

THE ESSENTIAL MEANING OF EXECUTIVE POWER[†]

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Scholars disagree about the Executive Power Clause's meaning. Some scholars claim that the clause does not vest any power but instead establishes the title and number for the apex of the executive branch. Others believe that the clause vests power but are unsure what domestic power it might vest. This article seeks to resolve the dispute by shedding light on the essential, historical meaning of executive power. Although "executive power" was often used to encompass a bundle of powers typically enjoyed by the executive branch, such as foreign relations control and the power to appoint, the phrase most often was used as a shorthand for the power to execute the laws. Indeed, the phrase "executive power" comes from the principal or essential power of an executive—the power to execute the law.

Evidence from the eighteenth century reveals this essential meaning of executive power. European political theorists of that era declared that the executive power was the power to execute the laws. In America, state constitutions and political commentators employed this basic definition. Debates at the Philadelphia and state ratifying conventions also confirm this meaning, with framers and ratifiers repeatedly observing that the President could execute the law by virtue of the executive power. Finally, after ratification, statesmen from all three branches understood that the executive power was the power to execute the laws.

The founders understood that at least two subsidiary authorities flowed from the power to execute the law. Vested with the executive power, the president may execute any federal law by himself. Because the Constitution establishes that the executive power is his, the Constitution authorizes the president to execute any federal law. This constitutionally sanctioned power to execute the law explains why the president is widely regarded as an executive, i.e., an official who exe-

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cutates the law. Moreover, the executive power also enables the president to control other governmental officers who execute federal law. Because only the president has the executive power, others who execute the law derive their authority to execute not from the statutes that create their offices but from the president. This feature of the executive power reveals why the president is properly referred to as the chief executive. Other officials who execute the law are “executive” officers by virtue of their law execution role and because they are the chief executive’s means of executing the law.

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Though a prominent part of our Constitution, the clause that vests the president with the “executive power” remains an enigma.¹ A handful of scholars claim that it mandates a unitary, hierarchical executive branch under the president’s control, and that it vests the president with the powers traditionally associated with the executive, subject to the refinements and limitations found elsewhere in the Constitution. Other scholars scoff at such claims, insisting that the clause vests absolutely nothing. Instead, the clause is but a convenient shorthand for relating that a single president enjoys the authorities enumerated in the remainder of Article II. A third group of scholars seem either to pass over the clause or to equivocate about its meaning. Not quite knowing what to make of it, they avert their eyes and hope that whatever the clause’s meaning, it will not jeopardize their particular claims.

The general neglect of the clause retards contemporary discourse. For instance, consider the scholarly treatment of Baron de Montesquieu’s famous separation of powers maxim. There is no more widely cited commentary on the separation of powers than Montesquieu’s discussion of the absolute necessity of keeping separate the three powers of government. Because the Constitution’s makers embraced Montes-

1. U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”).

quieu's famous maxim, every separation of powers scholar wants to claim that the maxim supports their particular assertions (or at least does not cast doubt on their arguments). Yet many scholars make no meaningful attempt to discern what Montesquieu meant by executive power. Hence, the most significant commentary on the separation of powers is opaque to many.

This article sheds light on the essential, original meaning of the executive power and highlights the president's centrality in federal law enforcement, thereby advancing the larger separation of powers discourse. At bottom, the executive power is the power to execute the laws. Vested with this authority, the president may execute any federal law by himself, whatever a federal statute might provide. As Governor Edmund Randolph put it, all enlightened people agreed that "the superior dispatch, secrecy, and energy . . . under it more politic to vest the power of executing the law in one man."² This power to execute the law explains why the president is widely regarded as an *executive*, i.e., an official who executes the law. The president also may control other government officers who execute federal law. As the Anti-Federalist, The Federal Farmer, put it, the president was "well circumstanced to superintend the execution of laws with discernment and decision, with promptitude and uniformity."³ The president's control over law execution by governmental officers would help ensure these beneficial qualities. This aspect of the executive power reveals why most acknowledge the president as the *chief* executive. Other officials who execute the law are "executive" officers by virtue of their law execution role and because they are the chief executive's means of executing the law. This article uses the phrase "chief executive thesis" to refer to both of these features of the president's executive power.⁴

No other constitutional provision, found in Article II or elsewhere, casts doubt on the essential meaning of the executive power or the chief executive thesis. Rather, the Constitution is replete with clues that underscore that the executive power is the power to execute laws. These other provisions augment, refine, or constrain the president's primary law enforcement function.

Though the Executive Power Clause delegates more than the essential power to execute the laws,⁵ this article will not discuss the other au-

2. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 201 (Jonathan Elliot ed., Ayer Co. 1987) (1888) [hereinafter DEBATES].

3. 2 THE COMPLETE ANTI-FEDERALIST 310 (Herbert Storing ed., 1981) [hereinafter ANTI-FEDERALIST].

4. Although one could defend a third means of controlling law execution—removal of officers statutorily charged with law execution—this Article does not address removal authority.

5. For a defense of the claim that the executive power also grants the president residual foreign affairs powers, see Saikrishna Prakash & Michael Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001).

thorities that flow from the clause.⁶ Nor will the article fully explicate what is meant by presidential control of law execution. Finally, this article will not attempt to precisely document the genesis of “executive power.” It is enough that the phrase had a well-known meaning before, during, and after the Constitution’s ratification.⁷

This article begins by setting forth two prominent views of the meaning of the Executive Power Clause and the executive’s relationship to law execution: the non-executive thesis and the chief overseer thesis. Part II lays out a comprehensive textual case for the chief executive thesis. Part III examines the works of influential eighteenth-century political theorists about the essential meaning of executive power. Parts IV, V, and VI consider the use of “executive power” in America before, during, and after the Philadelphia Convention of 1787. Part VII briefly documents how prominent statesmen in the early post-ratification years confirmed the chief executive’s preeminence in law execution. This article concludes by critiquing recent notions of the executive power and of the chief executive’s relationship to law execution.

The Executive Power Clause is not some trivial, obscure, or indecipherable provision. It grandly opens the Constitution’s second article, has a rich (if forgotten) history, and has a relatively clear original meaning. Moreover, if this article correctly describes the clause’s original meaning, one cannot make sense of the Constitution’s system of separated powers without a proper conception of this clause.⁸

6. The Article will not argue that the president enjoys all those powers enjoyed by the eighteenth-century king of England. Though this country’s legal institutions and traditions hail from Britannia, the people of the United States did not adopt the English Constitution of the relevant period jot for jot.

7. Justice Jackson famously wrote that we may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–35 (1952) (Jackson, J., concurring). While Justice Jackson’s point might have been true regarding many other issues relating to the executive power (such as the one facing the court in that case), the aim of this Article is to demonstrate that the founding fathers did have a unified, clear vision of the president’s relationship to law execution. The historical evidence on this point is neither enigmatic nor does it cancel itself out.

8. When it comes to the original understanding of the president’s law enforcement role, I have taken two previous stabs at this issue. See Steven G. Calabresi & Saikrishna Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Saikrishna Bangalore Prakash, Note, *Hail to the Chief Administrator: The Framers and the President’s Administrative Powers*, 102 YALE L.J. 991, 997 (1993) [hereinafter Prakash, *Hail to the Chief Administrator*].

This Article moves beyond those previous treatments in three respects. First, the Article establishes a core meaning for executive power. Executive power quintessentially refers to the power to execute the law. Next, the Article illustrates that the founders understood that the Executive Power Clause granted power and was not a clause that merely confirmed the number of and title for the executive. Finally, the Article carefully documents that the founding generation chose to establish a chief executive empowered to execute the law himself and to direct the law execution of others.

I. TWO NARROW CONCEPTIONS OF THE EXECUTIVE POWER AND THE PRESIDENT'S RELATIONSHIP TO LAW EXECUTION

One can articulate numerous views on the meaning of the Executive Power Clause and the executive's relationship to law execution. Under a "non-executive" thesis, one might maintain the Constitution does not establish a chief executive empowered to control federal law execution.⁹ Rather, Congress may determine who will execute federal law pursuant to the Necessary and Proper Clause. Moreover, proponents of theories similar to the non-executive thesis typically deny that the Executive Power Clause vests powers beyond those enumerated elsewhere in Article II. Instead, the clause supposedly announces the title of the single person that enjoys the powers listed in the remainder of Article II.

Pursuant to a "chief overseer" thesis, one might conclude that the Executive Power and the Faithful Execution¹⁰ Clauses bestow authority that permits the president to influence and monitor all federal law execution, but no authority to execute all laws himself or power to direct the law execution of other federal officials.¹¹ A "default executive" thesis could posit that the Constitution authorizes presidential control of federal law execution. But this is a default rule only; the Necessary and Proper Clause enables Congress to statutorily retract or limit such authority.¹²

Finally, a minority of scholars subscribe to the "chief executive" thesis: the Executive Power Clause vests the president with control over federal law execution, the rest of the Constitution confirms this reading,

9. See generally Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996); A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346 (1994) [hereinafter Froomkin, *New Vestments*]; Bruce Ledewitz, *The Uncertain Power of the President To Execute the Laws*, 46 TENN. L. REV. 757 (1979); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 4 (1994); Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627 (1989) [hereinafter Rosenberg, *Congress's Prerogative*]; Peter M. Shane, *Returning Separation-of-Powers Analysis to its Normative Roots: The Constitutionality of Qui Tam Actions and Other Private Suits to Enforce Civil Fines*, 30 ENVTL. L. REP. 11081, 11102 (2000); A. Michael Froomkin, Note, *In Defense of Administrative Agency Autonomy*, 96 YALE L.J. 787 (1987) [hereinafter Froomkin, *Agency Autonomy*].

