

Restraining the Energetic Executive:  
Can Administrators Legitimately Check Presidential Power?

Brian J. Cook  
Center for Public Administration and Policy  
School of Public and International Affairs  
Virginia Tech  
1021 Prince Street  
Alexandria, VA 22314  
brian\_j\_cook@vt.edu

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**DRAFT**

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**Abstract**

The strong “unitary” executive dominates present theory and practice regarding presidential power. A particular focus of continuing debate about the theory concerns the extent to which presidents control discretion in determining what the law means and how it is to be executed, and whether other executive officials can exercise a check on such presidential discretion. I review the scholarly debates about the historical, constitutional underpinnings of strong unitary executive theory claims about presidential control and direction of subordinate executive officials. Strong unitary executive theorists claim validation in particular from the Decision of 1789 and the establishment of a presidential removal power based on responsibility to popular will. I consider the consequences of that validation in our own time, which include weak legal checks on presidential discretion and normative confusion about the legitimacy of administrative resistance to questionable presidential commands. I conclude by sketching several potential remedies, from modest to radical, to bolster administration as a barrier to an overly-energetic executive posing a threat to the stability of the republic.

In his spirited, solo dissent in *Morrison v Olson* (487 U.S. 654 [1988]), the late Associate Justice Antonin Scalia declared that a “system of separate and coordinate powers necessarily involves an acceptance of exclusive power that can theoretically be abused” (487 U. S., p. 710). His position, in a challenge to the constitutionality of the method of appointment of independent counsels under the 1978 Ethics in Government Act, was that the Constitution granted the President exclusively the whole executive power. Therefore, any officer of the United States exercising “purely” executive power, such as a prosecutor, must be subject to presidential supervision and direction through presidential control of appointment and removal because the President was ultimately and exclusively responsible for the consequences of the exercise of the Constitution’s executive power. Mr. Justice Scalia also declared that the “purpose of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom.” While declaring that he saw nothing untoward in the appointment of the independent counsel by the Special Division court created by the act, or in the work of the independent counsel in pursuing the case, Scalia contended that the structure of the statute’s independent counsel provision could lead to prosecutorial abuse. Thus, “the fairness of a process must be adjudged on the basis of what it permits to happen, not what it produced in a particular case” (p. 731).

Scalia insisted that the independent council provision was much more likely to lead to the abuse of power and the unfair interference with individual freedom than would the Constitution’s clear design placing the exercise of all “purely” executive power under the exclusive supervision and control of the President. Mr. Justice Scalia’s dissent has been widely cited and quoted, and “remains one of the definitive statements in support of the unitary executive” (Calabresi and Yoo, 2008, p. 411-12). Integrating Scalia’s two claims about institutional design points to a

startling conclusion, however, one that goes beyond the warning with which he prefaced his commentary. Placing an “exclusive power” in one set of hands “permits” an abuse of power “to happen.” As Scalia, and others, would likely protest, the Constitution provides several bulwarks against this “theoretically” possible outcome. “The checks against any branch's abuse of its exclusive powers are twofold: first, retaliation by one of the other branch's use of its exclusive powers: Congress, for example, can impeach the executive who willfully fails to enforce the laws; the executive can decline to prosecute under unconstitutional statutes . . . and the courts can dismiss malicious prosecutions. Second, and ultimately, there is the political check that the people will replace those in the political branches . . . who are guilty of abuse” (p. 711).

The “unitary executive” provides further safety, Scalia insisted. The “President, in taking action disagreeable to the Congress . . . could be assured that his acts and motives would be adjudged . . . in the Executive Branch, that is, in a forum attuned to the interests and the policies of the Presidency” (p. 712). Thus the Executive Branch supplies “internal checks and balances” to restrain a President from abusing power (p. 731 [Scalia quoting three ex-Attorneys General in an appellant brief]). This claim about “internal” checks within the executive branch is prominent in the law review literature, and some have even called for an “internal separation of powers” (Katyal, 2006). However, the idea of internal checks is not generally part of strong unitary executive theory because it is inconsistent with the theory’s central claim that the Constitution grants the executive power exclusively to the President, who thus also has complete responsibility for the use of that power and complete control over those who assist in exercising that power.

By “strong” unitary executive theory, I mean a version of the theory that promotes not just unity in the executive (in the *Federalist* essays, at least, there is no reference to a “unitary”

executive), but also presidential preference for loyalty over competence in appointments “throughout the bureaucracy” (Waterman, 2009, p. 5) and the President as “chief administrator” (Prakash, 1993, 2003) who can substitute his judgment about the execution of the law for any executive official (see also Calabresi and Yoo, 2008, p. 428). This definition may coincide with what Tushnet (2010) calls the “super-strong” unitary executive theory, which also features the claim that Congress has no constitutional basis for interfering at all with how the President internally organizes and commands the executive branch.

The aim of this paper is to consider the constitutional and political legitimacy of checks on the President emanating from within the executive branch and to consider the implications of what I have found. I proceed by reviewing some of the scholarly debate about the constitutional validity of strong unitary executive theory, especially regarding the President’s relationship with other executive officers. Because of my special attention to the fate of the idea that subordinate executive officials might legitimately check the President’s exercise of the executive power, revisiting the early debates in the First Congress culminating in the so-called Decision of 1789 and a constitutionally-anchored presidential removal power is unavoidable. Strong unitary executive theorists consider the result an almost complete vindication of their constitutional validity claims. The implications are even more far-reaching, however, because the decision essentially anchored the presidency in a particular regime value: responsibility tied to popular will. As a result, not just presidents but almost all political actors have come to accept strong unitary executive theory claims that no executive officials can exercise discretion in interpreting and executing the law independent of the President, and no executive officials, including career administrators, can resist or countermand presidential directives regarding what the law means. I return to the present and use a current statute to emphasize the weaknesses of most of the checks

that Mr. Justice Scalia assured us were sufficient to avoid the inherent abuse of power that “theoretically” exists. I conclude by articulating what I believe is the political and moral quagmire in which the republic finds itself as a result of the general triumph of strong unitary executive theory, and briefly ruminate about whether something more formal and robust with respect to administrative checks on presidential use of the executive power is needed in light of current circumstances.

### **The Responsible Administrator: Only the President? Evidence from the Founding**

In the long-running debate over the historical accuracy and validity of unitary executive theory, two questions have generally organized the exchange of arguments. First, what was the founders’ intent? Second, what was the actual practice in the first century of the republic? The scholarship that has developed around these two questions has produced divergent answers to the central question of the President’s relationship to other executive officers. I concentrate attention on the interpretations of the historical record regarding the first question because it has been more critical to what the strong unitary executive theorists regard as the validation of their claims. Despite some impressive historical scholarship on their part, considerable skepticism may still in order. As Spitzer (2008) has bluntly stated it, the historical constitutional case for strong unitary executive theory borders on “the invention of a fictionalized constitutional past” (p. 341). With respect to the case for the complete subordination and control of administrators, however, I’m not so sure there is too much retrospective invention.

