

# Unitary, Executive, or Both?

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*The Unitary Executive: Presidential Power from Washington to Bush*,  
Steven G. Calabresi & Christopher S. Yoo. Yale, 2008. Pp vii, 544.

## INTRODUCTION

America's Chief Executive creates a conundrum for legal scholars. Presidents today sit at the center of the political universe. They have become responsible for national security and economic growth, they are the chiefs of their political parties, and their proposals set the legislative agenda for Congress. With the military power of the United States behind them, presidents were known during the Cold War as the leaders of the free world. Our 24-hour news cycle hangs on their every word and speculates on their family lives, their medical conditions, their psychology, and even their favorite breeds of dog.

The transition from the Bush to the Obama administration has only highlighted the importance of the person who occupies the office. Both men hold individual, and different, policies for responding to the terrorist attacks of September 11, 2001. President George W. Bush invoked his constitutional powers, though often supported by congressional approval, to launch wars in Afghanistan and Iraq, detain al Qaeda and Taliban members as enemy combatants subject to military trials, and use aggressive interrogation and electronic surveillance measures against terrorists. President Barack Obama has invoked his constitutional authority to order the detention facility at the US Naval Base at Guantanamo Bay, Cuba closed, suspend military commission trials, and limit the interrogation of terrorists. Differences in policies also occur in areas as diverse as global warming, antiballistic missile defenses, national health care, and judicial appointments. The preferences of the person who occupies the Oval Office significantly influence policies in almost every area under the sun.

For legal scholars, the problem created by this state of affairs is that the central importance of the modern Presidency seems to contradict the Constitution's text. The Constitution undeniably enume-

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rates more powers for Congress than the president. Congress has the authority to tax, spend, and regulate interstate commerce, which provides it with the power to enact domestic legislation. In contrast, Article II of the Constitution seems to vest the president with a paltry sum of powers. Scholars, such as Arthur Schlesinger, Jr, coined the classic phrase the “imperial presidency” to describe the idea that over time the executive branch has assumed powers that the Constitution directs to others.<sup>1</sup> According to this view, the Presidency has few inherent constitutional powers, but rather exists to carry out the laws passed by Congress. Even in foreign affairs and national security, the legislature should play the leading role in defining national policy. The Presidency’s growth into the dominant political institution it is today may be the product of changes in the national political system or external pressures, but that makes it no more legitimate.

Steven G. Calabresi and Christopher S. Yoo (no relation, as far as I know) have joined the many scholars who have tried to solve this problem (p 4). Their approach is unique, at least for law professors, and it is one that they had previously sketched out in a series of law review articles.<sup>2</sup> They do not focus on what political scientists have criticized as the “literary theory” of the Constitution, which seeks to understand the office through a pure understanding of its powers as set out in the text.<sup>3</sup> Nor do they approach the question by carefully parsing the few relevant Supreme Court precedents, such as *Morrison*

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<sup>1</sup> Arthur M. Schlesinger, Jr, *The Imperial Presidency* ix (Houghton Mifflin 1973) (arguing that the constitutional checks on the president’s power have been eroded, largely as a result of the president’s “capture . . . of the most vital of national decisions, the decision to go to war”).

<sup>2</sup> See generally Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive during the First Half-century*, 47 Case W Res L Rev 1451 (1997) (exploring the history of the unitary executive from the founding through President Andrew Jackson); Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive during the Second Half-century*, 26 Harv J L & Pub Pol 667 (2003) (continuing the history of the unitary executive from President Martin Van Buren to President Grover Cleveland); Steven G. Calabresi, Christopher S. Yoo, and Laurence D. Nee, *The Unitary Executive during the Third Half-century, 1889–1945*, 80 Notre Dame L Rev 1 (2004) (continuing the history of the unitary executive from President William Henry Harrison to President Franklin Roosevelt); Steven G. Calabresi, Christopher S. Yoo, and Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 91 Iowa L Rev 601 (2005) (concluding the history of the unitary executive from President Harry Truman to President George W. Bush).

<sup>3</sup> See Richard E. Neustadt, *Presidential Power and the Modern Presidents* 37 (Free Press 1990) (“The probabilities of power do not derive from the literary theory of the Constitution.”) (emphasis omitted). But see Richard M. Pious, *The American Presidency* 17 (Basic Books 1979) (“[T]he fundamental and irreducible core of presidential power rests not on influence, persuasion, public opinion, elections, or party, but rather on the successful assertion of constitutional authority to resolve crises and significant domestic issues.”); Terry Eastland, *Energy in the Executive* 9 (Free Press 1992) (“The presidency . . . cannot be understood apart from what the Constitution says it is.”).

*v Olson*<sup>4</sup> or *Humphrey's Executor v United States*,<sup>5</sup> for a new nugget of insight that has escaped everyone else. Rather, they have conducted an exhaustive survey of the views of each administration in American history. They attempt to show that every president has resisted congressional efforts to disrupt the unitary executive. Why? To convince the "Burkean common law constitutionalists" that presidents have not "acquiesced in a derogation of their power in a sufficiently systematic, unbroken, and unquestioned manner to make such a derogation a part of the structure of our government" (p 15). A consistent presidential defense of the executive power will defeat claims that historical practice justifies the constitutional legitimacy of independent administrative agencies or the independent counsel statute (pp 14–16).

Calabresi and Yoo, however, define the unitary executive in a much narrower way than the current controversy over presidential power would demand. They define the unitary executive as founded on the president's constitutional authority to command or remove all subordinate officials (p 14). As to whether the president possesses any other inherent or implied powers, the authors proclaim themselves to be "agnostic" (p 20). Focusing on the procedure, rather than the substance, of executive power may make sense as a matter of lawyerly argument. All Calabresi and Yoo wish to prove is the president's primacy in the management of the executive branch, regardless of the position's actual powers (pp 20–21).

But it is unclear as a matter of theory that we can separate the independence of the executive branch from its substance. While the Framers wanted to restore unity and independence to the executive branch, they also remained focused on the actual powers to be given to the president.<sup>6</sup> In *The Federalist Papers*, Alexander Hamilton observed that the president had to be directly elected, for example, rather than chosen by the legislature,<sup>7</sup> and should be one man, rather than multiple leaders, to ensure the executive could act with decision

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<sup>4</sup> 487 US 654 (1988).

<sup>5</sup> 295 US 602 (1935).

<sup>6</sup> See, for example, Federalist 74–76 (Hamilton), in *The Federalist* 500, 500–15 (Wesleyan 1961) (Jacob E. Cooke, ed) (describing the president's substantive powers to direct war, grant pardons, make treaties (with the Senate), and nominate and appoint officials (with the Senate)).

<sup>7</sup> See Federalist 68 (Hamilton), in *The Federalist* 457, 459 (cited in note 6) (explaining that the Convention has "not made the appointment of the president to depend on any pre-existing bodies of men who might be tampered with before hand to prostitute their votes; but they have referred it in the first instance to an immediate act of the people of America").

and vigor.<sup>8</sup> But Hamilton also wrote there that the president would possess well-understood powers, even in—or especially in—the area of foreign affairs and national security.<sup>9</sup> “Of all the cares or concerns of government,” Hamilton wrote in Federalist 74, “the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.”<sup>10</sup> The very theory of constitutional interpretation that established the idea of the unitary executive—that Article II, § 1’s Vesting Clause grants all of the federal executive power to the president alone, subject only to narrow, explicit exceptions in the text itself—did not arise in the context of the removal power. Under the pseudonym of Pacificus, Hamilton advanced the theory in defense of President George Washington’s declaration of neutrality in the wars of the French Revolution.<sup>11</sup> The authority to proclaim neutrality did not depend on the president’s power of removal, but on an implicit executive authority to set and conduct foreign policy on behalf of the nation.

Part I of this Review places *The Unitary Executive* in its legal context. The argument over the removal power became important as a constitutional proxy for the struggle between the president and Congress for control of the administrative state. Calabresi and Yoo make the modest argument that presidents never foreswore the removal power. Initially, defenders of presidential control over the administrative state based their legal arguments on a formalist reading of Article II and the constitutional structure. Critics, however, responded that the record of practice justified the independence of administrative agencies.

*The Unitary Executive* seeks to undermine these historical claims by showing a consistent presidential practice of opposing congressional encroachments on the executive branch. Part II discusses in more detail the evidence brought forward by Calabresi and Yoo, and whether it supports their interpretive claims about practice. The au-

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<sup>8</sup> See Federalist 69–70 (Hamilton), in *The Federalist* 462, 472 (cited in note 6) (noting that “the executive authority, with few exceptions, is to be vested in a single magistrate” so he can act with the necessary “[d]ecision, activity, secrecy, and dispatch”).

<sup>9</sup> See Federalist 74 (Hamilton) at 500 (cited in note 6) (noting, for example, that the commander-in-chief power to direct war “forms an usual and essential part in the definition of the executive authority”).

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

<sup>11</sup> See Alexander Hamilton, *Pacificus No 1* (June 29, 1793), in Harold C. Syrett, ed., 15 *The Papers of Alexander Hamilton* 33, 39 (Columbia 1969) (arguing that the different language the Constitution uses to describe the grants of legislative and executive powers, respectively, supports the inference that executive power was meant to be understood as a general grant, “subject only to the *exceptions* and *qu[a]lifications* which are expressed in the instrument”).

thors deserve praise for shedding light on a historical practice that has escaped the attention of legal scholars in general, and specialists on the separation of powers in particular. Their effort at comprehensiveness—there is a chapter on each presidential administration—precludes a deeper focus on critical moments, despite an effort to include case studies on events such as President Andrew Jackson’s campaign against the Second Bank of the United States (pp 105–22). The authors could have done more to explain whether presidents have undermined their claims to consistency when they have signed bills creating independence within the executive branch—for example, FDR’s acceptance of New Deal agencies (pp 291–99) or Jimmy Carter’s approval of the Ethics in Government Act (pp 365–66).<sup>12</sup>

Part III then turns to the fundamental question of whether process—the removal power—can be segregated from the issue of the president’s substantive constitutional powers. It points out that the arguments made for the unitary executive, in Calabresi and Yoo’s sense of the phrase, depend on the same theory of constitutional construction used to justify the president’s inherent powers in foreign affairs and national security. Furthermore, Part III argues that our greatest presidents have depended on these substantive powers, not just their management of the executive branch, to rise to the challenge of the great crises and emergencies that have faced the nation. Part III argues that Presidents Washington, Jefferson, and Lincoln could not have achieved their greatest successes without a broad understanding of “the executive power,” as set out in Article II of the Constitution.

## I. WHY REMOVAL MATTERS

Current legal scholarship on the Presidency remains focused on the removal debate.<sup>13</sup> Simply put, the question is whether the president

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<sup>12</sup> See Ethics in Government Act, Pub L No 95-521, 92 Stat 1824 (1978), codified at 2 USC § 701 et seq (showing that the Ethics in Government Act requires, among other things, that members of the executive branch file an annual public financial disclosure).

<sup>13</sup> See, for example, Steven G. Calabresi and Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 Yale L J 541, 597 (1994) (“[T]he President must also have a removal power so that he will be able to maintain control over the personnel of the executive branch.”); Lawrence Lessig and Cass R. Sunstein, *The President and the Administration*, 94 Colum L Rev 1, 26 & n 119, 27–28 (1994) (finding no consensus among Framers that the president had complete authority to remove inferior officers). See also *Morrison*, 487 US at 685–93 (1988) (holding that the “good cause” removal provision for independent counsel does not impermissibly burden the president’s power to control executive officials); *Bowsher v Synar*, 478 US 714, 726 (1986) (“[W]e conclude that Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment.”).

has the inherent constitutional authority to fire any individual responsible for executing federal law. A corollary question is whether Congress can vest law enforcement functions in agencies outside the executive branch.

The significance of this issue goes beyond making the president head of human resources for the federal government. Since the end of World War II, presidents have consistently sought to establish tighter control over the executive branch.<sup>14</sup> This was a natural response to three fundamental changes in American government. First, the Supreme Court's lifting of the limits on federal power vis-à-vis the states allowed economic regulation on a truly national scale.<sup>15</sup> During the twenty years after the New Deal, Congress—often at the behest of presidents—enacted laws setting national standards for working conditions, labor unions, and wages and hours, among other subjects.<sup>16</sup> Another burst of federal regulation followed in the 1960s and 1970s; federal rules spread to cover crime, voting, housing, race, consumer rights, and the environment.<sup>17</sup> The New Deal taught Americans to ex-

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<sup>14</sup> John P. Burke, *The Institutional Presidency* 181–85 (Johns Hopkins 1992) (concluding that, with the possible exception of President Eisenhower, there has been a distinct trend across all presidents to centralize decisionmaking power).

<sup>15</sup> See, for example, *West Coast Hotel Co v Parrish*, 300 US 379, 395 (1937) (upholding a state minimum wage law for women and children); *NLRB v Jones & Laughlin Steel Corp.*, 301 US 1, 30 (1937) (upholding the National Labor Relations Act).

<sup>16</sup> See, for example, Labor Management Relations Act of 1947, Pub L No 80-101, 61 Stat 136, codified at 29 USC §§ 151–56 (strengthening employer protections against unionization); Fair Labor Standards Amendments of 1949, Pub L No 81-393, 63 Stat 910, codified in various sections of Title 29 (modifying minimum wage and maximum hours regulations); Minimum Wage Increase of 1955, Pub L No 84-381, 69 Stat 711 (increasing the minimum wage); Labor-Management Reporting and Disclosure Act of 1959, Pub L No 86-257, 73 Stat 519, codified in various sections of Title 29 (regulating union corruption).

<sup>17</sup> See, for example, Housing Act of 1961, Pub L No 87-70, 75 Stat 149, codified in various sections of Title 12 (promoting urban development to increase housing availability); Clean Air Act of 1963, Pub L No 88-206, 77 Stat 392, codified at 42 USC § 1857; Civil Rights Act of 1964, Pub L No 88-352, 78 Stat 241, codified in various sections of Title 42; Elementary and Secondary Education Act of 1965, Pub L No 89-10, 79 Stat 27, codified in various sections of Title 20 (increasing funds to elementary and secondary education); Voting Rights Act of 1965, Pub L No 89-110, 79 Stat 437, codified at 42 USC § 1973 (providing federal protections to secure equal voting rights); Housing and Urban Development Act of 1965, Pub L No 89-117, 79 Stat 451 (promoting urban development to assist low- and moderate-income families); Higher Education Act of 1965, Pub L No 89-329, 79 Stat 1219, codified in various sections of Title 20 (increasing resources available to higher education institutions); Civil Rights Act of 1968, Pub L No 90-284, 82 Stat 73, codified in various sections of Title 18 (strengthening federal civil rights protections, particularly in housing); Consumer Credit Protection Act, Pub L No 90-321, 82 Stat 146 (1968), codified at 15 USC § 1601 et seq (increasing protections to credit consumers); Omnibus Crime Control and Safe Streets Act, Pub L No 90-351, 82 Stat 197 (1968) (increasing federal involvement in criminal law); Housing and Urban Development Act of 1968, Pub L No 90-448, 82 Stat 476, codified in various sections of Title 12 (providing more assistance to low- and moderate-income families

pect their national government to do more to cure everyday problems, and presidents and Congresses together responded with a mixture of direct rules, criminal laws, tax benefits, and spending.

Second, Congress delegated sweeping powers over these new subjects of federal attention to the executive branch and independent agencies.<sup>18</sup> Delegation gave presidents more power, but at a political price. Delegation allows Congress to escape political responsibility for difficult public policy choices, usually ones that will spark political opposition no matter what option is chosen.<sup>19</sup> Congress can avoid making decisions that are risky or unpredictable, or that require scientific or technical judgment.<sup>20</sup> Better to have the executive branch, for example, balance safety, air quality, industrial growth, and fuel costs in setting minimum mileage requirements for automobiles.<sup>21</sup> Individual legislators can criticize almost any agency decision without having to face the difficult political tradeoffs themselves.<sup>22</sup> They can focus instead on funneling benefits to discrete groups that will support them with votes or campaign contributions.<sup>23</sup> Delegation shifts political responsibility for a multitude of regulatory decisions to the president from Congress.<sup>24</sup>

Third, FDR set the example of presidents, not Congress, as the energetic force responsible for solving the nation's domestic problems.

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seeking housing); Consumer Product Safety Act of 1972, Pub L No 92-573, 86 Stat 1207, codified at 15 USC § 2051 et seq (establishing the Consumer Product Safety Commission); Housing and Community Development Act of 1974, Pub L No 93-383, 88 Stat 633, codified at 42 USC § 5301 et seq (promoting urban development to renew American cities); Clean Water Act of 1977, Pub L No 95-217, 91 Stat 1566, codified in various sections of Title 33 (strengthening federal environmental protections of American waterways).

<sup>18</sup> David Epstein and Sharyn O'Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers* 5 (Cambridge 1999) ("What divides the modern administrative state from its predecessors is the delegation of broad decision-making authority to a professional civil service.").

<sup>19</sup> See, for example, *id* at 1-4 (referring to the closing of military bases).

<sup>20</sup> See *id* at 198 (noting that Congress delegates the most authority in foreign relations, space and technology, consumer and product safety, the environment, and public health).

<sup>21</sup> 42 USC § 7521; Epstein and O'Halloran, *Delegating Powers* at 5 (cited in note 18) ("[T]he 1970 Clean Air Act required that industries use the 'best available control technology' to reduce emissions but left the definition of the crucial term 'best' to the EPA's discretion.").

<sup>22</sup> See Epstein and O'Halloran, *Delegating Powers* at 23 (cited in note 18) (noting that Congress can shift blame to the executive branch for difficult decisions).

<sup>23</sup> *Id* at 230 (noting that legislators "guard their authority in taxing and spending areas" in part to retain control over distributive, pork barrel programs).

<sup>24</sup> See William Howell, *Power without Persuasion: The Politics of Direct Presidential Action* 109 (2003) (inferring that Congress delegates more power to the president in areas of policy where electoral rewards are small); Epstein and O'Halloran, *Delegating Powers* at 23 (cited in note 18) (explaining that Congress is likely to do this in "policy areas where, even if great care is taken, things will go wrong every so often").

Presidents are now held accountable for the nation's economic performance, over which they have little real power (in contrast to the Chairman of the Federal Reserve Board).<sup>25</sup> They are expected to submit annual budgets to Congress, even though it is the legislature that commands the power of the purse.<sup>26</sup> They launch comprehensive reform proposals to deal with every imaginable national problem, even though the Constitution gives Congress almost all of the national government's powers over domestic affairs. Presidents today are expected to have solutions at hand for problems big and small: natural disasters (Hurricane Katrina relief), local crime (midnight basketball for teens), and poor borrowing decisions (lowering mortgage rates).<sup>27</sup> As Richard Neustadt wrote almost five decades ago, "Everybody now expects the man inside the White House to do something about everything."<sup>28</sup> Presidential proposals for legislation, managed by White House lobbyists and backed up by the veto pen, are now a central feature of president-Congress relations.

While all three of these developments had their historical antecedents, they emerged during the New Deal on a massive scale. Postwar

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<sup>25</sup> Terry M. Moe and Scott A. Wilson, *Presidents and the Politics of Structure*, 57 *L. & Contemp. Probs.* 1, 11 (1994) ("When the economy declines, an agency falters, or a social problem goes unaddressed, it is the president who gets the blame, and whose popularity and historical legacy are on the line."). See also Theodore J. Lowi, *The Personal President: Power Invested, Promise Unfulfilled* 19 (Cornell 1985) (arguing that, although President Reagan was able to maintain high approval ratings because of "the succession of international events . . . eventually, he will be paid because he is the piper").

<sup>26</sup> US Const. Art. I, § 8, cl. 1.

<sup>27</sup> See *President Outlines Hurricane Katrina Relief Efforts* (Aug. 31, 2005), online at <http://georgewbush-whitehouse.archives.gov/news/releases/2005/08/20050831-3.html> (visited Oct. 2, 2009); *Radio Address by the President to the Nation* (June 18, 1994), online at <http://clinton6.nara.gov/1994/06/1994-06-18-radio-address-on-the-crime-bill.html> (visited Sept. 19, 2009); *Remarks by the President on the Home Mortgage Crisis* (Feb. 18, 2009), at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-on-the-mortgage-crisis](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-the-mortgage-crisis) (visited Oct. 2, 2009).

<sup>28</sup> Richard Neustadt, *Presidential Power: The Politics of Leadership* 6 (Wiley 1960). See also Theodore Lowi, *The Personal President* at x-xi (cited in note 25) (labeling the latter part of the twentieth century the era of "presidential government," in which presidents enjoyed "credit beyond desert for putting the world to rights" and accepted disproportionate blame when things went wrong); Stephen Skowronek, *The Politics Presidents Make: Presidential Leadership from John Adams to George Bush* 17-32 (Belknap 1993) (arguing that presidential legacy depends less on concrete policy victories than it does on maintaining control over a broader social narrative); Thomas E. Cronin and Michael A. Genovese, *The Paradoxes of the American Presidency* 323 (Oxford 2003) ("It seems we want the presidency to be there always, ready when we call, to rise when the demand grows and diminish in less pressing times. We want a presidency with the potential to be heroic when we need it, but constrained and limited at other times."). For a discussion of how the president accomplishes his legislative program, see generally Andrew Rudavige, *Managing the President's Program: Presidential Leadership and Legislative Policy Formation* (Princeton 2002).



presidents responded by seeking to impose order and rationality over the executive branch.<sup>29</sup> Originally, delegation was driven by the idea that the executive branch would bring greater technical expertise. Rules would come from neutral administrators, rather than the political process and its susceptibility to temporary passions or interest-group biases. During the later New Deal and postwar period, however, it became evident that politics were inseparable from administration, especially as the delegations became broader. The Clean Air Act,<sup>30</sup> for example, orders the Environmental Protection Agency to set air-quality standards the attainment of which “are requisite to protect the public health.”<sup>31</sup> Deciding how much aerial pollutant to allow goes beyond technical expertise and requires tradeoffs between competing values, such as economic growth and improved health. As an original matter, it is doubtful that the Framers believed the legislature could grant such sweeping power absent the necessities of wartime emergency. But after losing the New Deal confrontations, the courts no longer policed the amount of delegation from Congress to the executive branch.<sup>32</sup>

If the president were to be held responsible for everything from air quality to voting rights, he would want to have the power to actually set the standards. Perhaps the most important function that centra-

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<sup>29</sup> Peri E. Arnold, *Making the Managerial Presidency: Comprehensive Reorganization Planning, 1905–1996* 160 (Kansas 2d ed 1998) (arguing that by the 1952 presidential election, “[t]he notion that the president was responsible for management in the executive branch was widely shared”); Burke, *Institutional Presidency* at 2 (cited in note 14).

<sup>30</sup> 42 USC § 7401 et seq.

<sup>31</sup> 42 USC § 7409(b)(1).

<sup>32</sup> The trend toward broad delegation is criticized on political grounds by Theodore Lowi, *The End of Liberalism: The Second Republic of the United States* 93–94 (Norton 2d ed 1979) (claiming that delegation “becomes pathological . . . at the point where it comes to be considered a good thing in itself, flowing to administrators without guides, checks, safeguards”); Martin H. Redish, *The Constitution as Political Structure* 135–61 (Oxford 1995) (arguing that the abandonment of the nondelegation doctrine has caused serious damage to the infrastructure of “American political theory”); David Schoenbrod, *Power without Responsibility: How Congress Abuses the People through Delegation* 99–152 (Yale 1993) (arguing that delegation weakens democracy, threatens liberty, makes law less reasonable, and is unnecessary because Congress has enough time to make the laws itself), and on constitutional law grounds by Larry Alexander and Sai-krishna Prakash, *Reports of the Nondelegation Doctrine’s Death are Greatly Exaggerated*, 70 U Chi L Rev 1297, 1328 (2003) (arguing that Article I’s Vesting Clause “refers to the powers listed in Article I, Section 8 and not the *de jure* powers of legislators”); Gary Lawson, *Delegation and Original Meaning*, 88 Va L Rev 327, 335–52 (2002) (grounding the nondelegation principle in the original meaning of the Constitution). For a defense of the trend, see Eric A. Posner and Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U Chi L Rev 1721, 1723 (2002) (arguing that Article I’s Vesting Clause only prohibits legislators from delegating their *votes* in the legislature to unelected individuals).

lization could play is to make sure that rules set in one area are consistent with the administration's overall domestic priorities and are coherent with national policy. All of the Cold War presidents sought to increase their ability to administer the vast swaths of bureaucracy inside the Beltway—both to inject more expertise into decisions and to make themselves the voice of electoral accountability within the administrative state. But they also wanted to make sure that the thousands of decisions made by the agencies every day were moving in the same direction. If the president has just been elected in the midst of a recession, for example, his White House could press each major agency decision to strike its regulatory balance toward pro-growth policies and private-market ordering. Given the breadth of federal power and the amount of delegation to the administrative state, centralization gives the president the upper hand in making the decisions that actually impact private citizens in their daily lives.

The primary method became direct presidential control over agencies' decisions through a larger and more specialized White House staff. A critical effort took place between the Nixon and Reagan administrations through the imposition of cost-benefit analysis on the executive branch by the Office of Management and Budget (OMB). Under Director George Shultz, OMB began to review environmental regulations to determine whether their economic benefits outweighed their costs.<sup>33</sup> The campaign to centralize control over the administrative state had a constitutional front too, through the effort to increase the formal control of the president over the executive branch and independent agencies.<sup>34</sup> Allowing the president to remove any officer responsible for carrying out federal law would give him direct control over the activities of the administrative state. If a subordinate refused to obey a presidential command—for example, to find that

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<sup>33</sup> The classic explanation of OMB cost-benefit review remains Christopher C. DeMuth and Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 Harv L Rev 1075, 1080–88 (1986) (explaining and defending the agency-review programs put in place by President Reagan). For a more recent investigation, see generally Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U Chi L Rev 821 (2003) (providing an overview of executive oversight of agency decisions from the Reagan through the Clinton administrations). A description of the Reagan administration's overall approach to the constitutional issues can be found in Eastland, *Energy in the Executive* at 163–64 (cited in note 3) (arguing that Reagan's regulatory review program embodied the belief that “[u]nder the Constitution, the President is responsible for this body of administrative law and its consequences for the nation”).

<sup>34</sup> See David E. Lewis, *Presidents and the Politics of Agency Design: Political Insulation in the United States Government Bureaucracy, 1946–1997* 86–87 (Stanford 2003) (noting that presidents can exercise influence over agencies using formal powers like the veto power, his role as chief executive, and his role as unitary head of state).

carbon dioxide is not a pollutant under the Clean Air Act—the president could replace him with someone who would carry out his policies.

