gress, and the express limitations upon those powers in the original Constitution and in the first ten amendments, all of which, by a series of decisions already cited, apply exclusively to the Federal government, and in no case to the government of the States.[1]

[1] Barron v. Baltimore, 7 Pet. 244; Smith v. Maryland, 18 How. 71; Purvear v. Commonwealth, 5 Wall. 475; Twitchell v. Commonwealth, 7 id. 321; The Justices v. Murray, 9 id. 274; Edwards v. Elliott, 21 id. 532; Walker v. Sauvinet, 92 U. S. 90.

CHAPTER XII.

THE EXECUTIVE DEPARTMENT.

§ **338.** In the orderly arrangement of the Constitution we have already seen that the first article applies to the Legislative Department, and the powers delegated to it by the Constitution. This second article applies to the Executive Department, and the powers delegated to the President as the officer in whom the executive power shall be vested. The first article is prefaced with the language, "All legislative powers herein granted shall be vested in a Congress of the United States." The second article is prefaced by the declaration, "The executive power shall be vested in a President of the United States of America."

We will now take up this article, clause by clause, and attempt to expound its meaning. We have already referred to the general purpose of the convention to conform the organism of the Federal government to the familiar canon of Baron Montesquieu, requiring the complete separation of the three departments as an essential security to the liberties of the people. It has also been seen that in the framing of the portions of the Constitution relating to the Legislative Department, it was intended to grant to the Congress of the United States legislative powers alone. It will now be seen on the threshold of the article in respect to the Executive Department that "the executive power shall be vested in a President of the United States of America." Whatever might be considered the powers thereafter granted to the President in any other Constitution or system of government, or however the powers granted in the first article to Congress, or in the third article to the Judicial Department, might be considered under any other system of government than our own, it is obvious that the Con-

stitution intended to vest in the President of the United States the executive power, and none other; and that the powers enumerated in the second article are to be regarded as in the minds of the framers of the Constitution as executive powers, and all others enumerated in the other articles as not executive powers. It has been said that the power to declare war is an executive power, because it is vested in the King of England, who is the executive of that kingdom; but it is certainly not true under the Constitution of the United States that the power to declare war is an executive power, and it is certainly true that it is only a legislative power. This first sentence, therefore, in this article is the key to the whole article.

Again, we think it is clear that the incidental powers which may be necessary and proper to carry into effect the powers vested in the Executive Department by the Constitution are legislative powers, and not executive, because the eighteenth clause of the eighth section of the first article gives to Congress the power — the legislative power — to supply the means necessary and proper for carrying into execution the powers vested in the Executive Department. It would seem indeed that while the express powers vested in the President are not in any degree within the control of the legislative power, yet where an executive power needs co-efficient means for carrying it into execution, those means are not executive powers at all, but are to be supplied by the legislative powers of Congress.

It is provided in section 1, clause 1, of article II, that the President shall hold his office during a term of four years. The office of President is, therefore, a constitutional office. He is by the Constitution an officer of the United States as well as the President. In this respect the President and Vice-President differ from senators and representatives in Congress. The latter, as we have seen, are not officers of the United States at all; they are senators and representatives of the respective States. The two officers mentioned hold their offices during a term of four years. This does not mean that

they shall hold the office or exercise its duties for a period of four years, but the term of office shall be four years; and, therefore, General Washington entered upon the duties and the execution of his office on the 30th of April, 1789; but his second term of office began on the 4th of March, 1793, and not on the 30th of April, 1793.

§ **339.** The manner of electing the President and Vice-President is thus prescribed.[1] As we have seen, the President is to be elected primarily by electors. He is not elected by a direct vote of the suffragans of the States. He is elected by the votes of electors, who may be chosen or appointed by the suffragans of the States or otherwise.

Let us see how this is provided for. The electors are to vote for the President, but who are to appoint the electors? "Each State shall appoint." The power of appointment is in the individual State. If it is asked what is the meaning of the word "State," the question is easily answered. It means the State — the Body-politic, as distinct from the government and the departments thereof, because these words are followed by this clause, "in such manner as the legislature thereof" (that is, the legislature of the State) "may direct." The legislative organization is the instrument through which the State as a Body-politic acts in the appointment of electors.

