

IMPERIAL AND IMPERILED: THE CURIOUS STATE OF THE EXECUTIVE

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ABSTRACT

In the last four decades, the presidency has been characterized both as the “imperial presidency” as well as the “imperiled presidency.” From an originalist perspective, both camps have elements of truth on their side. When it comes to the conduct and initiation of wars, modern Presidents exercise powers that rival those the Crown possessed in England. Presidents claim the power to start wars, notwithstanding Congress’s power to declare war. Moreover, Presidents insist that they have the sole right to determine how the armed forces will wage all wars, even though Congress clearly has considerable power over the armed forces. Law execution provides a fascinating contrast. The original Constitution established a single chief executive, empowered to execute all federal laws through subordinate executive officers. Over the course of almost a century and a half, Congresses have splintered the President’s executive power, committing slivers of it to numerous independent agencies. In other words, alongside the Constitution’s unitary executive, a number of independent executive councils have emerged. Hence the President is imperial in some respects and imperiled in others.

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Over three decades ago, in the midst of Watergate, Arthur Schlesinger argued that America had an “imperial presidency.”¹ Though this apprehension waned in the late 1970s and 1980s, many members of the intelligentsia have sounded a fresh alarm, warning that America once again has an imperial presidency.² Critics of the George W. Bush administration have excoriated it for, among other things, wiretapping in supposed contravention of federal law,³ employing coercive interrogation techniques,⁴ and its announced policy of not abiding by statutory provisions it deems unconstitutional.⁵ Some of the criticism has been rather pungent. Senate Majority Leader Harry Reid has described President Bush as “a loser and a liar” and has derided him as another “King George.”⁶ Mr. Reid subsequently apologized—but only, he likes to point out, for calling the President a “loser.”⁷ Bruce Fein, a conservative legal commentator, opined that “Mr. Bush would have quarreled with every indictment against King George III penned by Thomas Jefferson in the Declaration of Independence because it contradicted his monarch-like theory of a unitary executive.”⁸ President George W. Bush occasionally has added fuel to the fire. “I’m the commander—see, I don’t need to explain—I do not need to explain why I say things. That’s the interesting thing about being the president.... I don’t feel like I owe anybody an explanation.”⁹ This attitude seemed to have a touch of regal hauteur to it, bringing to mind President Richard Nixon’s far more imperial claim from the 1970s.¹⁰

1. See ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973) (Replica Books 1998).

2. PETER IRONS, *WAR POWERS: HOW THE IMPERIAL PRESIDENCY HIJACKED THE CONSTITUTION* 272 (2005); ANDREW RUDALEVIGE, *THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE* 261 (2005); FREDERICK A. O. SCHWARZ JR. & AZIZ Z. HUQ, *UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR* 7 (2007) (“Today, the President also deploys the monarchical executive theory”).

3. SCHWARZ & HUQ, *supra* note 2, at 203.

4. RUDALEVIGE, *supra* note 2, at 228-29.

5. *Id.* at 229.

6. David M. Herszenhorn, *Reid’s Chilly Relationship with Bush Enters a Deep Freeze*, N.Y. TIMES, Dec. 19, 2007, at A20.

7. *Id.*

8. Bruce Fein, *Can the Republic Survive?*, WASH. TIMES (D.C.), Nov. 27, 2007, at A16.

9. BOB WOODWARD, *BUSH AT WAR* 145-46 (2002).

10. I am referring to Nixon’s curious claim that “[w]hen the president does it, that means

Of course, there is nothing truly new here. Criticisms that the President has adopted monarchical trappings and attitudes are as American as apple pie. Indeed, such complaints were common even before there was a President.¹¹ In *The Federalist* No. 67, Alexander Hamilton rebuked those who had exaggerated the President's constitutional powers in a bid to defeat the Constitution.¹² His amusing comments are worth recounting today:

[C]alculating upon the aversion of the people to monarchy, they have endeavored to enlist all their jealousies and apprehensions in opposition to the intended President of the United States; not merely as the embryo, but as the full-grown progeny of that detested parent. To establish the pretended affinity they have not scrupled to draw resources even from the regions of fiction.... He has been decorated with attributes superior in dignity and splendor to those of a king of Great-Britain. He has been shown to us with the diadem sparkling on his brow, and the imperial purple flowing in his train. He has been seated on a throne surrounded with minions and mistresses; giving audience to the envoys of foreign potentates, in all the supercilious pomp of majesty. The images of Asiatic despotism and voluptuousness have scarcely been wanting to crown the exaggerated scene. We have been almost taught to tremble at the terrific visages of murdering janizaries; and to blush at the unveiled mysteries of a future seraglio.¹³

This pattern of inveighing against alleged presidential pretensions and usurpations continued after ratification, with polemicists taking unwarranted potshots at America's Cincinnatus.¹⁴ Thomas Jefferson's friends in the press claimed that George Washington and his Federalist allies were attempting to create a monarchy.¹⁵ Much

that it is not illegal." WATERGATE AND AFTERWARD: THE LEGACY OF RICHARD M. NIXON 328 (Leon Friedman & William F. Levantrosser eds., 1992).

11. CATO, TO THE CITIZENS OF THE STATE OF NEW-YORK IV, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 113, 115 (Herbert J. Storing ed., 1981) [hereinafter ANTI-FEDERALIST]; THE IMPARTIAL EXAMINER, UNTITLED 11 JUNE 1778, *reprinted in* 5 ANTI-FEDERALIST 194, 197.

12. THE FEDERALIST NO. 67, at 452 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

13. *Id.* at 452-53.

14. STANLEY ELKINS & ERIC MCKITTRICK, THE AGE OF FEDERALISM 360-61 (1993).

15. *Id.*

later, Abraham Lincoln was deemed a dictator and Franklin D. Roosevelt far worse.¹⁶

Such criticism of the executive branch is entirely healthy. Citizens who disagree with an administration's policies undoubtedly will voice vigorous criticisms and often will be prone to exaggerate the administration's defects. Moreover, members of the other branches, competing as they do for power and influence, naturally will take the President to task for supposedly overstepping his constitutional bounds.

What is perhaps of more recent vintage is the movement amongst some scholars and politicians to check the supposed trespasses by Congress upon the presidency. To be sure, there have been periodic calls to strengthen the presidency, such as the Brownlow Committee's administrative reforms proposed in the late 1930s.¹⁷ But what is seemingly new is the sense amongst some that Congress has subdued, even shackled the presidency.¹⁸ In the early 1980s, President Gerald Ford expressed this view with some exasperation, declaring that "[w]e have not an imperial Presidency but an imperiled Presidency."¹⁹

The diminishment of the presidency perhaps began in the late part of the nineteenth century with the creation of the Interstate Commerce Commission.²⁰ Over the course of the next century, Congress sought to make many fields of civil law execution independent of the President. This tendency to create independent executive fiefdoms seemed to accelerate and deepen after the Vietnam War and the Watergate scandal.²¹ Congress not only continued to create independent agencies charged with executing the law (such as the Federal Election Commission), but it also enacted all manner of statutes that sought to curb the perceived

16. See ARTHUR M. SCHLESINGER, JR., *WAR AND THE CONSTITUTION: ABRAHAM LINCOLN AND FRANKLIN D. ROOSEVELT* 15-16 (1988).

17. JAY M. SHAFRITZ, *DICTIONARY OF PUBLIC POLICY AND ADMINISTRATION* 28-29 (2004).

18. See generally HAROLD M. BARGER, *THE IMPOSSIBLE PRESIDENCY: ILLUSIONS AND REALITIES OF EXECUTIVE POWER* (1984); THOMAS FRANCK, *THE TETHERED PRESIDENCY: CONGRESSIONAL CONSTRAINTS ON EXECUTIVE POWER* (1980); THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989); *THE POST-IMPERIAL PRESIDENCY* (Vincent Davis ed., 1980).

19. SCHLESINGER, *supra* note 1, at 425.

20. See ROBERT E. CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* 19 (1941).

21. See C. Boyden Gray, *Special Interests, Regulation, and the Separation of Powers*, in *THE FETTERED PRESIDENCY*, *supra* note 18, at 213.

excesses of presidential law execution.²² The Impoundment Control Act, the Ethics in Government Act, the Foreign Intelligence Surveillance Act, the Hughes-Ryan Act—all of these and many others are the byproducts of that era's profound distrust of Presidents.²³

Prominent members of the George W. Bush administration share the view that Congress has unduly hampered the presidency. Vice President Dick Cheney has said that “[i]n the aftermath of Vietnam and Watergate ... there was a concerted effort to place limits and restrictions on presidential authority”²⁴ These efforts “were misguided”²⁵ In other remarks, the Vice President has said he believes “in a strong, robust executive authority,” and that “the world we live in demands it”²⁶ He further claimed that “we have an obligation as an administration to pass on the offices we hold to our successors in as good of shape as we found them.”²⁷ Sounding a note of optimism, Cheney claimed “that to some extent now, we’ve been able to restore the legitimate authority of the presidency.”²⁸

In comments on the scandal surrounding President Bill Clinton’s pardons of Marc Rich and others, President Bush has said he was “mindful not only of preserving executive powers for [him]self, but for predecessors as well.”²⁹ For this reason (and perhaps others), the

22. See *id.*; Theodore B. Olson, *The Impetuous Vortex: Congressional Erosion of Presidential Authority*, in *THE FETTERED PRESIDENCY*, *supra* note 18, at 225-42.

23. Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 332; Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824; Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783; Foreign Assistance Act of 1974, Pub. L. No. 93-559, 88 Stat. 1795.

24. James Taranto, *A Strong Executive: Does Watergate's Legacy Hinder the War on Terror?*, *OPINION J.*, Jan. 28, 2006, <http://www.opinionjournal.com/editorial/feature.html?id=110007885>.

25. *Id.*

26. Richard W. Stevenson, *Cheney Says 9/11 Changed the Rules*, *INT'L HERALD TRIB.*, Dec. 21, 2005, at 1.

27. Press Release, The White House, Vice President's Remarks to the Traveling Press (Dec. 20, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051220-9.html> [hereinafter Vice President's Remarks]. Other commentators demur, arguing that the Administration's unilateral approach to interbranch disputes and the conduct of warfare ultimately will leave the presidency weaker and not stronger. See generally JACK L. GOLDSMITH, *THE TERROR PRESIDENCY* (2007).

