

NONDELEGATION AT THE CONVENTION: JUNE 1, 1787

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INTRODUCTION

On June 1, 1787, the Constitutional Convention in Philadelphia, Pennsylvania marked the start of intense discussions regarding the constitutional relationship between the executive and legislative power in the United States. This discussion has continued since then, with a recent spike in concern following Justice Gorsuch's dissent in *Gundy v. United States*.¹ Supporters of the administrative state fear that the Court may begin to strike down administrative decisions as improperly legislative. To defend against this, many have attempted to push back on historical grounds, including Justice Kagan, who claims that nothing in the records of the Constitutional Convention suggests a limit on congressional power to delegate legislative power to the executive branch. However, the evidence discussed in this Comment suggests that Justice Kagan is incorrect.

The evidence from June 1, 1787 indicates the principle of nondelegation of legislative power to the executive branch was accepted at large as noncontroversial at the Convention. It was agreed that once a separate legislature and executive were established, the legislature would lack the ability to transfer powers “legislative ... in their nature” to the executive.² The Convention’s own *journal*, released in 1819 while many convention-goers were still alive, includes the text of a proposal considered to ban such a transfer of power explicitly, and James Madison’s notes from the Convention explain why it was not included explicitly: because such a prohibition was already included in the separation of legislative and executive power.

Worries from scholars like Mary Bilder about Madison’s credibility in editing his notes³, and exploitation of his role as the last surviving convention-goer, do not undermine this conclusion

¹ See 139 S.Ct. 2116, 2131 (2019) (Gorsuch, J., joined by Roberts, C.J. & Thomas, J., dissenting).

² See Gary S. Lawson & Joseph Postell, *Against the Chenery II “Doctrine”* 13 (Aug. 21, 2023) (C. Boyden Gray Ctr., Working Paper No. 23-23) (citing *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908)); see also 4 THE WORKS OF JOHN ADAMS 579 (Charles Francis Adams ed., 1851) (“three branches of power have an unalterable foundation in nature; . . . the legislative and executive authorities are naturally distinct”).

³ See generally MARY SARAH BILDER, *MADISON’S HAND: REVISING THE CONSTITUTIONAL CONVENTION* (Cambridge, Harv. Univ. Press) (2015).

about his account of what happened on June 1, because the key language was in Madison's original handwriting.

Notwithstanding other arguments in favor of executive agencies exercising delegated power, this Comment will focus on how the *Journal* and James Madison's records illustrate how and why the Founders were concerned with branches of government exercising improper powers, specifically the debates on June 1, 1787. In Section II, this Comment will examine the two main sources of information which relate to June 1, 1787, the records of the *Journal* (published in 1819) and *The Papers of James Madison* (published in 1840). Combining the evidence will enable us to review the scholars who have discussed the Constitutional Convention debates to see why their characterization of the June 1, 1787 episode reaches an implausible conclusion.⁴ Investigating the records of the Constitutional Convention is important because we have seen historical analysis of the issue take center stage in the Supreme Court. One need only look to Justice Kagan's dissent, which this Comment argues misapprehended the historical facts surrounding nondelegation debates by arguing that the Founders were not concerned about delegating legislative powers to the executive.

Section III explains the failure of defenders of broad delegation to the executive branch, like Eric Posner, Adrian Vermeule, Julian Davis Mortenson, and Nicholas Bagley to deal adequately with the evidence from June 1, 1787. Section IV addresses scholars who have criticized Madison's records because he left his records of the Convention incomplete only to revise them after the *Journal* was published in 1819 and respond to those criticisms as they relate to June 1, 1787.

Essentially, the revisions do not undermine Madison's original-handwriting notes which explain why the explicit ban on

⁴ See generally Posner & Vermeule, *supra* note 10. The bulk of the literature accepts the existence of the doctrine, but Posner and Vermeule argue that nondelegation does not exist.

delegation of legislative power was left out of the Constitution.⁵ Section V will outline additional writings by Madison which comport with his explanation as to why the proposal was rejected as unnecessary. Section VI will examine what Supreme Court Justices are writing about the nondelegation doctrine and why improper delegations of legislative power to the executive are in accord with the historical record.

The Appendix contains data from the members of the Convention to show that seventeen of the Framers were alive when the Journal was published, and there is scant evidence of them discounting the Journal of the Convention. In sum, while the Founders acknowledged the line between legislative and executive power was sometimes fuzzy, the basic idea that legislative powers could not be delegated to the executive was common ground for everyone at the Philadelphia Convention.

I. THE RECORDS AND NOTES CONFIRM NONDELEGATION DISCUSSION AT THE CONVENTION

Ever since Justice Gorsuch's dissent in *Gundy v. United States*, proponents of the administrative state are worried that the Supreme Court may soon begin striking down administrative agency decisions under the nondelegation doctrine as improperly legislative.⁶ Because Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,"⁷ the nondelegation doctrine forbids Congress from transferring legislative powers to the executive

⁵ See FARRAND, *infra* note 12, at 648. The sessions of the Convention were secret; before the final adjournment the secretary was directed to deposit the Journals and other papers of the Convention in the hands of the President. In answer to an inquiry of [George] Washington's, the Convention resolved "that he retain the Journal and other papers subject to the order of Congress, if ever formed under the Constitution." Accordingly, the secretary, William Jackson, after destroying "all the loose scraps of paper", which he evidently thought unimportant, formally delivered the papers to the president. *Id.* at Appendix A. Washington in turn deposited these papers with the Department of State in 1796 where they remained untouched until Congress by a joint resolution in 1818 ordered them to be printed. *Id.*

⁶ See Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 279 (2021) (citing *Gundy v. United States*, 139 S.Ct. 2116, 2131-48 (2019) (Gorsuch, J., dissenting)).

⁷ U.S. CONST. art. I, § 1.

branch.⁸ But, since 1935, the Supreme Court has not held that a statute has violated the separation of powers principle under the nondelegation doctrine.⁹

In defense of upholding administrative agency decision making power, many have tried to push back against the nondelegation doctrine on historical grounds including Justice Kagan in *West Virginia v. Environmental Protection Agency*.¹⁰ There, Justice Kagan states flatly in her dissent that “[t]he records of the Constitutional Convention, the ratification debates, the Federalist—none of them suggests any significant limit on Congress’s capacity to delegate policymaking authority to the Executive Branch.”¹¹ However, this is not correct. Justice Kagan’s statement ignores the Convention’s discussion of the delegation of legislative power to the executive on June 1, 1787.¹²

The Records of the Convention, hereinafter *Journal* indicate that delegates considered giving the executive “power to carry into execution the national laws, – to appoint to offices in cases not otherwise provided for; and to execute such powers, *not legislative or judiciary in their nature* as may from time to time be delegated by the national legislature.”¹³ The proposal was left out of the Constitution – James Madison’s original notes say – because it was unnecessary. It went without saying that an initial separation of

⁸ See *Wayman v. Southard*, 23 U.S. 1, 42-43 (1825) (affirming that Congress may not transfer to another branch “powers which are strictly and exclusively legislative.”); see also THE FEDERALIST NO. 47 (James Madison) (“The magistrate in whom the whole executive power resides cannot of himself make a law”).

⁹ See *Gundy v. United States*, 139 S. Ct. 2116, 2137-38 (2019) (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (holding that Section 3 of the National Industry Recovery Act was an unconstitutional delegation of legislative power to the executive)); see also *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 448 (1935) (arguing that the legislature must outline a course of procedure and certain rules of decision to limit authority when it delegates power to the executive).

¹⁰ *W. Va. v. Env’t Prot. Agency*, 142 S. Ct. 2587, 2642 (2022) (Kagan, J. dissenting) (citing Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002)).

¹¹ *W. Va.*, 142 S. Ct. at 2642.

¹² MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 66-67 (Yale U. Press, 1911). (The *Journal, Acts and Proceedings of the Convention* [hereinafter *Journal*] were originally published in 1819, and Max Farrand’s work represents the seminal work of the Convention to coalesce the *Journal* with James Madison’s notes, released at his death.)

¹³ *Id.* at 63-64, italics added. The proposal was suggested by James Madison, seconded by James Wilson, and passed in the negative.

legislative and executive power into two sets of hands would be permanent and unalterable by legislative delegation.