The primary evidence for the interpretations of founding intent regarding the strong unitary executive theory consists of the text of the Constitution, the historical record of successive drafts of various constitutional provisions and the constitutional convention and ratification debates, and the *Federalist*. Apart from the one undisputed fact – the creation of a

single-headed executive branch – almost all of this evidence lends itself to competing interpretations for the very simple reason that at the time the matters themselves were in dispute, and the historical record is still somewhat fragmented and incomplete. Nevertheless, scholars have accomplished much in pulling material together and giving us a more than adequate picture of the competing arguments and the choices that were ultimately made. I first take up the arguments about the constitutional text itself, bolstered as they are by reference to the historical record. I present the competing interpretations as a set of questions, responses, and rejoinders between strong unitary executive theory proponents and a few of the many prominent skeptics. I then move in the next section to a relatively brief recapitulation of the so-called Decision of 1789 and related disputes about the presidency in the first years of the republic.

### *The Constitutional Text*

What does the text of the Constitution tell us about the intentions of the framers with respect to executive power and the relationship of the President to other executive officers? There is both less, and more, than meets the eye in Article II such that both advocates and skeptics of strong unitary executive theory have contended that one must turn to other constitutional provisions to fully contextualize Article II. The biggest gulf between the two camps concerns how to read the parts and the whole for an answer to the question of founding intent. For ease of exposition, I first reproduce here the constitutional provisions that provide most of the fodder for the competing interpretations.

*Article I, Section 1:* All legislative Power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

*Article I, Section 8:* The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other

Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

*Article II, Section 1:* The executive Power shall be vested in a President of the United States of America . . . .

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:

"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

*Article II, Section 2:* The President shall be Commander in Chief of the Army and Navy of the United States, . . . ; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices . . . .

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

*Article II, Section 3:* He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall

judge necessary and expedient; . . . he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

*Article II, Section 4:* The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

*Article VI (third clause):* The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .

#### *Competing Interpretations of Article II and the Executive Power*

The Article I and Article II vesting clauses are the focal points of much of the debate in scholarship, law, and politics regarding the framers' original intent to create a unitary executive that encompasses complete command and control of the personnel of the executive branch. For strong unitary executive proponents, the difference between the two vesting clauses is telling. Article I vests "*All legislative Power herein granted*" (emphasis added), hence limits the legislature to enumerated powers. But Article II vests "*the executive power*" in a single executive (emphasis added). The Constitution does not say "the executive powers herein granted." Hence, the President is granted all "executive" power. Lessig and Sunstein (1994), although skeptics of this reading of the vesting clauses, summarize it thusly. The "President exercises hierarchical control over everyone within the executive department, and people who exercise discretionary authority must serve either at the President's pleasure or remain subject to his will in the sense that he can countermand their decisions. Congress' authority to structure the

executive branch cannot intrude on this basic principle” (p. 10). This amounts to “a conception of the executive that fits well with a familiar picture of the modern presidency – a strong, constitutionally empowered ‘chief-administrator’ of the executive branch” (p. 12).

A simple reading of more of the Article II text than the vesting clause alone raises a number of questions, however. In granting the President the appointment power with the advice and consent of the Senate, why does it not make any mention of the President’s power to remove those he has appointed? And why does Article 2, Section 2 modify that appointment power by empowering Congress to “vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments”? Why presume that inferior officers appointed by such alternative means would still be under the direct command of the President, that is, that he could substitute his own judgment about how to execute the law for theirs?

In addition, if the Constitution grants the whole executive power to the President, why does it not use the word “all” or “exclusive” or any other modifier signaling plenary executive power? Why does it go on to enumerate a specific set of presidential powers (Article II, Sections 2 and 3), but unlike Article I, it does not include a “sweeping” or “elastic” clause (Article I, Section 8)? Why does the Article II, Section 2 “Opinion, in writing,” clause exist? Wouldn’t a plenary executive power that encompasses presidential command of all executive officers include requiring reports about their actions?

### *The Strong Unitary Executive Case*

The strong unitary executive theorist response to these questions has several components. One claim is that the Constitutional Convention purposely limited the powers of Congress and did not similarly limit those of the President. This occurred through the efforts of Gouverneur

Morris, a proponent of a strong executive, in the Committee of Style (Prakash, 1993, pp. 996-97). As further reinforcement, strong unitary executive proponents argue that Article III, Section 1 must be read as a grant of the whole judicial power rather than merely “an indication of where judicial power resides.” It then follows that “Article II, Section 1, Clause 1 should be interpreted in the same manner for they are worded similarly” (Prakash, 1993, p. 997).

Proponents of a strong unitary executive theory bolster their case further by contending that the Article II vesting clause must be read in combination with the “take care” clause, the appointments clause, and the “opinions in writing” clause. In this more holistic reading of Article II, the President possesses the executive power, which is the power to execute the law. The President is further empowered “to take care that the laws be faithfully executed,” which means the President is directly and specifically responsible for the law’s execution. He may have “heads of departments,” “principal officers,” and “inferior officers” to assist him, but the ultimate execution of the law is the President’s responsibility, and he can direct any other executive official to execute the law as he determines is consistent with what the law requires, and for which he is specifically and wholly responsible. Or, more likely, the President can and will correct, personally or through his principal officers, the determinations of how to execute the law reached by other executive officials when they do not conform with the President’s determination. Furthermore, the appointments clause reinforces this relatively strict hierarchy by empowering the President to nominate and appoint essentially all species of executive officer, with the advice and consent of the Senate of course, with only the limited exception of those officials whose appointment Congress chooses to vest in the courts, or the “Heads of Departments.” The President also commissions all officers of the United States, and nothing in

the text of Article II or elsewhere in the Constitution excludes the President from supervising those officials alternatively appointed. The President still commissions them.

*Contesting the Strong Unitary Executive Interpretation*

Driesen (2009) has advanced the most direct response to the specific textual and historical interpretations and claims of strong unitary executive theory like those from Prakash (other analyses that question the strong unitary executive interpretation include Zamir, 1969; Bruff, 1979; Tiefer, 1983; Strauss, 1984, 2007; Froomkin, 1987; Breker-Cooper, 1993; Stack, 2006; Kitrosser, 2009; Prakash, 2006a; Shane, 2009, 2010; Edelson and Starr-Deelen, 2015). Driesen labels arguments insisting that the President has complete control over the executive branch and the actions of all its officials, particularly through appointment and removal, as “patronage state theory,” which he sees as forming the “political” dimension of unitary executive theory. He contrasts that orientation with what he calls a “duty based” theory that he anchors in a holistic or “intertextual” analysis of the Constitution as well as in pre-enactment history, including the convention and ratification debates. Driesen contends that the entire thrust of the Constitution is to cement the rule of law by ensuring as much as possible that all officials fulfill their primary duty, which is to obey the law. The oath clauses in Articles I, II, and III signal and reinforce this core obligation and expectation.

Driesen argues that the President’s principal duty is as expressed in the singular presidential oath, to “faithfully execute the Office of President of the United States, and . . . to the best of my Ability, preserve, protect and defend the Constitution of the United States.” The presidential oath and the “take care” clause should be read together. The latter has a passive construction (“that the laws be faithfully executed”), signaling that many others the Constitution specifically identified (“heads of departments,” “principal officers,” “inferior officers”) will

actually be executing the law. Because the general oath clause for other officeholders (Article VI), only requires them “to support this Constitution,” Driesen concludes that the framers intended that the President be watchful over the actions of others who will execute the law. The “ability limitation” applies to this obligation and “acknowledges that the President cannot prevent all abuses, because he cannot control all law execution himself. This ability phrase contrasts with the part of the oath wherein the President promises to ‘faithfully execute the Office of President,’” to which the “ability limitation does not apply.” Such a “contrast signals an understanding that the President can wholly control his own exercise of authority, but not that of others. Thus, the Take Care Clause creates a broad presidential duty while recognizing limits to presidential control over executive branch officials” (p. 87).