28. Vice President's Remarks, *supra* note 27.

29. Press Release, The White House, Remarks by the President in Question and Answer Session with the Press (Jan. 29, 2001), available at <http://www.whitehouse.gov/news/releases/20010129-7.html>.

President did not want an investigation opened into the particulars of President Clinton's flurry of last-minute pardons.³⁰ Certain decisions of President Bush, such as executive orders that gave prior Presidents a veto on the release of certain of their administrations' documents, certainly seem designed to respect (and perhaps enhance) the prerogatives of past Presidents.³¹ By augmenting the power of past Presidents to restrain the release of documents, Bush undoubtedly understood that he likewise was enhancing his own authority to prevent the release of his administration's papers once he leaves office.

I will not try to referee the dispute between those who think the presidency has become too muscular and those who regard it as entirely too frail. At some level, saying that the President has become overbearing and all-powerful is a little like saying that a cup of coffee is too bitter. To a degree, it is a matter of preference, making it a matter upon which reasonable people can disagree. Some people prefer strong Presidents who will cut through political impasses and take decisive action. Others prefer Presidents who are more passive and deferential to Congress, the courts, or the public.

Additionally, criticism of a particular President often reflects the partisan sensibilities of the critics. People frequently look the other way when a co-partisan takes some controversial action even if they might have criticized the practice when done by politicians of another party. For instance, few legal scholars criticized President Clinton's decision to wage war on Serbia even though there were many who had vociferously opposed previous presidential wars.³² One must suppose that partisan identification with President Clinton coupled with approval of America's participation in the Balkans War accounts for the remarkable silence. Similarly, the dearth of Republican oversight during the early years of the George W. Bush administration is likely attributed, at least in part, to an unwise adherence to President Ronald Reagan's "11th Commandment—Thou shalt not speak ill of another Republican."³³

30. *See id.*

31. *See, e.g.*, Exec. Order No. 13,233, 66 Fed. Reg. 56,025 (Nov. 5, 2001) (amending the 1978 Presidential Records Act).

32. *See* John Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673, 1685-86 (2000) (noting the curious silence).

33. REAGAN: A LIFE IN LETTERS 591 (Kiron K. Skinner et al. eds., 2003).

Now that a Democrat will occupy the White House, the Republican members of Congress undoubtedly will revert to a dogged defense of congressional prerogatives. One also can foresee that Democratic congressmen will be more prone to turning a blind eye towards the alleged improprieties and usurpations of President Barack Obama.

Because arguments about whether we groan under the strain of an imperial presidency necessarily will reflect different conceptions about the ideal features of the executive branch, and because individuals will be tempted to look the other way when their co-partisans are in power, I want to eschew any baseline that merely reflects either my own opinion of the optimal features and traits of the presidency or my own attitude regarding the merits of any particular occupant. Instead, this Article judges whether modern Presidents have usurped constitutional powers using the more fixed standard of the Constitution's original meaning. Have Presidents assumed congressional powers in a form of interbranch imperialism? Or has Congress, the "impetuous vortex" of which Madison warned,³⁴ usurped presidential powers as part of its general tendency to seize (or shackle) power rightly belonging to others?

Of course, any attempt to use the original conception of the presidency as a baseline is subject to a whole host of serious objections. Some will observe that the original understanding of particular provisions in Article II is (and has always been) rather contested.³⁵ Others will insist that the original understanding of various Article II provisions is unknowable, arguing that phrases like "executive power" and "[c]ommander in [c]hief" are simply inscrutable.³⁶ In his famous *Youngstown* opinion, Justice Robert Jackson made both of these points when he claimed that the conflicting historical evidence "cancels each other" and lamented that "[j]ust what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."³⁷

34. THE FEDERALIST NO. 48, at 333 (James Madison) (Jacob E. Cooke ed., 1961).

35. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

36. *Id.* at 641.

37. *Id.* at 634.

Although such limitations and concerns must be kept in mind, it does seem possible to reconstruct the Founders' vision regarding the President's powers over war and law execution. This relatively narrow focus makes the treatment more manageable and hopefully more interesting because these two areas provide a remarkable contrast.³⁸

In matters of war, Presidents have become hyper-Commanders in Chief, able to start wars at will and deeply resistant to, and even indignant about, legislative interference.³⁹ Believing that they were ultimately responsible for safeguarding the nation, the past few Presidents have insisted upon a right to start wars as a means of promoting national security.⁴⁰ This is a far cry from the original conception of the President. Though the President was a powerful and supreme military commander, he had no power to take the nation to war. He could not start wars; indeed, he could not even conduct offensive operations after another nation had declared war on the United States. Furthermore, Congress enjoyed sweeping power over the military and determined the manner of fighting wars, the placement of troops and naval vessels, and the proper military targets in times of war. Because Congress enjoyed broad authority over war and military matters, the Constitution did not grant the Commander in Chief any exclusive powers over the military.

In matters of law execution, by contrast, the President is no longer what members of the founding generation called a "supreme executive."⁴¹ Instead, recent Presidents have acquiesced to the perpetuation of what is best described as an enervated, splintered executive. Rather than the President serving as a true chief executive, the current situation is more aptly described as one in which there is one chief executive with limited law enforcement

38. Hence, I will not discuss the President's powers over foreign affairs or his influence over legislation. Michael Ramsey and I have previously written that the modern presidency's powers over foreign affairs are largely consistent with the original understanding. See Michael Ramsey & Saikrishna Prakash, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001).

39. LOUIS FISHER, *PRESIDENTIAL WAR POWER* 215 (2004).

40. IRONS, *supra* note 2, at 265-66.

41. See Landholder VI, in 3 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 487, 489 (John P. Kaminski et al. eds., 1976) (stating that the "supreme executive should be one person and unfettered, otherwise than by the laws he is to execute").

jurisdiction and a host of plural executive committees, each with a narrow but still important jurisdiction. This is far removed from the founding conception of the President. At the founding, individuals uniformly read the Constitution as empowering the President to execute all laws himself. Moreover, most believed that the Constitution permitted the President to direct and control the executive officers—those who executed the law. The powers to execute the law and control executive officers flowed from the grant of executive power. Using these powers, the founding generation expected that Presidents would ensure a uniform, just, vigorous, and prompt enforcement of federal statutes.

So we have a curious state of affairs, in which the President is imperial in some respects and imperiled in others. It would seem that both Gerald Ford and Arthur Schlesinger were right, in a manner of speaking.

I. THE HYPER-COMMANDER: WAR POWERS AND THE STORY OF PRESIDENTIAL AGGRANDIZEMENT

War powers scholarship of the last four decades has tended to criticize modern Presidents for acting at variance with the original understanding.⁴² Though the discussion below generally agrees with that critique, it also differs in important respects. First, most prior considerations have focused on what various founders said about the Constitution's allocation of war powers during the founding era.⁴³ As my colleague Michael Ramsey has pointed out, surprisingly little attention has been paid to the text of particular constitutional provisions and the original understanding thereof.⁴⁴ For instance, when discussing whether the President could start wars, scholars have spent little time trying to discern the meaning of the phrase "declare war," content to quote the numerous founders who denied that the President could start a war.⁴⁵ The treatment below makes claims about the meaning of constitutional text. Among other

42. See, e.g., David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008); Michael Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002).

43. See Ramsey, *supra* note 42, at 1549-51.

44. *Id.*

45. *Id.* at 1549-50.

things, I argue that the Constitution's grant to Congress of the power to "declare war" means that only Congress may decide whether the nation will wage war. Moreover, Congress's many powers over war and military powers cede Congress sweeping powers over all war and military matters.

Second, previous scholarly criticisms of presidential power actually have overstated the President's powers over wars and the military.⁴⁶ One common feature of many accounts is that although only Congress may decide to take the nation to war, the President has constitutional control over some or all aspects of the conduct of the war.⁴⁷ In particular, as David Barron and Martin Lederman recently pointed out, numerous scholars have assumed that Congress cannot regulate the conduct of the war, as such power is granted exclusively to the Commander in Chief.⁴⁸ In fact, under the original understanding, someone who was a "commander in chief" enjoyed no area of autonomy with respect to military operations.⁴⁹ Consistent with this view of the Commander in Chief's power, early Congresses repeatedly regulated military operations all the time, including battlefield operations.⁵⁰ Hence, when critics of executive dominance of warmaking concede that the Constitution affirmatively grants the President some autonomy when it comes to military operations, they concede too much, at least from the perspective of the original Constitution.

A. Original Framework: The Constrained Commander in Chief

The Constitution largely replicates the system that prevailed under the Articles of Confederation. To be sure, the Constitution sometimes uses different words, but the allocation of powers is much the same. As under the Articles, Congress may decide whether the nation will wage war.⁵¹ Likewise, Congress determines whether to have an army and navy and how they will be equipped.⁵²

46. See, e.g., Barron & Lederman, *supra* note 42, at 751 n.191.

47. *Id.*

48. *Id.*

49. See *infra* notes 85-95 and accompanying text.

50. See *infra* notes 82, 90-95 and accompanying text.

51. U.S. CONST. art. I, § 8.

52. *Id.*

Finally, Congress may direct the operations of the armed forces.⁵³ Considered together, these robust powers establish that there is no subject matter related to war and the military that is outside of Congress's reach.

Consider the "declare war" power. In the eighteenth century, this much-remarked-upon power was understood to consist principally of the power to decide to go to war. Any decision to go to war, whether or not expressed via a formal declaration of war, was seen as a decision to declare war.⁵⁴ Sir Robert Walpole, the first English Prime Minister, noted in the mid-eighteenth century that England typically declared war via "the Mouths of [her] Cannons."⁵⁵ Other Europeans, including monarchs, legislators, judges, and diplomats, likewise spoke of nations declaring war via their hostilities or hostile actions.⁵⁶ No less than King George III observed that because France had attacked English naval vessels, France had declared war against England.⁵⁷

The signals that served as declarations of war were quite varied. Nations might declare war via an invasion, with a naval attack, or by a host of seemingly innocuous statements or actions that were seen as declarations of war. Prior to the eighteenth century, "throwing down a gauntlet" (an armored glove) served as a declaration of war in Europe.⁵⁸ During the eighteenth century, Tripoli declared war by cutting down the enemy's flag.⁵⁹ Given the right context, withdrawing one's ambassador (or dismissing another nation's) might serve as a declaration of war because it signaled a break in diplomatic relations and that the time for parleying had ended.⁶⁰

Americans likewise understood that certain informal signals commonly served as declarations of war. John Adams, who had

53. *Id.*

54. STEPHEN C. NEFF, *LAW AND THE WAR OF NATIONS* 110 (2005).

55. 10 *THE HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS: SECOND PARLIAMENT OF GEORGE II, FOURTH SESSION* (May 12, 1738), *available at* <http://www.british-history.ac.uk/report.aspx?compid=37805>.

