2024

The Original Presidency: A Conception of Administrative Control

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Journal of Legal Analysis, 2024, **16**, 26–63
https://doi.org/10.1093/jla/laae002
Advance access publication 12 June 2024
Article

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Abstract

The two predominant conceptions of executive power and supervision over the administrative state are inadequate. One maintains that all administrative discretion is the President's, and that by virtue of the grant of executive power the President can both remove and control the discretion of all subordinate officers. That poses a possible textual problem: it seems to make the Opinions Clause superfluous. The other conception maintains that the President is, at best, a "persuader-in-chief," with no constitutional right to control administrative discretion or to remove officers tasked with implementing statutory duties. Although this view makes sense of the Opinions Clause, there is no historical evidence for it. The proponents of these two schools of thought have thus been locked in a decades-long stalemate, with competing and irreconcilable paradigms of total control or no control. This Article recovers another, lost way of thinking about presidential power. According to this conception, Congress can insulate inferior officers from removal because they must follow orders. As for principal officers, the President can remove but not control them, at least not directly. There is no constitutional obligation on the part of principal officers to obey; the only inducement is the threat of removal. The Opinions Clause, far from being superfluous, then assures the President the power to acquire information to exercise intelligently the power to remove. In addition to this account's textual and structural virtues, it appears to have been a relatively widely shared understanding of presidential power at the Founding, enough so to be within the range of plausible original meanings. This understanding of executive power may seem overly formalistic, but it is functionally more desirable than the two competing accounts that allow for total control or total balkanization.

1. INTRODUCTION

There are two conventional conceptions of executive power and presidential supervision of the administrative state. According to the first, all statutory discretion is ultimately the President's, who by virtue of the Constitution's grant of executive power can direct and remove all officers of the United States (Calabresi & Prakash 1994; Prakash 2003; Calabresi & Yoo 2008, 14; McConnell 2020, 145–48, 161–69). This conception, favored by formalists and originalists, raises the specter of an imperial presidency, one in which the President has illimitable control over domestic policy as determined and executed by administrative agencies (Crouch et al. 2020).[1] It advances what some see as an anti-administrativist agenda among modern scholars and judges who seek to take power away from agencies and place it in the President, in Congress, or in the courts (Metzger 2017, 17–20).

This conception also has a possible textual problem: the Opinions Clause, which empowers the President to "require the Opinion, in writing, of the principal Officer in each of the executive Departments,

* University of Minnesota Law School. E-mail: iwurman@umn.edu. Thanks to John Dehn, John Harrison, David Lewis, Robert Miller, Sai Prakash, Kevin Stack, and Matthew Wiener; and to the University of Chicago law faculty, the University of Minnesota law faculty, to the participants of the fourteenth annual constitutional law colloquium at Loyola University Chicago School of Law, to the participants of the 2024 Stanford Constitutional Law Center workshop, and to the participants of the 2024 national conference of constitutional law scholars hosted by the University of Arizona. Special thanks to William Harren and Maxwell Steinberg for research assistance.

[1] For a classic statement of the "imperial presidency," though largely in the foreign affairs and military context, see Schlesinger 1973.

upon any Subject relating to the Duties of their respective Offices."[2] In *Seila Law LLC v. Consumer Financial Protection Bureau* (140 S. Ct. 2183 (2020)), the majority of the Supreme Court held that the Constitution prohibited Congress from providing for-cause removal protections for a principal officer who is the sole head of a department. In dissent, Justice Kagan invoked the Opinions Clause in support of her criticism of the prevailing formalist conception of executive power: "For those in the majority's camp, that Clause presents a puzzle," she argued. "If the President must always have the direct supervisory control they posit, including by threat of removal, why would he ever need a constitutional warrant to demand agency heads' opinions? The Clause becomes at least redundant—though really, inexplicable—under the majority's idea of executive power." (Id. at 2227 n.3.).

Lessig and Sunstein (1994) stated this argument forcefully in the modern academic literature,[3] an argument which goes back at least to a letter (Lee 1789) from Richard Henry Lee, then a Senator, to Samuel Adams, on August 8, 1789, after the famous removal power debates. "It has been labored" in the Senate, Lee wrote, to increase the power of patronage by giving to the President "the sole right of removing all officers at the pleasure, under a fancy that such was the fair construction of the Constitution."[4] But "for what purposes can it be imagined" that the power to demand opinions was given, "if the same instrument designed that he should remove these Executive Officers at pleasure?" (Id.) "The absurdity" to Lee seemed "too strong" because "[t]he greater" power of removal includes "the less[er]" power, and therefore it must be an erroneous construction of the constitution "to suppose it gives the P[resident] a right of removal at pleasure." (Id.) No majority opinion, and no other Justice, has so much as mentioned this issue of the Opinions Clause in any of the Court's major executive power decisions of recent years (United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021); Collins v. Yellen, 141 S. Ct. 1761 (2021); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010); Morrison v. Olson, 487 U.S. 654 (1988)).[5]

The formalist scholars who believe the President has a constitutionally inherent power to control and remove executive officers have come up with a variety of explanations for the Clause, but none is fully persuasive. Some, like Calabresi and Prakash (1994, 603), accept that "the Opinions Clause is probably superfluous" because "the President has the constitutional authority to execute federal law" by virtue of the Executive Vesting Clause. Alexander Hamilton also thought the Clause was superfluous (Rossiter 1961, 447). Or perhaps it serves a confirmatory purpose (Calabresi and Prakash 1994, 634; Lawson and Seidman 2008, 47). Amar (1996, 659) argues that without the Clause, "a (bad but plausible) argument could have been made that Congress could pass laws preventing Cabinet officers from reporting specially to the President." McConnell (2020, 244–45) and Lawson (2006, 44–45) have made similar points. If the President has the power to control through the Executive Vesting Clause, however, then such an attempt by Congress would not at all be plausible; thus, on that account, the Clause would still be superfluous or merely confirmatory. Amar (1996, 654–66) and Calabresi and Prakash (1994, 634) also suggest that the Opinions Clause may be a "limitation" by confining the power to executive officers and to executive duties.[6] This is also not convincing, however, because in the absence of the Clause it is not clear why the President would have the constitutional power to demand an opinion about private business affairs, or to ask for opinions from legislative or judicial officers. Or, more precisely, the President can ask, but there would be no constitutional obligation on the part of the officer to obey.

None of that is to say the above conception of the presidency is necessarily wrong. McConnell (2020, 244, 264–65) suggests that the Clause may be more or less an accident of drafting history, originating from a draft that provided the President was not to have a privy council that obscured the President's responsibility. On this reading, the Clause would still be superfluous, though perhaps salutary. And it

[2] U.S. Const. art. II, § 2, para. 1. The clause is sometimes referred to as the "Opinion Clause," in the singular. Although the clause uses the singular, it seems more natural to refer to opinions in the plural because the President may seek multiple opinions, and from all the principal officers.

[3] "What possible reason could there be for providing the President with a constitutional power to demand written reports from officers over whom he already had an inherent power of control?" Id., 32. A. Froomkin (1987, 800), Murray (2018, 234), and Manning (2011, 2035) have made this argument as well.

[4] As far as I know, this letter has only been cited once in the relevant literature, in Bamzai and Prakash (2023, 1800 & n.310).

[5] Nor was it discussed in either *Humphrey's Executor*, the foundational case approving independent agencies, Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (upholding independent agencies), or *Myers*, the leading case confirming a presidential removal power over officers appointed by and with advice and consent, Myers v. United States, 272 U.S. 52 (1926).

[6] That is how the Supreme Court Justices treated the Clause when refusing to offer an advisory opinion on questions of treaty interpretation (Patrick 2007, 392–93). But nothing would have required them to provide advisory opinions to the President even in the Clause's absence.

is certainly possible to conceive the Clause in a non-redundant way. Even if the President can direct administration, that is not necessarily the same thing as compelling a subordinate officer to speak. Perhaps the President could remove an officer for failing to provide information, but it is obviously a more sensible constitutional system to require those officers to provide information in the first place so that the President can then make informed decisions about law execution or removal. Yet the Clause would still be "minor" (Taft 1916, 29), or "trifling" (Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640–41 & n.9 (1952) (Jackson, J., concurring)).

The second prevailing conception of executive power is that the President has the constitutional right neither to direct and control officers nor to remove them; or at least, Congress can structure the executive branch under the Necessary and Proper Clause to limit the President's ability to do either (Shane 2022, 114–17; Kitrosser 2014, 148, 249). More specifically, several scholars have observed that Congress may by law create duties for officers and that absent statutory authorization, the President may only oversee but not control those officers in the exercise of those duties (Strauss 2007; Stack 2006; Kagan 2001; Farina 1997; Rosenberg 1989). Many of these scholars accept further, however, that Congress may also restrict removals (Strauss 2007, 716; Rosenberg 1989, 689).

The proponents of this view take Richard Neustadt's memorable phrase that the President's power is merely the "power to persuade," and elevate it to constitutional status (Neustadt 1990, 10–11, 29–32).[7] Professor Peter Strauss, in his seminal article on the place of agencies in our tripartite system (1984, 646–47), articulates this view and argues that the Opinions Clause allows the President an opportunity "to mobilize the remainder of government to respond to the measure being taken," but which measure the President cannot direct nor apparently control through the possibility of removal. Then-Professor Elena Kagan (2001, 2324) described the President under this view as having "'procedural' supervisory authority over administrative officers, enabling the President to demand information from and engage in consultation with them." The President can then "offer advice" to the agency head (id., 2325). The problem with the power-to-persuade conception of executive power is that it gives the President only trifling power when it comes to domestic administration. Some scholars have observed that the Opinions Clause would be useless if the President did not have the constitutional power to do something substantive with the information given (Miller 1986, 62; Proto 1979, 201). More importantly, there is no historical support for this conception. As section 2 below shows, the founding generation universally believed that the President would have the power to superintend the execution of the laws—and superintendence implies much more than mere persuasion.

The two sides of this perennial debate have thus been locked in a stalemate between two paradigms, one of total presidential control and the other of total congressional power to create agency independence and balkanize administration. Each has textual, structural, or historical shortcomings, which explains the stalemate. Each also has functional shortcomings. As Edward Corwin observed (1957, 80–81), if the President could always "substitute his own judgment for that of the agency regarding the discharge" of statutory duties, that would "invite startling results." It would "render it impossible for Congress… to leave anything to the specially trained judgment of a subordinate executive official with any assurance that his discretion would not be perverted to political ends for the advantage of the administration in power." But the other alternative "would hold out consequences equally unwelcome." Such a view would "leave it open to Congress so to divide and transfer 'the executive power' by statute" so as to create effectively a parliamentary despotism.

This Article proposes to recover an older conception of executive power, remarkably consistent with the historical record, that is now lost to us, and which has the potential to advance the debate. This conception appears to have been shared by, among others, George Washington, Thomas Jefferson, James Madison, William Wirt, Daniel Webster, William Howard Taft, and the First Congress. And it charts a path between the two equally unwelcome paths against which Corwin cautioned.

According to this older understanding, the President may remove principal officers but, in the absence of statutory authority, may not direct them in the exercise of their statutory duties. Or, more precisely, there would be no constitutional obligation on the part of the officer to obey; only the threat of removal would induce compliance. The Opinions Clause then ensures that in at least one respect, there will always be a constitutional obligation to obey; principal officers must always give the President

[7] Neustadt's study was not of the President's formal, legal powers, but rather of the President's personal influence (id., ix, 7 & n*, 10-11). Neustadt's claim (simplified here) was that whatever formal powers of direction the President might have, formal powers are not enough to influence outcomes.

opinions in writing so that the President may intelligently exercise the power to remove.[8] As for inferior officers, their constitutional status requires that they obey their principals, which is why Congress can give them removal protections. To be sure, some scholars have pointed out that the President's only power to direct is what can be induced with the threat of removal (McConnell 2020, 349; Rao 2014, 1234–43). This is how the executive branch operates in practice; the President does not personally execute the duties of subordinate officers. Both these scholars believe that the President has a constitutional *right* to control other officers' discretion and argue that removal is sufficient for that purpose (McConnell 2020, 347–49; Rao 2014, 1241-43). Under the account offered here, the President does not have a constitutional right to demand obedience.[9]

This account may seem overly formalistic. Corwin (1957, 89-90) also famously observed of Chief Justice Taft's opinion in *Myers v. United States* that it created a "paradox," namely that "while the Constitution permitted Congress to vest" quasi-judicial duties "in executive officers, in the performance of which they were to exercise their own independent judgment, it at the same time permitted the President to guillotine such officers for exercising the very discretion that Congress had the right to require!" Corwin failed, however, to appreciate the practical difference between removal and control, which this Article elucidates. The political cost of removal is higher than merely directing an officer who is otherwise inclined to disobey. And the political costs increase further still depending on the propriety or lawfulness of giving such directions. The difference between a constitutional culture in which it is believed that principal officers are constitutionally obligated to obey the President and one in which such officers must independently exercise their statutory duties is significant. And aside from these important functionalist considerations, this account makes sense of much historical evidence, and of the Opinions Clause. More tentatively, it may also give renewed importance to the Pardon Power (U.S. Const. art. II, § 2, para. 1).

Simply put, both prevailing conceptions of presidential power are likely myths. Very few Founding-era Americans seem to have understood the President to have total control over the federal administrative apparatus, and very few (if any) believed the President had no constitutional right to control the administrative apparatus at all. The evidence suggests that the better view may be that Congress can grant independent duties and restrict the President's power to control principal officers directly, but cannot restrict removal, the ultimate tool of superintendence. This account not only makes sense of much text and history but is also remarkably consistent with how the American government works today in practice. It is at least one conception of the original presidency within the range of plausible original meanings insufficiently explored in the literature. This Article advances the evidence for it.

Section 2 begins with principal officers. It argues that "the executive power" is the power to carry law into execution, but not necessarily personally. Thus, the executive power includes the power to appoint and remove those officers who are to assist in law-execution. But it does not necessarily include the power to control them in their duties while they remain in office. At least that is the view shared by thinkers as varied as William Wirt, Daniel Webster, William Howard Taft, and possibly George Washington, Thomas Jefferson, and James Madison. And it would make sense not only of the Opinions Clause but also of a series of statutes in 1789 specifying that principal officers were to follow the instructions of the President. Congress sought in these statutes to avoid the implication that it was granting power that the Constitution already guaranteed; it would therefore be surprising if Congress inadvertently implied a discretionary grant of the power to control. The more likely explanation is that the President can in fact remove, but in the absence of congressional authority cannot directly control—or, more precisely, the principal officer has no constitutional obligation to obey.

Section 3 attempts a relatively comprehensive and definitive account of the role of inferior officers and the precedent with respect to them. It argues that the relationship of inferiors to the principals is the inverse of the relationship of principals to the President: Congress can insulate them from removal, but the inferior officers must always obey the instructions of their principals. This Part canvasses legal and ordinary dictionaries, usage in the First Congress, and practice and precedent to demonstrate that what makes officers "inferior" is they are subject to the ongoing direction and control of a superior

[8] At least two scholars have observed that even if the President has the removal power, the power to command does not necessarily follow (Krotoszynski Jr. 2012, 1643; Percival 2001, 966). Neither explores this possibility in depth.

[9] An alternative possibility is that the President does not have the constitutional power to remove but does have the constitutional power to direct (Liberman 1989, 353–58). Certainly the executive power to oversee law execution can be understood to remain intact so long as the President has either the power to direct or the power to remove. The account presented here, however, makes more sense of more of the historical evidence.

officer, or to a superior officer's revisionary control. That is why Congress can likely restrict the ability of the principal officer from removing an inferior; the latter must regardless follow the instructions of the former. To be sure, one can imagine a world in which the President's superintendence over inferior officers remains intact through a parallel mechanism in which principal officers can always remove but not necessarily direct the inferior officers. But the inverse mechanism happens to be the one supported through much of our history, and it helps make further sense of the Opinions Clause, which suggests no requirement of obedience but applies only to principal officers.

