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The Unitary Executive Without Inherent Presidential Removal Power

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Agency Independence After Seila *and* Collins

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The Unitary Executive Without Inherent Presidential Removal Power

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The Unitary Executive Without Inherent Presidential Removal Power

Abstract

This article develops and defends a new version of the unitary executive thesis: The Constitution puts the President in control of the government's executive activities, including exercises of policy discretion that is granted to executive officials by statute. The Constitution does not, however, give the President any particular tool with which to exercise control. The Constitution therefore does not confer removal power. Congress has substantial flexibility in structuring the executive branch, but it must ensure that the President has the tools needed to direct executive activities and policy choices. Removal power is one such tool, but there are others. Congress has legitimate reasons for limiting removal power, for example to create an apolitical civil service. Other tools of control, which Congress may choose instead of removal power, include the authority to give binding orders, and to set binding policy, with sanctions for failure to comply with directives or to follow policy. Agencies with substantial policy independence from the President are unconstitutional, but not simply because of restrictions on presidential removal. This new unitary executive thesis emerges from the text, structure, and history of the Constitution. It is consistent with the expectations of the Federal Convention. The new thesis is also largely consistent with the views expressed on all sides of the debate on removal power in the First Congress.

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Introduction

The unitary executive thesis is often identified with the claim that the Constitution gives the President power to remove other executive officials. That identification is a mistake. The unitary executive thesis is correct. The Constitution puts the President in charge of administering the government and carrying out the laws. It gives the President ultimate control of policy choices that are confided to executive officials by statute. The claim of removal power based on the Constitution is wrong. Congress need give the President no removal power, or may give only restricted removal power, provided that Congress otherwise enables the President to control executive officials and their policy choices. Presidential direction of executive activities is the Constitution's end, and removal is only a dispensable means to that end.

Those conclusions are part of a new version of the unitary executive thesis, which this article develops and defends: The Constitution puts the President in charge of carrying out the laws, and in charge of policy choices that are made in performing that function. Congress has substantial flexibility in structuring the executive, but must choose a structure in which the President is in charge. Congress may legitimately burden the President's ability to exercise control of executive activities, but any burdens must be light. Congress may not act with the purpose of insulating executive policy choices from presidential direction. Independent agencies in today's sense are unconstitutional.

This article shows how the new unitary executive thesis follows from the Constitution's text, structure, and history. The history the article examines includes both the Federal Convention and the First Congress's debates on removal in 1789, both of which have long been central to the question of presidential authority within the executive. The article sets out the new thesis and shows how it applies to familiar issues concerning presidential removal power and agency independence.

Section I explains how presidential control and removal power have often been linked. It reviews the Supreme Court's leading cases about the unitary executive principle, most recently *Collins v. Yellen*[1] in 2021, and Seila *Law LLC* v. *CFPB*[2] in 2020,

[1] 141 S. Ct. 1761 (2021).
[2] 140 S. Ct. 2183 (2020).

which are also cases about removal. It discusses an important historical episode in which presidential control and removal power were closely connected: President Jackson's removal of the Secretary of the Treasury in order to carry out his policy concerning the Bank of the United States.

Section II derives the new unitary executive thesis from the Constitution's text, structure, and history. The derivation combines several components that together yield the new thesis. Article II puts the President in charge of executive operations and policy making. Text and structure yield that conclusion, which matches the Federal Convention's assumptions about the executive branch they were designing. Article II, however, does not supply any tool with which to perform that function. More than one tool is available, none will fully achieve the goal of presidential control, and all can be misused. Congress has power to structure the executive branch, and good reason to legislate against misuses of tools of presidential control, such as using removal to create a political patronage machine. The new thesis integrates those features of the Constitution. Presidential control is a constitutional imperative that must be substantially implemented but inevitably will not be perfectly implemented. Some space between substantial and perfect implementation is unavoidable. Congress may occupy that space with restrictions that pursue legitimate goals, so long as the President is substantially in control. The new thesis does not allow Congress to act with the purpose of keeping policy choices away from the President. It allows some burdens on presidential authority within the executive, provided those burdens are light enough to allow the President effective control of other officials. The new thesis thus has a structure similar to that found elsewhere in constitutional law, with one important difference. It is not a balancing test. Congress must implement a constitutional imperative that requires that the President have effective means with which to direct other executive officials.

Section III addresses events in the First Congress that have become central to the debate over the unitary executive principle and presidential removal power. In 1789, in the process of creating the first executive departments, the House of Representatives debated removal power at length. The central question was whether the Constitution required or allowed Senate involvement in removal. Congress eventually adopted compromise language that recognized sole presidential removal power without purporting to confer it. Section III uses the new unitary executive thesis to

cast newer light on those events. It shows that supporters of Senate involvement were not supporters of agency policy independence in today's sense. Supporters of sole presidential removal power believed that the Senate could not be involved in removal, but that position did not entail unlimited presidential removal power derived from the Constitution. The new thesis embraces a unitary executive, and so is inconsistent with agency policy independence. The new thesis, unlike other variants of the unitary executive thesis, does not embrace removal power absolutism – it does not embrace a presidential power to remove officials at will that derives from the Constitution. Because the participants in the 1789 debates endorsed neither agency policy independence in today's sense nor removal absolutism, the new thesis is more consistent with the debates of 1789 than is either of its main rivals.

Section IV explores applications of the new thesis to the current structure of government and the current problem of independent agencies. I explain that the new thesis is consistent with leading aspects of government structure that are not consistent with removal power absolutism. Section IV then applies the new thesis to two leading cases about the unitary executive. It shows how the statutes at issue in *Seila Law* and *Morrison v. Olson*[3] are unconstitutional under the new thesis, even though the thesis does not require at-will removal power.

The conclusion explains how the new unitary executive thesis can be both new and a claim about the original meaning of the Constitution. The new thesis is a detailed account of the unitary executive principle. That principle was familiar to the Federal Convention, so although the detailed account is new, the main thesis is not. Detailed accounts of the Constitution can take time to emerge, in part because the Constitution was a novel legal phenomenon made by putting then-existing concepts into a new configuration.

I. The Linkage between the Unitary Executive Principle and Removal

This article argues that the unitary executive principle and removal power are connected, but that the principle does not entail the power. The principle requires presidential control of the executive, and removal power is one means of control. This section

[3] 487 U.S. 654 (1988) (1988) (upholding a statute creating an Independent Counsel designed to be free of presidential control).

discusses the Supreme Court's cases about removal and an important historical episode: President Jackson's removal of the Treasury Secretary so that he could appoint another who would follow Jackson's policy concerning the Bank of the United States. This discussion of history serves two functions. It provides background for the rest of the article. The history also illustrates the means-end connection between presidential authority and removal power. That connection is real. Thinking that it is necessary – thinking that removal is the only means of control and therefore is entailed by the unitary executive principle – nevertheless is a mistake.[4]

A. The Supreme Court's Cases about Presidential Authority and Removal

In each of its last two Terms, the Supreme Court has held unconstitutional a statutory restriction on the President's power to remove the head of an executive agency. In its opinions in those cases, the Court derived a presidential power to remove officials at will from the unitary executive principle – the principle that the President is in charge of the executive branch.

Seila Law v. CFPB[5] involved a statutory provision limiting the President's ability to remove the Director of the Consumer Financial Protection Bureau (CFPB), a regulatory agency. Under the statute creating the CFPB, its Director is appointed by the President with the advice and consent of the Senate for a five-year term.[6] During that term, the statute provides, the Director may be removed only for specified causes, which do not include failure to follow the President's policy.[7] The Court held that the removal

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[4] Scholars today often see the claim of inherent at-will removal power as the principal form of the unitary executive principle. *See, e.g.*, Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175, 193 (2021) (stating that "most" supporters of the unitary executive principle "assert that the Constitution requires the President to have the ability to remove all executive officers – principal or inferior – at will") (footnote omitted).

[5] 140 S. Ct. 2193 (2020).

[6] 12 U.S.C. § 5491(b)(2) (providing that the Director is to be appointed by the President with the advice and consent of the Senate), 12 U.S.C. § 5491(c)(1) (providing that the Director's term is five years).

[7] 12 U.S.C. § 5491(c)(3) (providing that the President may remove the Director for "inefficiency, neglect of duty, or malfeasance in office"). The statute does not explicitly provide that the President may remove the Director only for those reasons, but *Seila Law* states that the Director "serves for a term of five years,

restriction is unconstitutional, resting that conclusion on Article II's requirement that the President be able to control decisions of other executive officials. Chief Justice Roberts, for the Court, observed that Article II vests the executive power in the President, and requires the President to take care that the laws be faithfully executed.[8] One person, however, cannot perform all the functions of government, so lesser executive officers must assist the President.[9] That relationship requires that "[t]hese lesser officers must remain accountable to the President, whose authority they wield."[10] The President's power to oversee and control those who execute the laws, the Chief Justice reasoned, "includes the ability to remove executive officials."[11] The Chief Justice then reviewed history, including congressional debates in 1789 about removal power and the Court's cases, concerning the President's removal power.[12] *Seila Law* turned on a close connection between presidential supremacy within the executive and the power to remove.

In 2021, in *Collins v. Yellen*,[13] the Court once again held a removal restriction invalid. Justice Alito's opinion for the Court relied on *Seila Law* while reiterating and perhaps amplifying the earlier case's endorsement of unlimited removal power based on the President's status as chief executive. An important question in *Collins* was whether *Seila Law* could be distinguished on the grounds that the CFPB Director has broader authority than does the Director of the Federal Housing Finance Agency (FHFA), the agency involved in *Collins*.[14] The Court found that "the President's removal power serves vital purposes even when the officer subject to removal is not the head of one of the largest and most powerful agencies."[15] Those purposes center on presidential control of the executive. "The removal power helps the President maintain a

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during which the President may remove the Director from office only for" the causes listed in the statute. *Seila Law*, 120 S. Ct. at 2193.

[8] *Seila Law*, 120 S. Ct. at 2193 (quoting the Vesting and Take Care Clauses of Article II, U.S. Const., Art. II, §§1 & 3)

[9] *Id*.

[10] *Id*.

[11] *Id*.

[12] *Id*. at 2197-2200.

[13] 141 S. Ct. 1761 (2021).

[14] *Id*. at 1784 (describing the argument that Congress may impose more restrictions on removal of the FHFA Director than on removal of the CFPB Director because the former's authority is more limited).

[15] *Id*.

degree of control over the subordinates he needs to carry out his duties as the head of the Executive Branch," ensuring "that these subordinates serve the people effectively and in accordance with the policies that the people presumably elected the President to promote."[16]

Justice Kagan dissented in *Seila Law* and concurred in the judgment in *Collins* only insofar as the precedential force of *Seila Law* required her to. Her dissenting opinion in *Seila Law* recognized the connection between removal and presidential control, but differed from the majority as to the Constitution's requirements. "Throughout the Nation's history," she argued, the Court "has left most decisions about how to structure the Executive Branch to Congress and the President, acting through legislation they both agree to."[17] Restrictions on presidential removal limit presidential control, but often do so permissibly. "In particular, the Court has commonly allowed those two branches to create zones of administrative independence by limiting the President's power to remove agency heads."[18]

In *Collins*, Justice Kagan concurred in the judgment about removal power only for reasons of precedent: "*Stare decisis* compels the conclusion that the FHFA's for-cause removal provision violates the Constitution."[19] Stare decisis aside, she rejected the majority's "contestable—and, in my view, deeply flawed—account of how our government should work."[20] Electoral accountability, she argued, is assured when the courts defer to the judgments about executive structure found in statutes enacted by the political branches.[21]

Seila Law and *Collins* are the latest of a line of cases, now almost a century old, that link the President's ability to control government decisions and the President's ability to remove the officials who make those decisions. That line begins with *Myers* v. *United States*. [22] Myers was a Postmaster in Portland, Oregon, appointed in 1917 to a four-year term with the Senate's advice and

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[16] *Id*.

[17] *Seila Law*, 140 S. Ct. at 2224 (Kagan, J., dissenting).

[18] *Id*.

[19] *Collins v. Yellen*, 141 S. Ct. at 1799-1800 (Kagan, J., concurring in part and concurring in the judgment in part).

[20] *Id*. at 1800.

[21] *Id*. (arguing that Congress, not the Court, should decide on agency design).

[22] 272 U.S. 52 (1926).

consent.[23] By statute, Senate-confirmed postmasters could be removed by the President only with the Senate's consent.[24] In 1920, President Wilson directed the Postmaster General to remove Myers, without obtaining that consent.[25] Myers maintained that his removal was unlawful and sued in the Court of Claims for backpay for the period from his removal up to the expiration of his term.[26] After two oral arguments, and more than a year after the second, Chief Justice Taft delivered a long opinion for the Court.[27]

Chief Justice Taft's opinion helped set the agenda for subsequent judicial and scholarly debate, especially on two points. First, he analyzed in depth the debate and decision of the First Congress in creating the Department of Foreign Affairs (later the Department of State).[28] A central question in that debate was whether power to remove the Secretary of Foreign Affairs should be given to the President acting alone, or acting with the Senate's consent. That issue was discussed at length in the House, in conjunction with the broader issue of presidential control of executive officials. As adopted, the statute addressed the question of removal power somewhat indirectly. It provided that that the Chief Clerk of the Department was to take custody of the Department's records when the Secretary was removed by the President.[29] The statute did not mention any role for the Senate, but neither did it say in so many words that the President would act alone. Chief Justice Taft took the statute as "a legislative declaration that the power to remove officers appointed by the President and the Senate is vested in the President alone."[30] Speaking for the Court, Taft endorsed that conclusion.[31]

Second, Taft linked presidential removal power to presidential control of executive decisions. Describing the

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[23] 272 U.S. at 106.

[24] *Id*. at 107 (describing removal provision)

[25] *Id*. at 106.

[26] *Id*. at 106-107.

[27] *See id*. at 52 (dates of argument and opinion). By the time the case was decided, Myers had died; the Myers of *Myers* was his widow and administratrix. *Id*. at 108.

[28] *See id*. at 110-36 (26 pages discussing debates and decision of the First Congress).

[29] *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801, at 40-41 (1997) (describing adoption of the bill's final wording).

[30] 272 U.S. at 114.

[31] *Id*. at 136.

reasoning of supporters of presidential removal power in 1789, which he endorsed, the Chief Justice adopted a line that remains familiar. "The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates."[32] If the President is to act, but does so through subordinates, the President must be able to choose those subordinates. The Constitution explicitly gives appointment power.[33] "The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible."[34] In 1926, as in 1789 and 2020, removal power was derived from the authority found in Article to oversee executive decisions.[35]

Myers was less than a decade old when another case about removal and presidential authority came before the Court. In 1933, President Franklin Roosevelt removed William Humphrey, a member of the Federal Trade Commission.[36] Humphrey had been appointed for a seven-year term that would have expired in 1938.[37] The Federal Trade Commission Act provided that Commissioners "may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."[38] President Roosevelt removed Humphrey, not on any of those grounds, but because Roosevelt's mind and Humphrey's did not "go along together on either the policies or the administering of the Federal Trade Commission."[39]

Writing for the Court in *Humphrey's Executor*, Justice Sutherland found that the grounds for dismissal listed in the statute

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[32] *Id*. at 117.

[33] *Id*.

[34] *Id*.

[35] Justices Holmes, *id*. at 177, McReynolds, *id*. at 178, and Brandeis, *id*. at 240, all wrote dissenting opinions. Brandeis explicitly limited his opinion to lower-level civilian officials like Myers, not inquiring into the President's power as Commander in Chief, nor asking whether the President "acting alone" could "remove high political officers." *Id*. at 241.

[36] Humphrey's Executor v. United States, 295 U.S. 602, 618 (1935).

[37] *Id*. Humphrey died in February 1934, *id*.; the suit was maintained by his executor, who sought backpay for the period from Humphrey's removal to his death, *id*.

[38] *Id*. at 620.

[39] *Id*. at 619.

were implicitly exclusive.[40] The Court upheld the removal restriction, and distinguished *Myers* on grounds that show the connection between removal and the President's executive power. *Myers*, Justice Sutherland explained, had involved "an executive officer restricted to the performance of executive functions."[41] The decision in *Myers,* Sutherland maintained, "finds support in the theory that such an officer is merely one of the units in the executive department, and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive."[42] Sutherland was prepared to apply the rule of *Myers* to all "purely executive officers."[43] The Federal Trade Commission, however, "occupies no place in the executive department" and "exercises no part of the executive power vested by the Constitution in the President."[44] Rather, "[t]he Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid."[45] Justice Sutherland found that "[s]uch a body cannot in any proper sense be characterized as an arm or an eye of the executive."[46] Justice Sutherland's theory of the constitutional system and the FTC's place therein may or may not have been sound. His theory did assume some presidential direction of executive decisions, but it excluded the FTC from the Article II executive power.

Presidential removal power, and its connection with presidential control of executive decisions, were central to a major separation of powers case in the 1980s, *Morrison* v. *Olson*.[47] The Ethics in Government Act of 1978, adopted in the wake of the Watergate investigation and prosecutions, sought to deal with possible bias in prosecutorial decisions involving high-level executive officials.[48] The statute created a system under which those decisions would be in the hands of an official independent of the Attorney General and the President. The Act set out conditions under which the Attorney General was to refer evidence

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[40] *Id*. at 626.
[41] *Id* at 627.
[42] *Id*.
[43] *Id*. at 628.
[44] *Id*.
[45] *Id*.
[46] *Id*.
[47] 487 U.S. 654 (1988).
[48] *Id*. at 660-61.

concerning possible crimes by high-level executive officials to a panel of the D.C. Circuit, which was authorized to appoint an Independent Counsel.[49] Once appointed, an Independent Counsel exercised all the authorities of the Department of Justice as to the matters referred to her, and could be removed only for stated reasons that did not include differences of prosecutorial policy.[50]

Former Assistant Attorney General Theodore Olson, a target of an Independent Counsel investigation, challenged the Counsel's authority on constitutional grounds.[51] Chief Justice Rehnquist, for the Court, upheld the statute, rejecting the claim that the removal restriction "impermissibly interferes with the President's exercise of his constitutionally appointed function."[52] The Court recognized that the removal restriction interfered with presidential control, but found that the Constitution did not require that the President be able fully to direct the Counsel's decisions. With removal for cause available, the President could ensure that the Counsel complied with her statutory duties. The removal restriction therefore did not "interfere impermissibly" with the President's "constitutional obligation to ensure the faithful execution of the laws."[53]

Justice Scalia in dissent found the statute straightforwardly unconstitutional. Article II vests the executive power in the President and no one else, prosecution is a purely executive power, and the statute deprived the President "of exclusive control over the exercise of that power."[54] Justice Scalia focused on the removal

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[49] *Id*. In calling for appointment by a federal court, Congress relied on an aspect of the Appointments Clause, which provides that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, the Courts of Law, or in the Heads of Department." U.S. Const., Art. II, § 2, cl. 2. One point of contention in *Morrison* was whether Independent Counsel were so independent as not to be inferior, and another was whether appointment of a prosecutor by a court was constitutionally permissible. The Court upheld the statute as to both issues, 487 U.S. at 670-77. Justice Scalia, in dissent, maintained that Independent Counsel were not inferior within the meaning of the Constitution and so could not be appointed by a court. *Id*. at 715-23 (Scalia, J., dissenting).

[50] *Id*. at 662-63.

[51] Independent Counsel Alexia Morrison was investigating Olson for allegedly false and misleading statements he had made in congressional testimony while serving at the Justice Department. *Id*. at 665-66.

[52] *Id*. at 685.

[53] *Id*. at 692-93 (footnote omitted).

[54] *Id*. at 705 (Scalia, J., dissenting).

restriction as an impediment to presidential control of the Independent Counsel. Deriding the Court's observation that removal for cause gave the President "'some'" control, Scalia responded that "[t]his is somewhat like referring to shackles as an effective means of locomotion."[55]

In *Free Enterprise Fund* v. *PCAOB*,[56] which also involved a removal restriction, the Court swung back in the pro-President direction. The Sarbanes-Oxley Act of 2002 reformed the regulation of corporate accounting.[57] That statute created the Private Company Accounting Oversight Board (PCAOB), a body with substantial authority to regulate the accounting practices of private companies.[58] Members of the PCAOB are appointed by the Securities Exchange Commission (SEC) for a term of five years.[59] Under the statute, PCAOB members may be removed only by the SEC and only for willfully violating the law, willfully abusing their power, or failing to enforce compliance with the law without reasonable justification or excuse.[60] The parties agreed, and the Court assumed for purposes of deciding the case, that members of the SEC may be removed by the President only for limited reasons that do not include disagreement with presidential policy.[61] PCAOB Members thus were doubly removed from presidential control through removal: they could be removed only on limited grounds by officers who could be removed by the President only on limited grounds.

Chief Justice Roberts, writing for the Court, found the double insulation unconstitutional. He began with a constitutional requirement of presidential control and moved immediately to removal power to implement that principle. The Chief Justice quoted the Vesting Clause of Article II, then quoted a statement by Madison in the First Congress that if any power is executive, it is "'appointing, overseeing, and controlling those who execute the

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[55] *Id*. at 706.

[56] 561 U.S. 477 (2010).

[57] *Id*. at 484.

[58] *Id*. at 485-86.

[59] *Id*. at 484.

[60] *Id* at 486 (quoting the statute).

[61] *Id*. at 487 (deciding the case "with that understanding" on which the parties agreed). That assumption may have been incorrect. The Securities Exchange Act of 1934, Pub. L. 73-291, 48 Stat. 881, which created the Commission, contains no restriction on presidential removal of SEC members.

laws.'"[62] The next paragraph of the opinion begins, "[t]he removal of executive officers was discussed extensively in Congress when the first executive departments were created."[63]

After reviewing the Court's removal cases, the Chief Justice explained that two levels of removal restriction were "quite different" from one, which the Court had sometimes approved.[64] The difference had to do with the PCAOB's independence from presidential control. "Neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board."[65] The Chief Justice understood removal as a means of control and restrictions on removal as inhibitions on control. He characterized as directly responsible to the President those he could remove for any cause. Finding that two levels of insulation produced a substantially limited presidential power to direct the PCAOB, the Chief Justice found the statute "contrary to Article II's vesting of the executive power in the President."[66]

Justice Breyer dissented. He agreed that removal restrictions promote independence, but argued that the Constitution allows independence. Justice Breyer found little specific guidance in the text, contrasting *Free Enterprise Fund* with cases involving more specific provisions like the Appointments Clause.[67] Without a specific text, the Court should look to "function and context, and not to bright-line rules."[68] Function might call for independence, even when the function involved presidential power. "If the President seeks to regulate through impartial adjudication, then insulation of the adjudicator from removal at will can help him achieve that goal."[69] Independence for the PCAOB, Justice Breyer argued, rested on powerful functional considerations. The PCAOB's functions include adjudication, and independence for adjudicative officials has been accepted from the time of the framing.[70] The agency's functions rest on apolitical expertise, and

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[62] 561 U.S. at 492 (quoting U.S. Const., Art. II, § 1, and 1 ANNALS OF CONGRESS 463 (1789)).
[63] *Id*.
[64] *Id*. at 495.
[65] *Id*. at 496.
[66] *Id*.
[67] 561 U.S. at 516-17 (Breyer, J., dissenting).
[68] *Id*. at 519.
[69] *Id*. at 522.
[70] *Id*. at 530-31.

experts should not fear losing their jobs for political reasons.[71] In light of those functional considerations, Congress and the President "could reasonably have thought it prudent to insulate the adjudicative Board members from fear of purely politically based removal."[72] That judgment, in Justice Breyer's view, satisfied the Constitution's functional standard.

The Court's cases about the unitary executive principle have mainly been removal cases, and vice versa. Because American constitutional law and scholarship is focused on the Court's cases, that connection may seem to be indissoluble. The unitary executive principle may seem to entail removal power, so that to question the latter is necessarily to question the former. As this article shows, the unitary executive principle does not stand or fall with constitutionally inherent removal power.

B. Presidential Control of the Executive and Removal in President Jackson's Conflict with the Bank of the United States

Constitutional practice is not limited to cases, and the connection between the unitary executive principle and removal power is very much a story of extra-judicial actions that reflect constitutional commitments. The connection between presidential authority and removal had been a subject of well-known congressional and presidential practice for more than a century when *Myers* was decided. *Myers* dealt in depth with Congress's choices in 1789.[73] As the Chief Justice noted in that case, the First Congress discussed removal at length when it created the first executive departments in 1789.[74] This section describes another central piece of extra-judicial practice. In 1832, President Jackson used removal power to implement his policy concerning the Second Bank of the United States. His action shows the usefulness of removal and gave rise to another debate about the executive branch and the President's authority to direct it and to choose its personnel. Like the cases, the events concerning the debate provide important background. Like the cases, those events can create the

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[71] *Id*. at 531.

[72] *Id*. at 532.

[73] *Supra* --.

[74] *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801 39-40 (1997) (describing arguments in favor of presidential removal power).

misimpression that the unitary executive principle and inherent removal power necessarily go together.

In 1832 and 1833, removal and control of executive officials figured centrally in the struggle over the Second Bank of the United States. In 1832, President Jackson vetoed legislation that would have extended the Bank's charter, due to expire in 1836.[75] Jackson hoped to put the Bank out of business before that, by removing the federal government's deposits.[76] Authority to decide whether to keep the government's funds with the Bank rested by statute with the Secretary of the Treasury, not directly with the President.[77] Despite the President's policy, Secretary of the Treasury William Duane concluded that the federal funds were safe with the Bank, and that under those circumstances the statute did not allow him to remove them.[78] In keeping with Congress's decision in 1789, the Secretary of the Treasury served at the President's pleasure, and Jackson removed Duane.[79] Jackson gave a recess appointment as Secretary of the Treasury to Attorney General Roger Taney.[80] Taney concluded that the statute allowed him to take the money out of the Bank, even if it was safe there.[81]

That aspect of Taney's reasoning concerned his statutory authority. In explaining his decision to Congress, Taney also invoked the principle of the unitary executive. In administering federal funds and carrying out the statutes, the Secretary of the Treasury performed an executive function.[82] In doing so, the Secretary was properly under the supervision of "'the officer to whom the constitution has confided the whole executive power'" – the President.[83]

Jackson's and Taney's actions provoked a debate in Congress about the unitary executive principle and presidential removal power. Senator Henry Clay of Kentucky, who had lost the 1832 presidential election to Jackson, argued that Jackson had acted improperly in removing Duane. Duane had followed his own

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[75] *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: WHIGS AND DEMOCRATS, 1829-1861 59-65 (2005) (describing Jackson's veto).
[76] *Id*. at 67.
[77] *Id*. at 65.
[78] *Id*. at 67.
[79] *Id*.
[80] *Id*.
[81] *Id*.
[82] *Id*. at 68.
[83] *Id*. (quoting CONG. DEB. APP., 23 CONG., 1ST SESS. 60 (1833)).

good-faith interpretation of the statute and was not subject to presidential direction, and so the removal was unlawful.[84] Clay also raised a question that would recur: which government activities are executive and so arguably within the President's sphere. In managing federal money, Clay argued, the Secretary of the Treasury was not performing executive functions. He was an agent of Congress, which had the power to control taxing, borrowing, and spending.[85]

Other participants in the Senate debate supported presidential power. Pointing to Congress's decision in 1789, Senator William Rives of Virginia argued that the Constitution required that the President be able to direct the Secretary of the Treasury, who could not be made independent.[86] Senator Daniel Webster, no friend of Jackson, argued that the President had no power to command the Secretary, but could remove him for not implementing presidential policy.[87]

All the participants in the Bank deposits controversy understood that presidential authority within the executive and removal power were closely connected for practical purposes. The Bank episode, a leading piece of the canon of constitutional practice, can, like the cases, create the impression that presidential authority entails free removal power. The episode's place in the canon is justified, but the impression is not.

II. Article II, Congress's Power to Structure the Government, and the New Unitary Executive Thesis

This section derives the new unitary executive thesis from the text, structure, and history of the Constitution.