10. U.S. CONST. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed."). Though this clause is normally denoted the Take Care Clause, Professor Peter Shane has dubbed it the "Faithful Execution Clause." Shane, *supra* note 9, at 11102. Shane's label, though unconventional, is a superior description of the clause.

11. See, e.g., Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 668-69 (1984) [hereinafter Strauss, *Place of Agencies*] (arguing that while the president must have some influence over law execution, the Constitution permits some independent agency action as well). Professor Strauss's seminal article challenged the existing orthodoxy and helped renew interest in the subject of presidential influence/control of executive discretion. For a more recent discussion by Professor Strauss, see Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965 (1997) [hereinafter Strauss, *Presidential Rulemaking*].

12. Though no scholar has adopted this thesis, it does describe the structure of some early state constitutions. Though this Part does not flesh out this theory, later portions of the Article will refer back to this theory.

and Congress may not revoke or abridge either the president's power to execute the law or his authority to control the law execution of other federal officials.¹³ Before part II advances a textual defense of the chief executive thesis, this part briefly lays out the first two, more narrow conceptions of the executive power and the president's relationship to law execution.

A. *The Non-Executive Thesis*

The non-executive thesis denies that the Executive Power Clause vests any authority in the president. Further, the thesis denies that the rest of Article II grants the president the power to execute the law or to superintend law execution. Instead, the Constitution supposedly establishes that Congress decides who will execute the law and what role, if any, the president will have in law execution.

For instance, Professors Lawrence Lessig and Cass Sunstein have argued that the Executive Power Clause merely fixes the title and number of executives.¹⁴ In other words, the clause relates that one person—the president—enjoys the listed Article II powers. Under this “title and number” theory, the president cannot claim any constitutional authority arising from the Executive Power Clause, but instead must look elsewhere in the Constitution. Adherents of this title and number theory assert that if the clause granted authority to the president, the rest of Article II would be superfluous as the clause itself would encompass those powers specifically enumerated.¹⁵ Hence we should read the Executive Power Clause as if it ceded no power.

Although this narrow view of the Executive Power Clause has no necessary bearing on the more general issue of presidential control of law execution, many who subscribe to the title and number theory also deny that the president may superintend all federal law execution.¹⁶ In particular, such scholars contend that nothing else in Article II cedes the president control of law execution. The Faithful Execution Clause,¹⁷ which could be read as granting such authority, supposedly establishes a contrary position. The clause implies that the president shall “take Care

13. See, e.g., Calabresi & Prakash, *supra* note 8; Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); Lee S. Liberman, *Morrison v. Olson: A Formalist Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313 (1989); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225; Prakash, *Hail to the Chief Administrator*, *supra* note 8.

14. Lessig & Sunstein, *supra* note 9, at 48–50; see also Ledewitz, *supra* note 9, at 797 (noting the Executive Power Clause is “probably [an] empty grant”); Morton Rosenberg, *Presidential Control of Agency Rulemaking*, 23 ARIZ. L. REV. 1199, 1209 (1981) (arguing the Executive Power Clause “locates the situs [of power] but not its content”).

15. See Froomkin, *Agency Autonomy*, *supra* note 9, at 799–800; Lessig & Sunstein, *supra* note 9, at 48.

16. See, e.g., Lessig & Sunstein, *supra* note 9.

17. U.S. CONST. art. II, § 3.

that the Laws be faithfully executed” *by others*.¹⁸ The clause establishes a duty of watchfulness and not a duty or power to execute the laws. Some go further, claiming that the clause may command the president to respect whatever division of law enforcement duties that Congress enacts by statute.¹⁹ Under this radical view of the Faithful Execution Clause, should Congress create a wholly autonomous Justice Department, complete with an independent attorney general, the president would have to take care to respect Congress’s decision.

Three provisions supposedly buttress the claim that neither the Executive Power Clause nor the Faithful Execution Clause cedes the president any law enforcement authority. The presence of the Opinions Clause,²⁰ which permits the president to demand written opinions of the heads of the executive departments, suggests that in its absence, the president would lack such authority.²¹ Otherwise the clause would be pure surplusage.²² But if the president lacked the authority to demand written opinions in the first instance, his impotence would suggest that neither the Executive Power Clause nor the Faithful Execution Clause ceded power over law execution.²³ Put abstractly, the enumeration of the lesser power (opinions) suggests that the greater power (control) was not granted. Accordingly, in the absence of statutory authority to control federal law execution, the president can do little more than request opinions of those statutorily charged with law execution.

The Appointments Clause, which provides, *inter alia*, that Congress may vest the appointment of inferior officers with the president, department heads, or the courts,²⁴ also implicitly casts doubts on the claim of presidential control of department heads and law execution. If department heads were but agents of the president, there would be no need to list them separately from the president because appointment of inferior officers generally would reflect their principal’s wishes.²⁵ Precisely because the clause separately lists department heads and the president, it intimates that the former may be independent of the latter. And if the department heads are autonomous, then surely the president has no

18. See Ledewitz, *supra* note 9, at 797 (arguing the clause implies “that other parties are to execute the laws”); Rosenberg, *Congress’s Prerogative*, *supra* note 9, at 690.

19. See Lessig & Sunstein, *supra* note 9, at 69.

20. U.S. CONST. art. II, § 2, cl. 1 (“[H]e may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . .”).

21. See Lessig & Sunstein, *supra* note 9, at 34.

22. See Froomkin, *Agency Autonomy*, *supra* note 9, at 800.

23. *Id.*

24. U.S. CONST. art. II, § 2, cl. 2 (“[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”).

25. Froomkin, *Agency Autonomy*, *supra* note 9, at 799.

credible claim to superintend law execution by these department heads and their departments.²⁶

Finally, some who deny the president any constitutionally mandated law administration role argue that Congress, by virtue of the Necessary and Proper Clause,²⁷ may decide who will execute federal law. Professors Lessig and Sunstein champion the view that the clause enables Congress to “determine the means for specifying *how* powers—and again, *all* powers—in the federal government are to be exercised.”²⁸ With respect to law execution, the clause signals that Congress may “determine how to structure the administration and how it is to function.”²⁹ If, by virtue of the clause, Congress may select who will control federal law execution, that necessarily means that the Constitution does not indefeasibly grant the president control of federal law execution.

The non-executive thesis does not construe the Constitution as forbidding presidential control of law execution. It merely insists that the president does not have a constitutional right to execute the law himself or to control the law execution of others. Congress determines who will execute its law. If Congress were so inclined, it could permit presidential control over some or all of federal law execution. But Congress certainly need not transform the non-executive president into a statutorily authorized chief executive. The choice is for Congress to make.³⁰

B. *The Chief Overseer Thesis*

Professor Peter Strauss ably articulates the view that the president’s constitutional role in law execution is “ambivalent” and that the words of Article II are in “tension.”³¹ On the one hand, Professor Strauss acknowledges that the executive power is the president’s.³² Strauss notes

26. Lessig and Sunstein claim that a comparison of the Opinions and the Appointments Clauses may suggest another tell-tale sign that the president lacks control over all law enforcement. While the former clause applies to “executive Departments,” the latter clause merely refers to “Departments.” They suggest that these differences might mean that the president cannot demand opinions from all principal officers of the various departments but from only those principal officers in *executive* departments. Lessig & Sunstein, *supra* note 9, at 36. In highlighting these differences, Lessig and Sunstein draw upon the work of historian James Hart. See JAMES HART, *THE AMERICAN PRESIDENCY IN ACTION: 1789*, at 242–43 (1948).

27. U.S. CONST. art. I, § 8, cl. 18 (Congress may “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”).

28. Lessig & Sunstein, *supra* note 9, at 67.

29. *Id.* at 68.

30. Given that most acknowledge that the president is an “executive” and given that everybody agrees that the president may execute the law (at least where Congress so provides), it might seem odd to label the thesis the “non-executive” thesis. Yet this Article is about what the Constitution itself permits the president to do with respect to law execution. In its extreme form, the non-executive thesis posits that the president has *no* generic constitutional right to supervise or monitor law execution by others, to direct the execution of the laws by others, or to execute federal law himself. Hence the label seems appropriate.