It seems impossible to refute the notion that requiring an oath to support the Constitution of all executive branch officials, not to mention all legislators and judges, including in the states, indicates that the framers expected all public officials to be both collectively and severally committed first and foremost to fidelity with the Constitution, the rights it embodies, and the laws made under its auspices. Legislators and judges, including in the states, are in no way subordinate to the President, so it must be the case that the framers expected even executive branch officials to exercise independent judgment about the law and the Constitution, as signaled by including them in the general oath clause. If the framers had otherwise concluded that the oath for executive branch officials had to be balanced with subordination (and, presumably, obedience and loyalty) to the President, why did they not place an oath clause for other executive branch officials in Article II, perhaps adjacent to the President’s oath? In short, the general oath clause obligates all executive branch officials to support and obey the Constitution and laws duly promulgated and adjudicated under it, but it also empowers and obligates those officials to resist

commands to violate the law irrespective of any statutory protections they may have in that regard. That again raises the question of who has the ultimate say about what law is. But to argue that executive officials must submit to the President's determinations of what the law is, or even allow the President to make decisions legally assigned to them without exercising independent judgment, is to make the general oath clause meaningless, and would, as Edward Corwin (1957) emphasized, "convert all legal decisions into discretionary presidential choices" (Driesen, 2009, p. 79).

Driesen goes on to argue that the interpretation of Article II by contrast with Article I, which favors modern unitary executive theory, is essentially backwards. It is actually Article I that uses the word "all" in its vesting clause. The absence of any reference to "all" in Article II "reflects recognition of the President's inability to exercise all of the executive power himself." Others "must execute the law. The Vesting Clause gives the President very significant power, but does not deny others an important role in executing the law" (p. 93, his emphasis). The Constitution refers to these other actors multiple times and in a manner that signals something more complex than a simple command-and-control hierarchy under the President. There will be a "principal Officer in each of the executive Departments" from whom the President "may require the Opinion, in writing, . . . upon any subject relating to the Duties of their respective Offices." There will be "Ambassadors, other public Ministers and Consuls," and "other Officers of the United States" that the President has the power to nominate and appoint with the advice and consent of the Senate. But note that the Constitution empowers Congress to decide where to vest appointment of "inferior Officers." They may choose to give that appointment power to "the President alone," but they may choose instead to vest it "in the Courts of Law, or in the Heads of Departments." Although Article II empowers the President to "Commission all the Officers of

the United States,” such commissions require the oath to support the Constitution, which makes the President the vehicle, not the source, for imparting constitutional authority on executive officers.

The structure of the appointment power is particularly vexing for strong unitary executive theory. If appointment is an executive power, then, as already noted, Article II does not vest it solely in the President. Congress can, by law under Article II, vest the authority to appoint inferior officers in courts or Heads of Departments. That not only suggests that the framers envisioned at least one limit on the executive power, it also gives the other two branches clear avenues of involvement in the structure and management of the executive branch, just as the President has a role in the other two branches through such provisions as the veto and the appointment of federal judges and Supreme Court justices. The provision empowering Congress to vest the appointment of “inferior officers” in the heads of departments would be a “meaningless” (Froomkin, 1987, p. 799) authorization, moreover, if the President had complete control over the appointment and supervision of those inferior officers directly, or through his control of the heads of departments. That the “inferior officers” appointment clause plausibly suggests a limit to presidential direction of control of executive officials is reinforced by the “necessary and proper” clause of Article I, which empowers Congress to make all necessary and proper laws for carrying its own powers into execution, but also “all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” Hence, “the Constitution vests powers in departments and officers, not just the President” (Driesen, 2009, p. 91).

Furthermore, the “opinions in writing” clause makes more sense in this reading. First, it “confirms that department heads have responsibility to execute the law” and “confirms that

department heads have duties” (Driesen, 2009, p. 92) to the law distinct from presidential direction. Since the framers not only anticipated that Congress might grant heads of departments some autonomy of control and influence over executive branch structure, functions, and personnel, but also authorized Congress to do so, the framers recognized the need to also give the chief magistrate the power to find out what these partially independent executive officers were up to, presumably in order to ensure cooperative and efficient operation in the executive branch, one of the concerns that led to the rejection of a multi-headed executive. Hence, Article II is best read to indicate that the framers expected others to be executing the law, and the President would be overseer and supervisor, exercising “general leadership and persuasion, initiating personnel reviews, [and] monitoring to see that officials stay within the bounds that Congress has assigned to them” (Froomkin, 1987, p. 801; also see Strauss, 2007).

Recall that strong unitary executive theorists also argue that the parallel structure of the vesting clauses in Articles II and III reinforces the reading of Article II that the executive power is not just located in the executive branch, but vested specifically in the head of that branch (the Supreme Court in Article III, the President in Article II). Yet that same approach can lead to a plausible inference that the framers left for future lawmakers the creation of administrative functions and structures over which the President would have general supervision but not direct command and control. The Constitution authorizes Congress in Article III to create inferior federal courts that have a share in the judicial power and to define their jurisdictions. It also empowers Congress to limit to some extent the Supreme Court’s appellate jurisdiction, but not its original jurisdiction as constitutionally specified. Article II has this same structure. It grants specific executive powers to the President, which Congress cannot alter or interfere with. Yet with respect to everything outside those specific powers (the President’s original jurisdiction, so

to speak), which is the entire “inferior” structure and personnel of the executive branch dedicated to executing the law, Congress can “determine which agency will execute its policies,” and can “put stringent limits on the President’s control of agencies” (Froomkin, 1987, pp. 802-3).

*Strong Unitary Executive Theorist Rejoinder*

The unitary executive and President-as-chief-administrator theorists’ response to all these points is emphatically dismissive. “Throughout the history” of the development of the take-care clause at the convention, the emphasis was on the President having the personal duty and responsibility to execute the law, and “no one ever suggested that this authority should be vested in Congress . . . or in independent executive officials” (Prakash, 1993, p. 1002). Hence Prakash sees in the records of the convention “a consensus that the President should be charged with the administration of all federal laws” (p. 1002). Furthermore, “the executive’s duties under the Take Care Clause” do not amount to a mere “glorified busybody who could only look over the shoulders of others to determine if they were faithfully executing federal law. The Framers wanted the President to execute the law,” and with that “comes the authority to exercise any discretion that is part of federal law” (p. 1003).

The “opinions in writing” clause further reinforces this interpretation of Article II as locating all discretion in the execution of the law solely in the President. “The President may demand opinions in order to determine how he should execute federal law” (p. 1005). The clause stems from the Morris-Pinckney plan, which sought to create a council that would advise the President, but in all the debate concerning that proposal, it was always clear that the President held final decision-making authority and responsibility. Hence the Opinions clause is a remnant of the Morris-Pinckney plan’s idea that the President may need information and assistance from close subordinates to enhance his ability to fulfill his duty and responsibility to execute the law.

