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Command and Control: Operationalizing the Unitary Executive*

Comando e controle: operacionalizando o executivo unitário

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ABSTRACT

The concept of the unitary executive is written into the Constitution by virtue of Article II's vesting of the "executive Power" in the President and not in executive officers created by Congress. Defenders and opponents alike of the "unitary executive" often equate the idea of presidential control of executive action with the power to remove executive personnel. But an unlimitable presidential removal power cannot be derived from the vesting of executive power in the President for the simple reason that it would not

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actually result in full presidential control of executive action, as the actions of now-fired subordinates would still exist as law until repealed. Rather, the cleanest implication from the Article II Vesting Clause is a presidential power to nullify or veto actions by subordinates, even if those subordinates can continue to hold their congressionally created offices and draw their congressionally created salaries and benefits.

The President likely also has the ability directly to make executive decisions, even when Congress tries to vest power in subordinates to the exclusion of the President. The Constitution's unitary executive controls actions, not personnel.

This view does not completely foreclose arguments for a presidential removal power, though it makes them considerably more difficult to develop. It is consistent with some, but not all, of the views expressed by Attorneys General in the first half or so of the nineteenth century, when those actors expressly thought about the President's ability to control executive decisionmaking.

KEYWORDS

unitary executive — executive power — presidential control — removal of personnel — presidential veto

RESUMO

O conceito de executivo unitário está inscrito na Constituição por meio do art. II, que confere o "poder executivo" ao presidente e não a oficiais executivos criados pelo Congresso. Tanto os defensores quanto os opositores do "executivo unitário" costumam equiparar a ideia de controle presidencial sobre a ação executiva com o poder de remover pessoal executivo. No entanto, um poder de remoção presidencial ilimitado não pode ser derivado da atribuição do poder executivo ao presidente, pois isso não resultaria, de fato, em um controle total sobre a ação executiva, uma vez que as ações dos subalternos agora demitidos ainda existiriam como lei até serem revogadas. Assim, a implicação mais clara da Cláusula de Atribuição do art. II é um poder presidencial de anular ou vetar ações de subalternos, mesmo que esses subalternos continuem a ocupar seus cargos criados pelo Congresso e recebam seus salários e benefícios.

O presidente provavelmente também tem a capacidade de tomar decisões executivas diretamente, mesmo quando o Congresso tenta conferir poder a

subalternos, excluindo o presidente. O executivo unitário da Constituição controla ações, não pessoal.

Essa visão não fecha completamente os argumentos a favor de um poder de remoção presidencial, embora torne seu desenvolvimento consideravelmente mais difícil. Ela é consistente com algumas, mas não todas, as opiniões expressas pelos procuradores-gerais na primeira metade do século XIX, quando esses atores refletiram sobre a capacidade do presidente de controlar a tomada de decisões executivas.

PALAVRAS-CHAVE

executivo unitário — poder executivo — controle presidencial — remoção de pessoal — veto presidencial

The United States Constitution is frustratingly terse about the structure of the national government. It creates three major federal institutions — Congress,[1] the President,[2] and a supreme Court[3] — plus a Vice President[4] whose only powers are to preside over and break ties in the Senate and to serve as acting President on specified occasions.[5] The Constitution contemplates the possibility of federal "inferior Courts"[6] ordained and established by Congress[7] but does not specifically mandate the creation of any federal judicial offices other than a Chief Justice of the supreme Court.[8] It assumes that there will be "executive Departments,"[9] and specifically a "Treasury,"[10] headed by "principal Officer[s]"[11] and staffed by "Civil Officers"[12]

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1 *See* U.S. CONST. art. I, § 1.
2 *See id*. art. II, § 1, cl. 1.
3 *See id*. art. III, § 1
4 *See id*. art. II, § 1, cl. 3.
5 *See id*. art. I, § 3, cl. 4 & art. II, § 1, cl. 6. John Adams famously bemoaned: "My country has contrived for me the most insignificant office that ever the invention of man contrived or his imagination conceived." Letter from John Adams to Abigail Adams, Dec. 19, 1793, *in* 1 THE WORKS OF JOHN ADAMS 459, 460 (Charles Francis Adams ed., 1856).
6 U.S. CONST. art. III, § 1.
7 One could locate the power to create lower federal courts in either the Necessary and Proper Clause, *see id*. art. I, § 8, cl. 18, or the clause authorizing Congress to "constitute Tribunals inferior to the supreme Court." *Id* art. I, § 8, cl. 7.
8 There must be at least one Justice to constitute the "supreme Court" created by Article III, and there must be a Chief Justice to preside over presidential impeachment trials. *See id*. art. I, § 3, cl. 6.
9 *Id*. art. II, § 2, cl. 1.
10 *Id*. art. I, § 9, cl. 7.
11 *Id*. art. II, § 2, cl. 1.
12 *Id*. art. II, § 4.

including "Ambassadors, other public Ministers and Consuls,"[13] but it does not itself create any of those departments or positions.[14] It expects Congress to create them pursuant to the power to make laws "necessary and proper for carrying into Execution … all Powers vested by this Constitution,"[15] but with the possible exception of the Treasury Department it does not *require* Congress to create them.[16] Accordingly, when the Constitution discusses the appointment of federal officers, it refers to offices "which shall be *established by law*,"[17] meaning established by a statute that complies with the procedural requirements for federal lawmaking.[18] This was a monumental change from English practice, which gave the monarch "the prerogative of erecting and disposing of offices."[19] Importantly, the Constitution does not itself "vest[]" any power in executive personnel created by Congress. This is in stark contrast to the way that the Constitution directly "vest[]s" power in other officials.

The Constitution vests "[a]ll legislative Powers herein granted … in a Congress of the United States, which shall consist of a Senate and House of Representatives."[20] Thus, when a Congress is properly assembled through the processes for election specified in the Constitution, that body automatically

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[13] *Id*. art. II, § 2, cl. 2.

[14] This basic point is not always recognized even by able Attorneys General, *see, e.g., Office and Duties of Attorney General*, 6 OP. ATT'Y GEN. 326, 342 (1854) (Caleb Cushing) ("the Constitution and the laws give to him agents"), even when those persons were otherwise more careful about the matter. *See id*. at 327.

[15] *Id*. art. I, § 8, cl. 18.

[16] The Constitution might mandate the creation of a treasury because the President and federal judges must receive federal "Compensation." *Id*. art. II, § 1, cl. 7; *id*. art. III, § 1. Technically, one perhaps could have compensation without a treasury. The Constitution provides only that money cannot be withdrawn from the Treasury without an appropriation, *see id*. art. I, § 9, cl. 7, not that money can only be spent out of a treasury. But I can imagine a structural argument that requires creation of a federal treasury.