56. *See* NEFF, *supra* note 54, at 108-09.

57. Letter from the King to Lord North (July 18, 1778), *in* 4 *THE CORRESPONDENCE OF KING GEORGE THE THIRD FROM 1760 TO DECEMBER 1783*, at 180 (John Fortescue ed., 1928).

58. *See* NEFF, *supra* note 54, at 72.

59. *See* JOSHUA E. LONDON, *VICTORY IN TRIPOLI* 95 (2005).

60. Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War,"* 93 *CORNELL L. REV.* 45, 73 (2007).

served as the nation's ambassador to France, noted that both England and France had used hostilities to declare war against each other during the Revolutionary War, and (correctly) predicted that there would be no other declaration of war.⁶¹ Similarly, Americans recognized that when certain Native American tribes beheaded the soldiers of another nation, they thereby declared war.⁶² Finally, Americans, recounting the events in Europe during the Revolutionary War, repeatedly noted that wars could be declared via various hostile signals such as aiding a warring nation, recognizing the independence of rebel subjects, and seizing another nation's property.⁶³

By conveying to Congress the power to declare war, the Constitution implicitly, but nonetheless undeniably, grants Congress a monopoly on the decision to go to war. Indeed, early commentators uniformly agreed that the President could not take the nation to war because the Constitution granted the power to declare war exclusively to Congress.⁶⁴ For instance, in 1795, Professor James Kent observed that "war can only be commenced by an act or resolution of congress"⁶⁵

As one might expect, early Presidents well understood that the grant of the declare war power to Congress meant that they could not declare war. To begin with, they recognized that they could not unilaterally issue a formal declaration of war.⁶⁶ Indeed, no President has ever claimed such authority.⁶⁷ More generally, early Presidents likewise realized that the Constitution barred them from taking any action that was considered a declaration of war.⁶⁸ For this reason, George Washington refused to authorize offensive operations against certain Native American tribes that had declared war

61. Letter from John Adams to Samuel Adams (Feb. 14, 1779), in 3 THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 47, 48 (Francis Wharton ed., Wash., D.C., Gov't Printing Office 1889).

62. Prakash, *supra* note 60, at 78.

63. See Saikrishna Prakash, *Exhuming the Seemingly Moribund Declaration of War*, 77 GEO. WASH. L. REV. (forthcoming Nov. 2008).

64. Saikrishna B. Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299, 313-15 (2008).

65. JAMES KENT, DISSERTATION: BEING THE PRELIMINARY PART OF A COURSE OF LAW LECTURES 66 (1795).

66. See Ramsey, *supra* note 42, at 1550-51.

67. See Prakash, *supra* note 64, at 314-15.

68. See *infra* notes 100-06 and accompanying text.

against the United States.⁶⁹ “The Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they shall have deliberated upon the subject, and authorized such a measure.”⁷⁰ In Washington’s view (and in the opinion of his Cabinet), to have authorized offensive operations against the Native American tribes would have been to declare war upon them.⁷¹

The declare war power not only grants Congress the power to decide whether to go to war, but it also grants Congress the power to control all those decisions and functions that are normally associated with a declaration of war. As I recount in a recent piece, formal declarations of war were not simple, one-sentence documents that did no more than declare war.⁷² Instead, they typically were complex and detailed, laying down rules related to the status of treaties, the rights of enemy nationals resident within the declarant’s territory, and the types of enemy property that were subject to capture.⁷³ Because Congress has the power to declare war, it has the power to establish rules related to these subject matters, and the right to expect that its rules will be honored as the supreme law of the land, whatever state law or the President might say to the contrary.

Additional powers related directly to the use of force and the capture of enemy property—specifically, the powers to grant letters of marque and reprisal and to make capture rules—were likewise understood to grant Congress a monopoly with which the President could not interfere.⁷⁴ In early naval wars, Congress granted the President the power to grant letters of marque and reprisal,⁷⁵ suggesting that the President lacked such power under the Constitution. Relatedly, an early Supreme Court opinion, *Little v. Barreme*,⁷⁶ concluded that the President could not supplement

69. *Id.*; Letter from George Washington to William Moultrie (Aug. 28, 1793), available at [http://rs6.loc.gov/cgi-bin/query/r?ammem/mgw:@field\(DOCID+@lit\(gw330067\)\)](http://rs6.loc.gov/cgi-bin/query/r?ammem/mgw:@field(DOCID+@lit(gw330067))) (for a scan of the original letter, follow the “IMAGES” hyperlink).

70. *Id.*

71. *Id.*

72. Prakash, *supra* note 63.

73. *Id.*

74. *See id.*

75. *See id.*

76. 6 U.S. (2 Cranch) 170 (1804).

Congress's capture rules, thereby indicating that the President lacked the constitutional power to create capture rules on his own.⁷⁷ Finally, even Alexander Hamilton, often regarded as having a rather pro-executive conception of presidential power, acknowledged that the President had no power to order the capture of alien property. Indeed, he reached this conclusion in the face of a French naval war against American shipping.⁷⁸

Other powers the Constitution grants to Congress—including, most prominently, the power to make rules for the government and regulation of the armed forces—cede Congress complete (although not exclusive) control over the armed forces.⁷⁹ Using its authority, early Congresses specified where ships would patrol during times of war, what enemy vessels were proper military targets, and such mundane things as the uniform method of loading and firing muskets.⁸⁰ Early Congresses even regulated the treatment of prisoners. Sometimes, they required the President to keep prisoners safe.⁸¹ Other times, they authorized the torture and execution of prisoners in retaliation for the mistreatment meted out to Americans.⁸²

These claims of sweeping congressional power over war and military matters will strike some as quite dubious. After all, Article II of the Constitution famously makes the President the Commander in Chief.⁸³ Is the Commander in Chief meant to be a potted plant, incapable of making meaningful military decisions? Of course not. As Commander in Chief, the President enjoys substantial power over the military. A 1778 military dictionary defined he “that commands [the army] in chief” as someone who may

regulate the march of the army, and their encampment, ... visit the posts, ... command parties for intelligence, ... give out the orders ... in day of battle, he chuses [sic] the most advantageous ground, makes the disposition of his army, posts the artillery,

77. *Id.* at 177-78.

78. Letter from Alexander Hamilton to James McHenry (May 17, 1798), in 21 THE PAPERS OF ALEXANDER HAMILTON 461, 461-62 (Harold C. Syrett ed., 1974).

79. U.S. CONST. art. I, § 8, cl. 14.

80. See Prakash, *supra* note 63.

81. See, e.g., Act of July 6, 1812, 2 Stat. 777.

82. See, e.g., Act of March 3, 1813, 2 Stat. 829.

83. U.S. CONST. art. II, § 2, cl. 1.

and sends his orders.... At a siege, he ... orders the making of [defensive fortifications] and making the attacks.⁸⁴

There is little doubt about the significance of such authorities, because Presidents may make such decisions across all theaters of war.

Yet, notwithstanding their tremendous power over military operations, commanders in chief by no means enjoyed unlimited or exclusive power. Commanders in chief were never thought to have the power to declare war, raise armies, or fund them.⁸⁵ Moreover, commanders in chief were never thought to have exclusive operational control over their units.⁸⁶ Although the powers of commanders in chief are significant, these powers did not guarantee any sphere of autonomy or independent decisionmaking. In particular, others, both civilian and military, directed commanders in chief.

The experiences in England and America prove as much. In the Anglo-American tradition, commanders in chief always have been under the control of others. In England, there were regional commanders in chief and sub-commanders in chief of various units, none of whom had any operational autonomy.⁸⁷ In America, the same relationship held true. During the colonial era, there were multiple commanders in chief, all subordinate to superior commanders and the Crown.⁸⁸ More relevant, the nation had a congressionally appointed Commander in Chief during the Revolutionary War who commanded under the direction of the Continental Congress.⁸⁹ In 1775, Congress appointed George Washington as Commander in Chief.⁹⁰ Notwithstanding his ap-

84. A MILITARY DICTIONARY, EXPLAINING AND DESCRIBING THE TECHNICAL TERMS, PHRASES, WORKS, AND MACHINES USED IN THE SCIENCE OF WAR, at E3 (1778).

85. See, e.g., Ramsey, *supra* note 42, at 1549-53.

86. See *infra* notes 87-95 and accompanying text.

87. See Henry P. Beers, *The Papers of the British Commanders in Chief in North America, 1754-1783*, 13 MILITARY AFF. 79 (1949) (discussing various commanders in chief of North America); see also OXFORD HISTORY OF THE BRITISH ARMY 364-65 (David G. Chandler & Ian Beckett eds., 1994) (discussing commanders in chief for India, Bengal, and Madras).

88. See DAVID RAMSAY, *THE LIFE OF GEORGE WASHINGTON* 11 (Mallory & Co. 1811) (discussing Washington's role as Commander in Chief of the Virginia militia during the French and Indian War).

