmism exhibited by the opinion's critics while celebrating the elevation of the executive.<sup>167</sup>

Corpus linguistic tools once again provide useful evidence in support of these public sentiments. A search in the Corpus of Historical American English (COHA) yielding the collocates of *executive power* during the 1910s and 1920s shows that the following words were among those that most frequently co-occurred with the phrase *executive power*: *limit*, *uncontrollable*, *stretch*, and *violent*.<sup>168</sup> Additionally, a COHA collocate search for words appearing one word to the left of *executive* during this time period produced interesting results: whereas the same search in the COFEA performed in Section I of this paper yielded no collocates with private sector connotations,<sup>169</sup> the COHA search shows that, in the early 1900s, private sector associations were beginning to creep into the list of executive's collocates.<sup>170</sup> For example, *industrial* occurred fifth most frequently after *chief*, *central*, *national*, and *democratic*.<sup>171</sup> While the public understanding of the executive's role remained solidly rooted in a governmental context and, in fact, appears to have closely aligned with the original Founding

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of the Federal Reserve Board, he becomes dictator of our national banking system. He is czar of the administration of justice in Alaska and the District of Columbia by virtue of his power to dismiss the judges of these regions . . . No constitutional monarch in the world has anything remotely approaching such power. If the king of England tried to exercise any one of these powers without the consent of parliament, he would be ousted from his palace and his throne as soon as the English people could realize what he was doing.

*Id.*

<sup>167</sup> A West Virginia newspaper's editorial board compiled views of the *Myers* opinion collected from newspapers across the country. The *Columbus Ohio State Journal* expressed contempt for critics of the *Myers* opinion, writing, "The view of the liberals probably is that the decision places a dangerous power in the president's hands, capable of being abused greatly. The danger exists theoretically but is almost negligible practically. A president, sobered by his great office, is not likely to be a mere political self-seeker." *Emphatic Disagreement Over Ruling on President's Powers*, BLUEFIELD DAILY TELEGRAPH (Bluefield, W.V.), Nov. 4, 1926, at 6. The *Richmond News-Leader* wrote that "for better or for worse, America is committed to executive, not to congressional administration, and American must make real the power of the man to whom she entrusts her affairs." *Id.*

<sup>168</sup> CORPUS OF HISTORICAL AMERICAN ENGLISH, <https://corpus.byu.edu/coha/> (last visited Mar. 28, 2018) (collocate search of *executive power* in 1910 and 1920 looking at results within four words to the left of the phrase) [hereinafter COHA].

<sup>169</sup> *See supra* § I.

<sup>170</sup> *Id.* (collocate search of *executive* in 1910 and 1920 limited to words occurring within one word to the left of *executive*).

<sup>171</sup> *Id.*

Era understanding of executive power, evidence of the preliminary stages of linguistic drift towards the private connotation of executive is also apparent and possibly influenced the evolution of public perception of the executive's role.

*B. Agreeing to Disagree: A Fragmented Supreme Court's Rejection of Executive Overreach in Youngstown Sheet & Tube v. Sawyer*

Although President Harry Truman became the thirty-third president merely by default upon the death of President Franklin Roosevelt, he took comfortably to the position and frequently tested the bounds of executive power during his tenure.<sup>172</sup> After ordering American troops into Korea in 1950 without specific Congressional authorization, an act by itself of questionable constitutionality,<sup>173</sup> Truman pressed the limits of his executive authority even further by issuing Executive Order 10340.<sup>174</sup> In an attempt to thwart a potential nationwide steelworker strike, Truman's executive order directed the Secretary of Commerce to seize privately owned steel mills.<sup>175</sup> Again acting without Congressional approval, the President justified his bold move as necessary to address the imminent national defense crisis that would result should steel production halt during wartime.<sup>176</sup> The steel companies complied under protest but challenged the constitutionality of the President's actions almost immediately, arguing that the "order amount[ed] to lawmaking, a legislative function which the Constitution has expressly confided to the Congress and not to the President."<sup>177</sup>

Although a six-to-three majority declared Truman's actions unconstitutional, the Court remained highly fragmented as to the reasons why, resulting in the issuance of seven distinct opinions.<sup>178</sup> Justice Hugo Black, a renowned constitutional originalist,<sup>179</sup> spoke for the majority in a brief opinion

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<sup>172</sup> See Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act*, 89 AM. J. INT'L L. 21, 32 (1995).