Shall appoint whom? "A number of electors." How many? "Equal to the whole number of senators and representatives to which the State may be entitled in the Congress." A State thus appoints electors equal to the number of senators and representatives that the same State is entitled to in Congress. This sentence makes the States the source, as we have seen, of all legislative and all executive power in the government of the United States. Let it be noted that the basic principle of compromise of the related powers of the States as co-efficient Bodies-politic and as Bodies-politic according to their numbers, which settled the constitution of the Senate and the House of Representatives

[1] Art. II, sec. 1, clause 2.

as branches of the Congress, by giving equality of representation to the States in the Senate and representation according to numerical strength in the House, was carried out in the constitution of the Executive Department by combining in one the dual elements of statehood represented in the two Houses, and making each State potential in the election of the executive by combining its powers as an independent State, and its powers according to numbers.

The clause proceeds, "But no senator or representative, or person holding an office of trust or profit under the United States shall be appointed an elector."[1] This clause is suggestive of what is just above stated, that neither a senator nor representative is a person holding an office of trust or profit under the United States; such hold under the State represented by them, not under the United States. This excludes all members of Congress from having anything to do with the election of President. It makes the President entirely independent of Congress and of its members, and divorces these from any part in the election of the executive. It also excludes all persons in the pay of or in subordination to the United States government from taking part in the election, which is intended to be free from all such influences, and to be controlled only by the free voice of electors appointed by the States in the manner prescribed.

§ 340. What is the significance of "in such manner as the legislature thereof may direct?" If the legislature chooses, may it not direct the appointment to be made by popular vote, or by the legislature, or by one branch of the legislature, or by the Governor? Is there any restriction upon the State or its legislature as to the manner in which the State shall appoint these electors? It would seem not. Until the year 1860, the legislature of South Carolina directed the election of its electors by the legislature itself; and it is further to be noted that the manner of appointment so directed is nowhere to be altered or established by any other instrumentality, as was provided in the case of the

[1] Federalist. No. LXVIII.

time, place and manner of holding elections for senators and representatives.[1] A State may therefore appoint electors or refuse to appoint, and in any manner that it may direct by its legislature, nor is there power which can control or nullify its action.

§ 341. In a former part of this work the nature of the executive functions and of the organization of the Executive Department has been discussed in connection with the consideration of the subject of government. It will therefore not be necessary to say anything upon that subject here. It is only necessary to say that the Executive Department was established without any advisory council or other limitation upon the power of the President; but it is obvious that the vesting of the executive functions in one man without limitation upon his personal will, determined in secret, without debate or public discussion, and with no appeal, was a perilous investiture of power, which naturally made the framers of the Constitution careful about the limitations upon it. The debates in the Constitutional Convention have been reported by Mr. Madison, and may be referred to as instructive upon the purposes of the framers of the Constitution.[2]

Whether the executive should be singular or plural was first debated. The argument in favor of its unity was that it secured energy and responsibility; energy by reason of singleness of determination, and responsibility of the one, which would be divided if the executive be plural. The plan of a single executive was adopted by a vote of seven States to three.[3] The question arose whether there should be a council attached to the Executive Department. It was argued that even the royal executive of Great Britain had a cabinet to advise him. Mr. Randolph, in his eighth resolution, had proposed that the executive and a convenient number of the national judiciary should compose a council of revision.[4]

[1] Art. I, sec. 4, clause 1.
[2] Madison Papers, 762.
[3] Id. 783.
[4] Id. 733.

The use of the judiciary for any such purpose was strongly reprobated by Messrs. Gerry and King, largely on the ground that the judiciary, by reason of their judicial functions, could set aside laws because at variance with the Constitution, and should not therefore take part in their original enactment. This proposition was therefore postponed, by a vote of six States to four,[1] to take up a proposition giving the veto power to the executive.