Congress, however, placed numerous obstacles to presidential coordination and control of regulatory policy. While Congress wants to shift political responsibility to the president by delegation, it still seeks to retain as much influence over the agency as possible.<sup>35</sup> In Congress's ideal world, the president would take all of the downside for politically unpopular decisions, while Congress could continue to dictate to agencies the rules that it wanted to satisfy different interest groups.<sup>36</sup> A chief tool to achieve this end was to insulate agencies from presidential control.<sup>37</sup> Congress cannot prevent the president from appointing the heads of the agencies, and all of the postwar presidents generally attempted to choose nominees who agreed with their policies.<sup>38</sup> But Congress could make it difficult for the president to fire them once in office by permitting only for-cause removal. Without the threat of removal, presidents would have little formal authority to compel independent agencies to obey their orders.<sup>39</sup> Agency leaders would become more susceptible to control by Congress, which would continue to control their funding and legislative mandate, and potentially embarrass them (or praise them) in oversight hearings.<sup>40</sup>

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<sup>35</sup> Epstein and O'Halloran, *Delegating Powers* at 22 (cited in note 18) ("Congress delegates broad power to bureaucrats knowing in advance that they will make mistakes. When they do so, legislators can step in, undo any wrongs imposed on their constituents, and reap all the credit for making things right.").

<sup>36</sup> *Id.* at 29–30.

<sup>37</sup> A second tool—influencing the content of regulations through informal methods—was best expressed with the legislative veto, which was challenged in court by the Reagan administration and eventually struck down in *INS v Chadha*, 462 US 919, 959 (1983).

<sup>38</sup> Lewis, *Presidents and the Politics of Agency Design* at 24 (cited in note 34) (noting that the Founding Fathers "granted presidents the ability to nominate principal officers").

<sup>39</sup> Calabresi and Prakash, 104 *Yale L J* at 598 (cited in note 13) ("If the President is to have effective control of his constitutionally granted powers, he must be able to remove those who he believes will not follow his administrative agenda and philosophy."); Lewis, *Presidents and the Politics of Agency Design* at 26 (cited in note 34) (arguing that presidential control over agency design is critical towards preserving a "manageable" bureaucracy).

<sup>40</sup> Lewis, *Presidents and the Politics of Agency Design* at 143–44 (cited in note 34) (noting that where the president's removal power is absent, Congress gets more of its desired policy outcomes); Edward Markey, *Congress to Administrative Agencies: Creator, Overseer, and Partner*, 1990 *Duke L J* 967, 971 (outlining tactics Congress can use in response to "agency intransigence"); Barry Weingast and Mark Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking at the Federal Trade Commission*, 91 *J Polit Econ* 765, 769–70 (1983) (noting how Congress can exert influence over agencies by favoring top performers, holding oversight hearings, and wisely using confirmation hearings); Peter Strauss, *The Place of Agencies in the Government: Separation of Powers and the Fourth Branch*, 84 *Colum L Rev* 573, 592 (1984) ("Perhaps the central fact of legislative-executive management of oversight relationships with the agencies is the extent to which behavior is determined by political factors rather than law.").

The Reagan administration launched a steady campaign against congressional efforts to shield the agencies from presidential control. It defeated direct legislative control over executive branch officers in *Bowsher v Synar*,<sup>41</sup> which prohibited an officer subject to congressional removal from executing a deficit reduction act.<sup>42</sup> In *INS v Chadha*,<sup>43</sup> Reagan successfully attacked an informal tool for influencing regulations, the legislative veto, which allowed one house of Congress to vote to block administrative action.<sup>44</sup> In 1987, the administration attempted to assert removal authority over the agencies, the final step in its campaign, by attacking the independent counsel established by the Ethics in Government Act of 1978.<sup>45</sup>

The basic constitutional argument in favor of presidential control relies on two provisions of the Constitution and a broader point about constitutional structure. First, Article II of the Constitution vests “the executive power” in the president of the United States.<sup>46</sup> Unlike Article I, which enumerates the “legislative powers herein granted” to Congress,<sup>47</sup> Article II does not define the “executive power.” It could be limited to the few powers set out in Article II, § 2, such as the commander-in-chief power, the opinion power, and the right to issue pardons, fill vacancies, call Congress into session, and receive ambassadors.<sup>48</sup> The president shares the great powers set out in Article II, such as making treaties and appointing officers, with the Senate.<sup>49</sup> Still, the power to remove could fairly be said to reside within the presi-

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<sup>41</sup> 478 US 714 (1986).

<sup>42</sup> *Id.* at 736 (holding that the powers vested in the Comptroller General under § 251 of the Balanced Budget and Emergency Deficit Control Act exceeded those authorized by the Constitution).

<sup>43</sup> 462 US 919 (1983).

<sup>44</sup> *Id.* at 919.

<sup>45</sup> Ethics in Government Act of 1978, Pub L No 95-521, 92 Stat 1824, 1867, codified at 28 USC §§ 591-98. The independent counsel provision was reauthorized in 1983, 1987, and 1994. See Ethics in Government Act Amendments of 1982, Pub L No 97-409, 96 Stat 2039 (1983), codified in various sections of Title 28; Independent Counsel Reauthorization Act of 1987, Pub L No 100-191, 101 Stat 1293, codified at 28 USC §§ 591-99; Independent Counsel Reauthorization Act of 1994, Pub L No 103-270, 108 Stat 732, codified in various sections of Title 28. The independent counsel provision was allowed to sunset in 1999. See William K. Kelley, *The Constitutional Dilemma of Litigation under the Independent Counsel System*, 83 Minn L Rev 1197, 1234-41 (1999) (discussing constitutional issues raised by independent counsels); Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 Mich L Rev 601, 608-38 (1999) (describing history).

<sup>46</sup> US Const Art II, § 1, cl 1.

<sup>47</sup> Compare US Const Art I, § 1 with US Const Art II, § 1, cl 1.

<sup>48</sup> US Const Art II, § 2, cl 2.

<sup>49</sup> *Id.* (giving the president the power to make appointments with the Senate’s “advice and consent” and the power to make treaties with the “advice and consent of the Senate,” provided “two thirds of the Senators present concur”).

dent's unenumerated executive power. Executives in the colonies and Great Britain held the power to appoint officers alone, and hence the power to remove (p 309). Because the Constitution specifically conditions the appointment power upon the Senate's advice and consent, but remains silent on removal, we can infer that removal remains an executive power.<sup>50</sup>

Second, the Constitution makes the president the nation's chief law enforcement officer. It grants perhaps the most significant executive power, that of taking "Care that the Laws be faithfully executed," in the president alone.<sup>51</sup> The Take Care Clause makes the president responsible for enforcing federal law, which implies an ancillary authority to interpret it in the course of enforcement. This is especially the case with federal laws that have not reached the stage of judicial interpretation, but even arises in setting law enforcement priorities for scarce executive resources. Because the Constitution makes the president ultimately responsible for executing the laws, he must also have the ability to control inferior executive officers to prevent them from enforcing or interpreting federal law at odds with his views. This view implies that any federal officer responsible for enforcing federal law must be a member of the executive branch. Otherwise, Congress could vest an agency with the authority to enforce federal law, but locate it outside the executive branch and thereby permit the execution of federal law beyond the president's control (p 293).<sup>52</sup>

A third argument generally flows from claims about the Constitution's structure, one first made by Alexander Hamilton in the Helvidius-Pacificus debates. The Constitution vests the president with "the executive power."<sup>53</sup> As Justice Antonin Scalia wrote in his dissent in *Morrison*, this "does not mean *some of* the executive power, but *all of* the executive power."<sup>54</sup> Article II constitutes a broad grant of power, much like Article III's Vesting Clause, which is the only textual source for the federal judiciary's powers.<sup>55</sup> The powers enumerated in § 2,

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<sup>50</sup> See notes 34, 39, and accompanying text.

<sup>51</sup> US Const Art II, § 3.

<sup>52</sup> For a prominent argument along these lines, see Saikrishna B. Prakash, *The Chief Prosecutor*, 73 *Geo Wash L Rev* 521, 575 (2005) (arguing that the president's constitutional duty to faithfully execute the laws prevents him from giving prosecutors total autonomy, even if he were so inclined).

<sup>53</sup> See note 46 and accompanying text.

<sup>54</sup> 487 US at 705 (Scalia dissenting).

<sup>55</sup> See, for example, Calabresi and Prakash, 104 *Yale L J* at 570-71 (cited in note 13) (arguing that the linguistic similarity between the Vesting Clause of Article II and Article III suggests Article II should be read as a general grant of power). For a discussion of the judiciary's inherent powers and the Vesting Clause, see Akhil Reed Amar, *A Neo-Federalist View of Ar-*

such as command of the military, pardons, and execution of the laws, are executive in nature.<sup>56</sup> Other clauses in § 2, such as the Appointments and Treaty Clauses, do not create a new species of hybrid executive-legislative powers. Instead, they represent a dilution of the unitary nature of the executive branch by inclusion of the Senate in its operations, much as the president takes part in the legislative function of passing laws through the conditional veto.<sup>57</sup> “The general doctrine then of our constitution is, that the Executive Power of the Nation is vested in the President,” Hamilton wrote in 1793, “subject only to the *exceptions* and *qu[a]lifications* which are expressed in that instrument.”<sup>58</sup> Those exceptions, moreover, ought “to be construed strictly.”<sup>59</sup>

Choosing the appropriate rule of construction can determine the outcome of the debate over the president’s removal power. Article II of the Constitution only discusses the method of appointment of federal officers. The president “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States,” except for inferior officers, who may be appointed solely by the president, the courts, or department heads.<sup>60</sup> The Constitution’s silence on removal could be taken to adopt the formal process in which a legal act to reverse a previous act must follow the same procedure—just as it takes the enactment of a law to repeal an earlier law (the Constitution does not address the repeal of legislation, only its enactment), the removal of an officer should follow the same process as his appointment. Or the Constitution might leave the decision up to Congress. Its authority under the Necessary and Proper Clause to create agencies to help it exercise its Article I, § 8 powers could include the conditions for the removal of officers, as well as the size, shape, and duties of the agencies themselves.<sup>61</sup>

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*title III: Separating the Two Tiers of Federal Jurisdiction*, 65 BU L Rev 205, 229–30 (1985) (arguing that if Congress creates an exception to the Supreme Court’s appellate jurisdiction pursuant to the Article III “exceptions clause,” it “*must* create an inferior federal court to hear such cases at trial or on appeal”).

<sup>56</sup> See Calabresi and Prakash, 104 Yale L J at 578–79 (cited in note 13) (noting that the limitations placed upon these powers were meant to make them “executive,” as opposed to monarchical).

<sup>57</sup> *Id* (arguing that the limitations were necessary to prevent the creation of near-boundless executive power).

<sup>58</sup> Hamilton, *Pacificus No 1* at 39 (cited in note 11).

<sup>59</sup> *Id* at 42.

<sup>60</sup> US Const Art II, § 2, cl 2.

<sup>61</sup> US Const Art I, § 8, cl 18.

To put it charitably, the Supreme Court has taken inconsistent positions on these arguments. In *Myers v United States*,<sup>62</sup> former President and Chief Justice William H. Taft held that Congress could not require Senate advice and consent before the president could remove a first class postmaster.<sup>63</sup> Examining the creation of the great Departments in 1789, Chief Justice Taft found that the first Congress had understood the Constitution to vest the removal power in the president, a significant fact because many of the Framers sat in the first Congress.<sup>64</sup> Taft rejected the notion that Congress could set the conditions for removal as part of its legislative power to establish agencies.<sup>65</sup> As he wrote, “[T]he power of appointment and removal is clearly provided for by the Constitution, and the legislative power of Congress in respect to both is excluded save by the specific exception as to inferior offices. . . .”<sup>66</sup> Such power in the hands of Congress, Taft observed, would upset the independence of the three branches of government. “It could never have been intended to leave to Congress unlimited discretion to vary fundamentally the operation of the great independent executive branch of government and thus most seriously to weaken it.”<sup>67</sup> Practical experience buttressed the conclusions of logic. “Made responsible under the Constitution for the effective enforcement of the law,” Taft argued, “the President needs as an indispensable aid to meet it the disciplinary influence upon those who act under him of a reserve power of removal.”<sup>68</sup> Without complete control over removal, Taft concluded, the president would be prevented from “de-

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<sup>62</sup> 272 US 52 (1926).

<sup>63</sup> *Id.* at 176.

<sup>64</sup> *Id.* at 111–12:

In the House of Representatives of the First Congress, on Tuesday, May 18, 1789, Mr. Madison moved in the Committee of the Whole that there should be established three executive departments—one of Foreign Affairs, another of the Treasury, and a third of War—at the head of each of which there should be a Secretary, to be appointed by the President by and with the advice and consent of the Senate, and to be removable by the President. The committee agreed to the establishment of a Department of Foreign Affairs, but a discussion ensued as to making the Secretary removable by the President. “The question was now taken and carried, by a considerable majority, in favor of declaring the power of removal to be in the President.”

<sup>65</sup> *Id.* at 126–27.

<sup>66</sup> *Myers*, 272 US at 126–27.

<sup>67</sup> *Id.* at 127 (rejecting a “whole power of removal” for Congress as being “quite out of keeping with the plan of government devised by the framers”).

<sup>68</sup> *Id.* at 132.

termining the national public interest” and “directing the action to be taken by his executive subordinates to protect it.”<sup>69</sup>

Yet, only nine years later, the Court cut back the reach of *Myers*. While the president might have the authority to remove a postmaster, he did not necessarily enjoy the same power over a member of the Federal Trade Commission (FTC). In *Humphrey's Executor*, the Court took up the constitutionality of the basic structure of the New Deal's independent agencies,<sup>70</sup> which prohibited the president from removing agency heads except “for cause.”<sup>71</sup> With Justice George Sutherland writing, the majority held that the FTC “cannot in any proper sense be characterized as an arm or an eye of the executive.”<sup>72</sup> Creating a wholly new category of government, Justice Sutherland described the FTC's functions as “quasi legislative or quasi judicial powers” because it investigated and reported to Congress and conducted initial adjudications on claims of anticompetitive violations before a case went to federal court.<sup>73</sup> The FTC acted “as an agency of the legislative and judicial departments,” and was “wholly disconnected from the executive department.”<sup>74</sup>

*Bowsher* and *Chadha* may have encouraged Reagan administration officials in the hope that the Court was ready to overrule *Humphrey's Executor*. But their campaign before the justices crested when it confronted the independent agencies. *Morrison* addressed the independent counsel's investigation of Ted Olson for advising the president, while Assistant Attorney General for the Office of Legal Counsel, to invoke executive privilege against a congressional investigation into the EPA.<sup>75</sup> After President Ronald Reagan exercised the privilege and a compromise was reached, the committee claimed that Olson had misled Congress.<sup>76</sup> Upon the referral of the chairman of the congressional committee, the Attorney General asked for an indepen-

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<sup>69</sup> Id at 134 (emphasizing that requiring the president to go through the Senate “might make impossible that unity and co-ordination in executive administration essential to effective action”).

<sup>70</sup> The FTC itself was created in 1914, but the structure of independent agencies did not truly begin to blossom until the New Deal. See Lewis, *Presidents and the Politics of Agency Design* at 42–43 (cited in note 34) (noting the expansion of administrative agencies that accompanied the New Deal and World War II).

<sup>71</sup> *Humphrey's Executor*, 295 US at 619 (inquiring whether the president can be restricted from firing agency heads for reasons beyond those statutorily enumerated).

<sup>72</sup> Id at 628 (noting that the FTC's function is meant to be “free from executive control”).

<sup>73</sup> Id.

<sup>74</sup> Id at 630.

<sup>75</sup> 487 US at 665 (explaining that Olson's advice led to an administrator withholding documents, leading to House condemnation and a lawsuit).

<sup>76</sup> Id at 666.



dent counsel.<sup>77</sup> Olson challenged the constitutionality of the independent counsel's appointment and removal provisions while the Iran-Contra affair was unfolding, and prevailed in the US Court of Appeals for the DC Circuit.<sup>78</sup>

Rejecting *Humphrey's Executor's* summoning forth of quasi functions, the Court returned to a cleaner separation of powers among simple executive, legislative, and judicial powers. Congress cannot interfere with the president's executive power or his constitutional responsibility to execute the laws, and, according to Chief Justice William Rehnquist's opinion for the Court, there was no doubt that the independent counsel's functions were executive.<sup>79</sup> Unlike *Bowsher*, however, Congress did not retain control over the independent counsel.<sup>80</sup> Here, Congress had only placed a restriction on the prosecutor's removal, but sought no power to direct her itself (a conclusion belied by the facts of Olson's case itself, which arose from a dispute between Congress and the executive branch and an investigation demanded by a congressional committee).<sup>81</sup> According to the Court, the president could continue to command the independent counsel even with the good cause removal provision.<sup>82</sup> While there was some reduction in the president's authority, the Court believed it was outweighed by the importance of establishing independence for those who would investigate the highest-ranking executive branch officials.<sup>83</sup> "Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing," Justice Scalia declared in his *Morrison* dissent.<sup>84</sup> "But this wolf comes as a wolf."<sup>85</sup> The independent counsel, in his view, violated the Constitution's vesting of *all* of the executive power in the president, and upset the political functioning of the separation of

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<sup>77</sup> *Id.* (noting that the Public Integrity Section of the Justice Department recommended an independent counsel for all three persons suspected of interference, but that the attorney general only approved one for Olson).

<sup>78</sup> *In re Sealed Case*, 838 F2d 476, 487 (DC Cir 1988) (holding the appointment of the independent counsel unconstitutional).

<sup>79</sup> *Morrison*, 487 US at 691 ("There is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch.").

<sup>80</sup> *Id.* at 686 (noting that the act specifically gave removal authority to the attorney general).

<sup>81</sup> *Id.* at 694 (observing that "this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch").

<sup>82</sup> *Id.* at 692 (arguing that the removal provision does not "impermissibly burden[] the President's power to control or supervise the independent counsel").

<sup>83</sup> *Morrison*, 487 US at 691-96 (noting that the impingement upon the powers of the presidency is comparatively slight).

<sup>84</sup> *Id.* at 699 (Scalia dissenting).

<sup>85</sup> *Id.*

powers by releasing a politically unaccountable and unrestrained prosecutor whose job would be to pursue selected executive branch officials.<sup>86</sup> The following decade fulfilled Justice Scalia's prophecies. At least five independent counsel investigations targeted Clinton administration cabinet members, including the secretaries of commerce, housing, and agriculture, with a sixth, the most serious and damaging to the Presidency, focused on the web of scandals known as "Whitewater," which led to President Bill Clinton's impeachment.<sup>87</sup>

Steven Calabresi has been one of the staunchest defenders of the Reagan administration's efforts to restore the unitary executive to constitutional law. Earlier scholars had addressed the centralization of control over the administrative state in the president, but primarily in functionalist rather than formalist terms.<sup>88</sup> In 1992, Calabresi published an article in the *Harvard Law Review* with Kevin Rhodes arguing that Article II's Vesting Clause, like that of Article III for the federal judiciary, was a reservoir of implied executive power.<sup>89</sup> In 1994, he co-wrote an article with Saikrishna Prakash in the *Yale Law Journal* claiming that the history of the Constitution's drafting and ratification supported his textualist arguments.<sup>90</sup>

Defenders of the approach set forth by *Morrison* provided several responses. One argument, developed by Professors Lawrence Lessig and Cass Sunstein, countered Calabresi and Prakash's formalist argu-

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<sup>86</sup> *Id.* at 703–16 (Scalia dissenting).

<sup>87</sup> See Robert J. Spitzer, *The Independent Counsel and the Post-Clinton Presidency*, in David Gray Adler and Michael A. Genovese, eds, *The Presidency and the Law: The Clinton Legacy* 89, 93–94 (Kansas 2002) (noting that at least nine independent counsels pursued investigations during the Clinton administration); Richard A. Posner, *An Affair of State: The Investigation, Impeachment, and Trial of President Clinton* 59–94 (Harvard 2000) (detailing the Starr investigation and the controversy surrounding it).

<sup>88</sup> See, for example, Strauss, 84 *Colum L Rev* at 592 (cited in note 40) (arguing that "political factors rather than law" are the primary arbiters of oversight relationships); Geoffrey P. Miller, *Independent Agencies*, 1986 *S Ct Rev* 41, 44 (resting his thesis that "Congress may not constitutionally deny the President the power to remove a policy-making official who has refused an order of the President . . . on a model of the President's relationship to the federal administrative state"); Stephen L. Carter, *The Independent Counsel Mess*, 102 *Harv L Rev* 105, 107–08 (1988) (locating congressional attempts to rein in executive power as reactions to the Watergate scandal).

<sup>89</sup> Steven G. Calabresi and Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 *Harv L Rev* 1153, 1175–79 (1992) (reading the text of the Vesting Clause to give a substantive grant of power). See also Lee S. Liberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court Was Wrong*, 38 *Am U L Rev* 313, 314 (1989) (arguing that the Vesting Clause "does two things: it grants the President the entire executive power of the United States, and grants it to him alone").

<sup>90</sup> Calabresi and Prakash, 104 *Yale L J* at 599–635 (cited in note 13) (outlining the pre-ratification understanding of the president's administrative role).

ments for a unitary executive with a formalist argument of their own.<sup>91</sup> They claim that a fourth type of government power, that of “administration,” does not fall within the executive power of Article II and could be subject to congressional regulation—including limitations on presidential removal of agency officials.<sup>92</sup> Jerry Mashaw’s recent history of the administrative state similarly concludes that administration was separate and distinct from the executive power vested by Article II.<sup>93</sup> Under these theories, the current evolution of the administrative state into decentralized, relatively independent entities falls within the markers set out by the Constitution’s text and the immediate practice that followed its ratification.

A second defense of a nonunitary executive takes a decidedly functionalist approach. Drawing on Justice Byron White’s dissents in *Bowsher* and *Chadha*, functionalists argue that the insulation of agencies from presidential control, like the legislative veto, formed part of the legislative-executive bargain, making delegation to the agencies possible.<sup>94</sup> The formal rules defining the executive and legislative powers present the government with the possibility of a Coasean bargain. In agreeing upon the legislative veto or for-cause removal, the president and Congress have contracted around the separation of powers to reach a level of delegation which they both want, but which is not necessarily permitted by the formal rules. Presidents agree to these conditions because without them, Congress would delegate little administrative authority at all. Put more conventionally, Congress’s broad delegation of authority to the executive justifies new forms of checks and balances on the president to correct the imbalance in the separation of powers.<sup>95</sup>

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<sup>91</sup> Lessig and Sunstein, 94 Colum L Rev at 38–55 (cited in note 13).

<sup>92</sup> *Id.* (arguing that the founding generation understood a distinction between “administrative” and other executive powers).

<sup>93</sup> See Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 Yale L J 1256, 1271 (2006) (“The Constitution’s silence on most matters administrative provides extremely modest textual support for the notion that all administration was to be firmly and exclusively in the control of the President.”); Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1830*, 116 Yale L J 1636, 1657 (2007) (claiming that the embargo of 1807–09, “like any system of administrative implementation under the American Constitution, was subject . . . to three forms of control: political control by elected officials; administrative control through hierarchal supervision; and legal control through judicial review”); Jerry L. Mashaw, *Administration and “the Democracy”: Administrative Law from Jackson to Lincoln, 1829–1861*, 117 Yale L J 1568, 1666 (2008) (detailing administrative controls in the Jackson administration).

<sup>94</sup> See, for example, Strauss, 84 Colum L Rev at 581–83 (cited in note 40).

<sup>95</sup> *Id.* at 667–69 (arguing that contemporary political realities require a recalibration of the eighteenth century model of checks and balances).

Both defenses of *Morrison*—formalist and functionalist—depend on practice as their chief form of evidentiary support. To Lessig and Sunstein, and to Mashaw, the historical record of the first agencies shows that the Framers did not understand the formal constitutional text to require that all administrative agencies fall within the direct control and removal authority of the president.<sup>96</sup> Instead, some agencies, particularly the Post Office or the Treasury Department, occupied a space that was neither legislative nor executive. For functionalists who apply rational choice models, the modern administrative state is the product of a series of bargains in which presidents have accepted a degree of independence for agencies in exchange for sweeping delegations of substantive power.<sup>97</sup> Practice shows that presidents not only have consented, but have actively desired limitations on their removal authority as the price for access to regulatory powers otherwise forbidden to them.<sup>98</sup>

It is within this context that Calabresi and Yoo's book should be understood. *The Unitary Executive* answers the claims of defenders of *Morrison* that practice justifies the independence of the modern administrative state. It systematically surveys the administration of each president to show that no chief executive has ever consented to limitations on his authority to remove and direct subordinate branch officials. They speak in particular to scholars who interpret the Constitution along common law methods.<sup>99</sup> To them, Calabresi and Yoo "claim only that the executive branch's consistent opposition to congressional

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<sup>96</sup> See Lessig and Sunstein, 94 Colum L Rev at 38–70 (cited in note 13) (examining the nineteenth century view of executive versus administrative functions); Mashaw, 115 Yale L J at 1270–76 (cited in note 93) (arguing against a textualist warrant for unifying the executive and administrative functions); Mashaw, 116 Yale L J at 1695 (cited in note 93) (noting that "the historical record seems barren of any claim of inherent executive authority to regulate foreign commerce, even though the embargo was motivated entirely by foreign affairs concerns and was explicitly justified as a substitute for war"); Mashaw, 117 Yale L J at 1684–93 (cited in note 93) (outlining the various "accountability systems" which check administrators).

<sup>97</sup> For an analysis of rational choice decisionmaking in the context of the executive branch, consider Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 Cardozo L Rev 437, 486–504 (1993).

<sup>98</sup> For example, Thomas Jefferson "was given enormous statutory discretion under the embargo statutes, but one of his first acts was to issue an interpretation limiting his own authority." Mashaw, 116 Yale L J at 1685–86 (cited in note 93). See also Lewis, *Presidents and the Politics of Agency Design* at 71 (cited in note 34) ("If presidents must choose between no agency and an agency that is more insulated than they prefer, they often will accept the proposal for the insulated agency.").