[17] *Id*. art. II, § 2, cl. 2 (emphasis added).

[18] *See id*. art. I, § 7, cl. 2. For more detail on the Constitution's deferral to Congress on the structure of the federal government, see STEVEN GOW CALABRESI & GARY LAWSON, THE U.S. CONSTITUTION: CREATION, RECONSTRUCTION, THE PROGRESSIVES, AND THE MODERN ERA 287-89, 381-85 (2020).

[19] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *262 (1787). *See also id*. ("as the king may create new titles, so may he create new offices"). Does this mean that reorganization acts that allow the President to create new offices, such as happened with the Administrator of the Environmental Protection Agency, are unconstitutional, at least if those reorganizations are not specifically ratified by statute? Probably. It definitely means that the Attorney General cannot create an office of Special Counsel that is not created by statute. *See* Steven G. Calabresi & Gary Lawson, *Why Robert Mueller's Appointment as Special Counsel Was Unlawful*, 95 NOTRE DAME L. REV. 87, 102 n.80 (2019).

[20] U.S. CONST. art. I, § 1.

possesses the federal legislative powers "herein granted." The Constitution vests "[t]he judicial Power of the United States … in one supreme Court, *and in such inferior Courts as the Congress may from time to time ordain and establish*."[21] When a federal judge is appointed, either to the Supreme Court or to an inferior federal court created by Congress, the Constitution automatically vests him or her with "[t]he judicial Power of the United States." But Article II of the Constitution does not vest "executive Power" in any congressionally created federal officers or employees. Instead, it vests "[t]he executive Power … in a President of the United States of America"[22] — *not*, one should note, in "a President and such subordinate executive officials as the Congress may from time to time ordain and establish."[23] That vesting of executive power is qualified by the duty to "take Care that the Laws be faithfully executed,"[24] and by implicit fiduciary principles,[25] but the "executive Power" is constitutionally vested specifically in the hands of one person. Period.

This is the inescapable textual feature of the Constitution that establishes, as conclusively as anything in constitutional interpretation[26] can be established, the basic fact of a "unitary executive." Whatever the federal "executive Power" encompasses is vested in the person of the President and in no one else.

This says nothing about the *content* of that "executive Power." Such power might include only those powers specifically enumerated in sections 2 and 3 of Article II. It might include those enumerated powers plus the power to execute the laws. It might include the foregoing plus some measure of assumed power over foreign affairs. Or it might involve something resembling the powers of

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[21] *Id*. art. III, § 1. On the significance of the "ordain and establish" language, and its relationship to the grant of power to "constitute Tribunals," see Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1025-36 (2007).

[22] U.S. CONST. art. II, § 1, cl. 1.

[23] For the classic study of the structural differences between Article II and Article III, see Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

[24] *Id*. art. II, § 3.

[25] *See* Gary Lawson & Guy Seidman, "A Great Power of Attorney": Understanding the Fiduciary CONSTITUTION (2017); Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2019); Ethan J. Leib & Jed Handelsman Shugerman, *Fiduciary Constitutionalism: Implications for Self-Pardons and Non-Delegation*, 17 GEO. J. L. & PUB. POL'Y 463 (2019).

[26] I am discussing here *only* constitutional interpretation — that is, the ascertainment of the communicative meaning of the historically concrete document known as the Constitution. There are many other activities that one can perform regarding that document, such as normative prescription, adjudication, daydreaming, etc. I am not downplaying or questioning the value of those other activities. I am just not engaged in any of them here.

the English monarchy, minus a few items (such as the power to create offices or declare war) specifically vested elsewhere. Those are matters that have to be worked out through interpretative moves beyond those described thus far.[27] For now, all that matters is that anything falling within the compass of federal "executive Power," however much or little that turns out to be, is vested in the President. That is the meaning of a "unitary executive."

I

But what does it mean, in practical terms, to say that the President is unitarily vested with the "executive Power"? It surely does not mean that the President *must*, as a constitutional matter, personally execute every executive function.[28] If that was so, there would be no reason to have officers. Once Congress creates subordinate executive officers and employees, the President may subdelegate some measure of "executive Power" to them,[29] consistently with fiduciary standards for subdelegation of authority[30] and the accompanying duty to supervise.[31]

Suppose, however, that the power of the executive personnel does not appear to come from subdelegation from the President but instead from direct statutory authorizations from *Congress*? When Congress creates federal offices, it typically does not simply create the office, provide a salary and

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[27] For a range of views on the scope of executive power all published in the same year, see MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION (2020); SAIKRISHNA PRAKASH, THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS (2020); Julian Davis Mortenson, *The Executive Power Clause,* 168 U. PENN. L. REV. 1269 (2020).

[28] *See* MCCONNELL, *supra* note 27, at 144-45.

[29] Specifically, the President may subdelegate the power to execute the laws, though not necessarily other functions granted by Article II such as the commander-in-chief power or the pardon power. *See* LAWSON & SEIDMAN, *supra* note 25, at 127-28. *Accord: Presidential Succession and Delegation in Case of Disability,* 5 OP. O.L.C. 91 (1981). Because this power to subdelegate law execution is an incident to the Constitution's grant to the President of "[t[he executive Power," it comes directly from the Constitution. Congressional statutes that try to limit this power of subdelegation — by, for example, requiring subdelegations to be in writing and published in the Federal Register, *see* 3 U.S.C. § 301 (2018) — are unconstitutional to the extent that they constrain rather than help "carry[] into Execution" the President's constitutionally vested power of subdelegation. A famous opinion of an Attorney General, to be discussed later, *see supra* —, suggests otherwise, *see Relation of the President to the Executive Departments,* 7 OP. ATT'Y GEN. 463, 481 (1855), but I think that is a mistake.

[30] *See* LAWSON & SEIDMAN, *supra* note 25, at 134-35.

[31] *See* Gillian E. Metzger, *The Constitutional Duty to Supervise,* 124 YALE LJ. 1836 (2015).

benefits, and move on. The offices are typically defined by their substantive powers and duties, and the officers are given authorizations by legislation, either the legislation creating their office or by subsequent legislation defining, expanding, or contracting the original powers of the office. What is the effect of those statutes that specifically and directly purport to give authority to subordinate executive officers, in the face of the brute fact of the Constitution's creation of a unitary executive?