The “inferior officers” appointment clause is also insignificant, even meaningless, in this view. All it amounts to is to allow heads of departments to make some appointments, as allowed by law, without presidential superintendence. Because both those department heads, and all other executive officials, are subject to presidential superintendence and control, those inferior officers, although independently appointed, have no independence from direct presidential control and instruction on how to exercise discretion in the exercise of the law. Finally, the Constitution’s sweeping clause does not authorize Congress to create agencies independent of presidential control. The clause limits Congress to making law that allows it to carry out its own powers enumerated in the Constitution, or law that enables other “departments or officers” from carrying out powers the Constitution vests in them. Since the Constitution vests the executive power solely in the President, with the limited exception of the appointment power, Congress is prohibited from creating administrative entities with executive power not under presidential command. In short, so-called independent agencies are in fact unconstitutional (Prakash, 1993, pp. 1009-12).

In many respects, the competing interpretations of the constitutional text and the records of the debates in the drafting of that text have reached a stalemate, although strong unitary executive theorists hardly see it that way. As Lessig and Sunstein (1994) contend, the framers were not entirely clear in their own minds about the definition and distribution of the legislative, executive, and judicial powers that should shape separation-of-powers scheme. They were even less sure about the definition and distribution of the executive power and reached agreement on only a limited set of specifications and boundaries. As pragmatic politicians who “thought flexibility a virtue” and “did not have a sufficiently developed conception of the distribution of national powers to allow for clear and authoritative legal arguments about who would direct what

we now call administration” (p. 74), they left much to the operation of the separation of powers and the arena of cooperation and conflict among future lawmakers, executives, and judges (see Strauss, 1984, pp. 596-602; also Percival, 2001). There are enough gaps in the record or in the actual decision making at the Convention, or in the purposeful effort of the framers to leave many details of government structure and development to those who would organize and lead the refashioned republic, that attention must turn to those developmental efforts. The key problem first confronted was the constitutional structure of appointment of executive officials, and the absence of any procedure for removal except by impeachment. This brings into focus the work in the very first session of Congress, which endorsed a reading of the Constitution as including a removal power as part of the executive power.

### **The Decision of 1789 Re-revisited**

Article II gives the President the power of appointment over a broad range of executive offices, including those that might be “established by Law.” The Constitution brackets that power with the clause requiring the Senate’s “advice and consent” for such appointments, and by the appointments clause applying to inferior officers. A mechanism for filling offices is central to managing the execution of the law, but so is a mechanism for removing officers who are not faithfully executing the law. If the framers wanted the President to have plenary executive power and thus control over all who would assist him in executing the law, why does the Constitution provide the President no mechanism for removing subordinates, whether they be “principal officers,” “heads of departments,” or any other officer? Why does it provide no other means for removing any “civil Officers of the United States” except through impeachment, a mechanism solely in the control of Congress (with the Chief Justice presiding)?

One can either accept the absence as intentional, or suspect that it is an oversight or error, and dig into the historical record for clues of actual intent. If one accepts that the Constitution means what it says, or in this case what it doesn't say, then it "contains only a single . . . procedure for removing executive branch officials from office," making this procedure "exclusive." In that case, "the President may never remove an officeholder prior to expiration of his term in office; only the Senate can do that, through impeachment" (Driesen, 2009, p. 89).

Article III establishes tenure for federal judges "during good behavior," but Article II is silent about the tenure of office for executive branch officials beyond the President and Vice President. How to explain this contrast between Article II and Article III regarding tenure of office? One possibility is that the framers "did not consider the ability to fire disobedient officials sufficiently essential to maintaining" Presidential control over administration "to justify express inclusion of such a power in the Constitution. Instead, the Constitution uses" inter-branch power sharing as well as "duty" to "secure fidelity to law" among administrators (Driesen, 2009, p. 91). Part of that inter-branch control of administration might entail Congress establishing tenure of office for executive officers by statute.

The other possibility is that the framers expected the President to exercise a discretionary power of removal over all executive officers for all forms of failure to faithfully execute the law short of the criteria for impeachment. But is such removal at will really consistent with the underlying theory and overall structure of the Constitution? There is an indirect check on at-will removal for those officers subject to confirmation by the Senate, as Presidents might suffer the indignity of the Senate refusing to confirm their replacements. But what about those "inferior officers" and other any other executive officials for which Congress might provide appointment other than by the President? Could not a President, knowing he would be serving for four years,

remove officers who he found troublesome, and maneuver to replace them with “candidates who had no other merit than that of coming from the same State to which he particularly belonged, or of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure” (*Federalist* 76)? There are no answers to these questions in the records of the Constitutional Convention, which only show that the delegates were adamant about applying impeachment to the President, and only secondarily to all civil officers. They uttered nary a word about alternative means of removing those other officials. Trying to make sense of it all became the task of the First Congress when it took up the matter of creating the first executive departments and the principal officers who would lead them.

There are many analyses and interpretations of the debates leading up to the decision on presidential removal powers, including one that I am especially partial to (Cook, 1992; revised 2014, pp. 43-50). A relatively recent and updated analysis can be found in Prakash (2006b). For present purposes, I distill out of the multiple competing arguments from the debates in the House the essential contours and outcomes that form the principal pillar in the original intent validation of the strong unitary executive case.

The focus of the debate in the House of Representatives was the creation of the executive departments for Foreign Affairs (State), War, and Treasury. James Madison’s motion to create a Secretary of Foreign Affairs, to be appointed by the President with the advice and consent of the Senate, and removable by the President, got the debate underway. However, it was Rep. Egbert Benson (NY) who pushed the debate into its longest and most intense segment by moving to strike the removal clause from Madison’s motion. Benson wanted to affirm that the President’s removal power derived from the Constitution and not from a mere statute.

Ultimately, the House approved Benson amendment, and did so in similar fashion for the War Department, thus seeming to establish a constitutionally-anchored removal power, at least for principal officers or heads of departments. The legislation met more difficulties in the Senate, with Vice President John Adams choosing to break a series of 10-10 ties to move the legislation forward for the President's signature. The treatment of the Treasury Department and the Treasury Secretary was initially more complicated because of congressional fears about the executive gaining control of the power of the purse, but eventually the Treasury Secretary became subject to the same conception of the presidential removal power.

Responsibility, administrative stability, and the nature and extent of the executive power were the values and questions at the heart of the positions taken in the congressional deliberations on the removal power and the ensuing public debates on related controversies arising during the republic's early years under the Constitution. To ensure that a powerful executive could be safely controlled by the republican principle, that is, the judgment of the people, all responsibility for the conduct of the executive branch must rest in the President's hands. This was Madison's position. A fair number of representatives in the House insisted that impeachment was the only means for removal of executive officials of whatever sort, or, contrary to Benson's amendment, that Congress had the authority to define the scope of the presidential removal power, or at least that the advice and consent of the Senate was required in any removal decision short of the circumstances of impeachment. This latter position seemed to have a surprising ally in Alexander Hamilton, the great proponent of energy in the executive.