The Constitutional Convention rejected the nondelegation proposal as unnecessary due to a consensus that the executive power did not include the power to receive legislative powers delegated from Congress.¹⁴ James Madison's credibility has come under fire because Madison revised his notes later in life and only published them when no one else was alive to correct them.¹⁵ However, because Madison's explanation for the nondelegation proposal's rejection was written in Madison's original handwriting at the Constitutional Convention, scholars' concerns about Madison's revisions to his notes do not undermine his reliability about why the nondelegation proposal was rejected.¹⁶

However, why should Constitutional Convention debates about the extent of executive power matter today? There may be five, possibly six, Supreme Court Justices inclined to renew the nondelegation principle. In *Gundy v. United States*, Justice Gorsuch dissented, joined by Chief Justice Roberts and Justice Thomas.¹⁷ Justice Alito's concurrence in *Gundy* indicated his willingness to reconsider the deferential approach the Court has "taken for the past 84 years" towards executive agencies' power.¹⁸ Justice Kavanaugh's statement respecting the denial of certiorari for *Paul v. United States* signals his belief that nondelegation may warrant future consideration.¹⁹ Further, Justice Barrett's article on *habeas corpus* suspension and nondelegation suggests that she too may be sympathetic.²⁰ Hence, counting the Justices to get to five theoretical votes indicates that the Supreme Court may curb

¹⁴ FARRAND, *supra* note 12, at 66-67.

¹⁵ See *infra* Part III. See generally MARY SARAH BILDER, MADISON'S HAND (2015) (arguing that Madison revised his notes to a greater extent than previously recognized and that when he finished them, he was influenced by the new government's challenges and Thomas Jefferson's political ideals); see also Mortenson & Bagley, *supra* note 1, at 277 (refuting the claim that the Constitution was originally understood to contain a nondelegation doctrine, but without discussing June 1, 1787).

¹⁶ FARRAND, *supra* note 12, at 66-67.

¹⁷ *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).

¹⁸ *Id.* (Alito, J., concurring).

¹⁹ See generally *United States v. Paul*, 826 F. App'x 809 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 2822 (mem.) (2021).

²⁰ See generally Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251 (2014).

executive agencies' power via a nondelegation principle which prevents the transfer to another branch of "powers which are strictly and exclusively legislative."²¹

II. EVIDENCE FROM JUNE 1, 1787

On June 1, 1787, the Constitutional Convention rejected a nondelegation proposal as unnecessary.²² There are two source of information from which this conclusion is derived. First, the *Journal* describes James Madison's proposal, and it became public knowledge when some Founders were still alive with none of them saying the *Journal* was unreliable. Next, the discussion from James Madison's notes explains why the proposal was rejected. Thus, this section will examine the language proposed to limit the executive's power, the source of the proposal, and analyze why it was rejected.

Did "executive power," as used in Article II section 1 clause 1, included the power to receive legislative power delegated from Congress? In other words, did the power 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 thereof"²³ include the power to transfer legislative power to the president or the president's subordinates? The discussion on June 1, 1787, makes the plain answer: no.

The Constitutional Convention had an extended discussion about how the president would be selected and whether the executive would be one figure or a council, but only spent a short amount of time discussing the nature of executive power as such. After a lengthy discussion about the unitary versus plural executive issue, James Madison along with others proposed to fix the extent

²¹ *Gundy*, 139 S. Ct. at 2123 (quoting *Wayman v. Southard*, 23 U.S. 1, 42 (1825)).

²² See FARRAND, *supra* note 12, at 67.

²³ U.S. CONST. art. 1, § 8, cl. 18.

of executive power itself.²⁴ The *Journal* reveals that James Madison proposed the following language: ‘with power to carry into execution the national laws, – to appoint to offices in cases not otherwise provided for; and to execute such powers, *not legislative or judiciary* in their nature as may from time to time be delegated by the national legislature.’²⁵ It is worth mentioning that the proposal was documented in the *Journal* published in 1819 from Secretary Wilson’s notes. As further explained in Section IV, any changes from the *Journal* and Madison’s later published notes are indicated within angle brackets “< >”, and the reason for rejection is not in the brackets but in Madison’s original handwriting.²⁶

Madison’s notes describe his efforts in the third person: “Mr. <Madison> – <thought> it would be proper, before a choice should [sic]. be made between a unity and a plurality in the Executive, to fix the extent of the Executive authority...”²⁷ After a semicolon, Madison’s sentence continued with a description of what executive power included: “[A]s certain powers were in their nature Executive, and must be given to that departmt. whether administered by one or more persons, a definition of their extent would assist in determining how far they might be safely entrusted to a single officer.”²⁸ Madison then proposed a clarification that would describe executive power in more detail:

He accordingly moved that so much of the clause before the Committee as related to the powers of the Executive shd. be struck out & that <after the words> “that a national Executive ought to be instituted” there be inserted the words following> viz, “with power to carry into effect. the

²⁴ See FARRAND, *supra* note 12, 66-70 (“Mad: agrees wth. Wilson in his definition of executive powers ex vi termini, [from the force of the boundary] do not include the Rights of war & peace &c. but the powers shd. be confined and defined – if large we shall have the Evils of elective Monarchies – probably the best plan will be a single Executive of long duration wth. a Council, with liberty to depart from their Opinion at his peril.”); *id.* at 71 (“The Question of the unity or plurality of the Exve. post-poned – and the Come. proceeded to examine the powers – these points being discussed – the Come took into consideration the Duration of the Office of the Ex –”); *id.* at 74 (“Mr. Dickinson was of opinion that the powers of the Executive ought to be defined before we say in whom the power shall vest.”).

²⁵ See FARRAND, *supra* note 12, at 63 (emphasis added).

²⁶ See *id.* at 67.

²⁷ *Id.* at 66.

²⁸ *Id.* at 67.

national laws. to appoint to offices in cases not otherwise provided for, and to execute such other powers <“not Legislative nor Judiciary in their nature.”> as may from time to time be delegated by the national Legislature”.²⁹

The reference to a ban on the transfer of legislative powers to the executive warrants the attention of those concerned about the historical merits of nondelegation.

We must know which actors were involved at the Convention to understand the proposal and why it missed the cut to make the final version of the Constitution, specifically two members of the South Carolina delegation. First, General Charles Cotesworth Pinckney, 41, was a Revolutionary War veteran, and close friend of General George Washington.³⁰ Madison tells us that “[t]he words <not legislative nor judiciary in their nature> were added” because of a suggestion from General Pinckney that improper powers might be delegated to the executive.³¹ General Pinckney’s proposal received support from both Madison and Convention Secretary James Wilson, who seconded the motion.³² Thus, the notion of an improper power, *i.e.*, legislative power, being delegated clearly concerned some at the Convention.

General Pinckney’s younger first cousin once removed, however, also named Charles Pinckney but without the military experience or a middle name, was less sure about the need for the general’s proposal.³³ Charles Pinckney garnered support from Edmund Randolph from Virginia, and the younger Pinckney would ultimately win the vote in the convention, 7 states to 3.³⁴ Here is Madison’s description of how the events transpired, and most importantly, why:

²⁹ See FARRAND, *supra* note 12, at 67.

³⁰ See *Charles Cotesworth Pinckney*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Charles-Cotesworth-Pinckney> [https://perma.cc/HYQ9-NR5M] (last updated Apr. 2, 2024).

³¹ See FARRAND, *supra* note 12, at 67.

³² *Id.*

³³ *Id.*

³⁴ *Id.* (Connecticut, New York, New Jersey, Pennsylvania, Delaware, North Carolina, and Georgia voted against the proposed language, and Massachusetts, Virginia, and South Carolina voted in favor).

The words <“not legislative nor judiciary in their nature”> were added to the proposed amendment in consequence of a suggestion by Genl Pinkney that improper powers might <otherwise> be delegated,

<Mr. Wilson seconded this motion>

Mr. Pinkney moved to amend the amendment by striking out the last member of it; viz. “and to execute such other powers not Legislative nor Judiciary in their nature as may from time to time be delegated.” He said they were unnecessary, the object of them being included in the “power to carry into effect the national laws”.

Mr. Randolph seconded the motion.