Section 4 explores some implications. This account would allow for administrative agencies to which Congress could assign duties, and the officers exercising those duties would be liable to the law and could be required to exercise independent judgment; they would not have any constitutional obligation to obey the President's instructions, except for requests for opinions in writing. To be sure, the President could always remove; that is a powerful and important check, but as this Article will explain that check is widely understood to have different costs and implications than a power of direct control. And much of the civil service as currently structured is likely constitutional because the agency heads review adjudicatory decisions and generally must sign off on regulations. Finally, this Part offers a solution to the problem of dual for-cause removal, at issue in the Supreme Court this term in *Securities & Exchange Commission v. Jarkesy* (No. 22-859). It suggests that if the Supreme Court adopts the same solution that it did in *Free Enterprise Fund v. Public Company Accounting and Oversight Board* (561 U.S. 477 (2010)), namely eliminating the second layer of for-cause removal, then it will be committing a double constitutional error. The second layer is perfectly constitutional. It is the first layer, if any, that is problematic.

2. THE PRESIDENT AND PRINCIPAL OFFICERS

This part begins with the proposition that the President cannot personally execute the laws in the absence of congressional authorization. By the eighteenth century, this was the rule under the British Constitution as powerfully illustrated by Sir Edward Coke's tussle with King James I. There is no reason to think eighteenth-century Americans understood "the executive power" to include personal execution as opposed to overseeing the execution of the law by others. A corollary of this power to oversee the execution of the laws, however, was the power to appoint and likely to remove officers who assisted in execution. That makes sense: if the monarch was responsible for the execution of the laws but could not execute those laws personally, there had to be an ability to appoint and remove those who did. This law of appointments and removals appears to have remained intact in the colonies and early American states.

That then raises the following question: did officers appointed by the President have a constitutional obligation to obey the chief magistrate? This question is difficult to answer for a few reasons. First is that the President could always instruct the officers and threaten to remove them. That many officers would have obeyed instructions (or be removed) does not answer the precise question of whether there was a constitutional obligation of obedience. And the most prominent officers were often understood to be extensions of the chief magistrate; in Chief Justice Marshall's terms, they "aid him in the performance of" certain "important political powers," and therefore "act by his authority and in conformity with his orders" (Marbury v. Madison, 5 U.S. 137, 165–66 (1803)). The range of relevant evidence is thus somewhat narrow: it will tend to involve situations in which an officer is removed for disobedience, or where there was no norm of obedience and instead a recognition that the President could not personally interfere in specific decisions.

What limited evidence exists, however, is instructive. Many presidents seemed to think that at least with respect to certain duties they could remove officers but not necessarily interfere with their execution of those duties. That would explain the relevance of, or give renewed importance to, the Opinions Clause. Although as a general matter officers will be moved by threats of removal, they will not always; the Opinions Clause ensures that the President's authority will have to be followed in at least one respect, namely the giving of information so that the President can, if necessary, responsibly exercise the power to remove.

2.1 Personal Execution

It was almost certainly the understanding of "the executive power" at the Founding that the President could not personally execute the laws, at least those that involve the private rights of citizens. In a

famous dispute with King James I, who wanted to adjudge certain cases personally, Sir Edward Coke exhorted that the king could not personally sit in judgment in cases where the life, liberty, or property of the subject was at issue. Nor could the king personally make arrests because of his sovereign immunity; the use of officers was therefore critical if the subjects were to have legal remedies for wrongs done to them at the hands of executive officers. The meaning of the executive power therefore translated more or less to "the power to oversee the execution of the laws."

2.1.1. *From Coke to Blackstone*

The king's personal execution of the laws came into question in a famous dispute between Edward Coke, then Chief Justice of the Court of Common Pleas, and King James I in 1607 or 1608.[10] The Archbishop of Canterbury, Richard Bancroft, "had appealed to the king to decide a matter in dispute between him and the judges, on the ground that the judges being merely delegates of the crown, James might draw the case out of the courts and hear it himself" (Usher 1903, 664). The king summoned the common law judges to a meeting; in all likelihood, Coke pushed back against the king but ultimately prostrated himself after the king flew into a rage (id., 674–75). The details of this and related meetings matter less than what Coke left for posterity. He wrote an account of the encounter, supplying needed precedents to support his position, which after his death was translated from law French into English and published in 1656 (id., 665).

According to that account, in what is described as the Case of Prohibitions of the King, "the Question was made" whether in any case "in which there is not express Authority in Law, the King himself may decide it in his Royal person; and that the Judges are but the Delegates of the King, and that the King may take what Causes he shall please to determine, from the Determination of the Judges, and may determine them himself" (Coke 1777, 105 [63]). Coke and supposedly the other judges answered that "the King in his own Person cannot adjudge any Case, either criminal, as Treason, Felony, &c. or betwixt Party and Party, concerning his Inheritance, Chattels, or Goods, &c. but this ought to be determined and adjudged in some Court of Justice, according to the Law and Custom of England" (id., 105-06 [63]–[64]).

Coke went on to report that "the Judges informed the King, that no king after the Conquest assumed to himself to give any Judgment in any Cause whatsoever, which concerned the Administration of Justice within this Realm, but these were solely determined in the Courts of Justice," and then added as support that "the King cannot arrest any Man… for the Party cannot have Remedy against the King" (id., 106 [64]). Coke then cited precedents for that proposition. Coke proceeded to cite Magna Charta and the various statutes of Edward III respecting due process of law (id.), before famously stating that although the King has reason as much as judges do, the life, liberty, and property of the subject "are not to be decided by natural Reason, but by the artificial Reason and Judgment of Law," which "requires long Study and Experience" (id., 107 [64]–[65]). Coke then stated that the law "protected his Majesty in Safety and Peace," which "greatly offended" the King because it implied the King was "under the law," to which Coke responded by quoting Bracton for the proposition that the King is under both God and the law (id., 107 [65]).

It would not be overstating to say that Coke's dispute with James I directly led to the Act of Settlement of 1701, which provided that the commission of judges shall be *quamdiu se bene gesserint*, during good behavior (12 & 13 Wm 3 c.2). That Act effectively separated the judicial power—the power to adjudge the kinds of cases that Coke described, namely the power to divest a subject of life, liberty, or property—from the more general executive power.

Prior to the Act of Settlement, however, the judicial power was merely a subset of executive power, and even afterward the two powers were not entirely distinct (Vile 1998, 31-33). Blackstone, for example, wrote in the eighteenth century that the king has "the whole executive power of the laws," but because "it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust," it was necessary that "courts should be erected, to assist him in executing this power" (1765, 267). Montesquieu also described "the executive [power] in regard to matters that depend on civil law" as the "judiciary power" (1748, 157). And one of the complaints against the king in the Declaration of Independence was that "[h]e has made Judges dependent on his Will alone, for the tenure of their offices" (1776, para. 11). For Americans of the revolutionary era, judicial and executive

[10] The episode is dated in Coke's posthumously published reports to 1607, but it may have occurred in 1608 (Usher 1903, 670).

power were still blended, even though they recognized the importance of separating these strands of executive power.

The upshot is that the king could not exercise at least this part of the executive power personally. But Coke's report goes beyond even this narrow "judicial" piece of the executive power, citing cases for the proposition that the king cannot personally make an arrest because if the king does so wrongfully, sovereign immunity would bar any recovery (Coke 1777, 106 [64]). Thus it was the king's officers who typically executed the laws affecting the life, liberty, and property of the subject, and those officers could be held liable at law (Seidman 2005, 430–37; Jaffe 1963, 1–2, 9; Pugh 1953, 479–80; Watkins 1927, 39; Pollock and Maitland 1898, 515–18). Blackstone agreed that although "the king himself can do no wrong," ministers and other officers could, and therefore they "may be examined and punished" (1765, 267). Otherwise the law would "define a[] possible wrong, without a[] possible redress" (id.). Other treatise writers agreed (Bagshaw 1660, 105; Hale c. 1640, 107 [146]). These principles remained so ingrained in the eighteenth century that Blackstone, as noted above, wrote that it was not only impossible but also "improper" that the monarch "should personally carry into execution" the executive power of the laws.

2.1.2 *The American Founding*

The leading proponent of the theory that the President can personally execute all laws, Professor Prakash, recognizes that the king could not personally execute the laws in England (2003, 717). Prakash argues, however, that the rule was likely different in America. Prakash first argues that "[f]or over two centuries, Congress has clearly accepted presidential execution by vesting some decisions solely with the president" (id., 718). But if the President could personally execute the law, there would seem to be little need to assign specific law-execution duties to the President. Prakash additionally argues that "[u]nlike the English monarch, our chief executive is not above the law," but rather "is subject to judicial process before Congress (in impeachment proceedings) and before the courts (in suits brought by individuals)" (id.). Yet it is hardly clear that the President was not immune from suit. Early sources suggest that although the President might have been liable at law for his private wrongs, he was not liable for his public wrongs except through impeachment (Elliot 1836, 2:480; Maclay 1890, 167; Story 1833, 418-19 [§ 1563]).

It would be surprising if the Americans understood the executive power to include personal execution of duties vested in subordinate officers in the absence of legal authorization. Both Coke and Blackstone were hugely influential on the Founders. Modern commentators have pointed out Blackstone's influence (Wurman 2020, 104 & n.37). James Madison, for example, said in the Virginia ratifying convention that "Blackstone's Commentaries" was a "book which is in every man's hand" (Elliot 1836, 3:501). As for Coke, John Adams called him "our judicial oracle" (Wilstach 1925, 131). Thomas Jefferson wrote about the influence of both (Appleby and Ball 2004, 58). Coke's reports, which contain the Prohibitions del Roy, were the most widely distributed law reports in America in this period.[11] And on the question of personal execution, both Blackstone and Coke agreed.

Some insight might also be gleaned from the letters of George Washington. In a letter from Washington on May 25, 1789, that has been often cited in the literature, Washington wrote that "[t]he impossibility that one man should be able to perform all the great business of the state, I take to have been the reason for instituting the great departments and appointing officers therein, to assist the supreme magistrate in discharging the duties of his trust" (Ford 1891, 397-98). In that same letter, he refused personally to negotiate a commercial agreement with a foreign diplomat. Washington wrote that his ignorance of commercial matters, even "if there had been no other circumstance that merited a consideration, would be a conclusive reason for preventing me individually from entering upon any kind of negotiations on that subject" (id., 396).

But Washington did supply another consideration: he did not think anything should be done without the head of the relevant department. Washington made clear that he did not mean to suggest that it would "be beneath the dignity of a President of the United States occasionally to transact business with

[11] In a census of lawbooks from colonial Virginia, of 263 copies of 87 identified law reports, "the most popular of reporters was Sir Edward Coke," 18 copies of whose reports were found (Bryson 1978, xii). The census is based "on printed sources plus two manuscripts," principally inventories of decedent's estates (id., x). Unfortunately, the probate records of Williamsburg, the colonial capital and seat of the General Court, were lost to fire (id.). Presumably there would have been many more copies of Coke's reports found there.

a foreign minister" (id., 398). But he was concerned about "in what light the public might view the establishment of a precedent for negotiating the business of a department, without any agency of the head of the department, who was appointed for that very purpose" (id.). And earlier in the letter he had explained that he has "been taught to believe, that there is in most polished nations a system established, with regard to the foreign as well as the other great departments, which, from the utility, the necessity, and the reason of the thing, provides, that business should be digested and prepared by the heads of those departments" (id., 397).

This letter points to important reasons why the monarch, or the President, might not have been able to execute the law personally. It has been often observed (as in Washington's letter) that the chief magistrate cannot possibly execute all of the laws alone. But even if it were possible, it would not be wise. That is because as the numerous branches of legislation expand, the President cannot hope to have the necessary expertise. Washington was ignorant of commercial matters; that is why ordinarily the relevant officers should conduct the relevant business. That is similar to what Mathew Hale wrote in his seventeenth-century work on the royal prerogative: "the weight, multiplicity and variety of the occasions and emergencies of a kingdom doth necessarily require assistances" for the king, at least in the sense that he needed councilors (Hale 1976, 105).

None of this conclusively established that the President could not personally execute the law in the absence of congressional authorization. But Washington seemed to believe that the duties assigned to the respective departments should be executed by the officers appointed to those departments, though with his superintendence. A June 8 letter to John Jay, who was still serving as a carryover secretary of foreign affairs, further supports this account. Washington sought information in writing about the state of the department because he sought "insight into the business and duties of that department" (Ford 1891, 400-01). That is still not conclusive, but Washington seems to have understood that other officers and departments had duties that could only be exercised by those officers and departments.[12]

On the other hand, Washington did seem to believe he could personally execute certain duties in the absence of the proper officer having been appointed, or simply in the officer's absence. Professor Prakash highlights at least one example of President Washington personally executing the laws when the department heads were away (Prakash 2015, 98). And Washington's letter to Gouverneur Morris in October of 1789, instructing him on several points of negotiation with England, is another example. In an accompanying letter setting out Morris's credentials and authorization to conduct diplomacy on behalf of the United States, Washington explained that "[t]his communication ought regularly to be made to you by the Secretary of State; but, that office not being at present filled, my desire of avoiding delays induces me to make it under my own hand" (Ford 1891, 441). If the office had been filled, however, it is ordinarily that officer, not the President, who executes its duties.

The statements from other leading figures in the Founding generation, or who were influential on them, are generally consistent with the idea that the President or chief executive's power was to oversee rather than personally execute the laws. John Locke, in the Second Treatise, wrote that because the laws need a perpetual execution, there must be a power always in being "which should see to the *Execution* of the Laws that are made, and remain in force" (Locke 1689, 325). This power to "see to" law execution is consistent with a power to superintend via the ability to appoint and remove those who execute the laws. Blackstone also suggested that executive power was the power of "enforcing the laws" (Blackstone 1765, 142), but we already know that this did not mean that the king could personally execute all of the laws. In the Constitutional Convention, the delegates agreed that executive power was the "power to carry into effect[] the national laws" and "to appoint to offices in cases not otherwise provided for" (Farrand 1911, 1:67, 70).

The Constitution, of course, provides (art. II, § 2, para. 2) that the President shall "take care that the laws be faithfully executed," a recognition that other officers would be doing most of the execution (McConnell 2020, 145). When writers spoke of this clause, or the importance of unity in the person charged with executing the laws, they tended to confirm that the relevant power was to "superintend" or "see to" law execution. At the Virginia Ratifying Convention, Edmund Randolph argued, "All the enlightened part of mankind agree that the superior dispatch, secrecy, and energy with which one man

[12] In another letter on January 21, 1790, to Thomas Jefferson, he wrote, "I consider the office of secretary for the department of state very important on many accounts, and I know of no person, who in my judgment could better execute the duties of it than yourself" (Ford 1891, 468).

can act, renders it more politic to vest the power of executing the laws in one man" (Elliot 1836, 3:201). That is why the President was vested with an uncontroversial prerogative: "[t]o see the laws executed," a power which "every Executive in America has" (id.). And James Wilson said in the Pennsylvania's ratifying convention that a power "of no small magnitude" with which the President was entrusted was the power to "take care that the laws be faithfully executed" (id., 2:513). William McClaine of North Carolina similarly explained that his power was to "take[] care to see the laws faithfully executed" (id., 4:136). James Iredell in the same ratifying convention: "The office of superintending the execution of the laws of the union, is an office of the utmost importance" (id., 4:106).