31. Strauss, *Presidential Rulemaking*, *supra* note 11, at 979.

32. *Id.*

that the framers consciously made this choice to secure responsibility, efficiency, and a counterweight to Congress.³³ All eyes could be drawn towards a single executive who could be held accountable for law execution.³⁴ Unencumbered by an executive council, the president could act quickly and energetically.³⁵ Armed with the authority to coordinate law execution, the president would serve to balance Congress.³⁶ However we define executive power, argues Strauss, we must respect the decision in favor of executive unity.³⁷

On the other hand, other constitutional provisions undermine the meaningfulness of the Article II vesting clause. Article II also refers to legal “duties” placed on the department heads; with respect to those department heads, it only mentions that the president may appoint them and seek their opinions; it grants the Senate a prominent role in appointments (thereby leading the department heads to serve two masters); and it limits the president’s role to ensuring that others faithfully execute the laws.³⁸ Considered together, these provisions caution against reading too much into the Executive Power Clause. In addition, Strauss argues that exactly “how our government should be organized below the level of Congress, President, and Court was explicitly left in Congress’[s] hands, under a Necessary and Proper Clause” that “carelessly but nonetheless tellingly, imagines ‘Powers vested by this Constitution . . . in any Department or Officer.’”³⁹ In the end, “the text of the Constitution settles no more than that the President is to be the *overseer* of executive government.”⁴⁰

One might label the president that emerges from the Constitution’s supposed ambivalence and tension as a “chief overseer.” According to Strauss, of the executive duties assigned to others by Congress, “[t]he President can ask about those duties and see that they are faithfully performed, but he and his department heads are to understand that the duties themselves are theirs.”⁴¹ In other words, though he can shape the law (by, for example, requiring consultations or consideration of cost-benefit analysis⁴²), he cannot undertake those law-execution duties himself nor can he direct the performance of such duties. That is so because Congress, under the Necessary and Proper Clause, may properly decide that it is necessary to shield executive decision making from presidential control. Hence, the president can only personally execute a law or super-

33. Strauss, *Place of Agencies*, *supra* note 11, at 600–02.

34. *Id.*

35. *Id.* at 599–600 nn.99–101.

36. *Id.* at 600–02.

37. *Id.* at 600.

38. Strauss, *Presidential Rulemaking*, *supra* note 11, at 979–80.

39. *Id.* at 980.

40. *Id.* at 985–86.

41. *Id.* at 984.

42. Strauss, *Place of Agencies*, *supra* note 11, at 662–66.

intend the law execution of others where statutes provide as much. According to Strauss, this limited presidential role is a good thing, for a stronger president would be “unacceptably hazardous to the public health.”⁴³

Although Strauss’s arguments share some similarities to those advanced by the proponents of the non-executive thesis, there are significant differences that yield a much more robust reading of executive authority. First, Strauss does not dismiss the Executive Power Clause as a nullity. Though he does not reveal his favored reading of the clause, he does seem to give the clause some weight in his textual arguments. In particular, the Executive Power Clause seems to be the basis for his view that the president should be able to shape all law execution as a means of furthering the founders’ desire to have coordinated, efficient, and responsible law execution. Second, the Opinions Clause complements this power to shape all law execution by granting the president a constitutional right to information from all those who actually execute the law, including those whom Congress wishes to insulate from presidential influence.⁴⁴ This right to information makes the president’s ability to shape law execution meaningful.

Likewise, Strauss reads the president’s Faithful Execution Clause duties as extending to all laws, regardless of whether the particular law is to be executed by a so-called independent agency. Though a modest reading of the clause, Strauss’s argument would acknowledge presidential authority well beyond what modern presidents actually wield in practice. Presidents currently do not monitor independent agencies to determine if these agencies faithfully execute the law probably because so many believe that Congress may entirely insulate certain law execution from presidential oversight. To use the language of the Constitution (as Strauss would read it), contemporary presidents do not take care that the laws are faithfully executed where statutes cede law execution to independent agencies. Finally, this faithful execution duty vests the president with authority to take some action (such as removal) in the event that he finds that an officer’s law execution has been faithless. After all, the clause does not just require that the president make a judgment (i.e., has the law been executed faithfully?); he affirmatively must ensure that the law is executed faithfully (“take care”).⁴⁵ When considered together, Strauss’s claims buck conventional wisdom because they posit far greater presidential power over law execution. For those looking for a synopsis of the two theses, Table I summarizes them.

43. Strauss, *Presidential Rulemaking*, *supra* note 11, at 985.

44. Strauss, *Place of Agencies*, *supra* note 11, at 646–47.

45. *Id.* at 614–15.

TABLE I
SUMMARY OF NON-EXECUTIVE AND CHIEF OVERSEER THESES

Non-Executive Thesis	Chief Overseer Thesis
<ul style="list-style-type: none"> • Executive Power Clause conveys no power. • The clause merely establishes a title (the president) and the number of executives (one). • Remainder of Article II indicates that the president has no power either to execute federal law or control the law execution of others. • Faithful Execution Clause implies that others execute and requires that the president abide by laws that vest independent execution authority elsewhere • Opinions Clause confirms that the president lacks general law execution authority. • Appointments Clause suggests that the president cannot command department heads because it permits Congress to vest appointment of inferior officers with the president or department heads. • Necessary and Proper Clause permits Congress to decide who will carry into execution its laws. 	<ul style="list-style-type: none"> • The Executive Power Clause connotes a decision to have a responsible and efficient president capable of serving as a counterweight to Congress. • Executive Power Clause confers authority to shape the law execution conducted by all officers (executive or not). • Remainder of Article II indicates that the president has no right either to execute the law himself or control the execution of others. • Although the Faithful Execution Clause grants a power to oversee all law execution, it also indicates that the president's role may be limited to oversight. The president is to take care that <i>others</i> faithfully execute the laws. • Opinions Clause ensures that the president receives information that will be useful as he tries to influence law execution. • Necessary and Proper Clause permits Congress to decide who will carry into execution its laws and hence Congress can insulate executive officers from presidential direction. But Congress must permit the president to shape and monitor all law execution. • Combination of the Executive Power and Faithful Execution Clauses permits the president to remove officers where they have faithlessly executed the law or where they do not respect his ability to shape law execution.

In my view, both theses mistakenly downplay the Executive Power Clause. One reads the clause as a nonentity, while the other reads it as but ensuring the president the limited role of being able to cajole those who actually execute the law. Neither concludes that the clause vests substantial powers with the chief executive. Moreover, both theses misconstrue the remainder of Article II. They dismiss more natural readings and embrace interpretations that lack a firm historical basis. The parts that follow lay out the textual and historical bases for the chief executive thesis and for concluding that the two narrow conceptions are mistaken as a matter of original understanding.

II. THE TEXTUAL FOUNDATIONS FOR THE CHIEF EXECUTIVE THESIS

The chief executive thesis maintains that the president, by virtue of his executive power, controls federal law execution in at least two ways. First, the president may use his executive power to execute the laws himself. When a statute requires an executive action to be taken or an executive decision to be made, the president may act or make the choice because the Constitution establishes that only he enjoys the executive power. Second, the president may use his exclusive grant of executive power to direct the law execution of officers. In lieu of executing the law himself, the chief executive may direct his subordinate executives in their law execution.

This part details the textual foundations of the chief executive thesis. Though the part begins by discussing the Executive Power Clause, most of the historical support for the reading of that clause follows this part. Nonetheless, even without considering much historical evidence, the basic dictionary definition of executive power confirms that the executive power is the power to execute the laws and that the person who wields it is the chief executive.

The clauses that are sometimes thought to undermine presidential control of law execution do nothing of the sort. Properly understood, they confirm the president's control of federal law execution. Each, in their own way, augments, refines, or limits presidential power but none actually suggests that the president has a remote or fleeting relationship to law execution. When considered in historical context,⁴⁶ Article II's text powerfully supports the chief executive thesis.⁴⁷

46. Although the claims made in this Part are primarily textual, the Part also cites historical evidence relevant to the original meanings of provisions (other than the Article II vesting clause).

47. While most of the claims made about the other clauses stand on their own, some arguments are based on the essential meaning of the Executive Power Clause. If the reader is unconvinced by the dictionary definitions of executive power found in this Part, for the time being the reader should accept the claims about executive power when considering the other constitutional provisions related to the chief executive thesis. After reading the entire Article, the reader can revisit the textual claims made herein to see how they fit with the historical evidence relating to the executive power.

A. *The Executive Power Clause*

The Executive Power Clause grants authority beyond those powers listed elsewhere in Article II.⁴⁸ In general, the clause grants the president all of those rights, powers, and privileges commonly associated with a chief executive vested with the executive power, subject to the many exceptions and limitations enumerated in Article II and elsewhere in the Constitution. For example, because someone vested with the executive power generally enjoyed the “federative” or foreign affairs power, the president boasts such authority as well. Given that specific provisions necessarily trump the more general Executive Power Clause, however, some foreign affairs powers are vested with Congress, such as the power to declare war.⁴⁹

A comparison of the introductory clauses of the Constitution’s first three Articles supports the claim that the Executive Power Clause vests authority with the president. The Article I vesting clause clearly indicates that Congress’s legislative powers only extend to those powers “herein granted.”⁵⁰ In sharp contrast, the Executive Power Clause lacks such language, thereby suggesting that the Article II vesting clause vests authority beyond those enumerated elsewhere in Article II.⁵¹ Moreover, the Judicial Power Clause—Article III’s counterpart to the Executive Power Clause—simply must vest power with the federal judiciary, because it is the only clause in Article III that could possibly vest any power.⁵² Indeed, if that clause grants no authority, federal judges lack a constitutional basis for their actions; save for salary and tenure, they would be mere creatures of statute. Once we conclude that the Judicial Power Clause grants authority, the analogous Executive Power Clause must bestow power as well because the clauses are virtually *in haec verba*.⁵³

The familiar charge that ascribing some meaning to the Executive Power Clause improperly makes the rest of Article II redundant is unconvincing. First, the remainder of Article II is hardly superfluous because it cabins and refines the otherwise broad grant of executive

48. The textual arguments contained herein are also discussed in Calabresi & Prakash, *supra* note 8; Calabresi & Rhodes, *supra* note 13; and Prakash, *Hail to the Chief Administrator*, *supra* note 8.