<sup>99</sup> See, for example, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U Chi L Rev 877, 879 (1996) ("The common law approach [to constitutional interpretation] restrains judges more effectively, is more justifiable in abstract terms than textualism or originalism, and provides a far better account of our practices.").

incursions on the unitary executive has been sufficiently consistent and sustained to refute any suggestion of presidential acquiescence in derogations from the unitary executive” (p 16). In this sense, their exhaustive description of presidential practice makes a difference, for the purpose of constitutional interpretation (as opposed to pure historical interest), only to the extent one thinks that practice can or should impose a gloss on the Constitution’s text and original understanding. And, to put it more narrowly, it matters only insofar as one thinks that the practice of the executive branch, rather than the decisions of the Supreme Court or the acts of Congress, should have at least an equal weight in interpreting the extent of executive power. The next Part asks whether Calabresi and Yoo have in fact proven their case.

## II. REMOVAL IN PRACTICE

*The Unitary Executive* represents a tremendous amount of work. It systematically examines every administration from Washington to George W. Bush for signs that a president voluntarily accepted the idea that Congress could condition his removal power. This provides a historical comprehension that can be all too lacking in separation of powers debates, which often contrive a conflict between the Framers’ understanding of the Constitution and modern practice. Much like David Currie’s history of the Constitution in Congress,<sup>100</sup> *The Unitary Executive* serves as a unique reference work that provides the basic information on each president and his interaction with Congress and the courts on the important question of the structural integrity of the executive branch. It deserves to be a standard resource for any legal research on presidential administration.

This systematic approach has both its upsides and downsides. It produces some gems that might go unnoticed when following a specific issue over time, rather than comparing presidents against one another. Legal scholarship on the Presidency tends to focus on the Framing period and modern controversies, usually with the purpose of showing similarities or differences between the two. This method unfortunately overlooks the development in institutions over time and the way that constitutional questions have changed in response to circumstances. Focusing only on the Framing and contemporary issues

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<sup>100</sup> See generally David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801* (Chicago 1997); David P. Currie, *The Constitution in Congress: The Jeffersonians, 1801–1829* (Chicago 2001); David P. Currie, *The Constitution in Congress: Democrats and Whigs, 1829–1861* (Chicago 2005); David P. Currie, *The Constitution in Congress: Descent into the Maelstrom, 1829–1861* (Chicago 2006).

also causes us to forget important American leaders and how they confronted challenges that may not be all that different from our own.

According to Calabresi and Yoo, for example, the three greatest defenders of their conception of a unitary executive are Andrew Jackson (no surprise there), Grover Cleveland, and Calvin Coolidge (pp 268–69). Jackson's veto of the bill rechartering the Second Bank of the United States, and his firing of his Treasury Secretary when he refused to remove federal deposits from the Bank, are relatively well known. But the latter two may surprise constitutional law scholars, for whom Cleveland and Coolidge are best left to obscurity. Cleveland, known as the only president to hold nonconsecutive terms in office, can claim responsibility for repealing the Tenure in Office Act,<sup>101</sup> which had limited presidential removal power from the days of Andrew Johnson's impeachment. Coolidge, better known for his declaration that "the business of America is business," wins praise from Calabresi and Yoo for litigating and winning *Myers v United States*.<sup>102</sup> Heroes of the unitary executive may not correlate with popular or scholarly conceptions of presidential success—an interesting question that the authors do not take up.

The historical approach sheds light on otherwise unnoticed themes and patterns. One issue that comes through in sharp relief, but whose salience has receded today, is civil service reform. Calabresi and Yoo argue that the creation of the civil service did not initially threaten the president's appointment and removal powers, even though it required competitive examinations for federal employment (pp 7, 207, 422–23). Rather, in their view, the civil service helped presidents fend off pressure from their political supporters to continue a partisan-minded spoils system (pp 207, 422–23). They argue, convincingly, that civil service reforms allowing the termination of federal employees "for cause" were not understood to limit the president's removal authority, or to the extent that they did, they only required the president to give a "cause," any "cause," for termination (pp 422–23). Yet, over time the tenure-like protections for the civil service have sharply reduced the president's ability to change the direction of the permanent bureaucracy, to the point where scholars in the 1970s identified the civil service as an obstacle to improving the responsiveness and effec-

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<sup>101</sup> An Act Regulating the Tenure of Certain Civil Offices ("Tenure of Office Act" or "Tenure Act"), 14 Stat 430 (1867).

<sup>102</sup> 272 US at 52.

tiveness of government.<sup>103</sup> Interestingly, Calabresi and Yoo trace the ossification of the bureaucracy from the Supreme Court's extension of due process protections to the termination of government employees in cases like *Board of Regents v Roth*,<sup>104</sup> *Perry v Sindermann*,<sup>105</sup> and *Arnett v Kennedy*,<sup>106</sup> rather than any action by Congress. *The Unitary Executive's* historical approach shows that presidents consistently followed a common position toward the civil service that sought to maintain the right to fire federal employees in order to guarantee a uniform execution of federal law.

The account would have been complete if it had delved more deeply into actual practice that went beyond presidential, judicial, or congressional statements. Calabresi and Yoo, for example, could have conveyed some sense of how widely presidents used their authority to remove members of the civil service. Even if the Supreme Court made clear in 1903, in *Shurtleff v United States*,<sup>107</sup> that Congress's use of a for-cause restriction did not limit the president's removal power, it would still be important to know how the presidents and Congress lived by the decision. *Shurtleff* itself, as the authors admit, is unclear and seems to assume that Congress actually could limit the president's removal power, if the statute plainly stated so (pp 234–35). One could read *Shurtleff* as simply avoiding the constitutional question. In that case, it would be important to know whether presidents continued to remove civil servants for reasons other than inefficiency, neglect, or malfeasance in office, or whether they believed that for-cause provisions limited their authority. Even if *Shurtleff* implied that the heads of the Interstate Commerce Commission (ICC) and the Federal Trade Commission (FTC) were removable by the president at will, if removal rarely if ever happened, it may be the case that presidents actually believed the Constitution favored Congress. Conversely, it would be important to understand whether the 1970s due process cases protecting public sector employees had the effect that the authors suppose. If

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<sup>103</sup> See, for example, Gerald E. Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U Pa L Rev 942, 943–45 (1976).

<sup>104</sup> 408 US 564, 569–70 (1972).

<sup>105</sup> 408 US 593, 602–03 (1972) (holding that where a college had a de facto policy of tenure renewal, the individual was entitled to a formal hearing where he might prove the legitimacy of his claim to job tenure).

<sup>106</sup> 416 US 134, 152–55 (1974) (holding that the right not to be discharged except for cause does not include the post-termination right to an adversary hearing).

<sup>107</sup> 189 US 311, 317 (1903) (“[I]t would be a mistaken view to hold that the mere specification in the statute of some causes for removal thereby excluded the right of the President to remove for any other reason which he . . . should think sufficient.”).

it became more difficult for presidents to remove, and hence control, the civil service after *Roth*, *Sindermann*, and *Arnett*, we might expect fewer removals or at least a reduction in turnover in the federal workforce. It is possible, of course, that the mere existence of the authority guaranteed presidential control over the bureaucracy, but examples would be helpful.

Another intrusion into the classic separation of powers, the independent agencies, also takes on a different cast through Calabresi and Yoo's approach. According to them, early agencies such as the ICC, the Federal Reserve Board, and the FTC were not understood to be formally independent until 1935, when the Court decided *Humphrey's Executor* (p 300). Until then, removal of members of these commissions, like the members of the civil service, fell under the *Shurtleff* rule, which held that a statutory provision allowing removal for inefficiency, neglect, or malfeasance in office did not restrict the president's independent constitutional power of removal. Even the Federal Reserve Board, whose independence seems the most defensible on functional grounds—we do not want elected politicians setting monetary policy because of their short-term interest in reelection—was not originally understood to be independent of presidential removal and control (p 259).

The example of the Federal Reserve could even allow for a test of the removal power's significance. Calabresi and Yoo could have researched how many Federal Reserve officials were removed by presidents from Woodrow Wilson through FDR. Since we have very good information on interest rates during this period, perhaps it would have been possible to determine whether the pace and timing of removals had any effect on interest rates. It would be interesting to know whether the introduction of removal protections for the Federal Reserve produced any real difference in the Bank's manipulation of interest rates or its success in managing inflation and economic growth. Some scholars have argued, for example, that interest rates tend to loosen as a presidential election approaches, which suggests that presidents are influencing the Fed to increase economic growth in the short run for their electoral benefit.<sup>108</sup> If that is true, that might both bolster and harm Calabresi and Yoo's argument. It would show that presidents can implement their policies even in the face of for-

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<sup>108</sup> See, for example, Edward Tufte, *Political Control of the Economy* 142–44 (Princeton 1980) (“The electoral-economic cycles breeds a lurching, stop-and-go economy the world over.”); William Nordhaus, *The Political Business Cycle*, 42 *Rev Econ Stud* 169, 187–90 (1975) (“Moreover, within an incumbent's term in office there is a predictable pattern of policy, starting with relative austerity in early years and ending with the potlatch right before elections.”).



cause removal provisions, but it would also undermine the importance of the removal question overall.

One downside of a chronological approach, however, is its sacrifice of analytical depth. *The Unitary Executive* attempts to say something about every president, no matter how obscure. Do we really need to know what William Henry Harrison, Zachary Taylor, and James Garfield, who collectively served about two years in office before their untimely deaths, thought about executive power? And the effort to be comprehensive in this way tempts the authors to veer from inference into speculation. Calabresi and Yoo, for example, argue that Garfield supported their view of the unitary executive because, several years before his election, he changed his view from support of to opposition to the Tenure in Office Act (p 203). But in his inaugural address, as the authors concede, Garfield asked Congress to enact legislation that would limit the grounds for removal of “minor” executive officials (pp 203–04). Garfield only served in office for six months before his assassination by a frustrated applicant for federal office; no serious test of his views on the unitary executive truly occurred.

Devoting attention to presidents like Garfield, or even those who served full terms that proved of little importance (Millard Fillmore comes to mind, though rarely), can divert the analysis from truly consequential presidents. Some of our greatest presidents, those acknowledged to have vigorously used their substantive powers the most, are also those who have defended Calabresi and Yoo’s definition of the unitary executive the least. Abraham Lincoln, for example, is probably the president who pressed executive power to its farthest bounds (more on that later).<sup>109</sup> Yet, as the authors acknowledge, Lincoln also signed legislation requiring Senate consent to remove the comptroller of the currency, allowing presidential dismissal of a military officer to undergo a review process and reversal by a court-martial, and demanding “cause” when firing consular clerks (p 172). And, of course, Congress imposed the Tenure in Office Act upon the man who finished out Lincoln’s second term. All too briefly, Calabresi and Yoo suggest that Lincoln suffered these glaring intrusions into the structural integrity of the executive in order to expand his powers over the

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<sup>109</sup> See Abraham Lincoln, *Letter to Albert G. Hodges* (Apr 4, 1864), in Don E. Fehrenbacher, ed, *Lincoln: Speeches and Writings 1859–1865* 585, 585 (Library of America 1989) (“I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation.”). See also Schlesinger, Jr, *Imperial Presidency* at 59 (cited in note 1) (“[Lincoln] obviously did not become a despot lightly.”); Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* 225 (Princeton 1948) (labeling Lincoln’s presidency a “constitutional dictatorship”).

conduct of the war (p 172). This, however, fatefully links the idea of the unitary executive in matters of personnel to the concept of the executive power as including authorities of substance—a connection that, as will be explored more fully in Part III, the authors do their best to disavow. But if, as Calabresi and Yoo suggest in the conclusion to their book, the president has few substantive powers, even in wartime, then one of our three greatest presidents broke any chain of unanimous presidential support for the unitary executive. Calabresi and Yoo's account of Lincoln is disappointing on this score, and the likely culprit is the decision to spend some pages discussing the Fillmores and Taylors of the American past.

Another puzzle for Calabresi and Yoo is why, if presidents have such a strong interest in defending the unitary nature of the executive branch, Congress successfully enacted so many laws with for-cause removal protections or legislative vetoes. Presidents can and have vetoed laws because of such provisions, such as Andrew Johnson's veto of the Tenure in Office Act or Richard Nixon's veto of the War Powers Resolution (pp 180, 352). Presidents sometimes must sign large omnibus laws that contain needed funding to keep the government operating even though they might contain provisions that intrude on their executive powers. With increasing frequency, they have used signing statements to object to such provisions. But even if one accepts that an objection in a signing statement is enough to maintain a consistent position in favor of a unitary executive, what are we to make of the times when presidents have supported such legislation while remaining silent on the constitutional problems?

A chief case in point is President Jimmy Carter. Carter had actually campaigned on the platform of making the Justice Department independent of presidential control (p 363). Attorney General Griffin Bell managed to torpedo the plan upon taking office (pp 363–64). But the Carter administration then supported the Ethics in Government Act, which created the office of the independent prosecutor and gave it for-cause removal protection. Calabresi and Yoo explain Carter's signing of the Act as “a small price to pay for the greater goal of preventing a post-Watergate Congress from turning the whole Justice Department into an independent agency” (p 366). Nevertheless, Carter not only signed but actively supported the bill, which created one of the greatest departures from the pure unitary ideal. Similarly, Carter supported the statute that created the inspectors general in each de-

partment (p 366).<sup>110</sup> It is true that the head of OLC at the time, John Harmon, testified against the constitutionality of the act. Nevertheless, Carter signed it and since the act was not part of some larger omnibus legislation, he did so willingly. It is hard to see why Carter, at least, does not disrupt the authors' claim of an unbroken chain of presidential defense of the executive branch.

Carter, however, does not appear to be the only president who accepted congressional efforts to disrupt the executive branch's control over law enforcement. It appears that Nixon and Ford, for example, signed legislation that created legislative vetoes, though to be fair, they sometimes did object (pp 352, 360). This practice goes back at least to FDR, who approved legislation granting for-cause protections to New Deal agencies, such as the National Labor Relations Board, or extending them to existing agencies, such as the Federal Reserve (p 287).

Several interesting questions arise from these examples. First, it is not clear what the significance is, for purposes of constitutional interpretation, of instances where presidents acquiesce to legislative intrusions into the unitary executive. Calabresi and Yoo explain that presidential failure to oppose for-cause removal protections or legislative vetoes does not undermine their thesis because those same presidents objected in other cases. On Nixon, for example, they write that even though he did accept such provisions, "his previous objections [in other cases] were doubtlessly sufficient to preserve his constitutional challenge for the purposes of coordinate branch construction" (p 352). Carter's support of the independent counsel law is justified by the greater good of heading off an independent Justice Department, while Reagan's and Clinton's agreement to the renewal of the Ethics in Government Act is offset by their litigation against the Act (Reagan) or just plain "foolishness" (Clinton) (pp 376-77, 400).

The authors do not explain why presidents who object some of the time, but acquiesce other times, are consistent with their claim of an unbroken defense of the unitary executive. The default rule could just as easily run the other way: presidents have conceded the point unless they consistently object to legislative vetoes or conditioned removal provisions. This seems especially so given that presidents have available in the signing statement a relatively costless tool to register their objections, one not subject to interference from the other branches. A more fully developed theory of coordinate branch con-

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<sup>110</sup> The Inspector General Act of 1978, Pub L No 95-452, 92 Stat 1101, codified in various sections of Title 5.

struction could place these individual waivers, if they can be called such, in an interpretive context that would help make sense of them.

Instead of finding a blanket uniformity of presidential practice, which does not seem as neat as it first appears, Calabresi and Yoo could have further investigated the cases in which presidents approved the fragmentation of the executive branch. Under certain circumstances, it seems, presidents will accept intrusions into the unitary executive. The interesting question is why, when it comes at the cost of full presidential control over policy. One possibility is that accepting for-cause removal protections signals that the president can be trusted to keep certain promises, whether to the electorate or to the other branches. The separation of powers may create a bargaining environment where it is difficult to enforce commitments. Although judicial review may provide a means to enforce some agreements, there can be significant justiciability barriers that prevent courts from reaching many cases. Standing or the political question doctrine, for example, can preclude courts from resolving disputes over war powers and foreign affairs.<sup>111</sup>

Presidents make commitments that may involve restricting their own powers in order to receive valuable benefits in exchange. Accepting devices that decrease their own control over personnel or law enforcement may be one of the few meaningful ways to signal their trustworthiness. The Ethics in Government Act is a good example. President Carter came to office on a platform of making a clean break from the Nixon-Ford years and the interference with law enforcement decisions that characterized Watergate (pp 364–66). He wanted to restore Americans' faith in their government (pp 365–66). One movement toward restoring such trust was to promise that he and his top advisors would follow exacting ethical standards. But after Watergate, the electorate may not have fully believed promises of ethical conduct without an institutional mechanism, like an independent counsel, who could investigate allegations without interference from the president. Such motives may explain why presidents have ultimately accepted various independent investigatory commissions, such as those investigating the 9/11 attacks (headed by former Governor Thomas Kean and former Representative Lee Hamilton) or the failure of American intelligence on the existence of Iraqi weapons of mass destruction (headed by Judge Laurence Silberman and former Senator Charles

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<sup>111</sup> See, for example, *Campbell v Clinton*, 203 F3d 19, 28 (DC Cir 2000) (per curiam) (holding that whether president can initiate hostilities abroad without a declaration of war is a political question).

Robb). Such commissions are a vehicle to signal the president's commitment to investigating mistakes and instituting reforms.<sup>112</sup>

Another good example of an executive interest in administrative independence is the Federal Reserve. Presidents will have a strong incentive to loosen interest rates as their reelection approaches. The economy may experience a short-term boost in economic growth with artificially low unemployment and low interest rates, but at the price of longer-term inflation. But that inflation will come to bear after the election.<sup>113</sup> Investors will place less faith in the Federal Reserve if it is known to manipulate interest rates to keep the existing political party in power. They will expect inflation to increase, which will affect prices and wages, causing inflation to grow even higher and reducing overall social welfare. A president should favor central bank independence, which correlates positively with political freedom, political stability, and price stability.<sup>114</sup>

A second purpose served by such commitments is that they give presidents a way to persuade Congress to delegate broad rulemaking powers to the executive branch. It was President Herbert Hoover, for example, who first suggested the legislative veto in order to convince Congress to grant him significant authority to reorganize the executive branch.<sup>115</sup> During World War II, Congress enacted more than thirty statutes giving the president wartime powers, but with a legislative veto attached.<sup>116</sup> As Justice White observed in dissent in *Chadha*, "President Roosevelt accepted the veto as the necessary price for obtaining exceptional authority."<sup>117</sup> By the time of *Chadha*, Congress had inserted legislative vetoes in almost two hundred statutes covering subjects from budgets to the environment.<sup>118</sup> While presidents objected to many of these, as Justice White noted, "the Executive has more often agreed to legislative review as the price for a broad delegation of

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<sup>112</sup> See Eric A. Posner and Adrian Vermeule, *The Credible Executive*, 74 U Chi L Rev 865, 868 (2007) (arguing that presidents are wise to use signaling mechanisms such as independent commissions to prove their credibility to the public).

<sup>113</sup> See note 108 and accompanying text.

<sup>114</sup> See Dennis Mueller, *Public Choice III* 461–66 (Cambridge 2003) ("Empirically [central bank independence] appears to be positively correlated across countries with indexes of political freedom and political stability.").

<sup>115</sup> See *Chadha*, 462 US at 968–69 (White dissenting) (arguing that the legislative veto is a prominent and important mechanism in the American political process).

<sup>116</sup> *Id.* at 969 (White dissenting).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 968.

authority.”<sup>119</sup> Presidents clearly would rather have such authority, even with the legislative veto, than have no delegated authority at all.

A third purpose might involve presidential and congressional decisions to delegate authority based on their expectations about future electoral changes. When the Presidency and Congress are in the hands of the same political party, one would expect broader delegations of authority with fewer strings attached than if the two institutions were under separate control. Congress will simply delegate broadly to the president for reasons of technical expertise and efficiency in lawmaking. But if the political party is unsure whether its electoral advantage will persist over time, it may well wish to introduce independence in the bureaucracy to prevent the other party from undoing its handiwork. For example, if the Democratic Party controls both Congress and the Presidency, its preferences may be advanced by delegation to an agency that can more effectively issue rules that broaden the reach of regulation. Both the president and Congress can establish the agency's baseline policy preferences by being present at its creation. But if the Democratic Party expects that it will lose the Presidency in the near future, it cannot be certain that the executive branch will continue to pursue congressional preferences. Giving the agency independence through for-cause removal protections, in some circumstances, may be preferable to giving the president full control over the agency when that president may be a political opponent in the future.

Presidents may have good reasons, in their view, to accept deviations from a pure theory of a unitary executive. At times, they have promoted agency independence; at other times, they have accepted it. Calabresi and Yoo might have devoted more attention to these cases of acquiescence rather than cases of objection. Situations in which maintaining fidelity to a unitary executive actually has real costs may prove more illuminating, as a matter of constitutional interpretation, than rote recitations of principle. If presidents demonstrate more attachment to the unitary executive at the price of narrower delegated powers from Congress or decreased trust in their political commitments, we can put more store in the meaningfulness of the practice's value as some form of precedent.

I do not mean to take anything away from *The Unitary Executive's* value as a survey of presidential practice. The authors have illuminated swaths of history that have been *terra incognita* for constitutional scholars. The book should be a starting point for anyone who

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<sup>119</sup> *Chadha*, 462 US at 974.

conducts separation of powers research on a specific historical period. But because of its ambitious historical scope, *The Unitary Executive* overlooks important questions about constitutional interpretation and the significance of examples that weigh against their theory of consistent presidential practice. For those who agree with the argument of *The Unitary Executive* as a matter of the original understanding of the Constitution, this nagging issue leaves uncertainty over whether the book has proven its basic claim about historical practice.

### III. IS REMOVAL ALL THERE IS?

*The Unitary Executive* may ultimately convince because its claims, in its own words, are “for fairly modest presidential powers” (p 428). Calabresi and Yoo make the case only for presidential direction of whatever powers reside in the executive branch. On the question of whether the executive branch itself has any substantive powers, they claim to be “agnostic” (p 428).

But the authors cannot maintain their non-believer status for long. The travails of the Bush administration force them to find religion, or rather in this case, apostasy. At first, they observe that President George W. Bush’s claims to presidential power are “hardly unprecedented” and follow in the footsteps of Presidents Jefferson, Lincoln, Theodore and Franklin Roosevelt, and Nixon (pp 428–29). On the other hand, the authors assert that the writer of this Review, along with other lawyers, provided poor legal advice to President Bush, which led him to claim “implied, inherent presidential power in the War on Terror” (p 429). These claims to power, they believe, have committed the offense of giving the unitary executive theory a bad name. Most directly, Calabresi and Yoo declare: “Although Bush deserves a lot of credit for his steps to safeguard the country, the cost of the bad legal advice that he received is that Bush has discredited the theory of the unitary executive” (p 429). That theory, they emphasize, only reaches as far as the “presidential authority to remove and direct subordinate executive officials,” but does not include “implied, inherent foreign policy powers, some of which, at least, the president simply does not possess” (p 429).

This Part addresses this claim directly. In short, it argues that the story of the Presidency has not truly been one solely of whether the president is really the chief of the executive branch. The central element of the Presidency has been the growth of its executive powers, not its powers of management. The Framers created the Presidency so

that a branch of the government would always be “in being” and could exercise substantive powers in times of crisis and emergency.<sup>120</sup> Indeed, the basic theory of the unitary executive was born not out of a debate over removal, but over President Washington’s declaration of American neutrality during the wars of the French Revolution.<sup>121</sup> Our greatest presidents did not succeed because they carefully husbanded the removal power, but because they responded to great challenges using every tool at their disposal, including their substantive powers as Chief Executive and commander in chief. Authority through the removal and command of subordinates no doubt was an element of executive power, but it was secondary to the more important issue—the scope of the president’s constitutional authorities. In the interests of full disclosure, I have been at work on a book making this argument, but not in the context of responding to a claim that the executive power is limited to the direction and removal of subordinate officials.<sup>122</sup>

#### A. The Framing

The broad exercise of presidential power is not confined to the twentieth or twenty-first centuries but represents the necessary expansion over two hundred years of the constitutional powers of the office. It started with the Revolutionaries’ efforts to avoid executives who might become monarchs. By the time of the Constitution’s ratification, however, the Framers’ views had evolved in favor of an independent, forceful president. The Constitution devotes more of its attention to listing the powers of Congress, but it deliberately paints the president’s powers in broad strokes. Our greatest presidents, from George Washington onward, have filled in these sketchy outlines with *deeds*—deeds that met national challenges, both foreign and domestic. Presidential power has grown with the nation’s power, both in our constitutional law and in substance.

This insight can be traced at least as far back as Alexis de Tocqueville. In his classic *Democracy in America*, he observed that the

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<sup>120</sup> John Locke, *Two Treatises of Government* §144 at 74 (Barnes & Noble 3d ed 1966) (J.W. Gough, ed) (explaining that because legislatures could not always remain in session, society requires “a power always in being, which should see to the execution of the laws that are made and remain in force”).

<sup>121</sup> See Stanley Elkins and Eric McKittrick, *The Age of Federalism* 336–39 (Oxford 1993) (explaining that there appeared to be unanimity between the Framers in regards to whether or not America would be neutral in the French Revolution and that the decision was not brought before Congress).

<sup>122</sup> See John Yoo, *Crisis and Command: A History of Executive Power from George Washington to George W. Bush* (Kaplan 2010).



Presidency was a relatively weak office because the armed forces were tiny, the nation was protected from Europe by the oceans, and no natural enemies sat along its borders.<sup>123</sup> “The President of the United States is in the possession of almost royal prerogatives, which he has no opportunity of exercising; and those privileges which he can at present use are very circumscribed: the laws allow him to possess a degree of influence which circumstances do not permit him to employ.”<sup>124</sup> That would change, Toqueville predicted, as America grew. It is in foreign relations “that the executive power of a nation is called upon to exert its skill and its vigour.”<sup>125</sup> If the national security of the country “were perpetually threatened, and if its chief interests were in daily connection with those of other powerful nations,” Tocqueville continued, “the executive government would assume an increased importance in proportion to the measures expected of it, and those which it would carry into effect.”<sup>126</sup>

Many scholars, however, believe that the exercise of executive power today runs counter to the original constitutional design.<sup>127</sup> This group argues that the Revolution against King George III was part of a larger rejection of executive authority and that the Presidency was intended to be a narrow, limited office. The Framers would never have intended to resurrect the same royal prerogatives that they had just fought a war to overthrow.<sup>128</sup> This view of the Presidency diminishes its constitutional authority and independence to that of a “clerk-in-chief” whose main duty is to execute Congress’s laws.

