

Our Complicated Constitution
By
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Two hundred thirty-eight years ago, on September 17, 1787, George Washington, Presiding Officer, and thirty-eight other comparatively well-to-do citizens of the United States, signed the Constitution. They agreed that nine of the thirteen states would need their state legislatures to adopt the document before it would have the force of being the supreme law of the land.

They were pioneers. Not many other nations existing in 1787 had written constitutions laying out the structure of government, especially one establishing three branches of government. One guiding value of the Framers was that “ambition should be made to counteract ambition,” in the words of James Madison.

Which branch did they put first in their document? I doubt any of you would flub the answer. Article I set up the legislature. Another guiding value shared by the Framers was that they wanted a government “of laws, not of men.” It followed, then, that the first branch would be the one that made the laws.

Section 1 is quite clear: *All legislative Powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representative.* No other entity was given the power to make laws.

Nice idea.

Article II, Section 1 begins: *“The executive Power shall be vested in a President of the United States.”*

What would you define as executive power? To execute the will of Congress as stipulated by the laws? To be an alternate source of law? The Framers did not provide clarity about what constituted executive power.

In *The Federalist Papers*, Alexander Hamilton advocated “an energetic executive.” Yet the rebellion against England had been against King George III and listed in the Declaration of Independence specific examples of grievances they thought to be excessive uses of executive power. How much “energy” would be too much?

The first Executive Order was issued by the first President. Washington asked his department heads to provide a “full precise, and distinct general idea of the affairs of the United States they oversaw.” Makes sense. In essence, “tell me what you think your department needs to deal with and why.”

Franklin Roosevelt issues 3,728, more than 300 for each year in office. Most executive orders direct operations in the Executive branch. They are not permanent as would be a law passed by Congress, and they cannot contravene a law passed by Congress.

What if there has been no pertinent law passed by Congress?

In Article III, setting up the Judiciary, there is no mention made of the Supreme Court ruling on the constitutionality of a law passed by Congress. That principle was established, as you all remember from your US History class, by Chief Justice Marshall in *Marbury v. Madison*.

When historians write about periods in American history, they generally refer to “the Eisenhower Administration” or “the Truman Administration.” I have not yet read a history that marks specific periods by the number of the Congress (47th, 75th, 103rd) in power at the time.

People of a Certain Age, especially my age, would any of us argue that, in our lifetimes, Congress has seemed to be the most important branch of American government? Have any of us questioned the practice of the Supreme Court ruling on the constitutionality of laws, despite the fact that the Constitution doesn’t specifically stipulate that practice?

Mr. Madison and his fellow Framers might have hoped that they were setting up a government in which ambition would counteract ambition. But from the time when President Jefferson agreed to the Louisiana Purchase before consulting Congress (which would have to approve the purchase price), through the prosecution of several wars since 1941 without a Declaration of War by Congress, to the refusal, because of political disagreement, to spend money already allocated by Congress, the ambition of Presidents has far outdone the exercise of power by Congress.

Is this apparent imbalance of power a sign that the Framers screwed up?

Probably not. The 39 men who signed the Constitution were of similar social and economic standing. Many, if not most, had some level of education that included the works of political philosophers who had lived before them. They were, themselves, reasonably skilled politicians, selected by their states to represent states’ interests at the Convention.

They were, in short, a group of politically aware men who set up a structure that depended upon political activity. They would have expected that those who would run the government would be of social and economic standing similar to their own. (They were deliberate in allowing the masses—and then only men—the power to vote for **only one part** of one branch of government. Most power was to remain in the hands of men like themselves.)

There was, according to author Jeffrey Rosen in *The Pursuit of Happiness*, a shared understanding that Virtue was essential to Happiness. It followed that those elected to office would be men of Virtue, focused on their responsibility to serve the public interest.

So, politically aware men, of considerable social and economic standing, steeped in the importance of Virtue, began their political document with the words, *We the People*.

The Constitution that George Washington and his 38 colleagues gave we, the people, to think about is complicated. The political debate over what the words mean should not be a surprise.

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