Draft, please do not cite or quote

June, 2019

Executive Power

John Harrison*

This article presents a new conceptualization of the executive power conferred by Article II of the Constitution. That conceptualization is a more detailed version of the Whig understanding of executive power, which was common among Americans when the Constitution was adopted. The executive power is the capacity to use the resources of the government to perform the functions of the government, subject to the affirmative requirements and limitations imposed by law. Executive officials operate in a legal environment of rules that empower and constrain them, but those rules do not come from the executive power itself. They come from elsewhere in the Constitution and laws. Possession of executive power by itself confers no policy discretion, no authority to use the government's resources, and no privileges to invade private interests. Military functions are executive, and members of the military are likewise subject to rules that empower and constrain them, including especially the law of war. The President's status as Commander in Chief makes him the highest commander while leaving him, like all commanders, subject to the law. The article identifies possible constitutional sources of executive policy discretion other than the executive power itself, and explains that presidential control of the executive branch is consistent with the limited conception of executive power it espouses. In addition to being familiar at the time of the framing, the Whig understanding of executive power figured prominently in the Federal Convention's drafting and has been a mainstay of debates about the executive throughout the Constitution's history.

* James Madison Distinguished Professor and Edward F. Howry Professor, University of Virginia School of Law.
Thanks to participants at a workshop at the University of Virginia and to Sai Prakash.

I. Executive Power as Capacity to Occupy Characteristic Legal Positions
  A. Empowerment, Constraint, and Executive Functions
    1. The Legal Environment of Empowerment and Constraint in Domestic Executive Functions
    2. The Armed Forces and the Law
    3. Foreign Relations and the International Legal Personality of the United States
  B. Executive Power as Capacity to Occupy Legal Roles
II. Executive Capacity and Article II
  A. Text and Structure
    1. The Executive Power and the Operations of Government
      a. The Executive Power in Domestic Operations
        i. Government Institutions and the Functions of Officials
        ii. Officials' Privileges to Invade Private Interests
        iii. Regulation of Official Conduct
      b. The President as Commander in Chief
      c. Executive Control over Foreign Affairs
    2. The Executive Power and the Royal Power
    3. Executive Autonomy and the President's Political Independence
  B. The Text and Conceptions of Executive Power at the Time of the Framing
    1. The 18th Century Whig Conception of the Executive Power
    2. The President's Powers at the Federal Convention
      a. The "Executive" and the Executive Power
        i. The Federal Executive Department and the Royal Power
        ii. Executive Power as Authority to Carry Out the Law
        iii. The Federal Executive Department and the Federative Power
      b. The President as Commander in Chief
    3. Enumeration of Power in Article II
    4. History, Novelty, and Original Meaning
III. Sources of Executive Autonomy Other Than the Vesting and Commander in Chief Clauses
  A. The Limited Enumeration of Congressional Power, Defaults in Favor of the Executive in Foreign Relations, and Control Over Tactics
    1. Foreign Relations and Executive Authority in the Absence of Legislation
    2. Tactics and Congress's War Powers
  B. Legislative Power, Executive Power, and Specificity
  C. Executive Privileges and Immunities
  D. The Executive Power and the Unitary Executive
IV. The Whig Conception of Executive Power in American History after 1787
  A. Executive Power in the Neutrality Proclamation Controversy
  B. *In re Neagle*
  C. *Youngstown Sheet & Tube Co.* v. *Sawyer*
V. Conclusion

After more than two centuries of the Constitution, Americans do not have a clear understanding of the executive power vested in the President by Article II. One leading manifestation of that lack is that a fundamental question remains a matter of doubt and controversy: to what extent do the President's executive power and status as commander in chief of the armed forces grant autonomy to act without authorization from, and sometimes even contrary to, rules of sub-constitutional law?[1] The question is often put as that of the existence and scope of inherent executive power, and the power inherent in the role of commander in chief.[2]

This article proposes a reading of the Vesting and Commander in Chief Clauses of Article II that defines the executive power and includes the role of commander in chief within it. That conceptualization is more detailed and explicit than any currently available. It to some extent answers the question concerning inherent executive power and clarifies where it does not answer. The conceptualization of executive power presented here is novel in its specific formulation but in broad outline familiar from 18th century Whig thinking on both sides of the Atlantic. Executive power, I argue, is a particular legal capacity. It is the ability to occupy the characteristic positions of executive officials in a legal environment of rules that empower and constrain those officials. Those rules authorize executive officials to use the resources of the government to achieve the purposes of the government. They may impose affirmative obligations and negative constraints. The constraints may apply specifically to officials, and also include constraints that apply to private people and from which officials are not exempted by the privileges that come with their official capacity.

The Article II executive power consists entirely of the capacity to occupy that role, and the executive power includes the functions of the armed forces. The rules that empower and constrain officials do not come from the executive power itself, but from elsewhere in the Constitution and the law, especially federal statutes. The Commander in Chief Clause confirms the principle of civilian control of the military but leaves the President subject to applicable law as is any commander. It confers no legal advantages that a commander does not otherwise have. The Vesting and Commander in Chief Clauses thus do not confer the kind of decisional autonomy often referred to as inherent power.

The President and the executive may nevertheless to some extent be free from congressional control, and another purpose of this article is to clarify the possible sources of that freedom, which are not the executive power or the role of commander in chief. To some extent, especially with respect to relations with other sovereigns, other aspects of the Constitution itself contribute to the legal environment of empowerment and constraint within which the executive operates. Only insofar as Congress has enumerated power to add to that body of legal rules may it constrain the executive, and the extent of congressional power in that respect is not clear. The question is one of enumerated legislative power, not inherent executive power. It is also possible

[1] *See, e.g.*, Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act, Op. Office Legal Counsel (Jun. 1, 2009) (slip op.) (funding restriction on U.S. diplomatic activities infringes President's exclusive authority to conduct diplomacy and is unconstitutional).

[2] *See, e.g.*, 37 **Presidential Studies Quarterly** No. 1 (Mar., 2007) (special issue titled "Invoking Inherent Presidential Powers").

that the concept of legislative power requires some degree of generality in its exercise, so that Congress may not make some highly specific decisions. Either kind of limit on Congress, if present in the Constitution, could account for executive control of military tactics, which proponents of executive power often endorse. It is also possible that the Constitution itself gives some protections, such as evidentiary privileges, that enable the President and the executive to exercise whatever decisional autonomy the law gives them, for example with respect to the President's power to pardon offenses against federal law. The unitary nature of the executive, with the President as its chief, is in a sense another source of presidential autonomy, in that it limits Congress' ability to make other executive officials independent of the President. That autonomy, however, must be exercised within applicable legal constraints: the unitary executive means that the President, not someone else in the executive, is the final decision maker, subject to the law.

Section I of this article develops the conceptualization of executive power just described. Section II argues that the executive power conferred by Article II consists entirely of the executive power so conceptualized, and that as commander in chief the President exercises that power with respect to the armed forces. It discusses both the text and structure and the understandings of members of the Federal Convention. Section III describes possible limits on congressional authority with respect to the executive that do not arise from the content of the executive power itself. Section IV explains that the conceptualization presented here is a more developed version of an understanding of the executive that is familiar in American constitutional history. Although this conceptualization of executive power is novel, its novelty comes from adding greater depth to the well-known principle that the executive is subject to the rule of law.

I. Executive Power as Capacity to Occupy Characteristic Legal Positions

This section first describes the operations of executive officials and then, on the basis of that description, develops a conceptualization of executive power.

A. Empowerment, Constraint, and Executive Functions

Despite the enormous variety of activities the executive branch undertakes, a concise and general description of the executive function is possible. Executive officials use the resources of the government to pursue the goals of the government, fulfilling affirmative obligations to pursue those goals and subject to limits imposed by law. The resources of the government are material, including the efforts of executive officials themselves, and juridical, like the special legal capacities of the government. That description applies to the domestic operations of executive officials, to the armed forces, and to the conduct of foreign relations on behalf of the United States.

1. The Legal Environment of Empowerment and Constraint in Domestic Executive Functions

The use of government resources to achieve the government's goals, subject to legal constraints, appears throughout the domestic activities of the executive. The Social Security

Administration, for example, distributes cash benefits. Statutes give officials the duty and corresponding legal power to make those payments.[3] The payments are of funds held in the United States Treasury.[4] Social Security Administration personnel are also paid from the Treasury and the services they provide thus are resources of the government.[5] They operate in buildings owned by the government, or leased by the government from private landlords pursuant to authority to enter into contracts that is conferred by statute; that contracting authority is itself another government resource.[6]

That pattern is found throughout executive operations. While the Social Security Administration provides cash benefits, the Veterans Health Administration of the Department of Veterans Affairs provides health care in kind. The Secretary of Veterans Affairs has a statutory duty to provide medical facilities for veterans who are entitled to care.[7] In order to fulfill that duty, the Secretary is empowered to acquire facilities and to employ private contractors to build them.[8] The Secretary is also empowered to exercise the government's rights as owner of those facilities by transferring them.[9]

Both the Social Security Administration and the Veterans Health Administration use the material and juridical resources of the government to carry out the duties involved in the programs they administer. Federal law enforcement officials often use another legal advantage of the government that is less important to agencies that provide benefits: the privilege to invade private interests in the performance of their function. United States Marshals may make warrantless arrests under specified circumstances, interfering with the private interest in natural liberty.[10] In the performance of their functions, Marshals have the powers conferred on sheriffs by local law.[11] Those powers often include execution of search warrants, which permit entrance into private property without the owner's consent.[12]

---

[3] Under the Supplemental Security Income component of Social Security, for example, every person who is eligible "shall be paid benefits by the Commissioner of Social Security," who thus has an obligation to make payments and the authority to do so. 42 U.S.C. 1381a.

[4] *See*, *e.g.*, 42 U.S.C. 401(a) (creating the Federal Old-Age and Survivors Insurance Trust Fund in the United States Treasury, to which are appropriated amounts equal to the receipts of specified taxes).

[5] *See*, *e.g.*, Consolidated Appropriations Act, 2016, Pub. L. 114-113, 129 Stat. 2242, 2646 (appropriation for administrative expenses of Social Security Administration).

[6] For example, the Social Security Administration has its headquarters in the Arthur J. Altmeyer Building in Woodlawn, Maryland. *See* **United States Social Security Administration, FY 2018 Congressional Justification** 131-132 (2017) (requesting funds for ongoing renovation of Altmeyer Building). That agency also leases space in the World Trade Center in Washington, D.C. *See id.* at 133-134 (describing plans to consolidate leased space). The Administrator of General Services has statutory authority to lease space for federal agencies in privately owned buildings. 40 U.S.C. 585.

[7] 38 U.S.C. 8102(a).

[8] 38 U.S.C. 8103 (Secretary may construct, alter, or acquire sites for medical facilities); *id.* 8106(a) (Secretary may carry out construction of medical facilities by contract).

[9] 38 U.S.C. 8118.

[10] 28 U.S.C. 566(d) (Marshals may make arrests without warrant for federal offenses committed in their presence).

[11] 28 U.S.C. 564.

[12] *See*, *e.g.*, Code of Virginia 19.2-56 (search warrants may be directed to sheriffs).

The special permissions given to executive officials go only as far as their functions. Use of federally-owned vehicles for private purposes is forbidden, for example.[13] Officers who exceed their authority in conducting arrests may be liable for damages paid from their personal funds.[14] Executive officials are also often subject to duties that apply only to them, duties designed to ensure that they perform their functions properly. For example, an official who pays a fraudulent claim for benefits in return for a kickback, which only an official can do, commits a crime.[15] Another rule of conduct that applies only to executive officials bars U.S Treasury officials from engaging in some transactions that are open to private persons.[16]

Executive officials similarly operate in a legal environment that empowers and constrains them when they exercise authority that resembles that of courts and legislatures. Administrative Law Judges' decisions on issues of fact, for example, are subject to deferential review in the Article III courts.[17] When they give the deference called for by statute, and only that level of deference, the courts respect the authority conferred on executive adjudicators while simultaneously enforcing the limits of that authority. In similar fashion, agency exercises of rule-making authority granted by statute are accepted by the courts provided they satisfy the statute granting the authority and the Constitution, and are not arbitrary or capricious.[18] Executive officials and agencies are empowered by the law and their authority reaches only as far as the law that confers it.

In using the resources of the government to achieve the goals of the government, executive officials operate in an environment constituted by legal rules. Although those rules govern many different functions, the rules can be classified by a small number of legal relationships that they create. Those relationships involve enablement and constraint. Enablement comes in two legal forms, one associated with juridical and the other with material resources. In using juridical resources, like the government's contractual capacity, officials exercise legal powers and thereby change legal relations. A contracting officer uses the government's contracting capacity to make a contract, like a lease, which establishes new legal rights and duties. Rules giving power also constrain by establishing the limits of power and so identify legal changes officials are not able to make, for example by issuing an arbitrary regulation.

---

[13] Appropriated funds may be used to operate a government vehicle only for official, not personal, purposes, 31 U.S.C. 1344, and expenditures not authorized by appropriations may give rise to adverse personnel actions, 31 U.S.C. 1349, and criminal penalties, 31 U.S.C. 1350.

[14] *See, e.g.*, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) (allowing damages action against federal officers personally for unlawful search and seizure).

[15] An improper payment made by an official in return for anything of value would be bribery under 18 U.S.C. 201(b)(2). To agree to pay a false claim, knowing it to be false, would be a crime even without the bribe under 18 U.S.C. 286, which criminalizes agreements and conspiracies to defraud the government "by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim."

[16] Treasury officials may not carry on trade in the funds or debt of the U.S. government. 31 U.S.C. 329.

[17] When they review an administrative adjudication conducted by an Administrative Law Judge under 5 U.S.C. 556, the courts defer to fact-finding supported by substantial evidence. 5 U.S.C. 706(2)(E).

[18] 5 U.S.C. 706(2) (agency action to be set aside when arbitrary or capricious, contrary to constitutional right, or in excess of statutory authority).

Enablement with respect to material government resources takes the form of legal permissions. Officials also have permissions to act in ways that private persons are forbidden to, for example by using a government vehicle (for official purposes). Permissions are also important insofar as they allow executive officials to engage in conduct that normally would violate private rights, like breaking down a door to execute a search warrant.

In addition to powers and permissions that enable them to perform their functions, executive officials are also subject to distinct legal burdens, which constrain them. First, they are subject to duties that do not apply to private people. The most basic such duty is affirmative: officials' obligation to perform their function. The absence of duty with respect to an official function creates a configuration that is itself very important: discretion. Discretion is sometimes granted implicitly, when duties constrain but do not completely dictate official decisions. It can also be granted explicitly, as when an official is authorized to exercise judgment.[19] Executive officials are also subject to negative duties that apply specifically to them, like the ban on dealing in federal debt that applies to Treasury officials.

Another source of constraint is the residue of the special permissions that officials enjoy. When those permissions run out, officials are subject to the law that applies to private people. Federal law enforcement officials are privileged under some circumstances to use deadly force, for example, but that does not mean they are legally incapable of committing murder. Officials who commit homicide that is not justified by their privilege may be criminally punished.[20]

Executive operations take place in an environment of legal rules. Those rules prescribe officials' functions, the means they have to perform those functions, and the limits on what they may do.

2. The Armed Forces and the Law

Members of the armed forces, including commanders, occupy the same kind of legal environment as other officials who perform the government's operational functions. They too use the resources of the government to achieve the goals of the government, subject to the constraints of the law. The material resources of the United States' defense establishment include the efforts of more than a million people and a vast array of weapons and supporting infrastructure.[21] Those weapons are instruments of war and not of brigandage only because of a juridical resource: military personnel who conduct themselves in accordance with the law of war

[19] For example, the Secretary of Veterans Affairs has a duty to provide medical facilities, 38 U.S.C. 8102(a), and discretion to decide whether demolishing and replacing an existing building in order to fulfill that duty is in the interests of the United States, 8103(b).

[20] *See*, *e.g.*, Tennessee v. Davis, 100 U.S. 257 (1879) (state prosecution of federal officer for homicide committed while performing his duties may be removed to federal court). A more recent example is *Idaho* v. *Horiuchi*, 215 F. 3d 986 (9th Cir. 2000), *rev'd en banc*, 253 F. 3d 359 (9th Cir. 2001), *vacated as* moot, 266 F. 3d 979 (9th Cir. 2001), a criminal prosecution against FBI Special Agent Lon T. Horiuchi that was originally brought in Idaho state court and removed by the defendant to federal court.

[21] *See* **International Institute for Strategic Studies, The Military Balance 2017** 45 (2017) (U.S. defense budget for 2017 of $617,000,000,000; active forces of 1,347,300).

enjoy combatant privilege.[22] Their lawful acts of hostility are not crimes or torts. Another crucial juridical resource makes the forces a military and not a mob: military superiors may give orders to their subordinates, which if lawful must be obeyed.[23]

Along with empowerment comes constraint. As in the domestic context, constraint appears in affirmative duties, in the limits of powers, in special rules for the executive, and in the limits of permission to depart from otherwise applicable legal requirements. Lawful orders must be obeyed, but an illegal order is not binding.[24] Indeed, obeying an illegal order may itself be punishable as a war crime.[25] War crimes are defined by a body of law that applies specifically to military personnel and military matters.[26] When combatant privilege runs out, the civilian law applies. Members of the armed forces who seize private property without authorization may be liable in tort, for example.[27] Just as there are limits to the juridical resource of combatant privilege, the limits of permission to use material resources also impose constraints.[28] Members of the military are from time to time prosecuted for using official equipment for their private gain.[29]

While their contents sometimes differ, the legal environments of military and civilian government activities have the same structure.