The new thesis holds as follows: By vesting the executive power in the President, the Constitution gives the President two

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[84] *Id*. at 66-67.

[85] *Id* at 69.

[86] *Id*. at 68.

[87] *Id*. at 69. Currie argued that Webster's position made no sense: the reason the President had removal power was to enable him to direct the Secretary. *Id*. Currie's argument shows how closely connected removal and presidential control have become in American constitutional thinking. The burden of this article is that although the two are related, their connection is not indissoluble. The President can have the power to command without the power to remove, and can have the power to remove without the power to command, and both arrangements are ways to implement the principle of the unitary executive.

functions. One is to ensure that executive officials properly administer the government and carry out the laws. The other is to control policy-making authority that is vested in executive officials by statute. Congress has substantial discretion in structuring the executive branch, and legitimate reasons to adopt rules that may make the President's performance of those functions more difficult. But Congress must respect the President's constitutional role. Any burdens that Congress imposes on presidential control of executive activities must be minor, and must serve a legitimate goal. Creating an apolitical civil service, and more generally preventing the use of government resources for electoral advantage, are legitimate goals. In pursuit of those and other permissible goals, Congress may limit the President's removal power, so long as it provides some means by which the President may perform his constitutional function. Congress may not act with the purpose of conferring policy-making authority on executive officials that is not subject to presidential control. Agency independence as commonly understood today is an unconstitutional purpose.

The reasoning to the conclusions just stated has several steps, each of which has multiple components. The first step is to derive the President's constitutional function from the text and structure.

The second step examines the different means through which the President may perform that function. That examination leads to two conclusions. First, no one tool of control, including removal, is constitutionally required. Second, tools of control can be misused; removal power can be used to turn government employment to partisan electoral ends. Those conclusions produce a third: designing the executive branch, including choosing the means by which the President will direct it, requires pragmatic judgments and policy trade-offs.

The third step derives the new thesis. It begins with the familiar principle that under the Necessary and Proper Clause, Congress has authority to design the executive apparatus and choose the rules that govern it, including rules about removal. The new thesis results from a synthesis of that principle with the earlier conclusions about the President's role and the tools of control. The President's role is a constitutional imperative that Congress must respect. That imperative requires that when Congress makes the pragmatic judgments and trade-offs required to choose tools of presidential control, it must make sure that the President can

adequately perform that role. Presidential control will inevitably be limited, because no tool of control is perfect, so Congress is not required to strive for complete presidential authority. Burdens on the President's ability to direct executive operations thus are permissible, but must be minor because of the imperative the Vesting Clause of Article II entails.

A. The President's Constitutional Role as Holder of the Executive Power

This section lays out the President's role in the government that results from Article II's vesting of the executive power. It proceeds in two stages. The first stage derives a general principle of presidential supremacy in executive operations from the text and structure of the Constitution, with help from the drafting history at the Federal Convention. The second stage elaborates on that principle, showing how it entails the two roles of ensuring lawful execution and directing policy-making authority conferred by statute.

1. The Basic Principle of Presidential Primacy in Executive Operations

Article II's text and structure produce a basic principle about the federal government's executive operations: The President is in charge of them. The available records of the Federal Convention indicate that its members assumed that the text they adopted included that principle. This section derives that basic principle, which the next section will work out in more detail. On this fundamental issue, the new unitary executive thesis takes the same position as other members of the unitary-executive family.

a. Text and Structure

Article II vests the executive power in the President. It raises two questions: what is executive power, and what follows from granting it to a single individual, when the government will consist of a great many?

i. Executive Power and Administering the Government

The executive power conferred by Article II includes, and may consist entirely of, the authority to administer the government

and carry out the laws: the ability to use the resources of the government to perform the functions of the government, subject to constraints imposed by the law.

Legal rules by themselves are abstract. They are not actions. A local postmaster who accepts mail and turns it over to intercity mail carriers turns the abstract rule into real activity. A core meaning of execution of a rule is to do just that. The executor of a will, for example, distributes funds according to the testator's instructions.[88] Delivering funds to their designated recipients implements an abstract command with a concrete action. Taking concrete action pursuant to a statute is executing the statute.

Professor Julian Mortenson has recently shown in depth that at the time of the framing, the term "executive power" was used to refer to the concrete implementation of legal rules by government officials.[89] His extensive research confirms that a way of speaking that is natural today was natural in the late 18th century: official actions pursuant to the law are the execution of the law.[90] The important feature of his findings for the unitary

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[88] *See, e.g.*, CODE OF VIRGINIA § 64:2-422 (executor to pay proceeds of sale of real estate to persons entitled thereto).

[89] Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1230-34 (2019) (maintaining that executive power was the power to carry out the laws).

[90] Professor Mortenson makes both positive and negative claims about executive power. His positive claim is that it includes taking concrete steps to implement the law. His negative claim is that the executive power does not include any other component of the British monarch's authority. *Id*. at 1223-30 (listing aspects of the royal prerogative other than the executive power). Mortenson's negative claim is substantially more controversial than his positive claim. He identifies a body of thought, which he rejects, according to which the Article II executive power includes independent authority over foreign affairs derived from the royal prerogative. *Id*. at 1181-85. Professors Saikrishna B. Prakash and Michael D. Ramsey are leading exponents of the claim that Article II includes foreign affairs power. *See*, Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231(2001). The claim that the Article II executive power includes the authority to carry out the law is much less controversial. *See, e.g.*, Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004) (rejecting claim of inherent foreign affairs powers but not of power to carry out the law).

The unitary-executive thesis is to a large extent neutral with respect to the scope of executive power. The thesis asserts that whatever Article II confers, the President is in charge of it. The widely accepted principle that executive power includes or consists of authority to carry out the laws, however, buttresses

executive thesis is that the concept of executive power comprehends almost all of the day-to-day activities of the government. Courts too take specific action, but those actions are only jural: they declare and change legal relations. Executive officials translate the courts' judgments into concrete action, for example by levying on property to execute a judgment.[91]

The Constitution's structure confirms that the Article II executive power includes all the government's implementing activities except those of the courts. Each of the Constitution's first three articles begins by vesting one of three powers: legislative, executive, and judicial.[92] Those three powers are quite general, and include many particulars. Article I addresses particulars when it gives the power to tax, which is central to government but still only part of the larger whole of legislative power.[93] No fourth power that is so general is conferred. That structure implies that the three powers together are collectively exhaustive of what government does: every official act is legislative, executive, or judicial.[94] At the time of the framing, sophisticated Americans were familiar with a tripartite typology that divided the whole of government's operations into those three categories.[95] Montesquieu provided a classic formulation of that typology.[96] In broad outline,

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the unitary-executive reading of Article II. Law execution and administration are a large part of what the government does. Putting the authority to carry out those functions in the hands of a single officer indicates that that officer plays a central role in the constitutional system.

[91] *See, e.g.*, CODE OF VIRGINIA § 8.01-466 (at request of judgment creditor, clerk of court shall issue a writ if fieri facias and "place the same in the hands of a proper person to be executed"). The writ of fieri facias is a directive from the court to an implementing official: by it, "the officer shall be commanded to make the money therein mentioned out of the goods and chattels of the person against whom the judgment is." *Id*. § 8.01-474.

[92] *See* U.S. CONST. Art. I, § 1 (vesting in Congress all legislative power the Constitution grants); *id*., Art. II, § 1 (vesting the executive power vested in the President); *id*., Art. III, § 1 (vesting the judicial power of United States in supreme and inferior courts).

[93] *See* U.S. CONST., Art I, § 8, cl. 1 (giving Congress taxing power).

[94] Whether the powers overlap, so that some act might be taken with two or three powers – whether they are mutually exclusive -- is a distinct question from whether they are collectively exhaustive.

[95] *See, e.g.*, THE FEDERALIST NO. 47 (James Madison) (discussing importance of separation of legislative, executive, and judicial power).

[96] *Id*. (citing Montesquieu as leading exponent of the importance of separating the three powers). *See* Matthew P. Bergman, *Montesquieu's Theory of Government and the Framing of the American Constitution*, 18 PEPP. L. REV. 1,

the Constitution appears to follow it. If the Article II executive power does not include administering the government, the framers did not allocate the authority to carry out the vast bulk of the government's operations.

The tripartite structure of government power under the Constitution may seem to be a commonplace, but it is a matter of controversy in today's debate over the unitary executive. Allocating the government's non-judicial operations to executive power supports the President's claim to direct those operations. Professor Peter Strauss has provided the leading formulation of the contrary position.[97] The tripartite structure, he argues, is significant only at the very highest levels of government. Articles I, II, and III divide power among Congress, the President, and the courts. But the mass of agencies that carry on the government's business do not fit into the tripartite system. "[W]e should stop pretending that all our government (as distinct from its highest levels) can be allocated into three neat parts."[98] Attempting "to locate administrative and regulatory agencies within one of the three branches" is a mistake.[99] Agencies that carry on the government "fall outside the constitutionally described schemata of three named branches embracing among them the entire allocated authority of government."[100] Each of the highest-level actors has some power to control the administrative parts of the government.[101] Asking whether the CFPB exercises executive

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23-27 (1990) (describing influence of Montesquieu's thought, including as to separation of powers, on the Federal Convention). Montesquieu's influence can also be found in the Supreme Court's contemporary separation of powers cases. *See*, *e.g.*, Buckley v. Valeo, 424 U.S. 1, 120 (1976) (citing Madison, and Madison's reference to Montesquieu, in finding "the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another").

[97] Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984). Strauss undertakes to address "a difficulty in understanding the relationships between the agencies that actually do the work of law-administration, whose existence is barely hinted at in the Constitution, and the three constitutionally named repositories of all governmental power -- Congress, President, and Supreme Court." *Id*. at 575 (footnote omitted).

[98] *Id*. at 579.

[99] *Id*.

[100] *Id*. at 578-79.

[101] "Each agency is subject to control relationships with some or all of the three constitutionally named branches, and those relationships give an assurance -- functionally similar to that provided by the separation-of-powers notion for the

power, and therefore must somehow be under presidential direction, is a mistake.

Strauss's analysis is powerful, but it does not clash with the new unitary executive thesis, because his is not a claim about the Constitution's meaning. Strauss provides a description and rationalization of how administrative government operates. He candidly acknowledges that the current system is a major change from the Constitution's "eighteenth century formal structure," and that "it is difficult to accommodate both the fact of the changes and our continuing assertion that the Constitution is law."[102] This article assumes that the Constitution is law, and measures the current practice of government against the Constitution, not the other way around.

Text and structure support the conclusion that the executive power is the authority to conduct the operations of government and carry out the laws.

ii. Vesting Executive Power in a Single Person

Executive power is a major part of government, in important respects the largest part. A single person holds that power. Vesting the executive power in a single person, however, presents a familiar problem. Everyone knows, and everyone knew at the time of the framing, that one person cannot perform all the practical functions of government.[103] The Constitution contemplates so many officials that it has a special rule for those lower down in the system, who are called inferior.[104] Article II also contemplates high-level officials when it gives the President

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constitutionally named bodies -- that they will not pass out of control." *Id*. at 589.

[102] *Id*. at 581.

[103] In *Seila Law*, the Court quoted the Vesting Clause and Take Care Clause of Article II, stated that "the 'entire executive power' belongs to the President alone," then reached back to the time of the framing for the resulting conclusion that "because it would be 'impossib[le] for 'one man' to 'perform all the great business of the State,' the Constitution assumes that lesser executive officers will 'assist the supreme Magistrate in discharging the duties of his trust.' 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939)." Seila Law v. CFPB, 140 S. Ct. 2183, 2197 (2020).

[104] *See* U.S. CONST., Art. II, § 2, cl. 2 (governing appointment of inferior officers).

power to call on the heads of department for advice.[105] Executing the laws requires many people, not just one.

And yet the power is vested in just one. Reconciling those two basic features of the Constitution's executive is a central challenge in understanding Article II. The unitary executive thesis reconciles them. A power can simultaneously be held by one person and by a great many if the great many have the one as their chief. If other officials work for the President somewhat as an agent works for a principal, then the two possibly incompatible aspects of the system work together. In the corporate bodies known to the framers, officers and employees of corporations carried out the directives of a governing body that held all the legal powers conferred on the corporate entity.[106] When the First Congress created the First Bank of the United States, for example, it authorized the Bank's directors to appoint such officers as needed

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[105] *Id*., Art. II, § 2, cl. 1 (empowering the President to require written opinions of Heads of Department). That clause may seem to undermine the unitary executive principle. Presidential control over the executive might be read to imply that the President has power require advice from subordinates, but if the unitary executive principle implies that power, the Opinions Clause is redundant. *See*, *e.g.*, Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L. J. 1725, 1795-96 (1996) (discussing whether Opinions Clause is redundant given the unitary executive principle). Presidential command of the executive, however, does not imply an authority to require opinions in writing. As this article shows, the Constitution itself does not give the President any specific means of control, including the authority to give officials orders such as an order requiring an opinion in writing. And however the President's authority over other officials is exercised, it extends only to those officials' functions. The Opinions Clause adds to those functions. Giving an opinion is a distinct task, different from simply performing other tasks, and a task an official might well wish not to have to perform. Department heads might prefer simply to do as they are told, without having to take a position as to what they should do. The unitary executive principle means that the President, in some fashion, must be able to direct officials in their functions. That principle does not identify those functions. By laying out a separate duty that must be performed at the President's request, the Opinions Clause confers on the President a power that the unitary executive principle by itself does not entail. The unitary executive principle therefore does not imply that the clause is redundant.

[106] Colonial charters, which were familiar at the time of the framing, often had that structure: the monarch created a governing body that in turn could appoint officers and other employees. *See* Geoffrey P. Miller, *The Corporate Law Background of the Necessary and Proper Clause*, 79 GEO. WASH. L. REV. 1, 7-8 (2010) (describing colonial charters).

to carry out the Bank's business.[107] The analogy between the President's relation to other officials and the principal-agent relation is not perfect, of course, because the President is in turn the agent of the people. But the President need not be the principal strictly speaking to be the boss.

Another basic feature of the Constitution confirms that the President is the primary repository of executive power and that he exercises that power through other officials. The Constitution itself prescribes the rules for electing the President. It sets out the criteria for eligibility.[108] It sets the President's term.[109] It sets out a complex election process, one that balances popular involvement with the equal sovereignty of the states.[110] The selection of other high executive officials is then channeled through the President, who appoints to principal offices with the Senate's advice and consent.[111] That arrangement makes sense on the assumption that the primary choice concerning the way in which the laws will be carried out is the selection of the President.[112]

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[107] Act of June 1, 1789, ch. 10, § 6, 1 Stat. 190, 193 (providing that the directors of the Bank may hire officers and others to execute the business of the corporation).

[108] *See* U.S. CONST., Art. II, § 1, cl. 5 (setting out qualifications for the presidency).

[109] *Id*., cl. 1 (providing four-year term).

[110] Article II provides for election by electors, chosen as the state legislatures decide. *Id*., cl. 2. Popularly elected legislatures thus may, but need not, provide for popular election of presidential electors. Electors are allocated to the states by a formula that takes into account both state population and equal state sovereignty: each state has as many electors as it has Senators and Representatives combined. *Id*. The Twelfth Amendment modified the system by providing for separate election of the President and Vice President. U.S. CONST., Amend. XII (providing that each elector is to vote separately for President and Vice President).

[111] U.S. Const., Art. II, § 2, cl. 2 (providing for appointment of principal officers by the President).

[112] The unitary executive thesis rests on a reading of the Vesting Clause of Article II. It does not rest on the claim that the word "vested" by itself entails that the grant in Article II is exclusive. Professor Jed Shugarman has recently presented substantial evidence that at the time of the framing, "vest" and its cognates did not convey exclusivity. Jed Shugarman, *"Vesting": Text, Context, and Separation of Powers Problems*, STAN. L. REV. (forthcoming 2022). Professor Shugarman's findings do not undermine the unitary executive thesis. The fact that vesting as such is not intrinsically exclusive is undoubted. For example, Article III vests the judicial power of the United States in "one supreme Court" and "such inferior Courts" as Congress may establish. U.S.

This familiar reading of the Vesting Clause in light of the structure, which the Court endorsed in *Seila Law*, is subject to the objection that it reads too much into the brief words that open Article II. General provisions like the Vesting Clause should not be read as laying down sharp rules, goes the objection. Rather, they should be applied flexibly with an eye to the goal of effective government. Scholars have developed terminology to capture that distinction in separation of powers cases: sharp rules are found by formalistic reasoning, while flexibility in the interest of effective government is found by functionalist reasoning.[113] The objection to the reading of Article II proposed here is that it finds a formal rule in a general provision that should be interpreted functionally.

A rule-like reading of the Vesting Clause on this point follows from its clarity. Just as the first sentence of Articles I, II, and III each conveys a power of government to a specific institution, that of Article II conveys it to a specific officer. Those allocations, at once general and clear, indicate that the clauses are making basic decisions.[114] Other constitutional provisions, by contrast, indicate that they call for flexible, policy-based judgment. A classic example is the Necessary and Proper Clause, which

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CONST., ART. III, § 1. The vesting of judicial power in the Supreme Court is not exclusive, nor is the vesting of judicial power in the inferior courts. Other features of the Constitution, however, show that the federal judicial power is exclusively vested in the courts created by Article III. *See* Stern v. Marshall, 564 U.S. 462, 484 (2011) (explaining that Congress may not confer judicial power on entities outside Article III). The argument that the executive power is primarily in the President, and in other officials subject to presidential supervision, does not rest on any implicit exclusivity in "vested." It rests on features of the Constitution discussed above, such as the Constitution's mention only of the President. The unitary executive thesis does rest on the claim that Congress may not by statute alter the Constitution's arrangement of power. *See id*. If the Constitution allows other officials to perform executive functions only under the President's supervision, Congress may not depart from that arrangement, any more than it may change the President's term to five years.

[113] *See* Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions: A Foolish Inconsistency*, 72 CORNELL L. REV. 488 (1987) (distinguishing formalist and functional approaches and supporting the latter).

[114] Possible vagueness in the concepts of legislative, executive, and judicial power does not keep the clauses that allocate them from being reasonably clear. Whatever legislative power is, Congress has it all.

authorizes Congress to make pragmatic, means-ends judgments.[115] The Vesting Clauses do not use that kind of terminology.

The Necessary and Proper Clause itself may seem to challenge a reading of Article II that substantially constrains Congress. Justice Kagan, in dissent in *Seila Law*, argued that the clause gives Congress "broad authority to establish and organize the Executive Branch."[116] Exercises of that power, however, must be consistent with other commands of the Constitution.[117] An important feature of the new unitary executive thesis is that it accords Congress substantially more flexibility than do many other forms of the basic unitary-executive principle. Like Justice Kagan, it would allow Congress considerable power to determine the tenure of executive officials.[118] But the new thesis does embrace

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[115] *See* M'Culloch v. Maryland, 17 U.S. 316 (1819) (stating that the Necessary and Proper Clause enables Congress to decide that a national bank will be useful in carrying out federal powers).

[116] Seila Law v. CFPB, 140 S. Ct. 2183, 2227 (2020) (Kagan, J., dissenting).

[117] "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." McCulloch v. Maryland, 17 U.S. 316, 421 (1819). A statute that by its terms vested the executive power in an officer other than the President would be inconsistent with the letter of the Constitution. So would be a statute that would produce a legal effect inconsistent with the vesting of the executive power in the President. The important question in applying the Vesting Clause concerns the clause's consequences for the President's role in the executive branch, so that statutes can be measured against the Constitution's requirements. Whatever the consequences of vesting the executive power in the President are, Congress must respect them.

[118] *See Seila Law*, 140 S. Ct. at 2226 (Kagan, J., dissenting) (Congress has "wide leeway to limit the President's removal power in the interest of enhancing independence from politics in regulatory bodies like the CFPB"). Much of Justice Kagan's disagreement with the majority in *Seila Law* is concerned specifically with the Court's embrace of constitutionally based removal power. She points out, correctly, that the Constitution says nothing about presidential removal of other executive officials. *Id.* She also argues that the general language of the Vesting Clause will not carry the weight of "an unrestricted removal power." *Id.* at 2227-28. On that point too, she agrees with the new thesis. A strength of that thesis is that it does not infer a specific implementing rule from the general language of the clause. Rather, the new thesis infers an equally general and strong principle of presidential supremacy as to executive decisions.

the basic unitary executive principle, as Justice Kagan apparently does not.[119]

iii. The Take Care Clause

In addition to vesting the executive power, Article II provides that the President shall take care that the laws be faithfully executed.[120] The Take Care Clause often figures in debates about the unitary executive principle in general and removal power in particular. One standard line of reasoning is that the clause imposes a duty on the President, and thereby implies that the President has the power needed to carry out the duty. That reasoning is deeply embedded in the Supreme Court's cases and historical practice. The Court in *Seila Law* relied on *Myers* on this point.[121] *Myers* in turn relied on Madison's reliance on the Take Care Clause in the 1789 debates.[122] The Court has also drawn a much more limited inference from the clause than it did in *Seila Law*. *Morrison* concluded that for-cause removal power was enough to enable the President to fulfill the take-care duty.[123]

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[119] Justice Kagan does not embrace the thesis that the Constitution should be disregarded because an eighteenth-century document cannot meet the needs of twenty-first century government. Instead, she argues that "the text of the Constitution allows these common for-cause removal limits." *Id*. at 2225. Rather than suggesting that the Constitution is inadequate to today's needs, she maintains that the Court "second-guesses the wisdom of the Framers." *Id*. at 2226. This article too assumes that the text of the Constitution remains authoritative today.

[120] U.S. CONST., Art. II, § 3 (providing that "He shall . . . take Care that the Laws be faithfully executed").

[121] After citing *Myers* for the proposition that the President must be able to select those who administer the law, *Seila Law*, 140 S. Ct. at 2198 (quoting *Myers*, 272 U.S. at 117), *Seila Law* again cited *Myers* for the principle that the President must be able to remove those "'for whom he cannot continue to be responsible,'" *id*. (quoting 272 U.S. at 117). *Seila Law* then quoted the earlier case connecting removal to the take-care obligation. "'To hold otherwise,' the [*Myers*] Court reasoned, 'would make it impossible for the President . . . to take care that the laws be faithfully executed.'" *Id*. (quoting 272 U.S. at 164).

[122] According to Chief Justice Taft, Madison and those who agreed with him argued that removal power resulted from the President's responsibility "for the conduct of the executive branch, and enforced this by emphasizing his duty expressly declared in the third section of the Article to 'take care that the laws be faithfully executed.' Madison, 1 Annals of Congress, 496, 497." *Myers*, 272 U.S. at 117.

[123] For-cause removal power, the Court reasoned, enabled the President "to assure that the counsel is competently performing his or her statutory

The Take Care Clause reinforces the unitary-executive reading of the Vesting Clause, on which this article primarily relies. As *Seila Law*, *Myers*, and *Morrison*, all recognize, the Take Care Clause is naturally read as a duty: The President is required to ensure faithful execution. Imposing a duty makes sense only if the person who bears the duty is able to comply with it. So the clause implies that the President has a substantial supervisory role respecting law execution. As the contrast between *Seila Law* and *Morrison* shows, the take-care responsibility is consistent with different understandings of the President's supervisory role. The Take Care Clause thus reaffirms the general principle that the President oversees law implementation, but does not clearly entail any more specific conclusions about the President's role.[124]

b. The Federal Convention's Assumptions Concerning Presidential Primacy

This section discusses the Federal Convention's understanding of the President's role in the Constitution the Convention drafted. Available records of the delegates' deliberations strongly support the inference that they expected the President to direct executive operations. None of them would have been surprised by the basic unitary executive principle. One of their leading purposes was to put a single person in charge of the administration of the federal government and the execution of its laws. The delegates gave little attention to the details of administration and the roles of lower-level officers who would

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responsibilities in a manner that comports with" the Ethics in Government Act. Morrison v. Olson, 487 U.S. 654, 692 (1988).

[124] Dean John Manning and Professor Jack Goldsmith have identified enough roles attributed to the clause to liken it to the mythical shape-shifter Proteus. Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835 (2016). Professors Kent, Leib, and Shugarman have recently relied on the Take Care Clause, and the President's oath, to derive significant fiduciary-type duties for the President. Andrew Kent, Ethan J. Leib, and Jed Handelsman Shugarman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2019). Their basic conclusion, I think, also follows from the Vesting Clause. Executive power is the ability to carry out the laws, and doing so faithlessly is not doing so at all. Professor Metzger also draws a strong inference from the clause, finding in it a demanding duty to supervise administrative activities. Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L. J. 1836 (2015). The content of the President's duty under the clause is an important question; this article is concerned with the power, the exercise of which is subject to that duty.

mainly conduct the government's affairs. They barely touched on the practical implementation of the principle that a single official would direct the administration of government. Removal, other than through impeachment, likewise did not receive substantial attention. From a very early point, however, the delegates assumed that the person at the head of the executive would manage its affairs. The delegates' failure to focus much on some important trees, like removal, should not obscure the shape of the forest they planted.

On May 29, 1787, Edmund Randolph of the Virginia delegation presented a series of resolutions.[125] Those resolutions set out basic principles for a new national government, and structured the Convention's debates for the next several weeks. Resolution 7 called for a "National Executive," and did not specify the number of people who would make it up.[126] That resolution proposed that the national executive would have "a general authority to execute the national laws" along with the "Executive rights" then held by Congress under the Articles.[127] The former is the authority to administer the domestic laws. It is the function at issue in almost all debates about the unitary executive. The Postal Service, the Federal Trade Commission, and the CFPB, all perform that function.

The clause concerning law execution was modified slightly on June 1. That modification was part of a change that was not connected to domestic administration. James Wilson was concerned about giving the new executive the executive rights of

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[125] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 20-22 (Max Farrand, ed., 1937). All the records Farrand edited must be used with care. None is close to being a transcript of proceedings. The most extensive report, Madison's Notes, are not the notes Madison took during the proceedings; Madison produced his Notes based on rougher notes that have not survived. *See* MARY SARAH BILDER, MADISON'S HAND 62-63 (2015) (describing Madison's practice of taking rough notes and then preparing the documents that he retained, which Bilder calls the Notes). Bilder also concludes that Madison substantially altered important passages of the Notes after he first produced them. *E.g.*, *id*. at 179 (describing revisions made in the fall of 1789). None of this means that Madison and the other note-takers are wholly unreliable, but it does remind later readers that nothing like a verbatim record exists. For ease of exposition, this article refers to the records as if they were a transcript, but without meaning to imply that they were. When I write, for example, that James Wilson took a position, I mean that the records (usually Madison's) state that Wilson took that position.

[126] 1 THE RECORDS OF THE FEDERAL CONVENTION, *supra* --, at 21.

[127] *Id*.

the Confederation. Wilson "did not consider the Prerogatives of the British Monarch as a proper Guide in defining the Executive powers."[128] War and peace, for example, were legislative powers.[129] "The only powers [Wilson] conceived strictly Executive were those of executing the laws, and of appointing officers" not appointed by the legislature.[130] Madison, seconded by Wilson, then moved to strike the Virginia Resolution's language, and instead to provide for a national executive "with power to carry into effect. the national laws." to appoint, and to exercise other powers as delegated by the legislature.[131] Madison's proposal was modified slightly, and as modified was among the decisions that were later referred to the Committee of Detail. That committee was charged with turning the resolutions the convention had approved into a draft constitution.[132]

The text that went to the Committee of Detail strongly implies that the officer not yet called the President would be in command of the government's operations. The resolution provided "That a national Executive be instituted to consist of a single person," to be chosen for a six-year term, "with Power to carry into Execution the national Laws."[133] The activities of government agencies that are the subject of today's debate about the unitary executive carry into execution the national laws. The resolution assigned that function to a single person. It did not mention any subordinate officials. From the resolution, one might think that one individual would carry out the law personally. The framers knew that was impossible. Yet they provided that one individual would have power to carry the laws into execution.

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[128] *Id*. 65.

[129] *Id*. at 65-66.

[130] *Id*. at 66.

[131] *Id*. at 67 (periods in original).