This question has befuddled American constitutional law and practice since the founding. The Constitution's terseness about governmental structure made that befuddlement predictable, if not inevitable. Apart from the Article II Vesting Clause and the Take Care Clause, the only provision that speaks directly to the relationship between the President and executive subordinates is the Opinions Clause, which says that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."[32] Apart from relating only to the fraction of executive officials who count as "principal" officers (meaning essentially heads of departments[33]), this does not say a lot about the allocation of executive power.[34] It lets the President know what certain subordinates are thinking and doing but says nothing directly about what, if anything, the President can do with that information. And the latter is the real question.

There are at least four possible classes of answers to what the President can do with information about subordinates and their actions, whether that information is obtained from principal officers via the Opinions Clause or from other sources. One class of answer is "nothing." Perhaps Congress can grant power to subordinate executive officials, and the President has, as a legal matter, nothing to do with how that power is exercised. A second possible answer is that the President can fire the subordinate if the President doesn't

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[32] U.S. CONST. art. II, § 2, cl. 1.

[33] *See* Calabresi & Lawson, *supra* note 19, at 136-37.

[34] Why have the Opinions Clause at all? While it is possibly a vestige of earlier plans at the Constitutional Convention for executive councils, in the final unitary design of the executive it does serve the important function of clarifying the President's relationship to the principal officers by foreclosing Congress from creating such officers who report only to Congress and not to the President. It is thus more a limitation on Congress than an empowerment of the President. *See* Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 30-32. Mike Rappaport independently came up with the same analysis of the clause. *See* Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 729 n.137 (crediting Mike Rappaport with the idea).

like what he or she hears from or about the subordinate. A third possibility (possibly conjoined with the second) is that the President can countermand the subordinate's action, exercising a veto power over executive decisions. A fourth possibility (possibly conjoined with the second and/or third) is that the President can personally assume the subordinate's functions and take the action himself or herself. All of these are *classes* of answers, because the answer may vary with context. Perhaps there are different answers depending on the executive actions in question. Maybe it matters whether the action is mandatory under the operative statute or whether it involves a measure of discretion. Perhaps it matters whether the executive action involves case-specific adjudication of private rights. Maybe there are some executive functions, such as the pardon power or the commander-in-chief power, that Congress cannot entrust to subordinates under any circumstances. The full spread of possibilities gets very large and complex very quickly.

For purposes of this article, I will focus on the subset of congressional statutes that purport to vest power in subordinate executive officials to exercise some measure of discretionary authority but do not involve presidential functions specifically enumerated in sections 2 and 3 of Article II. The implications of my analysis may extend more broadly; that is all for another time. Let us deal here with straightforward law execution, carrying out executive duties created by statute rather than by the Constitution itself.

Historically, debate has focused on the first two possibilities, with some people claiming that the President must be able to remove any and all executive officials, regardless of whether Congress has specified a particular tenure of office for those officials, and others claiming that at least some power can be granted to officials by Congress that is beyond formal presidential control (though presidents may have informal, non-legally binding methods of control that could be as or more effective than formal legal controls, such as refusing to provide political support for an official whose decision is unpopular with Congress or the people[35]). Neither of those commonly discussed possibilities, however, is supported by the Constitution. Indeed, both are flatly inconsistent with relatively clear constitutional commands. The real question, rather, is whether the President has a countermanding power, a direct decisionmaking power, or both. This article categorically defends the former and somewhat less vigorously defends the latter.

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[35] *See* Cary Coglianese, *The Emptiness of Decisional Limits: Reconceiving Presidential Control of the Administrative State*, 69 ADMIN. L. REV. 43 (2017).

The case for the foregoing set of propositions is undeceptively simple: By vesting the "executive Power" in the President, the Constitution mandates that the President control in some fashion all exercises of executive power. The real question is what the mechanism (or mechanisms) of control must look like. An unfettered removal power is not only inconsistent with the Constitution's text and structure[36] but also fails to provide the constitutionally necessary measure of control. A direct decisional authority is not flatly inconsistent with constitutional text, and may even be mandated by it, but it raises difficult questions about the extent of congressional and presidential power. A countermanding power, however, both provides constitutionally adequate presidential control and avoids the difficult issues posed by assertions of direct presidential decisionmaking authority.

Is it a strike against such a countermanding power that presidents have not traditionally claimed or exercised it? If one believes that constitutional rules are a product of practice and custom, yes, of course that would count against it. If one believes that constitutional rules are a product of the Constitution, then no: The practice either conforms to the Constitution or it does not. In this case, the practice does not conform — for readily identifiable and understandable (even if constitutionally indefensible) reasons. Since I believe that the Constitution's meaning comes from the Constitution rather than from what various actors — be they presidents, attorneys general, legislators,[37] judges, or academics — say about it, I have little intellectual interest in practice.[38] Nonetheless, I will take a look at what various people

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[36] It might also be inconsistent with historical practice, *see* Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175 (2021); Christine Kexel Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129 (2022); Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1 (2021), but, as I explain below, that is not something to which I give much weight in ascertaining the text's communicative meaning.

[37] It is commonplace, for example, to look at actions of the First Congress as valuable expositions on constitutional meaning. If the Constitution could speak, I think it would warn us against that practice, as the Constitution pretty obviously contemplates a Congress full of corrupt and venal gasbags. *See* Gary Lawson, *The Constitution's Congress*, 89 B.U. L. REV. 399 (2009). The First Congress lived down to those expectations; its very first enactment was blatantly and obviously unconstitutional. *See id*. at 403-06.

[38] The rationale for this methodological preference would require a separate article (or perhaps book), but: Persons in positions of actual power are likely to have concerns other than correctly ascertaining the Constitution's communicative meaning. In particular, if those persons are well motivated, they are likely to be interested in constructing arrangements that will allow the government to function effectively. If they are poorly motivated, they are likely to be interested in constructing arrangements that will allow the government to function effectively (so that they can efficiently use the machinery of government to extract wealth

— attorneys general more than presidents — have said about the relationship between presidents and subordinates, not as authorities to be followed but as suggestions to be examined. After all, maybe they thought of something that I didn't. We'll see.

II

Start with two theories of the relationship between the President and subordinates that seem flatly inconsistent with the Constitution. The first is that Congress can sometimes, and maybe even always, vest law execution power in executive subordinates that the President cannot control.[39] The second is a theory so commonplace that it has (wrongly) become so associated with the idea of the unitary executive that it is often taken to *constitute* the idea of the unitary executive:

The proposition that the President must be able to remove executive officials for any reason, including disagreement with their policy views or exercises of discretion, regardless of what Congress specifies by statute.[40]

Both theories are pretty clearly wrong as a matter of original communicative meaning.