3. Foreign Relations and the International Legal Personality of the United States

Like military and domestic civilian operations, the conduct of foreign relations consists of using the resources of the government to achieve the purposes of the government, subject to the constraints of the law. Conducting foreign relations of course requires the use of many

---

[22] **United States Department of Defense, Law of War Manual** 52 (2016) (military necessity justifies actions such as destroying and seizing persona and property).

[23] *See* 10 U.S.C. 892 (failure by a member of the military to comply with a lawful order is an offense subject to punishment by court martial).

[24] For example, the U.S. *Manual for Courts Martial* states that "[a]n order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate. This inference does not apply to a patently illegal order, such as one that directs the commission of a crime." **Joint Service Committee on Military Service, United States Department of Defense, Manual for Courts-Martial** IV-20 (2016) (para. 14b(2)(a)(i)). The Manual's statements allude to two different kinds of prosecution. The first statement is directed at prosecution for insubordination. In such a proceeding, the subordinate acts at his peril in that if the tribunal determines that the order was lawful, the defendant's belief that it was not will not be a defense. *See, id.* (lawfulness of order is question of law for the court). The second statement is directed at prosecution for crimes other than insubordination, such as murder, in which the defendant seeks to rely on an order as a defense. A patently illegal order does not provide a defense. *See, e.g.*, United States v. Calley, 22 U.S.C.M.A 534, 543-544 (1973) (a "palpably illegal" order is no defense in a prosecution for murder).

[25] *Id.*

[26] For example, the Uniform Code of Military Justice criminalizes certain conduct by members of the armed forces when they are held as prisoners of war. 10 U.S.C. 905(2) (maltreatment of subordinate prisoners punishable by court martial).

[27] *See, e.g.*, Little v. Barreme, 6 U.S. 170 (1804) (Naval officer who seized civilian vessel in excess of congressional authorization subject to personal tort liability).

[28] *See, e.g.*, 10 U.S.C. 908 (unauthorized sale of government property by service member subject to punishment by court martial).

[29] *E.g.*, United States v. Simonds, 20 M.J. 279 (U.S.C.M.A. 1985) (prosecution under 10 U.S.C. 908 for unlawful sale of ship's stores).

physical assets of the United States, like embassy buildings and vehicles and communications equipment.[30] Central to that function is a juridical resource that exists because of international law: the international legal personality of the United States as a sovereign.[31] When the President makes a treaty, he does so on behalf of the United States, not of himself as a personal sovereign.[32] The Permanent Representative to the United Nations votes in the Security Council for this country, not herself.[33]

The legal environment in which U.S. officials work with respect to foreign relations has two sources: international and U.S. domestic law. In international relations, executive officials thus are like the managers of a corporation. International law provides some of the legal environment that in domestic law is provided by corporate law; international law confers capacities on states as corporate law enables corporations to hold property and make contracts.[34] United States domestic law completes that legal environment, enabling government actors to exercise the international legal personality of the United States.[35] In similar fashion, corporate law governs the internal decision making processes of corporations, identifying the natural persons who act for the corporation and the procedures they are to use in doing so.[36]

B. Executive Power as Capacity to Occupy Legal Roles

This account of the legal environment of empowerment and constraint in which executive officials operate suggests a conceptualization of the executive power itself. The rules that empower and constrain officials have many sources. Those sources include the Constitution, numerous federal statutes, state law that creates and protects private rights, international law that applies between sovereigns like the U.N. Charter, and international law that applies to individuals, like the law of war. Other than being law, those sources do not have much in common. Yet the executive power itself also appears in all those situations, as executive officials do.

---

[30] *See, e.g.*, 22 U.S.C. 292 (authorizing Secretary of State to acquire diplomatic and consular facilities in other countries).

[31] A state has "status as a legal person" under international law, with capacity to own property, make contracts, enter into international agreements, pursue and be subject to legal remedies, and along with other states to make international law as customary law or by international agreements. **Restatement (Third) of The Foreign Relations Law of the United States** sec. 206 (1987). As the Comment to section 206 of the *Restatement* explains under the heading "*Legal personality of states*," the "legal status and capacity of states are analogous to the status and legal capacity of persons in developed national legal systems, including personality before the law." *Id.*, cmt c.

[32] *See*, *id.*, sec. 311(1) (states have capacity to make treaties), sec. 311(2) (individuals represent states for purposes of making treaties), *id.*, cmt. b at 170 (President has authority to "represent the United States in negotiating or concluding international agreements").

[33] *See* **U.N. Charter** art. 23 (United States is a permanent member of the Security Council), art. 28, para. 1 (each member of the Security Council to be represented at the seat of the U.N.); 22 U.S.C. 287(a) (President to appoint, with the advice and consent of the Senate, a U.S. representative to U.N., who shall represent the United States in the Security Council).

[34] *See, e.g.*, 8 Del. C. 1953 sec. 122 (legal capacities including powers to own property and make contracts conferred on corporations).

[35] *See, e.g.*, U.S. Const., Art. II, sec. 2 (President makes treaties with the advice and consent of the Senate).

[36] *See, e.g.*, 8 Del. C. 1953 sec. 141(a) (corporation is managed by board of directors); *id.* sec. 211 (stockholder meeting and election of directors).

Although the law governing the operational functions of government varies from function to function, and has many different sources, the executive power is common to the performance of all those functions. It thus must be capable of playing the same role in all those situations, without itself supplying the rules that officials implement. Considered as a legal phenomenon, it must be the ability to perform those roles, to hold those powers and permissions, to be subject to those duties. That is the legal position implementing officials always occupy, whatever may be the law that prescribes their responsibilities and gives them the means, material and juridical, to carry out those responsibilities.

Executive power itself is thus the legal capacity to occupy those many positions, to receive those powers and permissions and be subject to those duties. It is like contractual capacity, which enables the function of contracting but does not itself make or prescribe the terms of any contract.[37] Contractual capacity is nevertheless indispensable in the creation of enforceable private bargains and hence in the law of contracts. Executive power is what implementing officials have in common. It distinguishes them from private people, who as such do not act for the government, just as the full contractual capacity of adults distinguishes them from infants, who lack it.[38]

In this respect executive power is essentially receptive and incomplete. It is an essential ingredient in the performance of operational functions of government, because individuals who lack it may not be empowered to perform those functions, but it is only an ingredient. It must be complemented by the rules that actually prescribe those functions and enable their performance. Executive power is the legal ability to be put in those positions and thus, in a manner of speaking, the power to have the power to implement the law and administer the government.[39]

II. Executive Capacity and Article II

This section argues that the executive power granted in Article II is the legal capacity to occupy executive roles described in Section I and nothing else. That capacity brings with it none of the rules about the government's operations that determine executive duties, powers, and other legal relations. All those rules, including for example permission to use government resources, have sources other than the executive power itself. In an important sense, therefore, nothing is inherent in the Article II executive power except the capacity to occupy the roles set out by other sources of law, especially statutes.

This section further maintains that as Commander in Chief of the army and navy the President exercises the Article II executive power with respect to the armed forces' operations. The rules that govern the armed forces and their commanders do not come from commanders'

---

[37] *See* **Restatement (Second) of Contracts** sec. 12 (1981) (no one can be bound by a contract who lacks legal capacity to enter into a contract).

[38] *Id.* (natural persons in general have full contractual capacity but infants do not).

[39] So conceived, executive power does have an essence. This account of the concept thus differs from that of Professors Bradley and Flaherty. Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 **Mich. L. Rev.** 546 (2004). Many of my conclusions agree with theirs, however, because the executive power's essential subjection to the law means that it does not entail any decisional autonomy, in foreign affairs or elsewhere.

status as such. Those rules have other sources, including federal statutes and the unwritten law of war, just as the rules that empower and constrain executive officials in their civilian domestic operations have sources other than the grant of executive power itself. The Commander in Chief Clause thus establishes civilian control over the military, but does not confer any discretion with respect to the use of the armed forces that is immune from congressional control.

Just as the authority used in military operations is the same as is used in domestic civilian operations, so the authority to conduct the country's foreign relations is a species of the executive power. The executive function includes carrying on relations with other countries, subject to applicable law. The executive power vested by Article II does not include any authority with respect to foreign relations that is distinct from the power used to administer domestic law. It does not include the distinct federative power that John Locke identified in his theory of separation of powers. Military command and foreign relations are aspects of the executive power, and the executive power is a capacity and nothing more.

This conceptualization of executive power accords with the larger structure of the government. Although the Constitution divides government power into three categories, the three are fundamentally complementary to one another and not in competition. Both the executive and judicial powers complement the legislative power in that they carry out, and decide cases under, laws made by the legislature. The independence of the three branches from one another, although a basic principle, therefore does not imply that the executive is independent of the law it administers. The legal environment the executive occupies is largely shaped by legislation, and understanding executive power as the capacity to occupy that environment coheres with the legislature's ability to make the law.

A. Text and Structure

This section argues that the executive power conferred by Article II is the capacity to administer the government and enforce the law pursuant to legal rules not derived from the executive power itself, and that the President's powers as commander in chief are part of that executive power. That interpretation of the text draws on structural evidence, especially familiar features of the operations of government, domestic, military, and foreign. It fits into the structure created by the Constitution, in which the executive is subject to the law the legislature makes while the executive branch is headed by a politically independent President.

The argument begins by relating the executive power granted by Article II to the operations of government. I then turn to an important question raised by the Constitution's British background – the relation between executive power and the King's power – and argue that the two are quite distinct. The section then explains how the conception of executive power offered here resolves a long-standing question: what to make of the difference between the Vesting Clause of Article I, which gives Congress all legislative powers "herein granted," and the corresponding clause of Article II, which gives the President simply "the executive power." The section concludes by showing how the account of executive power presented here is consistent with the political independence of the President from Congress.

1. The Executive Power and the Operations of Government

This section argues that the Article II executive power is solely the capacity to occupy the roles set out in the rules that govern the government's operation. I will first explain why the domestic executive power is limited to the capacity to occupy executive roles, turn to the President's status as commander in chief, and then to the conduct of foreign relations.

a. The Executive Power in Domestic Operations

In domestic operations, the only constitutionally inherent feature of the Article II executive power is the capacity just described: the capacity to be subject to the rules of empowerment and constraint that govern the administration of government and the enforcement of the laws. All other legal rules come from other sources, mainly non-constitutional sources. Textual and structural considerations lead to that conclusion.

The first and easier step in the argument to that conclusion is that whatever else the Article II executive power includes, it must include the legal ability to interact with the rules that guide administration of the government. To carry the law into execution is to take physical acts, like delivering the mail, and concrete juridical acts, like making contracts to purchase delivery vehicles, that cause the world to be what the law calls for it to be. That function must be performed by some individuals. By vesting the executive power in the President, Article II answers a basic question about the identity of the individuals who will implement the law: the President will have a central role with respect to that function. The understanding of law implementation developed earlier in this article fleshes out the idea of executing or implementing or administering the law. When Article II vests the executive power, at least it chooses some person who will play a leading role in doing so.

A more difficult and much contested question is whether the Vesting Clause does anything else. A standard way to put that question is whether there is inherent executive power that goes beyond doing what legal rules other than the grant of executive power call for. I will argue that there is not. Just as the adumbration of executive operations presented here clarifies the law-implementing aspect of executive power, it also clarifies the idea of inherent executive authority that goes beyond it. A claim of inherent executive power is a claim that some of the legal rules of empowerment and constraint that apply to executive officials come from the grant of executive power itself and may not be altered by ordinary legislation. I will argue that rules of that kind – rules about the functions and funding of government institutions, the privileges they enjoy, and the special duties to which they are subject -- cannot reasonably be attributed to the Vesting Clause of Article II. The rules that govern the executive in its many operation are so many, so varied, and so variable, that they are not to be found in a provision as fixed and general as that clause.

As explained above, those rules specify the functions of government, the organizational structures through which those functions are performed, the size and funding of those structures, the privileges to invade private rights that are available to officials, and the regulations that apply specifically to them. None of those kinds of rules can be found in the Vesting Clause of Article II.

i. Government Institutions and the Functions of Officials

A leading case concerning executive power helps illustrate the point that finding inherent executive power means finding that the executive power itself provides rules of empowerment and constraint. *In re Neagle*[40] turned on the functions that Deputy United States Marshals were authorized to perform. Neagle, a Deputy Marshal assigned by the Attorney General to act as bodyguard for Justice Stephen Field, had shot and killed former California Justice David Terry.[41] The Attorney General had authorized the U.S. Marshal in San Francisco to hire a special deputy to protect Field after Terry had allegedly threatened to assault Field, who had recently ruled against Terry's wife while sitting on circuit.[42] Neagle claimed that Terry had moved his hand as if going for a weapon while walking past Field in a railroad dining room.[43] Neagle was arrested by California officials on charges of murder.[44] He sought discharge from state custody, and in effect adjudication of the state charges against him, through federal habeas corpus.[45]

Neagle's habeas petition was properly before the federal courts only if he had acted pursuant to federal law, hence only if he was performing one of the functions of his office.[46] While federal statutes authorized the appointment of U.S. Marshals and deputies, and set out some of their functions, no statute explicitly authorized Marshals to protect federal judges from assault.[47] Whether Neagle had been acting under a law of the United States for purposes of the federal habeas jurisdiction thus was a matter of dispute. At the argument of *Neagle*, the Attorney General justified his earlier decision on the grounds that the executive branch had implied powers with which Congress could not interfere.[48]

Exactly how much illimitable executive power Attorney General Miller meant to claim is not clear. An aggressive version of his argument, worth considering because it is such a strong reading of Article II, is that the Vesting Clause itself added to, and displaced anything contrary in, a body of statutory law that was large when *Neagle* was decided and has grown enormously since. That body of statutory rules creates federal institutions and offices, assigns them functions, provides the resources available to perform those tasks, and imposes on officers

---

[40] 135 U.S. 1 (1890).
[41] *Id.* at 53.
[42] *If.* at 45-51.
[43] *Id.* at 52-53 (Neagle shot Terry believing Terry to be about to draw a knife while standing behind Field), 44-45 (earlier incident in which Terry drew a knife in Field's courtroom during altercation with Marshals).
[44] *Id.* at 4-5.
[45] *Id.* at 5-6.
[46] The federal habeas statute authorized review of the confinement of prisoners "in custody for an act done or committed in pursuance of a law of the United States, or of an order, process, or decree of a court thereof, or in custody in violation of the Constitution, or a law or treaty of the United States." *Id.* at 40-41 (quoting R.S. 753).
[47] "It is not supposed that any special act of Congress exists which authorizes the marshals or deputy marshals of the United States in express terms to accompany the judges of the Supreme Court through their circuits, and act as a body-guard to them." *Id.* at 58.
[48] The President, "by the very fact that he is made the chief executive of the nation . . . is invested with necessary and implied executive powers which neither of the other branches of the government can either take away or abridge," and that many of the three branches' powers "are self-executing, and in no way dependent, except as to the ways and means, upon legislation." *Id.* at 16 (argument of Attorney General Miller). In the account of his argument in the *United States Reports*, the Attorney General did not explain what it means to say that a presidential power may not be taken away by Congress but that the power is dependent on Congress as to ways and means.

prohibitions specific to their office. At the time of *Neagle*, Marshals, Postmasters, members of the United States Light House Board, and any number of other groups of functionaries all had different tasks Congress had assigned them.[49]

When it created the office of Marshal and provided for the appointment of deputies, Congress created a structure through which some law enforcement functions would be carried out. It decided to have a regionally dispersed group of presidential appointees play an important role. In appropriating funds for the Marshals, it decided how much of the taxpayers' funds to allocate to that function.[50] When it legislated that Marshals would have the legal powers of sheriffs, legislation relevant in *Neagle*, it gave them important juridical resources -- the privileges that come with status as a law enforcement officer.[51]

Congress made choices on similar issues when it created the Post Office, but decided on a different structure. While the number of Postmasters was enormous, far more than the number of Marshals, the Postal Service was in important ways centralized.[52] Postmasters were all appointed by the President or the Postmaster General, and the latter had substantial authority to manage the Postal Service from Washington.[53] The Postal Service generated massive revenue, and Congress mandated that it should be self-supporting, with its expenses appropriated from those revenues.[54] In order to secure that revenue, Congress forbade private express businesses from carrying letters.[55] To enforce that prohibition, Congress authorizing specified federal officers to conduct searches and seizures. Within the Postal Service, that law enforcement function was to be performed by special postal agents, not Postmasters.[56] With respect to the Postal Service, a huge federal operation, Congress legislated in considerable detail, allocating

---

[49] *See* R.S. 776 (providing for a United States Marshal for each judicial district), R.S. 780 (Marshals may appoint deputies), R.S. 787 (Marshals to attend court and execute courts' lawful precepts); R.S. 3830 (Postmasters to be appointed by President with advice and consent of Senate or by Postmaster General, depending on class of Postmaster), R.S. 3839 (Postmasters to keep post offices open during hours specified by Postmaster General); R.S. 4653 (President to appoint Light House Board), R.S. 4658 (administrative duties of Light House Board regarding lighthouses).

[50] *See* Act of Feb. 26, 1889, ch. 279, 25 Stat. 705, 744 (appropriation for salaries of U.S. Marshals for fiscal year ending on June 30, 1890, the fiscal year during which the events giving rise to *Neagle* took place). Attorney General Miller authorized J.C. Franks, U.S. Marshal for the Northern District of California, to hire a bodyguard for Justice Field to be paid $5 per day "payable out of the appropriation for fees and expenses of marshals . . . as an extraordinary expense." *Neagle*, 135 U.S. at 51.

[51] *See* R.S. 788 (Marshals and deputies to have the powers of sheriffs of the state in which they act).

[52] The Postmaster General's 1889 report to Congress listed 47,466 Postmasters, including 34,889 fourth-class Postmasters. **United States Post Office Department, Report of the Postmaster General of the United States** 12 (1889).