[132] On July 23, the Convention decided to appoint a Committee of Detail that would produce a draft constitution from the resolutions the Convention had adopted. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 85 (Max Farrand, ed., 1937) (deciding to appoint a Committee of Detail). The Convention chose John Rutledge, Edmund Randolph, Nathaniel Gorham, Oliver Ellsworth, and James Wilson as the Committee on July 24. *Id*. at 97. The Convention continued to debate the executive on July 25 and 26, and referred all its resolutions to the Committee on the latter date. *Id*. at 117. The Convention then adjourned until August 6 so that the Committee could prepare its draft. *Id*. at 118.

[133] *Id*. at 186 (setting out the Virginia Resolutions as amended and referred to the Committee of Detail).

One individual cannot perform the functions of government in person. But one individual can perform many functions through agents. Someone who does something through an agent is said to do it. The Convention's members understood that corporate entities, like the United States, necessarily perform all their actions, jural and material, through natural persons. The corporate entity can be said to perform the act through an agent, or can simply be said to perform the act. For example, the framers well understood one way in which an officer acts for a corporate entity: by borrowing money on its behalf. The United States has never signed a promissory note, but the framers knew that it had debts, and affirmed them. Article VI begins, "All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution as under the Confederation."[134] The United States, not Superintendent of Finance Robert Morris, contracted those debts and had to pay them, but Morris had conducted many of the negotiations.[135] The sovereign acted through the natural person, just as one natural person can act through another.

The delegates thus most likely assumed that the resolution creating a national executive called for a single person to execute the laws by supervising a great many others. Supervision can work many ways, and whether delegates had any specific form of supervision in mind is doubtful. They were not working at that level of detail. Probably few of them were thinking about removal, for example. But they probably did think that they were putting one person in charge of law execution.[136]

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[134] U.S. CONST., Art VI.

[135] *See* E. JAMES FERGUSON, THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE, 1776-1790, 119 (1961) (describing Morris's authority to negotiate foreign loans on behalf of the United States).

[136] It is conceivable that the delegates expected the individual who constituted the national executive to be a figurehead, with real authority at lower levels, but that is highly unlikely. A corporate person like the United States itself must make decisions through natural people, but a natural person can make decisions personally, as a figurehead does not, so a system that place power in an individual does not need a figurehead. Nor is there any reason to think that the Convention planned that the national executive would be like some constitutional monarchs, a national symbol performing purely ceremonial functions. Many constitutional monarchies today retain an hereditary monarch as a national symbol because they descend from systems in which the hereditary monarch exercised real power. The American framers had recently thrown off such a system. They contemplated a national executive who would make

Developments later in the Convention confirm that the delegates had that understanding of their provisions about carrying out the laws. Working from the resolution that gave the "national executive" the "power to carry into execution the national laws," the Committee of Detail produced a draft text that is very close to the final Vesting Clause of Article II. The section of the committee's draft concerning the executive begins, "The Executive Power of the United States shall be vested in a single person."[137] It then assigns the name President of the United States of America.[138] The document on which the committee's printed report was based is in the handwriting of committee member James Wilson, and the change in phrasing is likely his handiwork.[139] Wilson had said that "executing the laws" was one of the few "powers" that were "strictly Executive."[140] For the delegate who held the pencil, giving the executive power and giving the power to carry the laws into execution were equivalent.

The records strongly indicate that the rest of the Convention shared Wilson's assumption that the executive power, which would be vested in one person, included domestic administration. Wilson had asserted that it did, in a debate about whether it also included foreign-affairs authority.[141] Confirmation that the Committee of Detail and ultimately the Convention agreed comes from the take-care provision of the committee's draft and the Take Care Clause of Article II. The committee's draft provided "he shall take care that the laws of the United States be duly and faithfully executed."[142] A take-care provision along those lines matches Wilson's understanding of the grant of executive power. It confirms that the President has not only a power but a duty to carry out the law. "Duly and faithfully" are terms of obligation, not just empowerment. Inclusion of a take-care provision also confirms the assumption that the President will act through subordinates. One

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important decisions personally. For example, the Virginia Resolutions gave the executive appointment power, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* --, at 67, which is not held by mere figureheads. The Convention contemplated that the individual who was the national executive would make choices in fact, and not only in name through another, real powerholder.

[137] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* --, at 185.

[138] *Id*.

[139] *Id*. at 163 (reproducing the Committee of Detail draft in Wilson's handwriting with emendations by John Rutledge).

[140] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* --, at 66.

[141] *Supra* --.

[142] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* --, at 185.

way for an individual to take care that something is done is make sure that the agents through whom that individual acts are doing what is required.[143]

Debate in the convention rarely touched on the bureaucratic structure of the new government. Gouverneur Morris, who had substantial experience with the Confederation government's operations, did address the topic.[144] On August 20, he submitted a resolution fleshing out the government's operational structure.[145] Morris proposed an executive branch with the President in control. Its departments were to be headed by Secretaries of Domestic Affairs, Commerce and Finance, Foreign Affairs, War, and Marine (the Navy), all to serve at the President's pleasure.[146] Very likely Morris saw service at pleasure as implementing a principle of presidential executive leadership that the convention had been assuming all along. A month earlier, on July 19, Morris mentioned the great officers of state – ministers of finance, war, foreign affairs, and others: "These, he presumes, will exercise their

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[143] The drafting records confirm that the draft take-care provisions, and ultimately the Take Care Clause, were understood to impose a duty. The marked-up Committee of Detail working draft, in Wilson's handwriting with emendations by Rutledge, contemplated a duty. Wilson's initial version, which is crossed out in the document Farrand printed, modified "He shall take care" with "to the best of his ability." *Id*. at 171. That modifier is appropriate for a duty, not a power: people cannot exercise powers other than to the best of their ability, but they can completely fail to perform duties that they are able to perform. Rutledge's emendation, which replaced Wilson's crossed-out text, is even clearer on the point, reading, "It shall be his duty to provide for the due and faithful exec—of the laws." *Id*. The Committee, with Wilson as their scribe, saw their take-care provision as imposing a duty on the power granted in the first sentence of their draft. Unless the Convention later undid the Committee's work when it adopted the final version of the Take Care Clause, they understood the final version, like its forerunners, to impose a duty.

[144] Gouverneur Morris served as Assistant Superintendent of Finance to Robert Morris (to whom he was not related). *See* FERGUSON, *supra* n. --, at 119 (describing Gouverneur Morris's appointment as Robert Morris's assistant).

[145] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* --, at 342-344. Morris asked that his proposal be referred to the Committee of Detail, which had already reported a draft constitution. His resolution was referred to the committee, and there is no indication that the Convention took any further action on it. *Id*. at 342 (recording that Morris's proposal was referred to the Committee of Detail).

[146] *Id* at 342-343.

function in subordination to the Executive," not yet called the President.[147]

Morris's assumptions about how the new government would work cannot be automatically attributed to other delegates. His assumption of presidential leadership is nevertheless significant. Morris probably had thought more about executive operations than many, because he had been a federal bureaucrat himself. He was a frequent participant in the debates, and often was influential.[148] Morris served on the Committee of Style, which produced the near-final draft of the Constitution, and was both an important contributor and the scribe.[149] While Morris's work on the Committee of Style may have been devious, he openly avowed the assumption that the President would command the executive.[150]

The Convention's decisions concerning the executive power and the presidency rested on the assumption that possession of the executive power would put the President in command of the administration of the government and the execution of the laws. Whether the delegates thought much about how that broad principle would work in detail is doubtful. The available records do not support any strong inference about any specific tool of control, for example giving binding orders or removing subordinates. But they do support the conclusion that the delegates believed the officer they eventually called the President would be in charge of administration.

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[147] *Id*. at 53-54.

[148] In an important recent work about Morris's influence on the Constitution's final text, Dean Treanor calls Morris "a dominant figure at the convention," and notes that Morris was a leading participant in the debates. William Michael Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 119 MICH. L. REV. 1 (2021).

[149] *Id*. at 4. Decades later, Madison recalled Morris's role in the final drafting. "The **finish** given to the style and arrangement of the Constitution fairly belongs to the pen of Mr. Morris; the task having probably been handed over to him by the Chair of the Committee, himself a highly respected member and with the ready concurrence of others." 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 499 (Max Farrand, ed., 1937) (letter of April 8, 1831, from Madison to Jared Sparks).

[150] Dean Treanor argues that in preparing the final draft, Morris sought to undo earlier losses that he had sustained in the Convention's votes, with subtle language that might not be fully understood. Treanor, *supra* --, at --. Whatever Morris may have hidden, he did not hide his unitary-executive assumption.

2. The President's Constitutional Functions

This section derives from the general principle that the President is in charge of the administration of the government a more specific description of the President's constitutional function in that respect. That function has two main components. First, the President is to supervise other officials' performance of their assigned roles to ensure that they comply with the law. Second, the President is in over-all command of policy choices entrusted to the executive by statute. Those presidential roles reflect basic functions of executive power itself. Executive officials carry out the law, in compliance with the law, and make policy choices when the law authorizes them to do so.

a. The President's Supervisory Role

Executive power is the authority to carry out the law, so with that power comes the responsibility to act according to the law. As the primary holder of executive power, the President has over-all responsibility to see that it is exercised lawfully.

That presidential role is widely accepted, including by many who do not fully endorse the unitary executive principle. A leading example is the Court's opinion in *Morrison*. Justice Scalia's dissent in *Morrison* is a classic exposition of the unitary-executive position.[151] The Court's opinion is correspondingly non-unitarian, but nevertheless accepts the President's role in keeping the executive within the law. *Morrison*, the Court explained, was "not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the 'faithful execution' of the laws."[152] With power to remove for cause, the President retained "ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act."[153] The Independent Counsel exercised

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[151] Justice Scalia's dissent has been influential in part because of his ability to turn a phrase. Threats to the constitutional equilibrium of power, he wrote, often come before the Court "clad, so to speak, in sheep's clothing. . . . But this wolf comes as a wolf." 487 U.S. at 699 (Scalia, J., dissenting).

[152] 487 U.S. at 692.

[153] *Id*. (footnote omitted).

discretion that the President could not control, but the President could act to keep that discretion within the law.[154]

As *Morrison*'s reference to the Take Care Clause shows, that provision reinforces the President's obligation to keep other executive officials within legal bounds. That clause connects the President to other law-executors in two ways. First, it imposes an obligation on the President concerning a function he often performs through others – carrying out the laws. The President is to do that faithfully, but he does it through others. To do something through others in a specified way requires ensuring that the others do it that way. Second, the clause refers to the execution of the laws, which is in large measure done by other officials, and instructs the President to see that that activity is faithful to the laws.[155]

The principle that the President supervises executive compliance with the law is widely accepted, but one important complexity must be addressed to describe the President's role accurately. The President is not alone in ensuring compliance with the law by lower-level officials. Courts perform that function too. Judicial review of administrative decisions is central to American public law.[156] The judicial role has priority over the President's in an important respect. In cases within their jurisdiction, the courts decide on the duties of federal officers, and are not bound by the President's views.[157] If an official violates private rights, a

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[154] *See id*. at 691 (explaining that the Independent Counsel exercises "no small amount of discretion and judgment" that the President does not control).

[155] Recent scholarship has addressed the question whether the Take Care Clause adds to the Vesting Clause by requiring that execution be faithful. *See* Andrew Kent, Ethan J. Leib & Jed Handelsman Shugarman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2019) (arguing that the Take Care Clause requires faithful execution). My view is that an obligation of faithful execution comes with the executive power, which is the authority to carry out the law. Carrying out the law faithlessly is not genuinely carrying it out. Whether the Take Care Clause imposes any obligation in addition to the obligation that comes with the executive power itself is not relevant to the clause's implications for the relationship between the President and other officials.

[156] *See, e.g.*, Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020) (resolving challenge to statutory authority of several federal agencies to issue regulations concerning employees' health benefits).

[157] *See* United States ex. re. Kendall v. Stokes, 37 U.S. 524, 612-13 (1838) (holding that the President has no power to relieve officials of their duties).

presidential order is no defense in a suit for damages against the official personally.[158]

Judicial involvement in ensuring executive compliance with the law is consistent with the President's status as chief of law execution, and with a major presidential role in ensuring compliance. First, when the courts enforce rights against the government, they are in a sense supervising the President, who is in charge of all the government's acts. In doing so, the courts do not supplant the President's role within the executive, but add another, external, check. Second, the President's supervisory power is the authority to ensure compliance with the law, so an attempt to produce non-compliance is not a proper exercise of that power.[159] The central role of the courts is conclusively to decide the legal issues in the cases before them. Judicial review provides the measure for the lawfulness of the President's supervisory steps. When a court concludes that the law requires some executive action or inaction, any presidential attempt to countermand that decision would not be a lawful exercise of presidential supervision.

Courts as well as the President thus play an important role in ensuring executive compliance with the law. The President's take-care obligation is part of a larger system that enforces the rule of law.

b. The President and Policy Authority Conferred by Statute

This section considers a question that is central to American government in this century and to the contemporary debate over agency independence and the unitary executive: presidential control over statutorily granted authority to make decisions on a policy basis. The section derives from Article II a conclusion common to most versions of the unitary executive thesis: The Constitution puts the President in charge of executive policy choices.

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[158] *See, e.g.*, Little v. Barreme, 6 U.S. 170, 179 (1804) (holding that a presidential order does not justify violation of private rights).

[159] As the Court stated in *Kendall*, "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." 37 U.S. at 613.

Statutes that confer policy-making authority on officials other than the President are common. *Morrison* involved an officer who exercised "discretion and judgment" in deciding whether to bring a criminal prosecution.[160] Major regulatory decisions reflect agencies' policy choices.[161] Perhaps because executive policy-making authority was not as common at the time of the framing as it is today, presidential control of policy choice was not the central issue then that it is now.[162] Presidential primacy within the executive nevertheless emerged at the very beginning.[163]

Exercising policy discretion involves weighing competing considerations and making the best choice as the decision-maker judges it. The Constitution reflects the importance of that function in government, and the importance of its allocation. The most fundamental and comprehensive policy choices are those made in creating the law. Those choices are made by the people's representatives.[164] The chief executive participates in the law-making process through the veto, making independent judgments about the weight of competing considerations.[165] The importance of that policy-making function is shown by its allocation to the elected President personally. The veto is not part of the general executive power, in which other officials participate, but is held by the President alone. Making treaties and appointments to superior offices also involve resolving the competition among important

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[160] *Morrison*, 487 U.S. at 691.

[161] In *Chevron, U.S.A. v. NRDC*, 487 U.S. 837 (1984), which involved the Clean Air Act, the Court recognized both that regulatory agencies act on the basis of their policy views and that those views reflect the priorities of the President. "In contrast [to the courts], an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments." *Id*. at 865. Agencies "are not directly accountable to the people," the Court explained, but "the Chief Executive is." *Id*.

[162] The 1789 debates on presidential removal power centered on the President's ability to ensure compliance with the law, and the possibility that he would use removal power to encourage violations of it. *Infra* --.

[163] In his classic study of administrative history, Leonard D. White summarized the dominant presidential role that emerged in the Federalist era: "The power to govern was quietly but certainly taken over by the President. The heads of departments became his assistants. In the executive branch, according to Federalist orthodoxy, the President was undisputed master." LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 37 (1959).

[164] *See* U.S. CONST., ART. I, § 1 (vesting legislative power in the Senate and House of Representatives).

[165] *See id*., ART. I., § 7 (giving the veto power to the President).

interests, and those functions were also assigned to the President personally.[166]

Once the importance of making discretionary policy choices is recognized, the President's unique role as direct recipient of the executive power indicates presidential control over those choices. Because of that role, other executive officials are acting for the President, helping the President carry out the law. When one person acts as another's helper, the person being helped is entitled to make the important decisions. That arrangement is familiar from the law of agency, under which the principal makes the most important decisions.[167] Although the President is an agent of the people and the law, the Vesting Clause shows that within the executive branch, the President is like a principal.[168] The grant to one actor of a power implies that the recipient of the power will make the decisions that matter.

B. Tools of Presidential Direction of Executive Officials

The Constitution puts the President in charge of executive operations. That function includes overseeing compliance with the law and directing exercises of policy-making authority granted by statute. Those constitutional principles are not a set of specific rules about how the President is to exercise his supervisory functions. This article argues that those rules are to be made by

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[166] *See id*., ART. II, § 2 (giving the President the power to make treaties, with the Senate's advice and consent), and the sole power to appoint superior officers).

[167] For example, the principal decides the fundamental question of the scope of the agent's authority. *See* JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY 156 (1839) (explaining that an agency's authority to execute documents for the principal operates within the scope of authority given by the principal).

[168] In discussing the practical necessities that give rise to the recognition of agency relationships, Story explained that "a large proportion of the business of human life must necessarily be carried on by persons, not acting in their own right, or from their own intrinsic authority, over the subject-matter, but acting under an authority derived from others" who have "dominion, authority, and right over such subject-matter." *Id*. at 2. The President does not have the dominion, authority, and right that a private person has as to that person's legal rights, but the vesting of the executive power in the President means that lower-level executive officials are not acting in their own right even as the people's agents, but acting pursuant to authority that is primarily granted to someone else – the President. Story's understanding of the practical considerations that justify the law of agency also exhibits parallels between private-law agency and government executive operations. As to private activities, the necessity sometimes to act through others reflects "the urgent pressure" of other pursuits by the person acted for, "the necessity of transacting business at the same time in various and remote places," and "the importance of securing accuracy, skill, ability, and speed in the great accomplishments of human life." *Id*.

Congress, subject to the constraint of the unitary executive principle.

This section takes the next step in that argument, which concerns the different legal tools that might be given to the President to do the job the Constitution prescribes. Several tools are available, including removal. All serve the goal of presidential command of the executive, but none can enable the President fully to control what goes on in the executive branch. All of them can be used for purposes that are illegal or that Congress may decide are improper and should be prevented. An especially prominent improper purpose is the use of government resources to further the President's electoral goals.

Those features of the tools of presidential supervision have important consequences. First, none of the tools is inherent in the Constitution. Removal power therefore is not inherent in the Constitution. Next, different systems of rules can be chosen to implement the Constitution's design of presidential primacy, none of which will do so perfectly. Designing a system of rules governing the President's relations with other officials therefore requires trade-offs among competing goals. As the section following this one explains, that last conclusion in turn has implications for Congress's role in structuring the executive branch, and in particular for Congress's role in deciding on the mode of presidential supervision, including removal power.

1. Appointment

A leading theme of this article is that the Constitution does not confer removal power on the President. It does confer appointment power.[169] All other means of presidential control must be understood in light of that authority. Appointment by itself is a powerful means by which to affect government outcomes. Judicial appointments are an important issue in presidential elections, even though the President cannot direct or remove judges after they have been appointed.[170] Removal power is important partly

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[169] U.S. CONST., Art. II, § 2, cl. 2 (providing that the President appoints to principal offices and to inferior offices when Congress so directs).

[170] The Jacksonians' opposition to the Bank of the United States provides an example of the systematic use of judicial appointments to implement a party's constitutional principles, just as it provides an example of the use of removal and appointment to control executive decisions. As Mark Graber explains, "Jacksonian politicians made self-conscious efforts to secure a federal judiciary

because it is connected to appointment: a common reason to remove one official is to appoint a replacement. The combination of removal and appointment may serve policy goals or reward the President's political supporters.[171] Either way, it is the combination that matters: removal is useful because it paves the way for a new appointment.

2. Other Tools of Presidential Control

This section discusses the three main means other than appointment by which the President can affect other executive officials: removing them, giving them binding directives, and directly exercising legal powers statutorily vested in the official who is not the President.

a. Removal

i. Removal as a Tool of Control

Removal has been the focus of debate on presidential control of the executive since 1789 because it is very effective, for good or ill. Despite its power, removal will not always achieve the goal of presidential command of the implementation of the laws.[172]

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committed to [their] narrow conception of federal power." Mark A. Graber, *Overruling McCulloch?* 72 ARK. L. REV. 79, 84 (2019). Graber examines in depth "the relevant political and constitutional commitments of the sixteen justices who sat on the Taney Court from 1837 until 1860," and concludes that the result of that systematic effort was a Supreme Court that was prepared to hold that Congress lacked power to create a national bank and overrule *M'Culloch v. Maryland*. *Id.*

[171] Perhaps the most famous example of removal for policy purposes was President Jackson's replacement of Secretary of the Treasury William Duane with Roger Taney. Duane would not remove the federal deposits from the Bank of the United States; Taney was chosen because he would. *See supra* --. When Jefferson took over the presidency in 1801, an important question was whether he would remove Federalists in order to provide jobs for loyal Republicans. *See* DUMAS MALONE, JEFFERSON THE PRESIDENT: FIRST TERM, 1801-1805 69-89 (1970) (discussing pressure by Republicans for Jefferson to create vacancies to which they could be appointed.

[172] Now-Judge Neomi Rao has argued the removal is necessary and sufficient to ensure presidential control that is adequate under the Constitution. Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205 (2014). I contend that at-will removal power satisfies the Constitution's requirement of presidential control, but that at-will removal is not necessary under the Constitution. Even at-will removal power is not sufficient for the

As a tool of control, removal works through two mechanisms: selection and incentives. Selecting an official who shares the President's priorities and can implement them is a very good way to bring the government's decisions into line with those priorities. For example, one of President Reagan's main goals was to expand the United States' military capacity.[173] Reagan could not and did not manage all the details of that policy. He appointed a Secretary of Defense, Caspar Weinberger, who shared his goals and had experience in operating a large bureaucracy.[174] Change in personnel at the highest levels when Administrations change, like Reagan's appointment of Weinberger, is of course familiar. One reason it is familiar is that if necessary, the President can remove high-ranking officials to replace them with his appointees.[175]

Appointment is a powerful but limited tool, and so removal's contribution to appointment is also powerful but limited. Every individual is a package of policy views, abilities, and political and personal affiliations. Presidents select individuals on the basis of all those characteristics, weighing each characteristic's importance as seems best. All those characteristics together can lead the President to decide that on balance a subordinate should

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President to have complete control of subordinates. Substantial control is enough for constitutional purposes. The fact that even at-will removal power produces presidential authority that is not complete for practical purposes is part of the broader argument that no tool will give the President complete control of executive decisions.

[173] *See* EDWIN MEESE III, WITH REAGAN: THE INSIDE STORY 174 66 (1992) (describing Reagan's policy of increasing defense spending).

[174] *Id*. at 66 (describing selection of Weinberger based on Weinberger's fiscal expertise and extensive federal government experience); *id*. at 178 (describing Weinberger's support for increased defense spending in debates within Reagan administration).

[175] In light of *Collins* and *Seila Law*, the Justice Department's Office of Legal Counsel in 2021 advised President Biden that he could remove the Director of the Social Security Administration, even though by statute the Director serves for six years and may be removed only for cause. Constitutionality of the Commissioner of Social Security's Tenure Protection, United States Department of Justice, Office of Legal Counsel (July 8, 2021). President Biden then removed Social Security Commissioner Andrew Saul, who had been appointed to a six-year term by President Trump. Lisa Rein, *Fired and Defiant, Former Social Security Chief Is Cut Off From Agency Computers*, THE WASHINGTON POST (July 9, 2021), https://www.washingtonpost.com/politics/biden-social-security-fired/2021/07/12/b1837ec0-e324-11eb-b722-89ea0dde7771_story.html.

stay in office, despite serious deficiencies from the standpoint of the President's policy.

For example, James Madison, advocate of presidential removal power that he was, labored for two years with a Secretary of State in whose performance he had no confidence. When Madison took office in 1809, he appointed Secretary of the Navy Robert Smith as Secretary of State.[176] Madison did not expect Smith to be competent, and became increasingly exasperated with the Secretary of State's performance.[177] Eventually, Madison in effect forced Smith to resign.[178] Smith was appointed and kept in office for a reason unrelated to his ability or willingness to carry out the President's foreign policy. His brother, Senator Samuel Smith of Maryland, was a member of a pivotal bloc of Senators that Madison had strong reason to satisfy.[179] Madison well knew that the powers of appointment and removal, useful though they are, go only so far in enabling the President to direct the executive.

Later in his term, during the War of 1812, Madison encountered another limitation of removal as means of selection through replacement: it often operates after the fact. Madison eventually pressed Secretary of War John Armstrong into resigning.[180] Armstrong's resignation came only after his decisions had contributed to the successful British attack on Washington, in which the Capitol and White House were burned.[181] Armstrong's resignation came not only after the burning of Washington, but also after Madison had delivered a written rebuke to the

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[176] *See* IRVING BRANT, JAMES MADISON: THE PRESIDENT, 1809-1812, at 25 (1956) (describing the appointment of Robert Smith as Secretary of State and the reasons for it).

[177] *See id*. (describing Smith's inadequacy as Secretary of the Navy and expected incompetence as Secretary of State); *id*. at 275-76 (explaining that later in his administration Madison's desire to remove Smith from the Cabinet was thwarted by political considerations).

[178] *See id.* at 283 (describing Madison's request for Smith's resignation as Secretary of State, accompanied by an offer to name him Minister to Russia to soften the blow)

[179] *See id*. at 25 (describing role of Smith-Giles-Leib bloc in the Senate and its importance in Robert Smith's appointment as Secretary of State) *id*. at 267-68 (describing influence of Senators Smith, Giles, and Leib).

[180] *See* IRVING BRANT, JAMES MADISON: COMMANDER IN CHIEF, 1812-1836 314 (1961) (describing Madison's criticism directed to Armstrong that led to Armstrong's resignation).

[181] *Id*. (describing Madison's belief that Armstrong's inaction had contributed to the defeat).

Secretary.[182] Metaphorically speaking, the President removed Armstrong after the horse had left the barn. Literally speaking, he acted after his home had been set on fire by the enemy.[183]

In addition to functioning as a tool of selection, removal can further presidential control by affecting incentives. Many officials wish to retain their position enough that they are influenced by the threat of removal. Indeed, the incentive effects of removal power are almost axiomatic in the Supreme Court's cases in recent decades. The Court in *Seila Law* tied presidential control to removal power over executive officials, reasoning that "it is 'only the authority that can remove ' such officials that they 'must fear and, in the performance of their functions, obey.'"[184] Justice Kagan in dissent agreed that the point of the removal restriction was to "create zones of administrative independence by limiting the President's power to remove agency heads," but found that goal to be permissible.[185]

Removal power's incentive effects are substantial but still limited. Madison's Secretary of State knew that his political connections gave him substantial room in which to disappoint the President while retaining his position.[186] Some officials are prepared to leave office over a matter of principle. As to decisions affecting that principle, they are immune to the threat of removal.

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[182] *See id*. at 282-93 (1961) (describing Madison's August 13, 1814 message to Armstrong). That rebuke laid down a series of instructions that substantially increased the level of detail at which the President supervised him, and thereby increased the amount of the President's scarce time devoted to overseeing Armstrong's Department. *Id*.

[183] *See id*. at 304 (describing burning of the Capitol and White House by the British).

[184] *Seila Law*, 140 U.S. at 2197 (quoting Bowsher v. Synar, 478 U.S. 714, 726 (1986)). *Seila Law* involved a problem of too little removal power, while *Bowsher* involved a problem of too much. In *Bowsher*, parties subject to an exercise of statutory power by the Comptroller General challenged the constitutionality of the statute conferring that power. *See Bowsher*, 478 U.S. at 718-19 (describing Comptroller's power to sequester appropriated funds). The Court concluded that reducing spending was an executive power, which could not be exercised by a congressional officer such as it found the Comptroller to be. *Id*. at 726. A main reason the Comptroller was found to be an officer of Congress was Congress's power to remove the Comptroller by joint resolution (a statute). *Id*. at 727-29.

[185] *See Seila Law*, 140 S. Ct. at 2224 (Kagan, J., dissenting).

[186] *See supra* --.