A thoughtful defender of the first view writes that unitarians "view it as self-evident that the President should have directive authority over agency heads."[41] That is because it is self-evident that the President should have directive authority — of some kind — over agency heads (and agency legs,

for themselves and their favorite causes). In either case, one would expect constitutional "interpretation" to be shaped at least as much by practical attention to real-world results as to accurate ascertainment of communicative meaning. The extent to which the Constitution's communicative meaning does in fact generate a fully functional government needs to be the conclusion of an argument rather than a premise.

39 A catalogue of scholars who defend this position on the basis of theory, precedent, practice, and/or policy would fell forests. For a representative sample, see Jed Handelsman Shugerman, *Presidential Removal: The* Marbury *Problem and the Madison Solutions*, 89 FORDHAM L. REV. 2085, 2088 & nn. 18-26 (2021).

40 A list of defenses of this position would not be as long as a list of pro-removal books and articles, but it would be long. For two really good representative works, see STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008); Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205 (2014).

41 Robert V. Percival, *Who's In Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2488 (2011).

and agency arms, and agency torsos). The "executive Power" — all of it[42] — is vested in the President. This pretty much settles who gets to exercise federal executive power. You just have to read one sentence of the Constitution. That is about as self-evident as anything in the Constitution will ever be.

So, when agencies adjudicate or make rules, what kind of power are they exercising? The obvious answer is: "executive Power." But we just saw that the Constitution vests the "executive Power" in the President, not in subordinates. Does that mean that no person in the executive department other than the President can act? Maybe the President really does personally have to carry out every executive function of government, including adjudicating benefits claims and serving process on defendants?

Of course, it doesn't mean that. The Constitution knows that there are going to be "executive Departments"[43] whose officers will have "Duties."[44] There would be no point in providing for the impeachment and removal of "Civil Officers" if they had no power to act. There are obviously going to be actors besides the President exercising "executive Power." That much is also self-evident in the same "just read the text" kind of way.

How can both things be self-evident? There are actually two ways to theorize the answer to that seeming puzzle that lead to precisely the same place.

One is to say that the absurd conclusion that *only* the President can exercise executive power, so that *only* the President can execute federal laws, is actually correct rather than absurd—at least as a starting point.

Whenever Congress creates law to execute, the Constitution automatically vests in the President the power to execute that law, whether the statute names the President or some subordinate as the proper recipient of the power. So why bother creating subordinates at all? Because the President has the capacity to subdelegate some portion of the President's delegated "executive Power."[45] Congress, by creating subordinates, creates permissible

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[42] Jed Shugerman correctly points out that the word "all" does not appear in the Article II Vesting Clause. *See* --. Nor does it appear in the Article III Vesting Clause. That is because (1) the article "the" does the needed work and (2) the Constitution nowhere else vests executive power in anyone. As the cast of the Warner Bros. cartoons would say upon seeing the Article II Vesting Clause: "This is it."

[43] *See* U.S. CONST. art. II, § 2, cl. 1.

[44] *Id*.

[45] Who delegated "executive Power" to the President? The same hypothetical entity that delegated legislative power to Congress and judicial power to the federal courts: The "We the People" who ordained and established the Constitution in order to manage some portion

recipients of those presidential subdelegations that otherwise would not exist (because the Constitution does not create them, and the President, unlike old British monarchs, does not have an office-creating power). Laws creating subordinate executive officials are quintessentially laws that help the President "carry[] into Execution" the President's executive powers by facilitating whatever subdelegations the President chooses to make.[46] Once subordinates exist, perhaps one can even infer an intention to subdelegate from presidential silence in most cases, obviating the need for any formal instruments of executive subdelegation. Conceptually, however, the executive power all flows directly to the President and then flows outward from him or her. By defining the powers and duties of subordinates, Congress can designate permissible, and therefore impermissible, recipients of presidential subdelegation, but Congress cannot unilaterally subdelegate the President's executive power. And once executive power is subdelegated, both general fiduciary principles and the Take Care Clause require the President to retain ultimate responsibility for the actions of subordinates. It would be a clear breach of both implicit and explicit constitutional duties for the President to implement or agree to subdelegation of executive power that is beyond the President's control.

If one finds this too clever by half (I find it exactly clever enough and think it is the correct conceptual account of the Constitution's allocation of executive power), another route to the same place is to say that the Constitution allows Congress to create actors other than the President who will exercise "executive Power", but that any such power *is also, by constitutional command, vested in the President,* whether or not Congress wants that result. Congress, on this account, can actually vest actors with executive power, but it cannot vest them with executive power that is not simultaneously vested in the President. The President can *choose* to let those subordinates exercise their power without presidential participation, but if the President *wants* to exercise "[t]he executive Power" possessed by subordinates, Congress has no right to stop it. Any statute purporting to vest such power in a subordinate free of presidential

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of its affairs. On the significance and meaning of "We the People," see Gary Lawson & Guy Seidman, *Are People in Federal Territories Part of "We the People of the United States"?*, 9 TEX. A & M L. REV. 655 (2022).

[46] See Steven G. Calabresi & Christopher S. Yoo, The Unitary Executive During the First Half-Century, 47 CASE WESTERN RESERVE L REV. 1451, 1475-76 (1997) (describing George Washington's view of executive officials as his assistants).

control is an obvious violation of the clause that authorizes the creation of the subordinate in the first place: The Necessary and Proper Clause. Congress can create executive offices by virtue of the provision allowing it to enact "all Laws which shall be necessary and proper for carrying into Execution the foregoing [legislative] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[47] Congress can thus create subordinate executive officials to help "carry[] into Execution" the President's vested "executive Power." But vesting authority in people who can act free of presidential control does not "carry[] into Execution" the President's vested power; it *hinders* or *prevents* the actor with constitutionally vested power from carrying it into execution. Executive subordinates must be in aid of the President's constitutionally vested power, not in opposition to it.[48]

Thus, the most straightforward reasons why Congress cannot create subordinates independent of the President are that (1) the Article II Vesting Clause forbids it and (2) Congress has no enumerated power to do so. This argument, in either of the two foregoing forms, may not qualify as a form of self-evidence, but it is textually unavoidable. The President has *all* of the federal executive power.