[53] *Supra*--. The Postmaster General's 1889 report recommended that Congress make the management structure more elaborate by creating 26 postal districts so as better to supervise the nation's thousands of post offices. *Id.* at 8. Whether to create such middle management was up to Congress.

[54] *See* R.S. 4054 (Postal Service to be supported by congressional appropriations out of the service's own revenue). *See, e.g.*, Act of March 2, 1889, ch. 374, 25 Stat. 841 (appropriation for Post Office Department and post offices for fiscal year ending June 30, 1890), *id.* at 841 (appropriating $13,600,000 for salaries of postmasters).

[55] R.S. 3989 (prohibiting private express services from carrying letters).

[56] *See* R.S. 3989 (postal service special agents, under instructions of Postmaster General, to search vessels for letters carried contrary to law).

different functions to different functionaries and deciding on the resources that would be available to them.

In the 18th and 19th centuries, as today, Congress made specific choices about the means by which the laws would be implemented and the functions of the government performed. It made important management decisions, for example by substantially centralizing postal decision-making. Congress sought to conserve the taxpayers' funds by making the Post Office largely self-sufficient, even at the cost of suppressing the otherwise lawful and useful private express business. In deciding how much funding to make available to the U.S. Marshals, it traded off the benefits of law enforcement against its costs.

In his argument in *Neagle*, Attorney General Miller said that the executive had self-executing implied powers with which Congress could not interfere. He did not elaborate on the nature of those powers or on his qualification that Congress controlled the ways and means by which they would be exercised. To say that the Constitution itself enables the President to provide physical protection for federal judges is to say that the rules that determine which individuals are to perform that function, how many of them are to be available to do so, and how much they are to be paid, have some source other than acts of Congress. If those rules arise with no congressional action, then either the Constitution itself contains rules similar to those that Congress enacted in setting up the U.S. Marshals, or it authorizes the President to make them.

The Vesting Clause of Article II cannot reasonably be read to produce either of those results. Considered as a possible source of rules about implementation itself, that clause is far too general to be perform that function. It contains no hint as to how to resolve basic issues, for example the level of funding for law enforcement activities or the organizational structure through which they are to be carried out. The Constitution calls for a census, but the Vesting Clause provides no indication whether the census should be conducted by officials with other responsibilities, by a dedicated organization created for one census and then disbanded, or by a permanent dedicated institution that conducts every census.[57] The grant of executive power provides no resources with which to answer any such questions, many of which are quite basic to the administration of the government.

Because Article II grants power to the President, the other possible constitutional ground for the assignment to duties to officials in the absence of a statute would be authority in the President to provide for enforcement. Aspects of the Constitution other than the Vesting Clause of Article II count strongly against this possibility. First, whatever executive power may be exactly, legislative power is the ability to make legal rules, and all legislative power is in

[57] Article I requires a decennial census of population. U.S. Const., Art. I, sec. 2. Congress has adopted each of the three listed approaches. The first census, in 1790, was conducted by the U.S. Marshals. An Act Providing for the Enumeration of the Inhabitants of the United States, ch. 2, 1 Stat. 101 (Mar. 1, 1790) (Marshals to conduct census and may hire assistants to conduct the enumeration). For the Census of 1890, Congress created the office of Superintendent of the Census in the Department of the Interior, an office with the task of taking the Eleventh Census. An Act to Provide for Taking the Eleventh Census and Subsequent Censuses, ch. 319, 25 Stat. 760 (Mar. 1, 1889). In 1902, Congress created a permanent Office of the Census within the Department of the Interior, headed by a Director of the Census. An Act to Provide for a Permanent Census Office, ch. 139, 32 Stat. 51 (Mar. 6, 1902).

Congress.[58] At a more specific level, the Constitution provides that federal offices are to be established by law, which is to say by statute.[59] Another very specific and very important provision regarding federal operations governs their funding: "No money shall be drawn from the Treasury, but in consequence of appropriations made by law."[60] The Attorney General authorized paying Neagle out of an appropriation by Congress.[61] Money is the sinew, not only of war, but of government in general.

One more provision quite specifically undercuts the argument in favor of executive power that arises in situations like that in *Neagle*: the Necessary and Proper Clause. While Justice Miller for the majority did not explicitly endorse the strong reading of Article II suggested by Attorney General Miller, the Justice did intimate that in assigning Neagle that task the Attorney General was executing the Constitution itself.[62] Giving Justice Field a bodyguard enabled him better to decide cases and otherwise exercise his constitutional authority. In that sense protecting the Justice implemented or carried into execution the Constitution, causing its goals to be fulfilled in actual practice.[63]

Deciding on the appropriate functions of federal officials is indeed carrying the Constitution into execution in a sense. That is the sense, however, that is used by the Necessary and Proper Clause when it confers on Congress power "to make all laws which shall be necessary and proper for carrying into execution" its own powers and those vested in "the government of the United States, or in any department or officer thereof."[64] Execution by making legal rules is the work of the legislative power, as "all laws" in the Necessary and Proper Clause demonstrates. In a fundamental sense, as the Necessary and Proper Clause's language shows, Congress and not the President carries the Constitution into execution.[65]

---

[58] U.S. Const., Art. I, sec. 1 (all legislative power "herein granted" vested in Congress).

[59] The President is to appoint "ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not otherwise provided for, and which shall be established by law." U.S. Const., Art. II, sec. 2.

[60] U.S. Const., Art. I, sec. 9.

[61] *Supra*--.

[62] Pointing to the availability of federal habeas for prisoners "in custody for an act done or omitted in pursuance of a law of the United States," Justice Miller wrote, "In the view we take of the Constitution of the United States, any obligation fairly and properly inferrible from that instrument . . . is 'a law' within the meaning of this phrase." 135 U.S. at 58-59.

[63] Justice Miller argued that the preventive step of giving Justice Field a bodyguard was more effective in ensuring his safety than the threat of criminal prosecution were he to be murdered. *Id.* at 59. The courts themselves could not afford such protection, *id.* at 63, and Congress had adopted no law to that effect, *id.* Matters were different with respect to the President, however. His duty to take care that the laws be faithfully executed was not "limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*" but also included "the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protections implied by the nature of the government under the Constitution." *Id.* at 64.

[64] U.S. Const., Art. I, sec. 8, cl. 18.

[65] Justice Lamar made this point in dissent in *Neagle*, 135 U.S. at 83, as discussed in more depth below, *infra* --.

A more moderate view of the Vesting Clause's bearing on the functions of government officers like Neagle would be that it creates some limited flexibility in those functions no matter what the relevant statutes provide. Perhaps, for example, Deputy Marshals may be assigned as bodyguards for judges but Postmasters may not be, on the grounds that the general statutory function of the Marshals is to support the courts, whereas the Postal Service has nothing to do with the judiciary. Nothing about the executive power, however, suggests that distinction in

ii. Officials' Privileges to Invade Private Interests

Just as nothing about the vesting of executive power supplies any rules about the functions of actual government agencies and officials, nor about their funding, neither does the clause provide any rules about those officials' privileges to invade private interests. *Neagle* also involved that other kind of empowering rule. Because he was a Deputy U.S. Marshal, a federal statute gave Neagle the power of a California sheriff.[66] Sheriffs were charged with preserving the peace, making arrests, and preventing and suppressing affrays and breaches of the peace.[67] To those premises Justice Miller in *Neagle* added a peace of the United States, not just California, and concluded that as a result Neagle was both privileged and required to act in Justice Field's defense and use deadly force if necessary.[68]

The privileges to be given federal officials to invade private interests is another question on which Congress legislates in detail and that calls for any number of policy judgments for its resolution. At the time of Neagle, Congress had authorized special postal agents, not Postmasters, to search private vessels and seize illegally carried letters in order to enforce the private express statutes.[69] Quite likely that assignment of a task requiring privilege to interfere with private property reflected the judgment that investigations should be conducted by specialists in law enforcement, who are for example prepared for possible forcible resistance to a search. Postmasters, whose expertise was with the mail (or with obtaining patronage appointments), would not have been a good choice for that function or a good repository for the privileges associated with it.

Just as the rules governing officials' privileges must identify the officials who shall enjoy them, so it must identify the privileges' extent. The First Congress made a number of delicate decisions along those lines on the sensitive subject of excise taxation. Congress authorized federal inspectors to enter and inspect distilleries during the daytime but not at night, balancing the needs of law enforcement against the convenience of private owners.[70] Congress also decided when to use the intrusive enforcement tool of seizure and forfeiture, with the accompanying official privileges, as opposed to the less intrusive tool of lawsuits by the government.[71]

---

degree. A Postmaster who serves as a bodyguard for a judge is as much advancing a purpose of the government, and as much doing so without congressional authorization, as a Deputy Marshal, if Congress has not given the Marshals that assignment. Statutes define statutory functions, and large and small departures from those functions are departures.

[66] R.S. 788. *See Neagle*, 135 U.S. at 68-69 (discussing Deputy U.S. Marshals' powers as sheriffs).

[67] *Id.* at 68 (citing California statutes).

[68] *Id.* at 69. As the Court also noted, Neagle did not need any privilege held only by officials as a defense to the charge of murder; a friend of Justice Field who knew of Field's history with Terry would have been justified in responding to Terry's actions with deadly force. *Id.* at 53. Neagle needed to show that his use of force was part of his federal function in order to invoke the federal habeas jurisdiction; otherwise he would have had to present his defense in the state court prosecution. *Id.* at 54.

[69] R.S. 3989 (searches for letters), 3990 (seizure of letters).

[70] *See* Act of March 3, 1791, c. xv, sec.29, 1 Stat. 199, 206.

[71] *See, e.g., id.* sec. 10, 1 Stat. at 201-202 (spirits on vessels without proper certificates subject to seizure and forfeiture); *id.* sec. 23, 1 Stat. at 204 (suits to recover unpaid taxes).

As with the identity of implementing officials and the material resources available to them, so with their legal privileges, the Vesting Clause provides no guidance as to the many policy judgment that must be made. Those judgments include trading off effective enforcement against the interest of private parties in their personal and business privacy. The Toxic Substances Control Act, for example, authorizes inspections by the Environmental Protection Agency of facilities where toxic substances are manufactured, processed or stored.[72] That authority extends to many written records, but EPA may inspect records containing financial, sales, pricing, or research information only if the agency notifies the private party of the specific information it plans to acquire in the inspection.[73] The extent to which officials will be privileged to acquire private information is a distinct policy question, one separate from the function the official is to perform. Official functions can be carried out with more or less intrusion into private interests like control of business information.

Whatever the rules of official privilege may be, those who benefit from them will be exercising executive power. Because the function of implementing the laws is thus consistent with a wide range of substantive rules of privilege, it is not possible to deduce any particular rule from the availability of the executive power itself. While the possession of that power does not imply any specific rules about enforcement privileges, Congress has explicit authority to create those rules. It has legislative power and the ability to provide rules that enable effective implementation of the executive and legislative powers.

iii. Regulation of Official Conduct

Officials who carry on the government's operations are subject to legal rules that both empower and constrain them. Rules that assign functions and give privileges empower, and it is impossible to attribute them to the Vesting Clause of Article II. The same is true of rules that constrain, which are just as important to the proper conduct of government operations. Those rules are too detailed, and rest on too many policy choices and trade-offs, to be found simply in the decision to have officials who will carry on the government. Bribery and related conduct illustrate the problems with attributing the rules of constraint to the Constitution. Officials who are allowed to take bribes will not carry out their function well, nor will those who are improperly influenced by their private interests when performing their functions.

Those basic principles are clear enough, but there are many different ways to implement them. The Constitution itself makes bribery grounds for impeachment and removal of civil officers, but does not make bribery a crime punishable by any other penalty than removal from office and disqualification from further office.[74] While the First Congress passed a crimes act

[72] 15 U.S.C. 2610(a) (EPA Administrator and delegees may inspect facilities).
[73] 15 U.S.C. 2610(b) (specified information subject to inspection only if "the nature and extent of such information are described with reasonable specificity in the written notice required by subsection (a) for such inspection").
[74] U.S. Const., Art. II, sec. 3 (civil officers to be removed upon impeachment for and conviction of bribery); *id.*, Art. I, sec. 3 (punishment on impeachment and conviction is limited to removal and disqualification, but further punishment after criminal conviction is permissible).

that forbade bribery of judges, it did not adopt a general recusal statute such as now exists.[75] While conflicts of interest are a serious problem, so is the disruption that results when an important official is unable to act. The fact that officials act for the government says nothing about the safeguards that should keep them from improper influence in doing so, so the content of those safeguards cannot be attributed to the Vesting Clause of Article II.

Officials who implement the law and conduct the government's affairs do so subject to rules that empower and constrain them. The capacity to perform that role in the legal system is itself a distinctive legal position, and possession of the executive power puts officials in that position. Beyond that, possession of the executive power does not supply the content of the legal environment in which officials operate.

b. The President as Commander in Chief

In addition to holding the executive power, the President is commander in chief of the army and navy. One important consequence of that status is generally accepted: it secures unitary civilian control of the military. The Commander in Chief Clause establishes the President, a civilian, as sole head of the armed forces and so excludes either ultimate command by a collegial body or independent discretion in lower-level commanders.[76]

Whether the clause has any other consequences is a matter of considerable controversy. Some interpreters maintain that the clause brings with it some degree of presidential autonomy even in face of contrary legal directives. One common claim is that as commander in chief the President has some control over tactics, as contrasted with strategy, that Congress may not invade.[77]

The understanding of executive power presented in this article strengthens the conclusion that the Commander in Chief Clause establishes the President as sole head of the armed forces, subject to all applicable laws and with no authority to deviate from them. The armed forces carry out a central government function, and so exercise executive power as conceptualized here. In doing so they operate in a legal environment of empowerment and constraint, just as civilian officials do. They use the resources of the government to achieve the goals of the government, subject to legal constraints. The capacity to occupy that position is the executive power, and members of the armed forces participate in it.

That insight reinforces the conclusion that as Commander in Chief the President remains bound by the law. As several scholars have pointed out, at the time of the framing the term

[75] *See*, Act of April 30, 1790, ch. ix, sec. 21, 1 Stat. 113, 117 (bribing judges and acceptance of bribes by judges are crimes); 18 U.S.C. 208 (criminal punishment for certain official acts that affect the official's personal financial interest).

[76] Michael Ramsey, for example, infers from the Commander in Chief Clause that "Congress cannot assign ultimate command responsibilities to someone other than the President." **Michael D. Ramsey, The Constitution's Text in Foreign Affairs** 253 (2007).

[77] In his concurring opinion in *Ex parte Milligan*, 71 U.S. 2 (1866), Chief Justice Chase wrote that Congress's military power "necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief." *Id.* at 139.

commander-in-chief was used, not for the King of Great Britain, but for officers who were highest in some specific command hierarchy.[78] The President is commander-in-chief of the entire Army and Navy, not just some subordinate unit of either. He therefore has no superior in the hierarchy of command. The commanding officer of a fleet is a commander in chief, and the fleet commander is subject to the President as commander-in-chief of the whole Navy.[79] The President's distinctive status derives from the fact that he is commander-in-chief of the entire armed forces. He shares the role of commander-in-chief with others, but only the President commands the Army and Navy as a whole.

Commanders were and are as much subject to the law of war as other members of the armed forces. One of the most notorious episodes in British naval history was the execution in 1757 of Vice Admiral John Byng, Commander-in-Chief of British naval forces at the Battle of Minorca in 1756.[80] Byng was convicted by a court martial for failure to do his utmost to achieve victory, and was executed.[81] The Article of War under which he was put to death applied alike to common sailors and their commanders in chief.[82]

Status as a commander brings with it subjection to, not exemption from, the law governing the armed forces. That status also brings legal advantages, notably the authority to give binding orders, but those advantages are defined and limited by the law. Illegal orders are not binding and compliance with them can be a crime.[83] The President commands an Army and a Navy, regulated by law, not a robber band or a pirate fleet. His authority is constituted by law; officers, soldiers, and sailors take oaths to the Constitution, not to the President personally.[84]

As with the government's civilian operations, the law that applies to members of the armed forces, including their commanders, rests on many policy choices. As a result, it changes over time. Admiral Byng was convicted under an Article of War that had recently been amended so as to make the death penalty mandatory in the circumstances it covered.[85] The court that convicted Byng and was required to sentence him to death recommended that King George II

---

[78] *See*, *e.g.*, **Saikrishna Bangalore Prakash, Imperial from the Beginning: The Constitution of the Original Executive** 153 (2015) (commanders-in-chief were "appointed by and subordinate to" the King, who commanded the forces but was not called commander in chief).

[79] For example, at the beginning of World War II the United States had a Commander in Chief, U.S. Fleet, who despite that title was second in the naval command structure to the Chief of Naval Operations. **E.B. Potter, Nimitz** 3 (1976). Subordinate to both of those officers were the Commander in Chief, Pacific Fleet, *id*. at 5, and the Commander in Chief, Atlantic Fleet, *id*. at 8.

[80] *See*, 3 **W. Laird Clowes, The Royal Navy, a History from the Earliest Times** 156 (1898) (Vice-Admiral Byng was Commander-in-Chief of the British fleet at the Battle of Minorca).

[81] *Id*. at 156-157 (court martial sentenced Byng to death).

[82] The Article under which Byng was convicted applied to "every person in the fleet." *Id.* at 157 n. 1.

[83] *Supra*--.

[84] *See* 10 U.S.C. 502 (oath of enlistment to "support and defend the Constitution of the United States" and to obey the orders of the President and other officers).