Mr. Madison did not know that the words were absolutely necessary, or even the preceding words. “to appoint to offices &c. the whole being perhaps included in the first member of the proposition. He did not however see any inconveniency in retaining them, and cases might happen in which they might serve to prevent doubts and misconstructions.³⁵

The controversy about the existence of a nondelegation doctrine shows, alas, that Madison was right: it would have indeed “prevent[ed] doubts and misconstructions”³⁶ if the Madison-Pinckney-Wilson proposal had succeeded and been incorporated into the Constitution’s language. But note that the very argument against the proposal was not that the delegation of legislative power to the executive was *permitted*, but that such principle *went without saying*. The younger Pinckney thought that the power to execute non-legislative and non-judicial powers delegated by Congress was *already* “included in the ‘power to carry into effect the national laws.’”³⁷ Madison agreed that they were not strictly necessary but would be helpful. *Everyone agreed that executive power did not include the power to receive legislative powers delegated from Congress.*

³⁵ FARRAND, *supra* note 12, at 67.

³⁶ *Id.*

³⁷ *Id.*

Sometimes when a legislative proposal is not adopted, historians or scholars are at a loss to know why. Was the final actually-adopted product the same, or different from, the proposal? With respect to the non-delegation proposal of June 1, 1787, however, Madison's notes explain its non-adoption with perfect clarity. Both sides of the proposal, the younger Pinckney and Madison, said it was not necessary, and so implicit in the final version that the Convention accepted. Adding the nondelegation language was "unnecessary" (Pinckney) and "not...absolutely necessary" (Madison).³⁸ Thus, the principle of nondelegation embedded in the separation of legislative and executive power went without saying and was thus present in the separation of Congress from the presidency in the Convention's final product.

III. SCHOLARLY DEFENDERS OF DELEGATION DO NOT DEAL ADEQUATELY WITH JUNE 1, 1787

The scholars who argue that the founding era was not concerned about delegation have not dealt compellingly with the evidence from the Constitutional Convention on June 1, 1787. Posner and Vermeule take the position that nondelegation doctrine does not exist because executive agents operating within a statutory grant of authority are exercising executive power.³⁹ The authors argue that there never has been a nondelegation doctrine, and it is not anchored in the constitutional text.⁴⁰ The authors acknowledge that the "Constitution bars the 'delegation of legislative power'" but argue that this prohibition on delegation prevents legislators from delegating authority to vote on federal statutes or exercise other *de jure* powers of federal legislators.⁴¹

While Posner and Vermeule offer many theories for why courts should not enforce a nondelegation doctrine, this comment will focus on the authors analysis of the Constitutional Convention.⁴² To support their view, the authors briefly mention the convention debates to argue that the Founding Fathers were not concerned

³⁸ See *supra* text accompanying note 32.

³⁹ Posner & Vermeule, *supra* note 10, at 1721.

⁴⁰ *Id.* at 1722.

⁴¹ *Id.* at 1723.

⁴² See *id.* at 1733-34 (arguing that courts should not enforce a nondelegation doctrine because there is no constitutional warrant for it).

about delegation, but this view ignores the debate over how to explicitly define executive power granted to the president.⁴³ Posner and Vermeule argue that because the motion James Madison proposed to limit delegation was defeated, the failure to adopt the proposal indicates that “legislative delegation to the executive was viewed as unproblematic.”⁴⁴ Posner and Vermeule assert:

The convention debates contain one mention of delegation, a motion by Madison that the president be given power ‘to execute such other powers, not Legislative nor Judiciary in their nature, as may from time to time be delegated by the national Legislature.’ The motion was defeated, giving rise to the usual problem of discerning the grounds on which the proposal was rejected. A common view is that it was rejected as unnecessary, the authority being already implicit in the constitutional scheme; if so, then the disposition suggests, if anything, that legislative delegation to the executive was viewed as unproblematic.⁴⁵

Posner and Vermeule’s view that because the proposal was rejected, delegation of legislative power to the executive therefore must have been unproblematic does not fit the flow of the argument on June 1. It was unnecessary to say that the President might receive delegations of *non-legislative* power. But that does not mean that delegations of legislative power were unproblematic; quite the opposite. Madison’s agreement with Pinckney and use of the same word—“unnecessary”—makes clear what was going on. Pinckney did not say that a ban on delegation of legislative power would be unnecessary because it might prevent useful, unproblematic delegations – but that such a ban went without saying.

Madison agreed, but thought it might still have some value as a clarification. The view that the proposal was rejected because it was implicit in the constitutional scheme aligns with the Founders’ discussions around the separation of powers and Madison’s views

⁴³ Posner & Vermeule, *supra* note 10, at 1733-34 (“The Framers’ principal concern was about legislative aggrandizement, i.e., the legislature seizing powers belonging to other institutions, rather than legislative grants of statutory authority to executive agents.”) (citing James O. Freedman, *Delegation and Institutional Competence*, 43 U. CHI. L. REV. 307, 309 (1976)).

⁴⁴ Posner & Vermeule, *supra* note 10, at 1734.

⁴⁵ *Id.*

that if legislative grants of authority were permissible, then the “whole power of legislation might be transferred from the legislature itself[.]”⁴⁶ Posner and Vermeule take issue with Madison’s quote because it was given after the Convention debates and delivered to the Virginia House of Burgesses in a debate on the Alien Acts, but the importance of Madison’s quote is that it is consistent with his views during the Convention as well as those representatives arguing against the Alien Acts in Congress which mirror Madison’s writings attacking the Alien Acts.⁴⁷

Julian Davis Mortenson and Nicholas Bagley also refute the argument that the Constitution contains a nondelegation doctrine.⁴⁸ While Mortensen and Bagley do not mention the Convention debates on June 1, 1787, they examine legislative delegations before and after 1789.⁴⁹ Mortenson and Bagley argue that the Founders were concerned with consolidated power, and they disagree with the notion that the original public meaning of the Constitution included anything that resembles the modern nondelegation doctrine.⁵⁰ The authors provide evidence of a number of instances where Congress delegated in sweeping terms, e.g., territorial administration, the patent system, Indian affairs, foreign and domestic debt, naturalization, customs duties, military service, and the federal courts. Thus, the authors argue that there was no nondelegation doctrine at the Founding because, after the Convention, Congress left discretion to the executive branch to fill in necessary details.⁵¹

Mortenson and Bagley have noted in response to others’ mention of the June 1, 1787 proposal that Madison’s notes are “sketchy” and unreliable due to the “very small number of people involved,” and that there are “several equally plausible alternative

⁴⁶ JAMES MADISON, THE REPORT OF 1800, [7 JANUARY] 1800, *reprinted in* 17 THE PAPERS OF JAMES MADISON, 31 MARCH 1797–3 MARCH 1801 303-51 (David B. Mattern, et al. ed., Charlottesville, Univ. Press of Va., 1991).

⁴⁷ See DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801, 256 (1997) (describing objections to the proposed Alien Act by Representative Edward Livingston on the ground that the bill “would grant the President a combination of legislative, executive, and judicial powers”).

⁴⁸ See Mortenson & Bagley, *supra* note 6, at 277.

⁴⁹ See *generally id.* at 332-49.

⁵⁰ *id.* at 283-89.

⁵¹ See *id.* at 277.

readings” relying on a Twitter (“X”) thread by Mortenson.⁵² But the thread is not persuasive. For instance, Mortenson asks, “Why did Pinckney propose it?” But Madison’s notes are explicit on that point: “The words <“not legislative nor judiciary in their nature”> were added to the proposed amendment in consequence of a suggestion by Genl Pinkney that improper powers might <otherwise> be delegated.”⁵³ The “improper powers” were specified: legislative or judicial powers. The particular sorts of legislative or judicial powers that were most motivating those broad categories of non-delegable powers do not matter as much as the categories themselves, and the fact that the non-delegability of *those categories* of power was deemed by everyone at the Convention to go without saying. Further, the “time to time” language in the proposal undermines the suggestion made elsewhere in the thread that the only delegations that were forbidden were permanent ones.