That does not mean, however, that the President must be able to remove all, or even any, executive subordinates. Indeed, it is pretty clear that the President does not have such a constitutional power. Given the history of the removal question, a full treatment of this topic requires books rather than paragraphs, but here is what I can do in paragraphs at the moment:

The Constitution is not entirely silent on the removal of subordinate executive officials. If those officials qualify as "Civil Officers," they can be removed through impeachment by the House and conviction by the Senate.[49] Some representatives during the Decision of 1789[50] maintained that because

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47 U.S. CONST. art. I, § 8, cl. 18.

48 The same reasoning explains why Congress cannot tell courts how to decide cases or authorize clerks to decide motions. *See* Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making,* 18 CONST. COMMENTARY 191 (2001). The importance of the requirement that laws under the Necessary and Proper Clause be "for carrying into Execution" federal powers was first emphasized by David Engdahl. *See* David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch,* 1999 B.Y.U. L. REV. 75, 102-03.

49 *See* U.S. CONST. art. II, § 4.

50 For a vigorous debate about the Decision of 1789, *compare* Saikrishna Prakash, *New Light on the Decision o 1789,* 91 CORNELL L. REV. 1021 (2006), *with* Jed Handelsman Shugerman, *The Indecisions of 1789,* 171 U. PENN. L. REV. – (2023) (forthcoming).

the Constitution expressly provided for this method, it was the *sole* permissible method for removal of such officials.[51] If that seems absurd, it is only because of history; one can readily imagine a world in which Congress spends much of its energy overseeing, impeaching, and removing executive officials. This is a textually plausible position — at least until one looks behind Door Number Two.

Even in that imaginary world, impeachment and removal would not extend to *employees* who do not qualify as "Officers."[52] Would the employees therefore have life tenure by constitutional command? Surely not. Their positions, recall, do not stem from the Constitution itself. They come either from Congress creating them by statute pursuant to the Necessary and Proper Clause or by other executive actors creating those positions with appropriated funds if employees are in this respect like ink, wagons, or any other office supplies that can be purchased with lump-sum appropriations. In either case, the creating entity can presumably specify for how long the employees are being hired, meaning that tenure and termination in those settings are purely a matter of statute and contract. And because the only difference between officers and employees in this regard is that all officer positions *must* be "established by Law" and thus can *only* be created by Congress and not by executive actors purchasing them like inks or wagons,[53] it is hard to see why Congress cannot set terms of office in the statutes creating those offices. The statutes fix the titles, powers, duties, salaries, and benefits of the offices. The office's term — subject always to shortening through the constitutionally specified impeachment and removal process — does not seem all that different from those other features that define the office. Accordingly, another position advanced during the Decision of 1789 was that Congress can fix an officer's (or employee's) tenure by statute.[54] For the reasons just given, this one makes a great deal of sense. I happen to think it is correct.

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[51] *See* 1 ANNALS OF CONG. 389 (l1789) (statement of Rep. Jackson; *id.* at 477 (statement of Rep. Huntington).

[52] In all likelihood, there are lots more officers than people today think. *See* Jennifer Mascott, *Who Are "Officers o the United States?"*, 70 STAN. L. REV. 443 (2018); James C. Phillips, Benjamin Lee & Jacob Crump, *Corpus Linguistics and "Officers of the United States,"* 42 HARV. J.L. & PUB. POL'Y 871 (2019). But even under the strictest test for officer-dom, there are going to be several million federal employees.

[53] *See* Calabresi & Lawson, *supra* note 19, at 101-02.

[54] *See* 1 ANNALS OF CONG. 391 (1789) (statement of Rep. Thatcher); *id*. at 391-92 (statement of Rep. Jackson); *id*. at 393-94, 500-05 (statement of Rep. Lawrence); *id*. at 496-98 (statement of Rep. Livermore).

Perhaps, however, the Constitution also speaks in quieter fashion. All documents, as with all forms of communication, presuppose certain background rules.[55] One possible background rule for the Constitution regarding governmental structure is that modes of removal of subordinates parallel their modes of appointment. In the context of the Constitution, that would mean that officers appointed by the President with the advice and consent of the Senate can be removed only by the President with the advice and consent of the Senate, while officers appointed by, for example, "Courts of Law" could be removed only by "Courts of Law" (and, of course, by the House and Senate acting through impeachment and removal). This, too, was advanced as an option during the decision of 1789,[56] as well as during the New York ratification process two years earlier.[57] One could, of course, accept this position as the *default* position, subject to alteration by Congress in the statute creating the office, rather than as a fixed and unalterable constitutional rule. That is, if Congress neglects to specify a mode of removal in the statute creating the office, the Constitution might be thought to fill in a background rule of "removal follows appointment," which Congress can change if it wishes.

These three answers have in common that they *do not* constitutionally commit removal to the President. Under either the second or third option, Congress could choose to give the President unilateral and unlimited removal power in at least some cases (all of them under the second option and for inferior officers and employees under the third), but the President would not have inherent removal power. (The President might have such power over employees who are hired a la ink or wagons.) All of these positions regarding removal, as we have seen, have textual and structural support, as well as a measure of historical pedigree. So why did people like James Madison in 1789, and lots of scholars and judges today, choose a fourth answer and think that the President has unlimited removal power by constitutional command?

One possibility is that they believe the "executive Power" just includes a power to remove subordinates, so that the vesting of the "executive Power" in the President automatically carries with it a constitutional power of removal.

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55 *See* LAWSON & SEIDMAN, *supra* note 25, at 8-11.

56 *See* 1 ANNALS OF CONG. 389-90 (1789) (statement of Rep. Bland); *id.* at 391, 473-74 (statement of Rep. White); *id.* at 393 (statement of Rep. Sylvester); *id*. at 395-96, 490-92 (statement of Rep. Gerry); *id*. at 509-10 (statement of Rep. Page); *id.* at 585-91 (statement of Rep. Stone).

57 *See* THE FEDERALIST No. 77 (Hamilton).

That is indeed a plausible candidate for a background default rule, just as "removal follows appointment" is a plausible candidate for a background rule. But even if it is correct as a background rule, it does not necessarily lead to the result that its advocates sometimes assume.