[85] 3 **W. Laird Clowes**, *supra* n. --, at 157 & n. 1 (Article of War had recently been amended to eliminate authority of court martial to impose sentence other than death, and Byng's court martial concluded that the Article as it stood "positively prescribed death").

extend clemency, but the King refused to do so.[86] In 1779 that Article of War was amended to restore the court martial's sentencing discretion with respect to that offense.[87]

Whether penalties should be mandatory is an important question of both policy and principle. The Constitution does not provide the resources to answer that question itself. It does, however, confer on Congress authority to make rules for the government of the land and naval forces.[88] That power, not the Vesting or Commander in Chief Clause, is the source of the rules of conduct that apply to members of the armed forces.

As I will explain below, whether the President has some control over tactics that Congress may not override does not depend on the meaning of the Commander in Chief Clause. Rather, it depends on whether legislative power as such is limited in its permissible degree of specificity, and whether Congress has an enumerated power that enables it to make every possible tactical decision. Any limits are internal to Congress's power. Commanders, like executive officials generally, are subject to applicable law, so the place to look for sources of autonomy is in limits on law-making, not the idea of execution or command.

c. Executive Control over Foreign Affairs

The capacity-based understanding of executive power also accounts for the executive's role in conducting U.S. foreign relations. The international legal personality of the United States is an important juridical asset of the U.S. government. The executive administers the government's assets, engaging in relations with other sovereigns for this one just as it makes domestic contracts for the sovereign. Possession of the executive power enables officials to carry on the operations of the government in its foreign relations.

In performing that function, executive officials operate in accordance with applicable law. They must comply with otherwise-valid congressional statutes about foreign affairs just as they must comply with otherwise-valid statutes about contracting. Congress' enumerated powers in that field may not cover all possible decisions to be made for the United States acting on the international plane. Where Congress lacks power, it cannot add to the rules that empower and constrain executive officials. Foreign relations also differ from the domestic operations of the government because the international legal capacity of the United States exists in the absence of any statute, as domestic federal programs do not. Executive officials therefore are able to conduct foreign relations without any affirmative legislative action by Congress. That creates a default presumption in favor of executive discretion that does not exist in the domestic sphere. When Congress legislates within its enumerated powers, it can reduce or eliminate any executive discretion with respect to foreign affairs.

The executive role in conducting foreign affairs may seem to imply some autonomy regarding foreign policy, but it does not. Dealing with other sovereigns on behalf of the United

[86] *Id.* at 157 (recommendation of clemency); **N.A.M. Rodger, The Command of the Ocean: A Naval History of Britain, 1649-1815** 267 (2005) (King George II refused to pardon Byng).
[87] *See* 19 Geo. III, ch. 17, sec. III, 13 Stat. 331,332 (explaining that "the restraining of the power of the court-martial to the infliction of the punishment of death . . . may be attended with great hardship and inconvenience).
[88] U.S. Const., Art I, sec. 8, cl. 14.

States is undoubtedly an executive function. As John Marshall said before his appointment as Chief Justice, the President is the "sole organ" of this country in dealing with other sovereigns.[89] That role does not, however, imply any policy discretion with respect to those dealings. Executive officials act for the government, whether in the domestic or international sphere. They do so in accordance with law. Conduct of foreign relations does not mean control of foreign relations. The executive is also the sole organ for making contracts for the United States, but federal contracting is subject to extensive statutory control.[90]

Executive officials who conduct foreign relations routinely do so subject to the instructions and ultimate decision of a superior; the vast bulk of diplomacy is not carried on by the President, the only executive official with no superior. Being charged with foreign relations thus cannot logically imply autonomy regarding what to say and do. For example, in 1794, Chief Justice Jay was sent to Britain as a special envoy to negotiate a treaty that would resolve outstanding differences between the two countries.[91] In his discussions with British officials, Jay was guided by the instructions that President Washington had given him.[92] The text he negotiated was not the text ultimately adopted; the Senate gave its advice and consent with a reservation altering an article.[93] Jay was at the bargaining table in London, but the ultimate decisions were made by others. Having the task of speaking to foreign diplomats does not entail deciding what is to be said. The executive's function of handling this country's foreign relations is by itself no more than a manifestation of the principle that executive officials are responsible for administering the government.

The primary textual argument in favor of some presidential autonomy concerning foreign relations is that at the time of the framing the executive power was thought to include authority with respect to external affairs, the so-called "federative power."[94] Although chief executives did in general conduct foreign relations, however, executive power did not include any distinct role concerning foreign affairs that would entail independent policy-making authority.

As many Americans knew in 1787, John Locke had identified the federative power as distinct from the domestic powers of government. Having distinguished legislative and executive powers, Locke observed that "the Controversies that happen between any Man of the Society with those that are out of it, are managed by the publick."[95] The power to manage those controversies "contains the Power of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth, and may be called

---

[89] Marshall used that phrase in a debate in the House of Representatives in 1800, while a Representative from Virginia. "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." 10 **Annals of Congress** 613 (1800).
[90] *See*, *e.g.*, 41 U.S.C. 3701 (requiring that bids for federal contracts be evaluated solely on the basis of the solicitation for the contract).
[91] **Stanley Elkins and Eric McKittrick, The Age of Federalism** 395 (Jay confirmed by Senate as special envoy to Britain in April 1794).
[92] *Id.* at (Washington issued Jay instructions in May 1794).
[93] I **Senate Executive Journal** 186-187 (1795).
[94] *See*, *e.g.*, **Saikrishna B. Prakash**, *supra* n. --, at 112-116 (federative power accompanied executive power).
[95] **John Locke, Two Treatises of Civil Government** 411 (Peter Laslett, ed., 1960) (Second Treatises).

Federative."[96] Locke then observed, "These two Powers, *Executive* and *Federative*, though they be really distinct in themselves . . . yet they are almost always united."[97] Both powers routinely require the force of the community, which should be in the same hands, because dividing it would lead to "disorder and ruine."[98]

Locke maintained that dealings with other sovereigns were not readily governed by antecedent rules, so the holder of the federative power should have considerable discretion.[99] He regarded the executive power, by contrast, as intrinsically subordinate to the legislative power, which was supreme.[100] The English constitution gave the King a kind of supremacy, but that was because of his participation in the legislative power through his veto.[101] When executive power is placed in the hands of someone who does not share in the legislative power, it is "subordinate and accountable to" the legislative power.[102]

Locke gave a practical reason for the holder of the federative power to have discretion, but he did not describe foreign affairs as an exception to the principle that the legislative power is supreme. Most likely, he thought the federative power was in principle as much subject to legislative direction as the executive power. In any event, the argument that the Constitution implicitly recognizes a fourth power and implicitly vests it in the President is unpersuasive. Locke said that the legislative, executive, and federative powers were distinct. Drafters following his typology would have vested them by name, even if the President received two of them. Locke pointed out that the same person could hold the executive, federative, and part of the legislative power, as the King of England did; when the Federal Convention gave the President part of the legislative power, they did so distinctly in Article I, Section 7. Insofar as the King held the federative power because he was personally sovereign, the British model does not apply to the President in a system of popular sovereignty.[103]

---

[96] *Id.*
[97] *Id.*
[98] *Id.* at 412.
[99] *Id.* at 411-412.
[100] "In all Cases, whilst the Government subsists, the *Legislative is the Supream Power*. For what can give laws to another, must needs be superior to him." *Id.* at 413.
[101] "In some Commonwealths where the *Legislative* is not always in being, and the *Executive* is vested in a single Person, who also has a share in the Legislative; there that single Person in a very tolerable sense may also be called *Supream*, not that he has in himself all the Supream Power, which is that of Law-making: But because he has in him the *Supream Execution*," being superior to lower executive magistrates, and "having also no Legislative superiour to him, there being no Law to be made without his consent." *Id.* at 414.
[102] *Id.* at 414-415.
[103] Blackstone treated the King's control over "this nation's intercourse with foreign nations" as distinct from his role in Britain's "own domestic government and civil polity." 1 **William Blackstone, Commentaries on the Laws of England** *245 (1765). Blackstone discussed the king's foreign-relations prerogatives among "a number of authorities and powers; in the exertion of which consists the executive part of the government." *Id.* at 242. Foreign relations powers are executive in that they involve specific acts in the administration of government; when the President conducts or oversees negotiations with foreign diplomats, he performs an executive function. Blackstone did not, however, derive the king's autonomy with respect to some foreign-relations matters from the monarch's status as "not only the chief, but properly the sole, magistrate of the nation," *id.* at 243. As to treaties, for example, he explained that "with regard to foreign concerns, the king is the delegate or representative of his people." *Id.* at 245. "In the king therefore, as in a center, all the rays of his people are united, and form by that union a consistency, splendor, and power, that make him feared and respected by foreign potentates; who would scruple to enter into any

The strongest indication that the Constitution does not employ Locke's typology is that it vests three powers, not four. In the tripartite scheme the Constitution uses, the federative power need not be allocated as such. Although one country's legislature cannot make law for other sovereigns, a legislature can make rules about how the state for which it legislates engages in international acts like treaty-making. The executive then can implement the laws the legislature makes. A law might, for example, say that the executive is to negotiate trade agreements with stated features. Negotiating those agreements then would be an executive function. The power to make rules concerning foreign relations is legislative, whereas the power to carry on foreign relations is executive. If the Constitution simply granted legislative, executive, and judicial powers, and said nothing about foreign relations, the legislature would be able to make many of the decisions the Constitution itself makes about the processes by which this country's international capacity is exercised. The executive then would implement the laws concerning foreign relations. Because executive officials are subject to the law they carry out, the executive power does not bring with it autonomy concerning the conduct of the foreign relations executive officials carry on.[104]

The federative power is thus present in the tripartite system of legislative, executive, and judicial power, but may be hard to see. Not only is the federative power divided between law-makers and law-executors, some of the relevant law-making power was exercised in making the Constitution while some was given to Congress. Instead of leaving the treaty-making process for Congress to set up, the Federal Convention itself made the rules about that process. It gave the President some decisional autonomy – no treaty can be made without the President -- just as statutes often confer discretion on executive officials. The Convention also gave the Senate the kind of case-by-case decisional authority that legislatures sometimes exercise themselves but also quite often give to executive officials. The resulting system can reasonably be described as

---

engagements, that must afterwards be revised and ratified by a popular assembly." *Id*. The President's engagements must be reviewed and approved by the Senate. Blackstone thus explained the king's sole power to make treaties, which the President does not have, on the grounds that the king was sole delegate of the people regarding foreign relations, which the President is not.

[104] Hamilton wrote in *Federalist No. 75* that "though several writers on the subject of government power place [the treaty] power in the class of executive authorities, yet this is evidently an arbitrary disposition." *The Federalist No. 75*, at 504 (Jacob Cooke, ed., 1961). On careful attention, "it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them." *Id*. Legislative power is authority "to prescribe rules for the regulation of the society, while "execution of the laws of the employment of the common strength" for that purpose or "for the common defence, seem to comprise all the functions of the executive magistrate." *Id*. Making treaties "is plainly neither the one nor the other." *Id*. Rather, "its objects are CONTRACTS with foreign nations," which "are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign." *Id*. at 505-505. Treaty-making thus "seems to form a distinct department, and to belong properly neither to the legislative nor to the executive." *Id*. at 505. In his analysis of legislative power, Hamilton mistook the part for the whole. Making rules for the conduct of private people is the central application of legislative power, but making rules for the operations of the government is also a legislative function. For example, the Necessary and Proper Clause gives Congress, the legislature, power "to make all laws" needed "for carrying into execution" its own powers "and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." U. S. Const., Art. I, sec. 8, cl 18. Congress exercised that power when it created the Department of Foreign Affairs (now State) and charged its Secretary with conducting the foreign relations of the United States insofar as the President assigned him functions in that connection. An Act for Establishing an Executive Department, to be denominated the Department of Foreign Affairs, ch. iv, 1 Stat. 28 (July 27, 1789).

one in which the Senate participates in the executive function of making treaties, because actually making a particular treaty is an executive function and the Senate must specifically concur.[105] That description is correct because conducting relations with foreign countries involves administering the government, not because administration of the government automatically brings with it decisional autonomy. The President's autonomy regarding treaties is a distinct feature of the system, not a result of his possession of executive power. The Constitution thus specifically deals with a crucial piece of the federative power, the authority to make treaties. By doing so it does not fill a gap left by the allocation of legislative, executive, and judicial power. Rather, it exercises legislative power, making decisions that otherwise would have been left to the legislature.

Americans at the time of the framing thus had two plausible but ultimately unpersuasive reasons to think that the grant of executive power would bring with it autonomy with respect to foreign relations.[106] The function of acting for the United States in international relations is indeed executive, but does not entail any policy-making autonomy. The sovereign King conducted and made decisions concerning foreign affairs and also administered the government. The King's sovereign control over foreign policy, however, was distinct from the executive power. As Professor Rakove puts it, the characterization of foreign-relations functions as executive was "casual and conventional rather than critical and contemplative."[107]

---

[105] From the beginning, the Senate has kept a separate Executive Journal recording its decisions regarding treaties. *See*, *e.g.*, 1 **S. Exec. J.** 186-187 (1795) (approval of the Jay Treaty).

[106] *See*, **Saikrishna B. Prakash**, *supra* n. --, at 112-116 (federative power accompanied executive power).

[107] Reviewing 18th century American usage, Rakove writes, "we can plausibly conclude that, prior to 1787, American thinkers followed British practice in classifying war and diplomacy as executive functions. But that classification was casual and conventional rather than critical or contemplative." Jack N. Rakove, *Taking The Prerogative Out of the Presidency*, 37 **Presidential Studies Quarterly** 85. 92 (2007).

Interpreters who believe that the Constitution implicitly gives the President federative along with executive power recognize that some foreign-relations powers are vested elsewhere. Professor Prakash explains that feature of the Constitution by reading the executive power to include "power over international relations" subject to "broad exceptions." **Saikrishna B. Prakash**, *supra* n. --, at 111. Professor Ramsey similarly maintains, "The Constitution's executive foreign affairs power comes into play only for powers the Constitution does not otherwise allocate – and the most important powers are specifically allocated." **Michael D. Ramsey, The Constitution's Text in Foreign Affairs** 131 (2007). The most natural recipient of any residual federative power, however, is not the President but the Senate. As many Americans at the time of the framing were well aware, the Roman Senate had important foreign-affairs powers. It sent and instructed ambassadors, it received and negotiated with foreign ambassadors, and its consent was required for treaties. *Id*. at 144. (As Ramsey points out, in practice the consuls often took a leading role in drafting and negotiating treaties. *Id.* That role did not detract from the Senate's formal powers.) The Americans had overthrown a King and created a republic, and during the Revolution and framing regularly looked to Republican Rome. **Stanley Elkins and Eric McKittrick**, *supra* n. --, at 46-50. Discussing the First Congress's debates over the President's title and mode of address, Elkins and McKittrick write, "What had governed just about everyone was a principle which gave a strong accent to the ideology of the Revolution: the austere simplicity of the Roman Republic. The imagery of the Latin classics had permeated their lives, words, thoughts, and acts in endless ways ever since they could remember. . . . The very nomenclature of the government – "president," "senate," "congress," – as well as the official iconography, the mottoes of state, even the architecture, would all be heavily Roman." *Id.* When John Adams wrote to Benjamin Rush in 1789 that "Patres Conscripti was an higher Title than my Lords," he was associating his country's new government with the Roman Republic, not the British monarchy and aristocracy. John Adams to Benjamin Rush, July 28, 1789, **Old Family Letters, Copied from the Originals for Alexander Biddle, Series A** 51 (1892). The new order of the ages proclaimed in Latin by the Great Seal of the United States is not monarchy and the President is not a sovereign, but the Senate is a

2. The Executive Power and the Royal Power

As the discussion of federative power suggests, this account of the Article II executive power rejects the possibility that it includes any of the British royal prerogative, except to the extent that the prerogative included the authority to carry out the law and administer the government, subject to any applicable statutes. Two basic features of the Constitution lead to that conclusion. First, the King had the prerogative because he was sovereign.[108] Sovereignty includes all the powers of government, not just the executive. In Blackstone's day the King still set the standard of weights and measures, performing a legislative function by prescribing rules for private people.[109] The President is not sovereign. The United States is a republic, and so does not have a monarch. The Preamble attributes the sovereign power to make constitutions to the people.[110]

Second, the premise that the Article II executive power includes all the King's power requires an unlikely understanding of the relationship between the Vesting Clauses of Articles I and II. Article I provides that "all legislative power herein granted" is vested in Congress, and gives that body authority to set the standard of weights and measures.[111] If legislative power means power to make legal rules and executive power means power to carry them out, those parts of Article I fit comfortably with Article II.

If the executive power conferred by Article II is the whole royal power, including its law-making components, matters are not so simple in the text. On that reading, the weights and measures power is a non-legislative power conferred on Congress and an exception to the vesting of executive power in the President. Nothing signals that anomaly, however. Article I does not say that Congress has all legislative power and some executive power, Article II does not say that the President has the executive power except insofar as it is given to Congress, and the weights and measures power is inserted in Article I, Section 8 along with powers that really are legislative, like those over bankruptcy and naturalization.

3. Enumeration of Power in Article II

The understanding of executive power presented here resolves a long-standing question about the Vesting Clause of Article II. Article I's Vesting Clause gives Congress "all legislative power herein granted." Article II vests "the executive power." For more than two centuries, interpreters have discussed whether the contrast means that while Congress has only enumerated powers, the President has all executive powers, not just those specifically listed in Article II like the pardon power.[112] The question is misconceived. The President has only enumerated powers,

---

Senate. To give a republic a Senate was to suggest that the body so called held the federative power if one was conferred. The Constitution, however, does not confer the federative power as such.

[108] In Britain, the person upon whom the crown descends is "immediately invested with all the ensigns, rights, and prerogatives of sovereign power." 1 **Blackstone, Commentaries** *183.
Id. *264-265.