Finally Nicholas Parrillo’s comments on the evidence from June 1, 1787, do not deny that the Convention agreed with a non-delegation principle, albeit one pitched in very general terms.⁵⁴ Parrillo notes that the June 1, 1787 could be interpreted to say that “some abstract, unspecified limit on delegation existed, whose content and stringency received no recorded discussion,”⁵⁵ and that such an interpretation would be more plausible than Judge Michael McConnell’s interpretation in terms of historical prerogatives of the British crown.⁵⁶ But Parrillo does not deny that the Convention’s discussion betray hostility to delegation of legislative power to the executive, albeit hostility that is “abstract” and “unspecified.”⁵⁷

⁵² Compare Mortenson & Bagley, *supra* note 6, with Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding: A Response to the Critics*, 122 COLUM. L. REV. 2323, 2345. (2022), That footnote relies entirely on Mortenson’s Twitter thread. See Julian Davis Mortenson @jdmortenson, TWITTER (Dec. 19, 2021, 5:33 PM), <https://twitter.com/jdmortenson/status/1472711646753742855> [<https://perma.cc/XXQ8-A2BY>].

⁵³ See FARRAND, *supra* note 12, at 67.

⁵⁴ Nicholas R. Parrillo, *Supplemental Paper to A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 44-48 (C. Boyden Gray Ctr. for the Study of the Admin. State, Research Paper) (No. 20-17) (May 14, 2021), <https://ssrn.com/abstract=3696902> [<https://perma.cc/G9G7-RNQY>].

⁵⁵ *Id.* at 46.

⁵⁶ *Id.* at 46-48.

⁵⁷ *Id.* at 46.

In sum, the evidence from June 1, 1787 indicates that the founding era was concerned with delegation.

IV. MADISON'S RELIABILITY AND THE JOURNAL OF THE CONVENTION

Mary Bilder argues that because Madison left the records of the Constitutional Convention incomplete, his return to finish them later discredits an objective reading of his version of events.⁵⁸ Mary Bilder, the leading critic of Madison's credibility, makes one reference to the June 1, 1787 debates over the nature of the executive.⁵⁹ Bilder comments about how the delegates confronted the issue of how the executive would be comprised.⁶⁰ However, Bilder only focuses on the June 1, 1787 debates regarding whether the executive would be a single executive or a committee.⁶¹ Bilder's analysis of June 1, 1787 concludes after she describes how the delegates were 'unprepared for any decision' on the question of whether executive powers should be vested in a single executive or a committee.⁶² Thus, Bilder does not discuss the delegates' move to strike Pinkney's motion to include 'and to execute such other powers not Legislative nor Judiciary in their nature'.⁶³ Bilder writes:

On another clause relating to congressional power, Madison commented that it was not 'within the limits of human capacity' to 'delineate on paper, all those particular cases and circumstances in which legislation by the general legislature would be necessary, and leave to the states all the other powers.' Therefore the 'particular powers which are found necessary to be given, are therefore delegated generally, and particular and minute specification is left to the legislature.'⁶⁴

⁵⁸ See generally BILDER, *supra* note 15.

⁵⁹ BILDER, *supra* note 15, at 65.

⁶⁰ See *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*; see also FARRAND, *supra* note 12, at 67.

⁶⁴ BILDER, *supra* note 15, at 168.

However, the questions raised by Bilder do not undermine Madison's reliability as to June 1, 1787 because the key explanation for why the proposal was rejected was written in Madison's original handwriting – not in the revisions which came later.⁶⁵ Neither Pinkney's comment that the proposal was "unnecessary, the object of them being included" nor Madison's concession that "the words were [not] absolutely necessary" were within Farrand's angle brackets indicating Madison's later handwriting.⁶⁶ Accordingly, Madison's editing process raises no doubts about the nondelegation proposal and the reason for rejection with respect to the debates on June 1, 1787.

When Madison's papers were published in 1840, Madison's manuscripts revealed that he went over his notes after the *Journal* was published in 1819, and herein lies the crux of Madison's potential unreliability.⁶⁷ Because of the scattered sources which informed the study of the convention, Max Farrand published *Records of the Constitutional Convention* in the early twentieth century to gather all available records into a single work.⁶⁸ Farrand discovered that Madison "noted differences between his own record and that of the *Journal*, but also in many cases corrected his own notes from the *Journal*."⁶⁹ Farrand noted that many of the changes made were easily recognizable because the ink used in the original notes faded differently than the later revisions.⁷⁰ In the *Records of the Constitutional Convention*, Farrand indicated changes by enclosing them within angle brackets "< >".⁷¹

However, because the purpose of this Comment is to examine whether the founders were concerned with delegating legislative power to the executive branch, this Comment focuses on the *Journal* and Madison's records from June 1, 1787 to compare what the Founders discussed about nondelegation. Next, this Comment

⁶⁵ See FARRAND, *supra* note 12, at 67.

⁶⁶ *Id.*

⁶⁷ FARRAND, *supra* note 12, at xvi-xvii.

⁶⁸ *Id.* at xv-xvi.

⁶⁹ *Id.* at xvi.

⁷⁰ *Id.* at xviii. A few paragraphs later, however, Farrand notes that in some instances the revisions are not so easy to identify because the pages have worn and faded differently in different spots due to use and other extraneous factors.

⁷¹ FARRAND, *supra* note 12, at xix.

will outline how the *Journal* came about and how Madison's records do not conflict when it comes to nondelegation on June 1, 1787.

A. The History of the Records of the Constitutional Convention

After the Revolutionary War, the United States devised the Articles of Confederation to loosely bind the thirteen states. Concerns over the federal government's apparent weaknesses under the Articles of Confederation led the Congress of the Confederation to authorize a Federal Convention to address the problems of a weak central government.⁷² The first order of business was to elect a President, and Robert Morris, Esq. from Pennsylvania nominated "His Excellency George Washington Esquire" who was unanimously elected.⁷³ When President Washington took his chair, he expressed the uniqueness which the situation presented and hoped his unintentional errors would be excused.⁷⁴ Washington proposed to elect a secretary, and Colonel Alexander Hamilton nominated Major William Jackson who was elected.⁷⁵ The Constitutional Convention lasted for about four months, and the Committee of Detail prepared a report of the sessions.⁷⁶

⁷² See FARRAND, *supra* note 12, at xi.

The official authorization of the Federal Convention was a resolution of the Congress of the Confederation, adopted February 21, 1787: 'Resolved, That in the opinion of Congress, it is expedient, that on the second Monday in May next, a convention of delegates, who shall have been appointed by the several states, be held at Philadelphia,...[.]'

The second Monday in May, 1787, fell on the fourteenth, and on that day delegates from several of the states gathered in the 'long room' of the State House in Philadelphia. It was not until the twenty-fifth, however, that a sufficient number of delegates appeared to constitute a representation of the majority of the states. On May 25, the Convention organized and remained in continuous session until September 17, with the exception [sic] of one adjournment of two days over the Fourth of July and another of ten days, from July 26 to August 6, to allow the Committee of Detail to prepare its report.

Id. at xi.

⁷³ *Id.* at 2.

⁷⁴ *Id.* at 5-6.

⁷⁵ *Id.* at 2. Major Jackson was elected secretary over Temple Franklin, Benjamin Franklin's grandson.

⁷⁶ See *id.* at xi.

After the secret sessions concluded and the final adjournment transpired, Secretary William Jackson delivered the papers and records of the Constitutional Convention to the President.⁷⁷ Washington deposited the documents with the U.S. Department of State.⁷⁸ In 1818, Congress passed a joint resolution ordering the papers and records to be printed,⁷⁹ and President Monroe requested the Secretary of State, John Quincy Adams, to oversee the publication of the “*Journal*.”⁸⁰ According to Adams, “the papers were, ‘no better than the daily minutes from which the regular journal ought to have been, but never was made out.’”⁸¹

Adams requested Secretary Jackson’s assistance in reviewing the collection, but Adams reported that Jackson “looked over the papers, but he had no recollection of them which could remove the difficulties arising from their disorderly state, nor any papers to supply the deficiency of the missing papers.”⁸² After consulting with other delegates including General Bloomfield, David Brearley, Charles Pinckney, and James Madison, John Q. Adams collated the collection to the extent that, “with all these papers suitably arranged, a correct and tolerably clear view of the proceedings of the Convention may be presented.”⁸³ In 1819, Adams’ efforts culminated in the publication entitled “*Journal, Acts and*

⁷⁷ See *supra* note 5 and accompanying text.