89. See Prakash, *supra* note 64, at 362-64.

90. 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 96 (Gov't Printing Office 1905).

pointment, however, he was subject to continual congressional direction in matters large and small throughout the course of the war.⁹¹ Indeed, his commission required as much.⁹² No one, least of all Washington, thought that the Commander in Chief had any sphere of autonomy vis-à-vis the Continental Congress.⁹³ Finally, after the Constitution's ratification, Congress continued to direct the army and navy, notwithstanding the Constitution's creation of a more independent Commander in Chief.⁹⁴ As noted earlier, Congress directed where vessels could patrol, the types of enemy ships to attack, and the objectives of various wars.⁹⁵

Were there limits on congressional power over war and military matters? There were meaningful constraints, but almost all of these were practical and institutional, rather than constitutional in nature. Congress could have enacted whatever rules it wished, but it was (and is) constrained by the difficulty of crafting rules in real time to deal with ongoing battlefield situations. Congress lacked battlefield information of the type that would be needed to micromanage particular battlefield operations, like when to fire, when to advance, and whether to attempt a flanking operation.⁹⁶ Moreover, the deliberative legislative process is clearly ill-suited to making rules that will apply to ongoing skirmishes. Both chambers have to pass the same legislation, and then the President has ten days to decide whether to sign, veto, or allow the bill to become law with the passage of time.⁹⁷ Most battles would be long over before such bills could become law. Finally, the President may veto bills that he believes micromanage battlefield decisions in ways that are detrimental to the conduct of the war.⁹⁸ Such vetoes make it extremely difficult to specify operational details because Congress needs a two-thirds majority in both chambers to override the veto.⁹⁹

91. *Id.* (commission requiring Washington to “observe and follow such orders and directions, from time to time, as you shall receive from this, or a future Congress of these United Colonies, or committee of Congress”).

92. *Id.*

93. See Ramsey, *supra* note 42, at 1560 n.61.

94. See Prakash, *supra* note 64, at 342-45.

95. See *supra* notes 79-80 and accompanying text.

96. Prakash, *supra* note 64, at 377-79.

97. U.S. CONST. art. I, § 7, cls. 2-3.

98. *Id.* at cl. 3.

99. *Id.*

Needless to say, these constraints greatly hamper the capacity of Congress to dictate particular military operations. Indeed, in almost all situations it will be impossible for Congress to micromanage specific battlefield strategies and assets. Often, the most it can do is enact antecedent, standing rules that try to regulate the conduct of warfare, whatever the precise circumstances.

The one constitutional constraint upon Congress is that it may not deprive the President of control over the military. More precisely, Congress cannot establish independent military officers, for if it did, the President would not be Commander in Chief of the entire armed forces. What this means in practice is that although Congress can regulate the armed forces and the use of force in a host of ways, specifying all manner of rules related to military training, discipline, and battlefield tactics, it cannot divest the President of any military discretion that it chooses not to exercise. In other words, whatever military discretion Congress chooses not to exercise must be left in the hands of the Commander in Chief.

Early Presidents accepted congressional dominance of war and military powers. As noted, Washington understood that only Congress could decide whether the nation would wage war.¹⁰⁰ The same was true of his immediate successors. John Adams recognized that France was waging a naval war against the United States.¹⁰¹ Nonetheless, he did not imagine that he could decide to wage war in response.¹⁰² Similarly, Jefferson concluded that Congress would have to declare war against Tripoli if the United States was to engage in offensive operations against that nation.¹⁰³ Finally, Madison famously went to Congress to secure a declaration of war against England, even though he believed that England already was waging war against the United States.¹⁰⁴ Just as importantly, early Presidents abided by all the constraints that Congress placed on the use of military force and the numerous and diverse regulations that

100. See Letter from George Washington, *supra* note 69.

101. See ALEXANDER DECONDE, *THE QUASI WAR* 23 (1966).

102. See ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER* 155 (1976).

103. See The Avalon Project at Yale Law School, Thomas Jefferson: First Annual Message to Congress (Dec. 8, 1801), http://avalon.yale.edu/19th_century/Jeffmes1.asp (last visited Nov. 25, 2008).

104. Special Message to Congress (June 1, 1812), *in* 8 *THE WRITINGS OF JAMES MADISON* 192 (Gaillard Hunt ed., 1906).

Congress imposed upon the military.¹⁰⁵ No early President ever claimed that Congress lacked authority to direct military training, operations, and deployment.¹⁰⁶

B. Modern Framework: The Absolute Commander in Chief

The first time a President arguably exceeded his limited war powers was in the prelude to the Mexican-American War. President James Polk ordered General Zachary Taylor to defend disputed territory north of the Rio Grande.¹⁰⁷ No statute of Congress specified the boundaries of the state of Texas.¹⁰⁸ Some Whigs, most notably Abraham Lincoln, argued that President Polk had triggered a war by moving U.S. troops to the Rio Grande in a manner calculated to trigger Mexican aggression.¹⁰⁹ Indeed, Lincoln's "Spot Resolutions" implied that American troops had been sent to territory in Mexico (and hence not part of the United States).¹¹⁰

More radical changes in conceptions of presidential war powers occurred during the Korean War, as Louis Fisher has ably argued in his book.¹¹¹ In Korea, the President took the nation to war without first securing congressional authorization to wage war.¹¹² Though President Truman cited United Nations resolutions as his authority for waging war,¹¹³ no U.N. resolution purported to oblige the United States to wage war in Korea.¹¹⁴ Ever since then, America has waged a series of wars, large and small, that Presidents began without congressional approval: the bombing of Cambodia by President Nixon, the invasion of Grenada by President Reagan, and the bombing of Serbia by President Clinton are but examples of a

105. See Prakash, *supra* note 64, at 303; see also *id.* at 332-36.

106. See *id.* at 303; see also *id.* at 332-36.

107. See The National Archives, Teaching With Documents: Lincoln's Spot Resolutions, <http://www.archives.gov/education/lessons/lincoln-resolutions> (last visited Nov. 25, 2008).

108. See *id.*

109. See *id.*; RUTH TENZER FELDMAN, THE MEXICAN-AMERICAN WAR 65 (2004).

110. See Lincoln's Spot Resolutions, *supra* note 107; see also FELDMAN, *supra* note 109, at 65.

111. FISHER, *supra* note 39, at 97-100.

112. Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT'L L. 21, 33 (1995).

113. *Id.*

114. *Id.*

more general trend.¹¹⁵ Although Presidents George H.W. Bush and George W. Bush received congressional authority for their most famous wars, these were perhaps exceptions to the general trend.¹¹⁶ Indeed, the latter President's administration claimed constitutional authority to wage war against Iraq, whether or not Congress authorized that war.¹¹⁷

From the perspective of institutional design, perhaps presidential initiative in warmaking makes sense. Although John Yoo has argued that the Constitution authorizes the President to start wars,¹¹⁸ his more persuasive case rests on institutional factors.¹¹⁹ After all, Congress lacks ready access to diplomatic and military intelligence, is arguably too focused on parochial matters, and seems rather disinclined to be the dominant voice when it comes to war.¹²⁰ Countering these factors is the intuition that Presidents are more willing to go to war and may choose to do so out of a sense that lasting greatness will come only if they achieve military victories during their time in office.¹²¹ Indeed, President George W. Bush's former press secretary has claimed the President's desire to wage war on Iraq stemmed in part from a desire to burnish his legacy.¹²²

Apart from claiming the power to initiate warfare, modern Commanders in Chief have also asserted that the Constitution bars Congress from enacting statutes that interfere with presidential direction of wars. These claims were voiced as early as the mid-1950s by President Truman.¹²³ Many scholars have endorsed the

115. *Id.* at 21.

116. *See, e.g.*, Authorization for Use of Military Force Against Iraq, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

117. *See, e.g.*, Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., to the Deputy Counsel to the President (Sept. 25, 2001), *available at* <http://www.usdoj.gov/olc/warpowers/925.htm> (concluding that because "[d]eclaring war is not tantamount to making war," the President may wage war notwithstanding the Constitution's grant of declare war authority to Congress).

118. JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 293-94 (2005).

119. *See* Jide Nzelibe & John C. Yoo, *Rational War and Constitutional Design*, 115 *YALE L.J.* 2512, 2516-19, 2525 (2006).

120. *Id.* at 2524-25.

121. *See* William M. Treanor, *Fame, the Founding, and the Power To Declare War*, 82 *CORNELL L. REV.* 695, 700-01 (1997).

122. SCOTT MCCLELLAN, *WHAT HAPPENED* 130 (2008).

123. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 *HARV. L. REV.* 941, 1055-63 (2008).

notion that the Commander in Chief has exclusive authority over certain operational matters.¹²⁴

Recently, such claims came into stark relief with the publication of an Office of Legal Counsel memo claiming that Congress could not prohibit the use of coercive interrogation techniques by the armed forces.¹²⁵ The memo began by noting that Congress certainly could not dictate battlefield tactics and then drew an analogy to the treatment of prisoners.¹²⁶ If Congress could not dictate the former, then it could not regulate the latter, the memo argued.¹²⁷ Although many have condemned the memo's legal reasoning,¹²⁸ few disagree with the premise that there are limits to Congress's power over the armed forces. Those who agree that Congress lacks complete authority over the armed forces are in the unhappy position of attempting to determine which sorts of regulations are permissible and which impinge upon the Commander in Chief's constitutional authority.

The founding generation had no need to worry about this uncertain dividing line. They granted Congress complete authority over the armed forces, granting the Commander in Chief residual control.¹²⁹ When Congress speaks via legislation, the entire armed forces, including the President, must obey congressional statutes. Fortunately, the rest of the Constitution makes it difficult (but not impossible) for Congress effectively to micromanage an ongoing conflict in real time.¹³⁰ So although the Constitution grants Congress sweeping powers over the military, Congress has limited institutional and practical ability to direct warmaking the way an admiral, general, or Commander in Chief might.¹³¹

In any event, by repeatedly asserting broad presidential powers over war and military matters, Presidents have accumulated, as a

124. *Id.* at 1068-70.

125. Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, White House Counsel (Aug. 1, 2002), *available at* <http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf>.

126. *Id.* at 35.

127. *Id.*

128. *See Note, Government Counsel and Their Obligations*, 121 HARV. L. REV. 1409, 1421-23 (2008).

129. *See supra* notes 66-82 and accompanying text.

130. *See supra* notes 96-99 and accompanying text.

131. *Id.*

practical matter, absolute powers. Though some members of Congress periodically attempt to rein in presidential power,¹³² these attempts have foundered because Congress as a whole seems uninterested in taking more responsibility for war and military decisions. Whatever statutes or frameworks that Congress has enacted or might enact in the future seem destined to fail, so long as most federal legislators lack the resolve to hold Presidents accountable for running afoul of these statutes and congressional conceptions of the Constitution's allocation of war and military powers. Like the Constitution itself, statutes and resolutions are but parchment barriers if there is no will to enforce them.