Secretary Duane was unmoved by that possibility and refused to remove the federal deposits.[187]

A more recent story involving the Watergate investigation also illustrates that some officials are unaffected by the possibility of removal. Attorney General Elliot Richardson had appointed former Solicitor General Archibald Cox as Special Prosecutor for the investigation.[188] During his confirmation, Richardson had made a commitment to the Senate that he would remove Cox only for extraordinary improprieties.[189] Deputy Attorney General William Ruckelshaus had made a similar commitment.[190] When President Nixon directed that Cox be fired, neither would do so. Richardson resigned.[191] The President refused Ruckelshaus's proffered resignation and instead fired Ruckelshaus.[192] Richardson and Ruckelshaus chose to keep their commitments at the price of leaving office.[193]

Removal power goes a long way toward enabling the President to direct other officials, both to ensure that they perform their tasks lawfully and that they follow the President's policies. Removal nevertheless has limitations as a means to both those ends.

ii. Misuses of Removal Power

Removal power can be misused. Misuse comes in two main forms. First, removal or the threat thereof can lead to unlawful official conduct. Second, removal can create a vacancy to be filled

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[187] *See supra* --. Secretary Duane no doubt knew that Andrew Jackson had participated in more than one duel, and that Jackson was unlikely to hesitate at removing a Cabinet officer.

[188] *See* ROBERT H. BORK, SAVING JUSTICE: WATERGATE, THE SATURDAY NIGHT MASSACRE, AND OTHER ADVENTURES OF A SOLICITOR GENERAL 31-32 (2014) (describing Richardson's appointment of Cox as demanded by the Senate in connection with Richardson's confirmation as Attorney General).

[189] *Id*. at 80 (describing Richardson's commitment).

[190] *Id*. (describing Ruckelshaus's commitment).

[191] *Id*. at 83 (describing Richardson's resignation).

[192] Nixon accepted Richardson's resignation while firing Ruckelshaus because the President believed that Ruckelshaus did not have the obligation not to fire Cox that Richardson did. *Id*.

[193] Solicitor General Bork, as Acting Attorney General, removed Cox. *Id*. at 84. Unlike Richardson and Ruckelshaus, Bork had not made any undertaking concerning Cox's tenure, and Richardson urged Bork to remove Cox. *Id*. at 80.

for purposes that can reasonably be seen as improper, notably to support a political patronage machine.[194]

Jackson's conflict with the Bank provides an example of the first possibility.[195] If Secretary Duane was right that removing the federal deposits was unlawful, replacing him with a Secretary who believed the opposite led to an unlawful act. An official's interest in retaining office can also lead to unlawful conduct, especially when the decision at issue is in a gray zone.

When the President uses removal to produce an illegal act, both the President and the officer who takes the act share responsibility. When removal is used for patronage purposes, the improper conduct may be wholly that of the President. In the days when postmasterships were distributed as patronage, a Whig postmaster might have been competent and honest like the Democrat he replaced.[196] The replacement also might have been venal and incompetent, or more venal and more incompetent.[197] To

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[194] Whether appointment and removal for patronage reasons is undesirable is a long-debated issue in American politics. After the first change in partisan control of the presidency in the 1800 election, a major and difficult question for President Jefferson was whether to replace Federalist officeholders with Jeffersonian Republicans. *See* DUMAS MALONE, JEFFERSON THE PRESIDENT: FIRST TERM, 1801-1805, 69-89 (1970) (chapter titled "The Dreadful Burden of Appointments"). Under strong pressure from his supporters who wanted Federalists replaced with Republicans, *id*. at 72 (reporting James Monroe urging replacement of Federalists), Jefferson sought a middle course, limiting removals, *id*. at 72-74 (describing Jefferson's policy of limited removals), while making sure that new appointments would mainly go to his supporters (describing Jefferson's appointment of a loyal supporter as Postmaster General). In assessing removal as a tool of control, the important point is that the debate over patronage-based removal has two sides, one of which reasonably holds that public resources should not be used to support political activity.

[195] *See supra* – (describing the removal of Secretary Duane).

[196] The Post Office was a leading source of federal employment, and so of patronage, in the Nineteenth Century. When Andrew Jackson dramatically increased the role of politics in appointments, he removed 423 postmasters in his first year in office. DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848, 333 (2007). The example of a Whig replacing a Democrat underlines the centrality of patronage to antebellum politics. In principle, the Whigs opposed party, maintaining "that partisanship had been forced on them by the other side." *Id*. at 584. But when the Whigs took the presidency in the 1840 election, "the postmaster general soon busied himself replacing Democrats with Whigs throughout the country." *Id*.

[197] Howe concludes that "Over the long term, the spoils system diminished both the competence and prestige of public service. *Id*. at 334 (footnote omitted).

the victor belong the spoils, the saying went, with an allusion to the sack of cities.[198] Critics of patronage often see little more than vandalism in the use of public office to pursue electoral advantage.

b. Orders Backed by Threats

i. Obligations to Follow Presidential Directives and Sanctions for Failing to Do So as a Tool of Control

Removal is sometimes effective because it operates as a sanction. A straightforward and familiar way to ensure that subordinates' conduct accords with superiors' views is to give the subordinate an obligation to follow directives and to attach a sanction to failing to do so.

The armed forces work that way. As Commander in Chief, the President is at the top of a command hierarchy.[199] His lawful directives are binding, and are backed by sanctions stronger than removal from the service. Failure to obey a lawful order is a serious offense in military law, subject to serious punishment.[200] Civilian employees are also subject to sanctions for failure to carry out their tasks, although the sanctions may be less severe.[201]

Command hierarchies are often quite effective. The President's ability to command the armed forces is so much taken for granted that a standard topic in constitutional law concerns the

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[198] That phrase comes from William Marcy of New York, a close political ally of Martin van Buren. Van Buren developed many of the techniques of mass party mobilization, including extensive patronage. *Id*. at 485.

[199] *See* 10 U.S.C. § 747 (providing for a command hierarchy determined by officers' rank unless President specifies otherwise).

[200] Willful failure to obey a lawful order is an offense punishable by court martial, and in wartime is capital. 10 U.S.C. 890. Mutiny, which consists of failure to obey lawful orders in concert with others, is another capital offense. 10 U.S.C. 894.

[201] Civilian employees are subject to removal and reduction in grade for unacceptable performance. 5 U.S.C. § 4303. Agency heads have authority to make regulations governing the conduct of agency employees, 5 U.S.C. § 301, and so to decide what performance is acceptable. Discussing the President's ability to remove the Director of the FHFA for cause in *Collins*, the Court recognized that "it is certainly true that disobeying an order is generally regarded as 'cause' for removal." Collins. v. Yellen, 141 S. Ct. 1761, 1787 (2021).

extent of the *President's* war powers.[202] The President rarely fires a shot. Presidents have war powers only because the armed forces follow their orders, and the forces do that so reliably that the issue is described as if only the President's decision matters. That civil servants will in general implement their superiors' directives is also a presupposition of the debate over independent agencies. If CFPB employees were not expected to follow the policy directives of the agency's Director, the Director's freedom from presidential control would matter much less.

Command hierarchies nevertheless have limitations as tools of control, sometimes quite serious limitations. The Union's gravest crisis provides a leading example. Early in the Civil War, President Lincoln was severely disappointed in General George McClellan, commander of the Army of the Potomac. Lincoln was Commander in Chief, and could give McClellan orders and remove him from command, as he ultimately did. Lincoln relieved McClellan of command in November1862.[203] That decision was the culmination of a long struggle, throughout which Lincoln was seriously dissatisfied with McClellan's performance. That struggle illustrates the limitations of command authority.

In early January 1862, Lincoln was deeply disappointed in McClellan's failure to move against the Confederate forces, despite months of assurances from McClellan that he would do so.[204] Lincoln hesitated in giving McClellan any specific orders, however, because he faced a problem Presidents often face: Lincoln lacked the expertise in military matters needed to decide what should be done, even though he did not like what was being done.[205] Lincoln's delay facilitated further delay by McClellan, until Lincoln encountered another limitation on his nominal power as Commander in Chief. On January 27, he issued an order naming February 22 as the day for a general movement against the

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[202] *See, e.g.*, ANN VAN WYNEN THOMAS & A.J. THOMAS, JR., THE WAR-MAKING POWERS OF THE PRESIDENT: CONSTITUTIONAL AND INTERNATIONAL LAW ASPECTS (1982).

[203] DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN 485 (2005).

[204] *Id*. at 425. McClellan had taken command of the Army of the Potomac in July 1861. *Id*. at 377.

[205] *Id*. at 425-26. Lincoln's concern about his own ignorance of military matters led him to check a book on strategy out of the Library of Congress. *Id*. at 426.

Confederacy.[206] General McClellan did not move on that day.[207] Despite the President's power to give orders, a high official with strong political support would not automatically follow them.[208] Eventually, Lincoln's patience was exhausted and he removed McClellan from command, but not before McClellan had once again delayed despite orders to move forward.[209]

The kinds of actions the armed forces take illustrate one of the costs of failure to comply with commands, which in turn shows the limits of the power to give binding orders. Many military actions and inactions have effects that are irreversible. Those effects cannot be undone, even if the subordinate is disciplined for failing to follow orders. An important case concerning judicial review of commanders' decisions provides an excellent illustration of irreversibility (although not of failure to follow orders). *Durand v. Hollins*[210] was a suit for damages by a U.S. citizen whose property had been destroyed when the U.S. Navy vessel *Cyane* bombarded the city of Greytown, Nicaragua.[211] The court found in favor of Commander Hollins, whose actions had been authorized by the Secretary of the Navy. Had Hollins been ordered not to bombard Greytown, and had done so contrary to his orders, the city would have been levelled despite those orders.

The President may not know what specific orders to give, orders are not always obeyed, and when orders are not obeyed the consequences can be severe. Even the power of command has significant limits.

ii. Misuse of Authority to Give Binding Orders

At first glance, this kind of supervisory power may seem impossible to misuse. An obligation to comply with lawful orders,

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[206] *Id*. at 426.
[207] *Id*. at 427.
[208] *See id*. (describing McClellan's support (and opposition) in Lincoln's Cabinet).
[209] On October 6, Lincoln had General Henry Halleck, whom Lincoln had placed in over-all command (much to McClellan's displeasure), *id*. at 452-53, direct McClellan to cross the Potomac and give battle or force the enemy south, *id*. at 845. McClellan did not move. *Id*.
[210] 8 F. Cas. 111 (C.C.S.D.N.Y. 1860) (No. 4168).
[211] *Id*.

backed by a sanction, is an obligation to comply with lawful orders only.[212]

The power to give lawful orders nevertheless may induce unlawful official conduct in close cases. An official may comply with a presidential order, erroneously believing it to be lawful. If Secretary Duane was correct about his obligations concerning the federal deposits, Secretary Taney mistakenly complied with a directive to do an unlawful act. During the Quasi-War with France in 1799, Navy Captain George Little implemented a presidential directive that the Court found to have been unlawful, leading to an award of damages against Little personally.[213] The President's order, which Little may have believed to have been lawful, caused illegal conduct.

Instances in which a court finds a presidential order to the armed forces to have been unlawful are not common. Instances in which the forces carry out a presidential order of doubtful legality occur often enough to be important landmarks in the law regarding the use of force. One order that involved the preservation of the Union was found lawful by the narrowest of margins. In early 1861, President Lincoln proclaimed a blockade and directed U.S. Navy vessels to enforce it by taking prizes.[214] As to some of the captures, the Supreme Court sustained Lincoln's order by a 5-4 vote.[215] The Navy had carried out an order that was quite possibly unlawful.

A much more recent use of force was also subject to serious doubt. In 2011, President Obama ordered U.S. troops to Libya without explicit congressional authorization.[216] The War Powers Resolution, a statute, addresses the situation in which the

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[212] *See, e.g.*, 10 U.S.C. § 890 (providing for criminal punishment of members of the armed forces for willful failure to comply with lawful order).

[213] *See* Little v. Barreme, 6 U.S. 170, 179 (1804) (awarding damages against Little for unlawful seizure on presidential orders).

[214] *See* Prize Cases, 67 U.S. 635, 637 (1862) (describing President's order of blockade and taking of vessels as prize).

[215] *Id*. at 674- 82 (holding in favor of prize claimants). The Court divided 5-4 as to the legality of seizures made before Congress ratified Lincoln's acts in July 1861. All the Justices agreed that once Congress had given authorization, the blockade and the prizes taken were lawful. *See id*. at 698-99 (Nelson J., joined by Taney, C.J. and Catron and Clifford, J.J., dissenting) (seizures prior to congressional authorization were unlawful).

[216] *See* MARIAH ZEISBERG, WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY 1-5 (2013) (describing use of force in Libya).

President introduces U.S. forces into hostilities without such authorization. It provides that the President must withdraw those forces within 60 days, unless Congress has authorized the use of force or is physically unable to meet because of an armed attack.[217] U.S. operations in Libya continued after 60 days. The administration took the position that those operations were not hostilities, in part because U.S. forces used stand-off weapons and were not themselves exposed to much combat risk.[218] The argument that shooting without being shot at does not constitute hostilities provoked some derision.[219]

The power to give lawful orders can amount to the ability to give unlawful orders that will be carried out despite their illegality, especially in borderline situations. The power to give lawful orders can be misused.

c. Direct Exercise of Subordinates' Jural Powers

Officials who implement the law perform physical acts, like delivering mail, and jural acts, like issuing regulations. Statutes often vest jural power in officials other than the President,

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[217] *See* 50 U.S.C. § 1543 (requiring the President to notify Congress when forces are introduced into hostilities), § 1544 (b) (requiring the President to terminate the use of force within 60 days of notification, or date on which notification was required, unless Congress authorizes force or cannot meet). The statute's 60-day limit is mandatory. The statute also includes a congressional construction of the Constitution concerning the President's authority to use force. 50 U.S.C. § 1541(c) (listing circumstances in which President may use force under the Constitution).

[218] *See Recent Administrative Interpretation – Separation of Powers*, 125 HARV. L. REV. 1546, 1548-50 (2012) (describing Administration position as presented in congressional testimony).

[219] *See id*. at 1550 (arguing that the Administration's claim about hostilities "strains the term's everyday meaning" and has been subject to vehement criticism). Contemporaneous press accounts indicated that the President decided that the continuing operations in Libya were consistent with the War Powers Resolution despite advice to the contrary from the Department of Justice. *See* Trevor W. Morrison, *Libya, "Hostilities," the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62, 65-66 (2011) (describing reports of administration deliberations). If those accounts were correct, they reinforce the point that the Administration's reading of "hostilities" was quite questionable.

like the Administrator of EPA.[220] Jural powers can be subjected to presidential control by enabling the President to exercise them directly, or by enabling the President to negate subordinates' acts.[221] Some proponents of the unitary executive principle maintain that the Constitution itself gives the President the power directly to exercise powers vested by statute in others.[222] Now-Justice Elena Kagan, who does not believe that the Constitution contains a strong unitary-executive principle, has argued that statutes giving power to other officials should be read as giving that power to the President.[223] Whether its source is the Constitution or not, the ability to exercise power directly is a way to control that power. Like other means of presidential control, it has strengths and weaknesses in performing that function, and is subject to misuse.

i. Authority Vested Directly in the President as a Means of Presidential Control

Vesting of statutory power directly in the President is a useful means of presidential control. Direct vesting puts statutory power in the President's hands just as Article II puts the veto power in the President's hands.[224] Presidential vetoes can be major public acts that are very much the result of the President's personal choice.[225] To be sure, any such authority involves only jural acts.

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[220] *See, e.g.*, 42 U.S.C. § 7409 (giving Administrator of EPA authority to issue national ambient air quality standards).

[221] *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1243 (1994) (describing those tools as possible consequences of the unitary executive principle).

[222] *See, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541, 596 (1994) (arguing that the Constitution requires that President be able to exercise directly powers vested in other officials).

[223] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001). Professor Kevin Stack rejects Justice Kagan's proposed principle of statutory construction, arguing that statutes should be read as vesting power in the President directly only when they do so explicitly. Kevin M. Stack, *The President's Statutory Powers to Execute the Laws*, 106 COLUM. L. REV. 263, 267 (2006).

[224] *See* U.S. CONST., Art. I, § 7 (giving the President a qualified veto over legislation).

[225] As President Jackson's veto of legislation to extend the charter of the Second Bank shows, vetoes can reflect the President's own policy and be inseparably associated with him as a political matter. *See* HOWE, *supra* --, at 386 (describing

Being able to issue a Clean Air Act regulation is not the same as being able to fire on Greytown, which is a physical and not a jural act. Within that limited but important sphere, though, direct exercise of power is a good way for the President to direct that power.

Good it is, but not perfect. An important weakness emerges when that ability is examined in isolation from other tools of control, like selection of personnel and the ability to give binding orders. Assume that some jural power is vested in an official who was appointed by an earlier President with different policy views, and cannot be removed or directed by the current President. The current President's only way to influence the decision is to exercise the power directly. Presidents have a great deal to do, and personal expertise only in limited areas. Direct presidential action in the face of agency inaction takes time, because of the President's many responsibilities. Time can be vital. Delay in the decision to approve a vaccine can cost lives.

Presidents also cannot master the policy details of every major regulatory decision their administrations will make. For that reason, Presidents cannot make those decisions personally as a practical matter, even if they can do so in contemplation of law. A leading administrative law case illustrates the point. Deregulation was a signature policy of the Reagan administration, but President Reagan could not have been expected to know the details of the "bubble" policy regulations at issue in *Chevron*.[226] Presidents may rely on the White House staff more than on non-removable appointees, but the President's personal staff may include no one

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the principles underlying Jackson's Bank veto – "the defense of the people against the unfairly privileged and the strict construction of the Constitution" – as "the message of the Democratic party for a long time to come").

[226] Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984). As the Court explained, the regulation in that case was adopted when "a new administration took office and initiated a 'Government-wide reexamination of regulatory burdens and complexity.'" *Id*. at 857. The regulation thus reflected a leading commitment of the President. As the Court also explained, "[t]he Clean Air Act Amendments of 1977 [which the regulation implemented] are a lengthy, detailed, technical, complex, and comprehensive response to a major social issue." *Id*. at 848. In promulgating the regulation at issue in *Chevron*, the EPA issued a statement of basis and purpose that dealt in depth with both policy and legal issues, and responded to detailed comments that had been submitted to the agency during the notice and comment process. *See* Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans, 46 FED. REG. 50766 (Oct. 14, 1981).

with the relevant expertise.[227] Presidents act through experts they trust for a reason.

Presidential authority to rescind jural acts of subordinates can be useful, just as the power to act directly can be, but is also imperfect. Jural acts can lead to physical acts that in turn have irreversible effects. Release of information provides an example. Government employees with access to classified information generally agree that they will submit for review any material they plan to publish after leaving public service, like a memoir. That way the government can ensure that no classified information will be divulged.[228] Publication of information that should be withheld can have substantial negative consequences.[229] Giving the government's permission to publish is a jural act, one usually taken by officials other than the President.[230] The lower-level officials charged with review and giving permission may make a serious error as judged by the President, and allow release of information that in the President's view damages national security. A

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[227] Frustrated with McClellan's inactivity and his own lack of military expertise, Lincoln contemplated assembling his own staff to advise him on strategy. *See* GOODWIN *supra* --, at 425-26. The President finally acquired a national security staff of his own in 1947. *See* National Security Act of 1947, Pub. L. 80-253, § 101(c), 61 Stat. 495, 497 (providing for National Security Council staff).

[228] *See*, *e.g.*, 28 C.F.R. § 17.18(h) (2021) (requiring that Department of Justice employees with access to classified information enter into agreements providing for pre-publication review to prevent unauthorized disclosure);

[229] In *Snepp v. United States*, 444 U.S. 507 (1980), the Court approved imposition of a constructive trust on the proceeds of a book by a former CIA official that should have been submitted for pre-publication review but was not. The district court had found that publication of Snepp's book caused the government irreparable harm. *Id*. at 508-09 (describing district court findings).

[230] Direct presidential involvement in the decision whether to give pre-publication approval is sufficiently unusual as to be news itself. Former National Security Adviser John Bolton recently published a book about experiences in that office. JOHN R. BOLTON, THE ROOM WHERE IT HAPPENED: A WHITE HOUSE MEMOIR (2020). The pre-publication review process became highly contentious, Bolton and his publisher decided to release the book without approval, and the government sought an injunction against publication. *See* United States v. Bolton, 468 F. 3d 1, 2-4 (2020) (describing events leading up to publication in which officials other than the President conducted the review). As of this writing, the district court in *Bolton* has denied preliminary relief to the government, *id*., while granting Bolton's motion for discovery. United States v. Bolton, 514 F. Supp. 3d 158 (D.D.C. 2021). Bolton sought discovery concerning President Trump's personal role in the review process and the possibility that the President and other White House officials acted in bad faith. *Id*. at 165.

presidential power to rescind the permission would be useless in that situation: information cannot be unreleased.[231]

ii. Misuse of Authority Vested Directly in the President

Conscientious Presidents realize that sometimes they do best by appointing someone who can implement their policies better than they can. They understand that exercising a regulatory power directly is an imperfect way to translate their own policy views into law. A less than conscientious President might disregard his own limitations and use the power to displace lower-level decisions when it should not be used. A President with an inflated view of his own expertise, or inadequate patience with important policy details, might adopt a regulation that is seriously flawed when objectively evaluated by that President's own policy commitments.

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[231] In *Bolton*, the district court denied the government's request for preliminary relief. By the time the court ruled on the motion, thousands of copies had been distributed in the United States and elsewhere, leading the court to conclude "the horse is not just out of the barn – it is out of the country." United States v. Bolton, 468 F. 3d 1, 6 (D.D.C., 2020). In response to the government's argument that an injunction at least would prevent further spread of the book, the court explained that the effects of the book's release were irreversible, for good or ill. "In taking it upon himself to publish his book without securing final approval from national intelligence authorities, Bolton may indeed have caused the country irreparable harm." *Id*. Nevertheless, "even a handful of copies in circulation could irrevocably destroy confidentiality. A single dedicated individual with a book in hand could publish its contents far and wide from his local coffee shop. With hundreds of thousands of copies around the globe—many in newsrooms—the damage is done. There is no restoring the status quo." *Id*.

Just as the release of information can be irreversible, so can its destruction. Possible destruction of evidence is a classic reason to give an ex parte temporary restraining order – an order that is deliberately issued before the defendant has had an opportunity to contest it. Ex parte preliminary relief addresses the possibility that the defendant, upon learning of the litigation, will destroy evidence that will be unrecoverable. *See*, *e.g.*, Sealed Temporary Restraining Order, FTC v. Centro Natural Corp., No. 14-23879-CIV-ALTONAGA/O'Sullivan, at 3, 7-9 (S.D. Fla., Oct. 20, 2014) (finding that if defendants receive notice of the application for preliminary relief, they may transfer or conceal assets or destroy or conceal documents, and giving preliminary ex parte relief to prevent those acts).

Standard features of administrative law can mitigate but only mitigate this problem. Congress can impose the same requirement of rational decision-making on the President that it imposes on any executive rule-maker.[232] An inadequately-reasoned regulation issued by the President could be made just as unlawful under the Administrative Procedure Act as is an inadequately reasoned regulation issued by the Secretary of Transportation.[233] The kind of President who would unwisely decide to make a decision personally, however, might arrange for competent staff members to prepare a reasonable explanation for the President's predetermined result.

Presidents can misuse any power that they exercise personally.

3. The Constitution as a Source of Tools of Presidential Control

This section argues that the Constitution does not itself give the President any specific means by which to perform his constitutional function of directing executive activities, including his function of deciding on policy. The Constitution does not confer removal power, either as a means to the end of presidential control or as a separate component of the executive power.

a. The Constitution's Principle of Presidential Command of the Executive Does Not Imply any Specific Means to That End

The Constitution does not explicitly give the President removal power, or the ability to give orders, violations of which will be sanctioned. If the Constitution itself provides for any means of control, it does so implicitly. One argument that the Constitution does so is that it adopts the end of presidential

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[232] The Administrative Procedure Act calls for reasoned decision making in the issuance of regulations, 5 U.S.C. § 553 (prescribing notice and comment process to ensure rationality in regulation), and in adjudication, 5 U.S.C. § § 554, 556 (prescribing trial-type process to ensure rationality in adjudication on the record). The APA applies to federal agencies, 5 U.S.C. § 551(1), and the President is not treated as an agency, Franklin v. Massachusetts, 505 U.S. 788 (1992) (holding that the APA's definition of agency excludes the President).

[233] *See, e.g.*, Eagle Foundation v. Dole, 812 F. 2d 798 (7th Cir. 1987) (reviewing the reasoning underlying the Secretary of Transportation's decision to authorize a highway construction project).

direction of the executive and therefore implicitly conveys some means by which that end is to be achieved. That argument is inconsistent with one of the Constitution's most important provisions: the Necessary and Proper Clause.[234]

By vesting the executive power in the President, the Constitution entrusts that officer with a function. Rules that enable the President to perform that function, like grants of removal power, are a means to the end of accomplishing the President's functions. [235] Rules that implement the principle of presidential primacy thus carry into execution the executive power as vested in the President. The Constitution explicitly provides a source of rules that implement presidential power. Under the Necessary and Proper Clause, Congress may make laws that carry into execution the powers vested elsewhere, including the executive power vested in the President. Devising rules that will enable the President to do his constitutional job of directing executive activities is Congress's task.[236]

The Necessary and Proper Clause is general. A more specific provision reinforces the inference that Congress is tasked with implementing the principle of presidential control. Article I authorizes the legislature to make rules for the government of the land and naval forces.[237] The central component of those rules is the system of military discipline, which defines and enforces the

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[234] *See* U.S. CONST., Art. I, § 8, cl. 18 (giving Congress power to make laws that carry into execution its own powers and those of other departments and officers of the United States).

[235] The fundamental work on this topic is William W. van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of "The Sweeping Clause"*, 36 OHIO ST. L. J. 778 (1975). Professor van Alstyne argued that the Constitution is not the source of "incidental executive power." *Id*. at 793. He drew attention to the "relatively unexamined second half" of the Necessary and Proper Clause, which is the part that enables Congress to carry into execution the powers of other branches and officers, including the President – the "horizontal" component. *Id*. He argued that the Necessary and Proper Clause "assigns to Congress alone the responsibility to say by law what additional authority, if any, the executive and the courts are to have beyond that core of powers that are literally indispensable, rather than merely appropriate or helpful, to the performance of their express duties under articles II and III of the Constitution." *Id*. at 794. My reasoning follows the basic principle van Alstyne articulated.

[236] *Id*.

[237] U.S. CONST., Art. I, § 8, cl. 14 (conferring power "to make rules for the government of the land and naval forces").

obligation to comply with lawful orders.[238] The Constitution puts the President at the head of the armed forces even more clearly than it puts him at the head of the civilian administration.[239] Just as clearly as it makes the President Commander in Chief, the Constitution gives Congress authority to adopt the rules that will make the President's supreme command effective by establishing a command hierarchy and a system of discipline to enforce it. The Constitution itself could not contain the level of detail needed to establish military discipline and military courts.[240] Inevitably, the Constitution left the task of making the law that would implement the President's status to the legislature. In the field in which presidential primacy is most clearly established, the Constitution explicitly tasks Congress with implementing that principle. That arrangement suggests that the Constitution takes the same approach to presidential primacy in the executive generally.

Another feature of the Constitution has implications specifically for removal power, and shows that the Constitution itself does not confer that authority on the President. The Constitution provides for removal through impeachment, and deals with substance and procedure in some depth.[241] The explicit

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[238] Congress used this power to adopt the Uniform Code of Military Justice, which imposes discipline on the armed forces by providing rules that govern their conduct and an adjudicatory system to enforce those rules. 10 U.S.C. § 801 *et seq*. (Uniform Code of Military Justice). Congressional exercise of the power to govern the forces reaches back to the First Congress, which continued the Army establishment created under the Articles of Confederation, Act of Sept. 29, 1789, ch. 25, § 1, 1 Stat. 95, 95-96, and provided that the Army would be governed by the Articles of War adopted under the Confederation, *id*., § 4, 1 Stat. 96.

[239] *See* U.S. Const., Art. II, § 2 (President is Commander in Chief).

[240] "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind." McCulloch v. Maryland, 17 U.S. 159, 200 (1819).