The Anti-Federalists agreed: The President had "mighty power[]" to "take care, that the laws be faithfully executed" (Storing 1981, 8:203). His power was "to see [the laws] duly executed" (id., 3:149). The Federal Farmer wrote that in every state the "the execution of" the laws was left "to the direction and care of one man," because one man "seems to be peculiarly well circumstanced to superintend the execution of laws with discernment and decision, with promptitude and uniformity" (id., 2:310). Here the power was described as the power to "superintend." The same writer wrote just a few pages later that the chief executive "must execute" the laws (id., 2:314).

Even Hamilton described the power as one of superintendence. He wrote that officers to whom "different matters are committed"—implying that it is they who must exercise discretion—"ought to be considered as the assistants or deputies of the chief magistrate, and on this account, they ought to derive their offices from his appointment, at least from his nomination, and ought to be subject to his superintendence" (Rossiter 1961, 436). And in Charles Pinckney's speech on the draft Constitution, Pinckney argued that the President was empowered when necessary "to inspect" the various executive departments "as a check upon those Officers" and keeping them "attentive to their duty," giving the President the ability to "prevent[] and correct[] errors" and to "detect[] and punish[] mal-practices" (Farrand 1911, 3:111).

In sum, most knowledgeable American lawyers likely understood that the President would not have the power to execute the law personally, at least not without congressional authorization. The President's power was one of superintendence. To be sure, superintendence and personal execution are not mutually exclusive. The point here is only that there was widespread agreement that the President would superintend law execution by others, and agreement among authoritative sources that the British monarch could not personally execute the laws. There is little direct evidence that the President was thought to be able to personally execute the laws unless there was a vacancy or absence of the relevant officer.

2.2 Overseeing Execution

The inability of the monarch (or the President) personally to execute the laws explains why in both Britain and America the appointment and removal of officers were understood to be part of "the executive power" to oversee the execution of the laws. More precisely, the power to appoint was understood to be part of the power to oversee the execution of the laws, and it was a well-established maxim that one who appoints may also remove—if for no other reason, than merely by virtue of making a new appointment. Thus, both appointment and removal were essential to guarantee the ability to "superintend" or "see to" the execution of the laws. Whether Congress has any power to derogate from this default rule—for example by creating offices not held at pleasure—must also be examined.

2.1.1. Appointments

Beginning again with the British arrangement, Blackstone wrote that the king has "the right of erecting courts of judicature" because although "the constitution of the kingdom hath entrusted him with the whole executive power of the laws, it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust," and thus it was "necessary, that courts should be erected, to assist him in executing this power" (Blackstone 1765, 257). The king nominated the judges (id., 259). As to "officers," Blackstone wrote that "the law supposes, that no one can be so good a judge of their several merits and services, as the king himself who employs them," from which principle "arises the prerogative of erecting and disposing of offices" (id., 262). Charles, I argued that "[h]e cannot perform the Oath of protecting His people if He abandons this power, and assume others into it" (Parker 1642, 38; Mortenson 2020, 1325). That hardly meant that there were no exceptions to this power of appointment as established by statute or tradition; the U.S. Constitution after all also makes an exception to

the general rule. However the default was that the power to oversee the execution of the laws required the power to appoint.

Giles Jacob was a British writer particularly influential in America. He wrote a law dictionary in 1729, with several editions including one in 1782. The law dictionary was the "fourth most popular of all law books available" in colonial Virginia (McDowell 2010, 172; Johnson 1978, 61; Bryson 1978, xvii). It appears to have been the "most widely used English law dictionary" of the period (Levy 1997, 854; Bryson 1978, xvi, xvii). The dictionary has been found in the libraries of Francis Dana, John Mercer, Robert Treat Paine, St. George Tucker, Theophilus Parsons, and John Adams, among other luminaries (Johnson 1978, 33). And in 1736 Jacob first published a popular treatise, "Every Man His Own Lawyer" which was republished in New York in 1768. Although not as popular as the law dictionary, it was in relatively wide circulation in colonial Virginia (Bryson 1978, xv). A prolific author, Jacob also published a treatise, Lex Constitutionis: or, the Gentleman's Law, in 1719, in circulation in colonial Virginia but not to the extent of his other two works (id., 57).

In the 1782 edition of his law dictionary (and in editions dating back at least to 1736) Jacob wrote that the king "names, creates, makes and removes the great officers of the government" (Jacob 1782, 544; Jacob 1736, 417).[13] And in both above-cited editions of Every Man His Own Lawyer, he wrote an identical passage (Jacob 1736, 376; Jacob 1768, 239). A 1760 published text by Owen Ruffhead, who lamented ministerial usurpations, made a nearly identical statement and declared these prerogatives to be the "chief" among the royal prerogatives (Ruffhead 1760, 20). Jacob also wrote that the "power of appointing justices of peace is only in the king" (1768, 254). And in Gentleman's Law, he wrote, "He [the king] hath alone the Choice and Nomination of all Commanders, and other Officers at Land and Sea, the Nomination of all Magistrates, Counsellors, and Officers of State" (1719, 72). The short of the matter is that the power of appointing was, as a general matter, part and parcel of the executive power. Although Parliament was supreme and could abrogate this default rule, it is the default that for present purposes is important.

The same default rule in America. Mortenson (2020, 1325) has canvassed numerous early American sources to conclude that "the executive power was often viewed as either logically entailing or functionally implying the appointment of 'assistances.'" For example, George Mason thought that the Senate should have no role in "the appointment" of "public officers" because it was an executive power (Storing 1981, 2:11). James Wilson thought similarly: "there can be no good Executive without a responsible appointment of officers to execute" (Farrand 1911, 2:538-39). In the Constitutional Convention, Madison argued that the "extent of the Executive authority" was the "power to carry into effect[] the national laws" and "to appoint to offices in cases not otherwise provided for" (id., 1:67), and Wilson similarly argued that "Extive. powers are designed for the execution of Laws, and appointing Officers not otherwise to be appointed" (id., 70).

Counsel in a 1771 case in Virginia argued that "[i]f then our acts of Assembly, erecting [an office] have not said by whom the nomination shall be, it will follow that the King, who is to see the law executed, must nominate persons for that purpose" (Godwin v. Lunan, Jeff. 96, 105 (Gen. Ct. Va. 1771)). The Antifederalist writer Hampden wrote that "the most important and most influential portion of the executive power" was "the appointment of all officers" (Jensen 1976, 667). Brutus, Centinel, and Richard Henry Lee, among others, agreed (Mortenson 2020, 1329-30 & nn.315-20). As did Publius: "the appointment to offices… is in its nature an executive function" (Rossiter 1961, 305). And Kenton Skarin, in a book manuscript on colonial executives, demonstrates that "[g]ubernatorial commissions, royal instructions, and royal charters" firmly established the appointment power in colonial executives and that the appointment of local functionaries such as justices of the peace and sheriffs "depended directly on the executive" (Skarin Unpublished, 139). For an executive that could not execute the law, and who had to rely on others to assist in law execution duties, the appointing power was essential.

2.1.2. *Removals*

The more controversial proposition is that the executive power included the power to remove. Recall the statement from Giles Jacob's prominent law dictionary: the king "names, creates, makes *and removes* the great officers of the government" (1782, 544). His law dictionary was the most prominent in America. However, very few writers on executive power on either side of the Atlantic wrote about

[13] I am indebted to the work of Jed Shugerman for introducing me to this quotation, which appears in several of Jacob's works.

removal at all. Shugerman (2024) has argued that it is "rare to find much discussion of removal power on the Founders' bookshelf" (id., 21) with the sole exception of Giles Jacob (id., 48 n.306), and concludes that executive power therefore did not include removal (id., 46). But there is an explanation for such silence, which Shugerman's other work provides (Shugerman 2023). The removal power followed from the proposition that the power to remove was incident to the power to appoint. Thus, the appointment power included removal by default because an officer could be removed by the very act of appointing someone new.

Shugerman has canvassed numerous authorities for this proposition. This tradition was "enshrined in Latin" maxims, "[u]numquoque dissolvitur, eodem modo, quo ligatur" and "[c]ujus est instituere ejus abrogare," translating to "[e]very obligation is dissolved by the same method with which it is created" and "whose right it is to institute, his right it is to abrogate" (Shugerman 2023, 820; Bickford 1988, 448-49). Shugerman found the former formulation or closely related phrases "in many eighteenth-century legal sources" (Shugerman 2023, 820 & n.373). The latter formulation "is in dozens of eighteenth-century treatises, including works by the famous republican Algernon Sidney" (id., 820 & n.374; Sidney 1751, 315).

Shugerman highlights still another formulation, "eodem modo quo oritur, eodem modo dissolvitur," which translates to, "[i]n the manner in which… a thing is constituted, is it dissolved," which is found in some modern legal dictionaries and some nineteenth-century cases (Shugerman 2023, 820 & nn.375-76). Other sources also support this maxim. Dalton's treatise on Justices of the Peace was also widely distributed in founding-era America (Bryson 1978, xvii; Johnson 1978, 17). It provided as to high constables that "[a]lso in such manner as they are to be chosen, in the same manner, and by the like Authority are they to be removed; for, *eodem modo quo quid constituitur, dissolvitur*" (Dalton 1666, 49). Other variants of the maxim included, "quo ligatur, eo dissolvitur" and "eodem modo, quo aliquid constituitur, destruitur," both appearing under the list of maxims in the 1676 reports of the influential Henry Rolle (Wallace 1882, 249-52), although not in the context of appointments (Rolle 1676, xxxv).

This maxim was so well engrained in the law that, in 1779, Thomas Jefferson wrote in a letter that "Lawyers know," as to "offices held during will," that "issuing a new commission" terminates the old one (Boyd 1951, 3:242). That explains why the power of appointment implied the power to remove—the possessor of the power could always make a new appointment. There are numerous examples from colonial Virginia of the governor-in-council removing individuals in the very commissions appointing new officers (Skarin Unpublished, 144 & nn.486-88). In one illustrative episode, the council "Ordered That a New Commission of the Peace Issue for the County of Lancaster and that Nicholas Martin & Henry Lawson who have refused to act be left out of the said Commission & that Abraham Currell & Thomas Pinckard be added in their Room" (Hall 1945, 105).

And in 1780 Thomas Jefferson wrote in a private note: "The power of appointing and removing executive officers inherent in Executive. Executive inadequate to every thing. Appoint deputies…. He who appoints may remove" (Boyd 1951, 4:281). On this point Alexander Hamilton agreed. When he appointed Tench Coxe as the assistant secretary of the Treasury pursuant to the act establishing the Treasury Department, he noted in the commission that he could remove Coxe even though the statute was silent (Bamzai and Prakash 2023, 1834; Syrett and Cooke 1962, 411). That, too, implies the understanding that the power of removal followed the power of appointment, a proposition the Supreme Court subsequently adopted (*Ex parte* Hennen, 38 U.S. (13 Pet.) 230, 253 (1839)), as did other prominent Americans like Daniel Webster and Chancellor Kent (Bamzai and Prakash 2023, 1834 n.573; Webster 1857, 483, 486-87).

The above discussion is not intended as a complete defense of removal because the thrust of the argument to come is that one can think, as most formalists do, that the executive power entails a removal power, but also that neither the grant of executive power generally nor the power to remove specifically necessarily implies a right of direction or control. But it is intended to make a small intervention in the removal debates because the scholars who have written about removal have generally not been attuned to the importance of the common law maxim.

For example, McConnell observes in his recent book on presidential power that in 1787, "[t]he Committee of Detail and the Convention addressed and allocated every other significant royal prerogative, but not the Removal Power," and he writes that "it is hard to see how it could have been neglected; it is crucial to the structure of the executive branch" (2020, 162). The maxim that removal follows from appointments supplies an explanation. When Madison and Wilson and others agreed that

the only power strictly executive in nature was the "power to carry into effect[] the national laws," and "to appoint to offices in cases not otherwise provided for" (Farrand 1911, 1:67), that *included* removal. That is because he who appoints also removes. The initial drafts of the Constitution to come out of the Committee of Detail assigned the appointment power over ambassadors and supreme court judges entirely to the Senate, and the appointment of other officers to the President alone (id., 2:183, 185). There was no need to think about removal at all; the Senate, acting alone, would remove ambassadors, and the President, acting alone, would remove other officers. The appointment power was not shared between President and Senate until the Committee of Postponed Matters in the final days of the Convention on September 4 (id., 2:495; McConnell 2020 79–80). The Framers had no time to think about the implications that sharing the appointment power would have for removal.

Thus, in the famous debates over the removal power in 1789, Representatives could draw two different conclusions from this maxim. Several Representatives believed that, because of this maxim, the President and Senate together had the power to remove, as both together had the power to appoint (Shugerman 2023, 821). Daniel Webster, reflecting on the debates in 1789, forcefully articulated this view in 1835 in a related debate over executive patronage (Whipple 1895, 400-01):

> If the power of removal, when not otherwise regulated by Constitution or law, be part and parcel of the power of appointment, or a necessary incident to it, then whoever holds the power of appointment holds also the power of removal. But it is the President and the Senate, and not the President alone, who hold the power of appointment; and therefore, according to the true construction of the Constitution, it should be the President and Senate, and not the President alone, who hold the power of removal.

Webster illustrated with his investigations into the practice of the government departments and observed that most removals were effected through the delivery of new commissions after new appointments had been made (id., 400).

Although logical, and obviously within the range of plausible original meanings, there are strong arguments against this position. Webster agreed that the Constitution might derogate from this general rule, as it does in the case of judges (id.). He was too quick to find the Constitution otherwise silent on this question. At least, others in 1789 pointed out that the Constitution could be seen as supplying another rule. Some representatives agreed with the maxim but maintained that it was the President who did the appointing and the Senate merely advised and consented to that act (Bamzai and Parkash 2023, 1775). Even James Madison agreed that in general "the power to annul an appointment is, in the nature of things, incidental to the power which makes the appointment" (Gales 1834, 496). He argued that if all the Constitution said on this score was that the President and Senate shall appoint, then he would agree that the President and Senate together must remove. Because the Constitution included both the Executive Vesting Clause and the Take Care Clause, however, he thought otherwise. The power to remove may follow from the power to appoint, but the power to appoint, and therefore the power to remove, are ultimately incidents of the executive power. And the "association of the Senate with the President in exercising" the appointment function "is an exception to this general rule" that the executive power is vested in the President, which exception does not apply to removal (id.).

The Take Care Clause further supports this proposition, implying the President has the power "necessary to accomplish" the duty of faithful execution (id.). That is perhaps the better argument—giving the Senate a check on removal effectively transfers the take care duty from the President to the Senate. If the President believes the laws are not being faithfully executed and seeks to remove an officer, but the Senate disagrees, the Senate would have the ultimate say over whether the laws are being faithfully executed. The Constitution seems to give that final say to the President. Thus, the senatorial position that Webster subsequently defended is difficult to square with this part of the Constitution's text. This analysis also suggests that although Congress has power under the Necessary and Proper Clause to establish offices, qualifications, duties, and tenure, its power would not extend to giving the Senate a check. Indeed, if Congress had the discretion to do so, it was not clear (as Madison said) why Congress could not give the House a veto on removals, or a committee of one House (id., 495-96).

In short, in 1789 there was general agreement with the maxim of law that the power to appoint included the power to remove. But one could draw two different conclusions: the "senatorial" view or the "presidentialist" view. Both are within the range of original meanings. The former view seems more consistent with the practice that removals are often effected by new appointments. The latter view makes

sense, however, if "the executive power" was understood to include the power to appoint and remove, and the appointment function was shared with the Senate but the removal function was not. And it makes good sense of the Take Care Clause because the senatorial view would seem to transfer the take care duty from the President to the Senate and give to the Senate what is effectively a legislative veto.