II. THE ENERVATED, DIVIDED EXECUTIVE: LAW EXECUTION AND THE STORY OF THE INCREDIBLE SHRINKING CHIEF EXECUTIVE

The George W. Bush administration has made the theory of the "unitary executive" a subject of popular debate. In the minds of some, the theory has come to mean that the Constitution, properly understood, grants the President vast and illimitable power over wars, foreign affairs, and law execution.¹³³ Moreover, the theory is sometimes understood to suggest that the President can ignore treaties and statutes and proclaim himself above the Constitution.¹³⁴ Indeed, it seems that whenever one disagrees with the constitutional claims of President Bush, the unitary executive theory becomes something of a convenient scapegoat, making it the *bête noire* of left-leaning editorial writers and online bloggers.¹³⁵

It is fair to say that the unitary executive theory originally had a far narrower but still significant compass. In the minds of some who propounded the theory, it was limited to law execution and referred to the assertion that because the President alone has the executive power, he had the constitutional authority to superintend executive

132. See, e.g., Carl Hulse, *Senate Democrats in Bid To Limit U.S. Role in Iraq*, N.Y. TIMES, Feb. 23, 2007, at A10.

133. See, e.g., Christopher Kelley, *Rethinking Presidential Power—The Unitary Executive and the George W. Bush Presidency* (63rd Ann. Meeting of the Midwest Pol. Sci. Ass'n), Apr. 7-10, 2005, at 25, available at <http://www.cageprisoners.com/downloads/kelleypaper.pdf>.

134. See *id.* at 26-27.

135. See, e.g., Elizabeth de la Vega, *Big Brother Is Watching You (and Blowing It)*, SALON, Jan. 18, 2006, <http://www.salon.com/opinion/feature/2006/01/18/delavega/>.

branch officials in their exercise of statutory discretion.¹³⁶ In our explication and defense of the unitary executive theory, Steve Calabresi and I argued that the President has three authorities flowing from his grant of executive power: he may execute any federal law himself, he may direct executive officers in their execution of federal statutes, and he may remove those executive officers who fail to follow his orders or fail to live up to his expectations for speedy, efficient, and responsible execution.¹³⁷

Below I outline the originalist bona fides of the unitary executive theory, and whether practice, early and recent, squares with this conception. Although the early years of the Republic hewed closely to the unitary executive conception, practice diverged dramatically in the late nineteenth and early twentieth centuries. The President no longer can be regarded as a Chief Executive in the sense of someone empowered to control the execution of all federal law. Instead, there are many rival centers of executive power, each with their own executive fiefdom.

A. Original Framework: The Supreme Executive

Prior to the Philadelphia Convention, George Washington, Alexander Hamilton, Thomas Jefferson, and others saw the need to create a separate executive charged with law execution. In 1780, Hamilton lamented “the want of a proper executive.”¹³⁸ The Continental Congress was a “deliberative corps” and was neither suited to meddle with details nor “to play the executive.”¹³⁹ About the same time, Washington admonished a friend in Congress that there must be “more responsibility and permanency in the executive bodies.”¹⁴⁰ On the eve of the Convention, Jefferson, who had served as a delegate in the Continental Congress, thought it best “to separate in the hands of Congress the Executive and Legislative powers The want of [separation] has been the source of more evil

136. Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541, 615 (1994).

137. *Id.* at 595.

138. Letter from Alexander Hamilton to James Duane (Sept. 3 1780), in 1 WORKS OF ALEXANDER HAMILTON 219 (Henry Cabot Lodge ed., 1904).

139. *Id.*

140. Letter from George Washington to James Duane (Dec. 20, 1780), in CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY 1775-1789*, at 64 (1923).

than we have experienced from any other cause. Nothing is so embarrassing as the details of execution.”¹⁴¹ Other commentators sought the creation of a separate chief executive.¹⁴² Noah Webster said that if “the power of the whole” were “vested in a single person ... the execution of the laws [would be] vigorous and decisive.”¹⁴³

In the Convention’s early days, individuals and state delegations submitted various proposals.¹⁴⁴ Each plan called for a separate, national executive branch.¹⁴⁵ Whatever the attributes of the executive branch, it would possess the core power to execute the laws.¹⁴⁶ The Virginia (or Randolph) plan resolved that “a National Executive be instituted” and “that besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation.”¹⁴⁷ Charles Pinckney’s plan sought a President with “the Ex[ecutive] Authority of the U.S.” Among his duties would be “to attend to the Execution of the Laws of the U.S.”¹⁴⁸

The New Jersey and Hamilton plans had analogous provisions. The New Jersey plan envisioned Congress electing a plural executive that would have “general authority to execute the federal acts”¹⁴⁹ If the “carrying into execution” of acts and treaties by ordinary means proved impossible, the “federal Executive” could call forth the state militias “to enforce and compel an obedience to such” acts and treaties.¹⁵⁰ Similarly, Hamilton proposed vesting “[t]he supreme Executive authority of the United States” in a “Governour” who “serve[d] during good behavior”¹⁵¹ Among his other powers, this “Executive” would have “the execution of all laws passed”¹⁵²

141. Letter from Thomas Jefferson to Edward Carrington (Aug. 4, 1787), in 1 THE PEOPLE SHALL JUDGE 321-22 (1976).

142. See HENRY BARRETT LEARNED, THE PRESIDENT’S CABINET 51-52 (1912).

143. *Id.*

144. See *infra* notes 147-52 and accompanying text.

145. See *infra* notes 147-52 and accompanying text.

146. See *infra* notes 147-52 and accompanying text.

147. 1 RECORDS OF THE FEDERAL CONVENTION 20, 21 (Max Farrand ed., Yale Univ. Press 1937).

148. *Id.*

149. *Id.* at 244.

150. *Id.* at 245.

151. *Id.* at 292.

152. *Id.*

After delegates unanimously agreed that the “Nat[ional] Executive” would consist of one person¹⁵³ and would “carry into execution the nation[al] laws,”¹⁵⁴ these resolutions and others were sent to the Committee of Detail.¹⁵⁵ The Committee drafted clauses that eventually became the Executive Power and Faithful Execution Clauses,¹⁵⁶ thus confirming that the executive had a law execution power coupled with a correlative duty to ensure that he wielded that power to ensure a faithful execution.

Indeed, discussion of almost every executive issue presumed that the executive would be empowered to execute the law. James Madison noted that “[c]ertain powers were in their nature Executive, and must be given to that depart[ment], whether administered by one or more persons”¹⁵⁷ Hence, he sought a “national Executive” with “power to carry into effect[] the national laws[,] to appoint to offices in cases not otherwise provided for, and to execute such other powers (‘not Legislative nor Judiciary in their nature’) as may from time to time be delegated by the national Legislature.”¹⁵⁸ James Wilson similarly claimed that “executing the laws” was “strictly Executive.”¹⁵⁹

Delegates discussing the selection and tenure of the executive likewise assumed that the executive would be empowered to execute the law. Charles Pinckney argued that Congress should select the executive because it “will be most attentive to the choice of a fit man to carry [the laws] properly into execution.”¹⁶⁰ Later, Madison noted that the President should not be made dependent upon Congress lest the latter become “the Executor as well as the maker of laws”¹⁶¹ Madison also briefly discussed the function of the executive and judicial branches: “The latter executed the laws in certain cases as the former did in others. The former expounded [and] applied them for certain purposes, as the latter did for others.”¹⁶²

153. 2 *id.* at 29.

154. *Id.* at 32.

155. *Id.* at 95, 129, 132.

156. *See id.* at 185.

157. 1 *id.* at 67.

158. *Id.*

159. *Id.* at 65-66.

160. 2 *id.* at 30.

161. *Id.* at 34.

162. *Id.*

Even discussions of the veto assumed presidential execution of the law. The Randolph plan envisioned a Council of Revision (composed of the President and federal judges) that would exercise a veto over federal bills.¹⁶³ John Dickenson objected to the union of judges and President, because “the one is the expounder, and the other the Executor of the Laws.”¹⁶⁴ Much later, Madison defended the Council of Revision, noting that if it was improper for judges to participate in the exercise of the veto because they were to execute the laws, the argument proved far too much because a purely executive veto would be improper on the same grounds.¹⁶⁵ Armed with a veto, the executive could shape the very laws he was to execute.

During the ratification fight, Federalists and Anti-Federalists voiced similar understandings. First, many noted that the President could execute the law himself. Second, many individuals more realistically claimed that the President would superintend the law execution of executive officers.

Consider those who spoke of the President’s ability to serve as what Hamilton would later call “the Constitutional Executor” of the laws.¹⁶⁶ Edmund Randolph, who had opposed the concept of a single chief executive at the Philadelphia Convention, said at the Virginia ratifying convention that enlightened people agreed that “the superior dispatch, secrecy, and energy ... render it more politic to vest the power of executing the laws in one man”¹⁶⁷ Charles Pinckney similarly claimed that because the people would elect the “first magistrate,” the executive department would be infused with “that degree of vigor which will enable the President to execute the laws with energy and despatch [sic].”¹⁶⁸ Federalist Noah Webster asserted that “where laws govern, and not men, the supreme magistrate should have it in his power to execute any law, however

163. *See* 1 *id.* at 21.

164. *Id.* at 110.

165. 2 *id.* at 75.

166. Alexander Hamilton, *Pacificus No. 1*, 4 WORKS OF ALEXANDER HAMILTON 432, 444 (Henry Cabot Lodge ed., 1904).

167. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA 201 (Jonathan Elliot ed., 1987) [hereinafter DEBATES].