49. For an extended discussion of the president’s foreign affairs powers, see Prakash & Ramsey, *supra* note 5.

50. U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

51. See U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”); see also Frank B. Cross, *The Surviving Significance of the Unitary Executive*, 27 HOUS. L. REV. 599, 613 n.92 (1990); Morton J. Frisch, *Executive Power and Republican Government—1787*, 17 PRESIDENTIAL STUD. Q. 281, 287 (1987).

52. See Calabresi & Rhodes, *supra* note 13, at 1175–85.

53. Compare U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”), with U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”).

power.⁵⁴ Despite Article II, section 1, the pardon power is not as fulsome as it could be. Our president can pardon only for federal offenses and even then he cannot use the pardon to shield officials from impeachment.⁵⁵ Notwithstanding the Executive Power Clause, the president cannot unilaterally enter into a treaty; he must secure the Senate's supermajority consent.⁵⁶ In spite of his executive power, the president ordinarily cannot appoint unilaterally; important nominations require the Senate's consent.⁵⁷ Although some seem to recoil from this reading of the Executive Power Clause, they are on shaky ground. As James Madison noted during the ratification struggle (albeit in a different context), "[n]othing is more natural or common than first to use a general phrase, and then to explain and qualify it by a recitation of particulars."⁵⁸ The founders had precisely this view of Article II.

Second, both sides can play the redundancy card. Even if one struck out Article II's first sentence, it still would be crystal clear that one person, dubbed the "President," would enjoy the authorities found elsewhere in Article II. Each of the other Article II powers begins with either the "President" or "he," thus indicating that there would be only one president.⁵⁹ Moreover, Article I itself makes clear that Congress must present bills to a "President" and that "he" may sign the bills or return them with "his" objections.⁶⁰ Finally, if one read the Executive Power Clause as merely confirming that the president would enjoy those powers found in Article II, one would have to read "herein granted" in Article I, section 1, as redundant. After all, if Article II ought to be read as if it were like Article I, then the "herein granted" restriction in Article I must be superfluous. Thus, the title and number theory makes the first sentence of Article II pure surplusage with respect to both the Presentment Clause and the rest of Article II, and also renders part of the first sentence of Article I superfluous as well. If both constructions render

54. See Calabresi & Prakash, *supra* note 8, at 576–79; Calabresi & Rhodes, *supra* note 13, at 1196 n.216.

55. See U.S. CONST. art. II, § 2, cl. 1 ("[H]e shall have Power to grant Reprieves and Pardons for offenses against the United States, except in Cases of Impeachment.").

56. See U.S. CONST. art. II, § 2, cl. 2.

57. See U.S. CONST. art. II, § 2, cls. 2 & 3.

58. THE FEDERALIST NO. 41, at 278 (James Madison) (Jacob E. Cooke ed., 1961); see also Alexander Hamilton, Letters of Pacificus No. 1 (June 29, 1793), reprinted in 4 THE WORKS OF ALEXANDER HAMILTON 438 (Henry Cabot Lodge ed., 1904) [hereinafter WORKS OF ALEXANDER HAMILTON].

It would not consist with the rules of sound construction, to consider this enumeration of particular authorities as derogating from the more comprehensive grant in the general clause. . . . The difficulty of a complete enumeration of all cases of executive authority would naturally dictate the use of general terms, and would render it improbable that a specification of certain particulars was designed as a substitute for those terms, when antecedently used.

Id.

59. See generally U.S. CONST. art. II, §§ 1–4.

60. See U.S. CONST. art. I, § 7, cl. 2 (indicating that bills must be presented to the "president" and identifying the president as a person by using "he" and "his").

constitutional provisions redundant, one might conclude that avoidance of redundancy should play little, if any role in this particular dispute.⁶¹

If the Executive Power Clause vests anything beyond the authorities listed in Article II, it surely vests the power to execute the laws. The power to execute the laws is the quintessential executive power. In fact, “executive” comes from the verb “to execute,” which means to perform, to put into action.⁶² Samuel Johnson’s Dictionary, a dictionary from the founding era, recorded the meaning of “executive” as “active; not deliberative; not legislative; having the power to put in act the laws.”⁶³ The Oxford English Dictionary (of more recent vintage) confirms that the definition has not changed as it defines “executive” as a “distinctive epithet of that branch of the government which is concerned or charged with carrying out the laws, decrees, and judicial sentences.”⁶⁴ Though dictionaries do not always precisely capture how a particular word is actually used in common parlance, in this case, history confirms that the founding generation used the phrase “executive power” precisely as did the founding-era dictionary. As discussed at length in succeeding parts, the founders clearly understood that the executive power was the power to execute the laws.

If the Executive Power Clause grants the power to execute the laws, absent some powerful textual reason or historical understanding to the contrary, it must enable the president to execute the laws himself. Every other constitutional provision that grants a power to an entity permits the recipient to exercise the power personally. For instance, no one doubts that federal judges may exercise their federal judicial power over cases and controversies by rendering judgments regarding such cases. Likewise, no one doubts that the House of Representatives may impeach federal officers or that the Senate may try impeachments. All this is so because people naturally conclude that if the Constitution grants a power to an entity, the entity may exercise the power. Indeed, the ordinary rule is that *only* the constitutionally authorized recipient may exercise the power delegated to it (hence the consternation over potential delegations of legislative power).

61. In fact, there are quite significant differences between the two charges of redundancy. The chief executive thesis hardly renders the remainder of Article II redundant because the rest of Article II clarifies some of the contours of the more general grant of executive power. Under the thesis the rest of Article II plays a crucial role. In contrast, the proponents of the non-executive thesis can supply no reason why the framers would have bothered to include a vesting clause at the beginning of Article II that merely reiterated what was obvious from Article I’s Presentment Clause and from the rest of Article II. If one were really moved by arguments about redundancy, this comparison suggests that the advocates of the non-executive thesis have much more that they cannot explain.

62. See 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 683 (Librairie du Liban ed., 1978) (4th ed. 1773) [hereinafter JOHNSON’S DICTIONARY]; see also 5 OXFORD ENGLISH DICTIONARY 520 (2d ed. 1989) (“Execute” comes from Latin “ex(s)ecut,” past participle stem of “ex(s)equi,” meaning “to follow out.”).

63. 1 JOHNSON’S DICTIONARY, *supra* note 62, at 684.

64. 5 OXFORD ENGLISH DICTIONARY, *supra* note 62, at 522.

The Executive Power Clause is no different. Because the executive power is his and because the executive power is the authority to execute the law, the president always may execute the law himself. Not surprisingly, as we shall see later, there are numerous instances in which the founders declared that the president could execute the laws himself. Just as the president exercises the veto authority without the review or sanction of others, so too may he execute the laws. Whatever a statute may provide, the Constitution certifies the president as the “Constitutional Executor” of the law, as Hamilton put it.⁶⁵ Hence, whenever a statute requires that an executive decision or action be taken by any officer, the chief executive officer may decide or act himself.⁶⁶ Given the Executive Power Clause, personal presidential execution is always a constitutional option.

The claim that the president can personally enforce or execute any federal law may seem radical. After all, the rule in eighteenth-century England was the opposite—the king could *not* execute the law himself. But there were peculiar reasons for the English rule. Because the king was regarded as above the law,⁶⁷ it was thought necessary to preclude the king’s law enforcement lest that enforcement be completely unfettered.⁶⁸ Instead the English chief executive executed the law through his subordinate executive magistrates who were accountable through impeachment or suit. In this way, the English ensured that the king’s subjects had some mode of legal redress when law execution was improper or tyrannical.

In this instance English practice should not set the limits of presidential power. First, one cannot categorically say that the president necessarily has less power or authority than the English king. In fact, our Constitution’s executive is stronger than the English counterpart in at least one very significant respect. While the English executive’s powers were subject to modification by ordinary legislation (whatever the theo-

65. 4 WORKS OF ALEXANDER HAMILTON, *supra* note 58, at 444; *see also* 3 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 489 (John P. Kaminski et al. eds., 1984) [hereinafter DOCUMENTARY HISTORY] (Oliver Ellsworth arguing that the Supreme Executive should be unfettered save by the laws he is to execute); 3 DEBATES, *supra* note 2, at 201 (Edmund Randolph observing that everyone agreed that the power to execute the law should be vested with only one man).

66. Such statutes merely identify whom the president may have assist him in the exercise of his executive power. On the other hand, when Congress explicitly requires that the president make a particular decision, such statutes probably should be understood as forbidding presidential delegation. In effect, Congress has decided that with respect to a particular matter, the president must execute the law himself because it will not supply assistants to help him execute that law.

67. For example, he could not be held responsible either through impeachment or through judicial proceedings.

68. *See, e.g.*, 10 WILLIAM HOLDSWORTH, HISTORY OF ENGLISH LAW 360 (1938) (stating that the king cannot arrest a man because if he could, the arrestee would have no legal recourse). This rule most likely arose because at one time the crown actually was executing the laws itself and English subjects lacked legal recourse. Hence, the prohibition against personal execution did not arise by virtue of the nature of the executive power, but probably instead arose as a means of ensuring legal redress against the executive branch as a whole.

rists might have said), our executive's powers can never be altered by statute. Our Constitution precludes legislative supremacy and the statutory withdrawal of executive authority. Our chief executive is also more powerful in another more relevant respect. Though the king could not execute the law himself, our chief executive clearly may execute the law. For over two centuries, Congress has clearly accepted presidential execution by vesting some decisions solely with the president. Even those who fear and loathe a strong executive have never gone so far as claiming that the president is somehow constitutionally barred from executing the law. Once one admits that the president is stronger than the English monarch in these respects, it is hardly a leap to consider whether the president might enjoy greater law enforcement powers than the king.