<sup>173</sup> See generally *id.*

<sup>174</sup> *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 583 (1951).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*; Brief for Petitioner at 97, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1951) (No. 745).

<sup>177</sup> *Steel Seizure*, 343 U.S. at 582–83.

<sup>178</sup> *Id.*; ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES & POLICIES* 353 (5th ed. 2015).

<sup>179</sup> HUGO L. BLACK, *A CONSTITUTIONAL FAITH* 8 (1968) ("I strongly believe that this history shows that the basic purpose and plan of the Constitution is that the federal government should have no powers except those expressly or impliedly granted, and that no department of government—executive, legislative, or judicial—has authority to add or take from the powers granted it or the powers denied it by the Constitution . . . judges may [not] rewrite our basic charter of government under the guise of interpreting it."); Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 24, 31 (1994)

defined by a faithful adherence to the doctrine of separation of powers. In language reminiscent of the Founding Era, he noted, “In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”<sup>180</sup> Thus, he rejected the government’s argument that Article II vests in the president “all the executive powers of which the Government is capable.”<sup>181</sup> Instead, he held that the steel seizure was an unconstitutional infringement by the President on the legislative powers of Congress.<sup>182</sup> Accordingly, Justice Black’s oft-overlooked majority opinion was arguably extremely faithful to the original public meaning of executive power.

Despite the fact that Justice Black wrote for the majority, courts and scholars have favored Justice Robert Jackson’s concurring opinion in *Steel Seizure*, which, while reaching the same conclusion, took a markedly different approach to interpreting executive power. Justice Jackson posited that “Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”<sup>183</sup> He proceeded to lay out his seminal three-part framework of “practical situations in which a President may doubt, or others may challenge, his powers,” which he defined as: (1) when the President acts with Congressional authorization, whether it be express or implied; (2) when the President acts without Congressional authorization, but relying on his own independent powers; and (3) when the President acts contrary to the express or implied will of Congress.<sup>184</sup> Jackson argued that the magnitude of presidential power is determined by which of the three categories defines his actions, with the first category affording the most power to the president and the third, the least.<sup>185</sup> Without addressing the consistency of this framework with the original public

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(noting that Justice Black believed that “there is a single, immutable, judicially discoverable meaning for each part of the Constitution” and asserted that “in the construction of the language of the Constitution . . . we are to place ourselves as nearly as possible in the condition of the men who framed that instrument”) (quoting BLACK, *supra*).

<sup>180</sup> *Steel Seizure*, 343 U.S. at 587.

<sup>181</sup> Brief for Petitioner, *supra* note 176, at 96. Bizarrely, the government, at one point in its brief, appeared to justify the expansive use of presidential power in the steel seizure case with the fact that Truman ordered troops into Korea, claiming that act was a lawful “exercise of the President’s constitutional powers.” *Id.* at 98. However, history has shown that Truman’s unilateral commitment of troops to the Korean conflict without congressional consent was far from constitutionally black and white. See Fisher, *supra* note 172.

<sup>182</sup> *Steel Seizure*, 343 U.S. at 587 (“This is a job for the Nation’s lawmakers, not for its military authorities. . . . The Constitution limits [the President’s] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.”).

<sup>183</sup> *Id.* at 635–38 (Jackson, J., concurring).

<sup>184</sup> *Id.* (Jackson, J., concurring).

<sup>185</sup> *Id.* at 636–37 (Jackson, J., concurring).

meaning of executive power,<sup>186</sup> unquestionably Jackson’s canonized framework has been relied upon by courts and scholars alike to justify a sweeping variety of executive actions, many of which were and remain unfathomable under a Founding Era understanding of executive power.<sup>187</sup>

In addition to the legal nuts and bolts, the facts of *Steel Seizure* were highly publicized in the newspapers and elicited a strong reaction from the 1950s public.<sup>188</sup> Truman was likened to a king, attempting to usurp the executive power through his assertion of a “divine right.”<sup>189</sup> He was referred to as “the wrong sort of president” attempting to “drag us into dictatorship.”<sup>190</sup> A Chicago women’s group characterized the seizure of the steel manufacturing plants as the “latest of a long line of executive usurpation of power through executive orders and in derogation and usurpation of the constitutional powers vested in the Congress of the United States—all of which acts are illegal . . . and rest on claims to unlimited