168. *Id.*

unpopular, without hazarding his person or office.”¹⁶⁹ William Davie, at the North Carolina convention, sought to assuage those who feared the Congress. Even if federal legislators were the “most vicious demons that ever existed,” and plotted against the liberties of America, “all their machinations will not avail if not put in execution. By whom are their laws and projects to be executed? By the President.”¹⁷⁰ Davie stressed the importance of selecting the executive by rhetorically asking “[i]s not this government a nerveless mass, a dead carcass [sic], without the executive power?”¹⁷¹

While discussing the veto, other Federalists noted the President’s central role in law execution. Writing as “A Landholder,” Oliver Ellsworth claimed that “if lawmakers in every instance, before their final decree, had the opinion of those who are to execute them, it would prevent a thousand absurd ordinances”¹⁷² Massachusetts Governor James Bowdoin likewise noted that the President’s proposed veto served the same role it did for the Massachusetts and New York governors.¹⁷³ The veto safeguarded executive independence and “preserve[d] a uniformity in the laws which are committed to them to execute.”¹⁷⁴

Though Anti-Federalists split on the desirability of the veto, they agreed that the President could execute the law. “The Federal Farmer” admitted that granting the President “a share in making the laws, which he must execute”¹⁷⁵ was perfectly sound. “A Federal Republican” claimed that absent a veto, Congress would know no bounds.¹⁷⁶ In contrast, Presidents would be limited by the content of the laws. “To execute [laws] when made, is limited by their existence.”¹⁷⁷ Others, such as “Republicus,” complained that the

169. Noah Webster, *A Citizen of America*, in *FRIENDS OF THE CONSTITUTION: WRITINGS OF THE “OTHER” FEDERALISTS* 373, 380 (Colleen A. Sheehan & Gary L. McDowell eds., 1998) (emphasis omitted).

170. 4 *DEBATES*, *supra* note 167, at 58; *see also 2 id.* at 353 (“The Union is dependent on the will of the state governments for its chief magistrate”); *THE FEDERALIST* NO. 39, at 255 (James Madison) (Jacob E. Cooke ed., 1961).

171. 4 *DEBATES*, *supra* note 167, at 58.

172. *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES* 158 (Paul Leicester Ford ed., 1892).

173. 2 *DEBATES*, *supra* note 167, at 128.

174. *Id.*

175. 2 *ANTI-FEDERALIST*, *supra* note 11, at 314.

176. 3 *id.* at 83.

177. *Id.*

“supreme conservator of laws”¹⁷⁸ also enjoyed legislative authority. Despite his “modest title,” the President could “exercise the combined authority of legislation, and execution”¹⁷⁹

Others emphasized the importance of presidential independence for law enforcement. The Anti-Federalist who wrote “Essays by a Farmer” argued that if the executive lacked a long term of office, “he [could] never oppose large decided majorities of influential individuals—or enforce on those powerful men ... the rigor of equal law, which is the grand and only object of human society.”¹⁸⁰ Continuing, the “Farmer” noted that “a properly constituted and independent executive,—a vindex injuriarum—an avenger of public wrongs ... [could] enforce the rigor of equal law on those who are otherwise above the fear of punishment.”¹⁸¹

Federalists and Anti-Federalists also understood that the President would superintend executive officers. Alexander Hamilton wrote that “[t]he administration of government,” in “its most usual and perhaps in its most precise signification,” lies “within the province of the executive department.”¹⁸² Conducting foreign negotiations, preparing budgets, disbursing funds in conformity with appropriations, and directing war efforts—these and other related matters of a like nature were executive functions:

The persons therefore, to whose immediate management these different matters are committed, 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.¹⁸³

At the North Carolina convention, William Maclaine confirmed Hamilton’s claim that the Chief Executive would direct the assistant executives.¹⁸⁴ Some feared that federal tax collectors would oppress North Carolinians and that impeachment would be the only means

178. 5 *id.* at 168.

179. *Id.* at 169.

180. *Id.* at 42 (emphasis omitted).

181. *Id.* at 21 (emphasis omitted).

182. THE FEDERALIST NO. 72, at 486 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

183. *Id.* at 486-87.

184. 4 DEBATES, *supra* note 167, at 46.

of redress.¹⁸⁵ Maclaine responded that if the revenue officers oppressed, the President was to be held responsible:

The President is the superior officer, who is to see the laws put in execution. He is amenable for any maladministration in his office. Were it possible to suppose that the President should give wrong instructions to his deputies, whereby the citizens would be distressed, they would have redress in the ordinary courts of common law.¹⁸⁶

At the same convention, James Iredell similarly attested to the President's preeminent enforcement role. "The office of superintending the execution of the laws of the Union is an office of the utmost importance."¹⁸⁷ Even some Anti-Federalists recognized the advantages of executive superintendence. The Federal Farmer argued that history and reason had taught that lawmaking should be left to plural legislatures.¹⁸⁸ Law execution, however, was best entrusted "to the direction and care of one man."¹⁸⁹ A single executive seemed "peculiarly well circumstanced to superintend the execution of laws with discernment and decision, with promptitude and uniformity"¹⁹⁰ Presumably, the chief executive would ensure wise, prompt, and uniform law execution by "direct[ing]" subordinate executives.¹⁹¹

There was little controversy about the law execution power because all understood that such authority was a *sine qua non* of successful government. James Wilson rhetorically asked why "give the power to make laws, unless they are to be executed? and if they are to be executed, the executive and judicial powers will necessarily be engaged in the business."¹⁹² Similarly, "A Jerseyman" thought opponents of the Constitution's creation of an independent executive were bizarre, observing that it would be "highly ridiculous to send

185. *Id.*

186. *Id.* at 47.

187. *Id.* at 106.

188. 2 ANTI-FEDERALIST, *supra* note 11, at 310.

189. *Id.*

190. *Id.*

191. *Id.*

192. 2 DEBATES, *supra* note 167, at 461; *see also id.* at 469.

representatives ... to make laws for us, if we did not give power to some person or persons to see them duly executed.”¹⁹³

After the Constitution’s creation, there were some in Congress who denied that those who executed the law ought to be understood as the President’s subordinates. In the famous Decision of 1789, some representatives suggested that department heads were removable by the President only when the Senate concurred;¹⁹⁴ others argued that impeachment was the sole means of removing officers.¹⁹⁵ But Madison and many others demurred, asserting that because the President was empowered to execute the law and was made responsible for a faithful execution, the better reading of the Constitution was that the President could remove unilaterally.¹⁹⁶ As Madison put it, “[i]s the power of displacing, an executive power? I conceive that if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws.”¹⁹⁷ The Madisonian view prevailed, with Congress implicitly recognizing a presidential power to remove executive officers in three separate statutes.¹⁹⁸ Consistent with this congressional construction of the Constitution, early Presidents removed numerous officers, both grand and minor, using their constitutional authority. After all, no statute authorized such removals.¹⁹⁹

Some modern scholars have argued that whatever the scope of the President’s removal authority, the President was not seen as

193. 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 149 (Merrill Jensen ed., 1978).

194. 1 ANNALS OF CONGRESS 389 (Gales & Seaton eds., 1789).

195. *Id.* at 387.

196. *Id.* at 389.

197. *Id.* at 463; *see also id.* at 500.

198. *Compare* An Act for Establishing an Executive Department, To Be Denominated the Department of Foreign Affairs, ch. 4, § 2, 1 Stat. 28, 29 (1789) (providing that the Chief Clerk would have custody of all departmental papers “whenever the said principal officer shall be removed from office by the President of the United States”), *with* An Act to Establish the Treasury Department, ch. 12, § 7, 1 Stat. 65, 67 (1789) (providing that the Assistant to the Secretary of the Treasury would have custody of all departmental papers “whenever the Secretary shall be removed from office by the President of the United States”), *and* An Act To Establish an Executive Department, To Be Denominated the Department of War, ch. 7, § 2, 1 Stat. 49, 50 (1789) (providing that an inferior officer would have custody of all departmental papers “whenever the said principal officer shall be removed from office by the President of the United States”).

199. Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1799, 1827-30 (2006).

empowered to control all federal law execution. Indeed, some scholars have insisted that early Congresses created various independent departments and agencies, thus indicating that federal legislators did not believe that all law execution had to be under presidential control.²⁰⁰ Early practice proves that the theory of the unitary executive is a myth, or so say the theory's critics. Some have claimed that the Treasury Department in particular was an independent department outside of the executive branch.²⁰¹ Others have argued that the U.S. attorneys were free agents, not under presidential control.²⁰²

These claims are rather unfounded. At the most basic level, they are assertions backed by nothing other than doubtful readings of early statutes. Though the statutes never purported to create nonexecutive departments and never granted any administrative autonomy, scholars have confidently read them as doing both.²⁰³ Unlike modern statutes, which expressly proclaim that various entities are "independent" of the executive branch (and hence the President),²⁰⁴ no early statute ever declared that an officer or department would be "independent" of the President.

200. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 22-23 (1994). Professor Peter Strauss has a more nuanced position. He claims that the President may not displace decisions made by executive officers because the Constitution merely makes the President a Chief Overseer. See Peter Strauss, *Overseer or "The Decider"?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 703-04 (2007). In other words, the Constitution does not empower the President to execute all laws himself or to direct the execution of laws by others. Professor Strauss's argument is based on his reading of the Constitution's text. As the arguments in this Article indicate, the Founders read the text quite differently. For a more detailed discussion of Professor Strauss's claim, see Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 ILL. L. REV. 701, 805-08.

201. Lessig & Sunstein, *supra* note 200, at 71-72.

202. See Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 581-82; William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 492-93 (1989); Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 286 (1989); Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function?* *Morrison v. Olson and the Framers' Intent*, 99 YALE L.J. 1069, 1070 (1990).

203. See, e.g., Lessig & Sunstein, *supra* note 200, at 30-31.

204. See, e.g., 28 U.S.C. § 594(a) (2006) ("[A]n independent counsel appointed under this chapter shall have ... full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice [and] the Attorney General.").

Moreover, if early practice is the proper means of judging the soundness of the theory of the unitary executive, that practice unequivocally favors the theory. George Washington directed executive branch officials in a whole host of ways. He ordered attorneys to prosecute and to stop prosecutions.²⁰⁵ He issued general instructions to executive branch officers even where he had no statutory authority to do so.²⁰⁶ According to Leonard White, Washington made “[a]ll major decisions in matters of administration.”²⁰⁷ He did all of this pursuant to his belief that the Constitution made him the Chief Executive, empowered to direct the execution of law and under a duty to ensure a faithful execution. As Washington himself said, “[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.”²⁰⁸ In other words, the executive officers existed to assist the President in the exercise of his constitutional powers. In Leonard White’s view, Washington regarded the Secretaries as “*assistants*, not as rivals or substitutes.”²⁰⁹

When we examine the Treasury Department and other supposedly independent entities, it is clear that Washington directed their operations and law execution. According to historian Leonard White, Hamilton (like all department heads) never “settled any matter of importance without consulting the President and securing his approval.”²¹⁰ Washington was hardly shy about directing his Treasury deputy; the chief executive regularly conveyed his approval or disapproval of Hamilton’s plans or actions. For instance, he advised Hamilton on the structure of an agency that would collect revenue.²¹¹ Moreover, Hamilton’s famous opinion on the Bank of the United States was written in response to an

205. Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 553-58 (2005).

