

The Executive Power Clause

The Stakes
and the Challenges of Sifting Through
Evidence of the Meaning of a Historical
Concept

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Can the U.S. President Break the Law?

“Any effort to apply [federal criminal law] in a manner that interferes with the President’s direction of ... the detention and interrogation of enemy combatants thus would be illegal.”

– U.S. Department of Justice,
Internal Memo on Legality of
“Enhanced Interrogation” (2002)

Torture

Wiretapping

Use of force

Art. I Legislative Power
“Congress Shall Have Power...”

To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the [US];

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the Supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Art II Presidential Power

The executive power shall be vested in a President of the United States of America

The President shall be commander in chief of army & navy

He may require the opinion, in writing, of the principal officer in each of the executive departments

He shall have power to grant reprieves and pardons

He shall have power, by and with the advice and consent of the Senate, to make treaties

He shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, . . . judges of the Supreme Court, and all other officers of the United States

He may, on extraordinary occasions, convene [or adjourn] both Houses [of Congress]...

He shall receive ambassadors and other public ministers

He shall take care that the laws be faithfully executed

NOT INCLUDED: power to VETO (appears in Article I)

Note that almost all of these are PROCESS rights

informational rights: “opinion of officers”; “receive ambassadors”

COOPERATIVE process rights: *participate* in lawmaking; *participate* in appointments; *participate* in treaty-making --> each with a congressional check

only a couple of things seem genuinely independent [CLICK THROUGH]

Pardon power

Commander in chief

Take Care

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What Does the Vesting Clause Do?

1. *Cross-Reference Theory* – specifies that only the President can exercise the specific powers listed in Article II
2. *Law Execution Theory* – grants an additional power to the President: the power to execute the laws
3. *Royal Residuum Theory* – grants an additional power to the President: all otherwise-unallocated royal authority

Oversimplifying slightly, three competing interpretations

(1) **content-free shorthand reference to the rest of the powers** granted elsewhere in Article II.

Vesting Clause emphasizes organizational structure
Art II authorities must be **vested in a single human being** rather than in a corporate entity or a committee of individuals.

(2) Vesting Clause **does exactly what it says:**

gives Presidents the **power to execute duly enacted laws** and exercise the authority thus delegated them.

Quite significant in a constitutional scheme of enumerated powers.

(3) “executive power” is said instead to reference a **well-understood suite of powers that a Founding-era head of state would typically have possessed.**

Two Vesting Clauses

U.S. Const. Article II 1 st sentence	“The executive power shall be vested in a President of the United States of America.”
Blackstone Vol 1, Ch. 3 1 st sentence	“The supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen.”

I don't think American historians have taken Blackstone seriously enough AS A LAWYER

This first sentence is a giant clue in how they thought about it

It's like they copied Blackstone . . .

. . . But added in only SOME of the stuff

Look at the rest of the materials [[CLICK TO NEXT PAGE](#)]

A compromise through and through

Some important powers

Power (“executive”) and obligation (“take care”) to execute directly on individuals