It is true that the revolutionaries rebelled against King George III and his perceived oppressions of the colonies, but it does not follow that they opposed the idea of executive power. To most of those who gathered in Philadelphia in the summer of 1787, post-Revolutionary efforts by the states to allow only weak executives with

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<sup>123</sup> Alexis de Tocqueville, 1 *Democracy in America* 141 (Saunders and Otley 3d ed 1838) (Henry Reeve, trans).

<sup>124</sup> Id.

<sup>125</sup> Id.

<sup>126</sup> Id (hypothesizing that in the future America’s executive could be quite strong).

<sup>127</sup> See, for example, Bruce Ackerman, *The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy* 246 (Belknap 2005) (arguing that America does not have a presidential system and the current state of American government has only arisen through hard fought battles against executive encroachment of legislative power).

<sup>128</sup> See, for example, Bruce Ackerman, *Congressional Leadership is Necessary and Proper*, LA Times (Apr 2, 2007), online at <http://www.latimes.com/news/opinion/la-op-dustup2apr02,0,3065343.story?coll=la-opinion-center> (visited Sept 22, 2009) (“The Constitution was written by revolutionaries who had fought a war against the abuse of power by a king. The very notion of royal prerogative was repugnant — and so it should remain.”).

fragmented functions and powers had largely failed.<sup>129</sup> Undermining the integrity of the executive branch had led to unstable, oppressive legislatures. The drafters of the Constitution came to Philadelphia in large part to restore the independence and unity of the executive branch—a republican, not a royal, restoration.<sup>130</sup>

Independence put American theories of governance to the test, and they failed miserably. The Revolutionaries established one national charter, the Articles of Confederation, which soon proved crippled from lack of executive organization and leadership.<sup>131</sup> The revolutionists wrote their state constitutions to undermine the structural integrity of the executive branch, and the results were legislative abuse, special-interest laws, and weak governments.<sup>132</sup> Dissatisfaction with this state of affairs, even in a postwar time of relative peace and prosperity, led American nationalists to draft a new Constitution that would create a stronger, more independent executive branch within a more powerful national form of government.<sup>133</sup> They would become known as the Federalists.

Scholars often misunderstand the Articles of Confederation.<sup>134</sup> Drafted in 1777 and ratified in 1781, the Articles established the first American national government. Some have concluded that certain powers were legislative, such as the power to make war, simply because the Articles of Confederation granted them to the Continental Congress.<sup>135</sup> Andrew Rudalevige is one such critic of presidential power who believes that the Articles lacked an independent executive branch.<sup>136</sup> This view mistakes the Articles of Confederation as creating a legislature, which it did not. As Chief Justice John Marshall recognized, “the confederation was, essentially, a league; and congress was a

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<sup>129</sup> See Gordon S. Wood, *The Creation of the American Republic, 1776–1787* 446–53 (North Carolina 1969).

<sup>130</sup> See Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* 271 (North Carolina 1980) (Rita and Robert Kimber, trans); Charles C. Thach, Jr., *The Creation of the Presidency, 1775–1789* 65–123 (Baltimore 1923).

<sup>131</sup> See text accompanying notes 193–94.

<sup>132</sup> See text accompanying notes 194–97.

<sup>133</sup> See text accompanying notes 201–71.

<sup>134</sup> See Articles of Confederation (1778), reprinted in James Bayard, *A Brief Exposition of the Constitution of the United States* 171–78 (Hogan & Thompson 1845).

<sup>135</sup> Articles of Confederation Art VI, § 5 at 173 (cited in note 134). See, for example, Arthur Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 Seton Hall L Rev 527, 568 (1974); Raoul Berger, *War-making by the President*, 121 U Pa L Rev 29, 33 (1972).

<sup>136</sup> See Andrew Rudalevige, *The New Imperial Presidency* 19 (Michigan 2005).

corps of ambassadors.”<sup>137</sup> It had neither power of taxation nor power of internal legislation, and it was not chosen on the basis of popular representation.<sup>138</sup> It had as much real legislative power in the United States then as the United Nations has today.

Rather, the Articles of Confederation created America’s national executive, which inherited the Crown’s imperial powers in the colonies, while the states retained their legislative powers.<sup>139</sup> It kept “the sole and exclusive right and power of determining on peace and war,” entering into treaties, and conducting foreign relations.<sup>140</sup> It had the power to appoint committees and officers to administer federal law, the central function of the executive.<sup>141</sup> Congress’s problem was not a lack of executive power, but the way that power was organized and supported. Initially, Congress created committees to carry out decisions, a design that proved disastrous with troops in the field fighting the British.<sup>142</sup> In 1781, Congress replaced committees with executive departments headed by individual secretaries, an improvement,<sup>143</sup> but Congress continued to try to micromanage policy, and the executive still lacked “method and energy,” in the words of a young Alexander Hamilton.<sup>144</sup> The states, which continued to control supplies and internal legislation, failed to supply revenue to the national government or

<sup>137</sup> John Marshall, *A Friend of the Constitution Essays*, July 9, 1819, reprinted in Gerald Gunther, ed, *John Marshall’s Defense of McCulloch v. Maryland* 199 (Stanford 1969) (explaining the differences between the “league” created by the Articles of Confederation and the national “government” created by the Constitution). See also Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment outside Article V*, 94 Colum L Rev 457, 465 (1994) (noting that the “key point about the confederation was that it was a league, a treaty”).

<sup>138</sup> Articles of Confederation Arts II, V, VIII at 171–73 (cited in note 134). See Marshall, *A Friend of the Constitution Essays* at 199 (cited in note 137).

<sup>139</sup> See Jerrilyn Greene Marston, *King and Congress* 297–309 (Princeton 1987) (arguing that “executive and administrative responsibilities that had been exercised by or under the aegis of the king’s authority” were confided “to the Congress,” while the powers exercised by Parliament were “firmly allocated to the states”); Jennings B. Sanders, *Evolution of Executive Departments of the Continental Congress* 3–4 (North Carolina 1935) (arguing that there was disagreement over whether executive powers should be inherited by Congress, the states, or departments other than Congress); Thach, *The Creation of the Presidency* at 576–78 (cited in note 130) (arguing that although there were some who wished the Presidency to have unfettered treaty power, power was shared with the states); Wood, *The Creation of the American Republic* at 356 (cited in note 129) (noting that “all final governmental, lawmaking power remained with the states”).

<sup>140</sup> Articles of Confederation Art IX at 173–76 (cited in note 134).

<sup>141</sup> Articles of Confederation Art IX, § 5 at 175–76 (cited in note 134).

<sup>142</sup> Glenn A. Phelps, *George Washington and American Constitutionalism* 142–43 (Kansas 1993).

<sup>143</sup> *Id.* at 143.

<sup>144</sup> Alexander Hamilton, *Hamilton to James Duane*, in Henry Cabot Lodge, ed, 1 *Works of Alexander Hamilton* 219 (G.P. Putnam’s Sons 1904).

to comply with its requests.<sup>145</sup> This experience led General Washington to forever favor placing responsibility for executive action in a single, accountable leader.<sup>146</sup>

Once peace arrived, Congress proved utterly incapable of handling its executive duties.<sup>147</sup> It could not establish even a small military to protect northern forts near the Canadian border, which the British refused to hand over as required by the 1783 peace treaty ending the Revolutionary War.<sup>148</sup> Britain and France imposed harmful trading rules against American ships, while Spain closed the critical port of New Orleans to American commerce.<sup>149</sup> American ambassadors could do nothing because Congress had no authority over commerce with which to threaten retaliation.<sup>150</sup> It could not even approve an agreement with Spain, negotiated by John Jay, to reopen New Orleans and thus the Mississippi, the chief route for American farm exports.<sup>151</sup> Dissatisfaction with congressional weakness climaxed with Shays's Rebellion in August 1786. A mob of two thousand men blocked the Massachusetts legislature from meeting, though the discontents soon scattered after a brief confrontation with state volunteers.<sup>152</sup> Nationalists like Henry Knox and George Washington exaggerated the threat into twelve thousand soldiers who had threatened to rob banks and overthrow the state government.<sup>153</sup> Congress's dismal record, and the looming

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<sup>145</sup> Frederick W. Marks, III, *Independence on Trial: Foreign Affairs and the Making of the Constitution* 52–95 (Louisiana State 1973).

<sup>146</sup> Phelps, *George Washington and American Constitutionalism* at 50–53 (cited in 142).

<sup>147</sup> See, for example, Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* 199–205 (Knopf 1979).

<sup>148</sup> For a discussion of the problems in American foreign policy during this critical period, see John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* 73–79 (Chicago 2005) (concluding that the “story of the Continental Congress is a tale of failed attempts to organize the executive, not legislative, power effectively”). See also Forrest McDonald, *E Pluribus Unum: The Formation of the American Republic 1776–1790* 143–53 (Houghton Mifflin 1965); Marks, III, *Independence on Trial* at 3–51 (cited in note 145) (describing the inability of Congress to provide for national security under the Articles of Confederation).

<sup>149</sup> See Marks, III, *Independence on Trial* at 52–95 (cited in note 145) (describing the challenges of foreign trade restrictions in the immediate aftermath of the Revolution).

<sup>150</sup> See id. at 55 (noting that Britain's Lord Sheffield argued for strict trade limitations against the Americans precisely because the American Congress was powerless to regulate commerce).

<sup>151</sup> See id. at 26–35 (describing the negotiations between John Jay and the Spanish ambassador that stalled due in part to Congress's lack of power and cohesion).

<sup>152</sup> See Clinton Rossiter, *1787: The Grand Convention* 56 (Macmillan 1966) (“They called impromptu conventions to demand changes in the state constitution, resisted payment of taxes and fees, used force to prevent county courts from sitting, and finally rose in arms to march hither and yon in search of justice.”).

<sup>153</sup> See Marks, III, *Independence on Trial* at 102–05 (cited in note 145).

threat of chaos and disorder augured by Shays's Rebellion, was at the forefront of the minds of the delegates as they met in Philadelphia.

Experimentation with the executive went to extremes in the states. Some eliminated the independence of the governor's office.<sup>154</sup> In all but one state, the assembly elected the governor, making clear who served whom.<sup>155</sup> Some states tried executive committees or required the governor's decisions to be approved by a council of state appointed by the legislature.<sup>156</sup> As Professor Gordon Wood has observed, the councils often made the governors "little more than chairmen of their executive boards."<sup>157</sup> States limited the governor's term and eligibility.<sup>158</sup> Most states either provided for the annual election of the governor, restricted the number of terms a governor could serve, or both.<sup>159</sup> Pennsylvania tested the farthest reaches of radicalism by replacing the single governor with a twelve-man executive council elected annually by the legislature.<sup>160</sup> The Revolution had occurred because the colonists wanted to maintain the independence of their legislatures from the control of the British King-in-Parliament.<sup>161</sup> Their cure was to make the executive subordinate to the assemblies.

Some of the revolutionaries wanted to restrict the substance as well as the structure of executive power. Thomas Paine's *Common Sense* not only attacked the British monarchy, but it also called for an end to executives in the colonies.<sup>162</sup> Paine proposed to his fellow Americans that they adopt governments run by legislatures, which would have only a presiding officer.<sup>163</sup> Thomas Jefferson's draft for the Virginia Constitution gave the governor the title merely of "Administrator."<sup>164</sup> Jefferson enumerated the powers the executive could *not* exer-

<sup>154</sup> Wood, *The Creation of the American Republic* at 138 (cited in note 129).

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

<sup>156</sup> *Id.* at 137–39.

<sup>157</sup> *Id.* at 138.

<sup>158</sup> Wood, *The Creation of the American Republic* at 139–40 (cited in note 129).

<sup>159</sup> *Id.*

<sup>160</sup> See Pa Const § 19 (1776), reprinted in Francis N. Thorpe, 5 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies* 3086–87 (GPO 1909).

<sup>161</sup> Wood, *The Creation of the American Republic* at 310–11 (cited in note 129).

<sup>162</sup> Thomas Paine, *Common Sense* (1776), reprinted in Isaac Kramnick, ed, *Thomas Paine Common Sense* 60, 90–98 (Penguin Classics 1986) ("But where says some is the King of America? I'll tell you Friend, he reigns above . . . so far as we approve of monarchy, that in America THE LAW IS KING.")

<sup>163</sup> Thach, *The Creation of the Presidency* at 29–30 (cited in note 130).

<sup>164</sup> Thomas Jefferson, *First Draft of the Virginia Constitution* (1776), reprinted in Julian P. Boyd, ed, 1 *The Papers of Thomas Jefferson* 337, 341 (Princeton 1950) ("[T]he Executive powers

cise: he could not dismiss the legislature, regulate the money supply, set weights and measures, establish courts or other public facilities, control exports, create offices, or issue pardons.<sup>165</sup> The Administrator could not “declare war or peace, issue letters of marque or reprisal, raise or introduce armed forces, or build armed vessels . . . forts or strongholds.”<sup>166</sup> Although the draft left to the Administrator any remaining “powers formerly held by the king,” there was little left.<sup>167</sup>

But most states either gave the governor exclusive power to decide when to use the militia, or required that he consult the council before calling in the military.<sup>168</sup> Although Virginia prohibited the governor from exercising any prerogative, it generally rejected Jefferson’s advice and authorized the governor, with the advice of a council of state, to “exercise the Executive powers of Government.”<sup>169</sup> States sided with John Adams, who urged states to reproduce the forms and powers of the British constitution after adjusting for popular sovereignty.<sup>170</sup> His plan called for a governor, a commons, and a mediating

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shall be exercised by an [Admr.] to be annually chosen on certain day but not to be invested with powers of Adm. till one year after by the house of representatives.”)

<sup>165</sup> Id at 342 (“[H]e . . . shall not have the prerogative of Dissolving [the] house of Representatives[,] . . . coining monies or regulating their value[,] regulating weights & measures[,] erecting courts, offices, boroughs, corporations, fairs, markets, ports, beacons, light houses, sea-marks[,] laying embargoes or prohibiting exportn.[] . . . pardoning crimes or remitting fines or punishments.”).

<sup>166</sup> Id.

<sup>167</sup> Id.

<sup>168</sup> In a typical example, Delaware declared that its “president, with the advice and consent of the privy council, may embody the militia, and act as captain-general and commander-in-chief of them, and the other military force of this State, under the laws of the same.” Del Const Art IX (1776), reprinted in Francis N. Thorpe, 1 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies* 562, 564 (GPO 1909). See also Md Const Art XXXIII (1776), reprinted in Francis N. Thorpe, 3 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies* 1686, 1696 (GPO 1909) (“[T]he Governor, by and with the advice and consent of the Council, may embody the militia.”); NC Const Art XVIII (1776), reprinted in Thorpe, 5 *The Federal and State Constitutions* 2787, 2791 (cited in note 160) (“The Governor, for the time being, shall be captain-general and commander in chief of the militia.”); Pa Const § 20 (1776), reprinted in Thorpe, 5 *The Federal and State Constitutions* 3081, 3087–88 (cited in note 160) (“The president shall be commander in chief of the forces of the state.”); Vt Const Art XVIII (1777), reprinted in Francis N. Thorpe, 6 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies* 3737, 3745 (GPO 1909) (“The Governor shall be commander-in-chief of the forces of the state.”); Va Const (1776), reprinted in Francis N. Thorpe, 7 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies* 3812, 3817 (GPO 1909) (“The Governor may embody the militia, with the advice of the Privy Council.”).

<sup>169</sup> *The Constitution as Adopted by the Convention* (June 29, 1776), reprinted in Thorpe, 1 *The Federal and State Constitutions* at 380 (cited in note 173); Va Const (1776), reprinted in Thorpe, 7 *The Federal and State Constitutions* at 3816–17 (cited in note 168).

<sup>170</sup> See, for example, John Adams, *Thoughts on Government* (1776), reprinted in Robert J. Taylor, ed, 4 *Papers of John Adams* 86, 86–93 (Belknap 1979).

senate.<sup>171</sup> According to Adams, “a people cannot be long free, nor ever happy, whose government is in one assembly.”<sup>172</sup> Adams gave the governor a veto and control of the armed forces, rather than the legislature.<sup>173</sup> He advised the adoption of an executive “who, after being stripped of most of those badges of domination called prerogatives, should have a free and independent exercise of his judgment, and be made also an integral part of the legislature.”<sup>174</sup> Although the states experimented radically with the control of the executive branch, its substantive powers remained relatively unchanged.

The revolutionaries saw no need to reduce the substance of the executive power because they used constitutional structure to control their executives. Most state constitutions gave assemblies the power to choose their governors and allowed the executive to serve for only one-year terms, often with a limit on reelection.<sup>175</sup> These states further bound their executives by requiring them to receive the consent of a council of state before exercising any independent authority.<sup>176</sup>

Only one state, New York, freed its governor from these legislative shackles. British occupation of New York City for most of the war, and the terrible state of its security (the state legislature had to meet in seven different locations during the first year of the war), gave its inhabitants a reason to break ranks on a vigorous executive.<sup>177</sup> New York vested “the supreme executive power and authority of this State” in a single governor.<sup>178</sup> The people, not the assembly, elected him, and there was no limit on the number of three-year terms he could serve. No privy council was created to look over his shoulder, only a council of appointment and a council of revision to review the constitutionality of legislation.<sup>179</sup> The constitution vested him with the position of “general and commander-in-chief of all the militia, and admiral of the navy of this State”; the power to dismiss or call the legislature into session and to issue pardons; and the duty to make recommendations for legislation and to “take care that the laws are ex-

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<sup>171</sup> See *id.* at 88–91.

<sup>172</sup> *Id.* at 88.

<sup>173</sup> *Id.* at 89–90.

<sup>174</sup> Adams, *Thoughts on Government* at 89 (cited in note 170).

<sup>175</sup> Wood, *The Creation of the American Republic* at 138–40 (cited in note 129).

<sup>176</sup> *Id.* at 137–39.

<sup>177</sup> See Thach, *The Creation of the Presidency* 34–35 (cited in note 130).

<sup>178</sup> NY Const Art XVII (1777), reprinted in Thorpe, 5 *The Federal and State Constitutions* 2623, 2632 (cited in note 160).

<sup>179</sup> NY Const Arts VIII, XVII, XXIII (1777), reprinted in 5 *The Federal and State Constitutions* at 2631–34 (cited in note 160); NY Const Arts III, XXIII (1777), reprinted in 5 *The Federal and State Constitutions* at 2628–29, 2633–34 (cited in note 160).

ecuted to the best of his ability.”<sup>180</sup> The first governor, George Clinton, won such success with these powers that the state returned him to office for eighteen consecutive years, despite the British occupation. Clinton, wrote fellow New Yorker Gouverneur Morris, could not have been more suited to an office of such potential.<sup>181</sup> He was a man “who had an aversion to councils, because, to use his own words, the duty of looking out for dangers makes men cowards.”<sup>182</sup>

New York’s definition of what fell within the executive power remained fairly unexceptional. Indeed, it was similar to what Pennsylvania had given its pitiful executive.<sup>183</sup> It was only when these powers were in the hands of an independent and unitary executive that vigorous government emerged. These lessons did not go unnoticed. New York’s experience influenced not only the later constitution-writing efforts of Massachusetts and New Hampshire, but also the work of the Philadelphia Convention.<sup>184</sup> During the struggle for ratification, Publius expressed the thoughts of many when he declared that the New York Constitution “has been justly celebrated both in Europe and in America as one of the best of the forms of government established in this country.”<sup>185</sup> As Charles Thach concluded, “[H]ere was a strictly indigenous and entirely distinctive constitutional system, and, of course, executive department, for the consideration of the Philadelphia delegates.”<sup>186</sup>

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<sup>180</sup> NY Const Arts XVIII, XIX (1777), reprinted in 5 *The Federal and State Constitutions* at 2632–33 (cited in note 160). During the Revolution, George Clinton, the state’s first governor, sent the militia on his sole authority to reinforce General Horatio Gates’s campaign against British forces. He later notified the legislature of the move in his first inaugural address. Throughout the war, Clinton (himself a military officer) worked closely with General Washington and his subordinates to coordinate operations against the British. Although the legislature expressed its views when appropriating funds for the war effort, the legislature generally obeyed Clinton’s wishes. See E. Wilder Spaulding, *His Excellency George Clinton: Critic of the Constitution* 95–98, 114–18 (Macmillan 1938) (describing Governor Clinton’s substantial influence on New York’s tax policy and government finance).

<sup>181</sup> Thach, *The Creation of the Presidency* at 37 (cited in note 130).

<sup>182</sup> *Id.*

<sup>183</sup> Compare NY Const Arts XVIII, XIX (1777) at 2632–33 (cited in note 160) with Pa Const § XX (1776), reprinted in 5 *The Federal and State Constitutions* at 3087–88 (cited in note 160).

<sup>184</sup> See Rossiter, *1787: The Grand Convention* at 59, 65 (cited in note 109) (noting the agreement among the Framers that the “best previous efforts” to convert the “ideas of the revolution” into institutions had “taken place in Massachusetts, Virginia, and New York”); Thach, *The Creation of the Presidency* at 34–38 (cited in note 130).

<sup>185</sup> Federalist 26 (Hamilton), in *The Federalist* 164, 167 (cited in note 6) (noting that New York’s constitution clearly delegated the power to raise armies to the legislature, not the executive).

<sup>186</sup> Thach, *The Creation of the Presidency* at 43 (cited in note 130).



The framing generation had learned another corollary to this lesson. A legislature unbalanced by an independent executive brought its own dangers. In states such as Pennsylvania—where the executive had no veto, was straddled by a privy council, and was chosen by the assembly—the legislature exercised virtually unlimited authority.<sup>187</sup> During the Constitutional Convention, James Madison argued that “[e]xperience has proved a tendency in our governments to throw all power into the legislative vortex. The Executives of the States are in general little more than cyphers; the legislatures omnipotent.”<sup>188</sup> Legislative supremacy produced such “instability and encroachment” that if not checked, Madison predicted, “a revolution of some kind or the other would be inevitable.”<sup>189</sup> Though the colonies had won the Revolution, unrestrained state legislatures failed to follow through on the 1783 Peace Treaty with Britain,<sup>190</sup> imposed destructive trade barriers, and passed laws that oppressed minorities and property owners. Despite the colonies’ victory, the problems of government were so serious that historians came to describe these years as the “Critical Period.”<sup>191</sup>

New York and Massachusetts provided the models for the delegates who met in Philadelphia in the summer of 1787. They ended legislative supremacy, created an independent executive, and restored balance to their constitutions. The Framers could have followed the path they knew best and treated the executive as Congress’s “clerk-in-chief,” but instead they chose a less popular but more effective direction. By the end of the Critical Period’s exuberant experimentation with dominant legislatures, states began to opt for executives very

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<sup>187</sup> See id at 31–34.

<sup>188</sup> Max Farrand, ed, 2 *The Records of the Federal Convention of 1787* 35 (Yale 1911).

<sup>189</sup> Id (arguing that without a strong executive, the current government would dissolve).

<sup>190</sup> *Definitive Treaty of Peace between Great Britain and the United States, Sept 3, 1783, US-Gr Brit, 48 Consol. T.S. 487*, reprinted in Clive Parry, ed, 48 *The Consolidated Treaty Series: 1781–1783* 487, 487–98 (Oceana 1969).

<sup>191</sup> For a look at one of the most important documents revealing the Framers’ thoughts on the problem of state legislatures, see James Madison, *Vices of the Political System of the United States* (Apr 1787), reprinted in Robert A. Rutland, et al, eds, 9 *The Papers of James Madison* 348, 348–57 (Chicago 1975) (opining that the problems experienced by the American Confederacy were similar to those of all past confederacies and that such problems “result [ ] naturally from the number and independent authority of the states”). See also Charles F. Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government*, 36 *Wm & Mary Q* 215, 223–25 (1979) (discussing Madison’s disillusionment with “turbulent majorities who ruled the state legislatures”). In examining Madison’s thought during the Framing Period, I also have relied upon Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* (Cornell 1996); Drew R. McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* (Cambridge 1989); and William Lee Miller, *The Business of May Next: James Madison and the Founding* (1992).

much like that of 1787.<sup>192</sup> Why? As Wood has argued, the Framers believed that the 1776 constitutions had been the product of excessive revolutionary fervor.<sup>193</sup> Unchecked by independent executives and judiciaries, the state legislatures had passed legislation infringing property rights, cancelling debts, and oppressing minorities.<sup>194</sup> Factions, or special-interest groups, working at the expense of the broader public, had arisen.<sup>195</sup> Unrestrained democracy had produced sharp and abrupt swings in policy that destabilized the newly independent states.<sup>196</sup> The movement to restrain out-of-control legislatures, at both the state and national levels, proved so strong that Wood has likened it to a “Thermidorian” reaction.<sup>197</sup>

The object of this constitutional counterrevolution was a restored executive to check the excesses of the legislature, control law enforcement, appoint and manage government personnel, and conduct war and foreign relations. With Charles Louis de Secondat, Baron de Montesquieu’s ringing injunction that liberty could only survive with a clear separation of the branches of government, the Framers arrived at the Constitutional Convention determined to create an executive that would be elected independently of the legislature and possess its own inherent authorities, so as to confound factions and avoid the legislative manipulation that the revolutionary states had experienced.<sup>198</sup> As an authoritative work on the revolutionary constitutions has observed, “[T]he reaction against the colonial governor was so weak that it did not lead to parliamentary government with an executive committee of members of the legislature, but rather that within a decade the American system of presidential government evolved with full clarity and permanence.”<sup>199</sup>

As noted in Part I, the constitutional text itself only briefly describes the executive power. The important question is whether the Framers would have understood the phrase “the executive power,” or the Commander-in-Chief Clause, as continuing in the president powers that had traditionally belonged to British and colonial executives. To answer this, it is more important to recapture the meaning held by those who ratified the Constitution than those who drafted it during the

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<sup>192</sup> Wood, *The Creation of the American Republic* at 430–38 (cited in note 129).

<sup>193</sup> *Id.* at 430.

<sup>194</sup> *Id.* at 404–09.

<sup>195</sup> *Id.* at 502.

<sup>196</sup> Wood, *The Creation of the American Republic* at 431–32 (cited in note 129).

<sup>197</sup> *Id.* at 446–53.

<sup>198</sup> *Id.* at 152.

<sup>199</sup> Adams, *The First American Constitutions* at 271 (cited in note 130).