[241] The Constitution's provisions about impeachment may not have the prolixity of a legal code, but they are quite detailed by the Constitution's standards. The House has the sole power of impeachment, U.S. Const., Art. I, § 2. The Senate has the sole power to try impeachments, is on oath or affirmation when sitting for that purpose, is presided over by the Chief Justice when the President is impeached, and must have a two-thirds majority to convict. *Id*., § 3. Conviction on impeachment results in removal and may result in disqualification from office, but reaches no farther, while leaving open criminal prosecution. *Id*.

impeachment provisions do not support the inference that impeachment is the exclusive mode of removal. It is not likely that the Constitution in effect gave every executive officer who does not serve for years tenure on good behavior. The impeachment provisions do, however, support the weaker inference that they are the only rule about removal found in the Constitution itself. The impeachment provisions show that the drafters regarded removal as a topic important enough to address in detail. But other than in those provisions, the Constitution supplies hardly any rules about removal. That suggests that the Constitution does not deal with non-impeachment removal at all, other than through the Necessary and Proper Clause.

The impeachment provisions also reinforce that conclusion in another way. They impose some limits on any exercises of removal power by the President, as they impose some limits on all presidential acts. A removal that constitutes a high crime or misdemeanor, such as removal in return for a bribe, is unlawful.[242] If the Constitution does confer some removal power on the President, it thus does not simply authorize removal at will. The rule conferring removal power, if there is one, must be more complex than that. What that implicit rule might be is a matter of conjecture. Allowing removal for any reason short of a high crime or misdemeanor would be an arbitrary standard, resulting from the gap left by another provision. But the Constitution gives no affirmative indication of the grounds on which an inherent removal power would operate. The implication is that it confers no such power on the President, and leaves presidential removal authority to Congress under the Necessary and Proper Clause. The Constitution itself deals with removal only through the impeachment provisions.

The features of possible presidential tools of control discussed above reinforce the conclusion that the Constitution does not directly provide any such tool. If removal, or the ability to give orders backed by sanctions, or the ability to exercise power directly, were an indispensable and effective means of presidential control, the Constitution itself might be thought implicitly to

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Article II sets out the grounds for removal: treason, bribery, and other high crimes and misdemeanors. *Id*., Art. II, § 4.

[242] *Id*. (providing for impeachment and removal for high crimes and misdemeanors, including bribery).

require that means.[243] None of those powers is necessary for the President to direct the executive branch, because they are substitutes for one another. Removal power is an effective tool, but so is the ability to give binding orders backed by sanctions other than removal.[244] Civilian government combines the two, with the highest-level officials serving at the President's pleasure, while civil servants have protected tenure but are subject to direction by their superiors.[245] Both systems work reasonably well, so neither is indispensable. Nor is any tool sufficient; as discussed above, all are inadequate to some extent.[246] None of the various means to the end of presidential control can be attributed to the Constitution.

The end is mandated but the means are not. The general principle of the unitary executive is like the part of that principle found in the President's status as Commander in Chief. It is a constitutional imperative that must be respected but that does not bring with it specific means by which it is to be achieved.[247]

b. Removal as a Distinct Executive Power

Proponents of inherent presidential removal power also offer an argument that is not based on removal as a means to the end of presidential control. According to the other argument, removal is simply part of the executive power.[248] On this view, removal power is a separate, free-standing component of the executive power granted by Article II.

Understanding claims of inherent executive power requires distinguishing between two sources of a specific authority, like removal power, that an executive official might have. An inherent

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[243] In describing the range of Congress's Necessary and Proper Clause power, van Alstyne distinguished between powers "literally indispensable" for the President and the courts to perform their functions, and powers "merely appropriate or helpful" to the other two branches' work. van Alstyne, *supra* --, at 794. A power that has substitutes and will only imperfectly achieve its end is useful but not indispensable.

[244] *See supra* --.

[245] *See supra* --.

[246] *See supra* --.

[247] *See supra* – (explaining that creation of a system of military discipline that will make the President's commands effective is left to Congress).

[248] *See* SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 68-69 (2015) (describing argument that the Article II executive power includes powers deemed executive in the late eighteenth century, including removal power).

executive power is a specific authority conferred by the Constitution itself. Congress does not grant inherent executive powers and may not take them away. Most of the specific authorities of executive officials from statute. Exercise of those authorities is executive, although they are not inherent in the executive power. Acquiring a tract of property for a federal building, for example, is an executive function, because it involves administering the government according to the law.[249] But authority to purchase real estate comes from statute, not directly from the Constitution, and executive officials may pay for real estate purchases only with a statutory appropriation.[250] Conducting a public activity like operating post offices is solely executive in that only executive officials may perform those functions.[251] But postal operations, although purely executive in that sense, must be pursuant to statute. Congress has the postal power, not the President.[252]

Removal is a specific act, and when done by an executive official pursuant to statute is an exercise of executive power. Moreover, removal might also be exclusively executive in that Congress might be forbidden from removing officials itself, rather than authorizing their removal. Direct congressional removal of a named official might be a bill of attainder.[253] The impeachment process might implicitly be the exclusive means by which the House and Senate can remove an officer. To say that removal is an executive power in those senses, however, is not to say that removal power is inherently executive in the sense that it is conferred directly by the Constitution.[254]

Removal is inherently executive only if the Constitution itself confers the power and Congress may not interfere with it.

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[249] *See* 40 U.S.C. § 3304(a) (giving Administrator of General Services power to acquire buildings for federal purposes).

[250] *See*, U.S. CONST., Art. I, § 9, cl. 7 (providing that no money may be drawn from the Treasury except pursuant to appropriation made by law).

[251] *See* U.S. CONST., Art. I, § 6 (providing that no one holding office under the United States may serve in Congress).

[252] *See* U.S. CONST., Art. I, § 8, cl. 7 (granting power to establish post offices and post roads).

[253] *See* United States v. Lovett, 328 U.S. 303 (1946) (describing a statutory provision providing that named individual federal employees not be paid was a bill of attainder).

[254] As discussed in more depth below, statements during the 1789 removal debate that removal was executive do not mean that the person who made that statement believed in constitutionally inherent power in this connection. *Infra* -.

Two arguments for inherent removal power have developed. One is that the Constitution itself enables the President to remove lower-level officials in order to ensure that the President will be able to control their decisions. To derive removal power from a Constitution that does not mention it, that argument needs the premise that removal power is a necessary means of control. But as explained above, that premise is not correct. Removal is not a necessary means to the end of presidential supremacy within the executive.[255]

According to the second argument, removal power is not a means to an end. Instead, removal power is itself a separate component of the Article II executive power, distinct from the authority to carry out the law. This second line of reasoning is correct only if the executive power goes beyond the authority to administer the government and implement the law.[256] Those who believe, as I do, that the Article II executive power is confined to law execution do not think that it includes removal power.[257]

Even if the constitutional executive power goes beyond carrying out the law, however, the argument for inherent removal power nevertheless is blocked. Proponents of inherent executive power recognize that the Constitution sometimes overrides the allocation of authority that otherwise would result from Article II's vesting clause as they understand it. If the Article II executive power by itself would include the power to make treaties, because the British monarchs had that power, Article II's requirement of Senate advice and consent limits the power the President otherwise would have.[258] The Necessary and Proper Clause is as explicit as the Treaty Clause. A central application of the former is to create offices, and the Appointments Clause confirms that offices not created by the Constitution are created by law.[259] As the

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[255] *Supra*--.

[256] *See supra* – (discussing debate over the scope of the Article II executive power).

[257] On this score I agree with Professor Mortenson. *See supra* n. – (discussing Professor Mortenson's account of the Article II executive power).

[258] *See* PRAKASH, *supra* n. --, at 69 (explaining that otherwise inherent executive power can be overridden, for example by the inclusion of the Senate in the treaty-making process).

[259] *See* U.S. CONST., Art. II, § 2, cl. 2 (providing that the President shall appoint, with advice and consent of the Senate, "officers of the United States, whose appointment is not otherwise provided for, and which shall be established by law"). David Currie, referring to the Appointments Clause and other provisions that contemplate executive officials other than the President, explained that

Constitution itself shows, part of establishing a government office is selecting the tenure on which it will be held.[260] When Congress determines the grounds for removal from office, it exercises a granted power that overrides any residual presidential removal power.[261]

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those provisions "make clear the expectation that additional executive offices and departments would be created" and also "made plain that Congress had power to create them as necessary and proper to the execution of various powers granted to the President and Congress." DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801, 36 (1997) (footnote omitted).

[260] *See, e.g.*, U.S. CONST., Art. II, § 1, cl. 1 (providing that the President and Vice President shall serve for four years); *id.*, Art. III, § 1 (providing that judges of supreme and inferior courts shall serve on good behavior).

[261] British practice concerning removal further undermines the argument that would derive presidential removal authority by attributing a residuum of the British royal prerogative to the Article II executive power, and attributing at-will removal authority to the prerogative. As Professor Birk points out, standard British descriptions of the monarch's prerogative did not include removal. Birk, *supra* --, at 202. As he shows in depth, the British monarch did not have power to remove at will all subordinate officials who administered the government. *Id.* at 204 (stating that the royal removal power was often limited by law). From the days of the Norman Conquest, some offices were granted in fee simple, and so made hereditary, or for life. *Id.*

A challenge to the new thesis might be found in the evidence Professor Birk adduces indicating that the monarch did not have complete control over all lower-level officials who carried out the law. *See id.* at 211-14 (discussing limits on royal power to control). Those limits, combined with statements by commentators that the British monarch held the executive power, might seem to count against the new thesis. British practice on this point does not undermine the new thesis. That practice is relevant to the new thesis insofar as it bears on the meaning of the Vesting Clause of Article II. Statements about executive power by commentators on the British constitution, however, are not statements about the meaning of Article II. No commentator on the British constitution was expounding the American Vesting Clause. For example, Blackstone wrote that "[t]he supreme executive power in these kingdoms is vested by our laws in a single person, the king or queen." 1 WILLIAM BLACKSTONE, COMMENTARIES *189. Two paragraphs later, he stated, "[t]he executive power of the English nation being vested in a single person," and discussed the consequences of that statement. *Id.* An interpreter trying to read Article II in light of Blackstone's statements might ponder the difference. "Supreme executive power" might refer to power over the highest affairs of state, not minor matters, so perhaps the British monarch's executive power did not extend to all acts that carried out the law. Perhaps the difference in wording is significant. Blackstone, however, was not inserting a word into a vesting clause, nor leaving a word out. The unwritten British constitution had no vesting clause. As leading British scholar A.V. Dicey

The Constitution does not confer removal power.

4. Legitimate Reasons to Limit the Tools of Presidential Control

This section draws another implication from the article's examination of the tools of presidential control: because those tools can all be misused, Congress has legitimate reasons for limiting them to prevent misuse. By itself, the legitimacy of that interest does not imply that Congress may act on it. Raising revenue to support the government is a legitimate reason for taxation, but Congress may not act on that reason by adopting an unapportioned direct tax on property.[262] Congress's reasons to limit the tools of presidential control do, however, play a role in the new unitary thesis. The thesis holds that Congress may pursue those

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explained, the student of the British constitution may "search the statute-books from beginning to end," but will "find no enactment which purports to contain the articles of the Constitution." A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION xxviii (Liberty Press 1982) (8th ed. 1915). That is why Dicey's task was so different from that of American commentators like Kent and Story. The U.S. Constitution, unlike the British constitution, provides an authoritative text concerning "the legislature, the executive, and the judiciary." *Id*. at cxxviii. Dicey was not expounding a text. Like Dicey's statements, Blackstone's were descriptions of a practice, not exegesis of a document. Moreover, the phenomenon Blackstone was describing was not the executive power of Article II. Blackstone discussed the royal prerogative, a body of powers found in the historical practice of the unwritten British constitution, subject to whatever limitations appeared in that practice. *See* 1 BLACKSTONE, *supra*, at *250-51 (noting that the royal prerogative is subject to the limits found in the law).

The American framers stripped away many of the British constitution's inheritances from earlier times, like titles of nobility. Presidents do not supervise hereditary noble officers who administer the law, because titles of nobility are banned. U.S. CONST., Art. I, § 9, cl. 8 (providing that "no title of nobility shall be granted by the United States"). Article II's Vesting Clause operates in the context of the new American system, not the British constitution with its centuries of custom and principle of parliamentary supremacy, *see* DICEY, *supra*, at xxxvi (stating that Parliament's authority to make or unmake any law is the "dominant characteristic" of the British constitution). British practice and understandings bear on the meaning of the Constitution, but no British practice is based on that meaning.

[262] *See* U.S. CONST., Art. I, § 9, cl. 5 (providing that direct taxes must be apportioned among the States according to the census), *id*., Amend. XVI (granting power to levy income taxes without regard to the census)

goals provided that the President retains substantial control over executive decisions.

In more than two centuries of debate over presidential control of the executive, three main reasons for limiting that control have emerged. First and perhaps most important is ensuring that executive officials follow the law, and not the President's wishes when those wishes depart from the law. If the law requires that federal funds be deposited with a bank, the President's political and personal hostility to the bank should not affect the government's actions. An especially important form of unlawful conduct occurs when official decisions are made for partisan reasons instead of the reasons relevant under the law. Antitrust prosecutions should not be declined because the managers of a firm are political supporters of the President, nor should prosecutions be threatened in order to induce political support.[263]

Executive officials should follow the law, but the tools of presidential control can induce lawless decisions. Selection of personnel can be used to that end. So can the power to give orders, even though unlawful orders are not binding; not all unlawful orders are defied.

The second leading reason to limit presidential power involves power to select personnel. That power can be used for a purpose that Congress reasonably can decide is undesirable and should be made unlawful. The purpose is the use of appointment and removal to operate a system of political patronage. Taxpayers, and for example postal customers, have reason to demand that their money go to operating the government, not to financing the incumbent's partisan activities. Patronage appointment has been common throughout American history, has just as commonly been criticized, and has often been replaced with merit-based civil service systems.[264]

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[263] Justice Kagan identified "independence from politics in regulatory bodies like the CFPB" as a legitimate reason to limit presidential removal power in *Seila Law*. *Seila Law*, 140 S. Ct. at 2226 (Kagan, J., dissenting).

[264] In the twentieth century, the Supreme Court held that the First Amendment imposes significant limits on removal of state government employees on the basis of political affiliation. *See* Rutan v. Republican Party of Illinois, 497 U.S. 1050 (1990); Branti v. Frankel, 445 U.S. 507 (1980); Elrod v. Burns 427 U.S. 347 (1976). The Justices were aware of the long debate over patronage appointments. The Court's opinion in *Rutan* begins: "To the victor belong only those spoils that may be constitutionally obtained." *Rutan*, 497 U.S. at 64.

Third, some government decisions and activities call for technical expertise. The Board of Governors of the Federal Reserve System makes monetary policy, which is the subject of a large body of highly sophisticated economics.[265] Federal licensing of drugs like vaccines is based on the evaluation of highly technical submissions.[266] No President can come close to having the knowledge needed to make sound decisions on all the subjects the executive addresses. Presidents' lack of expertise is a reason to keep the President from personally making decisions that require it.

The constitutional requirement that the President be in command of the executive coexists with legitimate reasons to constrain presidential misuse of the tools of command.

C. Integrating Constitutional Principles to Derive the New Unitary Executive Thesis

This section explains how the aspects of the Constitution just described combine to produce the new unitary executive thesis, and elaborates on that thesis. The new thesis harmoniously integrates congressional power to structure the government and the constraints the Constitution's unitary executive principle imposes on Congress.

The derivation of the new thesis begins with the affirmative grant of power to Congress in the Necessary and Proper Clause. Considered in itself, and without regard to constraints that arise from other parts of the Constitution, that clause gives broad discretion.[267] Basic questions about the government are answered

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Justice Scalia in dissent recognized the policy argument against spoils-based appointment. "The merit principle for government employment is probably the most favored in modern America, having been widely adopted by civil-service legislation at both the state and federal levels." *Id*. at 93. He then listed some famous political machines to show that patronage has also been a common practice. *Id*. (naming Tammany Hall and the Pendergast, Byrd, and Daley Machines).

[265] *See, e.g.*, MICHAEL D. WOODFORD, INTEREST AND PRICES: FOUNDATIONS OF A THEORY OF MONETARY POLICY (2003) (setting out the theoretical foundations of monetary policy).

[266] *See* 21 C.F.R. § 314.50 (2020) (setting out the content and form of an application for approval of a new drug).

[267] *Supra*— (explaining that the horizontal aspect of the Necessary and Proper Clause enables Congress to create executive agencies and offices and prescribe their powers and operating rule).

by statute, not by the Constitution. The Constitution does not decide whether to have a Department of Commerce and Labor, as the country once did, or a Department of Commerce and a Department of Labor, as the country now does, or no agency along either lines.[268] The power to create an executive agency brings with it the power to decide on the tenure of its officers and the command structure within it.

When Congress uses its power to structure the executive, its legitimate goals can provide reasons to limit the tools of presidential control. Perhaps most important is that restricting removal power to keep the President from inducing illegal conduct, and to limit political patronage, are acceptable purposes considered in themselves.[269] Preventing illegal conduct and limiting patronage are good reasons for legislation, because they serve the fundamental purpose of creating an executive that will serve the public interest pursuant to the law.

Like all congressional powers, the power to structure the executive is subject to limits imposed by the Constitution's structural provisions. The Constitution requires a unitary executive. It gives the President constitutional functions, which entail substantial presidential control of subordinates.[270] The Constitution thereby lays down an imperative. Because the unitary-executive principle emerges from the text and structure of the Constitution, it is a mandatory requirement, like the requirement of presidential appointment to principal offices. In the exercise of its power to structure the government, Congress must respect that constitutional imperative.

The Constitution's imperative, however is not that the President have any particular tool of control.[271] Nor does the Constitution mandate that Congress create a system that will enable to President perfectly to control all executive activities. No system can achieve that goal and the Constitution does not require

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[268] Congress created the Department of Commerce and Labor in 1903. *See* Act of February 14, 1903, 32 Stat. 826. In 1913, Congress renamed that agency the Department of Commerce and created the Department of Labor. Act of Mar. 4, 1913, 37 Stat. 737.

[269] *See supra* --.

[270] *See supra* --.

[271] *See supra* --.

that Congress pursue the impossible.[272] The constitutional imperative is substantial, not absolute, presidential control.

Taken together, those features of the Constitution yield the new unitary executive thesis. The thesis has two components. The first concerns the purposes for which Congress must and may act. Substantial presidential control of executive activities and policy choices is the Constitution's own goal, so Congress must pursue it. A corollary of that principle is that any congressional purpose that rejects that goal is impermissible. Congress may not act with the purpose of keeping the President from performing his functions, including setting policy. Congress may not legislate on the assumption that policy independence for other officials is preferable to presidential command of policy.

The second component concerns the practical effects of statutes that structure the executive. Congress may choose among tools of presidential control, and it has legitimate reasons to limit them, but it must design the executive so that the President is substantially in charge. Combining those features of the Constitution entails that Congress may burden presidential control of the executive in the pursuit of permissible ends, but any burdens must be light enough that the President is effectively in command.

The new unitary executive principle has a structure familiar from other areas of constitutional law. The principle governs the purposes for which Congress may act and the effects that statutory rules may bring about. The First Amendment's protection of free expression shares that structure. First, the First Amendment forbids certain grounds for legislation. A "core postulate of free speech law" is that "t]he government may not discriminate against speech based on the ideas or opinions it conveys."[273] Second, when legislatures pursue permissible goals, the First Amendment often requires that they do so in a way that limits adverse effects on expression. Regulation of speech in public spaces, such as regulation of the noise produced by performances in public spaces, must be "'narrowly tailored to serve a significant governmental

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[272] *See supra* --.

[273] Iancu v. Brunetti, 139 S. Ct. 2294, 2299 (2019) (Kagan, J.). Justice Kagan's view was presaged by Professor Kagan. "First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives." Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996).

interest, and that they leave open ample alternative channels for communication of the information.'"[274]

Similar structure does not entail identical content. The constitutional requirement that the President substantially control the executive is not only a side constraint on Congress, the way the First Amendment is. Presidential control is a goal Congress is affirmatively directed to pursue in structuring the government, because it is the Constitution's goal. Nor is that goal to be balanced against other considerations. It is a constitutional command. But the two-part form is much the same: The Vesting Clause of Article II governs congressional purposes, and limits the restrictions that may be placed on achievement of a goal.

Substantial presidential authority over executive operations is a somewhat vague concept, so the Constitution here implies a standard, not a rule. Inherent at-will removal power is a rule, but the Constitution does not adopt it.

III. The New Thesis and the Decision of 1789

This section discusses events in the First Congress that have become fundamental to debates about the unitary executive principle and presidential removal power. When the First Congress designed the first executive departments – Foreign Affairs (soon renamed State), War, and Treasury --removal power was debated extensively in the House. The central question was whether the Constitution allowed or required Senate consent to removal, as it required Senate consent to appointment to principal offices. The result was a compromise that indirectly recognized presidential removal power without affirmatively creating it or attributing it to the Constitution.[275]

The new unitary thesis separates presidential policy supremacy from removal. That separation illuminates important anachronisms in 21st century invocations of 18th century positions. Today, supporters of inherent removal power point to arguments against Senate involvement and supporters of independence point to arguments in favor.[276] Positions from 1789 do not line up with

[274] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Community for Creative Non-Violence, 486 U.S. 288, 293 (1984).

[275] *See infra*--.

[276] The Court in *Seila* law relied on Congress's choices in 1789 for the proposition that the Constitution empowers the President to remove executive

today's positions. First, supporters of Senate involvement were not supporters of policy independence in today's sense.[277] Second, the arguments against Senate involvement did not entail inherent presidential removal power.[278]

Although the 1789 debates provide little if any support for today's main contending positions, they provide support for the new thesis. Both sides in 1789 agreed that lawless conduct by executive officials and the use of government office for personal and political gain were legitimate concerns. Opponents of Senate involvement feared that the Senate would protect its cronies from removal for wrongdoing and incompetence.[279] Proponents feared that unchecked presidential removal would lead to official lawlessness and appointment of the President's cronies.[280] All were concerned about problems that are legitimate reasons for restricting removal according to the new thesis. None was concerned about policy independence, which the new thesis rejects.

This section first briefly recounts the legislative developments in the First Congress. It then discusses the views of supporters of presidential removal, showing that they embraced presidential control much more clearly than they embraced constitutionally mandatory presidential removal power. The section then turns to supporters of Senate involvement. They were not motivated by executive policy independence, which the new thesis rejects. They were motivated by possible abuse of removal power, which the new thesis accepts as grounds for limiting that authority. [281]

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officials, 140 S. Ct. at 2197. Justice Kagan in dissent responded that "[t]he early history – including the fabled Decision of 1789 – shows mostly debate and division about removal authority." *Id*. at 2229.

[277] *See infra* --.

[278] *See infra* --.

[279] *See infra* --.

[280] *See infra* --.

[281] All discussion of congressional proceedings in 1789 are subject to an important caveat: the available records of debates are imperfect. The collections of debates published by Gales & Seaton in the nineteenth century were compiled from earlier newspaper accounts. Those accounts were not the work of professional shorthand reporters employed by Congress itself. *See* Elizabeth Gregory McPherson, *Major Publications of Gales and Seaton*, 31 Q. J. SPEECH 430 (1945) (discussing origins and limitations of the published debates). Even if those journalistic accounts are substantially accurate, as they probably are, they are not reliably correct word for word. For that reason, they may not catch

A. The Sequence of Decisions and Debates in Congress

On May 19, 1789, Representative Elias Boudinot of New Jersey proposed a resolution calling for three executive departments: Foreign Affairs, Finance (later Treasury), and War.[282] After some discussion of Boudinot's proposal, James Madison offered a resolution that would shape the debate for weeks and arguments about the structure of the executive for more than two centuries. He proposed an "executive department" called the Department of Foreign Affairs, to be headed by a Secretary.[283] The Secretary was to be appointed by the President with the advice and consent of the Senate, "and to be removable by the President."[284]

Madison's proposal sparked the first round of debate about removal. Three positions that apparently had substantial support quickly emerged. One was that the Constitution required that removal be by the President acting alone, another that the Constitution required the Senate's advice and consent for removal of officers appointed with Senate approval, the third that Congress could choose whether to give removal power to the President alone or require Senate approval.[285] After more discussion, a motion "declaring the power of removal to be in the President" was passed by a "considerable majority."[286] Those who supported presidential removal on constitutional grounds and those who supported it on policy grounds could support that resolution, and apparently did. The following day, the House appointed a select committee to prepare bills creating departments of Foreign Affairs, Treasury, and War, each Department to be headed by a Secretary to be removable by the President.[287]

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important nuances of phrasing. When I quote a statement from the debates, I should be understood as quoting the records, and not claiming that the Representative spoke the very words quoted. "Madison said," for example, will be shorthand for "the published records state that Madison said."

[282] 1 ANNALS OF CONGRESS 383-84 (1789) (Joseph Gales, ed., 1834). Boudinot proposed, not the text of a bill, but a resolution to be debated and adopted by the Committee of the Whole that would provide guidance for specific text. *See id.* at 394 (proposing that Committee of the Whole adopt general principles).

[283] 1 ANNALS OF CONGRESS, *supra* n. --, at 385.

[284] *Id*.

[285] *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801 37-38 (1997) (describing Representatives' views on removal).

[286] 1 ANNALS OF CONGRESS, *supra* n. --, at.

[287] *Id*. at 412.

On June 16, the committee reported a bill creating a Department of Foreign Affairs, and that bill began its odyssey through Congress and into constitutional history.[288] The bill put the Department and its Secretary under the President's direction. It provided that the Secretary "shall perform and execute such duties as shall from time to time be enjoined on or intrusted to him by the President of the United States, agreeable to the Constitution" concerning relations with foreign states.[289] The bill went on to provide that the Secretary "shall conduct the business of the Department in such manner as the President of the United States shall from time to time order or instruct."[290]

That the Secretary would be subject to the President's authority thus was never in doubt. The great dispute involved removal. Following the House's earlier resolution, the bill as introduced also provided that the Secretary would "be removable from office by the President of the United States."[291] The House then debated removal for the next several days. On June 19, the House, in Committee of the Whole, rejected an amendment that would have removed the President's removal power.[292] On June 23, however, the House took a step the significance of which has been debated ever since. On motion of Egbert Benson of New York, the House replaced the language authorizing presidential removal with a proviso that addressed removal less directly. The amendment changed the provision stating that in the case of a vacancy in the office of Secretary, the Chief Clerk of the Department was to have custody of the Department's papers. The new language said that the Chief Clerk was to have custody whenever the Secretary "shall be removed by the President" or a vacancy otherwise occurred.[293] So

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[288] *Id*. at 473.

[289] Foreign Affairs Bill {HR-8}, LEGISLATIVE HISTORIES, 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, 695 (Charlene Bangs Bickford & Helen E. Veit, eds., 1986) (reproducing the text of the bill).

[290] *Id*.

[291] 1 ANNALS OF CONGRESS, *supra* n. --, at 473.

[292] *Id*. at 599 (reporting the defeat of the motion to delete the removal provision by a vote of 20-34).

[293] *Id*. at 600-601 (reporting amendments proposed by Egbert Benson). Benson explained his proposal on pro-presidential grounds: Congress should not adopt language that purported to confer removal power, which the Constitution itself gave the President. Benson said that the unamended text was "somewhat like a grant." *Id*. at 601. He wanted to "evade that point, and establish a legislative construction of the constitution." *Id*. Although Benson believed that the Constitution gave the President removal power, the coalition that adopted

amended, the bill went to the Senate. The Senate passed the House's version, reportedly after Vice President Adams twice broke a tie by voting against amendments that would have removed reference to presidential removal.[294]

B. Arguments in Support of Sole Presidential Removal

This section discusses the arguments of supporters of sole presidential removal, who opposed Senate involvement, and the bearing of those arguments on the new unitary executive thesis. The new thesis embraces presidential control of executive activities but denies that the Constitution gives the President power to remove at will. Supporters of sole presidential removal often reasoned from the premise of presidential control over other officials. That premise is unitarian and consistent with the new thesis. Some proponents of sole presidential removal attributed their position to the Constitution, rather than urging it as better policy than including the Senate.[295] That constitutional argument may seem to be inconsistent with the new thesis, but was not.