[110] *Id*. *264-265.

[111] U.S. Const., Art. I, sec. 1 (vesting all legislative power), sec.8, cl. 5 (power to set standard of weights and measures).

[112] *See* Bradley & Flaherty, *supra* n. --, at 553 (describing argument that the contrast between Articles I and II shows that the President has all executive powers, not just those enumerated such as the pardon power).

some of which are not executive at all, like the pardon power. One of the President's enumerated powers is the executive power, to which the distinction between enumerated and unenumerated does not apply. The distinction does not apply because the strategy it is used to implement – limited power through a limited list – is relevant to legislative but not executive power. The limits of enumerated federal legislative power are also limits on the federal executive power; the President cannot implement a law Congress may not enact. As a result, to give the President all the executive power is not to extend his authority or the federal government's.[113] The President has all possible executive power, but no unenumerated powers.

4. Executive Autonomy and the President's Political Independence

One reason to think that the executive power includes some authority with which the legislature may not interfere derives from the Constitution's structure. The President is independent of Congress in that Congress does not choose him and may remove him only on limited grounds and through a procedure that involves a super majority in the Senate.[114] From the beginning, supporters of the Constitution have extolled the President's political independence from Congress.[115]

A politically independent chief executive may seem not to match the relationship between the legislative and executive powers that I attribute to the Constitution. In that relationship, the two powers complement one another and do not conflict. Executive officials carry out the legislature's laws, and administer the government's affairs pursuant to those laws. In a sense, that complementarity makes the executive the agent of the legislature, with the latter making policy decisions and the former carrying them out. Why should an agent be independent of the principal?

The first answer is that political independence is a relationship between Congress and the President, and the President is not only the holder of the executive power. Because of the veto, he also participates in legislation. The President is in effect a third house of the legislature, with his own mode of selection and his own constituency. On behalf of his constituency, he may resist the Senate and the House as they resist one another. Another non-executive presidential power, the pardon, is justifiably placed in the hands of a single individual chosen by the people, not the legislature.[116]

Political independence for the official who carries out the law also has strong arguments in its favor. One has to do with transparency in government. In a system based on the rule of law, executive officials, like judges, are supposed to follow the officially enacted rules, not the

[113] The debate about unenumerated executive powers reflects the confusion between powers that are executive in the sense that they are held by the officer or institution who implements the law, and the executive power as only the authority to implement the law.

[114] U.S. Const., Amend. XII (President chosen by electors), Art. II, sec. 4 (President removable through impeachment), Art. I, sec. 3, cl. 6 (two-thirds of Senate required to remove on impeachment).

[115] *See, e.g.*, *The Federalist No. 71* (Alexander Hamilton) (importance of President's independence of Congress).

[116] For example, Hamilton pointed out that a well-timed offer of pardon can sometimes bring an insurrection to an end. *The Federalist No. 74*, at 502 (Jacob Cooke, ed., 1961). Achieving that timing might be beyond the capacity of a deliberative body, and such a delicate decision should be in the hands of an officer politically selected and accountable.

personal desires of legislators.[117] Law-bound executive officials and courts that have limited incentives to curry favor with legislators are more likely to follow the law as written and not informal indications of legislator preferences. Those preferences might be such as not to stand the light of day as far as the legislator is concerned. Independence for the other two branches makes it harder for legislators to say one thing to their constituents in general and something else to insiders for whom they do favors through back-channel communications with those who implement the law.

Next, an independent political connection between the executive and the people is valuable because executive officials inevitably will exercise substantial discretion. Even if the legislature can specify the law to any degree it chooses, in practice there are limits on specification. Congress could not enact statutes choosing every target of federal prosecution if it wanted to. Executive officials will make important policy decisions even if the Constitution does not ensure that any particular decision will be in their hands. In a democracy, extensive discretion should come with accountability to the electorate.

B. The Text and Conceptions of Executive Power at the Time of the Framing

This section deals with the historical context of the Constitution and Article II in particular. It shows that at the time of the framing many sophisticated Americans believed that the executive power was solely the authority to carry out the law. It then shows that influential participants in the Federal Convention's drafting process had that understanding of executive power, and that the process produced a text that they reasonably could have believed used their conception in the Vesting Clause of Article II.

The historical evidence shows that an understanding of executive power consistent with the conceptualization presented here was part of the intellectual mainstream when the Constitution was adopted. That does not mean that there were no plausible competitors. It does mean that a well-informed reader of the Constitution, considering its structure and context, could reasonably have concluded that the executive power conferred by Article II was the governmental authority described in this article.

1. The 18th Century Whig Conception of the Executive Power

Americans who supported the Revolution were deeply influenced by the political thinking of English Whigs, and often called themselves Whigs.[118] Whigs were highly suspicious of royal power, seeing in English history a series of attacks on the people's liberty by the Crown,

---

[117] Hamilton also argued that the President should be "independent for his continuance in office on all, but the people themselves. He might otherwise be tempted to sacrifice his duty to his complaisance for those whose favor was necessary to the duration of his official consequence." *The Federalist No. 68* at 460 (Jacob Cooke, ed. 1961).

[118] "More than any other source, this disaffected [radical] Whig thought fused and focused the elements that shaped the colonists' conception of the English constitution and English politics." **Gordon S. Wood, The Creation of the American Republic, 1776-1787** 17 (1969). The first chapter of Wood's book, in which that sentence appears, is titled "The Whig Science of Politics." The influence of Whig thinking continued through the formation of the new American constitutions. "Even after Independence, most Americans still conceived of politics in conventional Whig terms." *Id*. at 134.

reaching back to William the Conqueror.[119] Once independent, Americans were in a position to put their principles into practice. Those principles had a strong Whig component, which called for making the republican chief magistrate "a very pale reflection indeed of his regal ancestor."[120]

The Whig-influenced conception of a chief magistrate had two partially overlapping components. First, it distinguished between the royal prerogative and the executive power strictly speaking. Second, that conception regarded the executive power as the administration of government in subordination to the law.[121]

Virginia's constitution of 1776 reflects that thinking. It provided for a Governor who, along with a Council of State, was to "exercise the executive power of government, according to the laws of this Commonwealth."[122] The Governor was not, under "any pretense" to "exercise any power or prerogative, by virtue of any law, statute, or custom of England," except that he was given a limited pardon power shared with the Council of State.[123] Take away the prerogative and the remainder is the executive power of government, to be exercised according to the law.[124] In similar fashion, the Maryland constitution of 1776 gave its Governor the "executive powers of government" plus some additional authorities including a limited pardon power, but explicitly denied any "power or prerogative by virtue of any law, statute, or custom of England or Great Britain."[125] In 1783, Jefferson proposed a revised constitution for Virginia which reflected Whig principles concerning the executive. It gave the Governor "those powers only, which are necessary to execute the laws (and administer the government) and which are not in their nature either legislative or judiciary."[126]

---

[119] *Id*. at 31 (Whig view of struggle for liberty against royal tyranny reaching back to the Norman Conquest, with another attempt to snuff out liberty by the Stuart monarchs of the 17th century).
[120] *Id*. at 136.
[121] *Id*. (Americans undertook to design a magistracy shorn of the royal "rights, powers, and prerogatives" but able to execute the law).
[122] Virginia Constitution of 1776. (The 1776 Virginia constitution does not have articles, sections, or paragraphs.)
[123] *Id*.
[124] While in Philadelphia in 1776, Thomas Jefferson prepared a draft constitution for the use of the convention then drafting a constitution for Virginia. Jefferson's draft took a slightly different route to the result the 1776 Virginia Constitution reached concerning the executive, and used instructive terminology. He called the person who would exercise "the executive powers" the Administrator. The Virginia Constitution, Third Draft, Art. II, 1 **The Papers of Thomas Jefferson** 356, 359 (Julian P. Boyd, ed. 1950). The Administrator was to have "the power formerly held by the king," minus a list of specific authorities, most of which were called prerogatives. *Id*. at 360. The excluded powers included a negative on legislation and the prerogatives of declaring war and concluding peace, of raising armed forces, and of pardoning crimes. As Wood explains, "such an enfeebled governor could not be a magisterial ruler in the traditional sense, but could only be, as Jefferson correctly called him, an 'Administrator.'" **Gordon S. Wood**, *supra* n. – at 137.
[125] Maryland Constitution of 1776, Art. XXIII. That provision gives the Governor authority to embody and direct the militia and to direct the regular military forces and then authorizes him to exercise all "other executive powers of government." *Id*. That formulation treats military command as part of the executive power. The denial of any prerogative barred the Governor from declaring war or concluding peace.
[126] Jefferson's Draft of a Constitution for Virginia, 6 **The Papers of Thomas Jefferson** 294, 299 (Julian P. Boyd, ed. 1952). Jefferson's draft explicitly denied reference to "those powers exercised under our former government by the crown as of it's prerogative." *Id*. at 298-299. (In the late 18th century an apostrophe often was used in the third person neuter possessive.)

Professor Henry Monaghan describes Jefferson's 1783 proposal as "of course, the Whig theory of executive power."[127] Between Jefferson's time and today, a political science professor who would become President wrote that "[t]he makers of the Constitution seem to have thought of the President as what the stricter Whig theorists wished the king to be: only the legal executive, the presiding and guiding authority in the application law and the execution of policy."[128]

The Americans who drafted and ratified the Constitution were familiar with an understanding of the executive power in which it consisted entirely of the authority to administer the government and carry out the law, and included no other part of the British royal power. I have argued above that the Constitution's text and structure imply that conception. Next I will review the proceedings of the Federal Convention, which show that many delegates attributed that meaning to the Vesting Clause of Article II they drafted.

2. The President's Powers at the Federal Convention

This section will seek the understandings of delegates to the Federal Convention concerning the text they produced and the intermediate drafts they considered. Any conclusions must be guarded. Even when a deliberative body's proceedings are completely and accurately recorded, learning what participants were thinking is not easy. The available records of debates in the convention are not close to being complete, and their accuracy is subject to doubt.[129] Nevertheless, some conclusions can be drawn with reasonable confidence. I will explore two questions: whether the delegates thought that the grant of executive power would extend beyond the power to carry out the law and administer the government, and whether they thought that making the President Commander in Chief would give him any authority regarding the use of the armed forces that Congress could not override. The answer to both questions is no.

a. The "Executive" and the Executive Power

The available information concerning the delegates' thinking about the executive power supports three conclusions. First, the delegates generally distinguished between the executive power their proposal would confer on the President and the totality of the King's power. It is very unlikely that any delegate believed that the Vesting Clause of Article II would give the President the royal power, subject to modification and defeasance by other provisions. Second, delegates in general likely believed that the executive power was confined to the capacity to carry out the law and administer the government. Third, it is unlikely that delegates generally believed that the executive power would give the President the autonomy with respect to foreign relations that the sovereign King enjoyed.

---

[127] Henry P. Monaghan, *The Protective Power of the Presidency*, 93 **Colum. L. Rev.** 1, 16 (1993). As Monaghan explains, the "executive envisaged by Whig theory" is devoted to "'law enforcement.'" *Id*. at 15.
[128] **Woodrow Wilson, Constitutional Government in the United States** 59 (1908).
[129] *See, e.g.*, **Mary Sarah Bilder, Madison's Hand** 198-201 (2015) (arguing that Madison substantially altered important passages in his notes of the convention).

i. The Federal Executive Department and the Royal Power

On May 29, 1787, Edmund Randolph presented several resolutions on behalf of the Virginia delegation.[130] Two are critical to understanding the Constitution's executive power. One proposed to confer on a new "National Legislature" the "legislative rights" then given to Congress by the Articles of Confederation.[131] The other gave a new "National Executive" a "general authority to execute the national laws" and "the executive rights vested in Congress by the Confederation."[132]

The "legislative rights" must have been several powers the Articles Congress had that were legislative in the central sense of that term: they were the authority to prescribe general rules to govern the affairs of private people.[133] That resolution was agreed to without opposition.[134] Later in the Convention, the Committee of Detail confirmed that understanding of the referent of "legislative rights." When it drafted an actual constitution based on the resolutions referred to it, including that part of the Virginia Resolutions, the committee's list of powers of the new federal legislature included those powers of the Articles Congress.[135]

The delegates thus used "legislative," in contrast with "executive," to refer to some of the powers that were conferred by the Articles. As readers of Blackstone knew, the King held a number of those powers, such as authority over weights and measures.[136] The royal power thus went well beyond the authority to carry out the law, and included much that was legislative in the ordinary sense of that term and the meaning of the Virginia Resolutions. Any delegate who knew the basics about the King of Great Britain would have thought that a grant of executive power would fall short of giving its recipient all the King's power, even defeasibly.

Nothing in the available records indicates that the delegates ever wavered in their understanding that an important component of the royal power was legislative as opposed to

---

[130] I **The Records of the Federal Convention of 1787** 20-23 (Max Farrand, ed., 1937).
[131] *Id*. at 21.
[132] *Id*.
[133] The Articles of Confederation gave Congress certain domestic legislative powers. Congress was given exclusive authority to regulate the value and alloy of coins struck by the United States and by states, to fix the standard of weights and measures, and to establish and regulate post offices and charge postage. Articles of Confederation, Art. IX, para. 4. Congress had another regulatory power that was arguably domestic: to regulate trade and manage affairs with "Indians, not members of any of the states." *Id*. That authority was hard to classify as between foreign and domestic.
[134] I **The Records of the Federal Convention of 1787**, *supra* n. --, at 47 (Convention Journal reporting approval), *id*. at 53 (Madison reporting approval with no dissent).
[135] The Committee of Detail's draft gave the new federal legislature power "to coin money; to regulate the value of foreign coin; to fix the standard of weights and measures; [and] to establish Post-offices." II **The Records of the Federal Convention of 1787** 182 (Max Farrand, ed., 1937). Those three powers occur together, probably reflecting their common origin in the Articles. They are followed in the Committee of Detail's list by the power to borrow money and emit bills of credit, *id*., which the Articles also gave to Congress, Articles of Confederation, Art. IX, para. 5.
[136] Blackstone listed the authority to set the standard of weights and measures as part of the royal prerogative respecting domestic commerce. 1 **William Blackstone, Commentaries** *264-266. Coining money, "the act of the sovereign power," was another of the King's prerogatives. *Id*. at 267. The value of the royal coinage was "likewise in the breast of the king." *Id*. at 268.

executive. The Constitution they ultimately proposed gives some of those royal powers to Congress, the body in which all legislative power is vested.[137]

ii. Executive Power as Authority to Carry Out the Law

At least some delegates believed the executive power to be confined to carrying out the laws. The scope of the executive power came up on June 2, when the convention turned to the Virginia Resolution concerning the new "National Executive," which at that point did not include an officer called the President. Randolph's resolution proposed that "besides a general authority to execute the national laws, it ought to enjoy the executive rights vested in Congress by the Confederation."[138] The first speaker on that provision that Madison reports is the younger of the two Charles Pinckneys from South Carolina, who was concerned about foreign relations powers. He "was for a vigorous executive, but was afraid the executive powers" in the Articles "might extend to peace & war which would render the executive a monarchy of the worst kind, towit an elective one."[139]

The next two speakers Madison records as addressing the substantive issue also supported a more limited executive. John Rutledge of South Carolina favored a single person as executive but opposed giving that person "the power of war and peace."[140] Roger Sherman of Connecticut favored election of the executive by the legislature because "he considered the executive magistracy as nothing more than an institution for carrying the will of the legislature into effect."[141]

James Wilson of Pennsylvania then propounded a Whig-type limited conception of executive power. He favored a single chief magistrate but "did not consider the prerogatives of the British monarch as a proper guide in defining the executive powers. Some of these prerogatives were of a legislative nature. Among others that of war & peace etc. The only powers he conceived strictly executive were those of executing the laws, and appointing officers, not {appertaining to and} appointed by the legislature."[142]

After Wilson spoke, the convention modified the Virginia Resolutions in a way that implemented his view. The discussion had turned to the choice between a single and plural executive, with Wilson supporting a single person, when Madison suggested that the powers of the office should be determined before choosing between one chief and a collegium.[143] He said that "certain powers were in their nature executive and must be given to that depart[men]t,"

---

[137] *E.g.*, U.S. Const., Art. I, sec. 8, cl. 5 (weights and measures power).
[138] I **The Records of the Federal Convention of 1787**, *supra* n. --, at 62-63.
[139] *Id.* at 65.
[140] *Id*.
[141] *Id*.
[142] *Id*. at 65-66. (I use braces where Farrand used brackets to distinguish my insertions from passages bracketed in the original.) Wilson almost certainly meant that war and peace were among other legislative powers, not that they were among powers of Congress other than legislative. Pierce's notes have Wilson saying that "Making peace and war are generally determined by Writers on the Laws of Nations to be legislative powers." *Id.* at 73-74. According to Blackstone, part of the King's prerogative was "the sole power of making war and peace." 1 **William Blackstone, Commentaries** *249.
[143] I **The Records of the Federal Convention of 1787**, *supra* n. --, at 66.

whether it was headed by one person or several.[144] That statement suggests that the executive department might have non-executive powers, as it did in the British system.