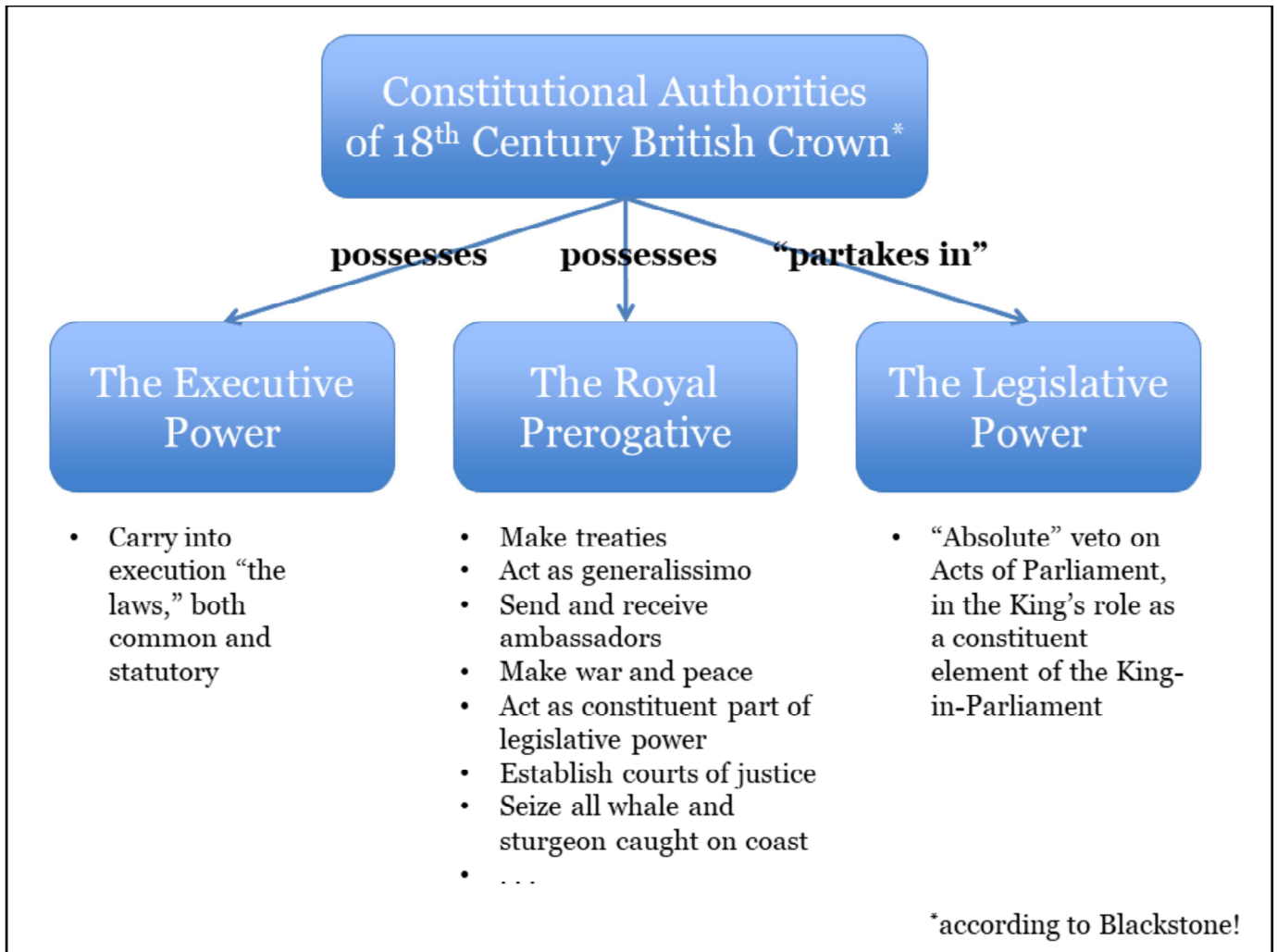
Single commander in chief, not a committee

But many major Blackstone powers are qualified

Treaties (with senate)

Appointments (with senate)

Run through: each one of these is a Blackstone power



Trans-Atlantic lawyerly usage, there was indeed a term of art for the basket of non-statutory powers that were held by the British King.

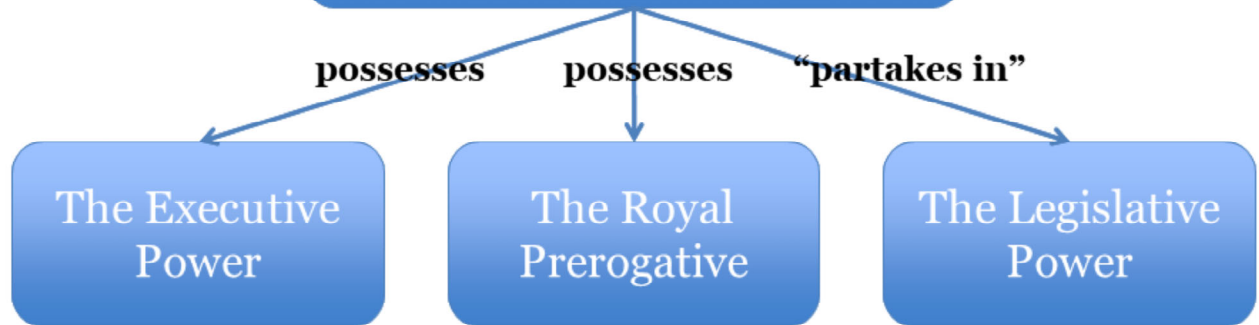
But that term was **“royal prerogative.”**

The Article II phrase **“executive power”** held *alongside* the “royal prerogative” — **narrow but potent role of “executing” the commands** and authorizations of both common and statutory law.

If my preliminary research holds up:

1. Article II should actually be understood to have **granted ONLY those substantive powers that were expressly specified** outside the Vesting Clause.
2. As for the **Vesting Clause, it granted exactly (and only) what it said: the President’s power *to execute*** duly promulgated laws.

Constitutional Authorities of 18th Century British Crown *



- Carry into execution “the laws,” both common and statutory

- Make treaties
- Act as generalissimo
- Send and receive ambassadors
- Make war and peace
- Act as constituent part of legislative power
- Establish courts of justice
- Seize all whale and sturgeon caught on coast
- ...