At the very outset of *Federalist 77* Hamilton stated quite plainly that "one of the advantages to be expected from the co-operation of the Senate, in the business of appointments, [is] that it would contribute to the stability of the administration. The consent of that body would

be necessary to displace as well as to appoint.” This troubled many at the time of the debate, and some scholars have offered evidence suggesting that Hamilton might not have thought too carefully about what he wrote regarding a role for Senate in removals, and that he later refuted it. As Jeremy Bailey (2008) has convincingly shown, however, Hamilton’s concern for an energetic executive must be measured against his abiding concern for administrative stability, the very thing he stressed in his only reference to a presidential removal power in *The Federalist*. Thus, “in his argument connecting unity to duration, Hamilton went out of his way to warn against the republican tendencies of a President who would have a fixed term and be eligible for reelection. Because each President would want to curry favor with ‘his constituents’ by removing executive officials associated with the repudiated ex-President, unity and republican principles would conspire against stability and thus steer the republican government toward traditional republican vices” (Bailey, 2008, pp. 460-61).

A small group in the House took up what they argued was Hamilton’s position, stressing the dangers of discounting stability in government and the constitutional value of constrained power. As Theodorick Bland (VA) stated early in the House debate, newly elected Presidents would be tempted to dismiss “the great officers . . . and throw the affairs of the Union into disorder” (*Annals of Congress*, p. 381). And as James Jackson of Georgia most presciently declared, “I cannot, for my part, admit that any part of the Constitution authorizes the President to exercise an uncontrolled power over [heads of departments], because I perceive, as a fundamental principle in the Constitution, that the exercise of all power should be properly checked and guarded” (*Annals*, p. 532).

This position in the debate was derided as a foolish threat to executive unity, and was swept aside along with the position that the Senate should have a say in removals short of

impeachment. The principal division was over the question of whether the removal power flows through Congress or directly from the Constitution. Although the Decision of 1789 cannot be read to have definitively determined that the Constitution prohibits Congress from modifying the President's constitutional grant of a removal power (Prakash 2006b), that removal power is very nearly absolute as a result of the Decision of 1789, as reinforced by subsequent presidential efforts, congressional acquiescence, and judicial endorsements, significant developments to the contrary notwithstanding. More important, presidential control of all executive branch personnel, in agencies of whatever form, flows from the removal power. Although there are continuing disputes about such matters as whether the President can veto or nullify the decisions of subordinate executives who are granted discretionary authority to make specific decisions by statute (cf. Calabresi and Yoo, 2008, p. 14 and Pierce, 2010, p. 597), the removal power, although not costless politically to invoke (Pierce 2010, 597, 610), provides all the power necessary to control the interpretation and execution of the law in any policy area that attracts the President's attention. Indeed, the mere threat of removal is enough to get most appointed officials to conform to the President's wishes or 'voluntarily' retire or resign. Merit-protected officials are only marginally more insulated because the scope of their discretion is more limited.

To fully understand for present circumstances the implications of the Decision of 1789 and the embrace of it by strong unitary executive theorists, it is helpful to look more closely at the nature of the debate from the perspective of what were essentially the competing conceptions of Madison and Hamilton.

### **Madison, Hamilton, and Valuing Responsibility Above Stability in Republican Governance**

Madison and Hamilton were not directly at loggerheads in the 1789 debates as they would be over Hamilton's actions as Treasury Secretary and especially during the battle over

Washington's Neutrality Proclamation. Nevertheless, Madison and Hamilton were entangled in an extended debate over the relative weighting of the value of energy, responsiveness, and responsibility in the executive, against the values of stability, and experience and expertise. This began at the Constitutional Convention and continued through their further respective efforts, sometimes in collaboration, to flesh out the theory and practice of their new republican constitution over the course of the following decade. For present purposes, however, I treat the Decision of 1789 as the culmination of this particular dimension of the complex Madison-Hamilton relationship, with Madison prevailing on the theoretical question of what the Constitution requires or implies, while departures in practice and later theorizing have sometimes embodied Hamilton's position, such as in the development of a Department of Justice, and the more general development of a merit-based administrative service in association with the rise of an administrative state. In this respect, the 1789 debate stands as the critical decision point in the political choice regarding the nature and extent of executive power under the Constitution and what checks on that power are constitutionally legitimate. Or, to be more precise with respect to the focus of this paper, whether other officials in the executive branch can legitimately, constitutionally, exercise a check on the President's use of the executive power.

Madison staked out his position based on the value of responsibility grounded in the "republican" principle. This is not to say that Madison did not care about stability in the law, and administration. He wrote, after all, "Stability in government is essential to national character and to the advantages annexed to it, as well as to that repose and confidence in the minds of the people, which are among the chief blessings of civil society" (*Federalist* 39). But Madison was the foremost defender of the republican principle, or rule by the majority. Although he was also the great worrier about the threat of majority faction, he seemed sanguine enough about the

Constitution's design to trust that good majorities, or at least only very weak factional majorities "unable to concert and carry into effect schemes of oppression" (*Federalist 10*), had a fair chance of emerging at the national level, especially with respect to the election of the President (Bailey 2008, 461-62). He largely held firm in this position for the rest of his life (McCoy, 1989, pp. 136-39). In the 1789 debate, Madison tied the republican principle to a hierarchical conception of the executive, arguing that concentrating control of all executive officials in the President was safe because the President must answer to the people for the decisions he makes in controlling and directing his subordinates.

If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community. The chain of dependence therefore terminates in the supreme body, namely, in the people, who will possess, besides, in aid of their original power, the decisive engine of impeachment.

(*Annals*, p. 499)

Madison's reference to impeachment is particularly interesting, as it relegates the threat of impeachment of the President to the status of a backstop to the threat of dismissal through election as a way to discipline the President's use of the executive power through the removal power. This is certainly the way that impeachment is presently viewed, although it is far from clear that such a view prevailed at the Constitutional Convention. Nevertheless, Madison's position was remarkably clear and consistent, and he was willing to vest extensive power in the President because he trusted the extended republic to sufficiently neutralize the threat of majority faction. It was thus safe to rely on popular politics to control policy rather than on additional

“auxiliary precautions” (*Federalist* 51) in the form of “administration by experts freed from politics” (Bailey, 2008, p. 463).

Hamilton also supported the republican principle, but he was unpersuaded by Madison’s confidence in the Constitution’s capacity to diminish the dangers of majority faction. “Hamilton believed that majority faction would survive the extended republic because representatives would be just as susceptible to the same causes of faction as citizens” (Bailey, 2008, p. 463). Hamilton thus warned that without modulation, responsiveness to the public could lead the republic seriously astray. His statement on the matter in *Federalist* 71 deserves quoting at length.

The republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they [entrust] the management of their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests. . . . [The people] know from experience that they sometimes err; and the wonder is that they so seldom err as they do, beset, as they continually are, by the wiles of parasites and sycophants, by the snares of the ambitious, the avaricious, the desperate, by the artifices of men who possess their confidence more than they deserve it. When occasions present themselves, in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests, to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection.