Madison then moved to replace the resolution's reference to the executive rights held by Congress with "power to carry into effect. the national laws. to appoint to offices in cases not otherwise provided for, and to execute such other powers {"not Legislative nor Judiciary in their nature."} as may from time to time be delegated by the national Legislature."[145] The younger Charles Pinckney moved to strike out the clause about further delegated powers (including the qualification), arguing "they were unnecessary, the objects of them being included in 'the power to carry into effect the national laws.'"[146] Madison reported that he "did not know that the words were absolutely necessary, or even the preceding words. 'to appoint to offices &c. the whole being perhaps in the first member of the proposition."[147] But he did not "see any inconveniency in retaining them, and cases might happen in which they might serve to prevent doubts and misconstructions."[148]

Put together, Madison's statements indicate that he believed the power to carry the laws into effect was central to, and perhaps the whole of, the executive power. His motion implemented his strategy of fixing the extent of the executive authority by identifying powers that were in their nature executive and must be held by the executive department. He offered three such functions, but when pressed said that perhaps the latter two were included in the first, which was the power of carrying the laws into effect. His willingness to accept the qualifier excluding powers legislative or judiciary in their nature suggests that in his view every specific power could in principle be allocated to one of the three great categories; his willingness to dispense with it indicates that he thought the principle was already implicit.

Wilson seconded Madison's motion, which followed Wilson's earlier suggestion along with the additional language that Madison said was perhaps unnecessary.[149] The convention then agreed to the younger Pinckney's motion to strike that additional clause out, thereby adopting Wilson's initial version: the national executive should have power to carry into execution the national laws and make appointments.[150]

At that point Wilson very likely was quite pleased with the change he had initiated, and thought that it mattered a great deal. Wilson had a well- thought- out vision of the Whig executive. In his 1798 *Lectures on Law*, he said the President "is to take care that the laws be faithfully executed; he is commander in chief" of federal forces and the militia when in federal service.[151] Having identified two functions of the President, Wilson went on, "In the Saxon

---

[144] *Id.* at 67.
[145] *Id.* The qualifier limiting the authorization to powers not legislative or judiciary in their nature was suggested by the elder Charles Pinckney, so that improper powers would not be delegated. *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.* at 63 (Wilson seconding Madison's motion).
[150] *Id.* (Journal report of final version); *id.* at 67 (Madison's report of
[151] 1 **The Works of James Wilson** 440 (Robert Green McCloskey, ed., 1967).

government, the power of the first executive magistrate was also twofold."[152] After describing the Saxon magistrate's military functions, Wilson turned to his other role: "The person at the head of the executive department had authority, not to make, or alter, or dispense with the laws, but to execute and act the laws . . . On the whole, he was no other than a *primum mobile*, set in regular motion by laws, which were established by the whole body of the nation."[153] Wilson contrasted the Saxon magistrate, and implicitly the President who so resembles him, with the English monarch as described by Blackstone. "The former was set in regular motion by the laws: the latter is the first mover, who regulates the whole government."[154] While Wilson in 1787 could not describe a presidency that had not yet been created, his description of that office in 1798 stresses carrying out the laws and subordination to them.

In the form it took after being amended along the lines Wilson urged, the resolution concerning the executive was referred to the Committee of Detail, along with the convention's other decisions up to that point.[155] On July 26, 1787, the convention recessed until August 6, so that the committee could prepare a draft constitution.[156] Wilson served on the Committee of Detail.[157] Wilson apparently was the committee's scribe; a document in his handwriting, with emendations in that of committee chair John Rutledge, was the basis of the committee's printed report.[158]

Like Article II, the committee's printed draft begins its treatment of the executive by vesting the executive power in the President: "The Executive Power of the United States shall be vested in a single person. His stile shall be 'the President of the United States of America;' and his title shall be, 'His Excellency'."[159] The Committee of Detail thus made the drafting decision to vest the executive power in an officer called the President, rather than providing that an officer or institution called the National Executive should have certain powers, none of which was called the executive power. That formulation may well have come from Wilson, who on June 1 had identified only two concrete powers as strictly executive – executing the laws and appointment.

---

[152] *Id.*

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

[154] 2 *Id.* at 444. In the Aristotelean cosmology to which Wilson alluded, the First Mover (*primum movens*) set in motion the *primum mobile*, the outermost sphere of the heavens, which was the first thing that was moved and which communicated motion to the lower spheres. *See*, **David Ross & John L. Ackrill, Aristotle** 57-59 (6th ed. 1995) (God as unmoved first mover causes motion of the *primum mobile*, the outermost heaven, which communicates motion to other spheres). Wilson thus likened the Saxon magistrate and the President to the first of all objects that are moved, receiving their motion from the laws and passing it on to others. The King, by contrast, he likened to the original source of motion.

[155] *See* II **The Records of the Federal Convention of 1787** 132 (Max Farrand, ed., 1937) (document in James Wilson's handwriting setting out decisions referred to the Committee of Detail, including resolution that the national executive should have "Power to carry into Execution the national Laws" and "to appoint to Offices in Cases not otherwise provided").

[156] *Id.* at 118.

[157] *Id*. at 97 (Committee of Detail consisted of John Rutledge, Edmund Randolph, Nathaniel Gorham, Oliver Ellsworth, and James Wilson).

[158] *Id*. at 163 (Wilson's draft with Rutledge's changes). Madison included a copy of the printed report in his notes for August 6. *Id.* at 177.

[159] *Id.* at 185.

Whether or not Wilson provided that language, he would have had good reason to think it even better than the resolution adopted in June. In the committee's draft, as in Article II, executive is a kind of power, not a kind of institution or office. Having an institution or officer called the executive presented a problem from Wilson's standpoint. The King was the executive, and also had powers that Wilson thought were not executive and that the American chief magistrate should not have. The executive department or the chief executive might be like the king, possessing the power to carry out the laws as well as other authorities. Such a department or officer would have, but not be limited to, the executive power as Wilson understood it. When "executive" is used as the name of a power and not an institution, however, it refers only to that power. Giving the executive power to a President avoids an implication that might arise from having a National Executive.

Changing the name from National Executive to President made the grants of power more important than they had been in the resolutions referred to the Committee of Detail. An institution called the National Executive naturally would have the executive power; the question was whether it would have non-executive powers because of the British model. The powers of a President, however, are much less clear from the name itself. From the standpoint of Whigs like Wilson, the solution was to give the President the executive power, granting the appropriately limited authority to carry out the laws while avoiding any unfortunate implications from the name.

Wilson thought that the executive power was the authority to carry out the laws and nothing more, so conferring it on the President achieved his goal. His committee's draft had another provision that also might be thought to perform that crucial function: the predecessor of the Constitution's Take Care Clause.[160] The committee's draft section 1 vested the executive power and provided for election by the legislature to a seven-year term. Section 2 then dealt with all other matters, including the commander in chief and pardon powers.[161] One of those matters concerned execution of the laws: "He shall take care to the best of his ability, that the laws of the United States be faithfully executed."[162] A provision that refers to executing the laws might be the source of the power to do so.

The take-care provision in the Committee of Details' text, however, very likely was understood as a duty concerning the executive power and not a power in itself. The committee's working draft apparently was a document in Wilson's handwriting with emendations by John Rutledge.[163] Wilson originally wrote "He shall take care to the best of his ability, that the laws of the United States be faithfully executed."[164] The qualification concerning the President's ability indicates that the clause imposed a duty and did not confer a power. That qualification is relevant to a requirement imposed on a limited human being. To require that the President do more than he could would be unjust, whereas requiring that he do his best would be good policy. No point is served, however, by giving a power that extends only as far as its holder's best ability

[160] U.S. Const., Art. II, sec. 3 ("he shall take care that the laws be faithfully executed").
[161] II **The Records of the Federal Convention of 1787**, *supra* n. --, at 185.
[162] *Id.*
[163] *Id.* at 163 (document in Wilson's handwriting with emendations in Rutledge's handwriting).
[164] *Id.* at 171.

goes. People cannot go beyond their abilities, so powers are in effect subject to that limitation whether they say so or not. To require that a power holder exercise that power as much or as well as he can is to impose a duty. Wilson's initial formulation thus imposed a duty.

Rutledge amended the clause to make explicit that it was a duty. With his striking-out and insertion, it read: "It shall be his duty to provide for the due and faithful exec[ution] of the laws of the United States to the best of his ability."[165] The printed report of the Committee of Detail is less clear on this point, reading "he shall take care that the laws of the United States be duly and faithfully executed."[166] Elsewhere in that article of the committee's draft, "shall" is used to impose duties. The section containing the take care provision begins "He shall, from time to time, give information to the Legislature, of the state of the union: he may recommend to their consideration such measures as he shall judge necessary, and expedient."[167] The contrast between "shall" and "may" shows that one is mandatory, the other permissive. "Shall" can also be used to convey a power simply by saying that an officer or institution shall do something, but that article of the committee's draft also included the clearer formulation that combines "shall" with "power,": "He shall have power to grant reprieves and pardons."[168] The committee thus apparently understood that the best way to convey a power was to use "power." While the committee may have changed its take-care clause from a duty to a power in its third take on drafting, the drafters readily could have understood the final language simply as a reformulation of a duty. If the clause only imposed a duty, the power to which that duty attached must have come from somewhere else. The grant of executive power provided the authority to which the duty attached.

Very likely, then, the members of the Committee of Detail believed that their draft conveyed the authority to carry out the law by vesting the executive power in the President. One member at least, James Wilson, believed that the executive power was limited to carrying out the laws.

Having received the Committee of Detail's report, the Convention continued to debate and modify it. Several changes were made regarding the presidency, but the clause vesting executive power in the President was not modified. On September 8, the convention appointed another committee "to revise the style of and arrange the articles" to which it had agreed.[169] The five-member Committee of Style delivered its printed draft constitution on September 12.[170] That draft shortened the Committee of Detail's opening sentences concerning the presidency into what became the opening sentence of Article II: "The executive power shall be vested in a President of the United States of America."[171] Nothing in the available records indicates that any

[165] *Id*.
[166] *Id*. at 185.
[167] *Id*.
[168] *Id*.
[169] *Id*. at 547.
[170] *Id*. at 582.
[171] *Id*. at 507 (those words in report of Committee of Style); U.S. Const., Art. II, sec. 1 (those words in Constitution).

delegate believed that that sentence meant anything other than had the very similar sentences of the Committee of Detail from which it was derived.[172]

James Wilson thus had good reason to believe that he had accomplished his goal of creating a Whig executive. A President, not called an executive, had been vested with what he had said was only the authority to carry out the law – the executive power.

iii. The Federal Executive Department and the Federative Power

The third conclusion the records support is that the delegates in general did not believe that the grant of executive power would bring with it any of the king's independent authority concerning foreign relations.[173] That inference rests mainly on the decisions the Convention made, which are well documented, and is buttressed by the available records concerning its deliberations. The Virginia Resolutions proposed to give the new National Executive the authority to execute the national laws and the executive rights given to Congress by the Articles.[174] Those rights included, and probably consisted entirely of, Congress's enumerated foreign affairs powers and functions. Congress under the Articles was a body of enumerated power.[175] The Virginia Resolutions thus referred to a list of specific powers.

That part of the Virginia proposal was immediately rejected. As described above, the grant of executive rights was struck out and that of authority to execute the laws retained. That authority was not at that stage called the executive power. It therefore could not be read as a grant of the powers that the British chief executive held, which went beyond executing the laws. At the very beginning, the Convention decided not to give the new executive any authority concerning foreign affairs that was independent of the national law.[176]

In its succeeding deliberations, the Convention allocated the Articles' foreign relations responsibilities to different officers and institutions. Those decisions were reflected in the report of the Committee of Detail. In that report, the Senate received the power to appoint ambassadors

---

[172] The Committee of Style also shortened the take care provision into its final form: "he shall take care that the laws be faithfully executed." *Id.* at 507 (printed report of the Committee of Style).

[173] The federal executive might receive the King's foreign-affairs powers but not the entire royal power, so the question whether the delegates believed their text would confer the former is distinct from the question it would confer the latter. The answer to both is no.

[174] *Supra* --.

[175] *See, e.g.*, Articles of Confederation, Art. IX, para. 4 (granting specific powers, e.g., to establish post offices).

[176] Rakove reaches the same conclusion concerning the convention's decisions in early June. "As the ensuing debate of June 1 makes clear, the delegates understood 'executive rights' [in the Virginia Resolutions] to embrace matters of war and peace -- and that was the problem." Rakove, *supra* n. --, at 92. "This single passage from the early debates at Philadelphia carries enormous significance. While a conventional or uncritical resort to standard eighteenth-century usage might support the idea that war and diplomacy were executive functions and duties, that casual association could not withstand critical scrutiny. If there had been no occasion prior to 1787 to consider or resolve this puzzle, there certainly was one now. Wilson had called the question, so to speak, and both Madison (most notably) and the Convention (more generally) had concurred in his objection." *Id*. at 93.

and make treaties.[177] Congress as a whole received the power to "make war."[178] The President's only foreign-affairs function was a duty rather than a power: he was to "receive ambassadors."[179]

The committee's decision to give the President the executive power and not the power to execute the national laws did not reflect a resolution conferring on the President residual foreign-affairs power. No resolution conferring such power had been proposed or adopted. To say that the committee meant its text to give residual foreign-affairs powers would be to say that it meant to reverse the Convention's very first decision on the issue, which had been to reject the grant of Congress's executive rights to the new National Executive. Indeed, to give the executive residual foreign affairs power would have gone beyond the Virginia Resolutions. Those resolutions would have given the new executive specific powers listed in the Articles, not a general foreign-affairs competency.

If the Committee of Detail had wanted to depart from the resolutions that had been referred to it, its proposal would have done so explicitly. It would have granted the President foreign-affairs powers not otherwise allocated, just as it gave him power to appoint officers "in all cases not otherwise provided for by this Constitution."[180] Instead, it used language that James Wilson, one of its members, had said was confined to carrying out the laws. The committee would not have sought to accomplish an important change by using language that could be readily misconstrued, either by the delegates or by later interpreters.

After the Committee of Detail reported, the Convention substantially increased the President's role in foreign relations. It did so by giving him specific powers that the Articles had conferred on Congress and the committee had given to the Senate: powers to appoint ambassadors and to make treaties. Both were shared with the Senate; the President's only sole foreign-affairs function remained the duty to receive ambassadors.[181]

The Convention's decisions thus indicate strongly that the delegates did not wish to give the President any foreign relations powers other than those specifically confided to him. That conclusion is consistent with the available records of their debates. The Virginia Resolutions' proposal to give the new National Executive the "executive rights" of Congress was immediately criticized on the grounds that those would include the king's powers over war and peace. Charles Pinckney the younger, John Rutledge, and James Wilson all made that objection.[182] Shortly after those objections were made, the troublesome clause was struck out, never to return.

In addition to voicing opposition to executive control over war and peace, James Wilson provided his colleagues with a conception of the executive power that did not entail independent foreign relations powers. His version of a Whig executive power included carrying out the laws

---

[177] II **The Records of the Federal Convention of 1787**, *supra* n. --, at 183.
[178] *Id*. at 182.
[179] *Id*. at 185.
[180] *Id*.
[181] The shift of power over sending ambassadors and making treaties from the Senate to the President was proposed by a committee with one member from each state that was appointed to deal with several issues the Convention had postponed. *See id*. at 473 (appointment of committee on postponed parts), 495 (committee report giving President power to make treaties and appoint ambassadors with advice and consent of the Senate).
[182] *Supra* --.

and making appointments and nothing else. The delegates thus had before them a meaning for "executive power" that would implement their decision to give the President independence in making foreign policy only by explicit grants like the treaty power.

The delegates' goals concerning presidential foreign-affairs power and the word meanings known to them strongly imply that like James Wilson they believed that the executive power would not bring with it any independent authority over foreign relations.

b. The President as Commander in Chief at the Convention

Information about the delegates' understanding of the President's role as commander in chief is scanty. The Articles of Confederation created no such office. They gave Congress "sole and exclusive right and power of determining on peace and war," except that states could engage in war under stated circumstances.[183] Congress was also charged with directing the operations of the armed forces.[184] Under the Articles, Congress could appoint officers in the land and naval forces, except regimental officers in the Army, but nothing required that it appoint a commander in chief, either of all the forces or of a theatre of operations.[185]

The Committee of Detail's draft gave Congress power "to make war" and made the President commander in chief.[186] Those who knew Blackstone would not have thought that the President's role would enable him to authorize the use of force on behalf of the United States. Blackstone derived the King's ability to give that authorization from his status as sovereign, not his status as military commander.[187]

On August 17, the convention voted to change "make" to "declare," the word used in the Constitution.[188] Why the change was made is very hard to say. James McHenry of Maryland recorded in his notes that the difference between the two was discussed, but did not elaborate.[189] Madison's notes attribute the motion to make the change to Gerry and Madison, and indicate that they wanted to make sure that the President would be able to respond to sudden attacks.[190] Madison also recorded that Roger Sherman said that he preferred "make" to "declare" and that

[183] Articles of Confederation, Art. IX, para. 9 (power to determine on war and peace), Art. VI, para 5 (circumstances under which states may engage in war).
[184] *Id*., Art. IX, para. 4.
[185] *Id*., Art. IX, para. 4 (power to appoint officers).
[186] I **Records of the Federal Convention of 1787**, *supra* n. --, at 182 (power to make war), 185 (President as Commander in Chief).
[187] Discussing foreign affairs, Blackstone explained that the king could make treaties, leagues, and alliances because in England "the sovereign power" was "vested in the king." **Blackstone, Commentaries** *249. "Upon the same principle," he continued, "the king has also the sole prerogative of making war and peace." *Id*. Only the king could determine that acts of armed force were on behalf of Great Britain; private people who engaged in hostilities without the king's authorization were "pirates and robbers." *Id*. After further discussion of the king's place in foreign relations, a few pages later Blackstone started a new topic: "The king is considered, in the next place, as the generalissimo, or the first in military command, within the kingdom." *Id*. at 254.
[188] II **Records of the Federal Convention of 1787**, *supra* n. –, at 313 (Journal).
[189] *Id*. at 320.
[190] Madison's notes describe the motion and continue "leaving to the executive the power to repel sudden attacks." *Id*. at 318. That last clause is not ascribed to any delegate; perhaps Madison said something like that, or perhaps the clause is in his notes because he had that in mind but did not articulate it.

the executive should be able "to repel and not to commence war."[191] Sherman thus apparently thought that the change was not necessary to provide for sudden attacks. Delegates who did think the change was needed for that purpose did not necessarily believe that the new version would give the President authority to use force in the face of congressional prohibition; they may have believed that a congressional power to make war would imply that substantial hostilities required specific authorization, while a power to declare war would not. Delegates who took a Blackstonian approach to war powers would have believed that a commander in chief needed some form of authorization, but Blackstone's view did not imply that authorization had to be highly specific.