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<sup>186</sup> While we seriously question whether a President acting pursuant to Jackson’s third category would ever be within the bounds of the original meaning of executive power, answering this question is simply beyond the scope of this paper. Rather, our discussion of *Steel Seizure* is offered for the purpose of illustrating the lasting effects of judicial interpretation on public perception of executive power and the ways in which judicial decisions are used to affirmatively shape the power of the President.

<sup>187</sup> See e.g., *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) (holding that the President has the exclusive power to formally recognize a foreign sovereign, even though doing so falls within Jackson’s third category and the action is “incompatible with the expressed or implied will of Congress”); *Loving v. United States*, 517 U.S. 748 (1996) (holding in part that Congress has the right to delegate to the President the authority to prescribe aggravating factors for imposition of the death penalty by a court-martial upon a member of the Armed Forces who has been convicted of murder); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (relying on Jackson’s framework to justify the President’s authority to freeze Iranian assets in the United States).

<sup>188</sup> See, e.g., *Think Straight, Legalists*, MARION STAR (Marion, Ohio), Apr. 19, 1952, at 6 (calling precedent permitting the President’s seizure of the steel mills “shortsighted”); Pat Hillings, *Hillings Explains Stand on Steel Plant Seizure*, COVINA ARGUS (Covina, Cal.), May 2, 1952, at 8 (“I have never seen the people at home as interested in government and politics as they are today. Everywhere I went throughout the district, Democrats and Republicans alike expressed deep concern and disgust over the corruption and lack of morality in the government. The people at home seem to be aware of the fact that only a change in our national leadership can eliminate corruption and restore confidence in the executive branch.”); *Text of O’Connor’s Speech to Senate on Steel Seizure*, BALTIMORE SUN, Apr. 23, 1952, at 7 (“The seizure of the steel plants is the very kind of situation that [the] founding fathers foresaw as leading to the concentration of too much power in one branch of the government.”).

<sup>189</sup> James W. Fifield, Jr., *Steel Seizure Akin to the Theory of Divine Right of Kings, Says Minister*, DAILY TIMES (Davenport, Iowa), Apr. 28, 1952, at 14 (“I am terrified at the thought of an America so apathetic, so unconcerned, so demoralized that it will sit passively by as the dagger of unlimited executive power is pressed toward the very heart of American freedom.”).

<sup>190</sup> *Show-Down Time*, ITHACA JOURNAL (N.Y.), Apr. 26, 1952, at 6.

and unrestrained executive power” and called for a new presidential candidate.<sup>191</sup> A New York paper forcefully asserted that “[the district court’s] decision [finding Truman’s actions unconstitutional] sets off a nationwide steel strike, but it is far better that the nation bear the catastrophe of such a strike than that a precedent be suffered in departure from constitutional government.”<sup>192</sup> Although some were willing to look past the constitutional implications and focus on the politics at play—presidential defense of downtrodden steel workers against the greedy interests of “big steel” robber barons<sup>193</sup>—the public appears to have overwhelmingly disapproved of President Truman’s actions as executive overreach.

Again, as was the case in *Myers*, the rhetoric surrounding *Steel Seizure* is thematically similar to that present in the Constitutional Convention debates and in the wider public discourse of the Founding Era: a rejection of a monarch;<sup>194</sup> a preference for limited executive functions as opposed to broad, inherent executive power;<sup>195</sup> and a deferential view of the legislature as the exclusive maker of laws.<sup>196</sup> Moreover, a corpus based search of the phrase *executive power* shows that, during the 1940s and 1950s, *executive power* most frequently co-occurred with *jealousy*, *limits*, *broad*, and *fear*, among others.<sup>197</sup> Searching COHA for

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<sup>191</sup> *Steel Seizure is Scored by Club Women*, CHI. HEIGHTS STAR, Jun. 3, 1952, at 5.