Hamilton’s statement is part of his defense of the length of the President’s term as provided for in the Constitution, but also for unlimited re-eligibility. His case seems to suggest a certain distancing of the President from the republican principle, distance that will enable the

President to help the people overcome the occasional “temporary delusion” that might threaten rights and degrade the public good. However, Hamilton regarded the mode of presidential selection, length of term, and unlimited re-eligibility as insufficient to guard against, and in some respects as exacerbating, the threats to good and stable governance over the long term. Hence, Hamilton stressed as much more important the role of the Senate in executive appointment, and, as already noted, in executive removals as well. “Hamilton went out of his way to warn against the republican tendencies of a President who would have a fixed term and be eligible for reelection. Because each President would want to curry favor with ‘his constituents’ by removing executive officials associated with the repudiated ex-President, unity and republican principles would conspire against stability and thus steer the republican government toward traditional republican vices” (Bailey, 2008, pp. 460-61).

Bailey concludes that Hamilton was sufficiently worried about the potential “revolutionary” effects on good government of a republican chief magistrate as to argue, in essence, for not one but two executives. “The one would use elections to make republican theory work with the requirements of energy. The other would be staffed by qualified men who would be attracted by the permanence of the office as well as its insulation from public opinion. Freed from republican theory, this second executive would be able to moderate the more republican, more unitary, President” (Bailey, 2008, pp. 464). If we are to take Hamilton at his word, expressed in print, this moderation would come from at least some officials who were insulated from unchecked at-will removal.

Madison was wary of Hamilton’s designs for the executive, which originally may have included, according to Madison’s notes from the Constitutional Convention, “lifetime tenure (i.e., during good behavior) for the President and senators” (Bailey, 2008, p. 463). Thus,

Madison may have sought to further cement the tie between the President and popular will through the removal power, increasing the likelihood that government administration would be subject to the electoral cycle, preventing the rise of what those of Whiggish tendencies always feared, viz., a ministry made even more tyrannical by the prospect of long duration in office, if not permanence (Lowery, 1993).

Hamilton, for his part, feared the excesses of popular passion and the spirit of party and faction that thus would arise, hardly an unwarranted fear given where the eventual political alliance of Madison and Jefferson would lead. Each perspective could draw on supporting evidence – the behavior of the British ministry in oppressing the colonies against the preferences of Parliament, and the instability and administrative incompetence in several of the states where the government, especially the legislature, was most closely tied to the people through frequent election.

The choice Madison engineered in 1789 can best be understood to have placed the republic on a path, beginning with Jefferson, that remodeled the executive into an institution “based on opinion instead of law” (Bailey, 2008, p. 464). This is quite the provocative claim in a political culture in which we are constantly reminded that we are governed by the rule of law. But this notion of the rule of law, and the commitment that underlies it, has always been in acute tension with the popular foundations of the republican form. The law itself may be the product of popular passions not adequately filtered through representative lawmakers. But the law when put in action is not then subject to plebiscite at every turn. When should the law rule and when should the people rule? In the American republic, it is the executive more than any other institution that must confront this question on a regular basis. How the executive is organized will directly shape how the executive behaves in responding to that question.

It was inevitable, of course, that energy in the republican executive would stem in part from popular passions. The executive designed at the Constitutional Convention, particularly the mode of presidential selection, was meant to dampen the effects of those passions while staying true to the republican principle. In the Decision of 1789, however, especially as the advocates of a strong unitary executive theory insist we must interpret it, Madison led a firm and stable majority in the House that prevailed in establishing the nature of the executive power under the Constitution as including complete control of executive branch personnel, and thus complete control over their discretion, not just to execute the law, but to determine the meaning of the law. Hence, the choice was to vest in the President a far-reaching, if latent, power that “can theoretically be abused.”

Although unitary executive proponents insist that this power is inherent in the constitutional grant and thus based in law, their defense of the sweeping powers of the modern presidency as consistent with original intent has tied them to a far more expansive conception of the source of the President’s primacy the executive branch than the letter of the law. They may sometimes protest the logical extension of strong unitary executive theory to actions that they find objectionable, as do Calabresi and Yoo (2008) when they point out “some excesses in the powers that the [George W.] Bush administration claimed” in the War on Terror (p. 429), including overriding internal norms and procedures vetting legal advice. Strong unitary executive theorists insist that “our Reagan era concept of the unitary executive is agnostic about what the extent of the executive power is beyond the fact that it includes a removal power and a power to control subordinates” (Calabresi and Yoo, 2008, p. 430). Yet that seemingly modest insistence rests the whole theory on an original intent validation arising from a decision that led to presidents eventually claiming that they govern the whole nation through popular mandate

(Flaherty, 1996), no matter what the features of the electorate that placed them in office may be.

This accepted orientation to executive power easily overpowers law, and does so especially when the evidence of a popular mandate is most dubious.

### **Current Law and the Weaknesses of Internal Checks**

Resting a theory of governance on evidence of original intent is not just a claim that the theory is legally and politically valid, it is a claim that the theory is morally superior because it is tied to presumed regime values such as historical accuracy and the particular eminence of the republic's founding. Originalism has many faults. It robs future generations of agency in determining what the Constitution, the law, and the nation mean, for instance. In this particular matter, moreover, it is disingenuous, as it relies on an 'original' decision that was not itself originalist. The majority in the House in 1789 did not follow the expressed intent of the drafters of the Constitution with respect to a presidential removal power. There was no such expressed intent. Hence, they made their own determination of what the Constitution's executive power meant with respect to presidential control of subordinates. The question now is whether there is sufficient reason, despite an additional 230 years of not entirely consistent legal precedent and further developments in theory and practice, to reconsider the decision and the currently prevailing strong unitary executive theory. As a modest start to such a reconsideration, I begin with a brief review of some relevant current law.

#### *Federal Employee Legal Protection from Unlawful Supervisory Commands*

On June 14, 2017 the "Follow the Rules" Act became law (P.L. 115-40). It amended Title 5 of the U.S. code, §2302(b)(9)(D), which protects merit system federal employees from "prohibited personnel actions," aka retaliation, when they refuse "to obey an order that would require the individual to violate a law." The act simply added the phrase "rule or regulation"

after “law.” The bill had 11 co-sponsors, including six Democrats. Republican co-sponsors included several not generally known as champions of federal bureaucrats, like Louis Gohmert of Texas and Mark Meadows of North Carolina. The House Committee on Oversight and Government Reform report on the bill explained that the intent was to clarify the meaning of “law” in the statute, nullifying the U.S. Supreme Court decision in *Department of Homeland Security v. MacLean* (135 S. Ct. 913 [2015]), which interpreted the use of “law” in that particular provision as referring strictly to statutory law. Under the amended statute, employees now can refuse to obey orders of supervisors when such orders would require violating a statute, rule, or regulation.

The practical effect of all this is probably less to constrain the range of presidential and political appointee directives than it is to constrain supervisors and managers who are also merit protected. Also, the definition of “agency” in the statute *excludes* “the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities” (§2302(a)(2)(C)(ii)). The “Follow the Rules” Act received the *unanimous* approval of by both houses of Congress. It amended the Whistleblower Protection Act of 1998, which itself was an added chapter in the long saga of presidential-congressional contestation over the scope of Congress’s power to obtain information directly from executive branch employees, without higher-level authorization, as part of its investigatory and oversight functions, and the right of executive branch employees to provide information, even surreptitiously (see, e.g., Fisher, 1990). Subsection (b)(8)(A) and (B) of the

statute provides protection from retaliation for such information disclosure to Congress, and to special counsels or inspectors general, respectively.