2.2.3. *Necessary and Proper Clause*

The above analysis is not intended to be a complete defense of the removal power. Nor does it immediately address whether Congress through the Necessary and Proper Clause can establish offices with statutory terms of years that are not held at will, and therefore to which the maxim that removal follows from appointment may not apply. Nor does it immediately address the propriety of for-cause removal protections, which do not share the President's removal power with the Senate but rather restrict the reasons for removal. A few scholars have argued that there is no presidential removal power precisely because in English history there were many offices that had various tenure protections. Birk (2021) and Shugerman (2024) have written about the history of property rights in offices in England. Some offices were hereditary, others were lifetime appointments; King James I had, for example, made Sir Francis Bacon the Attorney General for life. These scholars suggest that these ancient tenures are probative of Congress's powers over offices under the American Constitution. And Manners and Menand (2021) argue that for-cause removal restrictions are in fact "permissions" because if an office included a statutory term of years, the officeholder was otherwise guaranteed the office for the full statutory term.

There are several reasons, however, to be skeptical that the Necessary and Proper Clause provides the same flexibility to create such property rights. As an initial matter, many of the offices that enjoyed tenure protections did not seem to wield executive power as such. Most involved municipal or judicial functions (Wurman 2020, 142 n.205). Others were inferior officers—a subject taken up in section 3, and to which a different rule might apply. But even if some officers with tenure protections were understood as exercising executive power, the default rule was still that the removal power belonged to the monarch. That is why the Act of Settlement granting good behavior tenure to judges was necessary. Parliament, which was supreme and without any superintending written constitution, could modify the default rule. That Parliament could do so tells us little about whether Congress can do so under the Necessary and Proper Clause.

Both statutory terms and for-cause protections may be problematic under the U.S. Constitution. Shugerman (2024) explains that in England the monarch had a different mechanism for maintaining oversight of law execution: the power to create new offices to circumvent intransigent and unremovable officeholders. But the U.S. Constitution gives the power of office creation to Congress. The President must therefore have some other tool available to oversee the faithful execution of the laws. The British history of derogating from the default rule is simply inapplicable in a written constitutional system the provides the President must be able to oversee faithful execution of the laws but cannot create additional offices when necessary. As for for-cause removal provisions, at least if the judiciary has a final review over the relevant removals, such provisions effectively transfer the take-care duty to the courts, which runs into the same problem as before.

Granting tenure protections in England or in continental Europe may also have made sense because the power freely to appoint and remove ministers is a dangerous power in a monarchical government; Montesquieu described this power in the hands of a single sovereign as despotic (Shugerman 2024; Montesquieu 1748, bk v, ch. 19). It does not follow that in a republican government, where the President is accountable to the people through elections, there should be federal officeholders who similarly enjoy their office indefinitely or for a term of years. Manners and Menand (2021) further explain that Parliament sought to restrict property rights in offices and made such offices more responsible to the king over the course of the eighteenth century, as the British system became more republican. Parliament did so by establishing a term of years for many offices that shortened the tenure of the officeholder. Parliament then sought to allow for removal of officers even within the statutory term of years by allowing removal for specified causes. In other words, statutory terms of years and for-cause removal provisions were used in England to increase accountability and to reduce property rights in offices by eliminating hereditary or lifetime appointments.

A few propositions would seem to follow. First, Congress probably cannot create property rights in offices by creating a term of years during which time removal is impossible. That would interfere with the President's duty to take care just as much as would giving the Senate a check. And that

would effectively create a property right in office whether for a short term or for life. And it would be equally strange to think Congress could create a lifetime appointment during good behavior, which the Constitution does only for judges. It would be incongruent with republicanism to allow for an Attorney General or Secretary of State to serve for life, quamdiu se bene gesserint.

It was not until *Humphrey's Executor v. United States* (295 U.S. 602 (1935)), which involved an office that combined both a statutory term of years and a for-cause provision, that the Supreme Court upheld a form of property right in holding federal office. But if it is problematic to grant good-behavior tenure for life, then it is unclear why a statutory term of forty, or thirty, or fifteen years would be consistent with republican government. Perhaps good behavior tenure is consistent with republicanism if limited for a few years, and there comes a point at which the tenure is too long. The inability to draw such a line is a strong argument against the exercise altogether, at least if there is no other tool to ensure the ability to oversee the execution of the laws.

2.3. Instruction

Thus far we have established the following: the President cannot personally execute the law in the absence of statutory authority but can oversee law execution by others. This power requires the ability to appoint officers, and therefore to remove them when necessary. One need not accept the above conclusions about the removal power to accept the next step in the argument: that even if the President can remove it, it does not follow there is a right to control the discretion of the officer. The question, at first glance, is the President's power of instruction and direction. But this turns out to be the wrong question. The power to "talk" to someone is hardly a constitutional power at all. *Anyone* can speak. The real question is whether that person has the constitutional power to make good on what she says. To use an analogy, James Monroe could declare that the United States would oppose any European interference in the Western Hemisphere (Muller 1917, 721). But only Congress could make good on that threat by, for example, declaring war (U.S. Cont. art. I, § 8, cl. 11) or regulating foreign commerce (id., cl. 3).

Here, similarly, the President can always instruct. And, to be sure, the President could threaten an officer with removal for disobedience. But that does not quite answer the question: whether there is a constitutional obligation on the part of the officer to obey. The President could always be removed, and an officer would ignore the President at her peril, but that is far different from having a constitutional obligation to follow instructions. Not every disagreement over law execution will end in removal. And removals made for the purposes of improperly influencing an officer who is bound to exercise discretion by law might subject the President to impeachment. As Madison said, "the wanton removal of meritorious officers would subject [the President] to impeachment and removal from his own high trust" (Gales 1834, 498).

To be clear, there is no question that the President has superintendence over law execution; but it is entirely possible that the only power to superintend is the power to remove. Although some writers in the founding period did speak as though the President could "execute" the law, perhaps himself or by controlling officers, for the most part, as we saw above, the assumption was that the President's power was to "see to" the execution of law, or to "take care" that the laws be executed, or to "superintend" the execution of the laws. These formulations do not compel the understanding that principal officers have a constitutional obligation to obey commands. But they do presuppose some amount of presidential control.

Because few if any speakers confronted the precise question at the time, we must turn to other evidence. We first revisit the "Decision of 1789," and observe the remarkable fact that Congress provided that the principal officers of the war and foreign affairs departments were to follow the President's instructions. We then turn to several famous episodes in which a presidential removal power was assumed, but the power to direct or interfere was denied. To be sure, some of these incidents occurred three or four decades after the Founding, and the later in time the less probative such incidents are of original meaning. But the evidence from the 1820s and 1830s is largely consistent with the evidence from the first decade after the Constitution went into effect. The aim is to establish this conception of administrative control, if not the best and most probable original understanding of the presidency, as within the range of plausible original meanings.

2.3.1. *The Other Decision of 1789*

A few commentators have pointed out and debated the significance of the numerous early and more contemporary statutes that delegate authority to the President personally or that specify an officer is

subject to the President's direction. These statutes create the negative implication that the President cannot personally execute the law and cannot direct the discretion of other officers absent statutory authorization for doing so. Stack has argued that these statutes call into question then-Dean Kagan's argument that any statutory delegation to an executive rather than an independent agency should presume presidential control (2006, 274–76). Lessig and Sunstein go further and claim that the early statutes to this effect evince Congress's power to create independent agencies (1994, 27-30). Calabresi and Prakash, argue, however, that even when a statute did not specifically grant the President authority to direct, the President directed anyway (1994, 647–63; Prakash 2015, 187–89).

The most interesting statutes for present purposes are those creating the departments of foreign affairs and war, which were the subjects of the "Decision of 1789" discussed above. The former statute was taken up first. Madison moved that there shall be established a Department of Foreign Affairs, "at the head of which there shall be an officer, to be called the Secretary of the Department of Foreign Affairs, who shall be appointed by the President, by and with the advice and consent of the Senate; and to be removable by the President" (Gales 1834, 1:370–71). It is well known that the House soon debated the proprietary of removal, but it has been less remarked that the House also briefly debated the appointment mechanism. The Committee of the Whole agreed to the establishment of the department, "but when they came to the mode of appointing the officer," Representative Smith of South Carolina moved to strike the relevant words as "unnecessary," and because "it looked as if they were conferring power, which was not the case, for the Constitution has expressly given the power of appointment in the words there used" (id., 371).

Representative Page did not see any issue repeating the constitutional language (id.); Madison then noted that because it was always possible for Congress to vest the appointment of inferior officers in the President alone, it does not hurt to specify the mode of appointment, but that he would not object to striking the language (id., 371–72). Representative Lee implausibly suggested that this officer was in fact inferior, and so the mode of appointing was in the gift of the legislature (id., 372). Representative Smith then reminded his colleagues that this officer was the head of the department and therefore a principal officer, at which point the House agreed to drop the language (id.). In light of Smith's initial remarks, and particularly given Lee's suggestion that the appointment power was in the gift of the legislature, it is almost certain that the language was struck not only because it was unnecessary, but also because the House did not want to appear to be conferring a power not within its power to confer.

When it came to the provision that this principal officer was to be "removable by the President," the representatives, as noted above, debated whether principal officers had to be removed by the president with the advice and consent of the Senate or whether the Constitution vested that power in the president alone. They also debated whether Congress in its discretion could delegate that power to the president alone. With the various arguments on the table, the House devoted over five full days of debate to the question. After the first day, a majority agreed to retain the clause that the principal officer would be "removable by the President," (id., 371, 383) and further rejected a proposal to include the modifying phrase "by and with the advice and consent of the senate" (id., 382).

After the fifth day, the House altered the bill to ensure that, as with the appointment power, its language would not be construed as a conferral of the removal power. The amended provision stated that "whenever the said principal officer shall be removed from office by the President," the departmental papers would then be under the control of the department's clerk (id., 578). As Representative Egbert Benson, the sponsor of this amendment, explained, the alteration was intended "so that the law may be nothing more than a declaration of our sentiments upon the meaning of a Constitutional grant of power to the President" (id., 505). The amendment passed by a vote of 30-18 (id., 580), and the Senate agreed by a vote of 10-10, with Vice President John Adams breaking the tie (Maclay 1890, 116). Although some scholars contend that the congressional discretion group also voted for this language and therefore it was not a constitutional determination as to the President's executive power (Shugerman 2023; Currie 1997, 40–41; Corwin 1927, 362–63; Myers v. United States, 272 U.S. 52, 285–86 n.75 (1926) (Brandeis, J., dissenting)), almost all who spoke or wrote about this decision subsequently, even those who had opposed a presidential removal power, agreed that the House had made a constitutional determination as to the President's executive power (Bamzai and Prakash 2023, 1775-77).

Whatever one thinks of the implications of these votes, one cannot deny that in both the appointing and removing contexts the House was sensitive to the question of whether it would appear to be conferring a power that the Constitution already vested in the President. It is therefore significant that the

statute provided, in relevant parts, that the Secretary "shall perform and execute such duties as shall from time to time be enjoined on or intrusted to him by the President of the United States," and further "the said principal officer shall conduct the business of the said department in such manner as the President of the United States shall from time to time order or instruct" (1 Stat. 28, 29). Identical language was included in the bill establishing the War Department (1 Stat. 48, 50). Similar language was also included in the bill temporarily establishing a post office: "The Postmaster General to be subject to the direction of the President of the United States in performing the duties of his office, and in forming contracts for the transportation of the mail" (1 Stat. 70). And a proposal to establish a home department (Gales 1834, 1:666)—defeated because the Representatives believed its duties could be subsumed within the foreign affairs department, which later became the state department (id., 667-68)—would have provided a principal officer, one of whose duties would have been "to see to the execution of the laws of the Union," and which officer would "do and attend to all such matters and things as he may be directed to do by the President" (id., 666).

These provisions are telling. It would be surprising if after the efforts to ensure that Congress would not appear to be conferring either an appointing or a removal power that the representatives would say nothing at all about appearing to confer an instructional power. The most plausible explanation seems to be that the President obviously had the power to instruct—again, anyone can speak—but the question was rather the obligation of the officer to obey. Although the President has "the executive power," nothing in the Constitution specifically requires officers to obey the orders of the President, aside from the Opinions Clause. Thus, Congress's statutes had to provide specifically when such officers had to obey. In the absence of such a provision, the officers could always choose to listen to the President, who could always remove those officers; but there was no constitutional obligation.

Significantly, this episode also suggests that contrary to what some prominent scholars have said, even when it comes to powers thought to be intimately connected to inherent executive prerogatives such as war or foreign affairs, Congress still has at least some power to demand independent discretion. For example, Corwin distinguished between the statutes creating the departments of war and foreign affairs with the department of treasury, the latter of which was not required by statute to follow the President's directions, but rather Congress's instructions (Corwin 1957, 81). "The State and War Departments," he wrote, "are principally, although not exclusively, organs of the President in the exercise of functions assigned him by the Constitution itself, while the Treasury Department is primarily an instrument for carrying into effect Congress's constitutional powers in the field of finance" (id.). The First Congress's actions, however, suggest that although there may be a norm of giving the President wider discretion over the former category of functions than the latter, outside the actual direction of war once authorized or begun the distinction may not be of much constitutional significance.[14]

2.3.1 *Madison's Comptroller*

The discussion so far may be surprising; it may seem implausible to maintain that the President can remove but cannot, officially, control aside from threats of removal. It turns out, however, that something like this account was shared by a diverse group of prominent thinkers, including Attorney General William Wirt, Senator Daniel Webster, and Chief Justice (and former President) William Howard Taft. It also appears to have been a view shared by James Madison, one of the chief architects of the "Decision of 1789."

In addition to creating the departments of foreign affairs and war, the House of Representatives considered the creation of a Treasury Department (Gales 1834, 1:384).[15] The statute established the principal officer, and then created an Auditor, a Register, a Treasurer, and a Comptroller (1 Stat. 65, § 1). The Comptroller's duties were "to superintend the adjustment and preservation of the public accounts; to examine all accounts settled by the Auditor, and certify the balances arising thereon to the Register," and "to countersign all warrants drawn by the Secretary of the Treasury, which shall be warranted by law" (id., § 3). He was to "provide for the regular and punctual payment of all monies which may be collected," and was in charge of directing "prosecutions for all delinquencies of officers of the revenue, and for debts that are, or shall be due to the United States" (id.).

[14] In the military context Congress still has broad power to assign duties to subordinates, although there may be more of a duty to obey the President at least when it comes to military tactics (Price 2021, 510). And perhaps the treaty power requires the President to have total control and direction of all diplomats engaged in treaty negotiations.

[15] Portions of the background discussion in this section appear in Wurman 2022.

On June 29, Madison argued that the House should make some "provision respecting the tenure by which the Comptroller is to hold his office" (Gales 1834, 1:611). This may seem odd because the House had just resolved that the principal Secretaries of the Departments of Foreign Affairs, War, and Treasury should all be removable by the President. According to the Reporter, Madison thought that the "nature" of the Comptroller's "office" was "not purely" executive and that its duties "partake of a Judiciary quality" as well, the "principal duty" being "deciding upon the lawfulness and justice of the claims and accounts subsisting between the United States and particular citizens" (id., 611-12).

Madison's proposed that "the Comptroller should hold his office during —— years unless sooner removed by the President" (id., 612). Some confusion ensued because Madison was arguing for some independence, but his proposal would in fact make the officer just as dependent on the President as before (id., 613-14). Madison eventually explained that he did not mean to question the President's power to remove, but rather, by including a shorter expiring term of years, to make the officer accountable to the Senate by requiring re-appointment every so often (id.). The idea, in other words, was that the President should *not* personally interfere with the Comptroller's duties. Nothing could stop the President from doing so by threatening removal, of course. But that is why Madison proposed a short appointment; if the adjudicator's impartiality were compromised by the President, he would have to answer to the Senate. Madison went on to make the point about presidential non-interference explicitly (id., 614):

> Several arguments were adduced to show the Executive Magistrate had Constitutionally a right to remove subordinate officers at pleasure. Among others it was urged, with some force, that these officers were merely to assist him in the performance of duties, which, from the nature of man, he could not execute without them, although he had an unquestionable right to do them if he were able; but I question very much whether he can or ought to have any interference in the settling and adjusting the legal claims of individuals against the United States.
>
> The necessary examination and decision in such cases partake too much of the Judicial capacity to be blended with the Executive. I do not say the office is either Executive or Judicial; I think it rather distinct from both, though it partakes of each, and therefore some modification, accommodated to those circumstances, ought to take place. I would, therefore, make the officer responsible to every part of the Government.