The mode of the election of the executive was the subject upon which the convention seemed to have been very much at sea. Wilson, of Pennsylvania, suggested an election by the people at large. Sherman was for appointment by the legislature.[2] Randolph's seventh resolution provided for an election by the National Legislature. The term of the office was fixed by a vote of five States to four, and one divided, at seven years.[3] The term of seven years was adopted with a view to ineligibility thereafter, as against a term of three years with re-eligibility. Wilson then proposed that the executive be elected by the qualified voters, who should elect the executive by ballot. This was rejected by a vote of two States to eight, and the election by the National Legislature for a term of seven years was agreed to by a vote of eight States to two. It was then agreed to make the executive ineligible after seven years by a vote of seven States to two, one State divided.

The question of the power of the executive negative then came up. Ten States voted against the absolute negative, and against the suspending negative ten States. The executive negative qualified by the power of each branch of the legislature to overrule it passed *sub silentio*.[5] Mr. Hamilton thought the British model of the executive the best; that the executive, if elected for life, would be elected by the people, and this would therefore be consistent with republican principles.[6] The Committee of Detail, to whom the various

[1] Id. 783–84.
[2] Id. 766.
[3] Id. 767.
[4] Id. 770.
[5] Id. 790.
[6] Id. 911.

propositions were referred, reported in favor of a single executive to be elected by the legislature for a term of seven years, but to be ineligible to re-election, and of conferring on the executive a qualified veto, subject to be overruled by two-thirds of both Houses.[1] The committee adopted the single executive *nem. con.*[2] The proposition to elect by joint ballot instead of by the ballot of each House passed by a vote of seven States to four. A motion to amend by electing by the people instead of by the legislature was defeated by a vote of two States to nine.[3] At this late period of the convention, August 24, Gouverneur Morris strongly opposed the election of the executive by the legislature. So strong were his views against this mode of election that a proposition that the President should be chosen by electors to be selected by the people of the several States failed by a divided vote.[4] But the seed had been sown and bore fruit in the report of the Committee of Eleven on the 4th day of September, in which it was provided that in case of failure to elect by the electors, the Senate, from the five highest on the list, was to choose the President by ballot.[5] In the discussion of this question great opposition to the eventual election of the President by the Senate was manifested. Mr. Williamson suggested that the eventual choice should be made by the legislature, voting by States, and not *per capita*. Sherman suggested and moved that the House of Representatives should have the eventual selection, and not the Senate. This proposition, backed by Mason, was adopted by a vote of ten States to one.[6] This history of the struggles in the Constitutional Convention over the selection and term of the executive is interesting as showing how, in the face of great divergence of opinion, the clause was finally adopted.

During the debates strong opposition was manifested to any monarchical taint in the organization of the Executive Department. The term finally adopted of four years, with

[1] Id. 1223–36.
[2] Id. 1417.
[3] Id. 1417–19.
[4] Id. 1420–21.
[5] Id. 1486.
[6] Id. 1510–12.

re-eligibility, was a substitute for the longer term of seven years with ineligibility. The executive unity which secured energy tending toward autocracy was balanced in the minds of the members of the convention against the short term for the executive and his personal responsibility, which could not be evaded. But great distrust was manifested at clothing the executive with large and dangerous powers; and it will be seen in the examination of future clauses relating to this subject that the powers of the executive are well defined as to extent, and limited in a large degree by their depending upon the co-efficient authority of the legislature for their efficacy.

§ 342. The electors appointed in each State in the manner prescribed by its legislature are to sit in their respective States, and not to meet in one body with electors from other States. This select body in each State (separate and apart from all other like bodies) is intended to voice the independent will of each State.[2] In the lack of quick communication between the different States in the Union, this plan offered a strong hope of independent action by the several States. It is obvious that in our day this expectation would be disappointed by the easy communication between the States, and this disappointment has been increased by the party conventions of the different organizations, whose choice of party candidates, dictated to the electoral college, defeats the whole plan as contemplated by the Constitution. Of this, more will be said hereafter.

The clause proceeds to declare that the meeting of electors in each State (which may be aptly called a college of electors) shall "vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each." This clearly implies that an elector shall vote for any two persons he shall choose, independent of the choice of other electors. It was

[1] Art. II, sec. 1, clause 3.