<sup>192</sup> *Historic Decision Outlawing Steel Seizure Moves for Return to Government Under Law*, PRESS & SUN-BULL. (Binghamton, N.Y.), Apr. 30, 1952, at 6 (referring to the government’s argument that the President is vested with “inherent power” as a “shadowy theory” and positing that a “present definition of executive power is wholesome and salutary in a period . . . in which the executive branch would tend to stretch its prerogatives and tend to deem too lightly the philosophy of checks and balances implicit in the Constitution”).

<sup>193</sup> Holmes Alexander, *Maybe Truman Planned the Steel Seizure as Campaign Ammunition*, L.A. TIMES, May 9, 1952, at 39 (explaining that, before issuing Executive Order 10340, Truman ordered a nation-wide sampling of public opinion regarding seizure of the steel mills, the results of which showed “no sympathy for the steel owners,” “no misgivings about the power of seizure,” “little if any feeling that the snatching of somebody else’s property was a violation of the Constitution,” and “no tremor to indicate fear of dictatorship”).

<sup>194</sup> *Madison Debates: June 1*, *supra* note 129.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> CORPUS OF HISTORICAL AMERICAN ENGLISH, <https://corpus.byu.edu/coha/> (last visited Mar. 28, 2018) (collocate search of “executive power” in 1940 and 1950) [hereinafter COHA]. The third most common collocate associated with *executive power* during this time period was *McCarthy*, demonstrating how ficklely associated the notion of executive power is with political movements. *Id.* Further review of the concordance line results shows that even where *broad* is associated with *executive power*, it is in the context of Congress authorizing a temporary broad grant of executive power to the President or judicial disapproval of an attempt to assert broad executive power. *Id.* Therefore, the corpus linguistic data support the conclusion that broad executive power was viewed with disfavor during this time period.

adjectives within three words preceding *presidency* during the same time period likewise produces *unfit, powerful, Jacksonian, and big*.<sup>198</sup> This data suggests that, in the public discourse of 1940s and 1950s America, the President was criticized for his attempted expansion of executive power and that the American people wanted to retain the more narrow meaning of the Founding Era, consistent with Justice Black’s majority opinion. However, just as in the 1910s and 1920s, a collocational search of the term *executive* in the ‘40s and ‘50s shows an increased frequency of private sector collocates—even more than in the *Myers* era—suggesting that *executive* continued to take on new connotations throughout the twentieth century.<sup>199</sup>

### *C. Executive Action in the Modern Era: Half a Century of Presidential Overreach*

While the political discretion of the judiciary has undoubtedly shaped the legal definition of executive power, the corpus linguistic data and the social response to those judicial opinions suggests that the *public* meaning of executive power has nevertheless remained relatively fixed. The common thread in public discourse from the Founding Era to the 1920s through the 1950s is a rejection of perceived presidential overreach, evincing a public understanding of a narrow executive power limited to little more than the mere execution of the laws. Indeed, a series of presidential attempts to usurp more power than is allocated to the position led one commentator to refer to the presidency as a “juggernaut that crippled the proper functioning of [] government.”<sup>200</sup>

The above reference was particularly aimed at the actions taken by disgraced President Richard Nixon in connection with the infamous Watergate scandal. Among the allegations levied against Nixon at his impeachment hearings were that he “used the executive power to authorize illegal surveillance and investigations by the Federal Bureau of Investigation,” “used the executive power to unlawfully establish a special investigative unit inside the White House to engage in unlawful covert activities,” “used the executive power to obtain confidential tax return information from the Internal Revenue Service,” and “used the executive power to impede lawful inquiries into the conduct of his office.”<sup>201</sup>

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<sup>198</sup> *Id.* (collocational search of *presidency* during the 1940s and 1950s limited to adjectives occurring within three words to the left).

<sup>199</sup> *Id.* (collocational search of words occurring within one word to the left of *executive* during the 1940s and 1950s).

<sup>200</sup> Herbert H. Bennett & Theodore Koskoff, *Foreward* to ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE, THE POWERS OF THE PRESIDENCY: FINAL REPORT 7 (1975) [hereinafter POWERS OF THE PRESIDENCY].

<sup>201</sup> Draft Impeachment Articles reprinted in *Compromise Impeachment Articles to be Debated*, PHILA. INQUIRER, July 25, 1974, at 4.