To summarize, then, Madison does not actually appear to question the President's power to remove. What he does question is the President's right to interfere in certain kinds of duties assigned by law to other officers. Precisely because the President can remove, the only way to ensure non-interference is to make the officer answerable to other constitutional actors if possible. Although Madison withdrew his proposal the next day, the upshot is that he seemed to believe that removal does not necessarily entail a constitutional duty on the part of principal officers to obey the President.

2.3.3. *Claims and inferior officer appointments*

Several early presidents seemed to believe that they could not—or at least should not—directly interfere with the settling of accounts or inferior officer appointments because Congress had by law vested the relevant decisions in other officers. In a letter from March 6, 1790, Washington's personal secretary, Tobias Lear, wrote to a supplicant relating to a money claim that "in obedience to" President Washington's command, he was to "inform you that it is not of the line of his official duty to take any part in the settlement of accounts" (Twohig 1996, 134 n.2; Prakash 2015, 189). "[T]he impropriety of his interfering in any degree with the claims of individuals upon the public is too obvious to escape observation," Lear explained, "to say nothing of the impracticability of his attending to all the applications which would appear equally meritorious" (id.).

Here we have three explanations for a refusal to interfere: impracticability, impropriety, and lack of official duty. This may suggest, as Prakash has argued, that Washington's reluctance was pragmatic (2015, 191). But the point about the lack of official duty suggests something more formal and structural. In a letter Washington wrote to William Tatham, he stated, "my public situation forbids any interference in questions of individual claims otherwise than as they may come before me officially in the form of an act of Congress—This will be satisfactory to you for my declining to direct any investigation of the vouchers which you mention" (Mastromarino 1999, 103-04). In another letter to Charlotte

Hazen, he wrote: "I have no power, nor would there be any propriety, in my interfering with the settlement of accounts, unless it be in the case of mal-practice in the officer" (Ebel 2015, 500-01).

On inferior appointments, Washington's views seemed to pull in both directions. In reply to a request, he wrote that "I can only observe, that I have uniformly avoided interfering with my appointments which do not require my official agency," which appears to make a pragmatic point (Twohig 1993, 428). But then he added that the laws "establishing the Post Office" give "power to the Post Master General to appoint his own Deputies, and making him accountable for their conduct," which "is an insuperable objection to my taking any part in this matter" (id.). He therefore directed the request "to be laid before the Post Master General who will take such measures thereon as his judgment may direct" (id.). The tenor suggests that Washington always *could* interfere, perhaps through the threat of removal; but as a general matter, if the law vested the appointment in the principal officer, it was that officer who had to exercise discretion.

Thomas Jefferson appeared to share Washington's view with respect to the settling of accounts.[16] In an 1808 letter he wrote, "[W]ith the settlement of the accounts at the Treasury I have no right to interfere in the least," because "the Comptroller is a law officer," and "he is the sole & supreme judge in all claims for money against the [United States] and would no more receive a direction from me as to his rules of evidence than one of the judges of the supreme court."[17] Jefferson's letter appears unequivocal about the lack of power to interfere.

In 1814, President Madison removed the Postmaster General for having filled the inferior office of postmaster of Philadelphia with an administration opponent, and for alleged acts of misfeasance. Madison justified the removal in a letter to Jefferson: the Postmaster General had appointed Senator Michael Leib "to the vacant post office in Phila in opposition to the known aversion of the City & of the whole State; & to the recommendation of the Pen: delegation in Congs," Madison explained. "Having actually made the appointment, contrary to my Sentiments also, which he asked & recd much excitement prevails agst him." "Among other misfeasances charged on him, is his continuance, or probably reappointment," of another postmaster who allegedly abused his office (Looney 2010, 196).

Madison's letter suggests that he did not direct the Postmaster General not to make the appointment in question, but rather had given his "sentiments" on the matter. And apparently, the Postmaster General felt no obligation to follow the President's wishes. The relevant statute did not at that time require the Postmaster General to follow the instructions of the President; the President is not even mentioned in the statute except with respect to the franking privilege (1 Stat. 733). Although Madison removed the Postmaster General, he did not state that the reason for the removal was his disobedience of the President. Rather, Madison's letter emphasized the "misfeasance" of the officer in making an appointment contrary to the general sentiments of the people of Philadelphia, and in keeping in office another wrongdoer. All of which suggests that Madison, too, did not appear to believe he had a constitutional right to control the discretion of the Postmaster General, although he undoubtedly believed he had a right to remove him.

In 1822 during the Monroe Administration, Secretary of State John Quincy Adams wrote about a Cabinet meeting in which he and Attorney General William Wirt tangled over the propriety of the Postmaster General bringing to the President's attention his desire to make a particular appointment to the office of postmaster at Albany (Adams 1874, 480-82). According to Adams, Wirt "severely censured the Postmaster-General for asking at all the opinion of the President, after having made up his own mind," because "[i]t was an attempt to put off his own responsibility upon the President" (id., 481). Adams disagreed; because the Postmaster-General "himself was removable from his own office at the pleasure of the President," and President Madison had removed a Postmaster-General for an improper appointment, "it was quite justifiable in him to consult the President's wish, with the declared intention of conforming to it" (id.). What is striking is that neither argued that the President could make the appointment himself, since the law vested the appointment in the Postmaster General. Even Adams appeared to believe that the President could only declare his views and that there would be no consequences to any disagreement unless the President took the drastic step of removal.

Perhaps inspired by this episode, the next year Wirt wrote an oft-cited opinion for President James Monroe on his power to interfere with the Comptroller's duties. Wirt concluded that he could not,

[16] For Jefferson's and Washington letters, I am indebted to Prakash 2015, at 189-90.
[17] Letter from Thomas Jefferson to Benjamin Latrobe (June 2, 1808). The Thomas Jefferson Papers at the Library of Congress. Series 1: General Correspondence. 1651–1827. Microfilm Reel: 041. http://hdl.loc.gov/loc.mss/mtj.mtjbib018649.

illustrated the point with inferior officer appointments, and generalized the point more broadly (The President & Acct. Offs., 1 U.S. Op. Atty. Gen. 624, 625–26 (1823)):

> [I]t could never have been the intention of the constitution, in assigning this general power to the President to take care that the laws be executed, that he should in person execute the laws himself.... To interpret this clause of the constitution so as to throw upon the President the duty of a personal interference in every specific case of an alleged or defective execution of the laws, and to call upon him to perform such duties himself, would be not only to require him to perform an impossibility himself, but to take upon himself the responsibility of all the subordinate executive officers of the government—a construction too absurd to be seriously contended for.
>
> But the requisition of the constitution is, that he shall take care that the laws be executed. If the laws, then, require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of the law; and were the President to perform it, he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself. The constitution assigns to Congress the power of designating the duties of particular officers: the President is only required to take care that they execute them faithfully.

Wirt's opinion goes on to use the example of the statute empowering the Postmaster General to appoint subordinate postmasters; if the Postmaster General fails to supply an appointment, or makes a corrupt appointment, the President cannot make an appoint himself but must remove the Postmaster General and appoint a new principal officer who will then make a proper inferior appointment (id.). The opinion extends to all duties vested by law in other officers. Wirt does not dispute that the President can always remove an officer to ensure the faithful execution of the laws: "he is to see that they do their duty faithfully; and on their failure, to cause them to be displaced, prosecuted, or impeached, according to the nature of the case" (id., 625). But the President might not always choose to exercise such a drastic option.

It is worth considering the possibility that the conception of executive power articulated by Washington, Jefferson, Madison, and Wirt applied uniquely in some way to the power of appointments and the settling of accounts. Perhaps the exception to control and interference stems from the Constitution's directly authorizing the vesting of appointments in the heads of department. This is not particularly persuasive, however, because Congress generally can establish offices and duties. As for the settling of accounts, there's little doubt that that function is partly judicial in nature, and could of course be done by courts (Wurman 2022, 760-68). But that does not explain the exception as a matter of constitutional text.

2.3.4. *Webster's speech again Andrew Jackson*

Senator Daniel Webster generalized the view. The context that gave rise to Webster's famous speech against Andrew Jackson is well known. President Jackson wanted to abolish the Second Bank of the United States, but the Bank was not due to expire for another few years. Thus, he sought instead to withdraw all U.S. government deposits from the Bank. The law authorized only the Secretary of the Treasury to make such a withdrawal. Jackson's Treasury Secretary, Louis McLane, was against the removal of deposits so Jackson had him reassigned to the State Department. He then appointed William Duane as the new secretary; but Duane refused to withdraw the funds, and Jackson fired him. Jackson then appointed Roger B. Taney as acting secretary, who promptly withdrew the funds. (Remini 1967, 109-53).

Even here, it is interesting to observe that in his message to the Cabinet about his views about the removal of the deposits from the Bank, Jackson emphasized that he was in effect hoping to persuade the Secretary of Treasury rather than to direct him (Richardson 1898, 19):

> In the remarks he has made on this all-important question he trusts the Secretary of the Treasury will see only the frank and respectful declarations of the opinions which the President has formed on a measure of great national interest deeply affecting the character and usefulness of his Administration, and not a spirit of dictation, which the President would be as careful to avoid as ready to resist. Happy will he be if the facts now disclosed produce uniformity of opinion and unity of action among the members of the Administration.

Nevertheless, Jackson's removal of the Secretary (and of the deposits) caused an uproar in the Senate, which censured Jackson, maintaining that "the President had assumed a power not conferred by the constitution and laws, but in derogation of both" (Gales & Seaton 1834, x:1187). Jackson, in turn, seethed over the Senate's censure and published a "protest" arguing that the censure was improper (Muller 1917, 3:1112-19). On May 7, 1834, Daniel Webster delivered a speech in the Senate on the President's protest, defending the Senate's action in censuring the President (Webster 1834).

Webster first grants the President's constitutional power to remove (id., 4):

> I did not vote for the resolution on the mere ground of the removal of Mr. Duane from the office of Secretary of the Treasury. Although I disapprove of the removal altogether, yet the power of removal does exist in the President, according to the established construction of the constitution; and, therefore, although, in a particular case, it may be abused, and, in my opinion, was abused in this case, yet its exercise cannot be justly said to be an assumption or usurpation. We must all agree that Mr. Duane is out of office. He has, therefore, been removed by a power constitutionally competent to remove him, whatever may be thought of the exercise of that power, under the circumstances of the case.

What, then, justified the charge against the President? The public moneys were "in their proper place," a place "fixed by the law of the land," and the law "conferred" only on the Secretary of the Treasury the power to change the place of deposits (id.). "On him the power of change was conferred, to be exercised by himself, if emergency should arise, and to be exercised for reasons which he was bound to lay before Congress" (id.). "No other officer of the Government," Webster continued, "had the slightest pretence of authority to lay his hand on these moneys for the purpose of changing the place of their custody," and "[t]he President could not touch them" (id.). The power to change the location "was a trust confided to the *discretion* of the Secretary, and to *his discretion alone*" (id., 4-5):

> The President had no more authority to take upon himself this duty, thus assigned expressly by law to the Secretary, than he had to make the annual report to Congress, or the annual commercial statements, or to perform any other service which the law specially requires of the Secretary. He might just as well sign the warrants for moneys, in the ordinary daily disbursements of Government, instead of the Secretary. The statute had assigned the especial duty of removing the deposites, if removed at all, to the Secretary of the Treasury, and to him alone. The consideration of the propriety, or necessity of removal, must be the consideration of the Secretary; the decision to remove, his decision; and the act of removal, his act.

Webster recognized that Taney, the acting secretary, was the one to remove the deposits. But the President had made known to all that the acting secretary was doing his bidding. "It is evidence that in this removal [of the deposits] the Secretary was in reality nothing but the scribe.... Nothing depended on his discretion, his judgment, or his responsibility" (id., 5). Webster added that had the President personally gone to withdraw the deposits, no one would doubt it was illegal; it was no different here (id.). "The act of removal, to be lawful, must be the *bona fide* act of the Secretary; *his* judgment, the result of *his* deliberations; the volition of *his* mind" (id.). He then drew the critical distinction (id. 5-6):

> All are able to see the difference between the *power to remove* the Secretary from office, and the *power to control him*, in all or any of his duties, while in office. The law charges the officer, whoever he may be, with the performance of certain duties. The President, with the consent of the Senate, appoints an individual to be such officer, and this individual he may remove, if he so please; but, until removed, he is the officer, and remains charged with the duties of his station; duties which nobody else can perform, and for the neglect or violation of which he is liable to be impeached.... The President, it is true, may terminate his political life; but he cannot control his powers and functions, and act upon him as a mere machine, while he is allowed to live.

Webster then explained why the "visible and broad" distinction "between the power of removal and the power to control an officer not removed" made sense (id., 6). He responded to the point—similar to the point many today make—that the power "of control and direction," although "no where given... by any express provision of the constitution," is "derived... from the right of removal" (id.). Webster argued the

reasoning is precisely the opposite: if the President did *not* have a power to remove, then all the more reason he must have a power to control (how else is he to take care the laws are faithfully executed?). But if the President can in fact remove, "there would appear to be less necessity to give him also a right of control" (id.). Webster then added that the Congress's power to impeach all civil officers of the United States would be relatively meaningless if those officers could merely say they were following the President's orders.[18]

We can also surmise that the political cost of Jackson's exercise of the removal power was higher to the extent it was believed he did not have a power to control the discretion of the Secretary. That is what allowed Webster to charge Jackson also with an abuse of the removal power. In all events, the censure had passed, and subsequently the Senate refused to confirm Taney to a full appointment (Strauss 2007, 706).

2.3.5. *Chief Justice Taft*

Fast forward a century. Chief Justice Taft is sometimes thought to have inaugurated modern unitary executive theory with his decision in *Myers v. United States* (272 U.S. 52 (1926)), holding that Congress cannot restrict the President's power to remove an official appointed by and with the advice and consent of the Senate. (Bowie and Renan 2022, 2065-77.) And it may certainly be the case that *Myers* was the first time the Supreme Court invalidated a restriction on the President's removal power. But, prior to *Myers*, Taft wrote a book on presidential powers, a collection of lectures that he delivered a decade before that decision. In that work, Chief Justice Taft wrote that the President may remove the Comptroller of the Treasury, "but under the act of Congress creating the office, the President cannot control or revise the decisions of this officer" (Taft 1916, 81, 125-26).

Taft's language in *Myers* similarly suggests that, although Congress may be unable to restrict the President's removal power over officers appointed by and with advice and consent, Congress can prevent the President from controlling and revising the decisions of officers. Taft wrote, "Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance" (272 U.S. at 135). And he added that "there may be duties of a quasi judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control" (id.). But, he explained, "even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised" (id.). Congress may not be able to insulate officers appointed by and with advice and consent from presidential removal, but Congress can insulate their decisions from direct presidential interference.

2.4. The Opinions Clause and the Pardon Power

The analysis of this Part helps us make sense of the Opinions Clause. As observed, the President can always instruct any subordinate officer (anyone can say anything), but those officers do not appear to have a constitutional obligation to follow the President's instructions. The law can require that any exercise of discretion be the subordinate's. If the President has no power, absent statutory authorization, to compel officers to follow the President's instructions in the exercise of their discretion short of threatening removal, then the Opinions Clause has obvious relevance. No matter what Congress does or does not provide, the President can always demand the written opinions of the principal officers. And more to the point, those principal officers have a constitutional obligation to provide those written opinions. In this respect, the Constitution is binding directly on those officers. It is the one instruction of the President's they must follow as a matter of constitutional obligation. The President would also be able to *do* something of significant with the information given, namely remove an officer if the President believes she is no longer faithfully executing the law, whether by exceeding legal authority or abusing her discretion.