Second, that step seems smaller still once one recognizes that the president is a responsible chief executive. Unlike the English monarch, our chief executive is not above the law. Rather he is subject to judicial process before Congress (in impeachment proceedings) and before the courts (in suits brought by individuals). Moreover, he enjoys a limited term and is selected by a mechanism that, in practice, has given voice to the people. Hence, the very reasons for precluding personal execution by the chief executive in England had no role to play in America.

Third, the step becomes positively insignificant in the face of the numerous framers and ratifiers who spoke of personal presidential law execution. As we shall see, various founders confirmed that the president could execute the laws himself. The president had the executive power, that authority consisted of power to execute the law, and the president—unlike the English king—was a responsible executive. Hence it followed that the president could execute the law himself.

Given the common sense reading that a recipient of power may exercise that power herself and that the executive power was considered the power to execute federal law, we should accept that the president can personally execute all federal statutes. In this instance, the English practice of barring personal execution by the monarch is hardly dispositive as to the American chief executive's powers. Not burdened by England's pernicious rules which shielded an irresponsible chief executive, the founders had no reason to replicate the constraints that the English erected to mitigate their deleterious rules.⁶⁹

In its ability to execute the laws and to employ the other presidential powers unilaterally, the apex of the executive branch is singular.⁷⁰ Unlike members of Congress who must act collectively across both chambers to exercise legislative powers (and with the president by virtue of Article I, section 7, clause 2), the president may employ the executive

69. Apparently no founder ever suggested that the English prohibition against personal law execution applied to the president.

70. See generally Calabresi & Rhodes, *supra* note 13.

power and most of his other constitutional powers all by himself. Unlike Supreme Court justices who must share the judicial power with each other and their brethren on the inferior courts,⁷¹ the chief executive does not share his executive power and need not consult with anyone as he goes about executing the laws and directing the law execution of others.

But, of course, though the executive power is the power to execute the laws, the president cannot effectually exercise this authority unilaterally. Unlike the powers to proclaim the state of the union or to veto legislation, each of which could be exercised unilaterally,⁷² the president simply cannot investigate, apprehend, and prosecute all potential law violators, and then personally execute the judiciary's judgment. Nor can he unilaterally collect all taxes or disburse all appropriations.

If the president is to be an effectual executive, he must have the aid of others, otherwise his power to execute the law is chimerical. Indeed, the Constitution indicates that the Congress, by statute, would create subordinate executives.⁷³ By virtue of his sole possession of the executive power, the chief executive may superintend those executives in their execution of statutes.⁷⁴ If other officers could execute federal law free of presidential control, these executive interlopers would have a joint right to the executive power. To paraphrase Hamilton, executive unity would be destroyed if there were autonomous executives each granted an executive fiefdom by statute.⁷⁵

That is why numerous founders noted that the president would control executive officers. Hamilton observed that the other executive magistrates were "deputies" or "assistants" of the chief magistrate because they were to assist the president in effectuating his constitutional powers.⁷⁶ Likewise, Madison affirmed that if any power was executive in nature, it was "the power of appointing, overseeing, and controlling those who execute the laws"⁷⁷ and that the person who controlled the subordinate executives enjoyed the executive power.⁷⁸ Not surprisingly, President Washington held the view that the executive officers existed to "as-

71. By virtue of the Judicial Power Clause, *see* U.S. CONST. art. III, § 1, no federal judge has a monopoly on the judicial power. Instead, the judicial power is shared among the various federal courts.

72. In practice, these powers are exercised with a great deal of assistance. The president has a stable of speech writers and has the Office of Management and Budget's (OMB's) Legislative Reference Division to help him determine the content of bills and to assist him in gauging the views of the various members of the cabinet.

73. *See* U.S. CONST. art. II, § 2, cl. 2 (observing that the president will appoint officers "which shall be established by Law"), *id.* art. II, § 2, cl. 1 (providing that the president may demand opinions of the principal officers in executive departments).

74. Unlike the *chief* justice who is merely *primus inter pares* and has little or no authority over the other justices, the chief executive or supreme executive magistrate may command the other executives in their law execution. After all, though the chief justice shares the judicial power, the chief executive has all the executive power.

75. *See* THE FEDERALIST NO. 70, at 472-77 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

76. THE FEDERALIST NO. 72, at 487 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

77. 1 ANNALS OF CONG. 463 (Gales & Seaton eds., 1789).

78. *Id.* at 519.

sist the supreme Magistrate in discharging the duties of his trust.”⁷⁹ These officers are the auxiliary eyes, ears, and arms by which the supreme executive magistrate executes the law and exercises his other prerogatives.

Because the Constitution vests the executive power only in the president’s hands, those who execute the law should be viewed as receiving their authority to execute from the president. Absent an implicit presidential delegation of the power to execute the laws, these executive officers would lack such authority.⁸⁰ Any other view of the matter would mean that, contrary to the Constitution and the founders’ vision, Congress could delegate the president’s executive power as it saw fit.⁸¹

Just as Congress may not create autonomous generals or admirals, Congress cannot create an independent executive officer charged with law execution. Likewise, just as Congress may not create an independent clerk who will enter court judgments as she sees fit and without regard to the instructions of Article III judges, Congress may not establish numerous fiefdoms in the executive’s department, whereby each executive officer acts as if he or she independently enjoys the executive power over particular statutes.⁸² Only the chief executive enjoys the executive power.

B. *Faithful Exercise of the Executive Power*

There are three principal ways of understanding the Faithful Execution Clause. On one view, the clause merely requires that the president loosely supervise those statutorily charged with executing the law. In other words, he is to monitor others while they execute the laws but the clause does not authorize presidential intervention except in cases of

79. 30 WRITINGS OF GEORGE WASHINGTON 334 (John C. Fitzpatrick ed., 1939).

80. Even though the power to execute the law is an aspect of the executive power, the implicit presidential delegation of authority to execute the law should not be understood as a delegation of an aspect of executive power, at least as the founders understood the phrase. Nor should the executive officer who executes the law be viewed as exercising the executive power. After all, the founders never spoke of every executive officer who executed the law as enjoying the executive power. Rather, in these situations, the president merely permits the executive officer to act as the president’s agent and in subordination to the president’s wishes. If the president somehow could cede power to execute the law independently, then it might be fair to say that the president had delegated a portion of his executive power. Because the president probably cannot make such a delegation, he does not delegate his executive power to others who execute the law, but instead merely permits others to execute the law on his behalf.

81. Though statutes place numerous duties on the subordinate executive officers, these statutes do not thereby delegate the power to execute the law. Indeed, to speak of a legislative “delegation” would imply that Congress could decide who may execute the law. Congress lacks the authority to delegate the executive power that it does not itself possess in the first instance. Instead, because the executive power is his, the president authorizes agents to execute the law on his behalf.

82. Executive officers need not always heed the president’s wishes; rather they must do so only while executing the law or while they are helping carry into execution some other presidential power. For instance, if an executive officer somehow exercised legislative power, then the president arguably would have no constitutional basis to direct the executive officer’s use of that power. In such a scenario, the executive officer is not exercising one of the president’s powers and thus the president has no authority for controlling the executive officer’s particular decision.

malfeasance. Read this way, the clause implicitly precludes broader claims that the president has a constitutional power to execute all federal laws. A more extreme construction suggests that the president must obey even those statutes that forbid him from overseeing law execution. Thus, if a tax statute bars presidential oversight with respect to its execution, the president must heed that statutory command. The final reading assumes that the president already enjoys the power to execute the laws and posits that the clause modifies that power by requiring faithful law execution.

The first reading is untenable. If the Executive Power Clause did not grant the president the power to execute the law and if the founders did not repeatedly note that the president could execute the law, perhaps the Faithful Execution Clause could be read as implicitly suggesting that the president had no such constitutional right. But given the meaning of the executive power and the historical evidence, the Faithful Execution Clause should hardly be construed as if it implicitly contradicted the former clause. There is no evidence to back up the claim that the Faithful Execution Clause somehow suggests that others are to execute the law independent of the president. The Faithful Execution Clause does not transform the Executive Power Clause's chief executive into a mere busybody who peers over the shoulders of others. Rather, the clause commands the president to ensure that his administration faithfully executes the law. Whether he executes the law himself or executes through the agency of his subordinates, he must strive for a faithful execution.

More than the first reading, the second one amounts to a full frontal assault on Article II's structure. The Faithful Execution Clause should not be read as a means of withdrawing the president's executive power for then the clause would undermine the very background rule that the clause presupposes. The Faithful Execution Clause presumes that the president already enjoys the power to execute the law and merely requires faithful exercise of that executive power.