Hence, 5 U.S.C. §2302 provides one possible avenue by which some federal administrators can exercise a check on the President and principal presidential subordinates. But how meaningful is this check? Far less than meets the eye. First, the President is empowered by the statute to exclude staff positions from the statute's protections beyond those already excluded, and to do so with very little justification required. Second, and more important, within the scope of its coverage the statute begs the question of what constitutes a supervisory order that would require a violation of a law, rule, or regulation. Who has the authority to determine that?

The language of the statute seems to indicate that individual employees in "covered positions" are so empowered. It overturned the old federal employment doctrine of "obey first, grieve later." Yet most laws, rules, and regulations are considered "policy" and therefore inherently political, and most have to be written with enough generality that they are open to interpretation, or discretionary judgment. At least since *Marbury v. Madison*, anything policy-oriented belongs squarely within the constitutionally-defined scope of the executive power, and thus ultimately within the responsibility and authority of the President to determine.

Furthermore, creative supervisors, managers, and higher-level political appointees will certainly be able to find ways to issue orders phrased so that they do not explicitly compel a violation of law while still sounding fishy to those receiving the orders. Hence, this statute leaves unanswered one of the key questions that animates this paper: who has the power to say what the law is?

In *Marbury*, Chief Justice Marshall famously stated that it "is emphatically the province and duty of the judicial department to say what the law is" (5 U.S. 137, p. 177). But even

Marshall recognized, long before the rise of the administrative state, that the courts can only rule on a tiny fraction of the instances of discretionary judgment in executing the law. As Charles Thach (1935) concluded, reflecting on the work of Frank Goodnow, “a part, at least, of the true significance of the law must nowadays rest on the judgment of the enforcing agency itself” (quoted in Bertelli and Lynn, 2006, p. 44). As a practical matter, then, the President has independent authority to determine what the law means and most such determinations will go unchallenged (Paulsen, 1994). Although the President is personally almost never to be found in the vastness of the federal bureaucracy’s day-to-day execution of the law, his surrogates are always there. Hence, although agencies and administrators must “follow the rules,” the President, whenever it suits him, can, as President George W. Bush claimed, be the “decider.”

### **Restraining the Energetic Executive: Beyond the Strength of Weak Internal Checks**

I have tried to show with the example of the “Follow the Rules” Act that internal checks, even those bolstered by statute enacted with unanimity by a co-equal branch, are riddled with weaknesses in the form of exceptions and exclusions. Their weaknesses all ultimately stem from the same source, however: an interpretation of the Constitution and 230 years of subsequent political conflict, intellectual debate, and practical adjustments that has become the dominant theory of governance and national leadership. Partisans of nearly all stripes either accept it or have no coherent alternative theory to offer as a successor. This strong unitary executive has “exclusive” control over the executive power, including how every executive official is to interpret and execute (or not execute; see Stepanicich, 2016) the law. It is possible to argue, and indeed it is something that deserves further exploration, that although any one internal check is too weak to stop a determined President, there may be surprising strength in multiple weak internal checks, much like social network scholars have theorized the strength of weak ties

(Granovetter, 1973). Through loose coordination and accumulated resistance, weak internal checks may ultimately stop a corrupt or even simply an overzealous President and his principal subordinates from wreaking havoc not just on the law, but on core administrative institutions and laying waste to the store of social and institutional capital carefully built up over generations. Some legal commentators of late are indeed suggesting that the weakest of internal checks – internal norms and procedures – are working in exactly this way (Goldsmith, 2018; Wittes, 2018). Two cheers for bureaucracy.

But wait. These kinds of checks have been subject to repeated attack from all across the political spectrum precisely because they are in the hands of often nameless and faceless bureaucrats. Forced to operate underground, or at least out of general sight, often fragmented and even disconnected from others in their own agencies, those who exercise these checks lack any common, connecting understanding of their value, and any clear-eyed conception of their proper boundaries. Even in normal times we find ourselves in a weird standoff, where much battling between the presidency and the bureaucracy takes place in the shadows, or completely opaque to the public and thus heightens public suspicions of the now popularly sinister deep state (Clark, 2017; Ingber, 2017). Normally presidents are reluctant to openly quarrel with administrators for fear it will make them look weak, expose disagreements about policy, and in some circumstances because it would appear as if they are interfering with the legal process, even if sometimes they should in order to rein in rogue elements of the bureaucracy. Administrators are equally reluctant to publically contradict the President or his principal subordinates, because it threatens the appearance of good order and discipline in the ranks, administrative efficiency and responsiveness to political superiors, or much worse, undermining the will of the people as expressed through the President. But that last fear is at the very heart of the problem that gives us

the worst of both worlds. We have a plebiscitary presidency (Lowi, 1985) based in will not law. That gives it energy, but it also makes elections sacrosanct to the point of absurdity, presumed to create policy mandate out of a confusing mélange of ideology and interest fueled by insane amounts of money and very little clarity about policy direction or the public interest. Once things move to the governing process, or administration, where the unitary executive theorists declare that the President has complete command and discretion, administrators are to follow the policy dictates of the President because that is what the people demand. Lawmaking is murky enough as we all know, but the administrative process, the process of executing the law, is an even more shadowy subterranean world that is inaccessible except to the most experienced, adept, and well-resourced interests. Do the people really know what is going on?

A number of commentators have of late warned that our institutions will not save us (Gessen, 2016), with some suggesting that ultimately the people must rise up to exert their sovereignty (Jurecic, 2018). There is some symmetric justice in that notion, but if our current difficulties stem from the root source I have suggested, it might be useful to ask what our institutions are good for if they can't contend with extreme conditions. Worries about overreacting may be wise, but on the other hand, adherence to the precautionary principle may be in order. That's what "auxiliary precautions" are all about. Arguments abound that ethical public administrators are such an added bulwark (e.g., Richardson & Nigro, 1991.) I offer brief thoughts on two formal, structural possibilities for bolstering administrative constraints on our energetic republican executive.

### *Spreading Sunshine throughout the Office of the President*

If responsibility is the central value guiding the presidency, and assessing whether presidential actions are responsible is ultimately in the hands of the people, then the people need

as much good information about presidential action as they can get. Yet much of the President's exercise of the authority to faithfully execute the law, and to use the removal power to ensure that subordinate executive officers do so as well, are invisible to the public at large, and even to many attentive interests. The empowerment that accompanied the responsibility conception of presidential power has led paradoxically to the insulation from responsibility and accountability, not just of the President, but of the President's vastly expanded support bureaucracy, and that has had a reinforcing effect on both presidential power and its insularity.

Although older treatises on the Administrative Procedure Act assert that the broad definition of "agency" under the APA includes the President (Newman, 1961), The Supreme Court clarified the definition to exclude the Office of the President in *Franklin v. Massachusetts*, 505 U.S. 788 (1992). It is time for Congress to consider taking action by applying the APA to the Office of the President, and redefining what law-executing procedures fall under the requirements of the APA (Rubin, 2003). A furious objection will come from strong unitary executive theorists. Not only will they argue that this would be a clear violation of the separation of powers, they will assert that it will greatly diminish the capacity of the President to ensure effective organization and orderly management of the vast executive establishment. Certainly good public management, effective administration, is critical for serving the public interest. But how can citizens judge whether the President is doing his job in ensuring good government management if most of the transparency is at the agency level and not at the level at which the President exercises control. Presidents do intervene in the rulemaking process, for instance, in ways that might never come to light (Bressman & Vanderbergh, 2006).