Philadelphia Convention. The Constitutional Convention, encapsulating discussion and votes at a single time and place, is understandably more straightforward to study than the ratification process, which took place over the course of a year at unruly ratifying conventions spread across the country, in open-air and closed-door meetings, and in letters and newspaper articles.<sup>200</sup> Yet, the ratification debates arguably have greater political legitimacy than the Philadelphia Convention.

The Federalists explained that limiting government power in emergencies, as the Anti-Federalists wanted, would be foolhardy. These powers, Hamilton argued in December 1787, “ought to exist without limitation.”<sup>201</sup> Echoing John Locke, he observed that the nature and scope of emergencies were “impossible to foresee.”<sup>202</sup> Because the “circumstances that endanger the safety of nations are infinite,” Hamilton warned, “no constitutional shackles can wisely be imposed on the power.”<sup>203</sup> Agreeing with his *Federalist Papers* co-author, Madison chimed in: “The means of security can only be regulated by the means and the danger of attack.”<sup>204</sup> Madison concluded that “it is vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power.”<sup>205</sup> A constitution with a weak government and executive, some Federalists argued, posed an even greater danger of tyranny, for to survive in a dangerous world, the nation would be forced to resort to actions the Constitution forbade.<sup>206</sup> Insecurity was ever-present in the Framers’ minds, for the new republic was hemmed in by the British to the North and the Spanish to the Southwest.<sup>207</sup>

This argument played into Anti-Federalist concerns about a centralized government that mingled specific powers. Federalists admitted that the Constitution did not fully separate all legislative, executive, and judicial functions, but pointed to the British and state constitutions which granted the executive a veto over legislation. A better safeguard than complete separation, they argued, was to give each branch incentives and the authority to check each other.<sup>208</sup> In Federal-

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<sup>200</sup> For discussion of the ratification process, see Akhil Reed Amar, *America’s Constitution: A Biography* 5–8 (Random House 2005).

<sup>201</sup> Federalist 23 (Hamilton), in *The Federalist* 146, 147 (cited in note 6).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> Federalist 41 (Madison), in *The Federalist* 268, 270 (cited in note 6).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> See text accompanying notes 148–49.

<sup>208</sup> Federalist 51 (Madison), in *The Federalist* 347, 348 (cited in note 6).

ist 51, Madison wrote that power needed to align with self-interest: "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place."<sup>209</sup> Competition among the branches would present the best protection. As Madison wrote, "[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others."<sup>210</sup>

Madison's reliance on structural checks and balances was a 180-degree turn from the enthusiasms of the Revolution. As Gordon Wood has emphasized, the revolutionaries put their faith in legislatures as exemplars of popular sovereignty.<sup>211</sup> The people could do no wrong, so why restrict the power of their representatives? By 1788, Federalists had come to see unlimited legislative power as presenting its own problems. In a democracy, Madison wrote in Federalist 48, the legislature held broader powers and access to the "pockets of the people."<sup>212</sup> He warned that "it is against the enterprising ambition of [the legislature], that the people ought to indulge all their jealousy and exhaust all their precautions."<sup>213</sup> He had seen the "impetuous vortex" of the legislature in action in Virginia and Pennsylvania.<sup>214</sup> How to guard against unwise popular passions acting through the legislature? "In republican government the legislative authority, necessarily, predominates." Madison wrote.<sup>215</sup> So, "the weakness of the executive may require, on the other hand, that it be fortified."<sup>216</sup>

Hamilton followed Madison's contributions to *The Federalist Papers* with a more detailed and sophisticated discussion of the executive branch. While the divisions within a legislature might encourage deliberation, they also tended to subject government decisions to "every sudden breeze of passion" or "every transient impulse," especially those created by the flattering "arts of men."<sup>217</sup> Hamilton saw that legislative sovereignty had its drawbacks, as when the legislature sold out the long-term common good for short-term popularity or

<sup>209</sup> Id at 349.

<sup>210</sup> Id.

<sup>211</sup> Wood, *The Creation of the American Republic* at 162–63 (cited in note 129).

<sup>212</sup> Federalist 48 (Madison), in *The Federalist* 332, 334 (cited in note 6).

<sup>213</sup> Id.

<sup>214</sup> See id at 333 (noting that in their fear of a tyrannical executive the drafters of the state constitutions "seem never to have recollected the danger from legislative usurpations").

<sup>215</sup> Federalist 51 (Madison) at 350 (cited in note 208).

<sup>216</sup> Id.

<sup>217</sup> Federalist 71 (Hamilton) at 482 (cited in note 6).

political gain—a conventional idea today, but a radical one then.<sup>218</sup> This situation called for executive intervention. A vigorous executive could protect against those “irregular and high handed combinations, which sometimes interrupt the ordinary course of justice,” and would provide a security against “enterprises and assaults of ambition, of faction and of anarchy.”<sup>219</sup> An executive did not owe an unjustified and “unbounded complaisance” to every sudden breeze of popular passion, nor did he have obligations toward the “humors of the Legislature.”<sup>220</sup> A popularly elected executive serving a set term in office could block “imperious,” impetuous, or unwise legislative acts that merely catered to a popular mood.<sup>221</sup> In his famous discussion of judicial review in Federalist 78, Hamilton used the same logic: each branch owed its ultimate constitutional responsibility to the people, not to the legislature, and could use its unique powers to negate unconstitutional actions of the other branches.<sup>222</sup>

The revolutionary state constitutions had created obstacles to good government, persuading the Convention delegates that a strong executive and republican government were not incompatible but mutually reinforcing.<sup>223</sup> “A feeble execution is but another phrase for a bad execution,” Hamilton argued in Federalist 70, “[a]nd a government ill executed, whatever it may be in theory, must be in practice a bad government.”<sup>224</sup> “[G]ood government” required “[e]nergy in the executive,” and a vigorous president was now seen as “essential to the protection of the community against foreign attacks” and “the steady administration of the laws.”<sup>225</sup>

Energy, in turn, depended on four pillars: unity, duration, financial support, and “competent powers.”<sup>226</sup> First was “unity” in office. Concentrating executive power in one person would bring “decision, activity, secrecy, and dispatch,” Hamilton wrote, echoing Niccolò Machiavelli.<sup>227</sup> To diffuse executive power among multiple parties, or to re-

<sup>218</sup> Id at 482–83.

<sup>219</sup> Federalist 70 (Hamilton) at 471 (cited in note 8).

<sup>220</sup> Federalist 71 (Hamilton) at 483 (cited in note 6).

<sup>221</sup> Id at 482–84.

<sup>222</sup> See Federalist 78 (Hamilton), in *The Federalist* 521, 525 (cited in note 6).

<sup>223</sup> Wood, *The Creation of the American Republic* at 432 (cited in note 129) (noting that reformers agreed that the libertarian bias of the people had to be offset by an increase of magisterial power in order to preserve justice, peace, and internal tranquility).

<sup>224</sup> Federalist 70 (Hamilton) at 471–72 (cited in note 8).

<sup>225</sup> Id at 471.

<sup>226</sup> Id at 472.

<sup>227</sup> Id. See generally, Niccolò Machiavelli, *The Prince and The Discourses* (Carlton House 1900) (E.R.P. Vincent, ed) (Luigi Ricci, trans).

quire the approval of a council of state, would endanger virtues needed for good government. Authority would be weakened, and confusion among many opinions would reign, frustrating the government's ability to respond to "the most critical emergencies of the state."<sup>228</sup> A plural executive would "conceal faults, and destroy responsibility," allowing blame for failure to be shifted and avoiding accountability of punishment by public opinion.<sup>229</sup> A "cabal" within a council would "enervate the whole system of administration" and produce "habitual feebleness and dilatoriness."<sup>230</sup> Hamilton pointed out, insightfully, that the British constitution had established a council precisely in order to hold ministers responsible for mistakes, to maintain the fiction that the king could do no wrong.<sup>231</sup> Under a republican government, the buck should stop with the chief executive, who should not be hampered with divided responsibility, nor free to deflect blame onto a committee. "A council to a magistrate, who is himself responsible for what he does, are generally nothing better than a clog upon his good intentions; are often the instruments and accomplices of his bad, and are almost always a cloak to his faults."<sup>232</sup>

But it would be short-sighted to focus only on unity and independence to the exclusion of one of Hamilton's other pillars—competent powers. In beginning his discussion of the president's powers in *Federalist* 72, Hamilton observed that the "administration of government" falls "peculiarly within the province of the executive department."<sup>233</sup> It included the conduct of foreign affairs, the preparation of the budget, the expenditure of appropriated funds, the direction of the military, and "the operations of war."<sup>234</sup> Officers who exercised these powers were assistants to the president who should be appointed by the executive and "be subject to his superintendence."<sup>235</sup> Both, however, were constructions that came from no specific grant of authority in the constitutional text, only Article II's vesting of the general executive power in the president.<sup>236</sup>

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<sup>228</sup> *Federalist* 70 (Hamilton) at 474 (cited in note 8).

<sup>229</sup> *Id.* at 476.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 478.

<sup>232</sup> *Federalist* 70 (Hamilton) at 480 (cited in note 8).

<sup>233</sup> *Federalist* 72 (Hamilton), in *The Federalist* 486, 486–87 (cited in note 6).

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 487.

<sup>236</sup> Forrest McDonald, *The American Presidency: An Intellectual History* 206 (Kansas 1994). See US Const Art II, § 1.

Chief among the president's enumerated powers was law enforcement. "The execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate," Hamilton observed.<sup>237</sup> The general grant of the executive power and the duty to "take Care that the Laws be faithfully executed" both restrict and empower the president.<sup>238</sup> They make clear that the president cannot suspend the law of the land at his whim, as British kings had, but they also give the president authority both to enforce the law and to interpret it. Enforcing the law gives the president the right to compel the obedience of private individuals and even states to the Constitution, treaties, and acts of Congress.<sup>239</sup>

Enforcement implies interpretation. In order to carry out the laws, an executive must determine their meaning. Sometimes those laws will be clear, as when the Constitution sets the minimum age for a president.<sup>240</sup> But more often than not, the laws are ambiguous or delegate decisionmaking to the executive. Judicial review usually arises after a law's passage and enforcement, and it requires that a case be brought. In situations where a law creates no private right to sue, or the constitutional issue involves a political question immune from judicial review, the courts may never even be able to take up a case that raises the right question, effectively giving the executive or Congress the final say.<sup>241</sup> With the current move to judicial supremacy and the decline of the political question doctrine, however, the courts are addressing more issues once in the hands of the political branches.<sup>242</sup>

Hamilton regarded the gravest threat to the separation of powers to be the legislature's propensity "to intrude upon the rights and to absorb the powers of the other departments."<sup>243</sup> Skeptical of "a mere parchment delineation of the boundaries," Hamilton believed instead that each branch needed "constitutional arms for its own defence."<sup>244</sup>

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<sup>237</sup> Federalist 75 (Hamilton) at 504 (cited in note 6).

<sup>238</sup> See US Const Art II, § 3.

<sup>239</sup> See *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579, 585 (1952) (holding that a president's power to enforce must come from "an act of Congress or the Constitution itself").

<sup>240</sup> See US Const Art II § 1, cl 5.

<sup>241</sup> See, for example, *Massachusetts v Laird*, 400 US 886, 886 (1970); *Baker v Carr*, 369 US 186, 217 (1962).

<sup>242</sup> See Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 Colum L Rev 237, 244 (2002); Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 NC L Rev 1203, 1206 (2002).

<sup>243</sup> Federalist 73 (Hamilton), in *The Federalist* 492, 494 (cited in note 6).

<sup>244</sup> *Id.*

For the executive, that weapon is the veto. Today, presidents often veto bills on policy grounds, needing the support of only thirty-four Senators to prevail.<sup>245</sup> More often than not, constitutional objections are left to the courts. This is almost the reverse of the Framers' expectations. In Federalist 73, Hamilton explained that the veto would allow the president to deflect "an immediate attack upon the constitutional rights of the executive."<sup>246</sup> Blocking an act of Congress would have been regarded as aggressive for courts at the time, but not for presidents. Between 1789 and 1861, presidents vetoed roughly two dozen bills for constitutional reasons; the Supreme Court struck down only two.<sup>247</sup> Jefferson even doubted whether he could veto a law for anything but constitutional reasons.<sup>248</sup> Under this view, if a bill only made bad policy, a president had no choice but to sign it. This problem did not trouble Publius. The veto would not just serve as a "shield to the executive," but would "furnish[] an additional security against the enactment of improper laws."<sup>249</sup> For him, the president could veto laws because they were too partisan, too hasty, or "unfriendly to the public good."<sup>250</sup>

Some have argued that if a president believes a law is unconstitutional, he has no choice but to veto it, and if his veto is overridden, he has no choice but to carry out the law faithfully.<sup>251</sup> They cite the Constitution's Take Care Clause as support.<sup>252</sup> Textually, however, this argument ignores the fact that the Constitution is the highest law of the land. The obligation to faithfully execute the laws requires the president to obey the Constitution first above any statute to the contrary,

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<sup>245</sup> See, for example, Partial-Birth Abortion Ban Act of 1995, 104th Cong, 2d Sess (vetoed Apr 9, 1996) in 142 Cong Rec S 25029 (Sept 26, 1996).

<sup>246</sup> Federalist 73 (Hamilton) at 497 (cited in note 243).

<sup>247</sup> Amar, *America's Constitution* at 184 (cited in note 200).

<sup>248</sup> David N. Mayer, *The Constitutional Thought of Thomas Jefferson* 228–29 (Virginia 1994) ("Jefferson tended to see constitutional objections as the only legitimate ground for the use of the veto power.").

<sup>249</sup> Federalist 73 (Hamilton) at 495 (cited in note 243).

<sup>250</sup> *Id.*

<sup>251</sup> See, for example, Michael Rappaport, *The Unconstitutionality of "Signing and Not-Enforcing,"* 16 Wm & Mary Bill of Rights J 113, 129 (2007). For similar views, see Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 Hastings Const L Q 865, 873 (1994); ABA, *Task Force on Presidential Signing Statements and the Separation of Powers Doctrine* 5 (2006), online at [http://www.abanet.org/op/signingstatements/aba\\_final\\_statements\\_recommendation-report\\_7-24-06.pdf](http://www.abanet.org/op/signingstatements/aba_final_statements_recommendation-report_7-24-06.pdf) (visited Oct 10, 2009). Those taking a different view include Gary Lawson and Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 Iowa L Rev 1267, 1330 (1996); Frank H. Easterbrook, *Presidential Review*, 40 Case W Res L Rev 905, 929 (1990); Michael S. Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Georgetown L J 217, 253, 264–67 (1994).

<sup>252</sup> Rappaport, 16 Wm & Mary Bill of Rights J at 129 (cited in note 251).



as the Supreme Court recognized in *Marbury v Madison*<sup>253</sup>—judicial review flows from the principle that a court cannot enforce a law that conflicts with the Constitution itself.<sup>254</sup> To require the president to carry out unconstitutional laws would defeat the larger purpose behind the veto—to give the president the ability to balance the legislature.<sup>255</sup> James Wilson, for one, anticipated that Congress might seek to grab executive power: “the legislature may be restrained and kept within its prescribed bounds by the interposition of the judicial department. . . . In the same manner the president of the United States could shield himself and refuse to carry into effect an act that violates the Constitution.”<sup>256</sup> As Akhil Amar has written, “In America, the bedrock principle was not legislative supremacy but popular sovereignty.”<sup>257</sup> “The higher law of the Constitution might sometimes allow, and in very clear cases of congressional usurpation might even oblige,” Amar argues, “a president to stand firm against a congressional statute in order to defend the Constitution itself.”<sup>258</sup>

The veto power and the refusal to enforce unconstitutional laws are aspects of executive control over law enforcement. Another is the inherent discretion to prosecute some laws more vigorously than others, which is a less confrontational, but equally significant, aspect of the executive’s discretion to allocate limited government resources in accordance with its policy preferences. Presidents may decide to devote few investigatory resources to enforce laws with which they disagree, while transferring more to priorities on their agenda. The pardon power enhances this discretion. A pardon is not subject to review by any other branch; President Jefferson used the pardon to free persons convicted of violating criminal laws that he regarded as unconstitutional.<sup>259</sup> The pardon power was reinstated after several state constitutions had removed it from the executive during the revolutionary period. However, as Hamilton predicted and President Gerald Ford’s

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<sup>253</sup> 5 US (1 Cranch) 137, 180 (1803) (holding that the Judiciary Act of 1789 was in conflict with the Constitution and therefore, void).

<sup>254</sup> See Saikrishna B. Prakash and John C. Yoo, *The Origins of Judicial Review*, 70 U Chi L Rev 887, 893 (2003).

<sup>255</sup> Federalist 73 (Hamilton) at 495 (cited in note 243).

<sup>256</sup> James Wilson, *Comments at the Pennsylvania Convention* (Dec 1, 1787), reprinted in Merrill Jensen, ed, 2 *The Documentary History of the Ratification of the Constitution* 444, 450–51 (Madison 1976).

<sup>257</sup> Amar, *America’s Constitution* at 179 (cited in note 200) (comparing early US presidents’ relationship to enactments by Congress with the king’s relationship to enactments by Parliament).

<sup>258</sup> Id.

<sup>259</sup> Thomas Jefferson, *Jefferson to Judge Spencer Roane* (Sept 6, 1819), in Paul L. Ford, ed, 10 *The Writings of Thomas Jefferson* 140, 141 (Knickerbocker 1899).

pardon of President Richard Nixon proved, the main check on abuse is public opinion.<sup>260</sup>

At the time of the Constitution's framing, executive power was understood to include the war, treaty, and other general foreign affairs powers.<sup>261</sup> Political theory developed by thinkers such as John Locke, Baron de Montesquieu, and William Blackstone, as well as Anglo-American constitutional history from the seventeenth century to the time of the framing, established that foreign affairs was the province of the executive branch of government.<sup>262</sup> Under the British constitution, the Crown exercised the powers over war and peace, negotiation and communication with foreign nations, and control of the military.<sup>263</sup> Parliament retained exclusive control over the purse, domestic regulation, and raising the army and navy.<sup>264</sup> When the colonies declared their independence, these powers were assumed by the national government under the Articles of Confederation—while the Continental Congress served as the country's executive, it lacked any true legislative powers.<sup>265</sup> Thus, when the Framers ratified the Constitution, they would have understood that Article II, § 1 continued the Anglo-American constitutional tradition of locating the foreign affairs power generally in the executive branch.<sup>266</sup>

Hamilton and the other Federalists did not look to the executive to manage war and peace for tradition's sake. They understood the executive to be functionally best matched in speed, unity, and decisiveness to the unpredictable high-stakes nature of foreign affairs.<sup>267</sup> As Edward Corwin observed, the executive's advantages in foreign affairs include: "[T]he unity of office, its capacity for secrecy and dispatch, and its superior sources of information, to which should be added the

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<sup>260</sup> See Federalist 74 (Hamilton) at 501 (cited in note 6); Benton Becker, *The History of the Nixon Pardon*, 30 *Cumb L Rev* 31, 44 (1999).

<sup>261</sup> See Yoo, *The Powers of War and Peace* at 31–32 (cited in note 148).

<sup>262</sup> See, for example, Locke, *Two Treatises of Government* §§ 146, 147 at 74–75 (cited in note 120); Charles Louis de Secondat, Baron de Montesquieu, *The Spirit of the Laws* (1748), bk 11, ch 6 at 151 (Hafner 1949) (Thomas Nugent, trans); William Blackstone, 1 *Commentaries on the Laws of England* \*244 (Chicago 1979). On Montesquieu's importance in the colonies, see Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 80 (Kansas 1985).

<sup>263</sup> See Yoo, *The Powers of War and Peace* at 45–54 (cited in note 148).

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 73–79.

<sup>266</sup> *Id.* at 30–87. See generally Saikrishna B. Prakash and Michael Ramsey, *The Executive Power over Foreign Affairs*, 111 *Yale L J* 231 (2001). For criticism of this theory, see generally Curtis Bradley and Martin Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 *Mich L Rev* 545 (2004).

<sup>267</sup> See Federalist 70 (Hamilton) at 472 (cited in note 8).

fact that it is always on hand and ready for action, whereas the houses of Congress are in adjournment much of the time.”<sup>268</sup>

Threats to the national security led to greater centralization of foreign affairs power in the executive. Article II gave the president the roles of commander in chief and Chief Executive. “Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand,” Hamilton wrote in *Federalist* 74.<sup>269</sup> “The direction of war implies the direction of the common strength,” he continued, “and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority.”<sup>270</sup> It was for this reason, Hamilton argued, that the Constitution vested executive authority in one person, rather than the multimember executives of the Continental Congress and the states.<sup>271</sup> The executive’s control, however, was incomplete. Making treaties would remain executive in nature—the power remained in Article II—but because of their status as supreme federal law needed Senate consent.<sup>272</sup> While the president would control military operations and diplomatic relations, he would not have the power to raise the military, issue the rules for its governance, nor enact any legislation with domestic effect. Appropriations for the military could only run two years, giving Congress a regular opportunity to review the executive’s foreign policies.<sup>273</sup>

## B. Washington

A singular factor influenced the ratification of the Constitution, and specifically Article II. All understood that George Washington would be elected the first president.<sup>274</sup> It is impossible to understate the standing of the “Father of the Country” among his fellow Americans.<sup>275</sup> He had led an outmanned and outgunned army to victory over the world’s leading military and economic power.<sup>276</sup> He had established America’s fundamental constitutional principle—civilian control of

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<sup>268</sup> Edward S. Corwin, *The President: Office and Powers 1787–1984* 201 (NYU 1984).

<sup>269</sup> *Federalist* 74 (Hamilton) at 500 (cited in note 6).

<sup>270</sup> *Id.*

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

<sup>272</sup> See US Const Art II, § 2, cl 2.

<sup>273</sup> See US Const Art I, § 8, cl 12.

<sup>274</sup> See Phelps, *George Washington and American Constitutionalism* at 120 (cited in note 142).

<sup>275</sup> *Id.* at 24.

<sup>276</sup> Phelps, *George Washington and American Constitutionalism* at 23, 32–33 (cited in note 142).

the military—before there was even a constitution.<sup>277</sup> Throughout his command of the Continental Army, General Washington scrupulously observed civilian orders and restrained himself when a Congress, on the run, granted him dictatorial powers.<sup>278</sup> He had even put down, by his mere presence, a potential coup d'état by his officers in 1783.<sup>279</sup> Washington cannot be quantified as an element of constitutional law, but he was probably more important than any other factor.

The Revolutionary War had revealed Congress to be feeble and the states to be unreliable.<sup>280</sup> Washington had exercised broad executive and administrative authorities that went well beyond battlefield command to keep the army supplied.<sup>281</sup> This experience made Washington a firm nationalist who supported a more effectively organized and vigorous national government.<sup>282</sup> Though he barely spoke at the Constitutional Convention, Washington placed his considerable prestige behind the enterprise.<sup>283</sup> During ratification, he launched a one-man letter-writing campaign to encourage Federalists throughout the country, and particularly in his critical home state of Virginia, to win the Constitution's approval.<sup>284</sup> Washington remains the only president to be elected by a unanimous vote of the Electoral College.<sup>285</sup>

Because the American republic grew so successfully, we tend to treat Washington's decisions with an air of inevitability. But the constitutional text left more questions about the executive unanswered than answered. Article II vested *the* executive power of the United States in a single president, but it did not list its components (unlike Article I's enumeration of legislative powers).<sup>286</sup> It did not create any advisors, heads of departments, or a cabinet, not to mention a White House staff. It did not specify how the president should interact with Congress, the courts, or the states, nor describe how the president and the Senate were to exercise their joint powers over treaties and appointments.

Washington filled these gaps with a number of foundational decisions—several on a par with those made during the writing and ratification of the Constitution itself. His desire to govern by consensus

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<sup>277</sup> Id at 35–47.

<sup>278</sup> Id.

<sup>279</sup> Id at 44–46.

<sup>280</sup> See text accompanying notes 147–59.

<sup>281</sup> Phelps, *George Washington and American Constitutionalism* at 38–39 (cited in note 142).

<sup>282</sup> Id at 53–54.

<sup>283</sup> Id at 99–100.

<sup>284</sup> Id at 116–20.

<sup>285</sup> Phelps, *George Washington and American Constitutionalism* at 124 (cited in note 142).

<sup>286</sup> Compare US Const Art I, § 1, cl 8 with US Const Art II, § 1, cl 1.

sometimes led him to seek cooperation with the other branches.<sup>287</sup> He was a republican before he was a Federalist, but ultimately Washington favored an energetic, independent executive, even at the cost of political harmony. Washington centralized decisionmaking in his office, so that there would be no confusion about his responsibility and accountability, and his direct orders sped quickly through the small federal bureaucracy.<sup>288</sup> He took the initiative in enforcing the law and followed his own interpretation of the Constitution. To Washington, the departments and their secretaries served only as “dependent agencies of the Chief Executive.”<sup>289</sup> As Leonard White has written, the president made “all major decisions of administration” and took full responsibility for them.<sup>290</sup> He managed diplomatic relations with other countries and set the nation’s foreign policy.<sup>291</sup> At the end of his two terms, the Presidency looked much like the one described in *The Federalist Papers*. This was no mistake. Hamilton’s outsized performance as Secretary of the Treasury helped, but the real credit goes to Washington.<sup>292</sup>

None of this was foreordained. Washington could have chosen to mimic a parliamentary system with cabinet secretaries who represented different factions in the legislature or a balanced government with executive branch officials drawn from an aristocratic social class.<sup>293</sup> He could have assumed the function of a head of state and given department secretaries freedom over their jurisdictions. Or he could have considered the Presidency as Congress’s clerk, draining any initiative from the job and committing himself solely to carrying out legislative directions. He might even have thought of himself as the servant of the states. A different man might have considered the Constitution an evolution from the Articles of Confederation, with the Congress continuing to exercise the nation’s full sovereignty.

Calabresi and Yoo, and judges and scholars since, have rightly focused on the “Decision of 1789” as an important event in the Washington administration (p 42). But congressional recognition of the executive right to remove cabinet secretaries, while important to constitutional lawyers, was not necessarily as critical to Washington’s success as his exercise of the Presidency’s substantive powers. Indeed, it is not clear whether Washington himself considered the recognition of his

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<sup>287</sup> Phelps, *George Washington and American Constitutionalism* at 167–69 (cited in note 142).

<sup>288</sup> *Id.* at 145–46.

<sup>289</sup> Leonard D. White, *The Federalists: A Study in Administrative History* 27 (Chicago 1948).