Moreover, if the president must execute (i.e., heed) a statute that withdraws his executive power, the president must likewise take care to conform to statutes that withdraw his commander-in-chief or veto authorities. In each situation, one could contend that the president must take care to faithfully obey the statutory directive. Surely if this was the radical import of the Faithful Execution Clause, there would have been some history suggesting that the clause could be used as a means of withdrawing all the president's powers, including his power to execute the laws. Yet there is no evidence suggesting that the Faithful Execution Clause establishes a default executive whose constitutional powers exist only until a statute withdraws them. In fact, as we shall see, the founders consciously abandoned state strategies that subordinated executive powers to legislative tinkering and retraction. Hence, no one doubts that Congress cannot abridge or withdraw the president's veto or pardon

powers. Similarly, the far more fundamental powers to execute the law and superintend the law execution of others cannot be annulled or abridged by ordinary legislation.

In fact, the clause's antecedents and its legislative history point toward the third reading—one consistent with the established meaning of the Executive Power Clause. The Faithful Execution Clause imposes a duty of faithful law execution on the only officer who enjoys the executive power. Whether the chief executive executes the law himself or whether he executes through his executive subordinates, the president must faithfully execute the law.

The earliest rendition of the clause seems to hail from Pennsylvania. In 1681, Charles II granted William Penn a charter that authorized Penn and his heirs “duly to execute [the laws], unto and upon all People within the said Country and the Limits thereof.”⁸³ A year later, Penn decreed that a “Governor and Provincial Council shall take Care that all Laws, Statutes, and Ordinances which shall at any time be made within the said Province be duly and diligently executed.”⁸⁴ With minor variations, this provision was part of the various Pennsylvania Frames of Government from 1682 to 1776.⁸⁵ The 1776 Pennsylvania Constitution simplified the provision when it provided that the plural Pennsylvania executive was “to take care that the laws be faithfully executed.”⁸⁶ In 1777, the New York Constitution apparently borrowed from the Pennsylvania Constitution when it created a unitary executive who was “to take care that the laws are faithfully executed to the best of his ability.”⁸⁷

By granting the “supreme executive power”⁸⁸ to their executives and by requiring faithful exercise of that power, both constitutions required their executives to execute the law faithfully. Indeed, this understanding of the state executive power and faithful execution clauses conforms to the remarks made by the state executives. President Joseph Reed and the Pennsylvania Executive Council observed that while the legislature was to secure the means and supplies for prosecuting the war, the executive was “to execute the laws” and apply those means “for public purposes.”⁸⁹ When the Pennsylvania Assembly charged special commissioners to draw money from the treasury and conduct the state's defense, the Pennsylvania Executive Council objected that the statute “plainly encroaches on the rights of the people, who have elected you for

83. 1681 CHARTER FOR THE PROVINCE OF PENNSYLVANIA.

84. 1682 PENNSYLVANIA CHARTER OF LIBERTIE.

85. See 1682, 1683, 1696 PENNSYLVANIA FRAMES OF GOVERNMENT.

86. PA. CONST. of 1776, Plan or Frame of Government § 20.

87. N.Y. CONST. of 1777, § 19. Vermont also borrowed from the Pennsylvania Constitution and because it too had a plural executive, it placed the Faithful Execution responsibility on its governor and council. See VT. CONST. of 1777, Plan or Frame of Government § 18; VT. CONST. of 1786, Plan or Frame of Government § 11.

88. N.Y. CONST. of 1777, art. XVIII; PA. CONST. of 1776, § 3.

89. PA. CONST. of 1776, Plan or Frame of Government.

the purpose of devising measures, and us for that of executing them; and so far as we attempt to legislate or you to execute,” the Pennsylvania Constitution is violated.⁹⁰ Likewise, New York Governor George Clinton observed that he was to “execute and not to legislate.”⁹¹

The federal Faithful Execution Clause is of a piece with its New York and Pennsylvania predecessors. As Hamilton observed, the U.S. Constitution is no different than the New York Constitution of 1777 in this respect.⁹² The same claim could have been made regarding the Pennsylvania Constitution of 1776 for the Faithful Execution Clause is *in haec verba* with its Pennsylvania counterpart. In all three constitutions, the executive (whether plural or singular) had the executive power and the concurrent duty to execute the law to the best of its abilities.

The Philadelphia Convention debates entirely support this reading of the Faithful Execution Clause. As recounted in greater detail later, every delegate who spoke of the president’s relationship to law execution (and there were many) affirmed that the chief executive would be responsible for executing federal law. Furthermore, every formal plan submitted to the Convention provided that the executive would execute the national laws. After unanimously approving such language,⁹³ the Convention created a Committee of Detail to rework the resolutions submitted to them and propose a draft Constitution.⁹⁴ The papers of the Committee indicate that it approved the Executive Power Clause and language more closely resembling the New York Constitution’s Faithful Execution analogue: the president “shall take Care to the best of his Ability, that the Laws . . . of the United States be faithfully executed.”⁹⁵ The Committee eventually eliminated the redundant “to the best of his ability” and used language which merely provided that the president “shall take care that the laws . . . be duly and faithfully executed.”⁹⁶ The Committee of Style tightened the language again, leaving the Faithful Execution Clause familiar to us.⁹⁷

90. CHARLES C. THACH, JR., *THE CREATION OF THE AMERICAN PRESIDENCY 1775–1789*, at 33–34 (The Johns Hopkins Press 1969) (1923).

91. MARGARET BURNHAM MACMILLAN, *THE WAR GOVERNORS IN THE AMERICAN REVOLUTION* 66 (1943).

92. See *THE FEDERALIST* NO. 69, at 464 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (Hamilton quoting the Faithful Execution Clause and other provisions and observing that “[i]n most of these particulars the power of the President will resemble equally that of” English king and New York governor).

93. See 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 32 (1937) [hereinafter *FEDERAL CONVENTION*] (vesting the president with the power “to carry into execution the nationl [sic] laws”).

94. See 2 *id.* at 95–96.

95. 2 *id.* at 171. The Committee of Detail’s documents also indicate that John Rutledge proposed similar language. *Id.* (“It shall be his duty to provide for the due & faithful exec—[sic] of the Laws [o]f the United States [t]o the best of his ability.”).

96. 2 *id.* at 185.

97. See 2 *id.* at 564, 574, 600. They deleted “duly and.” 2 *id.* at 600.

This history indicates that the clause merely modified the president's executive power to ensure faithful execution. First, the clause that resulted from the handiwork of the Committees of Detail and Style evoked the similar clauses in the Pennsylvania and New York Constitutions and thus drew upon settled understandings.⁹⁸ Second, the Committee of Detail contained the well-known champion of an energetic executive, James Wilson of Pennsylvania. Given that Wilson was the only member of the committee from New York or Pennsylvania,⁹⁹ he may have been responsible for the rephrasing.¹⁰⁰ Wilson, who had earlier said that the "only powers he conceived strictly executive were those of executing the laws, and appointing officers,"¹⁰¹ certainly would not have proposed language that would have undermined the executive's control over this strictly executive function. Nor would he have idly sat by while others made such proposals. Finally, not one of the many delegates who had previously confirmed that the executive would execute the laws raised any objections to the new language.

No one protested because there was simply no need to object. The clause accomplished the same purpose as the previous language with but one unobjectionable change. Instead of merely affirming the executive's power to "carry into Execution the national laws,"¹⁰² the Faithful Execution Clause also required a faithful execution of the laws. Accordingly, the Philadelphia Convention records provide no basis for asserting that there was a last minute departure from the principle of presidential control of law execution.¹⁰³ Such a contention is far-fetched given that the Committee of Detail received one resolution confirming that the executive would execute the law and subsequently reported out two clauses (the Executive Power and the Faithful Execution Clauses) that confirmed the same proposition.

As might be expected, the post-framing discussion of the clause confirms the president's preeminent and commanding law execution role. Speaking at the Pennsylvania ratifying convention, James Wilson observed that there was a "power of no small magnitude intrusted to this officer. 'He shall take care that the laws be faithfully executed.'"¹⁰⁴

98. Compare U.S. CONST. art. II, § 3 ("he shall take Care that the Laws be faithfully executed"), with PA. CONST. of 1776, § 20 ("they are also to take care that the laws be faithfully executed"), and N.Y. CONST. of 1777, art. XIX ("That it shall be the duty of the governor . . . to take care that the laws are faithfully executed to the best of his ability.").

99. See 2 FEDERAL CONVENTION, *supra* note 93, at 106 (listing the committee's members); 1 *id.* at 1-2 (listing delegates from each state).

100. See THACH, *supra* note 90, at 115-16 (observing that Wilson drew his list of executive powers from Pinckney and the New York Constitution of 1777).

101. 2 FEDERAL CONVENTION, *supra* note 93, at 116.

102. 2 *id.* at 132.

103. See, e.g., Lessig & Sunstein, *supra* note 9, at 68-69.

104. 2 DEBATES, *supra* note 2, at 513; see also 2 *id.* at 445 (Wilson observing that it was not "meant here that the laws shall be a dead letter; it is meant that they shall be carefully and only considered before they are enacted, and that they shall be honestly and faithfully executed").