Proponents of sole presidential removal regularly began their argument with a classic unitary-executive major premise: The President is chief executive and therefore must be able to control other executive officials. Madison said the President is "constitutionally authorized to inspect and control" officers' conduct.[296] The President has the executive power, he maintained,

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Benson's change included members who believed in constitutionally-based presidential removal, members who believed that Congress could decide who had removal power, and members who believed that the Senate should be involved. (That odd combination was made possible by the fact that Benson proposed two amendments, one of which put in the new language and one which struck the part authorizing removal by the President). *See* DAVID P. CURRIE [Federalist Era], *supra* n. --, at 40-41 (describing shifting coalitions). Recent contributions to the debate on the meaning of the votes on Benson's proposals include Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006) (majorities in House and Senate believed that the Constitution grants removal power to the President).

[294] 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* n. --, at 697 n. 4 (reporting Senate votes).

[295] Some supporters of presidential removal did not attribute it to the Constitution. They thought that Congress could choose whether to involve the Senate, and believed that sole presidential removal was better policy. *See* Prakash, *supra* n. --, at 1038-1040 (discussing Representatives who took that position).

[296] 1 ANNALS OF CONGRESS, *supra* n. --, at 480.

and if any power is executive it is "appointing, overseeing and controlling those who are to execute the laws."[297]

Representative Fisher Ames argued that the President has all executive power, but cannot personally execute the law.[298] To be responsible, the President must have a choice of "assistants," control over them, and power to remove them when he finds "the qualifications which caused their appointment cease to exist."[299] Later in that speech, Ames said that the President's executive power includes the authority to "superintend, control, inspect, and check" the officers who administer the laws, and that if the President loses confidence in an officer, he must be able to remove that officer.[300] Representative Thomas Hartley of Pennsylvania was another who believed that executive functions must be under the President's direction. The Department of Foreign Affairs was executive, and so it was important that the President have "complete command over it."[301] Officials in whose hands that function was placed "must be subjected to [the President's] inspection and control."[302] Representative John Laurence of New York argued that heads of department are "mere assistants" to the President.[303] The President has "the superintendence, the control, and the inspection of their conduct," and they were to receive from him "orders and direction."[304] George Clymer of Pennsylvania contended that without removal power the President would be unable to "superintend and direct" executive operations, and so would lose "efficiency and responsibility."[305]

From their premise about presidential control, participants in the debate drew a conclusion about the issue before the House: Senate participation in removal would blunt presidential control of the executive. Representative Clymer said that if the Senate were involved in removal, the President "ought to resign the power of superintending and directing the executive parts of government to the Senate at once, and then we become a dangerous

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[297] *Id*.
[298] *Id*. at 492.
[299] *Id*.
[300] *Id*. at 493.
[301] *Id*. at 498.
[302] *Id*.
[303] *Id*. at 504.
[304] *Id*. at 504.
[305] *Id*. at 508.

aristocracy."[306] Madison also focused on the harmful effects of a Senate role. If Senate consent was required for removal, high officers might "collude" with the Senate and reduce the President's supervisory power to "mere vapor."[307]

Supporters of sole presidential removal adopted the basic unitarian principle of presidential control over executive activities. Their statements about removal do not, however, show that they believed that the Constitution itself conferred removal power, let alone power to remove at will. In understanding the implications of what they said, context is crucial, as it always is.[308] The choice before the House was between sole presidential power and Senate involvement. Supporters of presidential removal derived their position from a constitutional principle of presidential control. They had no occasion to consider the possibility that the President might be given some tool of control other than removal. The bill required that the Secretary follow the President's directives. The only means it mentioned to enforce that obligation was removal.

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[306] *Id*. at 509.

[307] *Id*. at 480.

[308] Statements in congressional debates must be understood in context, just as statements in judicial opinions must be. For an example of a broad statement that was properly reconsidered in a different context, students of American constitutional law need look no farther than its most celebrated case, *Marbury v. Madison*, 5 U.S. 137 (1803). In *Marbury*, John Marshall stated a broad principle about his Court's appellate jurisdiction that he later modified in *Cohens v. Virginia*, 19 U.S. 264 (1821). In writing *Marbury*, Marshal had before him the facts of *Marbury*. Only later, on seeing different facts, did he realize that his earlier conclusion rested on a narrower principle than he first thought. "It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Id*. at 399. The reason, Marshall wrote, "is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." *Id*. at 399-400.

The importance of context also came up in the debates on the Federal Reserve Act of 1913, which resulted in the creation of the most important of the agencies that are today regarded as independent. Representative Franklin Mondell, Republican of Wyoming, maintained that Representative Carter Glass, Democrat of Virginia and sponsor of the pending Federal Reserve bill, had misrepresented the legislation by quoting a passage out of context. "We are none so young but what we have heard gentlemen read some extract taken from its context that might give a very erroneous impression, and that is what the gentlemen from Virginia did." 50 Cong. Rec. 4690 (1913).

Senate involvement would blunt the only tool the President was offered.

In that context, Representative Clymer was not considering some sanction other than removal that might enable the President to superintend and direct officials.[309] Madison was not assessing removal as compared to some other means by which the President could superintend and control his subordinates.[310] Quite possibly some sanction other than removal would have satisfied Hartley's and Lawrence's requirement of presidential command, control, and direction.[311] Any of them who was familiar with the military hierarchy would have realized, upon some thought, that supreme command can be assured through means other than removal from office.[312]

Another possible ground of confusion involves statements that removal was an executive power. Such statements did not entail that removal was an inherent executive power as the latter

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[309] *See supra* – (quoting Clymer).

[310] *See supra* – (quoting Madison).

[311] *See supra* – (quoting Hartley and Lawrence).

[312] Care in making inferences about Representatives' considered views on this issue is especially well taken because they were not debating the meaning of a word, or the scope of a concept. The removal question was about the implications of several provisions of the Constitution for an issue none of those provisions explicitly addressed. No one thought that the Constitution said who could remove but that its words on the subject were obscure. The Constitution said who could appoint. As Benson explained, the Constitution "detailed the mode of appointing to office" but "it was not explicit as to the supersedure." 1 ANNALS OF CONGRESS, *supra* n. --, at 388. Not only was the Appointments Clause being construed, so were the Vesting Clause of Article II, the Take Care Clause, and the impeachment provisions. When an interpretive problem involves drawing out the implications of a number of clauses, the more possibilities occur to the interpreter, the better. Statements in the 1789 debates must be understood in light of the specific issue on the table, which limited the possibilities that participants had in mind. Representatives' statements about an important issue that was before them are of course evidence of their considered views on that and related issues. But because of the limits imposed by context, their statements about underlying principles are more important. Supporters of sole presidential removal power in 1789 reasoned from the basic principle that the President is responsible for the executive branch and must have power commensurate with that responsibility. The unitarian view I propose rests on that principle. It also rests on the principle, apparently universally shared in 1789, that ensuring competence, honesty, and proper implementation of the law is of the highest importance.

concept is used today.[313] A power is executive but not inherent when it is available only when conferred by statute, but may be conferred only on an executive official. Disbursing federal funds is executive, but not inherent in executive power in today's sense. Only executive officials may spend federal money, but they are prohibited from doing so without a statutory appropriation.[314] In the 1789 debate about Senate involvement, saying that removal was executive could have meant, and probably often did mean, that only an executive official could perform it. A function that was purely executive in that sense could require statutory authorization while excluding involvement by a house of the legislature.

C. Arguments in Support of Senate Involvement in Removal

This section turns to the views of supporters of Senate involvement in removal in the 1789 debates. For supporters of inherent presidential removal power who rely on framing-era understandings, support for Senate involvement poses a problem.[315] Participants in the 1789 debate who believed that the Constitution required or allowed Senate involvement in removal did not believe that the Constitution itself allocated that power exclusively to the President.

Arguments for Senate involvement pose no problem for the new thesis, however, and to some extent support it. Proponents of Senate involvement were not advocating policy independence. They did not discuss policy independence. Their position was therefore consistent with the unitarian aspect of the new thesis. Nor is Senate involvement in removal as such inconsistent with the basic unitary executive principle. Senate involvement may be unconstitutional for reasons unrelated to that principle, as I think it is, but it can be squared with presidential control.[316] A statute that

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[313] *See supra* -- (explaining the difference between powers that are executive in that when granted by statute they must or may be exercised by executive officials and powers that the Constitution itself gives the President with which Congress may not interfere).

[314] U.S. CONST., Art. I, § 9, cl. 7 (no money may be drawn from the Treasury except pursuant to an appropriation).

[315] *See, e.g.*, Prakash, *New Light on the Decision of 1789*, *supra* n. – (conducting a new analysis of the vote pattern on removal power to determine the bearing of the 1789 decision and debates on the original-understanding argument for inherent removal power).

[316] Under current doctrine, a requirement of Senate involvement in removal would constitute a one-house veto of an executive decision and as such would

required Senate consent to removal while giving the President some other strong tool of control, like a sanction other than removal for failure to follow a presidential order or policy, would satisfy the unitary executive principle.[317]

Because the new thesis accepts some reasons for restricting removal, the consequentialist arguments offered in support of Senate involvement in 1789 are consistent with the new thesis. Supporters of Senate involvement said that it would check misuse of removal power.[318] The Senate would keep the President from using the threat of removal to induce unlawful conduct, and from using removal to reward his supporters with government office. Whatever may be the constitutional status of Senate involvement, those are legitimate reasons for limiting removal power. Arguments embracing those reasons are consistent with the new thesis.

Supporters of Senate involvement maintained that the Senate would check presidential abuse of removal power. They did not suggest that presidential removal would be used to improperly control independent policy-making authority vested by statute in officials other than the President. They did not discuss policy independence in today's sense, but rather had other concerns. Egbert Benson of New York argued that Senate involvement in removal would have a salutary effect on appointments: it would keep the President from filling offices with his "favorites."[319] William Smith of South Carolina feared that if the President alone could remove, he would displace "worthy men."[320] Smith had in mind intrigues about office, not policy disagreement. Men of "capacity and integrity" would not want to enter the public service subject to presidential removal.[321] They would fear that if they were removed through the machinations of an "envious person," the public would believe that they had been

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be unconstitutional. *See* INS v. Chadha, 462 U.S. 919 (1983) (holding that the houses of Congress may exercise power only through the law-making process).

[317] *See supra* --.

[318] *See infra* --.

[319] 1 ANNALS OF CONGRESS, *supra* n. --, at 397. The word "favorite," whether used by Benson or a reporter who sought to capture the gist of Benson's argument, evoked monarchy. Benson may well have used the word, because he pointed out that the President is not a monarch. *Id.*

[320] *Id.* 475-76.

[321] *Id.*

displaced because "guilty of malpractice."[322] Senate involvement was beneficial because it would limit such abuses, not because it would keep policy decisions away from politicians.

James Jackson of Georgia was worried that the President, if unchecked, would use removal power to subvert republicanism, not apolitical agency policymaking. Jackson feared that sole presidential removal power would undermine the "independency and firmness" of officials.[323] He was not concerned about the kind of independence the Federal Reserve enjoys today. Jackson hypothesized a President – not General Washington, of course, but a far less virtuous successor – who planned to use the Army to establish an "arbitrary authority."[324] If the Secretary of Finance refused to join the plot and finance the scheme, the President could replace "the man with the strong box."[325] Jackson opposed a "wanton and uncontrollable" presidential removal power.[326] He was worried about tyranny backed by a standing army, not about the possibility that the President would direct the Federal Reserve to target nominal GDP rather than inflation.[327]

John Page of Virginia, like some other proponents of Senate involvement, did not want officials to be "mere creatures" of the President who would be "dependent on his will alone."[328]

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[322] *Id*. at 476.

[323] 1 ANNALS OF CONGRESS, *supra* n. --, at 507.

[324] Annals at 506-507.

[325] *Id*. at 507.

[326] *Id*

[327] Jackson made the same argument later in the debate. If the President had sole removal power, "the treasury would fall into his hands; for nobody in that department would dare to oppose him." *Id*. at 552. With the "army and treasury" at the President's command, "we might bid a farewell to the liberties of America forever," because "the two things necessary to make a man a despot" were "the purse and the sword." *Id*.

Shortly after Jackson's second speech, Representative Thomas Scott of Pennsylvania pointed out that Jackson's concern about removal power as an instrument of despotism was ridiculous. Spending funds without an appropriation, as in support of a despotism, would be illegal. *Id.* at 553-555. Only a President who was prepared to violate the law would replace the man with the strong box to do so, and such a President would not be deterred by a removal restriction. The danger was that the President, with the army at his back, would simply seize the Treasury's strong box, not that he would use a legal power to further his scheme. Restrictions on removal were no security against that. Jackson's hypothetical was "amusement," not a serious problem. *Id*.

[328] *Id*. at 539-540. Creatures were invoked often enough to suggest that the House had somehow obtained an early draft of Mary Shelley's novel. Madison

The Senate could prevent "removal of a faithful servant who has opposed the arbitrary mandates of an ambitious President."[329] Page may have had in mind faithful opposition to the lawful but arbitrary measures of a President ambitious for the public good, but his rhetoric suggests otherwise.[330]

Near the end of the debate, Elbridge Gerry reiterated that the President might use removal power to impede lawful execution. Officials' duties are set by the law, he pointed out, not the President's directives.[331] That correct observation was relevant only if Gerry meant to imply that removal could induce compliance with an unlawful directive. Another of Gerry's observations confirms that he was concerned that presidential removal might impede the executive branch's compliance with the law. Gerry also feared that the President would remove an officer who does as the law requires for some trivial and extraneous reason.[332] Gerry worried that with removal power the President, in various ways and for various reasons, would make the executive less law-abiding.

Toward the end of his remarks, Gerry sounded a theme that would become dominant in the 19th century: the President might use removal power to advance his reelection.[333] The President might act for that improper end, rather than appointing good men

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told the House not to fear that the President would use removal to put in an "unworthy creature" of his own. *Id*. at 517. The need for Senate confirmation would keep the creature out. *Id*. Gerry feared that sole presidential removal power would make officers the "mere creature" of the President, apparently not meaning creature as a compliment. *Id*. at 492. Later, Gerry explained how removal followed by a recess appointment would put a "creature" in office. *Id*. at 522-23. Jackson too was afraid of "mere creatures" of the President. *Id*. at 506. So was Page. *Id*. at 539-540.

[329] *Id*. at 504.

[330] Page's speech illustrates changes in the way in which independence is used in connection with presidential control of the executive. The words "mere creatures of the President" were followed by "dependent on his will alone." *Id*. at 539-540. Independence of arbitrary and ambitious schemes meant willingness to follow the law despite the President's threats and blandishments. There is no reason to believe that Page was thinking about a choice among lawful alternatives that was independent of the President's legitimate policy views.

[331] *Id* at 597.

[332] *Id*.

[333] *Id*. at 598.

and removing the bad.[334] Gerry in 1789 was not thinking about mass-based political parties, reaching to every Post Office in the land. Organizations like that had not yet arrived on the scene.[335] The Massachusetts politician for whom gerrymandering is named, however, understood politics, and understood that using office to cultivate support was a standard tool of politics.[336]

Supporters of Senate involvement did not defend it as a protection of policy-making independence for executive officials. Moreover, their position was straightforwardly inconsistent with independence from political actors, which is a leading rationale for agency independence as understood today. Senators are political actors just as the President is.[337]

The 21st century case *Seila Law* illustrates the difference between independence from the President, which supporters of Senate involvement sought, and independence from political actors generally, which they did not embrace. The Court in *Seila Law* described the CFPB as "accountable to no one."[338] The agency's Director "is neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is. The Director does not even need to depend on Congress for annual appropriations."[339] Justice Kagan in dissent argued that the Court's decision "wipes out" a "fundamental" feature of the agency: "a measure of independence from political pressure."[340] Justice Kagan

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[334] *Id*.

[335] The chief designer and theorist of mass-based parties was Martin van Buren. "A defender as well as a practitioner of the new politics, Van Buren pioneered the modern analysis of political parties as a legitimate feature of government, instead of considering them (as all conventional political philosophers then did) a dangerous perversion." HOWE, *supra* n. --, at 484. Van Buren's new brand of "party politics" was "based on publicity, patronage, and organization." *Id*.

[336] Very likely so did Samuel Livermore of New Hampshire, who feared that the President would remove on "mere caprice" or to make room for a "favorite." 1 ANNALS OF CONGRESS, *supra* n. --, at 497. Monarchs have favorites for various reasons. Elected officials look especially favorably on those who will help them be reelected.

[337] This point applies both to those who thought the Constitution requires Senate involvement in removal and those who thought the Constitution allows it, at Congress's option.

[338] *Seila Law*, 140 S. Ct. at 2203.

[339] *Id*.

[340] *Id*. at 2226 (Kagan, J., dissenting).

referred to "political," not just presidential, pressure.[341] The legislators who created the CFPB were not so naïve as to think that only the President is subject to the influence of politically powerful interests. Nor were supporters of Senate involvement in 1789 so naïve as to deny that Senators are political actors.[342] There is no reason to think that they were concerned with the ability of subordinate executive officials to make policy choices free from political influence.[343]

Supporters of Senate involvement did not reject the unitary-executive principle, so their views are consistent with the unitarian aspect of the new thesis. The reasons they offered for restricting presidential removal are also consistent with the new thesis.

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[341] Independent central banks, the most important kind of independent agency, are independent of political and not just executive control. When the Bank of England became independent of political control in 1997, it simultaneously became independent of the executive and the legislature, which in the British constitution are not separated. *See* John Evemy, *The Bank of England, Operational Independence, and the Financial Crisis*, 14 BRITISH POLITICS 347 (2018) (discussing relationship between the independent Bank of England and the Finance Ministry during the 2007-2008 financial crisis). The famously independent German Bundesbank also operates in a parliamentary system. *See* Helge Berger, *The* Bundesbank*'s Path to Independence: Evidence from the 1950s*, 93 PUB. CHOICE 427, 427 (1997) ("the literature on central bank independence finds the *Bundesbank* to be the most independent and conservative central bank in the world").

[342] A response to the point that support for Senate involvement in removal is support for more, not less, political influence on removal, is that bringing the Senate into the process might on balance political influence. Removal only with Senate consent requires that more politicians agree on removal, and so might make removal for political reasons harder. With that in mind, supporters of Senate involvement in 1789 might have thought that requiring Senate consent would allow appointees to make policy decisions free from political influence. Proponents of Senate involvement in 1789, however, did offer promotion of policy independence as a virtue of requiring Senate consent. They did not say anything about policy independence as it is understood today.

[343] In claiming that supporters of Senate involvement in 1789 did not base their argument on policy independence in today's sense, I do not claim that they would have regarded that kind of independence as unconstitutional. The available evidence does not support any firm conclusion concerning their views about policy independence. The evidence does support the conclusion that supporters of Senate involvement did not point to policy independence in today's sense as a benefit of requiring Senate consent to removal. That conclusion is crucial for today's debate about the unitary executive, because supporters of Senate involvement are often treated as opponents of the unitarian principle. Their positions on removal do not entail that they were.

According to the new thesis, Congress may forbid removal based on failure to carry out an illegal order, just as it may take other steps to prevent unlawful executive actions.[344] Congress may limit removal used for patronage purposes.[345] Keeping the President from using federal employment as a source of political and electoral support was a legitimate goal in 1789 and remains legitimate today

Senate involvement in removal is unquestionably inconsistent with inherent sole presidential removal power. It is not inconsistent with the new unitary executive thesis. The new thesis entails no conclusion about Senate involvement, and so is neutral about it. All the new thesis requires is that the President be able to perform his function, including directing policy choice. Just as civil-service protections can be consistent with presidential control, so can Senate consent to removal. If cabinet members have a legally enforceable obligation to follow the President's orders, Senate consent to their removal is consistent with presidential control, for example.[346]

Among positions that are under consideration in the 21st century, the new unitary executive thesis is most consistent with all the views expressed in 1789.[347]

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[344] *See infra* – (describing consequences of the new thesis).

[345] *See infra* -- (describing consequences of the new thesis).

[346] Senate involvement in removal is not consistent with today's doctrine concerning the power of houses of Congress to act outside the Article I legislative process. *Supra* n. – (explaining that requiring Senate consent to removal would be inconsistent with *INS* v. *Chadha*). Independent of precedent, the Constitution does not allow Senate involvement in removal, for reasons unrelated to the unitary executive principle. Removal can be effected through legislative, executive, or judicial power. Insofar as legislative power can remove an official, the Senate must act with the House and President through the law-making power. Insofar as removal is done with executive power, the Senate has no role. Its involvement in appointment is an explicit qualification of the President's possession of the executive power, and is limited to its terms. Insofar as removal is done with judicial power, the Senate has only the small piece of that power that it holds as the court of impeachment.

[347] After creating the Department of Foreign Affairs, Congress applied the Decision of 1789, whatever it was, to the new War and Treasury Departments. DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801, 41 (1997). In discussing the Treasury Department, Madison made a remark concerning the Treasury Comptroller that are sometimes taken to suggest that Madison did not believe that the President had to control executive functions. As Professor Bamzai has recently shown, that interpretation seriously

IV. Implications of the New Thesis for Congress's Options in Structuring the Government

The new unitary executive thesis is abstract and a standard. This section elaborates on its application to some significant and familiar problems. First, this section explains why the most common ways in which Congress has structured the executive are constitutional, even though those structures include strong limits on at-will removal by the President.

Next, this section explains why agency independence as currently understood is unconstitutional even though the Constitution does not confer at-will removal power. Two leading examples – the CFPB and the Independent Counsel provisions of the Ethics in Government Act – fail the test under the new thesis, but not simply because of removal restrictions.

A. The Constitutionality of the Systems of Presidential Control Primarily Used in the Armed Forces and Most Civilian Agencies

If the Vesting Clause of Article II and the Take Care Clause empower the President to remove executive officials at will, the current rules about federal employment are largely unconstitutional. In the civilian government, only a small fraction of officers serve with tenure that turns over with presidential

misunderstands Madison's thinking about the Comptroller and the unitary executive principle. *See* Aditya Bamzai, *Tenure of Office and the Treasury: The Constitution and Control over National Financial Policy, 1787-1867*, 87 GEO. WASH. U. L. REV. 1299, 1330 (2019) (showing that Madison's discussion of the Comptroller accepted presidential power to remove that officer).

administrations.[348] The President has no general authority to remove members of the armed forces from the service.[349]

Any version of the unitary executive thesis must either reject that leading feature of the government or explain why it is constitutional. Removal power absolutism would lead to its rejection. The new unitary executive thesis produces a straightforward justification for that familiar system. No one tool of presidential control is constitutionally mandated. The new thesis accords Congress substantial flexibility as long as its statutes respect presidential primacy by providing adequate means of control. Although the vast bulk of federal employees do not serve at the President's pleasure, the President can direct their activities and control policy choices.

Most of the civilian government combines two effective means of presidential control. Policy-making officials are selected and removable by the President or are selected and removable by someone who bears that relation to the President.[350] Lower-level

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[348] In presidential election years, Congress prepares the so-called "Plum Book," identifying policy-level positions that turn over with a change in administration. *See*, *e.g.*, UNITED STATES SENATE COMMITTEE ON HOMELAND SECURITY, UNITED STATES GOVERNMENT: POLICY AND SUPPORTING POSITIONS (Comm. Print 2016) (2016 Plum Book). The 2016 Plum Book identifies over 9,000 Federal civil service "leadership and support positions in the legislative and executive branches of the Federal Government that may be subject to noncompetitive appointment." *Id*. at iii. That number of positions is a small fraction of total federal civilian employment. In 2020, the Office of Management and Budget estimated the total federal civilian workforce, excluding the Postal Service, at 2,206,137. Congressional Research Service, FEDERAL WORKFORCE STATISTICS SOURCES: OPM AND OMB 6 (2020) (reproducing OMB figures from recent presidential budgets).

[349] For example, current law prohibits discharge of officers in peacetime except by sentence of a court martial or in commutation of the sentence of a court martial. 10 U.S.C. § 1161(a). In a forthcoming major study of congressional and presidential power respecting the armed forces, Professor Zachary Price summarizes the situation: "With respect to the military, by contrast [with civilian agencies], longstanding practice supports allowing limits on presidential removal authority, at least during peacetime, so long as Congress has provided by law for robust alternative means of command discipline." Zachary S. Price, *Congressional Authority Over Military Offices*, TEX. L. REV. [213-14] (forthcoming 2021).

[350] *See*, *supra* n. – (listing offices that turn over with change in administration). Heads of Cabinet agencies, for example, are appointed by the President with no tenure protection. *See*, *e.g.*, 15 U.S.C. § 1501 (providing for appointment of

officials are required to carry out their duties as defined by policy-making officials.[351] Neither means of control is perfect, of course, but both work reasonably well.[352] Today's federal government is large, and no doubt exercises statutorily granted policy authority in many ways that are not consistent with the President's views. Exactly the same would be true if the President had the power to remove all federal employees at will. One person with a small staff cannot fully control an organization as large as the federal government, no matter what tool is available.

The armed forces largely implement presidential policy because they are mainly structured with one tool of control that is quite effective. Command hierarchies do not always follow the policy of their chief, but they generally do. If the President decides to launch a strike against Iranian nuclear facilities, the strike almost certainly will happen, for example.

A system in which the chief operates through binding orders does impose an important burden. The order-giver must be able to formulate an order that is clear enough that a violation can be identified and well enough adapted to its purpose that carrying it out will achieve the superior's goal. Recalcitrant subordinates have been known to respond to unwelcome orders with a strict compliance that will not achieve the orders' purpose.[353] A superior faced with such a subordinate might well yearn for the ability to replace that subordinate with someone who is with the program. Despite that weakness, command structures like that of the military are quite effective in putting superiors in charge.

B. The Unconstitutionality of Agency Policy Independence

Secretary of Commerce by the President with the advice and consent of the Senate with no limitation on the President's removal power).

[351] *See supra* n. – (explaining that civilian employees are subject to sanction for unacceptable performance and agency heads have authority to prescribe employee conduct).

[352] *See supra* – (discussing effectiveness of control of personnel and command hierarchies).

[353] A leading example of that kind of resistance by subordinates is the "work-to-rules" action, in which protesting workers carefully observe every rule and perform only their assigned functions, often with the result that work grinds to a halt or proceeds very slowly. *See* JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED 310 (1998) (describing work-to-rules as a form of protest).

The new unitary executive thesis is a unitary executive thesis. It shares a central implication with other versions: agency policy independence is unconstitutional. Congress may not act with the purpose of giving executive officials policy-making authority that is to be exercised without regard to the President's policy views. Whatever its purpose, Congress may not give officials policy-making authority that is not substantially under presidential control. This section applies the new thesis to two important cases, *Seila Law* and *Morrison v. Olson*.

1. The Unconstitutionality of the CFPB's Provisions Limiting Presidential Authority

Seila Law provides an example of unconstitutional independence. Congress's purpose in structuring the CFPB was to enable its Director to make important decisions, in both regulation and enforcement, without regard to the President's views of sound policy. That conclusion follows whether purpose is assessed objectively or subjectively. Without regard to purpose, the statute did not provide the President with adequate means to control the CFPB's policy.

Sophisticated readers of the Dodd-Frank Act, which created the agency, inferred from the statute's content that its purpose was to insulate the CFPB from policy control by Congress or the President.[354] The Director's five-year term and tenure protection supported that inference.[355] Especially telling was the content of that tenure protection. Allowing removal for failure to follow presidential policy would have enabled the President to direct policy while limiting purely partisan influence. Congress did not follow that route.