Suppose for the moment that the presidential removal background rule is correct. As Jed Shugerman has ably demonstrated,[58] and as was suggested above for "removal follows appointment," that does not carry the day unless it means that the "executive Power" includes a *limitless* power of removal. It is quite possible to say that the President has such power as a default, but that Congress can alter that default by specifying different terms or forms of removal. And a limitless presidential constitutional power to remove all executive officials simply does not leap out from the pages of the Constitution. One of the Constitution's most important moves was to make clear that the office-creating power was vested exclusively in Congress, so the President could not, in kingly fashion, create offices to hand out to cronies.[59] It is not *impossible* to separate out the term of an office from its creation, salary, benefits, powers, duties, and all other features that are obviously within the control of Congress,[60] but it is much more natural to see the term of office as part of the office than not. From the other direction, if the Vesting Clause does in fact carry the day, it does so for *all* executive personnel, whether officers or employees. The President would have unlimited power to remove civil servants. Or is there some way to limit the implied-from-the-Vesting-Clause removal power only to some subset of especially important executive officials, such as principal officers? Justice Scalia thought so,[61] but that may have been more a product of precedent than of logic.

If an unlimited power of removal does not flow naturally from the vesting of executive power, perhaps the Take Care Clause adds another element — and perhaps even an element that would support limiting the removal power to high-level officers. If the President has the duty to "take Care that the Laws be faithfully executed," how can the President do that if he or she cannot sack

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58 *See* Shugerman, *supra* note 39.

59 *See supra*.

60 Indeed, modern procedural due process law severs the procedures for termination of a statutorily created position from the other elements of the position, including the salary and benefits. *See, e.g.*, Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). This body of doctrine is not distinguished by its intellectual rigor. *See* Frank Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85.

61 *See* Morrison v. Olson, 487 U.S. 654, 724 n.4 (1988) (Scalia, J., dissenting). Michael McConnell also suggests this move. *See* McConnell, *supra* note 27, at 165-66.

subordinates, or at least important subordinates, who the President thinks are not doing the job properly? These practical concerns lay behind much of Chief Justice Taft's reasoning in *Myers v. United States*,[62] and I suspect that they lie behind much of the modern case for a limitless presidential removal power.[63]

There is a fatal flaw in all of the arguments that try to derive a presidential removal power as a structural inference from the need for presidential control of all executive power: A removal power does not actually give the President control of all executive power. The removal power would be a nice power for the President to have, but it does not satisfy the constitutional command of the Article II Vesting Clause.

Suppose a world in which the President can fire anyone at any time for any reason or no reason at all. The President announces to his or her subordinates certain instructions regarding how subdelegated executive power must be exercised.[64] A subordinate conducts an adjudication or issues a rule based on an interpretation of a statute — or, for that matter, a finding of fact[65] — that is contrary to those presidential instructions. The President finds out and fires the person. But the order or rule is still out there, creating legal rights and obligations until such time as it is repealed or invalidated. True, the fired official can be replaced with someone who will undo the action, but that occurs in real time rather than instantaneously. If the President is truly the repository of all federal executive power, there should not be *any* exercises of that power contrary to the President's instructions. (If the President has not given any instructions, then the subdelegee of presidential power has not done anything wrong, provided that the subdelegee acts within the scope of his or her subdelegated authority.) Accordingly, to carry out the commands of the Article II Vesting Clause, the President's instructions must be understood to limit the power of any subdelegee, regardless of what Congress has said in the statute creating the office (because Congress does not have the power to override the Article II Vesting Clause, as any such law would not be "necessary and proper for carrying into Execution" the executive power). The President's instructions thus function as an advance veto of any actions by subordinates contrary to those instructions, as they literally deprive the subordinates of power to act in a way contrary to those instructions.

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62 272 U.S. 52 (1926).

63 *See, e.g.,* MCCONNELL, *supra* note 27, at 167.

64 *See, e.g.,* Calabresi & Yoo, *supra* note 46, at 1483 (discussing how George Washington ordered the dismissal of prosecutions).

65 *See* Shalev Roisman, *Presidential Factfinding,* 72 VAND. L. REV. 825 (2019).

This affirmative-negative power of the President satisfies Article II, because it guarantees that nothing happens with the executive power that contravenes presidential directions. Because it does so, it does not leave room for a further inference of a presidential power of removal, which in any event would not provide the same guarantee. This does not conclusively prove that the President has no constitutional removal power, as one might still think that such a power constitutes an essential component of the "executive Power" regardless of its consequences. (I don't think so, for the reasons given above.) But it does mean that the case for presidential removal power gains nothing from the President's power and duty to supervise exercises of the executive power.

Could the President personally conduct the adjudication or issue the rule, even if the statute purports to vest power directly in the subordinate (*e.g.*, the Secretary of Labor)? In other words, in addition to a cancellation power, does the President have a supplanting power? If my account of executive power is correct, in which all executive power automatically vests in the President subject to presidential subdelegation to authorized recipients, then the answer is yes. The President does not *have* to subdelegate power to subordinates if the President would prefer to retain that power personally. Presumably, presidents would not often find it convenient or prudent personally to execute the laws, but the Constitution gives the President that option if the President wants to take it. The real issue in those circumstances, as Richard Murphy has ably shown in an important article,[66] is whether congressional limitations on how *subordinate executive officials* can act would also limit the President if the President assumed their functions. If, for example, the Secretary of Labor can promulgate workplace safety rules only after following certain specified procedures, would the President have to follow the same procedures if the President personally assumed that function? It would require a separate, and probably much longer, article to sort out all the considerations posed by that problem. The question reduces to whether Congress, in a world with no subordinate executive officials, could authorize the President to act on condition that the President follow specified procedures. For my present purposes, it does not matter how one resolves that question. The President *at least* has the cancellation power as a necessary inference from the Article II Vesting Clause. A supplanting power would be a bonus, though one that presidents probably would not find especially helpful.

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[66] *See* Richard W. Murphy, *The DIY Unitary Executive*, 63 AZ. L. REV. 439 (2021).

As it happens, presidents do not appear to have found a cancellation power especially helpful either, as, to my knowledge, no President has expressly sought to exercise it in the strong form described above. Instead, from 1789 onwards, presidents have focused on the power to remove subordinates — to the point of risking impeachment and removal from office in order to assert removal power.[67] Presidents have obviously viewed the removal power as a more powerful, flexible, and useful method of control than a cancellation power. Isn't it better to have someone you trust doing the job than to have to cancel out everything that an unfaithful subordinate might do?

Of course it is better, especially since a cancellation power can prevent subordinates from doing something contrary to presidential wishes but cannot really force subordinates to act affirmatively in a way that the President would prefer.[68] That is why presidents have always preferred a removal power to a cancellation power. So would I if I was a president. It is not at all surprising that presidents have hyper-focused on removal and only occasionally relied on cancellation. That does not make it constitutionally correct. Congress would surely like to be able to make law without going through bicameralism and presentment. It is surely easier to have a joint resolution, or a single house resolution, or a committee resolution undo an agency's action than to have to pass legislation. That does not mean that Congress can actually do it the short way.[69] Federal actors have what the Constitution gives them, not what they want.