In other words, the draft impeachment articles read as a laundry list of actions effected by the President's exercise of executive power not at all related to the President's executive function—that is, the execution of the laws.

Even apart from the abuses of executive power stemming from the Watergate scandal, Nixon was criticized for attempting to expand the scope of the executive in various other aspects of his presidency.<sup>202</sup> For instance, in 1971, prior to Watergate, the *Chicago Tribune* referred to Nixon as an “arrogant usurper of ‘raw executive power’ not delegated to him under the Constitution.”<sup>203</sup> Democratic Senator Sam Ervin, ultimately an instrumental figure in the Watergate scandal, reportedly contended that Nixon had amassed “the most dangerous concentration of executive power in our history.”<sup>204</sup> Much criticism centered around Nixon's liberal use of the executive order, an ever-more familiar theme in twenty-first century American political discourse. Moreover, Watergate, the ensuing investigations, and Nixon's ultimate resignation clearly exacerbated public distrust of a powerful executive. The office of the President was referred to as “the imperial presidency,”<sup>205</sup> “runaway presidency,”<sup>206</sup> and “iniquitous presidency.”<sup>207</sup> One newspaper comically asserted that Nixon's presidency made “the Cult of the Strong Presidency about as popular as snake handling in church” and that former “true believers” in the strong executive movement were losing faith as a result of his actions.<sup>208</sup> Thus, history suggests that, even when a strong executive movement gains temporary momentum, as it did during President John F. Kennedy's 1960 campaign, an overly strong executive in practice is inconsistent with the American view of the President's constitutionally vested executive power, a view that has remained relatively fixed since the Founding Era.

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<sup>202</sup> See, e.g., *Executive Abuses*, PALM BEACH POST (West Palm Beach, Fla.), Oct. 25, 1971, at 14 (“The Nixon administration has disturbed the triangle of power in a number of alarming ways.”).

<sup>203</sup> Willard Edwards, *Nixon Rapped on ‘Raw Power’ Play*, CHI. TRIBUNE, Oct. 12, 1971, at 12.

<sup>204</sup> Gaylord Shaw, *Nixon Using Executive Power in Efforts to Reshape Government*, LAWTON CONST. (Okla.), Mar. 15, 1973, at 18 (referring to the President's policies, not the allegations of Watergate).

<sup>205</sup> Arthur M. Schlesinger, Jr., *The Rise in Gall of the American Emperor*, BALTIMORE SUN, Dec. 23, 1973, at 35; see also POWERS OF THE PRESIDENCY, *supra* note 200.

<sup>206</sup> Arnold B. Sawislak, *Congress Has Only Self to Blame for Runaway Presidency Powers*, SIMPSON'S LEADER-TIMES (Kittanning, Pa.), Jan. 24, 1974, at 6; see also POWERS OF THE PRESIDENCY, *supra* note 200.

<sup>207</sup> Rowland Evans & Robert Novak, *Weakness of the Presidency*, DAILY WORLD (Opelousas, La.), Feb. 28, 1975, at 4; see also POWERS OF THE PRESIDENCY, *supra* note 200.

<sup>208</sup> Sawislak, *supra* note 206.

## CONCLUSION

“The experience of man sheds a good deal of light . . . not merely on the need for effective power, if society is to be at once cohesive and civilized, but also on the need for limitations on the power of governors over the governed.”<sup>209</sup> It is no surprise then that concerns about executive power have plagued public discourse well into the twenty-first century with no apparent end in sight. Presidents Obama and Trump are not the only Presidents to be accused of pressing the boundaries, and even exceeding the scope, of the executive power. Indeed, every President since Nixon has been assailed with accusations of executive overreach.<sup>210</sup> No doubt, the controversy over the executive’s proper role will continue to plague scholars and politicians well into the future. However, if

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<sup>209</sup> *Steel Seizure*, 343 U.S. at 593 (Frankfurter, J., concurring).