<sup>290</sup> *Id.*

<sup>291</sup> Phelps, *George Washington and American Constitutionalism* at 153–54 (cited in note 274).

<sup>292</sup> *Id.* at 145–49.

<sup>293</sup> See, for example, *id.* at 149.

removal authority over the Secretaries of Treasury and State to be significant, nor was there any articulation by the administration of its vision of the president's constitutional powers. As Calabresi and Yoo note, Washington moved to assert direct control over the administration of government even before Congress established the first great departments (pp 43–50).

Instead, Washington's great achievement was keeping the young nation out of the wars triggered by the French Revolution. Washington set the precedent that the executive branch would assume the leading role in developing and carrying out foreign policy. But he did not go unchallenged. In defending Washington's foreign policy initiatives, Hamilton first publicly argued that the president is vested with all of the government's executive power, except that specifically transferred to another branch by a constitutional provision.<sup>294</sup> Presidents ever since have taken the initiative in foreign affairs by relying on their constitutional powers.<sup>295</sup>

The beginning of the French Revolution in 1789 set off wars in Europe that would last a quarter century. Eventually, the United States became entangled and barely escaped with its independence intact.<sup>296</sup> But Washington kept the United States out of the conflict, giving the nation time to develop its strength and confidence.<sup>297</sup> In guiding the young republic between the Scylla and Charybdis of Britain and France, he imposed a policy of neutrality based on the constitutional understanding that he held the authority to set foreign policy, interpret and even terminate treaties, and decide the nation's international obligations.<sup>298</sup> Washington paid a steep price: his policies divided his government, sparked the creation of the first political party, and turned future presidential elections into partisan affairs.<sup>299</sup>

After the beheading of King Louis XVI, France declared war on Great Britain and Holland on February 1, 1793.<sup>300</sup> Edmund Genet, the

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<sup>294</sup> See Hamilton, *Pacificus No 1* at 33–43 (cited in note 11).

<sup>295</sup> See Yoo, *The Powers of War and Peace* at 160 (cited in note 148).

<sup>296</sup> Forrest McDonald, *The Presidency of George Washington* 110–13 (Kansas 1974).

<sup>297</sup> *Id.* at 113–37.

<sup>298</sup> *Id.* at 125–27.

<sup>299</sup> *Id.* at 139–40.

<sup>300</sup> For the relevant historical details surrounding America's response to the French Revolution, I have relied on Elkins and McKittrick, *Age of Federalism* at 303–73 (cited in note 121); Editorial Note, *Jefferson's Opinion on the Treaties with France*, in John Catanzariti, ed, 25 *The Papers of Thomas Jefferson* 597, 597–602 (Princeton 1992); McDonald, *The Presidency of George Washington* at 113–37 (cited in note 296); Alexander Hamilton, *Letter to John Jay* (Apr 9, 1793), in Harold C. Syrett, ed, 14 *The Papers of Alexander Hamilton* 297, 298 n 2 (Columbia 1969).

new regime's ambassador to the United States, arrived two months later.<sup>301</sup> News of war threw the American government into a quandary over the 1778 treaties with France, which had been crucial to the success of the Revolution.<sup>302</sup> Article 11 of the Treaty of Alliance called on the United States to guarantee French possessions in the Americas, which implied that the United States might have to defend France's West Indies colony (today's Haiti).<sup>303</sup> Article 17 of the companion 1778 commercial treaty gave French warships and privateers the right to bring captured enemy ships as prizes into American ports.<sup>304</sup> Article 22 prohibited the United States from allowing France's enemies to equip or launch privateers or sell prizes in American ports.<sup>305</sup>

Genet attempted to rouse the American people against Britain. Demanding that the United States honor the treaties, he authorized American ships to raid British shipping.<sup>306</sup> The cabinet split over a response. Jefferson deeply hated Great Britain, admired the French Revolution, and suspected Hamilton of plotting to duplicate the British political system.<sup>307</sup> For his part, Hamilton loathed the French Revolution, and his financial system depended on good relations with Britain.<sup>308</sup> Upon learning of the French declaration of war, Hamilton, "[w]ith characteristic boldness" immediately urged Washington to suspend or terminate the treaties.<sup>309</sup> Hamilton believed that Britain's control of the seas and its trading system made good relations with London paramount.<sup>310</sup> While a change in government did not automatically void treaties with another state, he argued that the uncertain status of the French government and the dangerous wartime situation allowed suspension of the treaties.<sup>311</sup> While Jefferson agreed that military participation in the European war was out of the question, he

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These events are also discussed in David P. Currie, *The Constitution in Congress: The Third Congress, 1793–1795*, 63 U Chi L Rev 1, 4–16 (1996).

<sup>301</sup> Elkins and McKittrick, *Age of Federalism* at 330 (cited in note 121).

<sup>302</sup> *Id.* at 339–40.

<sup>303</sup> See Treaty of Amity and Commerce Art XI, 8 Stat 12, 18 (1778).

<sup>304</sup> Treaty of Amity and Commerce Art XVII, 8 Stat at 22.

<sup>305</sup> Treaty of Amity and Commerce Art XXII, 8 Stat at 24.

<sup>306</sup> Elkins and McKittrick, *Age of Federalism* at 333–36 (cited in note 121).

<sup>307</sup> *Id.* at 338.

<sup>308</sup> *Id.* at 341.

<sup>309</sup> Editorial Note, *Jefferson's Opinion on the Treaties with France* at 597–602 (cited in note 300).

<sup>310</sup> *Id.* at 598.

<sup>311</sup> See Hamilton, *Letter to John Jay* at 297–98 (cited in note 300).

believed the United States was obliged to fulfill the treaties (under the Articles of Confederation he had served as minister to France).<sup>312</sup>

On April 18, Washington sent a list of thirteen questions to Hamilton, Jefferson, Knox, and Edmund Randolph<sup>313</sup> and ordered a cabinet meeting for the next day—establishing a regular mechanism of presidential decisionmaking.<sup>314</sup> Almost all of Washington's questions involved the interpretation of the 1778 treaties. Question four, for example, asked: "Are the United States obliged by good faith to consider the Treaties heretofore made with France as applying to the present situation of the parties?"<sup>315</sup> Washington ordered them to give an opinion on whether Article 11 applied to an offensive war launched by France, whether the United States could both observe the treaties and remain neutral, and under what conditions the United States could suspend or terminate the treaties.<sup>316</sup>

Washington's questions produced a deceptive unanimity in the cabinet. Everyone agreed that a proclamation of neutrality should be issued, but in order to assuage Jefferson's concerns, the word "neutrality" was not used.<sup>317</sup> Indeed, given the United States' distance, its military weakness, and its strategic irrelevance to the European theatre, neutrality was the only realistic option. Two other questions received the same unanimity. The cabinet agreed that the president should receive Genet as France's ambassador, making the United States the first nation to recognize the government of revolutionary France.<sup>318</sup> The cabinet members further agreed that consulting Congress was unnecessary.<sup>319</sup> The executive branch would decide the nation's position on the European wars. Adjourning the meeting without reaching the other questions, Washington asked his advisers to submit written responses on whether to suspend or terminate the 1778 treaties.<sup>320</sup>

No one in the cabinet disputed that the President held this power under the Constitution. On April 28, 1793, Jefferson, later joined by

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<sup>312</sup> Thomas Jefferson, *Opinion on the Treaties with France*, in Catanzariti, ed, *25 Papers of Thomas Jefferson* 608, 608–18 (cited in note 300).

<sup>313</sup> George Washington, *George Washington to the Cabinet* (Apr 18, 1793), in Catanzariti, ed, *25 Papers of Thomas Jefferson* 568, 568–69 (cited in note 300).

<sup>314</sup> *Id.* at 568.

<sup>315</sup> *Id.* at 569.

<sup>316</sup> *Id.* at 568–69.

<sup>317</sup> Thomas Jefferson, *Letter to James Madison* (June 23, 1793), in John Catanzariti, ed, *26 The Papers of Thomas Jefferson* 346, 346 (Princeton 1995).

<sup>318</sup> Elkins and McKittrick, *Age of Federalism* at 339 (cited in note 121).

<sup>319</sup> Thomas Jefferson, *Notes on Washington's Questions on Neutrality and the Alliance with France*, in Catanzariti, ed, *25 Papers of Thomas Jefferson* 665, 666 (cited in note 300).

<sup>320</sup> Editorial Note, *Jefferson's Opinion on the Treaties with France* at 599 (cited in note 300).



Randolph, argued that international law did not permit the suspension or annulling of a treaty because of a change in government.<sup>321</sup> Because Jefferson believed that France was unlikely to ask the United States to defend the West Indies, he recommended that the administration do nothing.<sup>322</sup> On May 2, Hamilton and Knox argued that the civil war in France allowed the United States to suspend the treaty or even terminate it because of the new circumstances threatening American national security.<sup>323</sup> They read the treaty to apply only to defensive wars, not to one in which France had attacked first.<sup>324</sup> Telling Jefferson that he “never had a doubt about the validity of the treaty,” Washington decided against suspension the next day.<sup>325</sup> On the question of the West Indies, Washington decided to remain silent, a wise choice, as Jefferson’s prediction proved correct and France did not seek American aid.<sup>326</sup>

Washington issued his decision in a proclamation.<sup>327</sup> Recognizing a state of war between France and the other European powers, he announced that the United States “should with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerent powers.”<sup>328</sup> Washington further saw fit to “declare the disposition of the United States to observe the conduct aforesaid towards those Powers respectfully” and “to exhort and warn the citizens of the United States carefully to avoid all acts and proceedings whatsoever which may in any manner tend to contravene such disposition.”<sup>329</sup> The proclamation also stated that the federal government would prosecute those who “violate the law of nations, with respect to the powers at war.”<sup>330</sup> His proclamation was a determination that American obligations did not require entry into the war on the side of the French. After a year, Congress implemented his interpretation into domestic law by making it a crime for a citizen to violate American neutrality.<sup>331</sup>

<sup>321</sup> Jefferson, *Opinion on the Treaties with France* at 608–18 (cited in note 312).

<sup>322</sup> *Id.* at 610–11.

<sup>323</sup> *Id.* at 600–01.

<sup>324</sup> *Id.*

<sup>325</sup> Jefferson, *Notes on Washington’s Questions on Neutrality and the Alliance with France* at 666 (cited in note 319).

<sup>326</sup> Elkins and McKittrick, *Age of Federalism* at 342 (cited in note 121) (highlighting Genet’s speech that France would not seek American aid for the guarantee of their islands).

<sup>327</sup> George Washington, *A Proclamation* (Apr 22, 1793), reprinted in James D. Richardson, ed, 1 *Compilation of the Messages and Papers of the Presidents: 1789–1908* 156, 156–57 (GPO 1896) (reproducing Washington’s proclamation of neutrality).

<sup>328</sup> *Id.* at 156.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.* at 157.

<sup>331</sup> Neutrality Act, 1 Stat 381 (1794).

Although the Continental Congress had negotiated and ratified the 1778 treaties, Washington never asked about its intentions.<sup>332</sup> None of his cabinet members wanted to interpret the treaties in the light most favorable to France. Both Hamilton and Jefferson grounded their appeals in the national interest, international law, and common sense.<sup>333</sup> Neither expressed a belief that consultation with Congress or the Senate was necessary or advisable.<sup>334</sup> Washington and his cabinet proceeded on the assumption that it was the province of the executive branch to interpret treaties, and so set foreign policy, on behalf of the United States. They even believed that the president had the authority to terminate the 1778 treaties.<sup>335</sup> Even though Hamilton convinced Washington to declare neutrality, it is doubtful that Jefferson could have produced any other outcome—the United States simply was not going to enter the war on France's side, at least not for another two decades.<sup>336</sup>

The proclamation provoked one of the great constitutional debates in American history. It is important to recognize that this first great constitutional argument over the president's powers did not narrowly address the president's removal power, but instead turned on the president's substantive executive authority. In a series of newspaper articles that summer, Hamilton adopted the pseudonym of "Pacificus" to defend the president's constitutional authority.<sup>337</sup> Hamilton began with the position that foreign policy was executive by its very nature.<sup>338</sup> Congress was not the "organ of intercourse" with foreign nations, while the judiciary could only "decide litigations in particular cases."<sup>339</sup> Declaring neutrality, therefore, must "of necessity belong to the Executive."<sup>340</sup> It drew from the executive's authority as "the organ of intercourse between the Nation and foreign Nations," as "interpreter of the National Treaties in those cases in which the Judiciary is not competent," and as enforcer of the law, "of which treaties form a part."<sup>341</sup> Hamilton argued that treaties, as well as the rules of interna-

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<sup>332</sup> See Rakove, *The Beginnings of National Politics* at 113–18 (cited in note 147); Samuel F. Bemis, *The Diplomacy of the American Revolution* 58–69 (Indiana 1957).

<sup>333</sup> See Editorial Note, *Jefferson's Opinion on the Treaties with France* at 600–01 (cited in note 300).

<sup>334</sup> Jefferson, *Notes on Washington's Questions on Neutrality* at 666 (cited in note 319).

<sup>335</sup> See *id.*

<sup>336</sup> Prakash and Ramsey, *The Executive Power over Foreign Affairs* at 325–27 (cited in note 266).

<sup>337</sup> See Hamilton, *Pacificus No 1* at 33–43 (cited in note 11) (reprinting Hamilton's pseudonymous Pacificus letters which defended broad executive authority).

<sup>338</sup> *Id.* at 37.

<sup>339</sup> *Id.* at 37–38.

<sup>340</sup> *Id.* at 38.

<sup>341</sup> Hamilton, *Pacificus No 1* at 38 (cited in note 11).

tional law, were part of the laws to be carried out by the executive,<sup>342</sup> and “[h]e who is to execute the laws must first judge for himself of their meaning.”<sup>343</sup> Last, but not least, Hamilton believed the Executive could declare neutrality because of its “[p]ower which is charged with the command and application of the Public Force.”<sup>344</sup>

Hamilton argued that the president’s authority derived from Article II, § 2’s grant of the executive power.<sup>345</sup> The Constitution already made the president commander in chief, maker of treaties with the advice and consent of the Senate, receiver of ambassadors, and executor of the laws.<sup>346</sup> But “[i]t would not consist with rules of sound construction to consider this enumeration of particular authorities as derogating from the more comprehensive grant contained in the general clause.”<sup>347</sup> Article II’s enumeration of powers “ought . . . to be considered as intended . . . to specify and regulate the principal articles implied in the definition of Executive Power; leaving the rest to flow from the general grant of that power.”<sup>348</sup> For Hamilton, the Senate’s role in making treaties was only a narrow exception from the general grant of executive power to the president, and “ought to be construed strictly.”<sup>349</sup> When the Constitution sought to transfer traditionally executive powers away from the president, it did so specifically, as with the power to declare war.<sup>350</sup> “The general doctrine then of our constitution is, that the Executive Power of the Nation is vested in the President,” Hamilton concluded, “subject only to the *exceptions* and *qu[a]lifications* which are expressed in that instrument.”<sup>351</sup>

Madison, however, expressed surprise and concern over the president’s Declaration of Neutrality. In a letter to Jefferson, Madison claimed Hamilton had talked Washington into an “assumption of prerogatives not clearly found in the Constitution and having the appearance of being copied from a Monarchical model.”<sup>352</sup> His immediate criticism was that the declaration represented an intrusion on Congress’s

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<sup>342</sup> Id at 43.

<sup>343</sup> Id.

<sup>344</sup> Id at 38.

<sup>345</sup> Hamilton, *Pacificus No 1* at 38–39 (cited in note 11).

<sup>346</sup> Id.

<sup>347</sup> Id at 39.

<sup>348</sup> Id.

<sup>349</sup> Hamilton, *Pacificus No 1* at 42 (cited in note 11).

<sup>350</sup> See id at 39–40.

<sup>351</sup> Id at 39.

<sup>352</sup> James Madison, *Letter from Madison to Jefferson* (June 13, 1793), in Catanzariti, ed, 26 *Papers of Thomas Jefferson* 272, 273 (cited in note 317).

power to declare war.<sup>353</sup> Jefferson explained that although he had agreed in the cabinet that the president could declare neutrality without consulting Congress, he nonetheless held constitutional concerns.<sup>354</sup> When Hamilton's *Pacificus* essays—defending the president's power to declare neutrality—appeared in the press, Jefferson begged Madison: "For god's sake, my dear Sir, take up your pen, select the most striking heresies and cut him to p[ie]ces in the face of the public."<sup>355</sup>

Under the pseudonym "Helvidius," Madison took issue with every point of Hamilton's constitutional arguments.<sup>356</sup> He dismissed Locke's and Montesquieu's classification of foreign affairs as executive in nature because they were "evidently warped by a regard to the particular government of England."<sup>357</sup> Making treaties and declaring war were legislative powers because they had the force of law; therefore, the president could not exercise them.<sup>358</sup> "The natural province of the executive magistrate is to execute laws, as that of the legislature is to make laws," Madison wrote.<sup>359</sup> "All his acts therefore, properly executive, must presuppose the existence of the laws to be executed."<sup>360</sup> The Constitution vested the power to declare war in Congress and gave the Senate an equal share in the treaty power. The legislature sets private rules of conduct that become the law of the land via the Supremacy Clause.<sup>361</sup> To allow the president a share of the legislative power "is an absurdity—in practice a tyranny."<sup>362</sup>

Madison's deeper argument was that placing the power to both start and wage war in the same hands risked tyranny. "Those who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether *a war ought to be commenced, continued, or concluded.*"<sup>363</sup> Why? Because, according to Madison, "[w]ar is in fact the true nurse of executive aggrandizement."<sup>364</sup> In war, "physical force is to be created," "the public treasures are to be unlocked," "the honors

<sup>353</sup> *Id.*

<sup>354</sup> See Jefferson, *Letter to James Madison* at 346 (cited in note 317).

<sup>355</sup> Jefferson, *Jefferson to Madison* (July 7, 1793), in Catanzariti, ed, *26 Papers of Thomas Jefferson* 443, 444 (cited in note 317).

<sup>356</sup> See James Madison, *Helvidius Nos 1-5*, in Thomas A. Mason, Robert A. Rutland, and Jeanne K. Sisson, eds, *15 The Papers of James Madison* 66, 66-120 (Virginia 1985).

<sup>357</sup> Madison, *Helvidius No 1* at 68 (cited in note 356).

<sup>358</sup> *Id.* at 68-69.

<sup>359</sup> *Id.* at 69.

<sup>360</sup> *Id.*

<sup>361</sup> Madison, *Helvidius No 1* at 70-71 (cited in note 356).

<sup>362</sup> *Id.* at 69.

<sup>363</sup> *Id.* at 71.

<sup>364</sup> Madison, *Helvidius No 4* at 108 (cited in note 356).

and emoluments of office are to be multiplied," "laurels are to be gathered," and all are to be placed at the disposal of the executive.<sup>365</sup> It is an "axiom," therefore, that "the executive is the department of power most distinguished by its propensity to war."<sup>366</sup> Pacificus's broad reading of the vesting of the executive power in the president, Madison retorted, was nothing less than an effort to smuggle the British Crown into the Constitution.<sup>367</sup>

History has looked more favorably on Hamilton's arguments. Helvidius claimed rather unpersuasively that foreign affairs were legislative in nature or shared between the branches, and he never directly addressed Hamilton's argument about the vesting of the executive power in the president.<sup>368</sup> It was difficult for Madison to deny that Article II granted the president some unenumerated powers, in light of his arguments during the removal debate.<sup>369</sup> Madison ultimately rested on the narrower point that the president could not interpret treaties in a manner that prevented Congress from exercising its own plenary constitutional power to declare war.<sup>370</sup> The proclamation, however, did not prevent Congress from declaring war. Washington's actions only had the effect of preserving the status quo.

Despite the partisan divisions, the Helvidius-Pacificus debates and the neutrality controversy demonstrate some common ground. No one doubted that the president held the initiative in foreign policy; nor did Madison take serious issue with the idea that the executive had the power to interpret or even terminate treaties. Madison and Jefferson were making a broader argument against unenumerated executive powers and the structural point that those powers could not be used to supplant Congress's own authorities. Hamilton agreed with this up to a point, noting that Congress's power to declare war gave it the final word on whether the United States was in a state of war with another country.<sup>371</sup> The Constitution's explicit grant of a specific power to Congress prevents the president from usurping that power, just as Congress cannot use its own plenary powers to invade the proper

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<sup>365</sup> Id.

<sup>366</sup> Id at 109.

<sup>367</sup> Madison, *Helvidius No 1* at 72 (cited in note 356).

<sup>368</sup> See Elkins and McKittrick, *Age of Federalism* at 362 (cited in note 121) (noting Madison's weak performance). But see Lance Banning, *The Sacred Fire of Liberty* at 527 n 18 (cited in note 191) (arguing that Madison demolished Hamilton's arguments).

<sup>369</sup> See note 64 and accompanying text.

<sup>370</sup> Madison, *Helvidius No 2* at 82-83 (cited in note 356).

<sup>371</sup> Hamilton, *Pacificus No 1* at 40 (cited in note 11).

scope of the executive.<sup>372</sup> We can see this balance in Washington's unsuccessful efforts to prosecute individuals for violating the proclamation.<sup>373</sup> Only Congress could regulate the conduct of citizens within the United States, and it was not until Congress enacted criminal legislation that prosecutions could succeed.<sup>374</sup>

The proclamation set one of the most important precedents for executive power. Presidents henceforth would exercise the initiative in foreign affairs. The growth of the nation and its interests would place increasing pressure on Jefferson's and Madison's constitutional vision. As the effect of foreign affairs on the nation grew, the powers of the office would keep pace. Still, Hamilton's view required no prerogative, no ability of the president to act outside of the Constitution when necessity demanded. He believed that the Constitution gave the president, through the grant of "the executive power" of the government, all of the authority necessary to handle exigencies and unforeseen circumstances.<sup>375</sup> Jefferson and Madison, on the other hand, fought against an elastic reading of presidential power. This would force them, surprisingly, into the position of relying on the theory of an extra-constitutional presidential prerogative when they assumed power in 1800. In this fundamental debate over the nature of the executive, the removal and control of subordinate officials would have been a corollary, if not an afterthought, to the greater question of the scope of the president's substantive authority.

### C. Jefferson

Jefferson is widely thought to have opposed a strong Presidency. While envoy to France, he faulted the proposed Constitution because it contained no presidential term limits.<sup>376</sup> He worried that once elected, a president would be returned to office for life. "I am not a friend to a very energetic government. It is always oppressive," he ex-

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<sup>372</sup> See text accompanying note 210.

<sup>373</sup> See Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U Pa L Rev 1003, 1048-53 (1985).

<sup>374</sup> The Washington administration attempted to prosecute violators of neutrality in the absence of a statutory crime. See *id.* at 1039-93. The issue was not finally resolved by the Supreme Court until 1812, in *United States v Hudson & Goodwin*, 11 US 32, 32-34 (1812). See generally Gary D. Rowe, *The Sound of Silence: United States v. Hudson & Goodwin, The Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 Yale L J 919 (1992).

<sup>375</sup> See, for example, Hamilton, *Pacificus No 1* at 33-43 (cited in note 11).

<sup>376</sup> Thomas Jefferson, *Jefferson to James Madison* (Dec 20, 1787), in Julian P. Boyd, ed, 12 *The Papers of Thomas Jefferson* 439, 441 (Princeton 1955).

plained to Madison.<sup>377</sup> He praised the Constitution because it created “one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body.”<sup>378</sup> While Secretary of State, Jefferson adopted a theory of strict construction to oppose Hamilton’s broad interpretation of the Constitution’s implied powers—first with the creation of the national bank, then with the proclamation of neutrality—and he organized America’s first political party to oppose the “monocrats” who were allegedly reinstalling features of the British monarchy in the United States.<sup>379</sup> Jefferson characterized his election “as real a revolution in the principles of our government as that of 1776 was in its form,” by saving the country from a Federalist Party that favored the executive.<sup>380</sup>

In office, however, Jefferson claimed the right to interpret the laws at odds with the courts and Congress, bought Louisiana even while doubting the act’s constitutionality, shepherded legislation through Congress, and tied the legitimacy of the Presidency to the will of the majority.<sup>381</sup> His actions belie the straw man of a weak Jeffersonian Presidency, a fact not lost on his contemporaries. Hamilton said that during their time in the Washington administration, Jefferson “was generally for a large construction of the Executive authority” and was “not backward to act upon it in cases which coincided with his views.”<sup>382</sup> This was Hamilton’s idea of a compliment. Henry Adams would conclude in his magisterial history on Jefferson and Madison that the former exercised presidential power more completely than had ever before been known in American history.<sup>383</sup> Many political scientists ever since have considered Jefferson’s actions as an example of principle giving way before the needs of political expediency.<sup>384</sup>

A growing minority of historians and political scientists, including Jeremy Bailey, Ralph Ketcham, David Mayer, and Gary Schmitt, ar-

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<sup>377</sup> Id at 442.

<sup>378</sup> Thomas Jefferson, *Jefferson to James Madison* (Sept 6, 1789), in Julian P. Boyd, ed, 15 *The Papers of Thomas Jefferson* 392, 397 (Princeton 1958).

<sup>379</sup> See Mayer, *The Constitutional Thought of Thomas Jefferson* at 196 (cited in note 248).

<sup>380</sup> Jefferson, *Jefferson to Roane* at 140 (cited in note 259).

<sup>381</sup> See note 387 and accompanying text.

<sup>382</sup> Alexander Hamilton, *Hamilton to James A. Bayard* (Jan 16, 1801), in Harold C. Syrett, ed, 25 *The Papers of Alexander Hamilton* 319, 319–20 (Columbia 1977) (refuting the claim that the Jefferson was an enemy to the power of the executive).

<sup>383</sup> Henry Adams, *History of the United States of America during the Administration of Thomas Jefferson* at 354 (Library of America 1889).