Because of the consistent focus on the removal question, we have a great deal of doctrine regarding removal and essentially none regarding either cancellation or supplanting. More precisely, we have no relevant *judicial* doctrine on cancellation or supplanting. There is actually a substantial body of *executive* doctrine on those questions, in the form of dueling opinions of attorneys general across the nineteenth century. Richard Murphy has recently canvassed these opinions in fine fashion,[70] so a brief summary here is all that is needed.

The story begins with Joseph Wheaton. During the War of 1812, Wheaton was a Deputy Quarter Master General. According to his own lights, he was a

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[67] Umm, Andrew Johnson?

[68] I am grateful to Christine Chabot for highlighting the negative character of the cancellation power.

[69] *See* INS v. Chadha, 462 U.S. 919 (1983).

[70] *See* Murphy, *supra* note 66, at 450-54.

genius at logistics—and a brilliant military strategist as well[71] — and wisely and prudently forwarded large sums of money for supplies across multiple campaigns. When he submitted his claims for reimbursement, however, the auditors in the Treasury Department took a different view. They sat on his claims for long periods of time, refused reimbursement for many of them, and at one point even found that he owed the government a substantial sum. As Wheaton put it, "the little minds of the accounting officers became alarmed, and their Argus eyes were all opened to find something wrong in Wheaton's department."[72] Congress evidently agreed with at least part of his complaint that involved delay and enacted a private bill requiring "the proper accounting officers of the treasury department … to settle and adjust the account of Joseph Wheaton, while acting in the quartermaster's department, upon the principles of justice and equity."[73] Major Wheaton was dissatisfied with the final adjustment, and he appealed to both Congress and the President.[74] President James Monroe referred the matter to Attorney General William Wirt, who responded in a formal opinion on October 20, 1823.

General Wirt noted that he "would proceed at once to the expression of an opinion on the merits of his claims, but that there is a preliminary inquiry which must be first made …; and that is, whether it is proper for you in interfere in this case at all?"[75] Wirt concluded that "[i]t appears to me that you have no power to interfere … My opinion is, that the settlement made of the accounts of individuals by the accounting officers appointed by law is final and conclusive, so far as the executive department of the government is concerned."[76] The next year, Wirt repeated his position even more emphatically, noting that the President has "no right to interfere … with the accounting department … the interference of the *President* in any form would, in my opinion, be illegal."[77] Wirt offered no new arguments to support this conclusion.

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[71] Wheaton's glowing account of his deeds can be found at *Appeal of Joseph Wheaton, Late Deputy Quarter Master General and Major of Cavalry, to the Senate and House of Representatives of the United States of America* (1820), https://www.loc.gov/resource/gdcmassbookdig.appealofjosephwh00whea/?

[72] *Id*. at 24. To be fair, it was not so much a hundred eyes as two that concerned Wheaton: He thought he got screwed by the Third Auditor.

[73] Act of Mar. 3, 1819, ch. LXXVI, 6 Stat. 232.

[74] Wheaton eventually got a few hundred bucks out of Congress for his troubles. *See* Act of May 17, 1824, ch. LXXXV, 6 Stat. 302.

[75] *The President and Accounting Offices,* 1 U.S. Op. Att'y Gen. 624, 624-25 (1823).

[76] *Id*. at 625, 629.

[77] *The President and Accounting Officers,* 1 OP. ATT'Y GEN. 678, 678 (1824). *See also The President and Accounting Officers,* 1 OP. ATT'Y GEN. 705 (1825) (conclusorily repeating the same position).

Why would General Wirt think that Congress could vest authority in accounting officers that is beyond the President's control?

Wirt's reasoning, if taken at face value, makes almost no sense. Wirt's chief argument is that the President could not possibly personally execute the tasks required of the executive department.[78] That is perhaps a good argument against the President choosing to exercise a power of supervision in any particular instance, but it is not an argument against the existence of the power. Somewhat more plausibly, Wirt argued that Congress had foreclosed presidential review by vesting authority directly in the treasury officers, leaving the President only to "take Care that the Laws be faithfully executed" by making sure that subordinates are performing their jobs honestly (and firing them if they do not).[79] That argument, of course, begs all relevant questions by assuming that Congress both intends *and has power* to deny to the President either a cancellation or supplanting power. It is not an actual argument against the power. Wirt made no mention of the Article II Vesting Clause; the bulk of his analysis was a simple recitation of statutes that purported to vest final authority in subordinate officers. Congress, of course, purports to do many things; the question in this case is whether the Constitution permits what Congress purports to do.

As legal argument, Wirt's opinion is astonishingly weak. The astonishment recedes a bit, however, when one reflects on why a lawyer of Wirt's abilities[80] would try to remove the President from the affairs of the executive department.

President Monroe, when asked to review the accounting officers' decisions about Wheaton, did not personally review the records. Instead, the President stuck the Attorney General with the task. At the time, being Attorney General was not a remunerative job, either financially or professionally. There was no Department of Justice to supervise; it was not created until 1870.[81] The Attorney General was not paid very much; Attorneys General were expected to earn their income primarily by acting as private lawyers *while they were also* serving as Attorney General.[82] If you were William Wirt, would you want the President shoving stacks of papers at you — without any additional pay?[83]

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78 *See id*. at 625, 628-29.

79 *See id.* at 625-28.

80 Wirt was highly respected as a lawyer. *See* H. JEFFERSON POWELL, THE CONSTITUTION AND THE ATTORNEYS GENERAL 14 (1999).

81 *See* Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870);.Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization without Civil Rights or Civil Service*, 66 STAN. L. REV. 121 (2014).

82 *See id*. at 131.