206. See Prakash, *supra* note 200, at 804-05.

207. LEONARD WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY* 27 (1956).

208. Letter from George Washington to Eléonor François Élie, Conte de Moustier (May 25, 1789), in 30 *THE WRITINGS OF GEORGE WASHINGTON*, June 1788-Jan. 1790, at 333, 334 (John C. Fitzpatrick ed., 1939).

209. LEONARD WHITE, *THE FEDERALISTS* 27 (1948).

210. *Id.*

211. *Id.* at 33.

“order” from Washington.²¹² White observes that when it came to the executive branch, a branch that included all the government agencies, Washington was the “undisputed master.”²¹³

B. Modern Framework: The Splintering of the Unitary Executive

The early dispute between those who saw a minimal role for the President in law execution and the original unitary executives, such as Madison and Washington, presaged more serious conflicts that surfaced a generation later and that still reverberate today. Although Presidents Adams and Jefferson continued to direct law execution without facing any constitutional challenges to their actions, their remote successor, Andrew Jackson, faced considerable criticism from partisan Senate critics. After Jackson removed his disobedient Treasury Secretary, James Duane, and directed his successor to remove federal deposits from the Bank of the United States, the Senate resolved, by a vote of twenty-six to twenty, that the President had assumed authority in derogation of the Constitution and laws of the United States.²¹⁴ A friendly Senate later expunged this resolution.²¹⁵

What is interesting about this episode is that a majority of the Senate either believed that Jackson lacked the authority to remove the Treasury Secretary, at least under the circumstances of the case, or that Jackson could not direct the Treasury Secretary to remove the deposits. Earlier versions of the censure were more detailed in the criticisms.²¹⁶ Given the more general language of the final resolution, we cannot say precisely what raised the hackles of the Senate majority.²¹⁷

212. Alexander Hamilton, *Opinion on the Constitutionality of an Act To Establish a Bank*, in PROCESSES OF CONSTITUTIONAL DECISIONMAKING 14, 14 (Paul Brest & Sanford Levinson eds., 3d ed. 1983).

213. WHITE, *supra* note 209, at 37.

214. See ROBERT REMINI, ANDREW JACKSON AND THE BANK WAR 141 (1967).

215. *Id.* at 174.

216. See, e.g., 10 REG. DEB. 58 (1834) (first resolution of Henry Clay) (claiming that President Jackson had assumed power over the Treasury not granted by the Constitution and laws of the United States and that he had improperly dismissed the Treasury Secretary and ordered removal of the Bank’s deposits).

217. In the debates preceding the censure’s expunging, critics pointed out that the final censure resolution was rather vague and ambiguous as compared to earlier versions. See 13 REG. DEB. 380-81 (1837) (resolution of Senator Thomas Hart Benton).

Equally telling is that Jackson apparently did not believe that he could order subordinate Treasury officials to withdraw the deposits. Though the statute authorized the Treasury Secretary to withdraw federal funds, it did not suggest that the Treasury Secretary was the only official capable of removing deposits.²¹⁸ After all, other Treasury officials presumably would carry out whatever decision the Secretary might make. Given that other executive officers could withdraw the funds (even if they could not make the decision to do so), President Jackson might have concluded that he could order these executive officers to withdraw the funds using his constitutional authority. Armed with the executive power, the President might have assumed that he could order subordinate Treasury officials to withdraw the funds, whatever the statute or the Treasury Secretary might say.

Because Jackson did not order subordinate Treasury personnel to withdraw the funds, one reasonably might infer that Jackson believed that he lacked the constitutional authority to order the removal of the Bank's deposits. Jackson might have felt that although he had a right to expect the Treasury Secretary to adhere to his orders, he lacked a constitutional right to make decisions statutorily committed to the Treasury Secretary.²¹⁹ If Jackson believed that he lacked the authority to direct Treasury subordinates to remove the deposits, it was an early departure from the original conception of the President as the executor of all federal law, with executive branch personnel merely acting as his assistants.

In a repudiation of the Decision of 1789,²²⁰ various Congresses also enacted Tenure of Office Acts that made it more difficult for the President to remove some officials. The most infamous, the 1867 Tenure of Office Act, required the President to obtain the Senate's consent prior to removing certain officers.²²¹ The House famously

218. See An Act To Incorporate the Subscribers to the Bank of the United States, ch. 44, § 16, 3 Stat. 266, 274 (1816).

219. Arguably, Jackson would not have given Treasury Secretary Duane days to decide whether Duane would order the deposits withdrawn had Jackson believed that he could order subordinate Treasury officials to withdraw the deposits. See REMINI, *supra* note 214, at 121-24.

220. See *supra* note 194 and accompanying text.

221. 14 Stat. 430, ch. 154.

impeached President Andrew Johnson,²²² and the Senate came within one vote of ousting him from office. The principal charge was that Johnson unilaterally removed War Secretary Edwin Stanton in contravention of the supposed statutory requirement that the Senate concur in the removal prior to its taking effect.²²³ Congress eventually repealed the 1867 Tenure of Office Act.²²⁴

Apart from its decisions to constrain presidential removals, Congress has created independent federal agencies. According to Robert Cushman, the first clear case of this occurred during the late nineteenth century, with the creation of the Interstate Commerce Commission.²²⁵ Although that Commission was abolished in 1995,²²⁶ numerous other independent agencies populate Washington, D.C. The list of independent agencies includes such prominent agencies as the Federal Reserve, the Federal Election Commission, and the Federal Communications Commission.²²⁷

What makes these entities “independent” is their placement outside the orbit of direct presidential control.²²⁸ Sometimes, statutes designate these agencies as “independent.”²²⁹ More important than any such designation, however, are the structure of these agencies and the tenure of their commissioners. To begin, commissioners have fixed, staggered terms that have no relationship to presidential elections.²³⁰ Relatedly, commissioners typically do not serve at the pleasure of the President because the organic statutes usually limit removal to situations in which the President has “cause” for removal.²³¹ Although the exact contours of “cause” are

222. 1 TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, ON IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS 2 (Gov't Printing Office 1868).

223. 2 *id.* 486-87.

224. An Act To Repeal Certain Sections of the Revised Statutes of the United States Relating to the Appointment of Civil Officers, ch. 353, 24 Stat. 500 (1887).

225. ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 19 (1941).

226. ICC Termination Act of 1995, Pub. L. No. 104-88, § 101, 109 Stat. 803, 804.

227. See Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 899 & n.19 (2008).

228. See Geoffrey Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 43-44.

229. See, e.g., 44 U.S.C. § 3502(5) (2000) (listing various agencies as “independent regulatory agenc[ies]”).

230. See, e.g., 15 U.S.C. § 78(d) (2006) (creating staggered terms for SEC commissioners).

231. See, e.g., 15 U.S.C. § 41 (2006) (providing that the President may remove FTC commissioners for “inefficiency, neglect of duty, or malfeasance in office”).

not clear, many suppose that the President may not remove someone protected by a for “cause” restriction merely because the President wishes to appoint someone else who shares the President’s policy preferences.²³² Finally, Congress typically requires that agencies be composed of some members of the opposition party, thus increasing the chance that some members will have preferences that vary from the appointing President’s presumed preferences.²³³ The end result is that commissioners of these agencies and commissions do not regard themselves as subordinate to the President, and Presidents typically do not believe that they are entitled to direct these commissioners.²³⁴

232. See, e.g., *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935) (holding that President Franklin Roosevelt could not remove Federal Trade Commissioner Humphrey based on mere policy differences).

233. DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN* 3-4 (2003).

234. As many have pointed out, these commissioners are not wholly oblivious to presidential suasion and pressure. First, commissioners may tend to favor the policies of the President who appointed them and thus act in ways that are consistent with presidential policies. Neal Devins and David Lewis have suggested that the President’s ability to appoint permits him to wield significant influence over those commissioners he appointed, especially in an era of party polarization. Neal Devins & David Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 462 (2008). Once the President appoints a majority of commissioners from his own party, his preferences are likely to prevail. Second, commissioners may wish to curry favor with the President in order to secure a reappointment or a new office somewhere else in the government. Third, Presidents often have an electoral mandate that makes others, including members of Congress and nominally independent commissioners, pay heed to their agendas. Fourth, the agency may be more reticent to defend its independence if it lacks powerful benefactors in Congress who will call the President to task for his attempts to interfere with the agency’s decision making. Finally, the customary relationship between an independent agency and the White House, plus the individual proclivities of the President and the commissioners, may make it easier (or more difficult) for the President to sway commissioners. Professor Devins documents how the EEOC, which had some of the hallmarks of an independent agency, yielded to White House pressure on various affirmative action policies. See Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent*, 15 CARDOZO L. REV. 273, 285-92 (1993).

All in all, though this Article lumps all independent agencies together, it is perhaps better to think of independent agencies as existing along a continuum, some more independent of presidential preferences than others. Where a particular independent agency rests on the continuum will change over time given White House aggressiveness, agency assertiveness, congressional vigilance, and the composition of the commission. It also seems fair to say that executive departments and agencies can likewise be placed on a spectrum, with some under more watchful presidential control and others at greater liberty to act at variance with presidential policies.

None of these constraints on removal would matter if these independent agencies did not wield any executive power. In fact, the independent agencies routinely execute the law against those who have violated federal statutes and agency rules.²³⁵ Although they cannot bring criminal charges,²³⁶ they can bring cases for civil violations of federal statutes.²³⁷ For instance, the SEC and the FEC regularly charge individuals and companies with violating federal law, thus serving as independent prosecutors of certain civil violations.²³⁸

The end result is that law execution is fractionalized in ways that go beyond even Edmund Randolph's vision of a triumvirate executive. To be sure, the nation lacks a set of plural, coequal executives who must work in tandem to accomplish anything. Nor do we have a Chief Executive checked in all major matters by an executive council. Instead, we have something of a subdivided executive branch, with the distribution of executive power fragmented across particular laws.