[18] Of course, impeachment might still be a supplementary guarantee in the event the President chooses to retain an officer who should be removed. Webster's point is well taken, however, because certainly the impeachment power would apply to many more situations under his account.

The Clause also advances accountability. The President can demand that the principal officers account for their actions, and they must do so publicly, in writing (Amar 1996, 670-72). If the President proceeds to remove, not only will the President have the relevant information to make an informed decision, but the basis of that decision will be available for all to see and judge. The President is ultimately accountable for the faithful execution of the laws, but also the principal officers are ultimately accountable for their own conduct. James Iredell, who offered the only extended discussion of the Opinions Clause during ratification, supports this view: "Their opinion is to be given him in writing. By this means [the President] will be aided by their intelligence, and the necessity of their opinions being in writing, will render them more cautious in giving them, and make them responsible should they give advice manifestly improper" (Elliott 1836, 4:108-10). "[T]he solemnity of the advice in writing, which must be preserved, would be a great check upon them" (id.).

More tentatively, the pardon power takes on renewed significance under this account. The same scholars who have debated the Opinions Clause have also debated the significance of this power. Some, like Amar (2005, 179) and now-Justice Kavanaugh (In re Aiken County, 725 F.3d 255, 263-64 (D.C. Cir. 2013)), have argued that the President's power to pardon implies the lesser power to control prosecutions. Others, like Lessig and Sunstein, have argued that "[t]here is an important difference between the power not to prosecute and the power to pardon—for the latter is much more likely than the former to incur significant political costs" (1994, 21). Price has cogently observed that the "the Pardon Clause cuts both ways," in that a "pardoning authority might imply that the President should rely on this back-end clemency power, and not any front-end discretion over enforcement," but also "that some authority to moderate the rigor of the law by excusing particular violations is an appropriate component of the executive function" (2014, 699-700).

The removal-but-not-direction conception of presidential power is another data point in this debate. The President can control execution through removal of officers and through the pardoning of offenses. Both have higher political costs than simply refusing to prosecute. Certainly, under this conception of presidential power, the pardon power does much more significant work than under one in which the President can direct all law execution. The insights here thus support the Lessig-Sunstein position that pardoning has different political costs than control. But those same insights suggest why Lessig and Sunstein are wrong about removal: the argument they make about pardoning can, and does, apply to the removal power.

2.5. Objections

Two objections now bear mentioning. First, although the Opinions Clause has obvious relevance on this account, there is contrary evidence. There is very little (if any) historical evidence that the President's power was merely the power to "persuade"; there is evidence, however, in favor of a general presidential power of direction and instruction. Hamilton, recall, argued the Opinions Clause was superfluous (Rossiter 1961, 447). Jackson obviously thought Webster was wrong (Richardson 1898, 3:85), although he had earlier taken pains to make his decision on the deposits appear to be a suggestion. And Attorney General Caleb Cushing thought Wirt was wrong (Relation of the President to the Executive Departments, 7 Op. Att'y Gen. 453, 469-70 (1855)). Prakash has uncovered additional strong statements in favor of presidential direction (Prakash 2015, 186-89). For example, both the Anti-Federalist Federal Farmer and future Supreme Court Justice James Wilson explained that the President would "direct" all subordinate officers (id.). Recall also that many writers expressed the idea that the President would "superintend" the execution of the laws. Noah Webster's famous 1828 dictionary defined the term "superintend" to include the ability "to oversee with the power of direction" (Webster 1828, 1:dclxxx). This is more evidence that perhaps the President would have a power of direction.

I have also previously argued that Blackstone's description of a "proclamation power" indicated the President has the power to direct subordinates as part of the executive power of law execution (Wurman 2020, 153-59). This historical prerogative is still the strongest argument against the revised account presented here. Blackstone wrote that the king's proclamations have "binding force, when... they are grounded upon and enforce the laws of the realm" (Blackstone 176, 260-61). Although lawmaking is the work of the legislative branch, "yet the manner, time, and circumstances of putting those laws in execution must frequently be left to the discretion of the executive magistrate" (id., 261). Therefore, the king's "proclamations, are binding upon the subject, where they do not either contradict the old laws, or tend to establish new ones; but only enforce the execution of such laws as are already in being, in

such manner as the king shall judge necessary" (id.). That prerogative does seem to imply that any discretion left by law is for the king—and the President—to exercise. McConnell similarly argues that the proclamation power is "the President's power to direct executive officers to exercise power they already have, by virtue of statutes, in a particular way" (2020, 114).

As noted previously, it is also possible to read the Opinions Clause as doing work under that account: the President has a right to demand obedience and to remove subordinate officers, but nothing compels an officer to speak. Better to require such officers to give the President information, rather than require the President to rely on threats of removal. The Opinions Clause also originated in the Pinckney Plan, and the constitution of Pinckney's home state of South Carolina provided a privy council that was "to advise the president and commander-in-chief when required, but he shall not be bound to consult them, unless in cases after mentioned" (South Carolina Cons. of 1776, art. V). That supports an interpretation of the Clause as simply empowering the President to obtain information without implying the President has any less power to superintend. It is also possible that the Opinions Clause was entirely vestigial, offered in the alternative to a privy council (Kitrosser 2014, 159).

There is thus a range of plausible original meanings. It has been the aim here to do no more than to excavate an under-considered possibility—the President can remove but not directly interfere—a possibility that seems to accord with much of the evidence. Under this account, the Opinions Clause and the Pardon Clause both do more significant work than under other accounts. And, as section 4 suggests, this account may also be more normatively and functionally desirable.

A second objection is that the evidence presented here could suggest an argument in favor of at least certain for-cause removal restrictions. After all, if the President cannot interfere with the statutory duties of an officer, then a removal intended to interfere is improper. But as noted above, such restrictions would be problematic at least if the judiciary could review the relevant removals; that would be no better than giving the Senate a check. There is also some doubt whether Congress can create property interests in holding federal office. And, perhaps most dispositively, the evidence presented above demonstrates a widely held view that the President could remove for any reason, although some such reasons would be an abuse of power; any power can be abused. Having said all that, as an internal executive branch procedure for processing removals—as a mechanism to require the President to give Congress the reasons for any removal—for-cause restrictions may very well be constitutional. After all, if the President removes for an improper purpose, it would certainly be necessary and proper for carrying into execution Congress's own powers and duties to obtain information related to the removals.

3. INFERIOR OFFICERS

The relationship of principals to their inferior officers is now to be considered. It is the inverse of the President's relationship with the principal officers: Congress can restrict the ability of the principals to remove the inferior officers but cannot restrict the obligations of the inferior officers to obey. The historical precedent supporting this account and Congress's power to limit the removal of inferior officers—the civil service comprises entirely such officers—comports well with the constitutional text. That is because the term "inferior officer" most likely connotes an officer who is subject to the direction and instruction of a superior officer. If that is the case, there is no constitutional problem insulating such officers from removal because they in any event must follow the directions of their superior officers. There may come a point where insubordination requires removal, but there are alternative arrangements, such as final review of adjudicative decisions by agency heads, that would often preclude the need for removal.

To repeat and elaborate upon what was said in the introduction: One can imagine a world in which the relationship of inferiors to their principals is parallel to the relationship of the principals to the President. There are several ways in which "the executive power" over superintendence can remain intact. However the inverse relationship proposed here is consistent with prior (and contemporary) practice respecting the removal of inferior officers. And that inverse relationship also helps make sense of the Opinions Clause. It is that clause that makes it appear that there is otherwise no constitutional obligation to obey the commands of a superior. But that clause applies only to the President and the principal officers. Excavating the landscape with respect to inferior officers is therefore further support for the relationship between the principals and the President that the previous section articulated. At

least, the Opinions Clause helps us make sense of the difference between the rules for the two types of officers.

3.1. Text and Early Usage

Mascott (2018) canvassed the meaning of "officers of the United States," but no article has sought to excavate the meaning of "inferior officer." Story (1833) wrote that "[i]n the practical course of the government, there does not seem to have been any exact line drawn, who are, and who are not, to be deemed inferior officers in the sense of the constitution, whose appointment does not necessarily require the concurrence of the senate" (§ 1530). He did not seek to supply such a line. This section begins that work. Although the evidence is not definitive, it largely supports the Supreme Court's current view that an officer is inferior if that officer must follow the orders and instructions of a superior officer, or if a superior officer can revise the decisions of the inferior (United States v. Arthrex, Inc., 141 S. Ct. 1970, 1982-83 (2021)).

3.1.1. *Legal dictionaries*

Bouvier's Law Dictionary (1839) is a bit too far removed from the founding to be extraordinarily probative of original meaning, but it is suggestive of the nineteenth-century understanding. Bouvier wrote that there are three types of "offices," political, judicial, and ministerial (id. 203). Political offices "are such as are not connected immediately with the administration of justice, or the execution of the mandates of a superior officer; the office of the president of the United States, of the heads of departments, of the members of the legislature are of this number" (id.). Ministerial offices "are those which give the officer no power to judge of the matter to be done, and require him to obey the mandates of a superior" (id.). This entry gives some support for both propositions. First, all non-principal officers are "ministerial" officers who must obey the mandates of superior officers. Second, the principal officers of the departments do not have to follow the mandates of a superior; they are classed along with the President and members of the legislature. It is important not to read too much into this because Bouvier was not specifically addressing the question of the principal officers' subordination to the President. But inferior officers, at least, must follow the mandates of their superiors.

The dictionary nowhere defines "inferior officer," but it defines "inferior" as "[o]ne who in relation to another has less power and is below him; one who is bound to obey another" (Bouvier 1856, 630). Finally, it defines a "crier" as "[a]n inferior officer of a court, whose duty it is to open and adjourn the court when ordered by the judges; to make proclamations and obey the directions of the court in anything which concerns the administration of justice" (id., 352). These entries further suggest that an inferior officer must obey the orders and directions of a superior officer.

The edition of Matthew Bacon's abridgment of the law published in 1778 does not define "inferior officer." It does, however, state that "[m]inisterial offices are those which give the officer no power to judge of the matter to be done, and require him to obey the mandates of a superior; as, the office of marshal, sheriff, and constable" (1778, 280). Although the 1782 tenth edition of Giles Jacob's law dictionary also does not define inferior officers, it does describe a "clerk controller of the king's house," who has "the Oversight of all Defects and Miscarriages of any of the inferior Officers," and a right to "sit... with the superior Officers, *viz.* The Lord Steward, Treasurer, *Controller*,..." (1782, *186). Jacob appears to have taken this definition from John Cowell's 1607 law dictionary (Cowell 1607). Here again, it appears to have been assumed that superior officers are totally responsible for, and can control the acts of, inferior officers—presumably through control or removal. Cowell's 1607 dictionary also describes an office of "master of the armorie," who has "command, and placing and displacing of all inferiour Officers thereunto appertaining."

Finally, a 1755 dictionary of arts and sciences—not a legal dictionary, to be sure, but nevertheless a technical one—defines the "victualling-office" charged with supplying the navy and explains that that office is "managed by seven commissioners who have their inferior officers, as secretaries, clerks, &*c*" (A Society of Gentlemen 1755, 3498). This is more evidence that superior or principal officers or commissioners had *their* inferior officers, whom they could direct and control.

3.1.2. *Ordinary Dictionaries*

The most prominent ordinary dictionary in the antebellum period was Noah Webster's 1828 dictionary. It does not distinguish between principal and inferior officers, but rather between the "great officers of

state, and subordinate officers" (Webster 1828, 2:cxcvi). The greater officers appear to be the principal officers because under the entry for "principal" Webster mentions "the principal officers of the government" (id., 2:cccxxxvii). Subordinate is then defined as "[i]nferior in order, in nature, in dignity, in power, importance, etc.; as *subordinate* officers" (id, 2:dclxviii). "Inferior" is defined as lower in place, station, age, or rank; or "subordinate," that is, "of less importance" (id., 1:dccclxx). These definitions are not particularly instructive. The matter becomes a bit clearer when one looks at the definition of "insubordinate," which Webster defined as "[n]ot submitting to authority" (id., 1:dccclxxxv) and "insubordination," which he defined as "disobedience to lawful authority" (id.).

The ordinary dictionaries from the founding period tend to define "inferior" the same way that Noah Webster would define it a few decades later; Webster presumably took his definition from these dictionaries. For example, Barclay (1792), Sheridan (1789), Perry (1788), Johnson (1785), Bailey (1783), Dyche and Pardon (1781), and Kenrick (1773) all use some variant of "lower in place, rank, or degree" or "subordinate." None defines insubordinate or insubordination, suggesting the word may not have been in common use. However, a 1792 English translation of a French work on public administration used the word insubordination to describe lack of administrative control, suggesting the word was in use (Necker 1792, 293). And the report of the impeachment trial of Justice Samuel Chase used the phrase "insubordination to law" (Evans 1805, 30). A history of France published in Philadelphia in 1797 also used the word to describe the disobedience of troops (Gifford 1797, 44). In any event, these definitions—particularly without an accompanying definition of insubordination—are hardly definitive, but they are somewhat suggestive. Lower or under in rank and "subordinate" likely imply obedience to a superior. But none of these ordinary language dictionaries is as explicit as the legal dictionaries.

3.1.2. *Revolutionary War Military Context*

The founding generation also would have been familiar with military officers. In that context, there was little question that the relationship of an inferior to a superior officer was one of total subordination and control; an inferior military officer had to obey any lawful command. To take a few examples, General Washington issued an order during the Revolutionary War declining to approve the result of a court martial that had exonerated an officer despite that officer having disobeyed an order from a superior. Washington's order explained, "Open defiance and opposition from an inferior to his superior officer upon a parade must in every well-regulated army be deemed a breach of order and discipline" (Huggins 2013, 352-54). In another order, this time approving the finding of a court martial, the charge was "disobedience of Orders and refusal to do duty when required by his superior Officer in a stile unbecoming an inferior officer" (Hoth 2004, 358-59).

And in a letter to the Board of War on another matter, Washington explained that the Commissary General of Military Stores had "a right to direct in every thing relative to the execution of the public works, under his care" and that "every Officer stationed at the Laboratories is bound so far, to follow his directions" with respect to those matters. "The rank of Lieut. Colonel which he now holds," Washington added, "entitles him to command in all respects over every Inferior Officer acting with him." (Lengel 2010, 482-84.) President Washington, in other words, might have at least assumed that an "inferior officer of the United States" was subject to the command and control of superior officers.[19]

3.1.4. *Ratification*

There was some discussion of the Inferior Officers Clause—allowing Congress to vest the appointment of inferior officers in the President alone, the courts, or the heads of department—during Ratification, though much of it unhelpful in discerning exactly who are the inferior officers. Still, the Federal Farmer generally supported the clause because he opposed the involvement of the Senate in appointments. The Farmer wrote, "We may fairly presume, that the judges, and principal officers in the departments, will be able well informed men in their respective branches of business, that they will, from experience, be best informed as to proper persons to fill inferior offices in them: that they will feel themselves responsible for the execution of their several branches of business, and for the conduct of the officers they may appoint therein" (Storing 1981, 2:308).

[19] In a letter to Thomas Jefferson, one Anthony Walton White declined a request by Jefferson to countermand a particular order because that order had been given by Major General Greene; "should any inferior officer take the liberty to countermand" the general's order would "lay him under a Millitary Sensure" (Boyd 1952, 357–58).