⁷⁸ *Id.*

⁷⁹ See J. Res. 8, 15th Cong., 1st Sess. (“Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, That the journal of the convention which formed the present constitution of the United States, now remaining in the office of the Secretary of State, and all acts and proceedings of that convention, which are in the possession of the government of the United States, be published under the direction of the President of the United States, together with the secret journals of the acts and proceedings, and the foreign correspondence of the Congress of the United States, from the first meeting thereof down to the date of the ratification of the definitive treaty of peace between Great Britain and the United States, in the year seventeen hundred and eighty-three, except such parts of the said foreign correspondence as the President of the United States may deem it improper at this time to publish. And that one thousand copies thereof be printed, of which one copy shall be furnished to each member of the present Congress, and the residue shall remain subject to the future disposition of Congress.”).

⁸⁰ FARRAND, *supra* note 12, at xii.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

Proceedings of the Convention, . . . which formed the Constitution of the United States."⁸⁴

Without a standard to guide him and using disparate sources, Adams' compilation was not without mistakes,⁸⁵ but James Madison's death left the country with a trove of materials from the Constitutional Convention. When James Madison died in 1836 at eighty-five years, melancholy enveloped the country, and the death of the last surviving signer of the Constitution changed forever the record of the Constitutional Convention.⁸⁶ Two days after his death, President Andrew Jackson sent a message to Congress urging them to take action so as to pay their respects.⁸⁷ After both branches of Congress drafted resolutions, President Jackson transmitted the resolutions to Madison's widow, Dolly Madison, and she responded with the best return she could make, i.e., by leaving Madison's records.⁸⁸ Dolly Madison wrote President Jackson and informed him that James Madison bequeathed to the people of the United States and to all who 'take an interest in the progress of political science and the cause of true liberty' his reports of the proceedings and discussions of the Convention at Philadelphia in 1787.⁸⁹ Dolly also included in her response to Jackson, Madison's "description of

⁸⁴ FARRAND, *supra* note 12, at xii.

⁸⁵ *Id.*

⁸⁶ 1 JAMES MADISON, THE PAPERS OF JAMES MADISON iii (New York, J. H. G. Langley, 1841).

⁸⁷ *Id.*

⁸⁸ *See id.* at xiv ("The best return I can make for the sympathy of my country is to fulfill the sacred trust his confidence reposed in me – that of placing before it and the world what his pen prepared for their use – a legacy the importance of which is deeply impressed on my mind.").

⁸⁹ *See id.* at xiv ("Sir: The will of my late husband, James Madison, contains the following provision: 'Considering the peculiarity and magnitude of the occasion which produced the Convention at Philadelphia, in 1787, the characters who composed it, the Constitution which resulted from their deliberations, its effects during a trial of so many years on the prosperity of the people living under it, and the interest it has inspired among the friends of free government, it is not an unreasonable inference that a careful and extended report of the proceedings and discussions of that body, which were with closed doors, by a member who was constant in his attendance, will be particularly gratifying to the people of the United States, and to all who take an interest in the progress of political science and the cause of true liberty.'").

the manner in which [Madison's notes] were taken, as it guarantees their fullness and accuracy."⁹⁰

In pursuance of the task I had assumed, I chose a seat in front of the presiding member, with the other members on my right and left hands. In this favorable position for hearing all that passed, I noted down, in terms legible, and in abbreviations and marks intelligible to myself, what was read to the chair or spoken by the members; and losing not a moment unnecessarily between the adjournment and re-assembling of the convention, I was enabled to write out my daily notes during the session, or within a few finishing days after its close, in the extent and form preserved in my own hand on my files. In the labor and correctness of this, I was not a little aided by practice, and by a familiarity with the style and the train of observation and reasoning which characterized the principal speakers. It happened also that I was not absent a single day, nor more than the casual friction of an hour in any day, so that I could not have lost a single speech, unless a very short one.⁹¹

President Jackson then sent copies of his correspondences with Mrs. Madison and thought it "to be appropriate to present a letter from her on the subject of the publication of a work of great political interest and ability, carefully prepared by Mr. Madison's own hand, under circumstances that give it claims to be considered as little less than official."⁹² Jackson communicated to Congress his belief that Madison's works deserved to be "the property of the

⁹⁰ See MADISON, *supra* note 86, at 716. John T. Woolley & Gerhard Peters, *Andrew Jackson Special Message*, The American Presidency Project, <https://www.presidency.ucsb.edu/documents/special-message-4004> [<https://perma.cc/Z248-GCUP>]; see also BILDER, *supra* note 3, at 239 ("[A] description drawn from a 'paper written by him.' They claimed that it 'guarantees their [the debates] fullness and accuracy.'").

⁹¹ MADISON, *supra* note 86, at xv-xvi.

⁹² *Id.* at xvii.

nation.”⁹³ The Joint Library Committee of Congress responded with a resolution authorizing the committee to purchase the manuscripts of Mr. Madison for thirty thousand dollars.⁹⁴ While advocating for Congress to pass the resolution, Senator Robbins of Rhode Island stated, “I consider this work of Mr. Madison, now proposed to be given to the world under the patronage of this Government, as the most valuable one to mankind that has appeared since the days when Bacon gave to the world his *Novum Organon*.”⁹⁵ Senator Robbins explained that just as Bacon’s work spurred a revolution in analytics to improve the condition of human life, even though Bacon saw it as a theory, Bacon’s progeny, such as Isaac Newton, used the work as a practical guide to expand the research and enable human beings to do more.⁹⁶ Robbins wrote,

“As this Organon of Bacon has been the beacon-light of mankind to guide him to true philosophy, and to the improvement of his physical condition, so will this work of Madison, as I trust and predict, be his beacon-light to guide him to the true science of free government, and to the improvement of his political condition; – the science of free government; the most difficult of all the sciences, by far the most difficult, while it is the most important to mankind; of all, the slowest in growth, the latest in maturity. Not the science which has penetrated the causes and explained to mankind the phenomena of the heavens is so difficult; that has been found of easier and more rapid attainment. Indeed the difficulties to be overcome in evolving this science are so great, that we are to wonder less at its tardy advances, than at its final success. ... Besides, the perfect

⁹³ See MADISON, *supra* note 86, at xviii (“I am persuaded that the work of Mr. Madison, considering the author, the subject matter of it, and the circumstances under which it was prepared – long withheld from the public, as it has been, by those motives of personal kindness and delicacy that gave tone to his intercourse with his fellow-men, until he and all who had been participators with him in the scenes he describes have passed away – well deserves to become the property of the nation, and cannot fail, if published and disseminated at the public charge, to confer the most important of all benefits of the present and succeeding generations, accurate knowledge of the principles of their Government, and the circumstances under which they were recommended and embodied in the constitution, for adoption.”).

⁹⁴ *Id.* at xviii.

⁹⁵ *Id.* at xviii-xix.

⁹⁶ *Id.* at xix.

model of a free government is not like the perfect model of any other science. Of every other science, the perfect model everywhere, and every where alike is perfect. The perfect watch at Washington, for instance is the perfect watch at Canton, and so all over the globe; but not so the perfect model of a free government: in that, though the principles are the same everywhere, the form varies as the circumstances vary, of the people by whom it is established; to which circumstances it must always be adjusted and made to conform.”⁹⁷

Senator Robbins emphasized the importance of publishing Madison’s records because of the value they would provide in understanding the process of analysis and discovery the Founders took when drafting the Constitution.⁹⁸ Robbins thought it a mistake to believe that the resulting Constitution would be sufficient to instruct future generations on the science of free government.⁹⁹ Rather, Robbins believed in the importance of acquiring knowledge through analysis which enables one to build upon the consequences of past knowledge for better comprehension and application.¹⁰⁰ Thus, Senator Robbins considered Madison’s papers to be a key source for mankind and “treasure of instruction” for those interested in the science of free government.¹⁰¹ Congress acted and purchased Madison’s manuscripts, and in 1840, *The Papers of James Madison* were published.

⁹⁷ See MADISON, *supra* note 86, at xix-xx.

⁹⁸ *Id.* at xxii.