Other features of the statute confirm that Congress sought to shift control over lawful policy choices, and not only to keep

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[354] The editors of the *Harvard Law Review* drew that inference from their review of the statute's provisions governing the agency. "The Bureau's design thus imports the high degree of independence reserved for the nonpolitical judgments of the Federal Reserve Board into the sphere of general regulatory agencies, which suggests an unprecedented lack of accountability for an agency making policy judgments." *Recent Legislation – Administrative Law – Agency Design – Dodd-Frank Act Creates the Consumer Financial Protection Bureau*, 124 HARV. L. REV. 2123, 2123 (2011). As the editors noted, the Director serves for five years and is removable only for cause, and the agency does not depend on Congress for funding. *Id.* at 2115-26.

[355] *Id.*

agency choices within the law. Like other agencies, the CFPB was subject to statutory requirements designed to ensure that agency decisions would comply with the law, including the requirement that those decisions rested on relevant expertise. Most important is that the CFPB's actions are subject to the APA, just as are those of agencies whose heads may be freely removed.[356] Agency action, such as CFPB regulatory action, is subject to judicial review to ensure that it is consistent with the Constitution and statutes and not arbitrary or capricious.[357] Courts conducting judicial review under the APA ensure that policy decisions are within the bounds of the law and reflect rational decision making.[358] Congress subjected the CFPB to the same safeguards of lawfulness and rationality it imposes on other agencies, and added a restriction on presidential removal authority. The point of the latter provision was to shift policy-making authority, not to cabin it within the law. The former goal already had been achieved.

Both subjective purpose and the effects of the removal restriction on presidential control can be discerned in litigation arising from CFPB Director Richard Cordray's resignation in November 2017.[359] Prior to resigning, Cordray had appointed Leandra English to be Deputy Director of the agency.[360] The CFPB's statute provides that the Deputy Director shall serve as Acting Director in the "absence or unavailability" of the Director.[361] Another statute, the Vacancies Act, deals with vacancies in Senate-confirmed posts generically. When a vacancy in such a post arises, the President may designate another Senate-confirmed officer to perform the functions and duties of the vacant office.[362] The President designated Mick Mulvaney, who had been confirmed by the Senate as Director of the Office of Management

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[356] The CFPB is an "authority of the government of the United States," 5 U.S.C. § 551(1), that does not come within any of the exceptions in that section and is not otherwise excepted from the definition, so it is an "agency" within the meaning of the APA, *id*.

[357] *See* 5 U.S.C. § 706(2) (providing that reviewing courts are to set aside agency action contrary to the Constitution or statutes, or arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law).

[358] *See, e.g.*, Motor Vehicles Mfrs. Ass'n v. State Farm Ins., 463 U.S. 29 (1983) (holding that regulation was arbitrary and capricious because not adequately reasoned).

[359] *See* English v. Trump, 279 F. Supp. 3d 307 (D.D.C. 2018).

[360] *Id*. at 313-14.

[361] 12 U.S.C. § 5491(b)(5)(B).

[362] 5 U.S.C. § 3345(a)(2).

and Budget, to perform the CFPB Director's functions and duties.[363] Deputy Director English sued Director Mulvaney and the President, seeking an injunction ordering the President to withdraw his designation of Mulvaney and not to designate anyone else to act as Director of the CFPB.[364]

In that lawsuit, the subjective purposes behind the CFPB's structure were put before the court. A group of current and former members of Congress appeared as amici.[365] Their brief argued that the specific provision of the Dodd-Frank Act concerning vacancies displaced the generic Vacancies Act.[366] The Act took that step, they argued, "[t]o ensure that the Bureau would maintain its independence even when its Director position was vacant."[367] Allowing an "acting Director, no matter how close his ties to the President, to head the Bureau for many months," the brief maintained, "would plainly undermine the independence that was so critical to Congress's plan in designing the Bureau."[368] Among the amici were leading proponents of the Dodd-Frank legislation, including Speaker Pelosi, Senator Warren, former Senator Dodd, and former Representative Frank.[369]

English v. Trump also confirms that the statute's restriction on presidential control was as substantial in practice as it was designed to be. The President designated OMB Director Mulvaney to head the CFPB because control over personnel was his only tool for directing the agency. Deputy Director English contested the President's decision, and members of Congress appeared as amici, because choosing the agency head was the President's only way to direct the agency. Congress had provided no other.[370]

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[363] *English*, 279 F. Supp. 3d at 314.

[364] *Id*. at 311.

[365] *See* Brief of Current and Former Members of Congress in Support of Plaintiff's Motion for a Preliminary Injunction, English v. Trump, 279 F. Supp.3d 307 (D.D.C. 2018).

[366] *Id*. at 2-3.

[367] *Id*. at 4.

[368] *Id*.

[369] *Id*. at 1A-3A (listing amici).

[370] As *Seila Law* notes, CFPB rules can be set aside by a super-majority of the Financial Stability and Oversight Council in "extreme situations" in which the regulation would put the banking or financial system at risk. 140 S. Ct. at 2204 n. 9. The Court concluded that that "narrow escape hatch" did not render the CFPB's structure constitutional. *Id*.

2. The Ethics in Government Act's Independent Counsel System

For Justice Scalia, the Independent Counsel created by the Ethics in Government Act of 1978 power away from the President.[371] Applying the new unitary executive thesis to that statute leads to the same conclusion as to constitutionality, but via a somewhat different route and without so colorful a phrase.

This discussion of the Independent Counsel will begin with the effects-based component of the new thesis. That order of analysis is useful because the inquiry into effects brings out aspects of the statute that bear on the purpose-based component of the new thesis.

The Ethics in Government Act dramatically limited the President's ability to control the Independent Counsel's discretion. The President had no direct power over the Counsel. Independent Counsel were appointed by a court, and all relevant authority held by an executive officer was in the Attorney General, through whom the President would have to act.[372] The statute allowed for removal by the Attorney General only on grounds that did not include discretionary choices of which the Attorney General or the President disapproved.[373] Removal was not available as a tool of control. Under the new thesis, the question then arises whether the President had any other means by which to exercise policy control.

The answer to that question depends on a provision of the act that may have been deliberately Delphic. Independent Counsel were required to comply with Department of Justice policy, "except where not possible."[374] Absent the qualifier, that requirement would have given the President substantial ability to direct the Counsel. That authority would have had to have been exercised through the Attorney General, but the Attorney General serves at the President's pleasure. A requirement to state policy puts some burden on the officer who must state it, but the burden is small. Government principals often direct their agents by setting

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[371] Justice Scalia found that the statute "deprive[d] the President of the United States of exclusive control over the exercise of" a function, prosecution, that is part of the executive power. *Id*. at 705.

[372] *See id*. at 660-63 (opinion of the Court) (describing appointment of Independent Counsel by a panel of a court of appeals on application by the Attorney General).

[373] *Id*. at 663 (describing provision governing removal of Independent Counsel).

[374] *Id*. at 662 (quoting statute).

out policy. At-will removal is not necessary for substantial command.

The qualifier nevertheless was quite readily interpreted as a substantial restriction on the Attorney General and the President. In what sense could compliance have been impossible? Physical impossibility was not likely, but the qualifier must have meant something. Compliance with Department policy could have made implementation of the Counsel's own policy impossible. That construction of impossibility – that it gave the Counsel policy independence – matches the non-executive selection process for the office and the office's name. That is the most likely reading of the statute. If the statute did give the Counsel authority to make policy independently, as it almost certainly did, then the system it set up gave the President no control on that score and was unconstitutional.

Deciding whether the statute's purpose was impermissible calls for an elaboration of the new thesis. The driving force behind the statute was the concern that the Attorney General, being politically and often personally close to the President, would make prosecutorial decisions on partisan and personal grounds.[375] Prosecutors should not consider personalities or partisan politics, so eliminating those considerations is by itself a legitimate purpose. But the statute did not legislate against those grounds of decision. Nor did it forbid removal for the Counsel's refusal to act on those grounds. Rather, Congress chose to paint with a broader brush. By giving the Attorney General no control, Congress kept the Attorney General from exercising lawful discretion by making prosecutorial choices on legitimate policy grounds. Instead, that discretion within the law was given to the Independent Counsel.

A purpose to vest policy discretion in a lower-level official with no presidential supervision is impermissible. But deciding whether Congress had that purpose in the Ethics in Government

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[375] That concern was expressed by the statute's supporters and is manifest in its content. The House Judiciary Committee report on the bill that became the Independent Counsel title of the Ethics in Government Act explains, "The purpose of the legislation is to provide a mechanism for the court appointment of a temporary special prosecutor when necessary in order to eliminate the conflict of interest inherent when the Department of Justice must investigate and prosecute high-level executive branch officials." H.R. REP. NO. 95-1307, at 1 (1978). The non-executive selection of, and limited removal power over, the Independent Counsel demonstrate an objective purpose to prevent the President from controlling the Counsel's decisions.

requires an elaboration of the new thesis's conception of impermissible purpose. Congress chose to keep the President from controlling the Counsel for *any* reason in order to keep the President from acting for an *improper* reason. Under the new thesis, that purpose is impermissible, even though legislating against partisanship is not as such impermissible. Congress chose not to implement a constitutional imperative of presidential policy authority. The statute subordinated that imperative to a legitimate interest, but it subordinated the imperative nevertheless. Rejecting presidential supremacy within the executive is impermissible as a means to an end and also as an end in itself. Congress may not decide that another goal is more important than the Constitution's goal. The new unitary executive thesis admits legitimate reasons to burden presidential policy authority, but admits no legitimate reason to eliminate presidential policy authority. It is not a balancing test.[376]

The Independent Counsel system was unconstitutional, but not simply because of the removal restriction.[377]

Conclusion

This article presents a new claim about the meaning of a Constitution that is more than 200 years old. A natural response is to ask what took so long for this to occur to someone.

A brief answer begins by noting that although the Constitution's words and concepts were not new in 1787, the

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[376] For someone who believes that presidential control and supervision are important interests that may lose out to even more important interests, the Independent Counsel system may seem an example of compelling interests outweighing the President's constitutional function. It was not. The Constitution addresses the problem that the President might decide not to prosecute his own misconduct and that of high officials. The President and all civil officers are subject to impeachment, conviction, and removal from office. U.S. CONST., Art. II, § 4 (providing for removal of civil officers on conviction by the Senate for treason, bribery, or other high crime or misdemeanors). The interest in saving the House and Senate the trouble of impeachment for high-ranking officials like the President and Attorney General is not compelling.

[377] The statute was also subject to constitutional objections under the Appointments Clause, which are distinct from the objections under the unitary executive principle. *See Morrison*, 487 U.S. at 670-77 (describing and rejecting the argument that the Independent Counsel was not an inferior officer who could be appointed by a court of law); *id*. at 715-24 (arguing that Independent Counsel was not an inferior officer) (Scalia, J., dissenting).

Constitution was. It combined existing words and concepts to create a novel system of government. The combination that created the Electoral College, for example, was novel. So was the Vesting Clause of Article II, in the context of a Constitution that also contains the Take Care Clause and the Necessary and Proper Clause. So was the detailed system of separated power that contributes to the context of every provision of the Constitution. The Constitution and the system of government it created were new things, made from existing concepts.

Even before the Constitution was complete, many of its drafters understood that in the new system, the President would be in command of administration and law-execution.[378] The new unitary executive thesis is a detailed elaboration of a basic inference that has been drawn from the text since before the text's adoption. Available understandings of any phenomenon, including a legal phenomenon like the Constitution, can become sharper and more detailed over time. New developments raise new questions that can lead to more elaborate understandings. Questions about the roles of the Senate and the President arose in 1789 that may not have been anticipated a few years before in Philadelphia. Only when Congress set about creating executive departments did some important but latent issues come to the fore.[379]

More than two centuries may still seem like a long time for the emergence of an elaboration like the new thesis. The new thesis, however, follows from a shift in focus that was understandably a long time coming. Beginning in 1789, the practical question about the President's role with respect to the rest of the executive frequently involved removal. American constitutional thinking often focuses on concrete issues, especially issues that come before the Supreme Court. Beginning with *Myers*, the President's status as chief executive was mainly discussed in cases about removal power.[380] A shift in focus to a more general view of presidential power, a view that includes but is not limited to removal, was under those circumstances unsurprisingly delayed. The new thesis, along with other claims about the more general question, took time to emerge.

Whether 230 years is a long time depends on the scale on which time is measured. According to its Great Seal, the United

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[378] *See supra* – (describing understandings at the Federal Convention).

[379] *See supra* – (describing 1789 removal debates).

[380] *See supra* – (describing the Court's removal cases).

States takes the long view. *Novus Ordo Seclorum* the Seal reads – a new order of the ages.[381] Measured by the ages, two centuries and a few decades is just a beginning.

[381] *See* 4 U.S.C. § 41 (Great Seal of the United States shall be the seal used by the United States in Congress Assembled); 22 J. CONTINENTAL CONG. 339 (resolution of June 20, 1782, adopting Great Seal with "*Novus Ordo Seclorum*" on the reverse).

By the President of the United States of America:

A Proclamation.

Whereas, on the twenty-second day of September, in the year of our Lord one thousand eight hundred and sixty-two, a proclamation was issued by the President of the United States, containing, among other things, the following, to wit:

"That on the first day of January, in the year of our Lord one thousand eight hundred and sixty-three, all persons held as slaves within "any State or designated part of a State, the people "whereof shall then be in rebellion against the "United States, shall be then, thenceforward, and "forever free; and the Executive Government of the "United States, including the military and naval "authority thereof, will recognize and maintain "the freedom of such persons, and will do no acts "or acts to repress such persons, or any of them, "in any efforts they may make for their actual "freedom.

"That the Executive will, on the first day

"of January aforesaid, by proclamation, designate
"the States and parts of States, if any, in which the
"people thereof, respectively, shall then be in rebellion
"against the United States; and the fact that any
"State, or the people thereof, shall on that day, be, in
"good faith, represented in the Congress of the United
"States by members chosen thereto at elections
"wherein a majority of the qualified voters of such
"State shall have participated, shall, in the absence
"of strong countervailing testimony, be deemed con-
"clusive evidence that such State, and the people
"thereof, are not then in rebellion against the
"United States."

Now, therefore I, Abraham Lincoln, President of the United States, by virtue of the power in me vested as Commander-in-Chief, of the Army and Navy of the United States in time of actual armed rebellion against the authority and government of the United States, and as a fit and necessary war measure for suppressing said rebellion, do, on this first day of January, in the year of our Lord one thousand eight hundred and sixty-three, and in accordance with my purpose so to do publicly proclaimed for the full period of one hundred days, from the

day first above mentioned, order and designate as the States and parts of States wherein the people thereof respectively, are this day in rebellion against the United States, the following, to wit:

Arkansas, Texas, Louisiana, (except the Parishes of St. Bernard, Plaquemines, Jefferson, St. John, St. Charles, St. James Ascension, Assumption, Terrebonne, Lafourche, St. Mary, St. Martin, and Orleans, including the city of New Orleans) Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina, and Virginia, (except the forty-eight counties designated as West Virginia, and also the counties of Berkley, Accomac, Northampton, Elizabeth City, York, Princess Ann, and Norfolk, including the cities of Norfolk and Portsmouth,) and which excepted parts are, for the present, left precisely as if this proclamation were not issued.

And by virtue of the power, and for the purpose aforesaid, I do order and declare that all persons held as slaves within said designated States, and parts of States, are, and hence-forward shall be free; and that the Executive

government of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons.

And I hereby enjoin upon the people so declared to be free to abstain from all violence, unless in necessary self-defence; and I recommend to them that, in all cases when allowed, they labor faithfully for reasonable wages.

And I further declare and make known, that such persons of suitable condition, will be received into the armed service of the United States to garrison forts, positions, stations, and other places, and to man vessels of all sorts in said service.

And upon this act, sincerely believed to be an act of justice, warranted by the Constitution, upon military necessity, I invoke the considerate judgment of mankind, and the gracious favor of Almighty God.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington, this first day of January, in the year of our Lord

one thousand eight hundred and sixty three, and of the Independence of the United States of America the eighty-seventh.

Abraham Lincoln

By the President:

William H. Seward

Secretary of State

McGuireWoods

Presidential Executive Order Targets DEI in Higher Education

January 22, 2025

The Ending Illegal Discrimination and Restoring Merit-Based Opportunity Executive Order (EO) issued on Jan. 22, 2025, takes aim at diversity, equity and inclusion programs at institutions of higher education. (McGuireWoods' affirmative action and OFCCP compliance team cover the other provisions of this Executive Order here.) The EO begins with the premise that "institutions of higher education have adopted and actively used dangerous, demeaning, and immoral race- and sex-based preferences under the guise of so-called 'diversity, equity, and inclusion' (DEI) or 'diversity, equity, inclusion, and accessibility' (DEIA) that can violate the civil-rights laws."

Here's what higher education institutions need to know.

- **Institutions of higher education with endowments over $1 billion may face investigations and federal lawsuits.** The EO requires the attorney general within 120 days or by May 22, 2025, in consultation with relevant federal agencies like the Department of Education, to submit a report to the assistant to the president for domestic policy containing recommendations for enforcing federal civil rights laws.
    - The attorney general's report shall include a "plan of specific steps or measures to deter DEI programs or principles (whether specifically denominated 'DEI' or otherwise) that constitute illegal discrimination or preferences." As part of this plan, the Department of Education and other agencies shall identify up to "nine potential civil compliance investigations of . . . institutions of higher education with endowments over 1 billion dollars," among other types of organizations such as publicly traded corporations, large nonprofit corporations or associations, foundations with assets of $500 million or more, and state and local bar and medical associations.
    - The attorney general's report will identify key sectors of concern, which likely will include higher education. The report also must identify the most egregious and discriminatory DEI practitioners in each sector, which may include the wealthiest and most prestigious colleges and universities.
    - The attorney general's report also will identify litigation appropriate for federal lawsuits, intervention or statements of interest in addition to potential regulatory action and subregulatory guidance.
- **Joint guidance from the U.S. Departments of Justice and Education on compliance with *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (SFFA), 600 U.S. 181 (2023), is forthcoming by May 22, 2025.** The EO requires the attorney general and secretary of education to issue joint guidance to all state and local educational agencies that receive federal funds and institutions of higher education that receive federal grants or participate in federal programs under Title IV of the Higher Education Act of 1965, as amended, regarding the measures and practices required to comply with SFFA.

The EO addresses First Amendment freedoms and specifically does not prevent “State or local governments, Federal contractors, or Federally-funded State and local educational agencies or institutions of higher education from engaging in First Amendment-protected speech” and “does not prohibit persons teaching at a Federal funded institution of higher education as part of a larger course of academic instruction from advocating for, endorsing, or promoting the unlawful employment or contracting practices prohibited by this order.”

Institutions of higher education, especially those with an endowment of $1 billion or more, should review their policies and practices for compliance with civil rights laws such as but not limited to Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and Title VII of the Civil Rights Act of 1964, among other civil rights laws.

McGuireWoods’ higher education practice group tracks developments on the implementation of this EO, including the attorney general’s report and the forthcoming Joint Guidance on SFFA. For additional information or questions about the information contained in this legal alert, please contact the authors.

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McGuireWoods

New Executive Order Revokes Executive Order 11246 and Targets Employer DEI Efforts

January 22, 2025

On Jan. 22, 2025, President Donald Trump issued a new executive order titled “Ending Illegal Discrimination And Restoring Merit-Based Opportunity,” which revoked Executive Order 11246 and directs federal enforcement agencies to target employers’ diversity efforts. Executive Order 11246 imposed federal nondiscrimination and affirmative action employment obligations on covered federal government contractors and subcontractors.

New Executive Order Actions

The new executive order revokes a variety of federal diversity, equity and inclusion (DEI); diversity, equity, inclusion and accessibility (DEIA); and affirmative action federal executive orders and presidential memoranda, including:

- Executive Order 11246 of Sept. 24, 1965 (Equal Employment Opportunity)
- Executive Order 13672 of July 21, 2014 (Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity)

The new executive order also:

- Directs that “[t]he Office of Federal Contract Compliance Programs within the Department of Labor shall immediately cease: (A) Promoting ‘diversity’; (B) Holding Federal contractors and subcontractors responsible for taking ‘affirmative action’; and (C) Allowing or encouraging Federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin.”
- Advises that “[f]or 90 days from the date of this order, Federal contractors may continue to comply with the regulatory scheme in effect on January 20, 2025.”
- Directs the Director of the Office of Management and Budget (OMB), with the assistance of the Attorney General, to:
  - “Excise references to DEI and DEIA principles, under whatever name they may appear, from Federal acquisition, contracting, grants, and financial assistance procedures to streamline those procedures, improve speed and efficiency, lower costs, and comply with civil-rights laws;” and
  - “Terminate all ‘diversity,’ ‘equity,’ ‘equitable decision-making,’ ‘equitable deployment of financial and technical assistance,’ ‘advancing equity’ and like mandates, requirements, programs, or activities, as appropriate.”

- States that “[i]t is the policy of the United States to protect the civil rights of all Americans and to promote individual initiative, excellence, and hard work. I therefore order all executive departments and agencies (agencies) to terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements. I further order all agencies to enforce our longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities.”
- Directs the head of each agency to include in every contract or grant award the following language:
  - “A term requiring the contractual counterparty or grant recipient to agree that its compliance in all respects with all applicable Federal anti-discrimination laws is material to the government’s payment decisions for purposes of section 3729(b)(4) of title 31, United States Code.”
  - “A term requiring such counterparty or recipient to certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.”

Implications for Federal Contractors

Executive Order 11246, Section 503 of the Rehabilitation Act of 1973 (the Rehabilitation Act), and Section 402 of the Vietnam Era Veterans’ Readjustment Assistance Act of 1974 (VEVRAA) *each* imposed nondiscrimination and affirmative action obligations on holders of covered federal government contracts and subcontracts.

These obligations are enforced by the Office of Federal Contract Compliance Programs (OFCCP) within the U.S. Department of Labor. OFCCP has authority to proactively audit covered contractor facilities regarding compliance with these obligations, even when there is no individual or class complaint of discrimination.

The new executive order has significant implications for federal contractors and subcontractors covered by this regulatory structure. Of note:

1. The nondiscrimination requirements of Executive Order 11246 and its affirmative action requirements regarding *women and minorities* (and OFCCP’s related implementing regulations) are no longer operative. However, as discussed below, nondiscrimination requirements of Title VII and other federal anti-discrimination laws continue to be in effect.
2. Federal affirmative action, nondiscrimination, and reasonable accommodation requirements regarding *disabled individuals and protected veterans* remain in place as those obligations emanate from statutes (i.e., the Rehabilitation Act and VEVRAA) that are not subject to executive action.
3. The new executive order does not alter federal nondiscrimination, non-harassment, and anti-retaliation obligations with respect to race, color, sex, gender, sexual orientation, sexual preference, pregnancy, religion, national origin, age, and disability under Title VII of the Civil Rights Act of 1964, the Equal Pay Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act.

4. The revocation of Executive Order 11246 impacts pending and new OFCCP audits — as the agency's audit jurisdiction is predicated on Executive Order 11246 and its implementing regulations. OFCCP audit requests focus on an employer's "current" affirmative action plans, and the new executive order provides that contractors "*may* continue to comply with the regulatory scheme" for now (indicating that compliance is discretionary). Further, the new executive order directs OFCCP to "immediately cease" certain activities related to OFCCP's audit practices and the agency's focus on statistical impact.
5. The new federal contracting/grant compliance requirement (i.e., "compliance in all respects with all applicable Federal anti-discrimination laws") and certification requirement (i.e., "certify that [the employer/entity] does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws") appear to be subject to enforcement through False Claims Act mechanisms, which presents the risk of costly investigations and the potential for significant liability.

Targeting of Employer DEI Efforts

Even if an employer is *not* a federal contractor or subcontractor, the new executive order is notable in that:

- It highlights the Trump administration's view that many private-sector DEI preferences, mandates, policies, programs, and activities are "illegal" under existing federal civil rights laws.
- It echoes arguments that many private groups and litigants have asserted in claims over the last few years regarding corporate DEI efforts.
- It raises the specter that the new administration and its appointees will direct the U.S. Equal Employment Opportunity Commission (EEOC) and other agencies to aggressively investigate "reverse" and other discrimination claims regarding employer DEI activity generally.

For example, the new executive order:

- Directs the Attorney General over the next 120 days, "in consultation with the heads of relevant agencies and in coordination with the Director of OMB," to submit a report "containing recommendations for enforcing Federal civil-rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI."
- States that such a report shall contain a proposed strategic enforcement plan identifying "[a] plan of specific steps or measures to deter DEI programs or principles (whether specifically denominated 'DEI' or otherwise) that constitute illegal discrimination or preferences."
- Directs that as a part of this plan each federal agency shall identify for enforcement targeting "up to nine potential civil compliance investigations of publicly traded corporations, large non-profit corporations or associations, foundations with assets of 500 million dollars or more, State and local bar and medical associations, and institutions of higher education with endowments over 1 billion dollars."

Further, new Acting Chair of EEOC Andrea R. Lucas noted in an EEOC press release issued on Jan. 21, 2025:

> "I look forward to restoring evenhanded enforcement of employment civil rights laws for all Americans. In recent years, this agency has remained silent in the face of multiple forms of widespread, overt discrimination. Consistent with the President's Executive Orders and priorities, my priorities will include rooting out unlawful DEI-motivated race and sex discrimination; protecting American workers from anti-American national origin discrimination;

defending the biological and binary reality of sex and related rights, including women's rights to single sex spaces at work; protecting workers from religious bias and harassment, including antisemitism; and remedying other areas of recent under-enforcement."

Where Can I Learn More?

A copy of the new executive order can be found here:

- New Executive Order

A copy of the White House's fact sheet on the new executive order can be found here:

- Fact Sheet

For questions about the new executive order and its implications for OFCCP audits, DEI programming and beyond, please contact the authors, your McGuireWoods contact, or a member of the firm's affirmative action, labor and employment, or federal contracting teams.

RELATED WEBINAR

Federal Affirmative Action and DEI Update

The End of EO 11246 and Beginning of New Enforcement Targets
January 28, 2025
1-2 p.m. (ET) | 12-1 p.m. (CT) | 10-11 a.m. (PT)

Join a panel of affirmative action and government contracting team members from McGuireWoods for an overview of the new executive order and related legal implications and risks for all.

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Higher Education Institutions Cautioned Against Misleading Statements About External Service Providers

January 29, 2025

On Jan. 14, 2025, the U.S. Department of Education issued guidance through a Dear Colleague Letter that, if left in place by the new administration, could significantly expand Federal Student Aid program reviews, attorney general investigations, and potential *qui tam* actions against institutions of higher education and "external service providers" such as online program managers that engage in business with these institutions. According to the Department, these external service providers and "their respective employees, contractors, or representatives" are subject to federal requirements pertaining to misrepresentation, and eligible institutions can be held liable for any misstatements by those providers.

The Jan. 14, 2025, Dear Colleague Letter

The Department's Dear Colleague Letter "remind[s]" institutions that receive federal financial student aid under Title IV of the Higher Education Act of 1965, as amended, (HEA) of their obligations pertaining to misrepresentations under § 487(c)(3) of the HEA and the Department's regulations, including subpart F of part 668. These requirements prohibit institutions "from providing false, misleading, or inaccurate information about the nature of its educational program(s), its financial charges, or the employability of its graduates." According to the Department, third-party entities also are subject to the same requirements as eligible institutions, and failure to follow those requirements can be attributable to the eligible institution. As such, violation could result in limitation, suspension or termination of the eligible institution's funds.

The Department realized that it could not classify third-party entities such as online program managers as third-party servicers through guidance after unsuccessfully attempting to do so. The Department is now attempting to regulate third-party entities engaged by institutions as "external service providers."

The Department specifies three types of statements related to external service providers that "are likely to qualify as a misrepresentation." First, it focuses on statements that inaccurately identify an external service provider's employee as an employee of the eligible institution, such as when communicating with prospective and enrolled students including by e-mail. The Department clarifies that its primary concern is "the use of contracted staff for recruitment purposes" rather than temporary contractors used to assist financial aid offices during busy seasons. According to the Department, its view that this type of conduct is deceptive is consistent with other federal and state consumer protection laws. The Department noted that "[t]he touchstone" of deciding whether a disclosure is deceptive is "the overall net impression of the representation" rather than "its literal truth or falsity."