Likewise, in *The Federalist No. 77*, Alexander Hamilton observed that one wholly unobjectionable power of the executive lay in “faithfully executing the laws.”¹⁰⁵ Addressing the North Carolina ratifying convention, William Maclaine declared that the Faithful Execution Clause was “[o]ne of the [Constitution’s] best provisions.”¹⁰⁶ If the president “takes care to see the laws faithfully executed, it will be more than is done in any government on the continent; for I will venture to say that our government, and those of the other states, are, with respect to the execution of the laws, in many respects mere ciphers.”¹⁰⁷

President Washington likewise understood that the clause placed on him a unique and personal duty to faithfully execute the laws. In a letter to Alexander Hamilton regarding the Whiskey Rebellion, Washington observed “[i]t is my duty to see the Laws executed: to permit them to be trampled upon with impunity would be repugnant to it.”¹⁰⁸ Several days later, Washington issued a public proclamation ordering state and federal officers to bring the tax dodgers to justice, citing his “particular duty” to take care that the laws be faithfully executed.¹⁰⁹ When that proclamation proved ineffective, Washington called forth the state militia units to suppress the Whiskey Rebellion, once again citing his “high and irresistible duty, consigned . . . by the Constitution, ‘to take care that the laws be faithfully executed.’”¹¹⁰ In pursuance of this duty Washington “resolved . . . to reduce the refractory to a due subordination to the law.”¹¹¹ Finally, in a proclamation addressed to citizens planning on invading a foreign nation, Washington obliquely referenced his Faithful Execution Clause duties. Maintaining that “it is the duty of the Executive to take care that such criminal proceedings should be suppressed [and] the offenders brought to justice,” he cautioned citizens that “all lawful means

105. THE FEDERALIST NO. 77, at 520 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Hamilton and Wilson’s observations, when read in conjunction with the comments of the Pennsylvania and New York executives, suggest that the clause’s duty was often overshadowed by the power that the duty presupposed. In other words, people more often focused on the underlying power to execute the laws while the faithful execution duty was often in the background.

106. 4 DEBATES, *supra* note 2, at 136.

107. *Id.* Anti-Federalist William Symmes posed many interesting questions about the Faithful Execution Clause and, in the process, confirmed the president’s law execution role. Symmes observed that sometimes laws would be expressed in general terms and that the judiciary would not be able to render a judicial decision. In such situations, the president would have to interpret and execute the laws without the benefit of a judicial backstop. See 4 ANTI-FEDERALIST, *supra* note 3, at 60. Should Congress direct the mode of executing the law, however, could the president object that the particular mode would lead to unfaithful execution? See *id.* Even worse, should Congress attempt to destroy the president through the use of statutes and thus violate the Constitution, would the president be obliged to execute such statutes? See 4 *id.* at 60–61. Though Symmes never answered his questions, the manner in which he posed his questions was revealing. Each query confirmed that the president would be responsible for executing the laws.

108. Letter to Alexander Hamilton (Sept. 7, 1792), in 32 WRITINGS OF WASHINGTON, *supra* note 79, at 143–44.

109. Proclamation of September 15, 1792, in 32 *id.* at 150–51.

110. Proclamation of September 25, 1794, in 3 ANNALS OF CONG. 1413, 1414 (1793).

111. *Id.*

will be strictly put in execution for securing obedience to the laws, and for punishing such dangerous and daring violations thereof.”¹¹² Our first chief executive understood that where law execution was concerned, the buck stopped with him.

The Faithful Execution Clause hardly limits the president to some relatively distant relationship to law execution (cajole but do not direct or make decisions). Nor does it serve as a means for Congress to retract or repeal the president’s executive power. Instead, the clause requires that the president employ his executive power to ensure a conscientious execution of Congress’s laws¹¹³ and thereby underscores the executive’s natural link to law execution.¹¹⁴

C. *The Commander-in-Chief and the Law Executing Militia*

The Constitution first mentions law enforcement in Article I. Pursuant to Article I, section 8, clause 15, Congress may “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”¹¹⁵ This clause, when read with its companion clause,¹¹⁶ could lead some to the mistaken conclusion that Congress might somehow control the militia’s law execution. However, when read in conjunction with the president’s authority as commander-in-chief of the militia¹¹⁷ and against the background of the Executive Power Clause, it is clear that the president controls the militia’s law execution. Though Congress determines the circumstances under which the militia may be summoned, the commander-in-chief assumes control of it to execute fed-

112. Proclamation of March 24, 1796, *available at* <http://www.yale.edu/lawweb/avalon/president/proclamations/gvproc09.htm> (last visited Apr. 22, 2003).

113. Many have claimed that the Faithful Execution Clause was meant to preclude the chief executive’s dispensation and suspension of the laws. *See* CHRISTOPHER N. MAY, *PRESIDENTIAL DEFIANCE OF “UNCONSTITUTIONAL” LAWS* 16 n.58 (1998) (citing a long list of scholars, including Calabresi & Prakash, *supra* note 8, who claimed that clause was “meant” to preclude executive suspension). Hence the clause supposedly was the Constitution’s analogue to the English and state constitution prohibitions on dispensing and suspending the laws. *See* ENGLISH BILL OF RIGHTS of 1689 (providing “[t]hat the pretended power of suspending the laws, or the execution of laws, by regal authority, without consent of Parliament, is illegal; That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal”); VA. CONST. of 1776, Declaration of Rights § 7; N.C. CONST. of 1776, art. V (“That all powers of suspending laws, or the execution of laws, by any authority, without consent of the Representatives of the people, is injurious to their rights, and ought not to be exercised.”). While the clause prohibits the suspending or dispensing of the law (absent congressional authorization), there appears to be no evidence explicitly linking the clause (or its antecedents) to this purpose.

114. Although the clause is best viewed as imposing a duty rather than as ceding a separate presidential power, several founders spoke of it as conferring a power. Indeed, those who insist that the Executive Power Clause conveys no power distinct from the rest of Article II must read the Faithful Execution Clause as a power grant otherwise they cannot possibly explain the dozens of founding era statements indicating that the president could execute federal law.

115. U.S. CONST. art. I, § 8, cl. 15.

116. *See id.* art. I, § 8, cl. 16 (allowing Congress to provide for the organizing, arming, and disciplining of the militia).

117. *See id.* art. II, § 2, cl. 1 (declaring that the president is commander-in-chief of the militia of the several states when called into national service).

eral laws. Congress supplies the “last resort” by which the president will execute the laws in times of crisis.

The clause’s legislative history confirms that the militia serves the president in his capacity as chief executive. At the Philadelphia Convention, Doctor James McClurg questioned whether the executive would be able to use the army or the militia to execute the laws.¹¹⁸ Drawing from the New Jersey plan,¹¹⁹ the Constitution answered McClurg’s query by declaring that the president would be commander-in-chief of the militia and that Congress could provide for summoning the militia (and not the army) to execute the laws. When authorized by Congress, the chief executive could use the armed citizenry to execute the law.

Despite the negative implication, some Anti-Federalists later complained that the president could use the army to execute the law. “Philadelphians” questioned whether the president would amount to “a king elected to command a standing army? Thus our laws are to be administered by this tyrant.”¹²⁰ Patrick Henry, recognizing that the Constitution did not explicitly authorize the use of the army in law execution, cleverly argued that Congress could use the Necessary and Proper Clause as a basis for using the army to execute the law.¹²¹

James Madison, Edmund Randolph, and Alexander Hamilton had ready responses. The Constitution simply did not permit the use of the army for law execution, claimed Madison.¹²² Nor did it authorize the use of the militia in the ordinary course of law execution.¹²³ Instead, the president could call the militia when there was some “obstruction” or “powerful combination” opposed to the law.¹²⁴ Such exceptional resort to the militia could hardly be objectionable for, as Madison noted, if the country gave legislative power to the federal government, the federal government would also need sufficient “executive power” to ensure that its legislative power was not illusory.¹²⁵ Randolph similarly remarked that civil authority would be used in the first instance. Only when it was incapable of executing the laws would the militia be called forth under the president’s command.¹²⁶ Hamilton went further than either Randolph or Madison, denying that the magistrate would need to use

118. See 2 FEDERAL CONVENTION, *supra* note 93, at 69. McClurg regarded the use of the army to execute the laws as inappropriate. See *id.*

119. See 1 *id.* at 245 (providing that the executive could call forth the “power of the Confederate States” to enforce federal acts and treaties).

120. 16 DOCUMENTARY HISTORY, *supra* note 65, at 57–58.

121. See 3 DEBATES, *supra* note 2, at 436. Interestingly enough, some supporters of the Constitution thought the militia insufficient for law execution and that more “regular forces” (i.e., the army) would be necessary. See 4 *id.* at 269 (comments of Charles Pinckney at the South Carolina ratifying convention).

122. See 3 *id.* at 414.

123. See 3 *id.* at 415.

124. *Id.*

125. 3 *id.* at 416. Madison thus confirmed that the executive power was the power to execute the law.

126. See 3 *id.* at 400–01. Future Supreme Court Justice James Iredell made a similar point in the North Carolina convention. 4 *id.* at 108.

military force (i.e., the militia) to execute the laws at all. Congress, invoking the Necessary and Proper Clause, could empower the executive to call out the local *posse comitatus* to help execute the laws.¹²⁷ Thus, the chief executive could execute the laws with the assistance of civil executives, the *posse comitatus*, or the militia.

As this legislative history illustrates, the president's law execution power was so apparent (and so otherwise unobjectionable) that some falsely alleged that he could use the army to execute the law. Others complained that the president routinely would use the militia to execute the laws. Not surprisingly, the rejoinders assumed presidential law execution as well.