<sup>210</sup> Richard M. Salsman, *When It Comes to Abuse of Presidential Power, Obama is a Mere Piker*, FORBES (Jan. 28, 2013, 8:00AM), <https://www.forbes.com/sites/richardsalsman/2013/01/28/when-it-comes-to-abuse-of-presidential-power-obama-is-a-mere-piker/#12d3e236235e>; *The Ebb and Flow of Executive Power*, N.Y. TIMES (Feb. 18, 2014), <https://economix.blogs.nytimes.com/2014/02/18/the-ebb-and-flow-of-executive-power> (“The modern history of congressional concern about executive overreach begins with Richard Nixon.”). See, e.g., Thomas B. Edsall, *Trump’s Tool Kit Does Not Include the Constitution*, N.Y. TIMES (Feb. 8, 2018), <https://www.nytimes.com/2018/02/08/opinion/trump-democracy-midterm-elections.html> (“Trump won the Republican nomination and the presidency by conducting a campaign directly challenging the notion that the electorate will punish a politician for ‘violating accepted constitutional arrangement.’ He has not wavered from this course throughout the first year of his presidency, and, barring unforeseen events, it will guide him into the 2020 election. If Republicans retain control of both branches of Congress in 2018 . . . Trump will claim vindication. His assault on the pillars of democracy will continue unabated with increasingly insidious effect.”); Michael D. Shear, *Obama’s Effort to Go It Alone on Guns Brings Republicans Together*, N.Y. TIMES (Jan. 5, 2016), <https://www.nytimes.com/politics/first-draft/2016/01/05/obamas-effort-to-go-it-alone-on-guns-brings-republicans-together> (noting the opinions of prominent Republicans as to President Obama’s decision to “take unilateral action on gun control in the face of congressional gridlock”); Dahlia Lithwich, *Tyranny in the Name of Freedom*, N.Y. TIMES (Aug. 12, 2004), <https://www.nytimes.com/2004/08/12/opinion/tyranny-in-the-name-of-freedom.html> (characterizing “the use of Secret Service to silence [protestors at the Republican National Convention] as an abuse of the executive power”); Alexander Cockburn, *Impeachment: Always a Good Idea*, L.A. TIMES, Mar. 29, 1998, at 29 (“Clinton’s arrogance rivals that of Richard Nixon’s during the Watergate crisis.”); Michael Kinsley, *President Should Let Congress Make War*, ALBUQUERQUE J., Oct. 22, 1993, at 12 (discussing expansion of executive power under President George H.W. Bush); *A Drastic Assertion of Executive Power*, SHEBOYGAN PRESS (Wis.), Mar. 31, 1983, at 40 (calling on the Supreme Court to “reject [a broad] assertion of executive power” under Reagan); *Breach of Faith*, SOUTH BEND TIMES (Ind.), Nov. 18, 1978, at 2 (characterizing the Carter administration’s closure of millions of acres in Alaska to commercial development as “the most arbitrary and capricious use of executive power [] ever encountered”); James Carey, *Pardon Raises Question of Power*, FREMONT TRIB. (Fremont, Neb.), Oct. 3, 1974, at 4 (discussing the public “furor” raised by Ford’s issuance of a “full, free, and absolute pardon” to Nixon).

the Constitution is akin to a contract between the American people and their government, then the original meaning of “executive power” is instrumental in understanding its terms. And while the desires of the Founding Fathers are unknowable, like any contract, the literal words on the page and the context in which they were written are strong evidence of just exactly what the American people bargained for in 1787. Moreover, with the help of corpus linguistics and modern technology, we now have the tools to study more empirically the original meaning of a constitutional phrase as understood at its inception.

Finally, we do not expect that an original public meaning analysis of executive power will close the debate surrounding the proper exercise of executive authority in the United States. Nevertheless, it should be considered as an interpretive ground zero—informing the debate from the perspective of those who entered into this “more perfect union” over two hundred years ago.