⁹⁹ *Id.*

¹⁰⁰ MADISON, *supra* note 86, at xx (“For there is a vast difference between the knowledge which is acquired analytically, and that which acquired synthetically; the latter is but isolated knowledge; the former is knowledge that is the consequence of other knowledge. Synthesis gives to us a general truth, but acquired in a mode that is barren of other fruit; analysis not only gives to us the same general truth, but puts us on the track of invention and discovery, and is always fertile of other, and often of better fruit: synthesis carries us to a fountain head, but never beyond; but analysis carries us beyond, and to the fountain of that fountain; it places upon us an eminence that overtops and overlooks the general truth in the wide survey it commands and gives to us; and as to that general truth, it enables us not only to comprehend it more perfectly, but to apply it more successfully. This is at once a branch and the general instrument of that primal philosophy of which Bacon speaks, and whose cultivation he so highly recommends – the philosophy of philosophy; the common mother of all sciences, and by which alone their boundaries can be extended.”).

¹⁰¹ *Id.* at xxiii-xxiv.

Today, as courts interpret the constitution and the powers delegated to each branch of government, Madison's papers offer scholars answers to the questions surrounding the exercise of free government.

V. ADDITIONAL SUPPORT FOR MADISON'S VIEWS ABOUT THE SEPARATION OF POWERS

Since the Constitutional Convention debates were done in secret, no one but the individual delegates knew what was discussed until the records were published. However, shortly after the Convention, Madison authored the Report of 1800 to protest the Alien and Sedition Acts, and Madison's views about the separation of powers were clearly articulated in the Report of 1800.¹⁰² Many of the framers were alive when Madison published the Report of 1800, and no one said anything about how his views about the general nature of delegation might be inaccurate.

In the Report of 1800, Madison criticized the Alien and Sedition Acts because of its effect of uniting "legislative, judicial, and executive powers in the hands of the President."¹⁰³ Madison acknowledged the difficulty in marking the divide between each departments delegated power, and noted that "all will agree, that the powers referred to these departments may be so general and undefined, as to be of a legislative, not of an executive or judicial nature; and may for that reason be unconstitutional."¹⁰⁴ Madison believed that if legislative powers, not of an executive or judicial nature were delegated to an executive department, then this would constitute an improper exercise of powers granted by the Constitution.¹⁰⁵ Thus, one aspect of the constitutionality of a congressional act rested upon the principle of separation of powers.

Madison explained how details were "essential to the nature and character of a law" and details should be clear to "leave as little as possible to the discretion of those who are to apply and to execute the law."¹⁰⁶ Without any rules to limit the conveyances of authority from the legislative to the executive, Madison reasoned that the

¹⁰² See generally MADISON, *supra* note 46.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

“whole power of legislation might be transferred by the legislature from itself” which could result in executive proclamations becoming substitutes for laws.¹⁰⁷ If the legislature could delegate this power, then it would result in a different nation operating under a different set of powers. Madison explained “[a] delegation of power in this latitude, would not be denied to be a union of the different powers.”¹⁰⁸ Next, Madison explained that the law must be analyzed to identify the “details, definitions, and rules” which relate to the law.¹⁰⁹ Madison included specific language of the Alien Act which read,

[t]he [A]lien [A]ct, declares, ‘that it shall be lawful for the president to order all such aliens as he shall judge *dangerous* to the peace and safety of the United States, or shall have reasonable grounds to *suspect*, are concerned in any treasonable, or *secret machinations*, against the government thereof.’¹¹⁰

Madison proceeds by criticizing the imprecision and ambiguity of the terms in the Alien Act, specifically “dangerous to the public safety” and “suspected of secret machinations”.¹¹¹ Madison is clear that the terms should not be mistaken for legal rules because “[t]hey leave every thing to the President. His will is the law.”¹¹² Because the act granted the President the authority to “designate the offensive conduct,” “ascertain the individuals on whom it is charged,” and “cause the sentence to be executed,” Madison concludes “that the act unites legislative and judicial powers to those of the executive.”¹¹³

Next, Madison argues that the general principles of free government are undermined by a union of powers as a result of the

¹⁰⁷ See generally MADISON, *supra* note 46.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Alien Act of 1798, ch. 58, 1 Stat. 570, 570-71 (1798) (amended 1812); see also Immigration & Ethnic History Society, *Alien and Sedition Acts of 1798*, UNIV. TEX. AUSTIN, <https://immigrationhistory.org/item/1798-alien-and-sedition-acts/> [https://perma.cc/3GWY-XHDL] (last accessed Apr. 15, 2024) [hereinafter Immigr. & Ethnic Hist. Soc’y].

¹¹¹ *Id.* at 571.

¹¹² *Id.*

¹¹³ Immigr. & Ethnic Hist. Soc’y, *supra* note 110.

Alien and Sedition Act.¹¹⁴ Madison labels the separation of powers as “an axiom in the science of government” and “necessary to the preservation of public liberty” for which he designates the United States as the example of where this axiom has been “understood in theory” and “pursued in practice.”¹¹⁵ Further, Madison writes that “[i]t is affirmed that such a union of power subverts the particular organization and positive provisions of the federal constitution,” and he supports his position by stating which powers are vested in each branch of government according to the U.S. Constitution.¹¹⁶ Because the Alien Act combined powers delegated to each branch, Madison argued that the constitutional organization of legislative, executive, and judicial powers was subverted.¹¹⁷ Thus, Madison’s writings in the *Report of 1800* indicate his opposition to any exercise of power not delegated by the Constitution.¹¹⁸ Madison wrote,

“The nature of governments elective, limited and responsible, in all their branches, may well be supposed to require a greater freedom of animadversion, than might be tolerated by the genius of such a government as that of Great Britain. In the latter, it is a maxim, that the king, an hereditary, not a responsible magistrate, can do no wrong; and that the legislature, which in two thirds of its composition, is also hereditary, not responsible, can do what it pleases. In the United States, the executive magistrates are not held to be infallible, nor the legislatures to be omnipotent; and both being elective, are both responsible. Is it not natural and necessary, under such different circumstances, that a different degree of freedom, in the use of the press, should be contemplated?”¹¹⁹

Madison’s writings in *The Report of 1800* confirm Madison’s position that legislative powers granted to other departments of power could be unconstitutional, especially if the powers were

¹¹⁴ See *supra* note 110 and accompanying text.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ See generally *id.*

¹¹⁹ JONATHAN ELLIOT & JAMES MADISON, THE DEBATES IN THE SEVERAL STATES CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, 570 (Lippincott 1836).

“general and undefined.”¹²⁰ Given that the *Report* was written three years after the Convention, and because Madison expressed his belief that acts authorizing the executive branch to exercise powers enabled “personal liberty to be invaded, property to be deprived of its value to the owner, and a life to be indirectly exposed to danger,” confirms the proposition that Madison’s views in 1800 aligned with his views during the Convention.¹²¹ In sum, *The Report of 1800* strongly supports the notion that the founders were concerned with delegating legislative power to the other branches of government.

Long after the Convention, in *Marshall Field & Co. v. Clark*, the Court held that the president’s ability to lay an embargo on all ships and vessels in the ports of the United States did not invest the president with the power of legislation.¹²² Congress had authorized the president to permit and suspend products to trade with another country that imposed exactions and duties which he deemed to be “reciprocally unequal and unreasonable.”¹²³ “Nothing involving the expediency and or the just operation of such legislation was left to the determination of the president.”¹²⁴

“But when he ascertained the fact that duties and exactions reciprocally unequal and unreasonable were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea, or hides, it became his duty to issue a proclamation declaring the suspension, as to that county, which congress had determined should occur.”¹²⁵

The Court held that “[h]e had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by congress.”¹²⁶ The Court held that “[l]egislative power was exercised

¹²⁰ ELLIOT & MADISON, *supra* note 119, at 570.

¹²¹ *Id.*

¹²² *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892).