The Convention's decisions, and the limited records of its discussions, thus shed little light on the President's role as commander in chief. As explained above, in the broader context of the times that status did not bring with it autonomy regarding the use of force.

3. History, Novelty, and Original Meaning

This article presents a more precise and worked-out form of an understanding familiar from British and American history. The basic idea is not new: it is the Whig executive. The specific conception is new. I do not claim that anyone at the time of the framing or after gave the detailed account of the concept of executive power that I provide. As far as I know, no one has ever done so. That claim to novelty raises a question insofar as this article's thesis is about the original meaning of the text. If no one at the time of the framing had this understanding, how can it be the original meaning?

The capacity-based conception of executive power is a detailed account of the basic idea that executive power is used to carry out the law and administer the government. The details come from an examination of the legal relations involved in performing those functions. Executive officials administer the government by exercising the government's own legal rights, like its capacity to make contracts, for example. The functions executive officials performed, and the legal relations involved in performing them, were familiar at the time of the framing as they are today. Some of the earliest federal statutes authorized executive officials to make contracts for the government, for example, and imposed affirmative duties on them.[192] The Constitution itself recognizes the negative duty against bribery.[193]

Carrying out the law and administering the government were and are practices involving legal relations. The 18th century concept of executive power referred to those practices and

[191] *Id*.
[192] *See, e.g.*, An Act for the Establishment of and Support of Lighthouses, Beacons, Buoys, and Public Piers, ch. ix, sec. 3, 1 Stat. 53-54 (1789) (Secretary of Treasury to make contracts for building, repairing, and supplying lighthouses); An Act to Regulate the Collection of Duties Imposed by Law on the Tonnage of Ships or Vessels, and on Goods, Wares and Merchandise Imported into the United States, ch. v, sec. 5, 1 Stat. 29, 36-37 (setting out duties of Collectors, Naval Officers, and Surveyors of ports of entry).
[193] U.S. Const., Art. II, sec. 4 (federal officers removable for bribery through impeachment).

relations, so to understand them more fully is to understand the concept more fully. The concept is the same.[194]

III. Possible Sources of Executive Autonomy Other Than the Vesting and Commander in Chief Clauses

A recurring question regarding presidential power is whether the President may take some governmental action in the absence of statutory authorization or contrary to statutory command.[195] The interpretation of Article II presented here removes two possible grounds for such action – the Vesting and Commander in Chief Clauses – but does not rule out the possibility that the Constitution elsewhere creates executive autonomy from Congress, or default rules in favor of executive power. This section considers possible sources of constitutional authorization. It argues that with respect to foreign affairs the Constitution itself does create a default rule in favor of executive authority, and that Congress' ability to control the executive depends on the scope of its enumerated powers. Inherent limits on the specificity with which Congress may legislate would also preserve some executive discretion, but I will argue that such limits are unlikely. The President and the executive also may enjoy some legal protections, like evidentiary privileges, that are necessary for the performance of executive functions, but such protections are not a source of primary authority. The principle of the unitary executive, which I endorse, concerns the identity of the person who controls executive functions, not what those functions or the legal constraints on them are.

A. The Limited Enumeration of Congressional Power, Defaults in Favor of the Executive in Foreign Relations, and Control Over Tactics

Both practice and practical considerations point to an important field of government operations in which executive officials act without any congressional authorization: foreign relations. When Congress created the Department of Foreign Affairs (now State) in 1789, it authorized the Secretary to perform various functions in that connection if the President assigned them to him.[196] That the President himself would also communicate with foreign governments, without need of any statutory authority, Congress seems to have assumed. More controversial,

---

[194] Like Article II when it uses the concept of executive power, the Seventh Amendment calls for an investigation into legal practices that may lead to a better understanding of those practices, an understanding that no single person at the time of the framing had. It provides that no fact found by a jury shall be reexamined "otherwise . . . than according to the rules of the common law." U.S.Const., Amend. VII. The rules of the common law referred to were not codified. They were found in many decisions of many courts. Novel insights into those many decisions, and thus into the rules of the common law, were possible in the 18th century and are today.

[195] Justice Jackson's famous discussion of three categories of presidential actions -- those taken with congressional authorization, in the absence of any congressional action one way or another, and contrary to a congressional decision – provides a leading illustration of the issues. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-638 (1952) (Jackson, J., concurring).

[196] *See*, An Act for establishing an Executive Department, to be denominated the Department of Foreign Affairs, ch. iv, 1 Stat. 28 (1790). The act authorized the Secretary to "perform and execute such duties as shall from time to time be enjoined upon or entrusted to him by the President" related to foreign relations, including for example "negotiations with public ministers from foreign states or princes." *Id*. at 29.

but often made, have been presidential claims to control the armed forces at some level of detail, often called the tactical as opposed to strategic level.[197]

Executive officials operate in a legal environment that is substantially but not wholly shaped by acts of Congress, and Congress has only enumerated powers. Those basic features of the constitutional system make possible executive action in foreign relations in the absence of affirmative authorization from Congress. Depending on their extent, Congress's powers may leave some space in which the executive may act and Congress may not, not because executive control is inviolate but because no enumerated power reaches the issue. If Congress's power to control military affairs does not reach to the level of tactics, the President will be left free of statutory constraint on tactical decisions.

1. Foreign Relations and Executive Authority in the Absence of Legislation

First, performing a function does not entail discretion with respect to the function. As discussed previously, the executive conducts foreign relations, communicating with other sovereigns on behalf of the United States. Doing so is an operation of the government and therefore part of the executive's function. The Archivist of the United States delivers important messages concerning the content of the law, because by law the Archivist promulgates statutes.[198] The Archivist does not decide what the statutes say, however. Congressional power to control the content of communications with other sovereigns is perfectly consistent with the actual communication being done by the executive.[199]

Second, the Constitution can create a default arrangement in favor of executive discretion that Congress can change by adding new rules of constraint to the environment in which the executive acts. Foreign relations work that way. Executive functions include the use of the juridical resources of the government to achieve the goals of the government. A crucial juridical resource is the international legal personality of the United States as a sovereign among sovereigns.[200] By creating a government of the United States, the Constitution creates an institution to exercise that capacity. By giving the President of the United States the executive power, the Constitution empowers the President as the organ through which that capacity can be

[197] *See*, *e.g.*, Placing of United States Armed Forces Under United Nations Operational or Tactical Control, 20 Op. O.L.C. 182, 184-186 (1996) (Congress may not intrude on President's authority to control tactics and hence to decide who will be in tactical command of U.S. forces).

[198] 1 U.S.C. 112 (Archivist to publish Statutes at Large).

[199] Hamilton discussed the possibility that the Constitution might have provided that the President negotiate treaties under the Senate's direction. In support of the Constitution's grant of shared power over treaties, he argued that giving the Senate sole power to make treaties would "relinquish the benefits of the constitutional agency of the president, in the conduct of foreign negotiations." *The Federalist No. 75*, at 506 (Jacob Cooke, ed., 1961). Even though the Senate "would have the option of employing him in this capacity," it could also choose not to do so. *Id*. "Besides this, the ministerial servant of the Senate could not be expected to enjoy the confidence and respect of foreign powers in the same degree with the constitutional representative of the nation." *Id*.

[200] *Supra*--. The Declaration of Independence asserted that personality, claiming that as "free and independent states" the United States could "conclude peace" and "contract alliances," acts of sovereigns in treating with other sovereigns. Declaration of Independence. France recognized that personality by entering into the Treaty of Amity and Commerce of 1778, 8 Stat. 12, as did Great Britain in the Treaty of Peace of 1783, 8 Stat. 80. Article VI recognizes that the United States already had made treaties, making "treaties made, or which shall be made, under the authority of the United States" the supreme law of the land. U.S. Const., Art. VI.

exercised. The Constitution thereby contributes to the legal environment in which the executive operates, in an empowering fashion.

The Constitution also enables Congress to add to that environment with further empowering and also with constraining rules. In order to facilitate foreign commerce, Congress might require that U.S. consuls assert the commercial rights of U.S. citizens to other governments. That duty would govern the conduct of this country's foreign relations but is no more constitutionally objectionable than the duty of Social Security Administration officials to pay benefits. The fact that a law like that would limit the discretion consuls otherwise would have does not mean that it conflicts with a constitutional rule empowering consuls and is therefore unconstitutional. The discretion that results in the absence of any other rule is not itself a constitutional norm, but rather the consequence of a silence in the legal rules that Congress may fill. As this point indicates, it is necessary in this context to be very careful in using concepts like constitutional power or constitutional discretion. Discretion that results from constitutional rules is not necessarily the kind of constitutionally-granted discretion with which Congress may not interfere.

With respect to foreign affairs, the Constitution and international law create a default rule in favor of executive power, which Congress may then constrain through exercises of its enumerated powers. That configuration explains an otherwise puzzling feature of U.S. foreign relations law. Concurring in *Youngstown Sheet & Tube Co.* v. *Sawyer*,[201] Justice Jackson identified situations in which the President may act unless Congress has legislated to the contrary.[202] In those situations, the assumption is in favor of executive power in default of congressional action. That possibility is puzzling. It is tempting to reason that the only possible source of executive power when Congress has not acted is the Constitution, but the executive's constitutional power may not be displaced by Congress, as the pardon power may not be.[203] The solution is to see that the Constitution can create a default from which Congress can depart when the Constitution contributes to a legal environment to which Congress may add. When that configuration obtains, as it does with foreign affairs, the executive has constitutional power but only in a limited sense, not the sense in which the President has the pardon power, for example.

Because the executive has control over foreign relations subject to any additional constraints created by Congress pursuant to its enumerated powers, executive autonomy has two possible sources. First, it may arise because Congress could act but has not done so. Second, it may arise because Congress lacks an enumerated power with which to control the relevant decision. Whether Congress has an applicable power may be a difficult question. For example, the United States is a party to a number of treaties that give it a vote in international decision-making processes. Most important is the United Nations Charter, which gives the Security

[201] 343 U.S. 579 (1952).
[202] "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility." *Id*. at 637 (Jackson, J., concurring).
[203] United States v. Klein, 80 U.S. 128, 141 (1872) (Congress may not affect legal consequences of a pardon).

Council primary responsibility for the maintenance of international peace and security and authorizes it to bind member states, for example by imposing economic sanctions.[204] The United States is a permanent member of the Security Council, and its affirmative vote is therefore required for an exercise of the Council's binding authority.[205] A vote on behalf of the United States is an exercise of that sovereign's international legal capacity. In the absence of any domestic-law duties concerning voting in the Security Council, the President as chief executive has discretion in casting this country's vote.

Whether Congress may direct that discretion is a difficult question, but not because the conduct of foreign relations is constitutionally confided to the executive the way the pardon power is confided to the President. The question is difficult because it is not clear whether any enumerated power of Congress authorizes it to impose duties as to Security Council votes. None of the specifically enumerated powers is well suited to the task. If Congress has general legislative power with respect to the United States' relations with other sovereigns, then very likely that power includes making rules about voting in international organizations. It is possible that the Necessary and Proper Clause in combination with the executive power, or the power to make treaties including the Charter, or the power of sovereignty vested by the Constitution in the United States as a whole, enables Congress to legislate concerning foreign relations in general.[206]

One purpose of this article is to find the questions that need to be answered in order to determine whether and when the executive has decisional autonomy. The grant of executive power itself does not confer autonomy, so any affirmative answer must come from somewhere else. The limits of Congress' power, which are far from fully explored when it comes to foreign relations, are a possible source of executive discretion that Congress may not displace.[207]

2. Tactics and Congress's War Powers

Executive branch legal officers often argue that the President is free from congressional direction at some level of military decision making.[208] As argued above, nothing in the executive power, or the status of commander in chief, secures that kind of autonomy.

Whether there are some military decisions that Congress may not control thus depends on the extent of congressional power. Although no legislation is needed to constitute the United

[204] Charter of the United Nations, Art. 24(1) (Security Council has primary responsibility for maintaining international peace and security). Article 41 of the Charter authorizes the Security Council to take measures not including the use of armed force, including "complete or partial interruption of economic relations," to maintain international peace and security. *Id*., Art. 41. The Security Council may also employ military force. *Id*., Art. 42.
[205] *Id*., Art. 23(1) (United States is a permanent member of the Security Council); *Id*., Art. 27(3) (decisions of the Security Council on non-procedural matters require the concurrence of the permanent members).
[206] *See* U.S. Const., Art. I, sec. 8, cl. 18 (Congress has power to carry into execution its own powers and powers of government of United States and its officers and departments).
[207] Professor Prakash also concludes that the extent of executive autonomy regarding foreign affairs depends on the extent of congressional power, but comes to that conclusion by a different route. He reasons that the executive power has a foreign-relations component and the Congress's enumerated powers that affect foreign relations, like the foreign commerce power, are exceptions to the executive power. **Saikrishna B. Prakash**, *supra* n. --, at 111-112.

[208] *Supra* --.

States an international sovereign, acts of Congress are needed to create the Army and Navy.[209] Congress' authority to create the armed forces in the first place indicates that it can set their basic purposes. None of Congress' powers over the Army and Navy, however, is especially well adapted as a textual matter to support the kind of detailed control that the President is entitled to exercise if he wishes. Raising an Army and providing a Navy are quite general decisions.

Congress' power to make rules for the government of the forces is mainly directed to establishing military discipline.[210] With that power, the legislature may significantly constrain the armed forces, but a power primarily designed to establish military discipline and ensure compliance with the law of war is not well suited to controlling operations. A decision whether to attack a specific objective, for example, might come within that description, but does not obviously do so. That power may also have a significant gap: its predecessor in the Articles of Confederation gave Congress, which combined legislative and executive functions, the powers of "making rules for the government and regulation of the said land and naval forces, and directing their operations."[211] That language in the Articles shows that a general power over military operations can be expressed more straightforwardly than by a reference to rules for the government of the forces. Reasonable drafters express themselves reasonably clearly, especially on important points. The failure to confer an important power clearly is evidence of a decision not to confer it at all.

Whatever the correct resolution of these questions concerning the scope of congressional may be, the answers are to be found in Article I, not the Vesting Clause of Article II.

B. Legislative Power, Executive Power, and Specificity

Some claims for executive autonomy as against the legislature concern the level of detail at which legislation may operate. The Office of Legal Counsel of the Justice Department has stated that Congress may not "micro-manage" the executive.[212] To reject micro as opposed to macro management indicates that the problem is one of the scale of legislative rules, with the larger being innocuous and the smaller potentially objectionable. That opinion denies that Congress "is constitutionally entitled to dictate *how* the executive branch is to execute the law."[213] That formulation suggests that Congress may state goals but must leave the selection of specific means to executive officials. Along similar lines are claims that the Constitution confers some degree of prosecutorial discretion on the executive.[214] Criminal statutes are general, the decision to prosecute an individual act is specific.

---

[209] U.S. Const., Art. I, sec. 8 (Congress has power to raise armies and maintain a Navy).
[210] *See id*. (power to make rules for the government of the land and naval forces). That is the power used to enact the Uniform Code of Military Justice, 10 U.S.C. 801 et seq.
[211] Articles of Confederation, Art. IX, para. 4.
[212] Common Legislative Encroachments on Executive Branch Authority, 13 Op. Off. Legal Counsel 253 (listing micromanagement of the executive branch as a form of encroachment).
[213] *Id.* at 254-254.
[214] For example, now-Justice Kavanaugh has taken the position that "under Article II, the President possesses a significant degree of prosecutorial discretion not to take enforcement actions against violators of a federal law." In re Aiken County, 725 F.3d 255, 262 (D.C. Cir., 2013) (section of opinion joined only by Judge Kavanaugh).

If Congress may act only at some level of generality, it is because of a limit on Congress, not because executive power as such necessarily brings with it some degree of discretion as to implementation. Some constitutionally permissible statutory rules are so specific as to contain a proper name, and must be implemented by executive officials. Congress sometimes confers benefits, like pensions, on particular individuals.[215] When Congress does so, the appropriate disbursing officer has a duty to make the payment called for by the statute, and no discretion to withhold it. A disbursing official who makes a payment is carrying out the law just as much as is a prosecutor who seeks an indictment. If executive power brings with it discretion in the details of implementation, highly specific benefits statutes are unconstitutional.

While executive power does not as such bring with it control over the specifics of implementation, legislative power may be limited in its specificity. One affirmative constitutional restriction, the Bill of Attainder Clause of Article I, Section 9, does limit the specificity with which Congress may operate.[216] It does not, however, ban all highly particular statutory rules. Rather, it forbids highly specific rules that inflict punishment, however punishment is defined.[217] According to one conception of legislative power, it intrinsically operates generally and prospectively.[218] To the extent that Congress is limited in the specificity with which it may legislate, some discretion for the executive may well result. That result would not derive from inherent executive discretion, but from the limits of legislative specificity.