<sup>384</sup> See, for example, Sidney M. Milkis and Michael Nelson, *The American Presidency: Origins & Development, 1776–1993* 103–04 (Cong Q 2d ed 1994).

gues that this contradiction proceeds from a false starting point.<sup>385</sup> It is assumed that Jefferson favored a weak executive because he sought a limited national government. The two ideas, however, need not conflict. Jefferson indeed wanted a government of limited constitutional powers balanced by states possessing significant sovereignty. In his draft of the 1798 Kentucky Resolutions, Jefferson argued that the Union represented only a compact between the states, rather than a national government representing one people.<sup>386</sup> But within that framework, he favored a clean separation of powers that made each branch of government supreme in its own sphere. For those matters properly classified as executive in nature, the president would govern, subject to the explicit exceptions and power sharing set out in the Constitution.<sup>387</sup> He favored a Presidency headed by one individual, free of a council of advisors, to enhance executive accountability and responsibility, and sought to reconceptualize the office as the representative of a popular majority, elected to carry out an agenda.<sup>388</sup> Jefferson embarked on a major innovation in presidential power, that of the president as party leader, which allowed him to promote a national program by coordinating the activities of the executive and legislative branches.<sup>389</sup> Jefferson made the Presidency more powerful by making it more popular.<sup>390</sup>

Jefferson profoundly affected the Presidency by introducing the concept of the prerogative. He advanced the theory, clearly following Locke, that the president could act outside the Constitution to protect the national interest in moments of great crisis or opportunity.<sup>391</sup> In this, he differed from Hamilton and the Federalists, who believed that the formal powers of the president were flexible enough to address any national emergency. Jefferson followed a strict-constructionist

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<sup>385</sup> Jeremy D. Bailey, *Thomas Jefferson and Executive Power* 3–4 (Cambridge 2007).

<sup>386</sup> See Thomas Jefferson, *Drafts of the Kentucky Resolutions of 1798* (Nov 17, 1798), in Paul L. Ford, ed, 8 *The Works of Thomas Jefferson* 458, 458–60 (Knickerbocker 1904).

<sup>387</sup> See *id.* 461.

<sup>388</sup> See Bailey, *Thomas Jefferson* at 11–13 (cited in note 385).

<sup>389</sup> See *id.* at 13.

<sup>390</sup> See Ralph Ketcham, *Presidents above Party: The First American Presidency, 1789–1829* 106 (North Carolina 1984). See also Bailey, *Thomas Jefferson* at 5–27 (cited in note 385); Mayer, *The Constitutional Thought of Thomas Jefferson* at 222–56 (cited in note 248); Gary Schmitt, *Thomas Jefferson and the Presidency*, in Thomas E. Cronin, ed, *Inventing the American Presidency* 326, 326–46 (Kansas 1989). Bruce Ackerman traces the rise of “presidential democracy” under Jefferson to the failure of the Electoral College system in the election of 1800 and the embrace of popular majoritarianism to support Jefferson’s selection. Ackerman, *The Failure of the Founding Fathers* at 244–66 (cited in note 127).

<sup>391</sup> See Bailey, *Thomas Jefferson* at 15–22 (cited in note 385); Schmitt, *Thomas Jefferson* at 341–43 (cited in note 390). See also Locke, *Two Treatises of Government* § 160 at 82 (cited in note 120).



approach to interpreting the Constitution, which resisted a broad reading of the president's formal powers.<sup>392</sup> The prerogative allowed Jefferson to protect the country in unforeseen circumstances and keep his constitutional principles. As in the Louisiana Purchase, he could act beyond the Constitution when necessity demanded it.<sup>393</sup> In exchange, the president had to throw himself upon the people for approval of his unconstitutional act. That check reinforced Jefferson's innovation of placing the legitimacy of the Presidency on national election and his representation of the will of the majority.<sup>394</sup>

While it was not the product of luck, the Louisiana Purchase must have seemed like the intervention of Fortune. When American ministers arrived in Paris to negotiate for control of New Orleans, they received a gift. Napoleon decided to sell not just New Orleans, but the entire Louisiana territory.<sup>395</sup> The American envoys quickly decided to exceed their instructions and buy all of Louisiana for about \$15 million.<sup>396</sup> The Louisiana Purchase was an undoubted success for the United States and for Jefferson. It doubled the size of the United States, gave it permanent control of the Mississippi and New Orleans, and dislodged France and Spain as serious threats to American national security in the West.<sup>397</sup>

But in order to buy Louisiana, Jefferson had to change his vision of the Constitution. Jefferson had believed that the Constitution did not permit the acquisition of new territory or the incorporation of such territory into the Union as new states.<sup>398</sup> The Constitution has no express provision providing for the addition of territory, though Article IV, § 3 gives Congress the power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."<sup>399</sup> Some later argued that this clause assumes that new property could be added in the future, but as Gary Lawson and Guy Seidman have pointed out, this interpretation runs counter to the text of the clause and its placement in the Constitu-

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<sup>392</sup> Schmitt, *Thomas Jefferson* at 342 (cited in note 390) ("When an instrument admits two constructions, the one safe, the other dangerous, the one precise, the other indefinite, I prefer that which is safe and precise.").

<sup>393</sup> See text accompanying note 391.

<sup>394</sup> Bailey, *Thomas Jefferson* at 15–22 (cited in note 385).

<sup>395</sup> Adams, *History of the United States of America* at 320 (cited in note 383).

<sup>396</sup> *Id.* at 332.

<sup>397</sup> Mayer, *Constitutional Thought* at 239 (cited in note 390).

<sup>398</sup> Gary Lawson and Guy Seidman, *The Constitution of Empire: Territorial Expansion and American Legal History* 21 (Yale 2004).

<sup>399</sup> US Const Art IV, § 3, cl 2.

tion.<sup>400</sup> The clause describes the power to make rules and dispose of property, but it does not empower the government to add new territory in the first place—it could be read to apply only to the territory of the United States as it existed in 1789, such as the Northwest Territory.<sup>401</sup>

Jefferson also doubted whether new territory could become states.<sup>402</sup> The Constitution provides for the addition of new states, upon the approval of Congress, and it prohibits the formation of new states out of the borders of existing states without their consent.<sup>403</sup> Jefferson apparently worried that this prohibition also applied to the creation of new states from the territory of existing states. His Attorney General, Levi Lincoln, agreed and advised that the boundaries of existing states be enlarged to include the Louisiana Purchase.<sup>404</sup>

Jefferson and his cabinet sought refuge in a position that was “virtually indistinguishable” from Hamilton’s arguments in the debates over the Neutrality Proclamation and the Jay Treaty.<sup>405</sup> Treasury Secretary Albert Gallatin argued in a cabinet meeting that the United States could use the treaty power to exercise a sovereign power belonging to all nations, such as the inherent right to acquire territory, and that Congress could admit the acquisition as a state or govern it as a territory.<sup>406</sup> This broad reading of the executive power allows the president and Senate together to exercise power that is nowhere set out in the Constitution but must be deduced by examining the rights of other nations in their international affairs. This power would redound to the benefit of the president, the primary force in treaty-making.

Jefferson accepted Gallatin’s reasoning, though he predicted that new territory would enter the Union as a matter of “expediency” rather than constitutional principle.<sup>407</sup> To John Dickinson, Jefferson admitted in August 1803: “Our confederation is certainly confined to the limits established by the revolution. The general government has no powers but such as the constitution has given it; and it has not given it a power of holding foreign territory, & still less of incorporating it into

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<sup>400</sup> Lawson and Seidman, *The Constitution of Empire* at 28–29 (cited in note 398).

<sup>401</sup> *Id.*

<sup>402</sup> Dumas Malone, *Jefferson the President: The First Term 1801–1805* 311–12 (Little, Brown 1970).

<sup>403</sup> US Const Art IV, § 3, cl 1.

<sup>404</sup> Adams, *History of the United States of America* at 354–55 (cited in note 383).

<sup>405</sup> Malone, *Jefferson the President* at 312 (cited in note 402).

<sup>406</sup> Albert Gallatin, *Gallatin to Thomas Jefferson* (Jan 18, 1803), in Henry Adams, ed, 1 *The Writings of Albert Gallatin* 111, 113–14 (Lippincott 1879).

<sup>407</sup> Thomas Jefferson, *Jefferson to Albert Gallatin* (Jan 1803), in Paul L. Ford, ed, 10 *The Works of Thomas Jefferson* 3, 3 n 1 (Knickerbocker 1905).

the Union.”<sup>408</sup> He confessed that “[a]n amendment of the Constitution seems necessary for this.”<sup>409</sup> Jefferson did not limit himself to private letters to friends, but expressed his views to his close ally in the Senate, John Breckinridge of Kentucky. “The Executive in seizing the fugitive occurrence which so much advances the good of their country, have done an act beyond the Constitution,” Jefferson wrote in August.<sup>410</sup> It was now up to Congress to support the unconstitutional act. “The Legislature in casting behind them metaphysical subtleties, and risking themselves like faithful servants, must ratify & pay for it, and throw themselves on their country for doing for them unauthorized what we know they would have done for themselves had they been in a situation to do it.”<sup>411</sup> Jefferson believed it was best to admit openly the violation of the Constitution and seek popular support, which he believed was healthier for the constitutional system. “We shall not be disavowed by the nation,” he predicted, “and their act of indemnity will confirm and not weaken the Constitution, by more strongly marking out its lines.”<sup>412</sup>

Jefferson even personally drafted at least two constitutional amendments adding Louisiana,<sup>413</sup> but events forced him from the luxury of his strict constructionist beliefs.<sup>414</sup> Shortly after he wrote to Dickinson and Breckinridge, Jefferson received a dispatch from Robert Livingston in Paris that Napoleon was having seller’s remorse.<sup>415</sup> Livingston reported that Napoleon would seize any delay or request for changes as an opportunity to renounce the agreement.<sup>416</sup> Jefferson worried that the delay of a constitutional amendment would give France the opening it needed, though both Madison and Gallatin thought France would not back out (no one in the cabinet thought a constitutional amendment was necessary either).<sup>417</sup> Jefferson sent letters to Congress asking that

<sup>408</sup> Thomas Jefferson, *Jefferson to John Dickinson* (Aug 9, 1803), in Paul L. Ford, ed, 8 *Writings of Jefferson* 261, 262 (Knickerbocker 1897) (discussing the difficulties of the Louisiana purchase).

<sup>409</sup> *Id.*

<sup>410</sup> Thomas Jefferson, *Jefferson to John C. Breckinridge* (Aug 12, 1803), in Ford, ed, 10 *Works of Jefferson* 5, 7 n 1 (cited in note 407) (claiming that adding the Louisiana territory was an unconstitutional act that was beneficial for the country, and that the president must appeal to the American people for approval of the act).

<sup>411</sup> *Id.* (arguing that the government is like a servant acting against his master’s express commands so that, though it was for the master’s own good, the servant must answer for the action).

<sup>412</sup> *Id.*

<sup>413</sup> Thomas Jefferson, *Drafts of an Amendment to the Constitution*, in Ford, ed, 10 *Works of Jefferson* 3, 3–12 (cited in note 407).

<sup>414</sup> Adams, *History of the United States of America* at 360–62 (cited in note 383).

<sup>415</sup> *Id.*

<sup>416</sup> *Id.*

<sup>417</sup> Malone, *Jefferson the President* at 316–18 (cited in note 402).

constitutional objections to the treaty be dropped, and that “nothing must be said on that subject which may give a pretext for retracting; but that we should do sub-silentio what shall be found necessary.”<sup>418</sup>

Jefferson’s most remarkable exchange came with Senator Wilson Cary Nicholas. Nicholas warned that any public statement by Jefferson against the constitutionality of the Purchase might sink the treaty in the Senate.<sup>419</sup> Jefferson agreed that “whatever Congress shall think it necessary to do, should be done with as little debate as possible, & particularly so far as respects the constitutional difficulty.”<sup>420</sup> Still he could not resist the opportunity to restate his belief that the Constitution did not envision the addition of new states from territory not already part of the nation in 1789. The opposite construction, advanced by his cabinet and by Nicholas, too, would allow the United States to add “England, Ireland, Holland, &c into it.”<sup>421</sup> Broad rules of interpretation, Jefferson warned, would “make our powers boundless” and would render the Constitution “a blank paper by construction.”<sup>422</sup> Jefferson claimed that when faced with a choice between two readings of the Constitution, “the one safe, the other dangerous, the one precise, the other indefinite,” he would choose the “safe & precise” and instead “ask an enlargement of power from the nation where it is found necessary.”<sup>423</sup>

Jefferson had claimed an authority for the president to act outside the Constitution itself when circumstances demanded it. If he had interpreted the powers of the executive narrowly, he would have put the Louisiana Purchase in danger. But it was Jefferson’s strict constructionist views that created this dilemma in the first place. His reading of the Constitution seems mistaken and has never been the view of any of the three branches of government since.<sup>424</sup> Article IV, § 3 gives Congress the authority to admit new states, and then adds the qualifier that when new states are formed from existing states, those states must consent.<sup>425</sup> The broader power, without that qualification, must apply to something (otherwise, why not just make all admissions

<sup>418</sup> Thomas Jefferson, *Jefferson to John C. Breckinridge* (Aug 18, 1803), in Ford, ed, 10 *Works of Jefferson* 7, 7–8 n 1 (cited in note 407). See also Thomas Jefferson, *Jefferson to Thomas Paine* (Aug 18, 1803), in Ford, ed, 10 *Works of Jefferson* 8, 8 n 1 (cited in note 407).

<sup>419</sup> Adams, *History of the United States of America* at 361 (cited in note 383).

<sup>420</sup> Thomas Jefferson, *Jefferson to Wilson Cary Nicholas* (Sept 7, 1803), in Ford, ed, 10 *Works of Jefferson* 10, 10–11 n 1 (cited in note 407).

<sup>421</sup> *Id.*

<sup>422</sup> *Id.*

<sup>423</sup> *Id.*

<sup>424</sup> See generally, for example, Lawson and Seidman, *The Constitution of Empire* (cited in note 398).

<sup>425</sup> US Const Art IV, § 3, cl 1.

subject to state consent), and that something must be the creation of states out of new territory. As Lawson and Seidman argue, the Admissions Clause, as it is known, merely declares that “new states may be admitted by the Congress into this Union.”<sup>426</sup>

Instead, Jefferson read the executive power to include the authority to acquire the Louisiana Territory because of the threat to the national security if it had remained in the hands of other nations. He took advantage of this great national opportunity, even to the point of adopting a vision of presidential powers potentially broader, in some ways, than that of Hamilton. Washington had established the legitimacy of the national government by keeping his energetic executive within its constitutional bounds.<sup>427</sup> Hamilton had given theoretical punch to Washington’s actions by arguing that the Constitution had to include the power to address every national emergency, and that this power would naturally reside in the executive.<sup>428</sup> Jefferson, however, approached the Presidency more in keeping with Locke’s theory of the prerogative. In his letter to Breckinridge, Jefferson had bypassed constitutional objections to the Louisiana Purchase by comparing his position to that of a guardian who acts beyond his authority but in the best interests of his ward.<sup>429</sup> He had to seize the opportunity “which so much advances the good of the country.”<sup>430</sup> Jefferson claimed that unforeseen circumstances, produced either by necessity or by opportunity, required him to exceed his legal powers to protect the greater good.<sup>431</sup> Following Locke, Jefferson looked for ratification for his ultra vires decisions—“an indemnity,” as he wrote to Breckinridge—from the people through their representatives in Congress.<sup>432</sup>

Several difficulties emerge from Jefferson’s adoption of Locke’s theory of the executive prerogative. He did not explain when the nation’s security is truly at stake—when it triggers the prerogative and when it does not. Jefferson admitted that it would sometimes prove difficult to identify the line between acting within the law and invoking the prerogative.<sup>433</sup> He compared the judgment needed to that of a

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<sup>426</sup> Lawson and Seidman, *The Constitution of Empire* at 73–75 (cited in note 398). See also US Const Art IV, § 3, cl 1.

<sup>427</sup> See text accompanying notes 274–321.

<sup>428</sup> See text accompanying notes 337–51.

<sup>429</sup> Jefferson, *Jefferson to Breckinridge* at 7 n 1 (cited in note 418).

<sup>430</sup> *Id.*

<sup>431</sup> *Id.*

<sup>432</sup> See Mayer, *Constitutional Thought* at 253 (cited in note 390).

<sup>433</sup> See Thomas Jefferson, *Jefferson to John B. Colvin* (Sept 20, 1810), in Paul L. Ford, ed, 11 *The Works of Thomas Jefferson* 146, 146 (Knickerbocker 1905).

good officer who knew when to act as he thought best because his orders did not anticipate an unforeseen case or extreme results.<sup>434</sup> Jefferson did not limit the executive's prerogative to just self-defense; he also approved actively seizing opportunity to advance the nation's interests. He believed that a president could act decisively, even without congressional approval, to acquire foreign territory like Louisiana. Any check would come from popular approval of his actions, though Jefferson left unclear whether it would be expressed in public opinion, congressional response, or the next national elections.

#### D. Lincoln

No one stands higher in our nation's pantheon than Abraham Lincoln. Washington founded the nation. Lincoln saved it. Without him, the United States might have lost eleven of its thirty-six states, and ten of its thirty million people. Building on Jackson's arguments against nullification, he interpreted the Constitution as serving a single nation, rather than existing to protect slavery.<sup>435</sup> The Civil War transformed the United States from a plural word into a singular noun. That nation no longer withheld citizenship because of race. It guaranteed to all men the right to vote and to the equal protection of the laws. Where once the Constitution was seen as a limit on effective government, Lincoln transformed it into a charter that empowered popular democracy.

Part of Lincoln's greatness stems from the tragic choices that confronted him. As he famously wrote in 1864, "I claim not to have controlled events, but confess plainly that events have controlled me."<sup>436</sup> He did not seek the war, but understood that there were worse things than war. Victory over the South came at an enormous cost to the nation. About 600,000 Americans lost their lives out of a population of 31 million—about equal to American battle deaths in all other wars combined.<sup>437</sup> One-quarter of the South's white male population of military age were killed or injured.<sup>438</sup> While the total value of Northern wealth rose 50 percent during the 1860s, Southern wealth declined by

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<sup>434</sup> *Id.*

<sup>435</sup> See text accompanying notes 451–54.

<sup>436</sup> Lincoln, *Letter to Albert G. Hodges* at 586 (cited in note 109).

<sup>437</sup> Daniel Farber, *Lincoln's Constitution* 92–114 (Chicago 2003).

<sup>438</sup> *Id.* at 439.

60 percent.<sup>439</sup> The human cost weighed heavily upon Lincoln, but it was necessary to atone for the wrong of slavery. “Fondly do we hope, fervently do we pray, that this mighty scourge of war may speedily pass away,” Lincoln wrote in his Second Inaugural Address.<sup>440</sup> “Yet, if God wills that it continue until all the wealth piled by the bondsman’s two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn with the sword,” he continued, “as was said three thousand years ago, so still it must be said ‘the judgments of the Lord are true and righteous altogether.’”<sup>441</sup> One of the lives lost would be Lincoln’s—the first president to be assassinated.

Lincoln’s greatness is inextricably linked to his broad vision of presidential power. He invoked his authority as commander in chief and Chief Executive to conduct war, initially without congressional permission,<sup>442</sup> when many were unsure whether secession meant war. He considered the entire South the field of battle, and read his powers to counter anything that helped the Confederate war effort. While he depended on congressional support for the men and material to win the conflict, Lincoln made critical decisions on tactics, strategy, and policy without input from the legislature. The most controversial was the Emancipation Proclamation.<sup>443</sup> Only Lincoln’s broad interpretation of his commander-in-chief authority made that sweeping step of freeing the slaves possible.<sup>444</sup>

Some have argued that part of Lincoln’s tragedy is that he had to exercise unconstitutional powers in order to save the Union. In their classic studies of the Presidency, Arthur M. Schlesinger called Lincoln a “despot,” and both Edward Corwin and Clinton Rossiter considered Lincoln to have assumed a “dictatorship.”<sup>445</sup> These views echo arguments made during the Civil War itself, even by Republicans who believed that the Constitution could not address such an unprecedented

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<sup>439</sup> Those deaths had a much greater impact than other wars, such as World Wars I and II, because the casualties represented a much larger share of the nation’s smaller population in 1861 than more recent conflicts.

<sup>440</sup> Abraham Lincoln, *Second Inaugural Address* (Mar 4, 1865), in James D. Richardson, ed., *6 A Compilation of the Messages and Papers of the Presidents, 1789–1897* 276, 277 (GPO 1897).

<sup>441</sup> *Id.*

<sup>442</sup> See text accompanying notes 476–90.

<sup>443</sup> See text accompanying notes 494–96, 507–16.

<sup>444</sup> See text accompanying notes 518–20.

<sup>445</sup> See, for example, Schlesinger, Jr., *Imperial Presidency* at 59 (cited in note 1); Rossiter, *Constitutional Dictatorship* at 225 (cited in note 109); Corwin, *The President: Office and Powers* at 20–22 (cited in note 268).

conflict.<sup>446</sup> Lincoln surely claimed that he could draw on power beyond the Constitution in order to preserve the nation. As he wrote to a Kentucky newspaper editor in 1864, “Was it possible to lose the nation, and yet preserve the constitution?”<sup>447</sup> To Lincoln, common sense supplied the answer: “By general law life *and* limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb.”<sup>448</sup> Necessity could justify unconstitutional acts. “I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation.”<sup>449</sup> Lincoln’s simple, yet powerful invocation of a prerogative power to protect the nation owes an intellectual debt to Jefferson and Locke.<sup>450</sup>

Lincoln, however, was no dictator. While he used his powers more broadly than any previous president, he was responding to a crisis that threatened the very life of the nation. He flirted with the idea of a Lockean prerogative, but his actions drew upon the same mix of executive powers that had supported Washington, Jefferson, and Jackson. He relied on his power as commander in chief to give him control over decisions ranging from tactics and strategy to reconstruction policy. Like his predecessors, Lincoln interpreted his constitutional duty to execute the laws, his role as Chief Executive, and his presidential oath as grants of power to use force, if necessary, against those who opposed the authority of the United States. Lincoln understood “my oath to preserve the constitution to the best of my ability, imposed upon me the duty of preserving, by every indispensable means, that government—that nation—of which that constitution was the organic law.”<sup>451</sup> It seems clear that Lincoln believed that the Constitution vested him with sufficient authority to handle secession and Civil War without the need to resort to Jefferson’s prerogative.

Lincoln refused to believe that the Constitution withheld the power for its own self-preservation.<sup>452</sup> Rather than seek a greater power outside the law to protect the nation, he found it in the Chief Executive Clause.<sup>453</sup> That gave Lincoln the authority to decide that seces-

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<sup>446</sup> J.G. Randall, *Constitutional Problems under Lincoln* 52–59 (Illinois 1951) (discussing accusations of “military dictatorship” leveled against Lincoln).

<sup>447</sup> Lincoln, *Letter to Hodges* at 585 (cited in note 109).

<sup>448</sup> *Id.*

<sup>449</sup> *Id.*

<sup>450</sup> See text accompanying note 391.

<sup>451</sup> Lincoln, *Letter to Albert G. Hodges* at 585 (cited in note 109).

<sup>452</sup> See Phillip S. Paludan, *The Presidency of Abraham Lincoln* 80–81 (Kansas 1994).

<sup>453</sup> Farber, *Lincoln’s Constitution* at 115 (cited in note 437).



sion justified military coercion, and the wide range of measures he took in response: raising an army, invasion and blockade of the South, military government of captured territory, suspension of the writ of habeas corpus, and tough internal security measures.<sup>454</sup> Lincoln consistently maintained that he had not sought prerogative powers, but that the Constitution gave him unique war powers to respond to the threat to the nation's security.<sup>455</sup> Lincoln's political rhetoric invoked Jefferson, but his constitutional logic followed Hamilton.

One of Lincoln's most remarkable exercises of presidential authority often goes unremarked. His decision that secession was unconstitutional and that the Union could oppose it by force was fundamental to the beginning of the Civil War.<sup>456</sup> Today, most accept Lincoln's view, but they forget that the Constitution does not explicitly address the question, nor does it spell out who has the right to decide it. As Daniel Farber pointed out in his book, *Lincoln's Constitution*, one need only contrast Lincoln's approach to that of his predecessor, James Buchanan.<sup>457</sup> Buchanan believed that secession was illegal but that he lacked the constitutional authority to stop it.<sup>458</sup> In the waning days of his administration, his attorney general concluded that the executive only had authority to defend federal property, and that he could not call in the militia to enforce federal law because no federal law enforcement officials remained in the South.<sup>459</sup> The Constitution gave neither the president nor Congress, the attorney general's opinion reasoned, the power to "make war" against the seceding states to restore the Union.<sup>460</sup> In his December 1860 annual message to Congress, Buchanan blamed the crisis on Northern agitation to overturn slavery.<sup>461</sup> Even though the South could not secede, he could not "make war against a State," leaving the federal government powerless.<sup>462</sup> After the rest of the Deep South seceded and formed the Confederate States of America, Buchanan again declared that the executive power

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<sup>454</sup> See *id.* at 116–21.

<sup>455</sup> See *id.* at 193–94.

<sup>456</sup> Abraham Lincoln, *First Inaugural Address* (Mar 4, 1861), in Fehrenbacher, ed., *Lincoln: Speeches and Writings* 220, 224 (cited in note 109).

<sup>457</sup> See Farber, *Lincoln's Constitution* at 92–114 (cited in note 437).

<sup>458</sup> James Buchanan, *Fourth Annual Message* (Dec 3, 1860), in James D. Richardson, ed., *5 A Compilation of the Messages and Papers of the Presidents, 1789–1897* 626, 635–36 (GPO 1897).

<sup>459</sup> *Power of the President in Executing the Laws*, 9 Op Atty Gen 516–24 (Nov 20, 1860).

<sup>460</sup> See Farber, *Lincoln's Constitution* at 75–76 (cited in note 437).

<sup>461</sup> Buchanan, *Fourth Annual Message* at 627 (cited in note 458). See also Farber, *Lincoln's Constitution* at 76 (cited in note 437).