¹²³ *Marshall Field*, 143 U.S. at 693 (“Congress itself prescribed, in advance, the duties to be levied, collected, and paid on sugar, molasses, coffee, tea, or hides produced by or exported from such designated country while the suspension lasted.”). The products included sugar, molasses, coffee, tea, or hides.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

when congress declared that the suspension should take effect upon a named contingency. What the president was required to do was simply in execution of the act of congress. It was not the making of law.”¹²⁷

VI. SUPREME COURT JUSTICES ARE DISCUSSING NONDELEGATION

The Supreme Court in *Gundy v. United States* elevated the nondelegation debate because of the fruitful commentary from the majority and dissent. The Court’s opinion starts with the foundational constitutional principle of nondelegation.¹²⁸ The opinion ends with a dissent arguing that unclear standards threaten the separation of powers by allowing executive agencies to make decisions which belong with Congress while debilitating judicial review.¹²⁹ Tucked in-between is a concurrence which signals it is willing to change course with respect to allowing agencies to adopt rules under “extraordinarily capacious standards.”¹³⁰ Four Supreme Court Justices in *Gundy* indicate a willingness to reconsider the nondelegation doctrine and many of their arguments rest upon the traditional understanding of separation of powers and nondelegation.¹³¹

In *Gundy*, the Court examined the nondelegation doctrine and found that the issue at bar did not violate the doctrine.¹³² The case has brought the nondelegation doctrine back to the forefront to reinvigorate the principle that the legislative branch cannot transfer legislative power to the executive branch. Legal scholars

¹²⁷ *Marshall Field*, 143 U.S. at 693.

¹²⁸ See *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019) (“The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government.”).

¹²⁹ *Gundy*, 139 S. Ct. at 2145 (Gorsuch, J., dissenting).

¹³⁰ *Id.* at 2131 (Alito, J., concurring).

¹³¹ *Id.* at 2130 (Alito, J., concurring) (“The Constitution confers on Congress certain ‘legislative [p]owers,’ Art. I, §1, and does not permit Congress to delegate them to another branch of the Government.”); see also *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (“In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the [executive] agency.”).

¹³² *Gundy*, 139 S. Ct. at 2121 (Nondelegation bars Congress from transferring its legislative power to another branch, but nondelegation was not violated when the Attorney General applied the Sex Offender Registration Act registration requirements to offenders).

have coined the term “nondelegation doctrine” to represent the principle that “Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.”¹³³ Justice Kagan and the majority held that the federal Sex Offender Registration and Notification Act (“SORNA”), which includes a provision authorizing the Attorney General to specify the applicability of SORNA’s registration requirements to offenders convicted of sex offenses before SORNA’s enactment, did not violate the nondelegation doctrine.¹³⁴ Since 1935, the Court has rejected nondelegation arguments authorizing agencies to adopt rules which impact the American public.¹³⁵ However, a concurrence by Justice Alito and dissent by Justice Gorsuch suggest that the Court could reconsider the approach the Court has taken since 1935.¹³⁶

Justice Gorsuch’s dissent in *Gundy* begins by stating that the Constitution limits the people’s elected representatives from adopting laws that restrict liberty.¹³⁷ In *Gundy*, Gorsuch points out that Congress could not agree about how to apply a Congressional Act to “pre-Act” offenders, and so Congress simply passed the problem to the Executive rather than solving the problem itself.¹³⁸ As a result, different Attorneys General exercised their discretion in different ways.¹³⁹ Gorsuch proceeds by outlining the Constitution’s purpose of placing sovereign in the people and not to a person or institution.¹⁴⁰ Article I, II, and III vested different powers in each branch of government with a distinct role.¹⁴¹

¹³³ A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 495 (1935).

¹³⁴ *Gundy*, 139 S. Ct. at 2121.

¹³⁵ *Id.* at 2130-31.

¹³⁶ *Id.* at 2116.

¹³⁷ *Gundy*, 139 S. Ct. at 2131.

¹³⁸ *Id.* at 2131-32.

¹³⁹ *Id.* at 2132.

¹⁴⁰ *Id.* at 2134.

¹⁴¹ *Gundy*, 139 S. Ct. at 2133. The idea of separating powers of government within a legislative, executive, and judicial body also has roots in Montesquieu’s magnum opus, “The Spirit of the Laws” where Montesquieu argues that when legislative and executive powers are vested in the same, there can be no liberty. The founders adopted this view and decided that some powers exercised can be improper powers. The founders designed the constitutional system to require acts of legislative power to have significant congressional support with executive veto hurdles to pass, too. The Bill of Rights was passed through Article 5 of the U.S. Constitution, and Congress can amend the Constitution which was designed to be an arduous process so as to function as a bulwark to liberty.

Gorsuch describes legislative power as the power to adopt generally applicable rules of conduct governing future actions by private actions, to which he cites four documents, Federalist No. 78, *Fletcher v. Peck*, John Locke's Second Treatise, and William Blackstone's Commentaries on the Laws of England.¹⁴²

Gorsuch proceeds about why the framers designed a system of separation of powers and the dangers of allowing one branch to shift accountability to another branch, which would render the Constitution useless.¹⁴³ Then, Gorsuch talks about the test to determine if Congress divested itself of legislative responsibilities.¹⁴⁴ First, Congress may allow another branch to fill up details.¹⁴⁵ Second, Congress may prescribe a rule and make the application depend on executive fact-finding.¹⁴⁶ Third, Congress may assign the executive and judicial branches certain non-legislative responsibilities.¹⁴⁷ Next, Gorsuch moves to the development of the nondelegation doctrine in the United States discussing the two cases where the Court struck down statutes for violating the separation of powers, i.e., *A.L.A. Schechter Poultry Corp. v. United States* and *Panama Refining Co. v. Ryan*.¹⁴⁸ After the Court struck down the statutes in the aforementioned cases, the New Deal ushered in legislation more "carefully crafted" to avoid the kind of problems that sank earlier statutes.¹⁴⁹ Since then, the Court has not "held another statute to violate the separation of powers in the same way."¹⁵⁰ Gorsuch argues that the reason courts have deferred is because of the "intelligible principle" doctrine.¹⁵¹

The "intelligible principle" phrase was first used in *J.W. Hampton, Jr., & Co. v. United States*, where the Court remarked that "a statute lay[ing] down by legislative act an intelligible principle to which the [executive official] is directed to conform

¹⁴² *Gundy*, 139 S. Ct. at 2133.

¹⁴³ *Id.* at 2135.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 2136.

¹⁴⁶ *Gundy*, 139 S. Ct. at 2136.

¹⁴⁷ *Id.* at 2137.

¹⁴⁸ *Id.* at 2137-38.

¹⁴⁹ *Id.* at 2138 (citing MARIAN C. MCKENNA, FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937 424 (2002)).

¹⁵⁰ *Gundy*, 139 S. Ct. at 2138.

¹⁵¹ *Id.*

satisfies the separation of powers.”¹⁵² Gorsuch criticizes the principle and the Court’s application of it because it took a life of its own where people divorced the comment from its context and treated the isolated phrase as if it were controlling.¹⁵³

Justice Kagan’s assertions in her *West Virginia v. E.P.A.* dissent do not align with the historical record. In *West Virginia v. E.P.A.*, Justice Kagan dissented and argued “that Congress enabled EPA to regulate power plants’ emissions through generation shifting.”¹⁵⁴ She further argued that “[t]he kind of agency delegations at issue here go all the way back to this Nation’s founding.¹⁵⁵ ‘[T]he founding era,’ scholars have shown, ‘wasn’t concerned about delegation.’”¹⁵⁶ Justice Kagan argued that no records of the Constitutional Convention suggest any significant limit on Congress’ capacity to delegate policymaking authority to the Executive Branch.¹⁵⁷ “The records of the Constitutional Convention, the ratification debates, the *Federalist*—none of them suggests any significant limit on Congress’s capacity to delegate policymaking authority to the Executive Branch. And neither does any early practice.”¹⁵⁸ “That Congress, to use a few examples, gave the Executive power to devising a licensing scheme for trading with Indians; to craft appropriate laws for the Territories; and to decide how to pay down the (potentially ruinous) national debt. Barely anyone objected on delegation grounds.”¹⁵⁹ Justice Kagan summarizes, because Congress has always delegated, it is impracticable for Congress to do anything else. Since our society is “increasingly complex,” the legislature cannot do its job absent an ability to delegate power under broad general directions. “First, Members of Congress don’t know enough to regulate an issue. ...

¹⁵² *Gundy*, 139 S. Ct. at 2138-39 (citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

¹⁵³ *Gundy*, 139 S. Ct. at 2139.

¹⁵⁴ *W. Va. v. Env’t Prot. Agency*, 142 S. Ct. 2587, 2628 (2022) (Kagan, J., dissenting).

¹⁵⁵ *Id.* at 2641.