Second, the Department states thatdeceptive or misleading statements about a person's role in recruitment could be deceptive. For example, presenting a person who is a sales representative or recruiter as an academic advisor or a counselor, regardless of whether that person is employed by the eligible institution

or external service provider, may qualify as a misrepresentation. The Department's main concern appears to be that some eligible institutions allegedly rewarded salespersons with the title of "counselor" based on their level of sales in violation of the incentive compensation ban.

Third, the final category is representing a program or component or resource that is provided in "substantial part" by an external service provider as " 'the same as' a corollary residential or campus-based version of the program provided by the eligible institution." The Department says that it is misleading and deceptive to describe a program offered by an external service provider as the same as a campus-based program when there may be differences in rates of completion, job placements, earnings or licensures.

The Department is clear that these three scenarios "do not constitute an exhaustive list," meaning the Department could say that analogous scenarios also count as misrepresentations.

Misrepresentations related to the nature of educational programs, financial charges or the employability of graduates may violate the Federal Trade Commission (FTC) Act in addition to the HEA and its implementing regulations. The FTC has brought recent cases against higher education institutions and companies involved in student lending that the FTC has alleged have made false or misleading claims to students.

Possible Implications for Qui Tam Litigation Actions

The Dear Colleague Letter could significantly increase the possibility for Federal Student Aid Program Reviews to include an inquiry into statements and representations by an institution's external service providers. Additionally, state attorneys general may determine that there are parallels between this guidance and the state consumer protection laws referenced in this guidance such that they have grounds to open investigations. The FTC also may use this guidance document to take adverse actions against higher education institutions.

Finally, this guidance invites *qui tam* litigation actions against such institutions and potentially against external service providers. When an institution of higher education receives federal financial student aid under Title IV, it certifies that it complies with all conditions for such funds. Possible litigants could use this Dear Colleague Letter to bring actions against institutions and their external service providers. Institutions that receive Title IV federal financial student aid should evaluate their operations with external service providers and consider the best way to structure their business to ensure that they are well prepared against any possible enforcement actions, investigations, or lawsuits under the Dear Colleague Letter.

Unlike with some prior Dear Colleague Letters, the Department has not set any virtual listening sessions or opportunity to comment. But the Department encouraged schools to contact it through the Contact Customer Support form link in Federal Student Aid's help center regarding any comments or questions.

Please contact the authors if you have questions regarding the Dear Colleague Letter and other education enforcement or compliance concerns.

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Federal Court Temporarily Blocks Parts of Executive Orders Impacting DEI in Government Contracting

February 25, 2025

On Feb. 20, 2025, Judge Adam B. Abelson of the U.S. District Court for the District of Maryland (Baltimore) issued a preliminary injunction enjoining aspects of the enforcement of two executive orders signed by President Donald Trump. Both executive orders — among the first the President signed after his inauguration — sought to curb diversity, equity and inclusion (DEI) initiatives among government contractors, large corporations, nonprofits and other entities. In light of the court's action, certain federal agencies and "other persons who are in active concert or participation with" them are restricted from implementing several key provisions of the executive orders — for now.

The two executive orders at issue are Executive Order 14151 "Ending Radical and Wasteful Government DEI Programs and Preferencing" and Executive Order 14173 "Ending Illegal Discrimination and Restoring Merit-Based Opportunity)." Both executive orders targeted, among other things, DEI activities within the private sector as they applied to government contracts. After issuance of the orders, plaintiffs sought to enjoin enforcement of three key provisions:

1. The "Termination Provision" from EO 14151, providing that every agency, department or commission head, in consultation with the U.S. Attorney General, the U.S. Office of Management and Budget (OMB) and the U.S. Office of Personnel Management, as appropriate, must "terminate, to the maximum extent allowed by law, … all … 'equity-related' grants or contracts."

2. The "Certification Provision" from EO 14173, providing that each agency must include two specific provisions in every contract or grant award:

   a. A term requiring that the contractual counterparty or grant recipient agrees that its "compliance in all respects with all applicable Federal anti-discrimination laws" is material to the government's payment decisions
   b. A term requiring the counterparty or recipient to certify that it "does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws"

3. The "Enforcement Threat Provision" from EO 14173, which requires the U.S. Attorney General — in consultation with agencies and the OMB — to submit a report to the White House containing recommendations for enforcing federal civil rights laws and taking other measures to encourage the private sector to end illegal discrimination and preferences, including DEI. As part of this plan, each agency must identify "up to nine potential civil compliance investigations of publicly traded corporations, large non-profit corporations or associations, foundations with assets of 500 million dollars or more, State and local bar and medical associations, and institutions of higher education with endowments over 1 billion dollars."

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Fourth Circuit Allows Anti-DEI Executive Order Provisions Involving Federal Contractors and Grantees to Proceed

March 19, 2025

On March 14, 2025, a three-judge panel of the U.S. Court of Appeals for the Fourth Circuit lifted a nationwide preliminary injunction that previously halted parts of two DEI-related executive orders signed by President Donald Trump — Executive Order 14151 "Ending Radical and Wasteful Government DEI Programs and Preferencing" and Executive Order 14173 "Ending Illegal Discrimination and Restoring Merit-Based Opportunity."

The features of the executive orders previously enjoined involved (a) the termination of all "equity-related" federal grants and contracts; (b) contractor and grantee certification of anti-discrimination law compliance; and (c) the administration's ability to bring federal False Claims Act (FCA) enforcement actions against organizations based on the new certifications.

Background

On Feb. 20, 2025, Judge Adam Abelson of the U.S. District Court for the District of Maryland (Baltimore) issued a nationwide preliminary injunction halting enforcement of aspects of Executive Orders 14151 and 14173. Both executive orders targeted, among other things, DEI activities within the private sector as they applied to federal government contracts and grants. The provisions of the executive orders enjoined involved:

1. The "Termination Provision" from EO 14151, providing that every agency, department or commission head, in consultation with the U.S. Attorney General, the U.S. Office of Management and Budget (OMB), and the U.S. Office of Personnel Management, as appropriate, must "terminate, to the maximum extent allowed by law, … all … 'equity-related' grants or contracts."
2. The "Certification Provision" from EO 14173, providing that each agency must include two specific provisions in every contract or grant award:
    a. A term requiring that the contractual counterparty or grant recipient agrees that its "compliance in all respects with all applicable Federal anti-discrimination laws" is material to the government's payment decisions.
    b. A term requiring the counterparty or recipient to certify that it "does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws."

The plaintiffs in the action also sought to enjoin the "Enforcement Threat Provision" from EO 14173, which requires the U.S. Attorney General — in consultation with agencies and the OMB — to submit a report to the White House containing recommendations for enforcing federal civil rights laws and taking other measures to encourage the private sector to end illegal discrimination and preferences, including DEI. The preliminary injunction did *not* enjoin the Attorney General from conducting investigations of DEI programs

or producing the White House report under EO 14173. However, the ruling *did* enjoin the administration from bringing any related FCA enforcement actions, including FCA demands, claims or actions, premised on any certification made pursuant to the Certification Provision.

For a detailed summary of the prior district court ruling and the related injunction order, see McGuireWoods' Feb. 25, 2025, alert.

Fourth Circuit Panel Ruling

In a March 14, 2025, opinion, a three-judge panel of the Fourth Circuit lifted Judge Abelson's preliminary injunction, holding that the Trump administration had "satisfied the factors for a stay" of that action pending ongoing appeal.

Circuit Judge Pamela Harris explained the panel's view that the government was likely to succeed on the appeal of the preliminary injunction, noting:

> As the government explains, the challenged Executive Orders, on their face, are of distinctly limited scope. The Executive Orders do not purport to establish the illegality of all efforts to advance diversity, equity or inclusion, and they should not be so understood. Instead, the so-called "Certification" and "Enforcement Threat" provisions apply only to conduct that violates existing federal anti-discrimination law. Nor do the Orders authorize the termination of grants based on a grantee's speech or activities outside the scope of the funded activities. Rather, the "Termination" provision directs the termination of grants, subject to applicable legal limits, based only on the nature of the grant-funded activity itself. On this understanding, the government has shown the requisite likelihood that the challenged provisions do not on their face violate the First or Fifth Amendment.

Although the decision was unanimous, two of the judges on the panel expressed approval of DEI generally, while the other judge questioned the relevance of such approval in the judicial process.

Fourth Circuit Chief Judge Albert Diaz noted in his concurring opinion that "I'm compelled to write separately to address what seems to be (at least to some) a monster in America's closet — Diversity, Equity, and Inclusion initiatives." Per Chief Judge Diaz:

> [D]espite the vitriol now being heaped on DEI, people of good faith who work to promote diversity, equity, and inclusion deserve praise, not opprobrium. For when this country embraces true diversity, it acknowledges and respects the social identity of its people. When it fosters true equity, it opens opportunities and ensures a level playing field for all. And when its policies are truly inclusive, it creates an environment and culture where everyone is respected and valued. What could be more American than that?
>
> Under the most basic tenets of the First Amendment, there should be room for open discussion and principled debate about DEI programs, and whether its corresponding values should guide admissions, hiring, scholarship, funding, or workplace and educational practices.

Chief Judge Diaz further caveated his opinion, noting, "Like my colleague, I too reserve judgment on how the administration enforces these executive orders, which may well implicate cognizable First and Fifth Amendment concerns."

Circuit Judge Pamela Harris echoed Chief Judge Diaz's comments in her concurring opinion, noting, "My vote should not be understood as agreement with the orders' attack on efforts to promote diversity, equity, and inclusion."

By contrast, Circuit Judge Allison Jones Rushing noted in her separate concurring opinion that:

> We must not lose sight of the boundaries of our constitutional role and the imperative of judicial impartiality. Any individual judge's view on whether certain Executive action is good policy is not only irrelevant to fulfilling our duty to adjudicate cases and controversies according to the law, it is an impermissible consideration. A judge's opinion that DEI programs "deserve praise, not opprobrium" should play absolutely no part in deciding this case.

The underlying legal action remains on appeal with the Fourth Circuit, which ordered expedited briefing. And McGuireWoods continues to monitor the evolving legal and regulatory landscape regarding this case and other executive orders.

For questions about these executive orders and the implications on federal contracting, grants and DEI initiatives generally, contact the authors, your McGuireWoods contact, or a member of the firm's federal contracting, affirmative action or labor and employment teams.

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Executive Order Seeks Reform of Higher Education Accreditors' Processes

May 2, 2025

On April 23, 2025, the White House issued an executive order directing the Secretary of Education to investigate and hold accountable accreditors of institutions of higher education that engage in unlawful discriminatory practices through diversity, equity and inclusion (DEI) initiatives, and to further reform and streamline the accreditation process to ensure high value and high quality education with a return on investment of federal loans and grants in higher education. The White House also published a fact sheet to supplement the executive order.

The executive order takes on two priorities: to ensure that accreditors are not requiring institutions of higher education to engage in unlawful DEI initiatives and reforming the accreditation process to allow for more competition and accountability amongst accreditors, promoting "student-oriented accreditation."

The U.S. Department of Education has the authority to recognize accreditors under the Higher Education Act of 1965, as amended (HEA). To receive federal financial student aid under Title IV of HEA, including federal student loans and Pell Grants, institutions of higher education must be accredited by an accreditor that the Department recognizes.

Many institutions of higher education asserted that their accreditors' standards prevented them from complying with the Department's interpretation of Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color or national origin. Institutions were left with a Hobson's choice to comply with Title VI and risk losing accreditation or comply with accreditation standards and risk a finding of noncompliance with Title VI. Either way, institutions were at risk of losing access to federal student loans and grants for their students.

The executive order directs the Secretary of Education to:

- Hold accountable, including through denial, monitoring, suspension or termination of accreditation recognition, accreditors who fail to meet the applicable recognition criteria or otherwise violate federal law, including by requiring institutions of higher education to engage in unlawful discrimination;
- Assess whether the American Bar Association's (ABA's) Council of the Section of Legal Education and Admissions to the Bar, the sole federally recognized accreditor for Juris Doctor programs; the Liaison Committee on Medical Education, the sole federally recognized accreditor for Doctor of Medicine programs; or the Accreditations Council for Graduate Medical Education, the sole federally recognized accreditor for allopathic and osteopathic medical residency and fellowship programs; or other accreditors of graduate medical education should be suspended or terminated as accrediting agencies under federal law;
- Investigate and terminate unlawful discrimination by American law schools, medical schools and graduate medical education entities;

- Ensure that accreditation requires that institutions support and appropriately prioritize intellectual diversity amongst faculty in order to advance academic freedom, intellectual inquiry and student learning.

To advance these objectives, the Secretary of Education is directed to undertake a number of actions, including:

- Resume recognizing new accreditors to increase competition and accountability;
- Provide accreditors with noncompliance findings related to member institutions resulting from Title IV or Title IX investigations by the Department's Office for Civil Rights;
- Launch an experimental site to accelerate innovation and improve accountability by establishing new flexible and streamlined quality assurance pathways;
- Streamline the process for higher education institutions to change accreditors to ensure institutions are not forced to comply with standards that are antithetical to institutional values, mission and current legal standards.

This executive order directs the Secretary of Education and Attorney General Pamela Bondi to investigate and take action against accreditors who require postsecondary institutions, including law schools and medical schools, to potentially engage in unlawful discrimination as part of their accreditation standards. Accreditors may suspend any standards, policies or other criteria that appear to promote DEI initiatives that violate federal antidiscrimination laws. An accreditor's failure to do so risks losing status as an accrediting agency under federal law.

Many accreditors revised their accreditation standards after the Department issued its Feb. 14, 2025, Dear Colleague Letter (DCL) concerning *Students for Fair Admissions*. Shortly after the DCL, the ABA voted to suspend DEI standards through August as the organization considers permanent changes. The ABA explained that delaying approval of a permanent proposed rule enables the organization to incorporate forthcoming guidance from the Department of Education on diversity and inclusion.

Similar challenges to private accreditation are starting to appear in court. In *State of Florida v. Migeul Cardona, et al.*, 2023-cv-61188-JB (S.D. Fla. 2024), Florida filed a lawsuit against the Secretary of Education challenging the constitutionality of the federal government's use of private accreditation as part of its process to approve postsecondary institutions within the meaning of the HEA. The district court dismissed the complaint for failure to state a claim, and earlier this month, the State of Florida reinstated the appeal before the U.S. Court of Appeals for the Eleventh Circuit. The Eleventh Circuit will consider whether accreditation schemes "as is" are unconstitutional or if they may be reformed consistent with the changes described in the executive order and fact sheet.

On May 1, 2025, the U.S. Department of Education announced its initial actions to comply with this executive order and lifted the moratorium on accepting new accreditors. In addition, the Department published a Dear Colleague Letter informing postsecondary institutions that they will streamline the process for institutions to change accreditors.

Postsecondary institutions grappling with compliance with accreditation standards and federal antidiscrimination laws should consult with counsel.

For questions or assistance in relation to this executive order, contact a member of McGuireWoods' education team.

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DOJ Issues Guidance to Recipients of Federal Funding for Compliance With Federal Antidiscrimination Laws

July 31, 2025

On July 30, 2025, the U.S. Department of Justice issued a Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination, warning that many programs and initiatives labeled as Diversity, Equity and Inclusion (DEI) may violate federal civil rights laws. The Guidance, issued by Attorney General Pamela Bondi, applies to recipients of federal funding, including most educational institutions, healthcare providers, state and local governments, and private employers receiving federal grants or contracts. This Guidance follows the DOJ's May 19, 2025, announcement of its new Civil Rights Fraud Initiative, which aims to use the False Claims Act (FCA) to investigate and pursue claims against entities that engage in unlawful DEI practices.

The Guidance outlines how longstanding federal antidiscrimination laws apply to programs and policies that incorporate or relate to race, sex, national origin, religion and other protected characteristics. The DOJ cautions that violation of federal antidiscrimination laws may result in the revocation of funding. It further warns that federal funding recipients may be found liable for the unlawful practices of their contractors, grantees and other related third parties.

The Guidance provides important insight into how the DOJ interprets and intends to enforce Title VI, Title VII, Title IX and the Equal Protection Clause with respect to DEI initiatives and programs. Notably, the DOJ makes clear that it will look beyond labels, intentions or perceived benefits of a program in scrutinizing the use of protected characteristics in decision-making.

The following practices receive specific attention and may be viewed as unlawful:

- Restricting eligibility or participation in programs, including scholarships, internships or fellowships, based on race, sex or other protected characteristics, even when framed as promoting diversity or inclusion.
- Prioritizing or requiring candidates from specific identity groups for hiring, admissions or promotions, including "diverse slate" or "underrepresented groups" requirements.
- Separating participants by race or sex for training or discussion purposes or using training content that stereotypes individuals based on protected characteristics.
- Operating programs or events framed around a specific racial or gender identity, particularly if those efforts suggest exclusion or prioritize benefits based on identity, even if participation is technically open to all.
- Using facially neutral criteria such as "lived experience," "cultural background" or geographic origin as proxies for protected traits.
- Funding or supporting third-party programs that use protected characteristics to determine access, eligibility or participation.

The DOJ also indicates that it will scrutinize policies that allow biological males to access female-only spaces (e.g., bathrooms, locker rooms and dormitories) or participate in women-only athletic events. When the U.S. Supreme Court held in *Bostock v. Clayton County* (2020) that Title VII prohibits discrimination on the basis of sexual orientation or gender identity, it specifically left open if these practices were required, prohibited or permitted.

In addition to identifying scrutinized practices, the DOJ provides recommendations on best practices to comply with federal antidiscrimination laws:

- Focus on skills and qualifications.
- Prohibit demographic-driven criteria.
- Document legitimate rationales for decisions, programs and initiatives that are not based on protected characteristics.
- Scrutinize neutral criteria to confirm that they do not serve as a proxy for a protected characteristic.
- Eliminate diversity quotas.
- Avoid exclusionary training programs.
- Include nondiscrimination clauses in contracts to third parties and monitor the third party's compliance.
- Establish clear antiretaliation procedures and create accessible reporting mechanisms.

The DOJ stresses that intentional use of protected characteristics will trigger legal liability unless the use satisfies a high level of judicial scrutiny. The Guidance recognizes, however, that federal laws may permit race-based remedies for specific, documented acts of past discrimination by an institution or for specialized contexts such as correctional facilities, where courts have recognized compelling institutional interests.

The Guidance concludes by urging recipients of federal funding "to review all programs, policies, and partnerships to ensure compliance with federal law," and to "discontinue any practices that discriminate on the basis of a protected status." Institutions are also encouraged to implement policies to prevent retaliation against individuals who raise concerns about potentially discriminatory practices. Institutions seeking to conduct such reviews should consider asking counsel to do so in connection with legal advice protected by attorney-client privilege.

This Guidance underscores that DEI-related programs, hiring practices and training courses are squarely within the scope of federal antidiscrimination enforcement, particularly when they involve, or are perceived to involve, identity-based decision-making. The DOJ focuses not only on what is explicitly stated in program criteria, but also on how programs are framed, perceived and implemented. Institutions must not simply avoid overt discrimination, but also should assess whether longstanding or well-intentioned practices could now be viewed as inconsistent with federal law under the DOJ's interpretation of those laws.

For questions about this Guidance and how to audit programs, policies and procedures to ensure compliance with the Guidance in an attorney-client privileged manner, contact the authors of this article. McGuireWoods has also published articles related to this Guidance, which may help contextualize the information it provides.

- DOJ Announces Initiative to Use False Claims Act to Investigate DEI Practices

- Department of Education Issues Request for Certification of Compliance With Civil Rights Laws
- EEOC and DOJ Issue Guidance and Warnings on DEI-Related Discrimination at Work
- Fourth Circuit Allows Anti-DEI Executive Order Provisions Involving Federal Contractors and Grantees to Proceed
- Federal Court Temporarily Blocks Parts of Executive Orders Impacting DEI in Government Contracting
- HHS Dear Colleague Letter Outlines Nondiscrimination Requirements for Medical Schools
- Executive Order Seeks Reform of Higher Education Accreditors' Processes
- Department of Education Opines That Any Separation Based on Race Is Illegal, Including Dorms, Graduations and Scholarships
- Presidential Executive Order Targets DEI in Higher Education

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McGuireWoods

Renewed Scrutiny: Intensified Oversight of Foreign Gifts, Contracts and Ties in U.S. Higher Education

December 3, 2025

The Trump administration is placing increased emphasis on oversight of foreign gifts, contracts and connections with colleges and universities in the United States. Newly announced reporting mechanisms and statutory changes making their way through Congress could reshape the landscape for this issue in U.S. higher education.

Executive Order. On April 23, 2025, President Donald Trump signed the Transparency Regarding Foreign Influence at American Universities Executive Order, which includes a focus on Section 117 of the Higher Education Act. Section 117 requires colleges and universities to report on an annual basis foreign gifts and contracts valued at more than $250,000. According to the executive order, "section 117 has not been robustly enforced" and therefore "the true amounts, sources, and purposes of foreign money flowing to American campuses are unknown." This concern echoes back to the first Trump administration, which increased scrutiny of foreign gift reporting by investigating universities and developing an online portal that required institutions to answer specific questions about their foreign financial ties. The executive order emphasized the current administration's commitment to the work it started during Trump's first term and ordered the Secretary of Education to take all appropriate actions to "require complete and timely disclosure by higher education institutions of foreign funding."

New Section 117 Reporting Portal. On Dec. 1, the U.S. Department of Education rolled out a portal for colleges and universities to complete their Section 117 reporting. Schools can begin using the portal to upload funding disclosures on Jan. 2, 2026, with this year's submission deadline falling on Feb. 2, 2026. The Department stated that failure to comply with the reporting requirement could result in an enforcement action.

Potential Legislative Action. At present, the Department does not have robust enforcement tools to address misrepresentations or violations of Section 117, given that reporting is not tied to federal student aid or the statutory and regulatory certifications required in a Program Participation Agreement to receive federal student aid. Changing this would require legislative action, such as an amendment to Title IV of the Higher Education Act of 1965. Such an amendment could give federal agencies the authority to pursue actions under the federal False Claims Act or even revoke federal student aid eligibility for egregious violations related to reporting requirements.

The Defending Education Transparency and Ending Rogue Regimes Act (DETERRENT Act), as passed in the U.S. House of Representatives, would include just such a change. Key provisions include:

- Reducing the foreign gift or contract reporting threshold from $250,000 to $50,000, considered alone or in combination with all other gifts or contracts within a calendar year.

- Requiring institutions of higher education (IHEs) to receive a waiver to enter into a contract with a foreign country of concern or foreign entity of concern.
- Requiring IHEs to annually report *any* contracts with countries of concern or foreign entities of concern regardless of the value of the contract.
- Requiring IHEs substantially controlled by a foreign source to annually disclose certain information regarding the foreign source that substantially controls the IHE.
- Requiring certain IHEs to disclose gifts or contracts between covered individuals (e.g., researchers) and foreign sources.
- Requiring private institutions of higher education with endowments or assets over $6 billion or with "investments of concern" above $250 million to annually disclose investments with a country of concern or foreign entity of concern.
- Imposing specified fines for violations and amending Title IV of the Higher Education Act of 1965 to include foreign reporting of gifts and contracts in the Program Participation Agreement, which allows for revocation of federal student aid and potential liability under the False Claims Act.

The Senate has not yet acted on the DETERRENT Act, which if enacted as proposed by the House would provide powerful enforcement tools not currently available.

Members of the House Rules Committee are simultaneously advancing three additional bills aimed at deterring improper foreign influence at colleges and universities: H.R. 1005: Combating the Lies of Authoritarians in School Systems Act; H.R. 1069: PROTECT Our Kids Act; and H.R. 1049: Transparency in Reporting of Adversarial Contributions to Education Act.

Compact for Academic Excellence in Higher Education. Section 8 of the administration's proposed Compact for Academic Excellence in Higher Education speaks to "foreign entanglements." Section 8's stated goal is to "assist the federal government in detecting, preventing, and eradicating criminal and terrorist financing and activity." It focuses on concepts of "know-your-customer" screening and related recordkeeping, and it appears to be calibrated towards identifying and monitoring potential foreign participation in and/or influence over university activities and initiatives, including dealings with non-U.S. students, faculty, temporary guests, donors, sponsors and other partners. Such initiatives may cover multiple areas, including export controls, classified activities, conflicts of interest, donations and foreign influence. If and as the Compact moves forward, participants may establish new best practices related to the screening and oversight of potential "foreign entanglements" that the administration will expect other colleges and universities to emulate.

The administration clearly indicated it will continue to focus on proper disclosure of foreign relationships. Institutions should consider reviewing and, if necessary, updating their screening and disclosure protocols related to foreign financial ties and foreign research, visitors, faculty and other connections.

For more information, contact the authors of this article. McGuireWoods' Higher Education Team will host a webinar covering this topic in January. An invitation is coming soon.

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DOJ Promulgates Final Rule Removing Disparate Impact Regulations Under Title VI

December 12, 2025

The DOJ issued a final rule on Dec. 9, 2025, entitled "Rescinding Portions of Department of Justice Title VI Regulations to Conform More Closely with the Statutory Text and to Implement Executive Order 14281." With this final rule, the DOJ removed regulations issued under Title VI of the Civil Rights Act of 1964 that precluded recipients of federal funding from engaging in disparate impact discrimination on the basis of race, color or national origin. The DOJ's final rule implements the April 23, 2025, executive order 14281, "Restoring Equality of Opportunity and Meritocracy," which seeks to "eliminate the use of disparate-impact liability in all contexts to the maximum degree possible[.]" In line with the E.O.'s mandate for agencies to "deprioritize enforcement of all statutes and regulations to the extent they include disparate-impact liability," this DOJ final rule directs the Attorney General to "initiate appropriate action to repeal or amend the implementing regulations for Title VI … for all agencies to the extent they contemplate disparate-impact liability."

The regulatory action removes four provisions of the DOJ Title VI regulations:

- Removes the primary provision that prohibited criteria or methods of administration that have a disparate impact, 28 C.F.R. § 42.104(b)(2)
- Removes provisions prohibiting disparate effects when selecting a site or location, 28 C.F.R. § 42.104(b)(3)
- Removes provisions authorizing "affirmative action" as a remedial action in cases of disparate impact and purposeful discrimination, 28 C.F.R. § 42.104(b)(6)
- Removes provisions that prohibit disparate impact in employment practices and that reach employment practices otherwise exempt from Title VI when those employment practices may cause a disparate impact in the delivery of program benefits or administration of the program, 28 C.F.R. § 42.104(c)

According to the DOJ, "The section of Title VI statute that sets forth the prohibited conduct, 42 U.S.C. 2000d, prohibits specifically intentional discrimination and makes no reference to unintentional disparate effects or impact." In promulgating this final rule, the DOJ states that the removal of these regulations will address statutory and constitutional concerns with implementation of Title VI and reduce compliance costs, including by eliminating the need for recipients to conduct a disparate impact analysis. The DOJ likely will work with other federal agencies to make corresponding changes to other agencies' Title VI regulations.

While these regulatory developments mean that recipients will no longer face disparate impact investigations under Title VI (and under settled Supreme Court case law, there is no private right of action for a disparate impact claim under Title VI), this final rule does not address other federal laws prohibiting disparate impact discrimination including Title VII, which references and prohibits unintentional disparate impact and authorizes private rights of action.

Similarly, certain state laws preclude practices that have a disparate impact. These laws will be enforced by state agencies and/or in private actions in state courts. One example is the growing number of states that enacted laws or issued regulations that focus on disparate impact caused by AI. Disparate impact is generally viewed as the primary framework for addressing discrimination concerns in the use of AI.

For questions about this DOJ regulatory action and the implications on federal grants and other programs of financial assistance, and potential intersection with other laws, contact the authors, your McGuireWoods contact, or a member of the firm's Higher Education Enforcement and Regulatory Counseling, Employment Litigation or Government Investigations & White Collar Litigation Practice Groups.

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