[2] Federalist, No. LXVIII.

contemplated that by this security of personal independence *inter se*, even in each college, a free vote would be obtained from each elector for the man he deemed best fitted for the Presidency.

But suppose the elector voted for two inhabitants of the same State with himself. It would seem the vote would be void, under this clause of the original Constitution, for either might be President. But that result would, perhaps, not now obtain under the twelfth amendment, for the vote is to be for one as President and the other as Vice-President. But the point is in doubt. The clause proceeds: "which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate." This transmission of the certified action of the college to the President of the Senate, at the seat of government, is important if not essential.

The *modus operandi*, under the original clause of the Constitution up to this point, has been changed by the twelfth amendment, which was adopted in 1802. That amendment provides: "The Electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate."

The historic cause for this change was the dangerous condition of things resulting from the election in 1800. Thomas Jefferson and Aaron Burr were voted for by the same political party and had equal votes. Neither, under the then Constitution, being designated as President or Vice-President, the original Constitution declared that when two persons had an equal vote, and each had a majority over all

others, the House of Representatives should choose one of them for President.

In this case the House of Representatives could not elect either Jefferson or Burr. For a long time it was felt that there would be a failure to elect, and thus an *interregnum* occur which might destroy the Union. After some weeks, however, Mr. Jefferson was elected and Burr became Vice-President.

The thoughtful statesmen of that period, in view of the danger in the future from a like contingency, determined to propose the twelfth amendment, which was adopted. As already quoted, each college of electors was to meet and vote for one person as President and another person as Vice-President. In this explanation we must consider the clause in the original Constitution: "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted." This clause is thus precisely copied in the twelfth amendment already referred to, and in our later history became a clause of grave and momentous consequence.

§ 343. In the Presidential election of 1876 Mr. Hayes and Mr. Tilden were the candidates for the Presidency. Contests arose in several States between the Hayes and Tilden electors, and the question was critical as to which set in each of them was entitled to be counted. The Senate was composed of a large majority of members favorable to Mr. Hayes, the House of Representatives of those favorable to Mr. Tilden.

There were rival sets of certificates from several of the colleges. They were transmitted to the President of the Senate, who was favorable to Mr. Hayes. The Constitution directed, as above indicated, that "the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted." The question arose, what was the function of opening the certificates in the presence of the House of Representatives, and who shall then count the votes? On the one part it was contended that the President of the Senate was to open the

certificates and count the votes and thus decide the contest. On the other hand, it was insisted with conclusive force that the presence of the two Houses made them controlling supervisors of the acts of the President of the Senate, which was simply ministerial, and that the counting of the votes was to be the act, not of the President of the Senate, but to be the concurrent act of the two Houses, as guardians of the count and as deciders of the result. This view was not only the clear meaning of the wording of the clause, but gained conclusive confirmation from the historic action of the two Houses, upon which the twelfth amendment had placed its sanction by the adoption of the precise words of the original article, which had been three times acted upon by the two Houses in accordance with this view. In none of the previous cases in 1793, 1797 or 1800 had the President of the Senate exercised any but the ministerial function of opening the certificates and laying them before the two Houses. Each House had appointed its one teller (or counter) to count the votes for it, and the result thus ascertained was reported by the tellers concurrently to the President of the Senate, who simply announced the result to the two Houses which had thus been obtained by and through their respective tellers. These precedents were regarded as interpretations of the constitutional language in the original Constitution; and as that language was precisely re-adopted in the twelfth amendment, the precedents were held to be an authentic construction of the language used in the original, and by the Constitution-makers (the States) in ratifying the amendment.

It is perhaps as well to add that the crucial question was this: The two Houses were intended to count the vote and decide upon the count; but when they differ, who shall umpire the difference and decide the count? In this case in 1876, the two Houses would, it was anticipated, widely differ in their conclusions. To meet this imminent difficulty, Congress passed "The Electoral Commission Bill," under which the disputed certificates were considered and decided upon by the Electoral Commission, subject to be set aside by the