¹⁵⁶ *W. Va.*, 142 S. Ct. at 2641-42 (Kagan, J., dissenting) (citing Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1734 (2002)).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

Second, Members can't know enough to keep regulatory schemes working across time."¹⁶⁰

In *West Virginia v. E.P.A.*, the Court struck down a rule promulgated by the Environmental Protection Agency which attempted to require existing coal-fired power plants to “reduce their own production of electricity or subsidize increased generation by natural gas, wind, or solar sources.”¹⁶¹ Recent decisions by the Supreme Court indicate a declining deference to regulators which could signal a return to the nondelegation doctrine. On the one hand, theorists argue that executive agencies have the authority to make rules which impact society outside of legislative purview. On the other hand, originalists argue that Courts should abide by the Constitution's mandate to vest legislative powers in a Congress which is elected by voters and that improper powers exist when branches of government exercise authority outside of the constitutional mandate.

CONCLUSION

Executive agencies and the administrative state have taken an expanded role in enacting rules and regulations, but the Court should reign in the excessive discretion granted to executive agencies to comport with the constitutionally based nondelegation doctrine. Evidence from the Constitutional Convention suggests that executive power did not include the power to receive legislative power delegated from Congress. Assuming that the integrity and maintenance of the government ordained by the Constitution should be maintained, legislative power should rest solely with a Congress duly elected by voters. In sum, legislative power is a delegated power from the people, the people give the legislature power to enact rules by which the duties and rights of citizens are regulated.¹⁶² Judicial power rests with the Supreme Court to assess

¹⁶⁰ *W. Va.*, 142 S. Ct. at 2641-42 (Kagan, J., dissenting).

¹⁶¹ *Id.* at 2600.

¹⁶² See THE FEDERALIST NO. 47, *supra* note 3; see also JOHN LOCKE, *of the Extent of the Legislative Power*, SECOND TREATISE OF GOVERNMENT § 141 (C.B. McPherson ed., Hackett Pub. Co. 1980) (1690), https://www.gutenberg.org/files/7370/7370-h/7370-h.htm#CHAPTER_XI [<https://perma.cc/5BYS-A7MS>] (“[T]he legislature cannot transfer the power of making laws to any other hands. It was delegated to them from the people, and they aren't free to pass it on to others.”).

the degree of commingling between branches of government, and the Court should abolish bodies which are not Congress and yet make rules that have the effect of laws.¹⁶³

¹⁶³ See *Mistretta v. United States*, 488 U.S. 361, 426-27 (1989).

APPENDIX

A. Table 1: Members Present During the 1st Day of the Constitutional Convention¹⁶⁴

<u>State</u>	<u>Constitutional Convention Member</u>
Delaware	George Read, Esquire
	Richard Basset, Esquire
	Jacob Broom, Esquire
Georgia	William Few, Esquire
Massachusetts	Rufus King, Esquire
New Jersey	David Brearly, Esquire
	William Churchill Houston, Esquire
	William Paterson, Esquire
New York	Robert Yates, Esquire
	Alexander Hamilton, Esquire
North Carolina	Alexander Martin, Esquire
	William Richardson Davie, Esquire
	Richard Dobbs Spaight, Esquire
	Hugh Williamson, Esquire
Pennsylvania	Robert Morris, Esquire
	Thomas Fitzsimons, Esquire
	James Wilson, Esquire
	Gouverneur Morris, Esquire
South Carolina	John Rutledge, Esquire
	Charles Cotesworth Pinckney, Esquire
	Charles Pinckney, Esquire
	Pierce Butler, Esquire
Virginia	George Washington, Esquire
	Edmund Randolph, Esquire
	John Blair, Esquire
	James Madison, Esquire

¹⁶⁴ FARRAND, *supra* note 12, at 1.

	George Mason, Esquire
	George Wythe, Esquire
	James McClurg, Esquire

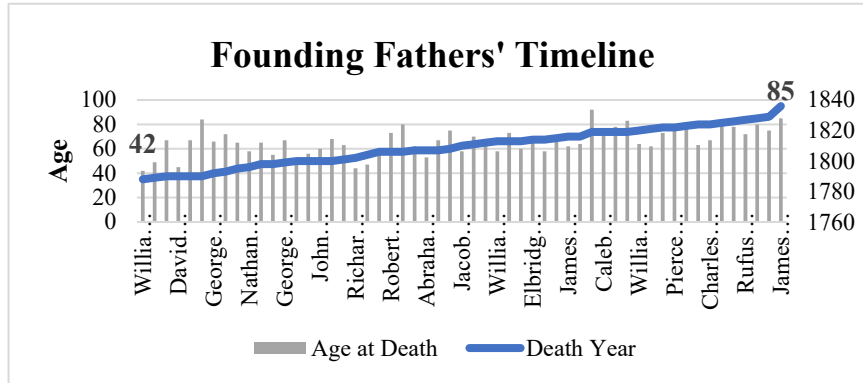
*B. Table 2: Founding Fathers' Timeline of Death*¹⁶⁵

Name	State	Birth	Death	Age
William C. Houston	NJ	1746	1788	42
William L. Pierce	GA	1740	1789	49
Daniel of St. Thomas Jenifer	MD	1723	1790	67
David Brearly (Brearley)	NJ	1745	1790	45
William Livingston	NJ	1723	1790	67
Benjamin Franklin	PA	1706	1790	84
George Mason	VA	1725	1792	66
Roger Sherman	CT	1721	1793	72
Daniel Carroll	MD	1730	1795	65
Nathaniel Gorham	MA	1738	1796	58
George Read	DE	1733	1798	65
James Wilson	PA	1742	1798	55
George Washington	VA	1732	1799	67
William Blount	NC	1749	1800	50
Thomas Mifflin	PA	1744	1800	56
John Rutledge	SC	1739	1800	60
John Blair	VA	1732	1800	68
Robert Yates	NY	1738	1801	63
Richard Dobbs Spaight	NC	1758	1802	44
Alexander Hamilton	NY	1757	1804	47
William Paterson (Patterson)	NJ	1745	1806	60
Robert Morris	PA	1734	1806	73

¹⁶⁵ *Meet the Framers of the Constitution*, NAT'L ARCHIVES, <https://www.archives.gov/founding-docs/founding-fathers> [<https://perma.cc/Y8Z8-TE3S>] (last updated Mar. 16, 2020).

Name	State	Birth	Death	Age
George Wythe	VA	1726	1806	80
Oliver Ellsworth	CT	1745	1807	62
Abraham Baldwin	GA	1754	1807	53
Alexander Martin	NC	1740	1807	67
John Dickinson	DE	1732	1808	75
Jacob Broom	DE	1752	1810	58
Thomas Fitzsimons	PA	1741	1811	70
Gunning Bedford, Jr.	DE	1747	1812	65
William Houston	GA	1755	1813	58
George Clymer	PA	1740	1813	73
Edmund Randolph	VA	1753	1813	60
Elbridge Gerry	MA	1744	1814	70
Nicholas Gilman	NH	1755	1814	58
Richard Bassett	DE	1745	1815	70
James McHenry	MD	1753	1816	62
Gouverneur Morris	PA	1752	1816	64
William Samuel Johnson	CT	1727	1819	92
Caleb Strong	MA	1745	1819	74
John Langdon	NH	1741	1819	78
Hugh Williamson	NC	1735	1819	83
William R. Davie	NC	1756	1820	64
John F. Mercer	MD	1759	1821	62
Jared Ingersoll	PA	1749	1822	73
Pierce Butler	SC	1744	1822	77
James McClurg	VA	1746	1823	77
Johnathan Dayton	NJ	1760	1824	63
Charles Pinckney	SC	1757	1824	67
Charles Cotesworth Pinckney	SC	1746	1825	79
Luther Martin	MD	1748	1826	78
Rufus King	MA	1755	1827	72

Name	State	Birth	Death	Age
William Few	GA	1748	1828	80
John Lansing, Jr.	NY	1754	1829	75
James Madison, Jr.	VA	1751	1836	85



Note: When the first records of the Constitutional Convention were published as the, “Journal, Acts and Proceedings of the Convention, Assembled at Philadelphia, Monday, May 14, and Dissolved Monday, September 17, 1787, Which Formed the Constitution of the United States”, were published in 1819, 17 of the Framers were alive to correct any errors.