APPENDIX 1: RAW SENSE FREQUENCY CODING

1. As belonging to a Single Governmental Leader (non-royal) (e.g. President, governor) 2. As belonging to the head of a private company 3. As referring to one's autonomy over oneself (akin to will power) 4. As belonging to a body of Governmental leaders (e.g. council) 5. As belonging to the Crown/ Divine power 6. As a division of finite governmental power relating to the allocation of responsibilities between governmental branches			
Year	Register	Sense	Freq.
1754	Franklin Papers	4	1
1754	Franklin Papers	1	1
1755	Franklin Papers	1	1
1760	Franklin Papers	4	2
1760	Franklin Papers	1	1
1761	Election Sermon	5	1
1761	Election Sermon	4	1
1762	Political/Legal	4	11
1764	Political/Legal	1	1
1764	book	4	1
1766	Political/Legal	5	1
1766	Election Sermon	1	2
1767	Religious Sermon	3	1
1767	Election Sermon	5	1
1767	Religious Sermon	1	1
1768	Election Sermon	1	3
1768	Personal Letter	1	1
1768	political speech by non-political	1	1
1769	Political/Legal	1	4
1769	Personal Letter from Gov.	1	1
1769	Political/Legal	4	1
1769	religious text	5	1
1770	Adams Papers	5	1
1770	Franklin Papers	5	3
1772	Religious Sermon	3	1
1772	Newspaper	5	1
1772	Adams Papers	5	1
1773	John Locke	5	9
1773	John Locke	3	7
1773	John Locke	1	11
1773	Political/Legal	5	1

1773	religious text	5	1
1774	Election Sermon	4	1
1774	pamphlet	5	1
1774	pamphlet	1	1
1774	Jefferson Papers	1	1
1774	religious text	5	1
1774	political/legal	5	1
1775	Adams Papers	1	1
1775	Hamilton Papers	5	2
1775	Edmund Burke (speech)	4	1
1775	Political/Legal	5	1
1775	Election Sermon	4	1
1775	Franklin Papers	5	1
1775	Newspaper	1	1
1775	Newspaper	5	1
1775	Religious Sermon	1	1
1776	Adams Papers	1	10
1776	Adams Papers	4	1
1776	Newspaper	5	1
1776	Jefferson Papers	1	2
1776	pamphlet	5	2
1776	Jefferson Papers	1	1
1776	political/legal	5	1
1776	political/legal	4	1
1777	political/legal	1	5
1778	Religious Sermon	5	1
1778	political/legal	1	8
1779	political/legal	3	1
1779	political/legal	1	9
1780	Religious Sermon	1	1
1780	Election Sermon	4	1
1780	Adams Papers	4	2
1780	Political/Legal	1	1
1780	Jefferson Papers	1	1
1781	Political/Legal	1	12
1781	religious text	5	1
1782	Election Sermon	5	1
1782	political/legal	4	1
1782	political/legal	1	2
1782	book	1	1
1783	political/legal	1	2

1784	political/legal	1	2
1784	political/legal	5	1
1785	personal letter	6	1
1785	pamphlet	6	1
1785	book	3	1
1785	political/legal	1	1
1786	Political/Legal	1	1
1787	pamphlet	4	1
1787	court case	6	2
1787	Hamilton papers	1	3
1787	political/legal	6	2
1787	Adams Papers	6	1
1787	Adams Papers	1	1
1787	book	3	1
1788	pamphlet	1	2
1788	pamphlet	5	1
1788	pamphlet	6	1
1788	Adams diary	1	1
1788	Hamilton Papers	1	2
1788	Monroe Papers	6	1
1788	Monroe Papers	1	3
1788	Monroe Papers	5	1
1788	Adams Papers (Letter)	5	1
1788	geographic report	4	6
1788	geographic report	1	2
1788	Political/Legal	6	1
1789	Adams Papers	5	2
1789	Adams Papers	6	9
1789	Jefferson Papers	5	3
1789	Hamilton Papers	1	1

APPENDIX 2: SENSE FREQUENCY PER MILLION

Period	Total Words	FREQUENCY PER MILLION					
		1	2	3	4	5	6
1754–1759	211,416.49	4.73	0.00	0.00	0.00	0.00	0.00
1760–1764	2,753,412.14	0.73	0.00	0.00	5.45	0.36	0.00
1765–1769	4,972,328.99	2.61	0.00	0.20	0.20	0.60	0.00
1770–1774	5,381,648.53	2.42	0.00	1.49	0.19	3.72	0.00
1775–1779	12,974,673.67	2.93	0.00	0.08	0.31	0.77	0.00
1780–1784	13,969,904.80	1.50	0.00	0.00	0.29	0.21	0.00
1785–1789	11,711,510.81	1.45	0.00	0.17	0.60	0.68	1.62