That the principals will feel responsible for the inferiors does not tell us precisely their relationship, but the Farmer goes on to equate inferior officers with subordinate officers, writing that "I think we may infer, that impartial and judicious appointments of subordinate officers will, generally, be made by the courts of law, and the heads of departments" (id.). In a prior essay on appointments, the Farmer mentioned "admirals and generals, and subordinate officers in the army and navy," suggesting that subordinate officers were the inferior military officers who had to obey the commands of their superiors (id., 2:302). All of which suggests that to the Federal Farmer, the inferior officers would be subordinate to and subject to the control of the principal officers.

3.1.5. *Use in the First Congress*

In the 1789 debate over the removal of principal officers in the House of Representatives, the limited discussion of inferior officers confirms these general conclusions. Recall that the draft statute creating the department of foreign affairs provided that the principal officer was to be appointed by and with advice and consent of the Senate (Gales 1834, 1:371). Representative Smith proposed that the language be struck, for "it looked as if they were conferring power, which was not the case, for the Constitution had expressly given the power of appointment in the words there used" (id.). Representative Richard Bland Lee then said he thought the secretary of foreign affairs "was an inferior officer" because "the President was the great and responsible officer of the Government," and this officer "was only to aid him in performing his Executive duties" (id., 372). Representative Smith retorted that the officer is "at the head of a department, and one of those who are to advise the President"; in contrast, "the inferior officers mentioned in the Constitution are clerks and other subordinate persons" (id.). Although Smith was clearly right that the secretary was a principal officer, both Smith and Lee seemed to understand inferior officers to be under the total control of their principals.

Representative Vining also described inferior officers as "subordinate," in contrast to the heads of department (id., 464). Representative White described the secretaries as the heads of department, and then said the inferior officers are the "chief clerks, and all others who may depend upon them" (id., 518). Madison also argued that inferior officers were "subordinate officers" who "are dependent on their superior" (id., 499). And in a letter from Edward Carrington to James Madison on the debates, Carrington seemed to think all officers were "inferior" to the President, writing that "the inferior Officers of the Executive department, are but aids of the President, and it would, in my opinion, have been absurd, to give him less than full powers over them" (Hobson and Rutland 1979, 316-17). Here the word "inferior" again indicates total subordination to a superior officer.

3.1.6. *Inferior Courts*

The Constitution also provides for inferior courts (U.S. Const. art. III, § 1; art. I, § 8, cl. 9). And it specifies that the Supreme Court shall have "appellate jurisdiction, both as to law and fact" from the inferior courts (id., art. III, § 2, cl. 2). Although facts tend to be reviewed deferentially, that does not detract from the point that the Supreme Court has directive authority over the inferior courts: most inferior officers exercising initial discretion will usually get some amount of deference in their exercise of that discretion. After all, that is why the initial discretion is vested in those officers. Presidents usually defer to the conclusions of courts martial, but they can nevertheless reverse them.

The historical record confirms that inferior courts were subject to the control and commands of other courts. A statute from the time of James I provided that certain causes must be heard in the "inferiour courts" in the cities and towns outside of the courts at Westminster (21 Jac. I. c. 23), which had been liberally removing cases from the inferior courts to their own courts. A case from 1653 confirmed that the King's courts at Westminster could reverse the inferior courts by writs of error (82 Eng. Rep. 797 (1653)). In 1618, Samuel Ward wrote to Francis Bacon, then Lord High Chancellor of England, that the "principall object" of his office was to "elect, direct and correct inferiour Magistracy" (Ward 1618, A4).

Mary Sarah Bilder's work suggests that in seventeenth-century America the relationship of higher to inferior courts was one of even more control. She has argued that in colonial America an "appeal," as opposed to a writ of error, "referred to a procedure under which a higher tribunal could completely and broadly rehear and redecide not only the law but also the entire facts of a case" (Bilder 1997, 914). For example, Cowell's 1607 dictionary described an "appeal" as "a removing of a cause from an inferior judge to a superior as appeal to Rome" (Cowell 1607). Such appeals were allowed in Massachusetts. In John Cotton's 1641 abstract of the laws of New England, Cotton wrote that there was "a liberty of

Appeale… from an Inferiour Court to an Higher Court" (Cotton 1641, 2). And Massachusetts law specifically provided that "[i]t shall be in the liberty of every man cast condemned or sentenced in any cause in any Inferior Court, to make their Appeal to the Court of Assistants" (Bilder 1997, 948 n.160; Whitmore 1889, 41).

Blackstone's discussion of inferior courts over a century later is consistent with their subordinate relationship to higher courts (Blackstone 1765, 3:30):

> The policy of our antient constitution, as regulated and established by the great Alfred, was to bring justice home to every men's door, by constituting as many courts of judicature as there are manors and townships in the kingdom; wherein injuries were redressed in an easy and expeditious manner, by the suffrage of neighbours and friends. These little courts however communicated with others of a larger jurisdiction, and those with others of a still greater power; ascending gradually from the lowest to the supreme courts, which were respectively constituted to correct the errors of the inferior ones, and to determine such causes as by reason of their weight and difficulty demanded a more solemn discussion.

Further, the Court of King's Bench "keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below," and the "court is likewise a court of appeal, into which may be removed by writ of error all determinations of the court of common pleas, and of all inferior courts of record in England" (id., 3:42-43). The above analysis is not intended to be exhaustive, but it does tend to show that inferior courts had the same relationship to superior courts as inferior officers had to their superiors.

3.2. Examples

Another source of information about inferior officers is the known examples of officers described as "inferior," both in British and American practice. These examples also tend to suggest that inferior officers are under the control of their superiors.

3.2.1. Blackstone

Blackstone described several such officers in a chapter on "subordinate magistrates." Blackstone had earlier written that there is a "supreme" magistrate "in whom the sovereign power of the state resides," and that all other magistrates are "subordinate, deriving all their authority from the supreme magistrate, accountable to him for their conduct, and acting in an inferior secondary sphere" (Blackstone 1765, 142). In this sense of accountability, all officers are "inferior" to the chief magistrate; but that does not yet help us distinguish among types of officers, and in what ways they are accountable. At a minimum, though, Blackstone here already suggests that officers are "inferior" if they derive their authority from some superior and are accountable to that superior, which seems to suggest either an ability to control the officers' conduct directly or to remove them.

In the chapter on subordinate magistrates, Blackstone explains that he is not to discuss the "great officers of state, the lord treasurer, lord chamberlain, the principal secretaries, or the like; because I do not know that they are in that capacity in any considerable degree the objects of our laws, or have any very important share of magistracy conferred upon them" (id., 327). He is also not to consider "mayors and aldermen, or other magistrates of particular corporations; because these are mere private and strictly municipal rights" (id., 328). His focus is instead on those officers "generally in use" and that "have a jurisdiction and authority dispersedly throughout the kingdom," including sheriffs, coroners, justices of the peace, and constables (id.).

The sheriff has a series of "ministerial," as in nondiscretionary, duties, including the duty to "execute all process issuing from the king's courts of justice," to "see the judgment of the court carried into execution," to "arrest and imprison," and to "execute the sentence of the court" (id., 333). The sheriff is also the "keeper of the king's peace," may "apprehend, and commit to prison, all persons who break the peace, or attempt to break it," and must "pursue and take all traitors, murderers, felons, and other misdoers, and commit them to gaol for safe custody" (id., 332). These officers, in other words, exercise what we would today recognize as executive power. To the present point, Blackstone explained that "[t]o execute these various offices, the sheriff has under him many inferior officers; an under-sheriff, bailiffs, and gaolers; who must neither buy, sell, nor farm their office" (id., 333). These "inferior" officers are all "under" the sheriff. The sheriff is even "answerable for the misdemeanors of" the bailiffs, and

Blackstone emphasized that the gaolers were "the servants of the sheriff," who "must be responsible for their conduct" (id.).

None of this language proves beyond doubt that an inferior officer must follow orders. Recall that Blackstone described all magistrates under the king as subordinate. Responsibility can be achieved either through removal or through instruction. In the sheriff's case, the sheriff was removable at the pleasure of the crown (id., 331). It is not clear from Blackstone whether the various officers inferior to the sheriff were removable at the sheriff's will; what is clear, however, is that those inferior officers were the sheriff's "servants," and the sheriff was personally responsible for their conduct.

Blackstone's discussion of coroners buttresses this point. Coroners dealt with the "pleas of the crown," and were removable only for specified causes (id., 336). Yet "the lord chief justice of the king's bench is the principal coroner in the kingdom, and may (if he pleases) exercise the jurisdiction of a coroner in any part of the realm" (id., 335). This suggests that, although coroners are protected from removal, they almost certainly must follow the instructions of the lord chief justice. If the "principal" coroner can exercise the jurisdiction of any of the other coroners, the principal officer could in this manner suspend the exercise of a coroner's duties, even if at-will removal was unavailable.

Blackstone, finally, confirmed that "petty constables are inferior officers in every town and parish, subordinate to the high constable" (id., 344). These inferior officers are again "subordinate" to "higher" or superior officers. Giles Jacob's, *Every Man His Own Lawyer* summarized that "[t]he office of *High Constable* consists in these things: he hath the direction of the petty constables, headboroughs and tithingmen within his hundred" (Jacob 1768, 260). And "he wrote that the "petty constables… are of like nature" to the other constables, "but of inferior authority to the others, and are as it were assistants to them" (id., 259). It appears to have been understood that an inferior officer was subject to the control and direction of the superior or high constable.

3.2.2. Nineteenth Century Cases

Turning to America, one early statute, in 1796, established the office of Surveyor General. The Surveyor general could appoint deputies and could remove them only for cause ("negligence or misconduct in office"); but the statute also provided that he could "frame regulations and instructions for the government" of the deputies (1 Stat. 464, § 1). This may be the earliest example of a for-cause removal restriction on an inferior officer, and the statute made clear that the inferior had to obey the instructions and regulations of the superior officer. Congress can protect inferior officers with for-cause removal protections, but insubordination would be cause to remove.

There are a handful of nineteenth-century cases that suggest that superior officers, although they could not exercise the duties of inferior officers in the absence of legislative authorization to that effect, could control and direct those inferior officers. For example, in *Wells v. Neville*, the question was whether a collector of customs could recover money paid to a customs inspector; the collector claimed that there was no statutory authority for the inspector to take the payments and that he had made a mistake in paying the inspector (29 F. Cas. 674, 674–75 (C.C.D. Pa. 1818)). After concluding that the statute authorized the supervisor, the collector, and the inspector to receive duties, Justice Bushrod Washington, riding circuit, explained that "the two superior officers [the inspector and supervisor] were not to exercise the duties of the inferior [the collector], by collecting the duties from the distillers; or else his appointment would seem to have been in a great measure, if not altogether unnecessary" (id., 675). In other words, the superior officers could not exercise the duties assigned to the inferior.

The supervisor would, however, "be accountable for moneys received by him from one or both of the inferior officers"—that is, the inspector and the collector, both inferior to him. "He might direct the payments to be made by the collectors directly to himself, or to the inspectors, subject, no doubt, as all his measures were, to the superior and controlling authority of the head of the treasury department" (id.). What Justice Washington described was a chain of officers, from collector to inspector to supervisor to the head of the treasury department, each exercising duties assigned to them by law, but each responsive to the instructions of their superiors and each responsible for the conduct of their inferiors.

United States v. Perkins (116 U.S. 483 (1886)) is the leading case for the proposition that Congress can restrict the ability of a head of department to remove an inferior office whose appointment Congress vests in that head of department. The case involved a naval cadet engineer whose services were not required; the secretary of the navy thus wrote to the cadet that he was honorably discharged with a year's sea-pay, as provided by an act of Congress (id., 483). The cadet sued for pay subsequently accruing on

the ground that he was not lawfully discharged because the statute provided that no officer in military service could be discharged in peacetime except by a sentence of court-martial (id., 483-84).

The Supreme Court ruled for the cadet, holding that Congress's power to vest the appointment in the principal officer included the power to "limit and restrict the power of removal as it deems best for the public interest" (id., 485). The Court thus rejected the position of the department of navy that the secretary had inherent authority to remove inferior officer at will. The case is instructive, however, because no one doubts that a cadet in the naval service must obey the commands of superior officers. Removal restrictions may be imposed, but that does not derogate from the executive power because the inferior must follow the instructions from the superior, all the way up to the head of department.

3.3. Objections and Qualifications

What all of the above suggests is that precedents holding that inferior officers can be protected against at-will removal are likely consistent with the original meaning of the Constitution. There are two reasons this is so: First, inferior officers must obey the commands of their superior officers. As a result, if "the executive power" is the power to oversee the execution of the laws, then that power remains intact despite such removal protections. The second reason such protections might be consistent with original meaning was discussed in the context of principal officers: it was understood that the power to appoint included the power to remove. And if Congress by law can vest the appointment of inferior officers in the principal officer, the principal officer would therefore have the power to remove; but, if Congress in its discretion can choose to grant the appointment power, perhaps it has the lesser power to grant that power on various removal conditions.

This is not, however, a perfect argument, for a few reasons. First, even if inferior officers must obey their superiors, it is not entirely clear what is to be done if those inferior officers disobey. In the military context it seems quite evident that such officers, if they are not court martialed, can be sidelined or reassigned. But in the civil context, it is less clear what the President or a principal officer can do with respect to such officers. Perhaps their acts, if inconsistent with the instructions of the principals, are ultra vires. But to operationalize such a rule might be difficult. The power to instruct and direct would seem to require the ability to remove *at least* for cause, and the failure to obey instructions would be such cause. If this is correct, then at least some congressional removal restrictions on inferior officers might be unconstitutional.[20]

Second, even if Congress could vest the appointment of an inferior officer in the principal, that hardly suggests that Congress could restrict the ability of the principal to remove. If the appointment power includes the power to remove, then Congress's ability to vest appointments in certain officers could be understood to include the ability of those officers to remove. Congress's power is to vest a certain power, with all its incidents; it is not obvious that Congress should get to pick and choose which components of that power to vest. In this reading, the President would not be able directly to remove the inferior officer, but the principal officer would. That is an important protection, as the Saturday Night Massacre—both the Attorney General and Deputy Attorney General resigned rather than fire special prosecutor Archibald Cox—demonstrates.

Third, there is significant evidence to suggest that the Founding generation may not have distinguished between principal and inferior executive officers in terms of the President's ability to remove. As Bamzai and Prakash show, the principle of the "Decision of 1789" appears to have been thought to apply to "all" executive officers (2023, 1831-32). For example, Representative Goodhue wrote in a letter that the debates in 1789 were about "whether the President should[] have the sole power of removing all Officers in the Executive departments, for altho[ugh] it came into view in the bill for establishing the Office of secretary for Foreign affairs yet the debates were upon the general principle" (Bickford 2004, 826). And Representative Sedgwick in a later debate stated that "a majority of the House had decided that all officers concerned in executive business should depend upon the will of the President for their continuance in office" (Gales 1834, 1:637). Nevertheless, Congress did not squarely confront the question of whether its power to vest the appointment of inferior officers in a principal might thereby limit the power of the President (or the principal) to remove the inferior.

[20] For example, the Sarbanes-Oxley Act gave removal protections to members of the Public Company Accounting and Oversight Board. Such board members could only be removed by the Securities and Exchange Commission if such members "willfully violated" the Act or "willfully abused" authority, or unreasonably "failed to enforce compliance" with the Act or the relevant rules. 15 U.S.C. § 7217(d)(3). Such limitations probably go too far.

One might object, finally, on functional grounds that if a principal must be able to removed for failure to obey instructions, that is no different than at-will tenure. But under the account presented here, a new administration could not simply wholesale fire all inferior officers and replace them with their political supporters. Congress can still legislate against the spoils system. That makes an important difference—a point taken up in more detail in section 4.