83 I am grateful to Steve Calabresi for bringing these considerations to my attention.

It is, of course, possible that Wirt's opinion was honestly motivated — and just badly reasoned. In any event, it was not followed by his successor, John Macpherson Berrien, who in 1829 concluded that, while Congress could limit the power of subordinate officials, such as auditors of military accounts, to overrule each other, the Secretary of War always had authority to reconsider the decisions of auditors, "acting (as, in matters connected with his department, he is presumed always to act) by the direction of the President."[84] Foreshadowing the structure seemingly contemplated by the Supreme Court in 2021,[85] the President directs the Secretary, who can then, on presidential orders, direct subordinates. Two years later, Roger Taney was even more explicit about the President's power of review: "The party may carry his appeal from the Secretary of War before the President."[86]

Taney, however, switched positions within a year. In 1832, he examined statutes seeming to vest final executive decisional authority in auditors and concluded:

> These laws, as well, indeed, as those which preceded them on the same subject, appear to me not to contemplate any appeal to the President; and I think, therefore, that the decision of the Comptroller in this case is conclusive upon the executive branch of the government, and that the President does not possess the power to enter into the examination of the correctness of the account, for the purpose of taking any measures to repair the errors which the accounting officers appointed by law may have committed. The party who supposes that justice has not been done to him must seek relief in court when a suit is brought against him, or may bring his claims to the consideration of Congress; and these, in my opinion, are the only means of redress … if the accounting officers have erred in their decision.[87]

There was no further analysis, and there was no reference to prior opinions.

Taney's revised views, which accorded with Wirt's position, were adopted in 1846 by John Mason. The President was asked to reconsider findings of fact in a pension claim that turned on length of service in the Revolutionary War seven decades earlier. General Mason was direct: "[T]he constitution assigns to Congress the power of designating the duties of

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[84] *Decisions of Accounting Officers — to What Extent Final,* 2 OP. ATT'Y GEN. 302 (1829).

[85] *See* United States v. Arthrex, Inc., 141 S.Ct. 1970 (2021).

[86] *Accounts and Accounting Officers,* 2 OP. ATT'Y GEN. 463, 464 (1831). And in 1834, the 1829 decision was reaffirmed. *See Accounts of General Parker and Accounting Officers,* 2 OP. ATT'Y GEN. 652, 653 (1834).

[87] *Accounts and Accounting Officers,* 2 OP. ATT'Y GEN. 507, 509-10 (1832).

particular subordinate officers; and the President is to take care that they execute their duties faithfully and honestly. He has the power of removal, but not the power of correcting, by his own official act, the errors of judgment of incompetent or unfaithful subordinates."[88] The only rationale offered for this conclusion, beyond reference to the prior opinions, was a rehash of Wirt's transparently weak argument that the President could not possibly review every decision.[89]

The various opinions denying the President power to review subordinate decisions were summarized, without additional argument, in 1852.[90] Shortly thereafter, however, Wirt's reasoning — which had never been further developed by his successors — was dissected and decisively rejected by Attorney General Caleb Cushing in 1854.[91] After surveying the variety of statutory provisions providing, or not providing, for presidential supervision of affairs of the executive departments,[92] General Cushing dismissed Wirt's 1823 opinion as ill-considered:

> Had the idea presented itself as a mere question of the *order* of business, to the effect that the President should act upon the subordinate officers through the heads of departments, it might have answered as a matter of convenience, but not one of legal necessity. But the idea utterly excludes the authority of the President, and so, while recognising the authority of the head of department, in effect makes the latter also superior to the President: which is in conflict with universally admitted principles. Such an assumed anomaly of relation, therefore, as this idea supposes, resting upon mere opinion or exposition, must, of course, yield to better reflection, whenever it comes to be a practical question demanding the reconsideration of any Attorney General.[93]

Cushing's primary concern in that opinion was to lay out the functions of the Attorney General, not to articulate a comprehensive theory of presidential power. A year later, Cushing took up that cudgel, elaborating on his reasoning in a remarkable opinion that sets out a theory of Article II strikingly similar to the view outlined in this article.[94]

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88 *Power of the President Respecting Pension Cases*, 4 OP. ATT'Y GEN. 515 (1846).

89 *See id.* ("Considering the high constitutional duties of the President, which occupy his whole time, it requires no argument to show that he could not acquit himself, by their adequate performance, if he were to undertake to review the decisions of subordinates on the weight or effect of evidence in cases appropriately belonging to them").

90 *See Jurisdiction of the Accounting Officers*, 5 OP. ATT'Y GEN. 630, 635-36 (1852).

91 *See Office and Duties of Attorney General*, 6 OP. ATT'Y GEN. 326, 342-44 (1854).

92 *See id*. at 339-40.

93 *Id*. at 343-44.

94 *See Relation of the President to the Executive Departments*, 7 OP. ATT'Y GEN. 463 (1855).

Cushing's central observation was that, in the Constitution, "no case occurs of the communication of power directly to any Head of Department…"[95] Just so; the Constitution vests "executive Power" in the President, not in any congressionally created subordinates.[96] This means that "no Head of Department can lawfully perform an *official* act against the will of the President; and that will is by the Constitution to govern the performance of all such acts."[97] Yep. If the President gives an instruction, no subordinate can act on behalf of the executive department in a way that contravenes that instruction. That is the essential content of the unitary executive.

To be sure, Cushing carves out several exceptions from this principle, one of which is valid. First, he exempts from presidential direction "acts purely ministerial"[98] — *i.e.*, the kind of acts that would be subject to mandamus if not performed or performed properly,[99] and that seems fine. If an action is truly legally required in that mandatory fashion, then it does not matter whether the President gives instructions or not. The law is the law. The President's cancellation power applies only to exercises of lawful discretion. Cushing's other exception, however, is more problematic:

He suggests that Congress can place power outside the President's control when that power is not "executive," as when the Attorney General adjudicates claims under a treaty.[100] This cannot be right. The Attorney General's power in that circumstance must be legislative, executive, or judicial. It certainly is not legislative power. If it is judicial power, it can only be exercised by Article III judges. It is plainly executive power and thus must be subject to presidential control. Cushing is also mistaken, I believe, in thinking that Congress can control the *form* in which the President gives instructions to subordinates.[101] It is hard to see how such a law "carr[ies] into Execution" rather than hinders the President's executive power. On the whole, however, Cushing's opinion impressively reflects the constitutional text and structure.

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95 *Id*. a t 465.
96 *See id*. at 460 ("by the explicit and emphatic language of the Constitution, *the executive power* is vested in the President of the United States").
97 *Id*. at 469-70.
98 *Id*. at 470.
99 *See id*.
100 *See id*. at 470-71.
101 *See id*. at 481.

The Constitution vests "[t]he executive Power" in the President and in no one else. As a result, no federal executive power can be exercised contrary to presidential instructions. Any attempt to do so by subordinates, with or without statutory support from Congress, is simply void. Those subordinates, during their statutory term of office, can collect their salaries and benefits and enjoy the view from their offices. But they cannot contravene the President's instructions, even if they don't like the President or the instructions. The Constitution does not allow a Deep State.