Citizens should see that executing the law is not some automatic thing, that many complexities and competing values are involved, that public debates and disagreements among

presidents, their political appointees, and career administrators is a good thing as it will show what the difficult choices are and what is at stake. Citizens can then better judge what policy perspectives they prefer. More important still, they will learn that the rule of law is not some pure, abstract ideal. It is socially, or better to say, administratively constructed, ranging from small cases applied to individuals to the resolution of big policy conundrums. Since any attention to government that citizens give is almost exclusively trained on the President, shining more light on presidential management might reveal that officials of many types disagree about questions great and small, but when acting in good faith they can give concrete expression to the law in ways that are consistent with the expression of public preferences through representative institutions. To address serious concerns about the separation of powers, the principal focus of an expansion of the APA might be aimed at the communications of politically-appointed agency heads with rulemaking staff and requiring all such communications to be part of the formal rulemaking record (see Beck, 2013).

I have not even scratched the surface of this idea and it may turn out to be impossible to put into practice. If we must accept that responsibility to the popular will is the primary value animating the strong unitary executive, however, then we can reasonably argue that more formalized transparency is a legitimate constraint on the President's discretion in the use of the far-reaching executive power to say what the law is.

#### *Reconstituting Administration*

There are other more far-reaching possibilities for strengthening the internal checks that some strong unitary executive proponents contend are part of the theory. One idea is to “reprofessionalize” the federal bureaucracy by pulling back on the drive to outsource, and by reinvigorating the competence and positive motivations of civil servants (Verkuil, 2017).

Another idea is to look for reforms that are consistent with the “legislative-centered public administration” that David Rosenbloom (2000) has documented. Congress might specify that certain kinds of administrative work, irrespective of agency setting, are beyond the reach of the President’s discretion under the “Follow the Rules” Act. Such reforms might reinforce the sense among civil servants that their administrative work is often an extension of the legislative function, and they thus can function as agents of Congress and can see themselves as legitimately resisting questionable presidential interpretations of law, especially when they can clarify statutory ambiguity or gaps by drawing on administrative experience to develop “common law enveloping and amplifying” statutes (Spicer & Terry, 1996, p. 9).

For purposes of provocation, however, I offer a brief rendition of a far more radical response. If, as I have argued, current circumstances have their origins in the design and initial interpretation of the constitutional system, then ripping up the offending features root and branch might be the only solution, however ridiculously impractical that may seem. This means reconstituting public administration as a true fourth branch. As I have begun to argue (Cook, 2016, 2017), the project of accommodating administration to the separation of powers in its current form has so far failed to protect the public interest. This is especially so since the design has begun to falter in regulating the effects of faction given the extraordinary expansion in the powers of the executive branch and the authority of the President to control those powers, as well as the unwillingness or inability of the co-equal branches to assert much counteracting force to presidential power over the law. Just as important, none of the three branches have the kind of commitment to the steady administration of law that it deserves as a core regime value, not to mention as a counterweight to popular passions or factional interest.

Steady administration of law thus requires an institution of its own that is part of the Constitution's basic structure. I will not here delve into the question of what specific constitutional text must be changed to give administration its own formal place in the separation of powers. I note, however, that most of the necessary elements already exist within the first three articles of the Constitution, including recognition of administration in the form of "executive departments" with "principal officers." These elements can be drawn together into a new article spelling out the structure, powers, and limitations of the fourth branch with little change necessary to the existing constitutional procedures for creating administrative units and appointing principal officers. After all, the judiciary is a separate branch, but Congress has the power to determine the scope and structure of the courts, except for the tenure of office of federal judges and the constitutionally specified original and appellate jurisdiction of the Supreme Court.

What is more important than the specifics of textual modification is to recognize administration as a constitutive institution of the regime that functions in ways distinct from legislative, executive, and judicial institutions. It is distinctive because it is the setting where, on a daily basis, the instrumental and the constitutive characteristics and impacts of public policy become evident at the interface between state and society. Although it is principally concerned with putting law into action, its experience with that primary role gives administration a unique "experiencing" function (Cook, 2010), a combination of monitoring, learning, and informing responsibilities, particularly about formative effects on both individuals and social relations, of law in action that the other constitutive institutions of the regime rely upon in the exercise of their authority (also see Sunstein, 2015). Because administration as an institution already exhibits these characteristics even in its currently subordinate constitutional role, how would elevating it

to a constitutional branch, at least at the national level, help restrain the presidency, with its enormous powers to determine what the law is?

My answer, in brief and only with respect to the focus of this paper, is that creating a constitutionally distinct fourth administrative branch will facilitate a recalibration of the functions of the separation of powers in two ways. First, it will provide a constitutionally legitimate check on presidential exercise of discretion in interpreting and executing the law, especially by asserting the value of stability against the energetic republican executive's temptation to "[suppose] that the dismissal of his predecessor has proceeded from a dislike to his measures; and that the less he resembles him, the more he will recommend himself to the favor of his constituents. These considerations, and the influence of personal confidences and attachments, would be likely to induce every new President to promote a change of men to fill the subordinate stations; and these causes together could not fail to occasion a disgraceful and ruinous mutability in the administration of the government" (*Federalist 72*). Second, it will insert administration's distinctive perspective into the counteracting and collaborating actions the separation of powers is meant to engender, and in particular, raise much higher in public visibility questions about what the law means, and when change or continuity in the law best serves the public good.

### **Conclusion: Whose Nightmare Is This?**

Contrary to the provocative title of Peter Shane's (2009) book, the conditions brought on by the triumph of strong unitary executive theory are not James Madison's nightmare but Alexander Hamilton's. We have a republican executive consistent with Madison's vision as expressed in the Decision of 1789, in which responsibility defined as responsiveness to the popular will is the principal motive force. It is, however, responsibility to a popular will crafted

by the President, much as Woodrow Wilson envisioned, but also amplified since the 1980s by the post-modern tools of the public spectacle (Miroff, 2003). That responsibility, or responsiveness, energizes and enables the executive to control not only the execution of the law, but its meaning and intent, by controlling and directing those who are actually tasked with the law's execution. It is Hamilton's nightmare because, despite the creation of a merit system that insulates many executive officials from direct exercise of the President's removal power, a determined occupant of our energetic republican executive office can override the quasi-formal constraints internal to the executive branch, and undermine the knowledge, expertise, and most especially the stability in administration that Hamilton emphasized as crucial to good government in a regime powered by popular passions. Even if the current occupant of the White House is an extreme outlier, or as some have argued, a self-inflicted wound, the prudent course is to consider ways of strengthening institutional and system resilience. We might even seriously rethink central elements of the public philosophy regarding what constitutes good governance and the public interest – who should rule, and how – rather than hunkering down and riding out the storm in the hope that the damage won't be so bad. That really doesn't help us prepare for the next time.

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