4. IMPLICATIONS

The notion that the President can remove but cannot directly control may seem much ado about nothing if the President can always threaten to remove. But the distinction mattered to Madison, Wirt, Webster, and Taft, and appeared to matter to Jefferson and Washington. And for good reason. As Webster proclaimed, "All are able to see the difference between the power to remove the Secretary from office, and the power to control him, in all or any of his duties, while in office" (Webster 1834, 5). And as Professor Strauss has written in more modern times, "The right to remove and the authority to decide are not to be conflated" (2007, 708). There are serious political costs to removing an officer; modern readers who recall the firing of FBI Director James Comey can attest. This Part unpacks the doctrinal and political implications of this distinction, specifically exploring the implications for independent agencies, the civil service, and dual for-cause removal.

4.1. Independent Agencies

It is often thought that what makes certain agencies "independent" is that they are protected from at-will removal; the President cannot fire the commissioners or agency heads for mere policy disagreements. If the President can threaten removal, then administrative officials may be inclined to follow the President's instructions, and in that sense, a statutory protection from removal is a greater guarantee of independence (Acs 2021, 793). The political science literature demonstrates a correlation between for-cause removal protections and agency independence (Selin 2015, 978). There are, however, several indicators of independence, including specifying tenure, multimember structures, partisan balance requirements, and independent litigation authority (Datla and Revesz 2013, 784-812). Independence has even stronger correlations with conflict-of-interest provisions, the size of the board, the requirement for expertise in nominees, quorum rules, party balancing, length of terms, and term staggering, than it does with removal (Selin 2015, 978).

The above materials suggest that perhaps the most important criterion that makes agencies independent is that Congress has tasked them with exercising independent judgment—much like it tasked the Secretary of Treasury with the independent duty to decide whether the U.S. Treasury deposits should be withdrawn from the Bank of the United States. Kagan's argument in favor of presidential administration depended on discerning Congress's intent to give the President or the relevant agency officials final decisionmaking authority (Kagan 2001, 2319-20). On this account, there is a range of agency independence, and some "executive" agencies will also be independent in important respects.

Even though the President's ability to remove inherently reduces the independence of principal officers, many scholars accept that the political costs of removal are substantial (Price 2021, 512; Datla and Revesz, 2013 813–18; Huq 2013, 41–42; Strauss 2007, 704; Stack 2006, 293–96). "The political reality is that [the President] will not always be able to afford the political cost of the removal, or to persuade the Senate easily to confirm the official who docilely will do his bidding" (Sunstein and Strauss 1986, 200). Daniel Webster, in an 1835 speech on curbing the spoils system, elaborated on the political costs (Whipple 1895, 394-406). Webster argued against an 1820 law that had created four-year terms for accounting officers. "By the operation of this law," Webster stated, "the President can deprive a man of office without taking the responsibility of removing him. The law itself vacates the office, and gives the means of rewarding a friend without the exercise of the power of removal at all. Here is increased power, with diminished responsibility" (id., 396).

The costs of removal will be even higher when Congress has made clear that certain officials ought to exercise independent discretion. Congress "should be able, as an alternate means of ensuring a measure of independence, to limit the President's directive authority, thus forcing him to bear the burden of removing an official (and substituting a more compliant person) when he wishes to dictate an agency's decision" (Kagan 2001, 2323). As Strauss has pointed out, Roger Taney was denied

an appointment as Attorney General because the Senate thought he had improperly followed the President's orders in removing deposits from the bank (Strauss 2007, 706). "[T]hat the discretion involved lay with the Secretary of the Treasury" rather than the President "gave the events high political visibility and animated the machinery of checks and balances" (id., 707). One of the greatest such checks is the advice and consent requirement for subsequent appointments (Acs 2021, 777).

Another obvious example of granting discretion to subordinate officers increasing the political cost of removal is the high-profile resignations of the Attorney General and the Deputy Attorney General when President Nixon asked them to fire special prosecutor Archibald Cox (Strauss 2007, 708). Nixon's instructions did not directly lead to his impeachment, but his interference with agencies did. One of the proposed articles of impeachment provided, "In disregard of the rule of law, he knowingly misused the executive power by interfering with agencies of the executive branch, including the Federal Bureau of Investigation, the Criminal Division, and the Office of Watergate Special Prosecution Force, of the Department of Justice, and the Central Intelligence Agency, in violation of his duty to take care that the laws be faithfully executed" (H. Doc. 93-339, 177).

Due to some combination of the senatorial check on appointments, or impeachment, or sheer political costs at the ballot box, there are great disincentives to use the removal power in cases in which discretion is vested in a subordinate officer. Thus, the President will not always remove an official who disobeys an instruction or commits errors. Strauss points to the example of Interior Secretary Harold Ickes who, contrary to President Roosevelt's wishes, refused to authorize the sale of helium to Germany even though the Second World War had not yet started (Strauss 2007, 707–08). In the past few years alone there are ample examples of numerous appointees who may have been kept on because the political costs of firing them are too high; at least, the media recognize these political costs as among the reasons to retain such officials.[21] And Donald Trump specifically stated that he did not fire Special Counsel Robert Mueller because of the political consequences that Nixon had experienced.[22]

To these observations—that the political cost of removal tends to be high, and that the cost increases when the relevant discretion is vested in a subordinate officer—we may add a third. The political cost increases still further if one believes that the President does not have a constitutional right to interfere and control. Neustadt observed long ago that a President's persuasiveness and effectiveness depend in part on "the sense that what he wants is his by right" (1990, 23). Whether Daniel Webster was right or wrong that Jackson committed an abuse of power depends on this distinction; if the President had a right to control the discretion of the Secretary, Webster's argument would have floundered. And the degree to which the proposed article of impeachment against Nixon would have bite depends on the constitutional propriety of interfering in such law enforcement decisions. Granting a subordinate officer discretion increases the political cost of removal because the desired act requires the intercession of the officer; but a right of interference would undercut much of any argument that the President has acted improperly.

That is the lynchpin of the difference between the present account and Rao (2014). Rao's position is that by virtue of the executive power the President has a constitutional right "to direct subordinates in the exercise of their discretionary statutory duties," which may be enforced through threats of removal (id., 1210-14). Rao accepts that the only constitutionally required enforcement mechanism is removal (id. 1210). But whether there is a right of interference makes a world of difference for assessing the propriety of a removal.

The upshot of this discussion is that removal restrictions are not the lynchpin of agency independence. Although agencies will tend to conform more to presidential instructions when the threat of removal is credible, there are high political costs to exercising the removal power. And those costs increase if it is understood that Congress may rightly vest independent discretion in officers subordinate to the President. The original conception of the presidency therefore allows for an independent administrative state, in which expert agencies exercise discretion vested in them by law. But the President retains an important check.

[21] *See, e.g.*, Justin Miller, "Napolitano Won't Go," The Atlantic (Dec. 30, 2009); Chris Cillizza, "Why Donald Trump might not fire Rod Rosenstein," CNN (Sept. 25, 2018).
[22] Devan Cole & Marshall Cohen, "Trump says he didn't fire Mueller because firings 'didn't work out too well' for Nixon," CNN (June 16, 2019).

4.2. Civil Service

In *Myers v. United States*, Justice McReynolds in dissent suggested that the Court's decision imperiled the civil service: "The long struggle for civil service reform and the legislation designed to insure some security of official tenure ought not to be forgotten. Again and again Congress has enacted statutes prescribing restrictions on removals, and by approving them many Presidents have affirmed its power therein." (272 U.S. 52, 181 (1926) (McReynolds, J., dissenting.) Chief Justice Taft responded that the civil service laws applied only to inferior officers: "It is the intervention of the Senate in their appointment, and not in their removal, which prevents their classification into the merit system. If such appointments were vested in the heads of departments to which they belong, they could be entirely removed from politics" (id., 174).

The analysis of inferior officers supplied here supports the civil service system. Inferior officers can be secured against at-will removal. Yet they must be truly inferior; they must be answerable to principal officers who may direct or review their conduct, for example as the Surveyor General's deputies were under the 1796 statute. As it happens, that's how modern administration usually works. At least in theory, civil service protections do not apply to persons "whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character" (5 U.S.C. § 7511(b)(2)). And some might complain that the Administrative Procedure Act allows agency heads to overturn the adjudicatory decisions of their hearing officers (5 U.S.C. § 557(b)), but that is exactly what the Constitution requires. As for rulemaking decisions, Percival (2011, 2487) has argued, "Most regulatory statutes specify that agency heads rather than the President shall make regulatory decisions."[23] Nevertheless, the Trump Administration believed it necessary to promulgate an executive order providing that, "[t]o the extent permitted by law, the head of each agency shall… require" both "that agency rules promulgated under" the APA's notice-and-comment rulemaking provision "must be signed by a senior appointee," and "that only senior appointees may initiate the rulemaking process for agency rules promulgated under" that section.[24] The Biden Administration revoked the order.[25]

All of this suggests that the bureaucracies generally cannot accomplish politically salient objectives at odds with the President's principal officers. None of this is to deny, however, concerns that agency bureaucracies can stymie the agendas of presidents with whom they disagree by a failure to implement directives. As noted previously, it may be difficult to operationalize a rule that accounts for insubordinate inferior officers who must in theory follow orders but who are in practice very difficult to remove. It is therefore not implausible to argue that removal protections even for inferior officers may in certain circumstances impede the President's power to oversee the execution of the laws. And, as noted, because the power to remove is incident to the power to appoint, it is not all that clear that Congress's power to vest the appointment of inferior officers in the principal officers of the departments includes the power to restrict removal. Nevertheless, the argument that the greater power to make the grant includes the lesser power to do so on conditions is also a plausible constitutional argument, supported by at least 150 years of precedent.

4.3. Dual For-Cause Removal

Another implication relates to dual for-cause removal protections, at issue in *Free Enterprise Fund v. Public Company Accounting and Oversight Board* (561 U.S. 477 (2010)), and this very term in *Securities and Exchange Commission v. Jarkesy* (No. 22-859; Jarkesy v. Sec. & Exch. Comm'n, 34 F.4th 446 (5th Cir. 2022), cert. granted, No. 22-859, 2023 WL 4278448 (U.S. June 30, 2023)). In *Free Enterprise Fund*, the Sarbanes-Oxley Act provided that the Members of the PCAOB could only be removed by the SEC after notice and a hearing if such members "willfully violated" the Act or "willfully abused" authority, or unreasonably "failed to enforce compliance" with the Act or the relevant rules (15 U.S.C. § 7217(d)(3)). The Court assumed, and the parties agreed, that the Commissioners of the SEC, which is understood to be an

[23] Percival cited the Clean Air Act § 109, 42 U.S.C. § 7409. Other examples include 21 U.S.C. § 371 (vesting FDA's regulatory authority with the Secretary of HHS); 15 U.S.C. § 46(g) (FTC has regulatory authority); 15 U.S.C. § 78w (SEC's authority to make rules); 42 U.S.C. § 902(a)(5) (social security administrator); 42 U.S.C. § 264(a) (Surgeon General, with the approval of the Secretary, is authorized to make and enforce such regulations as in his judgment are necessary to prevent interstate disease transmission); 49 U.S.C. § 113(c) & (f) (administrator of Federal Motor Carrier Administration given powers and duties related to motor vehicles vested by other statutes in the Secretary, but reports to the Secretary).

[24] Executive Order 13979, Ensuring Democratic Accountability in Agency Rulemaking, Jan. 18, 2021, https://www.govinfo.gov/app/details/DCPD-202100035.

[25] Executive Order 14018, Revocation of Certain Presidential Actions, Feb. 24, 2021, https://www.govinfo.gov/app/details/DCPD-202100168.

"independent agency," could only be removed by the President for cause (561 U.S. at 487).[26] The Court held that two layers of removal protections unconstitutionally interfere with the President's executive power and duty of faithful execution (561 U.S. at 492-98). The Court excised the removal restrictions on the Board, leaving its members removable at the will of the SEC (id., 508-09).

This remedy may have been appropriate because other than the threat of the removal from the SEC, the PCAOB operated largely independently of the SEC; without the removal restrictions excised, it is plausible to think that the PCAOB Members were not inferior officers. The SEC had to approve PCAOB rules, but the statute provided that those rules had to be approved if "consistent with" the Act (15 U.S.C. § 7217(b)(3)). The SEC could abrogate, add to, or delete the PCAOB rules (id. § 7217(b)(5)), but only after its own notice and comment rulemaking, suggesting a lack of a genuine principal-inferior relationship (otherwise such a rulemaking power would not have been necessary).

The question of dual for-cause removal may be revisited this term in *SEC v. Jarkesy*. At issue are the SEC's administrative law judges (ALJs), who have tenure protections. There is no question that the ALJs are inferior officers (Lucia v. SEC, 138 S. Ct. 2044 (2018)). Their adjudications are subject to reversal and revision by the SEC. Thus, the holding of *Free Enterprise Fund* would seem to dictate that the ALJ's tenure protections are unconstitutional. The government argues in its Supreme Court briefing in *Jarkesy*, however, that a different rule should apply for officers with adjudicatory functions.

There is no basis, however, to distinguish adjudicatory from non-adjudicatory officials as a formal matter. Recall that Madison agreed that the Comptroller, to the extent he exercised adjudicatory functions, ought to be protected from interference (Gales 1834, 1:614). But Madison did not propose to protect the Comptroller from *removal*; rather, he sought to shorten the tenure of office so that the Comptroller would also be answerable to the Senate.

Chief Justice Taft agreed more generally: "there may be duties of a quasi judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control," but "even in such a case" the President "may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised" (Myers v. United States, 272 U.S. 52, 135 (1926)). Of course, Wirt and Webster believed that any decisions could be committed to an officer's peculiar discretion, not just adjudicatory ones.

The adjudicatory nature of the ALJs does, however, make it all the clearer why certain inferior officers should have tenure protections. The only constitutional solution, then, would be to hold that the SEC Commissioners are removable at will; in any event nothing in the statute prevents such removals. But if the Court were to apply the same remedy as in *Free Enterprise Fund*, it would be committing two constitutional wrongs. It would be upholding for-cause protections for principal officers and rejecting such protections for inferior officer adjudicators who warrant them.

Additionally, if the Merit Systems Protection Board is the agency with the first-layer removal protection—that agency is responsible for removing ALJs—that may be unconstitutional for another reason. Recall that Congress's greater power to vest this power has been thought to include lesser power to restrict the incidental power of removal: "The head of a department has no constitutional prerogative of appointment to offices independently of the legislation of congress, and by such legislation he must be governed, not only in making appointments, but in all that is incident thereto" (United States v. Perkins, 116 U.S. 483, 485 (1886)). In other words, Congress's power to vest the appointment of inferior officers brings with it the removal power, and whatever restrictions that Congress wishes to impose upon it. But Congress has no power to vest an officer's removal in a department head in whom it has not vested the power to appoint.

5. Conclusion

The debate over presidential control of administration has stalled. One school maintains the President has the powers of removal and control, the other that Congress can restrict both. Both accounts make sense of some text and some history. Both have some virtues but raise functional concerns; an

[26] The statute, however, did not specify any removal restrictions. Vermeule (2013) has argued that the Court's move "is defensible, if at all, only on the ground that the Court was implicitly recognizing and incorporating by reference an extra-judicial convention about the independence of the SEC" (1219).

"unqualified" affirmation of either view would lead to "unwelcome" consequences (Corwin 1957, 80-81). An alternative reading of the historical record and constitutional text is available. The President may have the power to remove principal officers but not directly to control them—at least, in the absence of a statutory obligation, principal officers do not have a constitutional obligation to obey aside from having to give their opinions in writing. The President can always threaten removal, but removal comes at a cost. And that cost increases in a constitutional system in which the President does not have a right of interference. The distinction between removal and direction does significant work: it allows for a degree of administrative independence, while ensuring the President has ultimate supervision over law execution. Although there is evidence for all three views, the line of best fit may require that scholars and judges better distinguish between the power to remove and the power to control.

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