- “Absolute” veto on Acts of Parliament, in the King’s role as a constituent element of the King-in-Parliament

*according to Blackstone!

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Rhode Island Form of Ratification and Amendments, 29 May 1790
 ... sect or society ought to be favoured, or established by law in preference to others. 5th. That the legislative, executive and judiciary powers of government, should be separate and distinct, and that the members of the two first may ...

Louis-Guillaume Otto to Comte de Montmorin, New York, 1 June 1790
 ... make a new division of their territory at the beginning of the revolution, a measure so happily taken and executed in France in order to destroy the little tyrants and the local prejudices of the different districts. The moment ...

David Howell to Thomas Jefferson, Providence, 3 June 1790 (excerpts)
 ... Superior Court to avoid a more mortifying event, on account of the general concurrence of the people in the execution of their paper money system. In confidence of your friendship, of which you was pleased to give me sufficient ...

Providence Gazette, 21 August 1790 (excerpt)
 ... Happy are we to observe, that similar Motives have influenced your Conduct in filling the lower Offices in the executive Department. We most devoutly venerate that superintending Providence, which, in the Course of Events propitious to this Country, has ...

Rhode Island Legislature to President George Washington, Bristol, 30 October 1790
 ... happily united under an efficient and well-balanced Federal Government. In promoting to Places of Trust and Emolument, in the Executive Department, the wisest and best Men, you have pursued the Example of the People in the Election of the ...

Littleton Waller Tazewell: Sketches of His Own Family, 1823
 ... in June 1788. Under this law all restrictions of qualifications in the delegates were removed, and any of the executive or judicial officers of the government were eligible. The agitation produced by the examination of the important question now ...

Francis Baylies: Eulogy on the Hon. Benjamin Russell, Boston, 10 March 1845
 ... same year and in Boston in 1797. The leader of the Girondin Party during the French Revolution, Brissot was executed in 1793. Hancock first attended the Convention on 30 January, but he did not propose recommendatory amendments until the ...

A Reminiscence of the Arrival in Poughkeepsie of the News of Virginia's Ratification of the Constitution
 ... by Edmund Pendleton, the President of the Virginia Convention, to the President of Congress and all of the state executives enclosing an engrossed manuscript that included the Virginia Form of Ratification and the amendments recommended by the Virginia Convention. ...

[Introduction](#)

John Pintard to Elisha Boudinot
New York, 22 September 1787¹

My dear Elisha

Doctor Roorbach delivered me your letter of 19th. this morning his going out of town at 12. o'clock as also my going in expectation of meeting Mrs. Pintard at Kingsbridge on her way home allows me but a few moments to say any thing respecting the New Constitution which was published yesterday² & has as you may well suppose occasioned great speculation among our citizens—The grand scale on which our Federal Government is to move (as I hope) far surpasses the general opinion—What that is I cannot attempt to describe for We have done nothing else but read it as yet—That opinion shd. vary in this State especially we need not be surprized at—I can more easily subscribe my assent to the plan held out—I have been for sometime perfectly settled in the persuasion that we must have an Energetic government for it must be evident to all by this time that our Utopian Ideas were to[o] fine spun for Execution—Were we all as upright as Yourself & a very few others Mankind might be ruled by opinion, but as that can never be the case in an extensive dominion the Laws ought to be sufficient [48] & the executive powerful enough to restrain the turbulent & support the peaceable members of Society—As a merchant I am perfectly convinced that the Commerce of the U States must be governed by general Laws to be productive of general benefit—As a Citizen I am also convinced that taxation ought to be equal & the funds arising whether from Impost or otherwise to be equally applied—To carry these two points into effect the plan proposed is perhaps the best that can be imagined—I am not of that contracted Spirit as to fear the expence attending the establishment of our Federal Government—decent salaries will produce respectable Characters to fill the posts & every duty ought to be recompenced—Is the man who confines himself to the functions of his post, to be thought compensated by gaining his daily bread only—do we not all count it for worldly wisdom to be able to lay up something for a rainy day & where must the public Officer derive that something if not from his salary—There is a just mean between prodigality & niggardliness in public as well as in private concerns—The Expence of the new Government begins to be resounded & will I know be held forth as a strong objection—I hope to be able to come over soon to digest this matter with you—This will depend upon the health of my little boy who I fear is dangerously ill—Mrs. P. will accompany me at least such is the plan—Let me hear from you how Your time is to be applied that I may regulate my motions accordingly—I enclose you the supplement³ containing the Constitution which as our Liturgy says we ought to *wait, learn, & inwardly digest* before we too hastily decide on it—I am obliged to you