<sup>462</sup> Buchanan, *Fourth Annual Message* at 626, 635–36 (cited in note 458). See also Farber, *Lincoln's Constitution* at 76 (cited in note 437).

did not include the use of force against a state, and humbly requested that Congress, “the only human tribunal under Providence possessing the power to meet the existing emergency,” do something.<sup>463</sup>

Lincoln understood that the Constitution empowered him to do much more than issue a polite invitation that the South return home. The Confederate States were frustrating the constitutional system and denying the results of nationwide democratic elections. They had seceded against a national government that had yet to pass any law prohibiting slavery in the territories or the South itself. In his First Inaugural Address, Lincoln promised not to interfere with the bargain reached in the Constitution that the Southern states could decide on slavery as a matter of their own “domestic institutions.”<sup>464</sup> He construed his constitutional duty to execute the law to require him to enforce the Fugitive Slave Clause and to refrain from any interference “with the institution of slavery in the States where it exists.”<sup>465</sup>

Secession, however, was an unconstitutional response to his election. Echoing Jackson, Lincoln declared that the Union, as a nation, was perpetual.<sup>466</sup> It preexisted the Constitution; it preexisted the Articles of Confederation.<sup>467</sup> Even the Constitution recognized this fact by providing, in its Preamble, for a more perfect Union.<sup>468</sup> Because secession was illegal, Lincoln reasoned, the Southern states were still part of the nation and “the Union [was] unbroken.”<sup>469</sup> Resistance to federal law and institutions was the work not of the states themselves, but of a conspiracy of rebels who were illegally obstructing the normal operations of the national government.<sup>470</sup> The Constitution called upon Lincoln to use force, if necessary, against these rebels in order to see “that the laws of the Union be faithfully executed in all the States.”<sup>471</sup> Lincoln did not believe he had any choice; the Constitution required him to put down the rebellion. “You have no oath registered in Hea-

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<sup>463</sup> James Buchanan, *Special Message to Congress* (Jan 8, 1861), in Richardson, ed, 5 *Compilation of the Messages and Papers* 654, 656 (cited in note 458).

<sup>464</sup> Lincoln, *First Inaugural Address* at 215 (cited in note 456).

<sup>465</sup> *Id.*

<sup>466</sup> *Id.* at 217.

<sup>467</sup> *Id.* at 217–18.

<sup>468</sup> Lincoln, *First Inaugural Address* at 218 (cited in note 456).

<sup>469</sup> *Id.*

<sup>470</sup> See *id.*

<sup>471</sup> *Id.*

ven to destroy the government,” Lincoln told the South, “while I shall have the most solemn one to ‘preserve, protect and defend’ it.”<sup>472</sup>

Where Buchanan and previous presidents found only constitutional weakness, Lincoln discovered constitutional strength. He patiently maneuvered circumstances so that Jefferson Davis’s troops would fire the first shot.<sup>473</sup> Federal officials who sympathized with the Confederacy handed over armories, treasuries, and property, but federal installations in several ports remained in Union hands. Fort Sumter in Charleston Harbor held symbolic importance as a flashpoint.<sup>474</sup> On April 4, 1861, exactly one month into his term, Lincoln ordered the navy to resupply the Union fort, and to use force only if fired upon.<sup>475</sup> Davis ordered bombing to begin before the ships could arrive, and Union forces surrendered on April 14. Lincoln did not consult Congress, which was not in session, nor did he call Congress into session, as he could “on extraordinary Occasions” under Article II, § 3 of the Constitution.<sup>476</sup> He did not launch offensive operations against the South, but he placed American forces in harm’s way, which carried a strong risk of starting a war between the states.

The North was woefully unprepared. Its small army was deployed primarily along the western frontiers; its navy had only a few warships ready for action in American waters.<sup>477</sup> After the fall of Fort Sumter, Lincoln sprung to action.<sup>478</sup> On April 15, he declared a state of rebellion and called forth seventy-five thousand state troops under the Militia Act.<sup>479</sup> He proclaimed that groups in the South were obstructing the execution of federal law beyond the ability of courts and federal officials to overcome.<sup>480</sup> Lincoln’s proclamation prompted Virginia and the other upper Southern states to secede.<sup>481</sup> The president issued a call for volunteers, increased the size of the regular army, and ordered the

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<sup>472</sup> Lincoln, *First Inaugural Address* at 224 (cited in note 456). See Michael Stokes Paulsen, Book Review, *The Civil War as Constitutional Interpretation*, 71 U Chi L Rev 691, 706–07 (2004), reviewing Daniel Farber, *Lincoln’s Constitution* (Chicago 2003).

<sup>473</sup> See Farber, *Lincoln’s Constitution* at 116 (cited in note 437).

<sup>474</sup> Paludan, *The Presidency of Abraham Lincoln* at 59 (cited in 452).

<sup>475</sup> Abraham Lincoln, *Letter to Robert Anderson* (Apr 4, 1861), in Fehrenbacher, ed, *Lincoln: Speeches and Writings* 228, 228–29 (cited in note 109). See also Abraham Lincoln, *Letter to Robert S. Chew* (Apr 6, 1861), in Fehrenbacher, ed, *Lincoln: Speeches and Writings* 229, 229 (cited in note 109).

<sup>476</sup> See US Const Art II, § 3.

<sup>477</sup> James M. McPherson, *Battle Cry of Freedom: The Civil War Era* 313 (Oxford 1988).

<sup>478</sup> *Id.* at 274.

<sup>479</sup> Abraham Lincoln, *Proclamation Calling Militia and Convening Congress* (Apr 15, 1861), in Fehrenbacher, ed, *Lincoln: Speeches and Writings* 232, 232 (cited in note 109).

<sup>480</sup> *Id.*

<sup>481</sup> McPherson, *Battle Cry* at 276–82 (cited in note 477).

navy to enlist more sailors and purchase additional warships.<sup>482</sup> He removed millions from the Treasury for military recruitment and pay.<sup>483</sup> Article I, § 8 of the Constitution expressly vests in Congress the power to raise an army and navy and to fund them; the president has no power to exercise either authority.<sup>484</sup>

Lincoln put the army and navy to immediate use. He ordered a blockade of Southern ports and dispatched troops against rebel-held territory.<sup>485</sup> Lincoln called Congress into special session, but, significantly, not until July 4.<sup>486</sup> While of obvious symbolic importance, the July 4 date ensured that the executive branch, not Congress, would set initial war policy. Lincoln had three months to establish a status quo that would be difficult for Congress to change. This was remarkable leadership for a president who had been the underdog to win his party's nomination, who had not won a majority of the popular vote, whose cabinet was filled with men with far more distinguished records of public service, and who did not have close relationships with the congressional leaders of his party.

Rapid events forced Lincoln to exercise broad authorities on defense as well as offense. Maryland was a slave-holding state, and the state legislature and the mayor of Baltimore were pro-Confederacy.<sup>487</sup> If it seceded the nation's capital would be utterly isolated.<sup>488</sup> Mobs in Baltimore attacked the first military units from Massachusetts and Pennsylvania to reinforce the capital, and rebel sympathizers cut the telegraph and railroad lines to Washington.<sup>489</sup> Lincoln interpreted his constitutional powers to give him the initiative in responding to the emergency.<sup>490</sup> On April 27, 1861, he unilaterally suspended the writ of habeas corpus on the route from Philadelphia to Washington and re-

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<sup>482</sup> See Farber, *Lincoln's Constitution* at 117–18 (cited in note 437); Paludan, *The Presidency of Abraham Lincoln* at 71 (cited in note 452).

<sup>483</sup> Farber, *Lincoln's Constitution* at 118 (cited in note 437); Paludan, *The Presidency of Abraham Lincoln* at 71 (cited in note 452).

<sup>484</sup> See US Const Art I, § 8, cls 12–13.

<sup>485</sup> Lincoln, *Proclamation Calling Militia* at 232 (cited in note 479); Abraham Lincoln, *Proclamation of Blockade* (Apr 19, 1861), in Fehrenbacher, ed, *Lincoln: Speeches and Writings* 233, 233–34 (cited in note 109).

<sup>486</sup> Lincoln, *Proclamation Calling Militia* at 232–33 (cited in note 479). See also Abraham Lincoln, *Message to Congress in a Special Session* (July 4, 1861), in Fehrenbacher, ed, *Lincoln: Speeches and Writings* 246, 246–61 (cited in note 109).

<sup>487</sup> Farber, *Lincoln's Constitution* at 16 (cited in note 437).

<sup>488</sup> *Id.*

<sup>489</sup> *Id.*

<sup>490</sup> *Id.* at 17.

placed civilian law enforcement with military detention without trial.<sup>491</sup> Suspension prevented rebel spies and operatives detained by the military from petitioning the civilian courts for release.<sup>492</sup> The Constitution surely describes this power in the passive tense: “The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>493</sup> But it is located in Article I, which enumerates Congress’s powers and its limits.

Whether the federal government even had the power to abolish slavery remained unresolved. As he had proclaimed in his first inaugural address, Lincoln believed that slavery’s preservation was a matter of state law and that the federal government had no power to touch it where it already existed.<sup>494</sup> Emancipation might qualify as the largest taking of private property in American history, for which the government would owe just compensation under the Fifth Amendment. Another question that remained unclear was whether the United States had the right as a belligerent, under the laws of war, to free slaves. A nation at war generally had the right to seize enemy property when necessary to achieve its military goals, but it also could not, as an occupying power, simply take all property held by private citizens.<sup>495</sup>

As the conflict deepened, Lincoln’s view on whether to order emancipation as a military measure underwent significant change. He had overturned Generals John Fremont and Benjamin Butler because their proclamations were essentially political—they sought to free all slaves in their territories, even those unconnected to the fighting.<sup>496</sup> When General Butler in Virginia declared that slaves who escaped to Union lines were “contraband” property that could be kept by the Union, Lincoln let the order stand.<sup>497</sup> Congress urged a more radical approach by enacting two Confiscation Acts: the first deprived rebels of ownership of their slaves put to work in the war; the second freed the slaves encountered by Union forces.<sup>498</sup> Because both laws required an individual hearing before a federal judge before a slave could be

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<sup>491</sup> Abraham Lincoln, *Letter to Winfield Scott* (April 27, 1861), in Fehrenbacher, ed, *Lincoln: Speeches and Writings* 237, 237 (cited in note 109).

<sup>492</sup> See Paludan, *The Presidency of Abraham Lincoln* at 73–75 (cited in note 452).

<sup>493</sup> US Const Art I, § 9, cl 2.

<sup>494</sup> Lincoln, *First Inaugural Address* at 215 (cited in note 456).

<sup>495</sup> See J.G. Randall, *Constitutional Problems under Lincoln* 342–70 (Illinois 1951).

<sup>496</sup> Paludan, *The Presidency of Abraham Lincoln* at 87, 241–42 (cited in note 452).

<sup>497</sup> *Id.* at 84.

<sup>498</sup> Confiscation Act, 12 Stat 319 (1861); Second Confiscation Act, 12 Stat 589 (1862). See Randall, *Constitutional Problems* at 351–63 (cited in note 495).

freed, neither had much practical effect.<sup>499</sup> Of greater impact was the July 1862 Militia Act, which freed the slave of any rebel, if that slave joined the US armed forces.<sup>500</sup> On August 25, 1862, Secretary of War Edwin Stanton authorized the raising of the first five thousand black troops for the Union army.<sup>501</sup> As the war grew increasingly difficult, Lincoln became convinced that emancipation would be a valuable weapon for the Union cause. It would undermine the Confederacy's labor force and economy while providing a much-needed pool of recruits for the Union armies.

As the cost of the war in blood and treasure became ever higher, demands for an end to slavery grew louder in the North.<sup>502</sup> At the same time, the border states rejected proposals for gradual emancipation paid for by the federal government.<sup>503</sup> By late July 1862, Lincoln had a draft proclamation of emancipation ready and had notified his cabinet, which advised him to wait for a Union victory.<sup>504</sup> Antietam provided Lincoln the moment.<sup>505</sup> While Union casualties were steep (six thousand dead and seventeen thousand wounded—up to that point the most American casualties ever suffered in a single day), the Army of the Potomac had forced the Confederate army from the field.<sup>506</sup> On September 22, 1862, five days after the battle, Lincoln issued the preliminary Emancipation Proclamation as president and commander in chief.<sup>507</sup> It declared that all slaves in area under rebellion as of January 1, 1863, “shall be then, thenceforward, and forever free; and the executive government of the United States, including the military and naval authority thereof, will recognize and maintain the freedom of such persons.”<sup>508</sup> Lincoln stated his intention to ask Congress for compensation for the loyal slave states that voluntarily adopted emancipation, and for Southerners who lost slaves but remained loyal to the Union.<sup>509</sup> The president remained clear that the war was not about slavery, but the

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<sup>499</sup> Confiscation Act, 12 Stat at 319; Second Confiscation Act, 12 Stat at 589. See Randall, *Constitutional Problems* at 351–63 (cited in note 495).

<sup>500</sup> Militia Act, 12 Stat 597 (1862).

<sup>501</sup> Paludan, *The Presidency of Abraham Lincoln* at 153–54 (cited in note 452).

<sup>502</sup> *Id.* at 144–45.

<sup>503</sup> *Id.* at 147.

<sup>504</sup> *Id.* at 154. See Abraham Lincoln, *Preliminary Emancipation Proclamation* (Sept 22, 1862), in Fehrenbacher, ed, *Lincoln: Speeches and Writings* 368, 368–70 (cited in note 109).

<sup>505</sup> Farber, *Lincoln's Constitution* at 154 (cited in note 437).

<sup>506</sup> Paludan, *The Presidency of Abraham Lincoln* at 154 (cited in note 452).

<sup>507</sup> Lincoln, *Preliminary Emancipation Proclamation* at 368 (cited in note 504).

<sup>508</sup> *Id.*

<sup>509</sup> *Id.* at 370.

restoration of the Union.<sup>510</sup> Nevertheless, his proclamation freed 2.9 million slaves, 74 percent of all slaves in the United States and over 82 percent of the slaves in the Confederacy.<sup>511</sup> On January 1, 1863, Lincoln issued the final Emancipation Proclamation, “by virtue of the power in me vested as Commander-in-Chief, of the Army and Navy of the United States in time of actual armed rebellion against authority and government of the United States.”<sup>512</sup> The president rooted the constitutional justification for the Emancipation Proclamation as “a fit and necessary war measure for suppressing said rebellion.”<sup>513</sup>

Lincoln’s dependence on his constitutional authority explains the Emancipation Proclamation’s careful boundaries. He did not free any slaves in the loyal states, nor did he seek to remake the economic and political order of Southern society. Lincoln never claimed a broad right to end slavery. Rather, the Emancipation Proclamation was an exercise of the president’s war power to undertake measures necessary to defeat the enemy. With the cost of war in both men and money rising steeply, emancipation became a means to the end of restoring the Union. Shortly before issuing the preliminary Proclamation, Lincoln wrote to Republican newspaper editor Horace Greeley, and through him to a broad readership, that his goal was to restore “the Union as it was.”<sup>514</sup> Emancipation was justified only so far as it helped achieve victory. “My paramount object in this struggle *is* to save the Union, and is *not* either to save or to destroy slavery,” Lincoln wrote.<sup>515</sup> “If I could save the Union without freeing *any* slave I would do it, and if I could save it by freeing *all* the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that.”<sup>516</sup>

Lincoln made clear that the Commander-in-Chief Clause allows measures based on military necessity that would not be legal in peacetime. Responding to critics from his home state, he admitted that “I certainly wish that all men could be free, while I suppose you do not.”<sup>517</sup> Still, emancipation was a valid war measure. “I think the consti-

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<sup>510</sup> Id.

<sup>511</sup> Paludan, *The Presidency of Abraham Lincoln* at 154 (cited in note 452).

<sup>512</sup> Abraham Lincoln, *Final Emancipation Proclamation* (Jan 1, 1863), in Fehrenbacher, ed, *Lincoln: Speeches and Writings* 424, 424 (cited in note 109).

<sup>513</sup> Id.

<sup>514</sup> Abraham Lincoln, *Letter to Horace Greeley* (Aug 22, 1862), in Fehrenbacher, ed, *Lincoln: Speeches and Writings* 357, 358 (cited in note 109).

<sup>515</sup> Id.

<sup>516</sup> Id.

<sup>517</sup> Abraham Lincoln, *Letter to James C. Conkling* (Aug 26, 1863), in Fehrenbacher, ed, *Lincoln: Speeches and Writings* 495, 496 (cited in note 109).

tution invests its commander-in-chief, with the law of war, in time of war," he wrote.<sup>518</sup> Anything that belligerents could lawfully do in wartime, therefore, fell within the president's authority. There was no question in Lincoln's mind that taking the enemy's property was a legitimate policy in war. "Armies, the world over, destroy enemies' property when they can not use it; and even destroy their own to keep it from the enemy."<sup>519</sup> "Civilized belligerents do all in their power to help themselves, or hurt the enemy, except a few things regarded as barbarous or cruel," such as the massacre of prisoners or noncombatants.<sup>520</sup> Lincoln would consider anything permitted by the laws of war.

Emancipation did not just deny the South a vital resource, but it also provided black soldiers for the war effort. Lincoln claimed that Union generals "believe the emancipation policy, and the use of colored troops, constitute the heaviest blow yet dealt to the rebellion."<sup>521</sup> Black soldiers saved the lives and energies of white soldiers, and, indeed, the lives and rights of white civilians. "You say you will not fight to free negroes," Lincoln wrote.<sup>522</sup> "Some of them seem willing to fight for you."<sup>523</sup> But he closed by emphasizing again that emancipation was not the goal, but the means. When the war ended, "[i]t will then have been proved that, among free men, there can be no successful appeal from the ballot to the bullet; and that they who take such appeal are sure to lose their case, and pay the cost."<sup>524</sup> When that day comes, Lincoln promised, "there will be some black men who can remember that, with silent tongue, and clenched teeth, and steady eye, and well-poised bayonet," they helped achieve victory.<sup>525</sup>

The Emancipation Proclamation is usually studied as a question of the war powers of the national government, though it has also been studied as a question of whether it amounted to a taking of property requiring compensation.<sup>526</sup> What is sometimes neglected is that the Proclamation was a startling demonstration of the constitutional powers of the Presidency. Lincoln decided that military necessity justified emancipation. He did not consult with Congress, which had a very different program in mind. The Supreme Court did not reach the

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<sup>518</sup> *Id.* at 497.

<sup>519</sup> *Id.*

<sup>520</sup> *Id.*

<sup>521</sup> Lincoln, *Letter to James C. Conkling* at 497 (cited in note 517).

<sup>522</sup> *Id.* at 498.

<sup>523</sup> *Id.*

<sup>524</sup> *Id.* at 499.

<sup>525</sup> Lincoln, *Letter to James C. Conkling* at 499 (cited in note 517).

<sup>526</sup> See, for example, Randall, *Constitutional Problems* at 401–04 (cited in note 495).



question of the wartime confiscation of property until after the end of the war, when it upheld the seizure, transfer, and destruction of private property that supported the enemy's ability to carry on hostilities.<sup>527</sup> Lincoln freed the slaves en masse and bypassed the painstaking judicial procedures established by Congress. The legislature authorized the acceptance of escaped slaves into the Union armed forces, but it remained for the president to organize and deploy in combat the more than 130,000 freedmen who joined the Union armies.<sup>528</sup>

While the Proclamation had a broad scope, it also recognized the limits of presidential power. It only touched those areas, the Southern states, where slaves helped the enemy.<sup>529</sup> It did not reach into the institution of slavery in the loyal states.<sup>530</sup> Emancipation would no longer be a justifiable war measure once the fighting ceased, and it could even be frustrated by the other branches while war continued. Congress might use its own constitutional powers to establish a different regime—a reasonable concern with Democratic successes in the 1862 midterm elections—and allow the states to restore slavery once the war ended.<sup>531</sup> Lincoln understood that to ensure slavery's permanent end, the states would have to adopt a constitutional amendment.<sup>532</sup> Toward the end of the war, he pressed for adoption of a complete prohibition of slavery in what eventually became the Thirteenth Amendment.<sup>533</sup> Ratification made the link between emancipation and democratic rule clear. In June 1864, Congress rejected the amendment, which would be the first since the changes to the Electoral College after the Jefferson-Burr deadlock in 1801.<sup>534</sup> After resounding Republican victories in the November elections, Lincoln called upon the same lame-duck Congress to ratify the Thirteenth Amendment.<sup>535</sup> "It is the voice of the people now, for the first time, heard upon the question."<sup>536</sup> In a time of "great national crisis," Lincoln said "unanimity of action" was needed, and that required "some deference . . . to the will

<sup>527</sup> See, for example, *New Orleans v The Steamship Co*, 87 US 387, 395 (1874) (upholding the transfer of property); *Miller v United States*, 78 US 268, 313–14 (1870) (upholding the confiscation of property).

<sup>528</sup> See McPherson, *Battle Cry* at 769 (cited in note 477).

<sup>529</sup> Lincoln, *Final Emancipation Proclamation* at 424–25 (cited in note 512).

<sup>530</sup> See id.

<sup>531</sup> See Paludan, *The Presidency of Abraham Lincoln* at 157 (cited in note 452).

<sup>532</sup> See id at 299.

<sup>533</sup> See id at 300.

<sup>534</sup> Id at 300–01.

<sup>535</sup> Paludan, *The Presidency of Abraham Lincoln* at 301 (cited in note 452).

<sup>536</sup> Abraham Lincoln, *Annual Message to Congress* (Dec 6, 1864), in Fehrenbacher, ed, *Lincoln: Speeches and Writings* 646, 658 (cited in note 109).

of the majority, simply because it is the will of the majority.”<sup>537</sup> Congress promptly agreed to ratify the amendment even before the new Republican majorities took over.<sup>538</sup>

Lincoln’s great political achievement was to meld the original purpose of the war with the new goal of ending slavery. Emancipation of the slaves and restoration of the Union both drew upon Lincoln’s belief, expressed in his First Inaugural Address, that the Constitution enshrined a democratic process in which the fundamental decisions were up to the people, as expressed in the ballot box.<sup>539</sup> He tied together the concepts of popular sovereignty and liberty in the Gettysburg Address, reconciling the political structure of the Constitution with the values of the Declaration of Independence.<sup>540</sup> Lincoln justified the carnage of the battle with the prospect of preserving the “new nation,” created by “our fathers” that was “conceived in Liberty, and dedicated to the proposition that all men are created equal.”<sup>541</sup> The equality of all men, of course, was not an explicit goal of the Union as established in the Constitution, but instead was recognized by the Declaration of Independence.<sup>542</sup> Lincoln called on “us the living” to dedicate themselves “to the great task remaining before us” to ensure “that this nation, under God, shall have a new birth of freedom” and “that government of the people, by the people, for the people, shall not perish from the earth.”<sup>543</sup> Restoring the Union now stood for two propositions: the working of popular democracy *and* freedom and equality for all men. Emancipation may have been a policy justified by military necessity, but it became an end of the war as well as a means.

Lincoln’s words at Gettysburg illustrated, as perhaps nothing else could, the president’s control over national strategy in wartime. When the war began, Lincoln established the limited goal of restoring the Union, and Congress agreed in the Crittenden-Johnson resolutions, which declared that the goal of the war was preservation of the Union, while leaving alone the “established institutions” of slavery in the ex-

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<sup>537</sup> *Id.*

<sup>538</sup> Paludan, *The Presidency of Abraham Lincoln* at 301–02 (cited in note 452).

<sup>539</sup> See Lincoln, *First Inaugural Address* at 220 (cited in note 456).

<sup>540</sup> On this point, see Harry Jaffa, *A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War* 78–152 (Rowman & Littlefield 2000); Harry Jaffa, *Crisis of the House Divided: An Interpretation of the Issues in the Lincoln-Douglas Debates* 268–69 (Chicago 1959).

<sup>541</sup> Abraham Lincoln, *Address at Gettysburg, Pennsylvania* (Nov 19, 1863), in Fehrenbacher, ed., *Lincoln: Speeches and Writings* 536, 536 (cited in note 109).

<sup>542</sup> See United States Declaration of Independence (1776).

<sup>543</sup> *Id.*

isting states.<sup>544</sup> Initial military strategy focused on blockading the Confederacy in the East while dividing it in the West through capture of the Mississippi. This “Anaconda” strategy would slowly strangle the South until it came back to its senses and returned to the Union.<sup>545</sup> By the middle of 1862, stiff Southern resistance had convinced Lincoln that only unconditional surrender could end the war.<sup>546</sup> National goals became both restoration of the Union and, after the Emancipation Proclamation, freedom for all. Strategy shifted to the destruction of Confederate armies in the field and the end of the government in Richmond. Lincoln’s declaration that the war sought a new birth of freedom, he believed, would encourage “the army to strike more vigorous blows” by setting an example of the administration “striking at the heart of the rebellion.”<sup>547</sup>

Lincoln’s unprecedented action to preserve the Union exploited the broadest reaches of the Constitution’s grant of the Chief Executive and commander-in-chief powers. Once war had begun, Lincoln took control of all measures necessary to subdue the enemy, including the definition of war aims and strategy, supervision of military operations, detention of enemy prisoners, and management of the occupation. He freed the slaves, but only those in the South, because his powers were limited to the battlefield. He took swift action, normally within Congress’s domain, but only because of the pressure of emergency. After the first months of the war, Lincoln never again usurped Congress’s powers over the raising or funding of the military. He was not afraid of a contest with Congress, particularly over Reconstruction, but the Civil War witnessed far more cooperation between the executive and legislative branches than is commonly thought. When Lincoln believed Congress to be wrong, he did not hesitate to draw upon the constitutional powers of his own office to follow his best judgment. Lincoln’s greatness in preserving the Union depended crucially on his discovery of the broad executive powers inherent in Article II.

## CONCLUSION

Calabresi and Yoo have brought a much-needed historical perspective to the question of the president’s removal and law enforcement powers. Their contribution is not that they have turned to history

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<sup>544</sup> See James M. McPherson, *Abraham Lincoln and the Second American Revolution* 81 (Oxford 1991).

<sup>545</sup> See *id.* at 75–76.

<sup>546</sup> *Id.* at 74.

<sup>547</sup> *Id.* at 84.

when no one else has. Rather, it is that they have brought to light a certain kind of history: the evolution of an institution from the Framing to the current day. Their approach should appeal to scholars unconvinced that evidence from the original understanding is determinate or determinative. It may particularly prove useful to those who believe a common law approach—following tradition and the development of precedent—is the best method for interpreting the Constitution.

Still, *The Unitary Executive* incompletely lives up to its promise. It makes a good case for “unitary,” but not for “executive.” Though there are questions about whether practice is as uniform as Calabresi and Yoo believe, their work establishes a strong record in favor of the president’s authority to remove all subordinate officers in the executive branch. Where their work falls short, however, is explaining why the unitary executive is, in fact, an executive. If we follow the same methodology as Calabresi and Yoo, it becomes apparent that the executive power encompasses much more than managing those who enforce the law. Article II vests powers of substance that come to the fore during crises. Some of our greatest presidents have accessed those grants to the great benefit of the nation, such as Washington in declaring neutrality, Jefferson in buying Louisiana, and Lincoln in winning the Civil War. Presidents can also err when they misread conditions or turn their powers to purposes not envisioned by the Constitution. As that same nation struggles yet again with economic downturn and war, the need for presidential leadership will rise again.