A decision thus might be said to be inherently executive in the sense that it is too specific to be made by legislative power. That way of seeing the issue may be especially tempting, because specific acts on behalf of the government, like entering into a contract or bringing a lawsuit, are overwhelmingly taken by the executive. Many of them may be taken only by the executive; even if Congress can direct that a specific prosecution be brought, that directive will be carried out by executive officials. The association between specific acts and executive power is thus real, but that association does not mean that some decisions are too specific to be legislative. Legislative and executive power are complementary: executive officials carry out the law the legislature makes. Because of that complementarity, the executive power does not act as an affirmative restriction on the legislative power the way the First Amendment does, for example. When Congress acts at a level of specificity that the Constitution permits for legislation, it does not invade the executive sphere, but creates law for the executive to carry out. If the Constitution limits the specificity with which Congress may act, it can create executive discretion. That discretion will be a residuum of the legislative power, not an exclusive zone for the executive power.

---

[215] *See*, *e.g.*, Resolution Granting a Pension to Susan Decatur, widow of the late Stephen Decatur, 6 Stat. 700 (1837).
[216] U.S. Const., Art. I, sec. 9 (no bill of attainder shall be passed).
[217] *See*, *e.g.*, Ex parte Garland, 71 U.S. 333, 377 (1866) (Bill of Attainder Clause forbids legislative infliction of punishment).
[218] *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 **Yale L. J.** 1672, 1678 (2012) (antebellum due process doctrine rested on separation of powers principle under which legislative power operates generally and prospectively).

C. Executive Privileges and Immunities

When Special Prosecutor Leon Jaworski sought to subpoena White House records, the President responded that as President he enjoyed executive privilege rooted in the Constitution. The Supreme Court found that there was a privilege for presidential deliberations, but that a generalized claim of privilege would yield to specific needs of the criminal process.[219] Referring to the privilege's roots in the "separation of powers doctrine," the Court seemed to assume that it was grounded in the Constitution.[220] Whether the Court so held is not clear. In a case involving a claim for civil damages against a former President personally for conduct related to his official duties, the Court found immunity rooted in the Constitution but reserved the question whether legislation explicitly to the contrary would change that result.[221] The question whether the Constitution confers privileges or immunities from liability on the President is thus probably open in the Supreme Court's doctrine.[222]

Evidentiary privileges found in the Constitution, if they exist, do not imply any decisional autonomy. Informational privileges like the privilege asserted in *Nixon* derive from the obligation to make decisions, and are unconnected to any discretion in making them. The reasoning that supported a prima facie privilege in *United States* v. *Nixon* supports protection for judicial deliberations just as readily as it supports protection for executive deliberations, and courts regularly apply law without exercising discretion. In finding that there was a presumptive privilege for presidential deliberations, the Court in *Nixon* relied on reasoning about government in general, not the executive in particular.[223] Whether the Constitution itself produces evidentiary immunities is a question I will not seek to resolve.[224] The important point here is that the answer does not depend on the existence of executive autonomy, as opposed to the need for confidentiality in making delicate decisions, whatever their subject may be.

---

[219] United States v. Nixon, 418 U.S. 683 (1974).
[220] *Id*. at 706.
[221] Nixon v. Fitzgerald, 457 U.S. 731, 784 n. 27 (1982).
[222] Nixon involved presidential deliberations about executive decisions, not non-executive presidential decisions like those concerning the veto or pardons, and so raises the question whether the executive power itself gives rise to a privilege.
[223] "In support of his claim of absolute privilege, the President's counsel urges two grounds, one of which is common to all governments and one of which is peculiar to our system of separation of powers. The first ground is the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." United States v. Nixon, 418 U.S. 683, 705 (1974) (footnote omitted).
[224] In his classic work on Congress' power to carry out the executive and judicial powers, Professor William Van Alstyne makes a powerful argument that evidentiary privileges are a central example of the kind of supplementary rule that the Necessary and Proper Clause enables Congress to enact, but that the Constitution itself does not contain. William 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 State L. J.** 788 (1975).

The Court was correct to hesitate to find executive tort immunities in the Constitution. Those immunities come from the law being enforced, not the power to enforce it.[225] Presidential powers other than the executive power may entail privileges to invade private interests. Perhaps presidential decisions concerning pardons are by the Constitution exempted from creating tort liability, if such a decision could do so. When discretion comes from the Constitution, the Constitution may protect its exercise from liability. The pardon powers confer discretion, but the executive power itself does not.

D. The Executive Power and the Unitary Executive

One of the oldest questions in American constitutional law concerns the President's authority to control other officials who administer the government.[226] Whether the executive branch is unitary in that the Constitution gives the President substantial control over it, is a question distinct from the content of the executive power. The conception of executive power presented here is consistent with presidential control over subordinates. The principle that the executive is unitary thus does not imply any presidential autonomy regarding its exercise, although some derivations of that principle may.[227]

The principle of the unitary executive can be derived, not from any claim about the content of the executive power, but from the fact that the President has it, whatever it is. I believe that derivation to be correct, and will set out a brief form of it to show how presidential primacy in the executive is distinct from so-called inherent executive power.

The argument in support of the unitary executive principle begins with the observation that any understanding of the President's role must reconcile two features of the text and structure. First, Article II vests the executive power in the President and mentions no one else. In that respect it strikingly differs from the corresponding provisions of Article III, which vests the judicial power in the supreme court and the inferior courts that Congress creates.[228] No grant to lower-level officials corresponds to the grant to the inferior courts. Second, the Constitution nevertheless contemplates that there will be lower-level executive officials. It refers to the heads of the executive departments, who must be other than the President and whose departments may

---

[225] *Supra* --.

[226] In *Myers* v. *United States*, 272 U.S. 52 (1926), a dispute concerning presidential removal and control, the Court relied heavily on debates in and the decision of the First Congress in 1789, *id*. at 111-126.

[227] In this respect the principle that the President controls the executive branch is like the related but more specific claim that he may freely remove subordinate executive officials. Both can be derived from the President's possession of the executive power, although they can also be derived from the claim that the executive power includes either control in general or removal in particular. *Myers* involved the constitutionality of a restriction on the removal of Post Masters, and so raised both the general question of presidential control and the specific question of removal as a tool of control. As the Court's opinion shows, the principle that the President controls the executive can support the distinct principle that he must be able to remove subordinate officials. *See id*. at 117-118 (derivation of presidential removal authority from presidential control of executive branch).

[228] *Compare* U.S. Const., Art. II, sec. 1 (executive power vested in "a President of the United States of America") *with* U.S. Const., Art. III, sec. 1 (judicial power vested "in one supreme court, and in such inferior courts" as Congress may establish).

be quite substantial bureaucracies.[229] Practical considerations confirm the implication that the President will not act alone: he is only one person and cannot be expected to conduct or even much to supervise the operations of government.

The grant of the executive power to the President alone must mean something, but it cannot mean that he will be the only executive official. He can have the executive power while others perform executive functions if the others act on his behalf, using a power that is primarily his as an employee may use an employer's material assets. The two features of the text and structure work in harmony if everyone but the President who performs executive functions is subordinate to, or an agent of, the President. That relationship of subordination or agency implies some degree of presidential control and supervision.

This derivation of a unitary executive principle does not imply that anyone in the executive has any discretion. The President can supervise the performance of non-discretionary tasks, like paying Social Security benefits. This account of the unitary executive does imply that insofar as executive officials do have discretion, it is subject to some degree to presidential direction. The President is the primary repository of the executive power both when there is discretion and when there is none. On this reading, the unitary executive principle derives from the grant of the executive power specifically to the President and only derivatively to others, and not from the content of the power. Whatever that content is, the President is in charge of it.

IV. The Whig Conception of Executive Power in American History after 1787

In the long-standing debate over the content of executive power, the Whig view, which is adumbrated here, is a recurring entrant. This section gives as examples appearances of that understanding in important debates from the 18th, 19th, and 20th centuries. The examples show, not that the Whig view is the only known approach, but that it has figured prominently in constitutional thought throughout the Constitution's history.

A. Executive Power in the Neutrality Proclamation Controversy

An exchange in the press between Hamilton and Madison in 1793 shows how familiar the Whig conception of executive power was at the time of the framing. The authors, who had collaborated in *The Federalist*, disagreed over issues concerning the executive power raised by Washington's Neutrality Proclamation in April of that year.[230] Washington announced that the United States was neutral in the European war that had broken out in the wake of the French Revolution.[231] He had no statutory authorization to do so. Secretary of the Treasury Hamilton, writing as *Pacificus*, defended Washington's authority to issue the proclamation.

In most of *Pacificus No. 1*, Hamilton took an aggressive view of executive power, one that may well have gone beyond carrying out the law. He contrasted the Vesting Clause of

[229] *E.g.*, U.S. Const., Art. II, sec. 2, para. 1 (President may require the opinion in writing of "the principal officer in each of the executive departments").
[230] George Washington, *Proclamation* (April 22, 1793), *in* 1 **A Compilation of the Messages and Papers of the Presidents** 156-157 (James D. Richardson, ed. 1896).
[231] *Id*.

Article II with that of Article I, pointing out that the latter is limited to the legislative power granted by the Constitution, while the former is unqualified.[232] Hamilton concluded that the whole executive power is vested in the President, subject to the exceptions and qualifications found in the text.[233] He described the Senate's role in treaty-making as such a qualification, indicating that he believed that the executive power included control over foreign relations.[234]

Hamilton thus implied that the Article II executive power is not simply the law execution power. The first *Pacificus* essay concluded with an alternative, less aggressive justification for the neutrality proclamation. His vindication of executive authority "on this broad and comprehensive ground" was not "absolutely necessary," Hamilton wrote.[235] The duty to execute the law, found in the Take Care Clause, would have been enough. "The president is the constitutional **EXECUTOR** of the laws. Our treaties, and the law of nations, form a part of the law of the land. He, who is to execute the laws, must first judge for himself of their meaning."[236] In making his position on that question public, Washington was performing his executive function of carrying out the law. He did not need any authority that was not executive in the narrow sense, the sense espoused in this article. Hamilton thus indicated that he realized that some of his readers might take the Whig view.

Madison, responding as *Helvidius*, took the Whig line as his primary position, not a fallback. He argued that the powers to declare war and make treaties could never be considered executive because "[t]he natural province of the executive magistrate is to execute laws, as that of the legislature is to make laws. All his acts, therefore, properly executive, must presuppose the existence of the laws to be executed."[237] Madison, using the word "federative" as Hamilton had not, pointed out that Locke regarded federative powers as distinct from executive.[238]

The thesis that the executive power proper is only the power to carry out the laws, and that the first sentence of Article II vests only that power in the President, was familiar to two members of the Federal Convention who played leading roles in the ratification and early implementation of the Constitution. One apparently rejected it while recognizing its appeal, and the other explicitly adopted it.

---

[232] Alexander Hamilton, *Pacificus No. 1* (June 29, 1793), *in* XV **The Papers of Alexander Hamilton** 33, 39 (Harold C. Syrett, ed. 1969).
[233] *Id*. at 39.
[234] *Id*.
[235] *Id*. at 43.
[236] *Id*.
[237] James Madison, *Helvidius No. 1* (August 24, 1793), *in* 15 **The Papers of James Madison** 66, 68-69 (Thomas A. Mason, et al., eds. 2010).
[238] *Id*. at 68.

B. *In re Neagle*

At the argument in *In re Neagle*,[239] Attorney General Miller presented an aggressive view of the executive power, as Hamilton had done about a century earlier.[240] Like Hamilton, Attorney General Miller had a foil. Justice Lamar in dissent, joined by Chief Justice Fuller, explicitly rejected the Attorney General's reasoning.[241] Lamar's understanding of executive power and the executive role was very much in the Whig tradition, as it required statutory authorization for domestic activities of the executive.

Lamar agreed that the United States government has full power to protect itself and its agencies, and that its power was to be found not only "in express authorities conferred by the Constitution, but also in necessary and proper implications."[242] Lamar insisted also that those powers were to be exercised "in conformity with the modes, prescribed by the Constitution itself."[243] The relevant mode was Congress' power to make laws necessary and proper to carry into execution its own powers and those of the other branches and the United States in general. Lamar maintained that "[the Necessary and Proper] clause is that which contains the germ of all the implication of powers under the Constitution."[244] That clause "alone, conclusively refutes the assertion of the Attorney General" that the executive had authority to protect Justice Field.[245] The "manifest answer is, that the protection needed and to be given must proceed, not from the President, but primarily from Congress."[246] Justice Lamar also rejected the argument that "in the absence of statutes from that source [Congress] other departments may act in the premises."[247] Congressional power, he maintained, was "plainly not concurrent" but rather "exclusive."[248] In Justice Lamar's view, no statute and hence no law directed or authorized Deputy Marshals to do what Neagle had done.[249]

---

[239] 135 U.S. 1 (1890). The facts of *Neagle* are discussed *supra* --.

[240] Miller said that each branch of the national government was "by that Constitution invested with all those governmental powers, naturally belonging to such department, which have not been expressly withheld by the terms of the Constitution." 135 U.S. at 15 (argument of the Attorney General). The President "is invested with necessary and implied executive powers which neither of the other branches can either take away or abridge," *id*. at 16. Exactly how much power the Attorney General meant to claim is not clear, because he said that some of each branch's powers are "self-executing, and in no way dependent, except as to ways and means, upon legislation." *Id*. The qualification about ways and means may have been quite significant.

[241] Justice Lamar quoted portions of the Attorney General's argument, including the passage asserting that many of the necessary and implied powers of the branches are self-executing. *Id*. at 81.

[242] *Id*. at 82.

[243] *Id*.

[244] *Id*. at 83.

[245] *Id*.

[246] *Id*.

[247] *Id*. at 90.

[248] *Id*.

[249] Justice Lamar also responded to the argument that Neagle's act was authorized by the statute giving U.S. Marshals the powers of state sheriffs. Those powers, Lamar argued, were to be used to carry out the Marshals' duties, which he had concluded did not include protecting judges while traveling. *Id*. at 97-98.

Justice Lamar's basic principle was that in domestic operations the executive had to operate on the basis of statutory authority.[250] His view was a version of the concept of executive power that makes that power dependent on other legal rules.[251]

C. *Youngstown Sheet & Tube Co.* v. *Sawyer*

In 1952, President Truman ordered the Secretary of Commerce to take possession of the nation's steel mills and operate them in the face of threatened strikes. The mill owners sought injunctive relief against the threatened seizure, which the district court granted and the Supreme Court affirmed.[252]

Justice Black's opinion for the Court is a leading expression of the Whig conception of executive power. The Secretary, Justice Black explained, did not rely on any statutory authority, express or implied.[253] After rejecting the argument that the powers of the military in theatres of war were relevant, Justice Black came to the heart of his reasoning: the President's action directing seizure of the steel mills was an attempt to exercise legislative, not executive, power. "The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress -- it directs that a presidential policy be executed in a manner prescribed by the President."[254] But the President is not Congress. "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[255]

---

[250] Lamar distinguished international relations from domestic activities. In doing so, he showed the close connection between federal separation of powers and federalism on which his constitutional analysis rested. Justice Miller had pointed to situations in which the executive had extended the international protection of the United States to U.S. citizens, and individuals who had declared their intention to become U.S. citizens. 135 U.S. at 64. Justice Lamar responded: "We answer, that such action of the government was justified because it pertained to the foreign relations of the United States, in respect to which the federal government is the exclusive representative and embodiment of the entire sovereignty of the nation, in its united character," and to foreign countries "the internal adjustment of federal power, with its complex system of checks and balances, are unknown." *Id*. at 84-85.

[251] Whether Justice Miller in his opinion for the Court meant to assert that the Constitution by itself authorizes the executive to respond to threats to officials is hard to say. One important paragraph points both ways. Having noted the President's duty to take care that the laws be faithfully executed, Miller went on, "Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, or does it include the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protections implied by the nature of the government under the Constitution?" *Id*. at 64 (emphasis in original). The reference to the express terms of statutes points to implications by statutes, but Miller then referred to the Constitution itself. It is quite possible that Justice Miller was deliberately unclear, wanting to decide the case in favor of federal as opposed to state power without committing himself or the Court to any theory of executive as opposed to legislative power.

[252] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[253] *Id*. at 585-586.

[254] *Id*. at 588.

[255] *Id*. at 587.

The Court's laconic opinion does not elaborate on why the difference between executive and legislative power explains its result. The connection lies in a premise that Justice Black may have thought too obvious to mention: the executive is bound by the law, including private rights. That premise combined with the constitutional allocation of powers yields the result in *Youngstown*. The executive is bound by the law, and the President's possession solely of executive, and not of legislative, power, means that he cannot change the law.[256]

Youngstown involved an attempted executive invasion of private rights. The principle that the executive is bound by the law extends more broadly, though Justice Black had no occasion explicitly to endorse that broader extension. *Youngstown* was not *Neagle*, which involved the rules governing the proper use of government resources, and not just the rights of private people. My argument is that the same principles apply, so that for example the use of federally-owned vehicles requires legal authorization just as does the seizure of privately-owned steel mills.

V. Conclusion

Executive power carries out the law. That basic point is evident from the word "executive" and has been a staple of Anglo-American constitutional thinking for centuries. Closer analysis makes it possible to elaborate on that basic principle. Executive officials operate in an environment of legal rules that empower and constrain them, rules that do not flow from the executive power itself. That power is the capacity to occupy that distinctive place in the legal environment, but does not provide that environment's content. Possession of executive power by itself does not give any of the distinctive legal advantages of government power, including the ability to invade private legal interests. That is the rule of law.

[256] Monaghan also sees the connection between respect for private rights and the absence of executive law-making power. The Whig conception of the executive "recognizes little independent presidential authority, at least when presidential authority would interfere with pre-existing private rights," Monaghan, *supra* n. --, at 3, and *Youngstown*, which "provides the classic illustration of this conception of presidential authority," *id*., rests on the premise that "no independent, free-standing presidential law-making authority exists insofar as the rights of American citizens are concerned," *id*. at 4.