Although the President has the executive power over many laws because the execution of such laws is wholly committed to the executive branch, the President lacks the executive power over other laws related to certain civil violations. The executive power over execution of civil securities laws is committed to the five-member SEC.²³⁹ Execution of communication laws is committed to the five-member FCC.²⁴⁰

In effect, we have multiple chief executives where the original Constitution contemplates one. We have one chief executive with partial control of law execution and multiple executive councils granted a limited jurisdiction over particular civil violations. At the

235. See Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 561-65 (2003).

236. *Id.* at 561-62.

237. *Id.* at 564-65.

238. *Id.* Their litigational independence is somewhat curbed by their inability to argue their cases before the Supreme Court. Should an independent agency wish to appeal a judgment to the Supreme Court, it must convince the Justice Department to seek certiorari. See 28 C.F.R. § 0.20 (2008). Moreover, if a judgment favorable to the independent agency is heard by the Supreme Court, the Justice Department represents the government. See 28 U.S.C. § 518 (2006). Still, most civil cases never make it to the Supreme Court, and hence, the independent agencies have control over the vast majority of civil cases that they prosecute.

239. 15 U.S.C. § 78u(a)(1) (2006).

240. 47 U.S.C. § 151 (2000).

founding no one imagined that Congress might so fractionalize and distribute the executive power, creating numerous chief executives.

Apart from the interesting and unforeseen division of the executive power, the President no longer takes care that all federal law is faithfully executed. Modern Presidents have long acquiesced to congressional statutes that splinter the executive power, doing nothing more than occasionally vetoing the creation of new agencies that would usurp yet another sliver of executive power.²⁴¹ As a result of this lax approach, Presidents (and their assistants) pay little or no attention to the prosecutions brought by the independent agencies and thus have no way of knowing whether these agencies are faithfully executing the laws. Contemporary Presidents are essentially derelict.

Although much has been written about the independent agencies, typically lost in all the commentary about the unconstitutionality of such agencies is a true sense of the sweep of the argument favoring their constitutionality. If it is constitutional for Congress to create these independent executive councils, it is equally constitutional for Congress to make *all* of law execution independent of the President. Nothing about the independent agencies, such as the Federal Communications Commission, marks them as any different from any of the agencies Congress has chosen to situate within the executive branch. Hence, if the Federal Election Commission can be independent, so can the Environmental Protection Agency, Health and Human Services, even the Justice Department.²⁴² In this way, Congress might wholly neuter what Hamilton called the “constitutional executor” of federal laws.²⁴³

Going further, Congress might vary the structure of these independent entities. First, it might choose to have these agencies

241. *See, e.g.*, LEWIS, *supra* note 233, at 86-87 (stating that although President Ford vetoed the creation of a new independent consumer agency, three other independent commissions were created during his administration).

242. One might believe that the Department of Defense is different because the Constitution makes the President the Commander in Chief, and hence, one might suppose that Congress cannot make that Department independent. *See* U.S. CONST. art. II, § 2, cl. 1. Yet, this argument might only hold water with respect to the military officers and does not apply to any of the civilian apparatus charged with ordinary law execution relating to procurement, personnel, etc. Moreover, if “the Supreme Executive” can be a neutered executive, it is not clear why Congress would have any less power over the Commander in Chief.

243. Hamilton, *supra* note 166, at 444.

headed by a single administrator, rather than by an executive council. If the Constitution authorizes Congress to create independent agencies charged with executing the law, there is no reason to suppose that these agencies must be superintended by a plural council as opposed to a single chief executive.

Second, Congress might create various independent agencies that, though independent of the President, are answerable to a statutory chief executive. Once again, if the Constitution authorizes Congress to create independent executive agencies, there is no reason to suppose that these agencies cannot be collectively superintended by a chief administrator who ensures that agencies pursue a consistent set of policies and do not act at cross-purposes. Congress might provide that the chief administrator could remove the heads of the independent agencies at will, thereby ensuring that regardless of who appointed them, the chief administrator would have tremendous influence and control over the independent agencies. In this way, Congress might both wholly insulate law execution from presidential control while still ensuring that there is some general, system-wide oversight of how various executive officers enforce federal laws. In short, if Congress can create independent executives, it can create an ersatz chief executive who, although not a constitutional executor of the laws, would be a statutory executor of all laws, thereby supplanting the Constitution's Chief Executive.²⁴⁴

CONCLUSION

We live in odd times. On the one hand, many members of the commentariat believe that the presidency has metastasized into an imperial juggernaut, domineering the other branches and standing astride the entire nation.²⁴⁵ On the other hand, a few members of the Administration and some members of the legal academy believe

244. Of course, the President would have the power to nominate this statutory chief administrator. *See* U.S. Const. art. II, § 2, cl. 2. This would seem to give the President indirect influence on how laws were executed. Still, if Congress granted the chief administrator a sufficiently long term, a President might not be able to nominate a chief administrator and would be saddled with a holdover chief administrator.

245. *See supra* note 2.

that Congress has usurped powers properly resting with the President.²⁴⁶

Both camps have elements of the truth on their side, at least if we use the Constitution's original meaning as a baseline. In the modern presidency, we have something of a monarch and something of a cipher. When it comes to war and the military, we have an imperial system where the President may declare war and may ignore statutes that he believes violate his Commander in Chief power.²⁴⁷ In these areas, the President is somewhat of a juggernaut, far brawnier than any member of the founding generation imagined that he should be.

When it comes to the execution of certain laws, however, the President is a hapless cipher, a bystander who has neither the knowledge nor (seemingly) much interest in gauging whether certain laws are being properly executed in a manner ensuring uniformity, promptness, and vigor.²⁴⁸ Neither the President nor any members of his administration has much idea of how executives within the independent agencies are enforcing various laws.

In a way, these divergent outcomes were foreseen. Edmund Randolph, speaking at the Philadelphia Convention, had predicted that the President would be a "foetus of a Monarchy."²⁴⁹ His prediction seems rather true with respect to war powers. Modern Presidents claim and exercise war powers that were commonly associated with the most powerful monarchs of Europe.

At the same time, James Madison warned long ago that the legislative branch would be an "impetuous vortex."²⁵⁰ Rather than attempting to assume executive power directly, Congresses have systematically weakened the executive branch's control over law execution by making it far more difficult for the President to direct the law execution that occurs in the various independent agencies. By erecting obstacles to presidential control of independent agencies, Congresses have made it easier for legislators to influence them. After all, Congress still enjoys the funding power, may hold

246. *See supra* notes 24-28.

247. *See supra* Part I.B.

248. *See supra* Part II.B.

249. *Notes of Major William Pierce on the Federal Convention of 1787*, 3 AM. HIST. REV. 310, 322 (1898).

250. THE FEDERALIST NO. 48 (James Madison), *supra* note 34, at 333.

embarrassing hearings, and may alter or diminish the agency's powers. Little wonder that independent agencies are extremely solicitous of members of Congress. As Madison predicted, Congress has "mask[ed] under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments."²⁵¹

In *The Federalist* No. 70, Hamilton discussed the ways in which executive unity might be destroyed, listing two possibilities: "either by vesting the power in two or more magistrates of equal dignity and authority; or by vesting it ostensibly in one man, subject in whole or in part to the controul and co-operation of others, in the capacity of counsellors to him."²⁵² In either case, dissension would enervate the executive branch and would "serve to embarrass and weaken the execution" of legislative measures.²⁵³ Ingenious Congresses have discovered a third way: enact statutes that vest portions of the executive power in various multimember, independent agencies.²⁵⁴

Although Congress deserves the lion's share of the blame (or credit) for this state of affairs, modern Presidents also bear some responsibility. In a sense, they have decided to vigorously assert powers that are not theirs in the war and military arena, while largely turning a blind eye to the fragmentation and division of executive power by Congress across the independent agencies. Presidents seem to largely accept the reduction in their law execution power, preferring to make grand claims about the initiation and prosecution of wars.

The courts also have played a role in ushering in our curious state. When it comes to independent agencies and entities, the courts have held that various statutory constraints on presidential control are constitutional.²⁵⁵ Because the judiciary is the 800-pound gorilla of constitutional law, Presidents and their administrations have acquiesced to the judiciary's constitutional conclusions. Where war powers are concerned, however, the courts generally have shied away from declaring that the President lacks the power to wage war

251. *Id.*

252. *THE FEDERALIST* NO. 70, at 472-73 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

253. *Id.* at 475.

254. *See supra* notes 225-27 and accompanying text.

255. *See generally* *Morrison v. Olson*, 487 U.S. 654 (1988); *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

absent a congressional declaration of war. Given the absence of judicial constraints in one area and their conspicuous presence in the other, one cannot be surprised that Presidents have pushed the envelope in one area and have accepted the judiciary's limits in the other.

The picture sketched here perhaps mirrors the claims of Aaron Wildavsky that we have "Two Presidencies," one in matters of war and foreign affairs and one in matters of domestic policy.²⁵⁶ Wildavsky argues that Presidents have more success in Congress when seeking foreign policy/war legislation than when seeking domestic legislation.²⁵⁷ His thesis has since been contested.²⁵⁸ Whatever the truth of the matter, when we compare the Constitution's original understanding with modern practice, we do seem to have "Two Presidencies."

What are we to make of our modern presidency—part imperial, part cipher? Understandably, reactions will vary. Originalists may argue for a return to the original conception of presidential powers. Others may suggest that we should strengthen the President's control of "law execution," while leaving the working allocation of war powers undisturbed. Though it will strike some as odd, others may wish for a still stronger warmaking President and a much weaker law enforcement executive. The principal attraction of the popular notion that the Constitution's meaning changes over time is that we can refashion the Constitution to reflect our changing preferences. The modern presidency reflects the living Constitution perspective.²⁵⁹ If the past is prologue, one can predict that conceptions of presidential power will continue to mutate.

256. Aaron Wildavsky, *Two Presidencies*, 4 TRANS-ACTION 7-14 (1966).

257. *Id.* at 8.

258. See, e.g., George C. Edwards III, *The Two Presidencies: A Reevaluation*, in THE TWO PRESIDENCIES: A QUARTER CENTURY ASSESSMENT 101 (Steven A. Shull ed., 1991).

259. Cf. Michael D. Ramsey, *Presidential Originalism?*, 88 B.U. L. REV. 353, 372 (2008) (arguing that although the original Constitution did not permit the President to start a war, the modern Constitution might).