The Constitution does not contemplate that during exigencies, the president will direct the execution of tax and commerce laws, but that in more pacific periods Congress may vest the enforcement of these very same laws in independent Treasury and Commerce Departments. Rather, the militia is just one more arrow in the executive's law enforcement quiver. In addition to using civil officers and departments created by statute, the executive, with Congress's statutory permission, may fulfill his natural function by marshaling the ultimate guarantor of the laws: the armed people.

D. *The Opinions Clause*

The president may require the written opinions of the executive departments' principal officers upon subjects relating to their duties.¹²⁸ Recall that in some quarters, such specific authority casts doubt on the claim that the president controls law execution. The Opinions Clause's very presence suggests that in its absence, the president would lack opinion authority. And if he would otherwise lack such basic authority, he clearly may not direct law execution generally. Thus the clause supposedly implies that far from controlling executive officers, the president only may demand their opinions so far as the Constitution is concerned.

Two responses come to mind. First, one could accept that the Opinions Clause *is* redundant but simultaneously deny that its redundancy somehow violates basic norms of constitutional interpretation. The canon against redundant interpretations is not a trump card that wins in every instance. Alternatively, one can supply nonredundant readings of the clause that do not discard or ignore the ample evidence about the executive power. Consistent with the chief executive thesis, perhaps the

127. See THE FEDERALIST NO. 29, at 183 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (observing that a congressional statute permitting the executive to call out the posse would be a necessary and proper law to help assist those charged with executing the laws).

128. U.S. CONST. art. II, § 2, cl. 1 ("[H]e may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . .").

clause restrains the president, empowers him (by constraining Congress), or preempts certain complaints about the Constitution.

In the only extended analysis of the Opinions Clause, Professor Akhil Amar offers both rebuttals.¹²⁹ Amar first punctures the balloon of those who insist that “each [constitutional] clause *must* add something new.”¹³⁰ Citing the Necessary and Proper Clause and much of the Bill of Rights, he notes that “[e]ven a casual look at the Constitution reveals clauses that are in some sense redundant or superfluous.”¹³¹ In the face of so many *admitted* redundancies,¹³² we should reject rigid application of the maxim against redundant constructions. Instead, we must apply this maxim “sensitively and contextually to aid sound construction” and overrule it when it would defeat “common sense and interpretive aesthetics.”¹³³ Given the uncontroverted evidence that the president may execute the laws and direct the subordinate executives, common sense suggests that Alexander Hamilton may have been correct when he said the clause is “a mere redundancy in the plan; as the right for which it provides would result of itself from the office.”¹³⁴

Amar also reveals how the clause might actually “exemplify and clarify” the president’s powers and thus not be redundant at all.¹³⁵ Squeezing the clause for perhaps more than its worth, Amar offers numerous constructions that render the clause meaningful without doing harm to the amply supported chief executive thesis. Perhaps the clause establishes an antiroyalty principle whereby the president cannot use executive officers for personal business; he may only seek opinions relating to *official* duties. Maybe it reflects a personal accountability principle, where each officer is responsible for her opinion but the president makes the ultimate decision. Conceivably the clause prevents the president from demanding secretive, oral opinions.¹³⁶

Most of Amar’s proposed readings suggest that the clause constrains the president. Yet the clause might empower the president by constraining Congress. Congress might wish to create “automaton” executives who would execute the law without sharing information and opinions with the president. The clause, however, explicitly forbids Congress from creating such relatively unhelpful subordinate executives.¹³⁷ Whenever Congress creates a principal executive officer, the president may enjoy that officer’s opinions. Such a reading creates no redundancy vis-à-vis the chief executive thesis’s construction of the Executive Power

129. See Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647 (1996).

130. *Id.* at 648.

131. *Id.*

132. Amar points out that these provisions were understood to be redundant by many founders. *Id.*

133. *Id.* at 650.

134. THE FEDERALIST NO. 74, at 500 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

135. Amar, *supra* note 129, at 651–53.

136. See *id.* at 654–55, 661–66, 670–72.

137. I am indebted to Michael Rappaport for this reading of the Opinions Clause.

Clause. That thesis only posits that the president be able to execute the law himself and that he be able to direct the law execution of other executive officers. The thesis does not treat these subordinate executive officers as presidential playthings. In particular, it does not guarantee a right to opinions from subordinate executive officers any more than it guarantees a right to free labor from these subordinates. The executive officers are constitutionally subordinate in the sense that they exist to help the president with law execution and his other powers. They are hardly the abject servants of the executive.

Finally, the clause may have been included out of an abundance of caution—*ex abundanti cautela*.¹³⁸ Unlike a provision that truly serves no purpose, a provision that preempts objections serves a valuable end. Given the Opinions Clause, no one could successfully distort the text and deny that the president would lack advice.¹³⁹ Moreover, the clause also underscores a difference between the federal and state constitutions: the Constitution does not create a federal executive council that might rival the president or shield poor decision making. Without explicitly barring a council, the clause envisions that the president may seek advice from individual officers.

Each of these readings has its drawbacks. Yet each is superior to the claim that the Opinions Clause suggests that the president has no constitutional relationship to law execution other than demanding opinions.¹⁴⁰ First, those who press this radical reading have not yet satisfactorily explained the president's need for the opinions of those supposedly independent of him regarding duties not assigned to him. Remember this reading posits that the clause permits the president to secure opinions from otherwise independent officers and limits their power to assigned statutory duties. Why would the president desire or need opinions regarding how someone else will independently execute the laws? Such an opinion would be of no significance to the president because the opinion would not relate to the *president's* powers and duties but would instead relate to the powers and duties of someone else. After all, under this radical reading the president can do precious little with the opinion because he cannot command the officer to execute in a particular way. The chief executive thesis, by contrast, can make sense of the clause. The chief executive may demand opinions regarding the duties of a department head so that the president may make appropriate decisions as to how to direct the department head in the execution of the law.

138. See, e.g., *Fort Stewart Sch. v. Fed. Labor Relations Auth.*, 495 U.S. 641, 646 (1990).

139. George Mason made such a claim, wrongly claiming that because the president lacked a constitutional council he would be "unsupported by proper information and advice." See George Mason, *Objections to the Constitution and Marcus*, in 1 THE DEBATES ON THE CONSTITUTION 345, 354, 373–78 (Bernard Bailyn ed., 1993) [hereinafter DEBATES ON THE CONSTITUTION]. James Iredell, writing as Marcus, effectively rebutted Mason. See James Iredell, *Marcus I–V*, in 1 *id.* at 363, 373–78.

140. See, e.g., Lessig & Sunstein, *supra* note 9, at 34–36.

Second, and more important, each of the alternative readings of the Opinions Clause harmonizes with the executive power's original understanding, while the radical reading flatly contradicts what we know about the president. Can it be that the best reading of the Opinions Clause stealthily undermines the dozens of statements (enumerated later) about the president's control of law execution? Given the consensus for a law enforcement chief executive and the conspicuous lack of evidence of anyone contemporaneously reading the Opinions Clause as undermining the chief executive thesis, the reading is far too radical.

The clause's legislative history further confirms the chief executive thesis. The power to demand written opinions had its genesis in a Gouverneur Morris-Charles Pinckney proposal. At Philadelphia, they sought a council whose members would serve "at pleasure" and carry out duties under the president's direction.¹⁴¹ In addition, the president could "submit any matter to the discussion of the Council of State and . . . require the written opinion" of members.¹⁴² In all cases he was to "exercise his own judgment."¹⁴³ After receiving a variation of this proposal,¹⁴⁴ the Committee of Eleven subsequently reported out the modest Opinions Clause.¹⁴⁵ When the Convention took up the clause, George Mason re-proposed an executive council composed of state representatives.¹⁴⁶ Morris, the author of the original council plan and a member of the Committee of Eleven, revealed that the council plan was rejected because members of the Committee thought that the president "by persuading his Council—to concur in his wrong measures would acquire protection for them."¹⁴⁷ Such views carried the day as the Convention approved the Opinions Clause.¹⁴⁸

As approved by the Convention, the clause left ultimate decision-making responsibility with the president, even more so than the original Morris-Pinckney version. After confirming the Opinions Clause was "substituted" for an executive council¹⁴⁹ and denouncing such councils because they served to deflect responsibility,¹⁵⁰ James Iredell observed that because of the clause, "the President will personally have the credit of good, or the censure of bad measures; since, though he may ask ad-

141. 2 FEDERAL CONVENTION, *supra* note 93, at 342. Though the chief justice was part of the proposed Council of State, the proposal made clear that he would not be subordinate to the president. He was the only official that would not serve at the president's pleasure. See 2 *id.* at 342–43.

142. 2 *id.* at 343.

143. 2 *id.*

144. See 2 *id.* at 367 (Council must "advise him in matters respecting the execution of his Office. . . . But their advice shall not conclude him, nor affect his responsibility for the measures which he shall adopt."); 2 *id.* at 481 (sending unresolved reports and measures to Committee of Eleven).

145. See 2 *id.* at 499.

146. See 2 *id.* at 541–42.

147. *Id.*

148. 2 *id.* at 542–43.

149. 4 DEBATES, *supra* note 2, at 108.

150. See 4 *id.* at 108–09.

vice, he is to use his own judgment in following or rejecting it.”¹⁵¹ In his *Lectures on Law* delivered after the Constitution’s ratification, James Wilson likewise applauded the lack of the constitutional council and the resultant focus on the president. “In the United States, our first executive magistrate is not obnubilated behind the mysterious obscurity of counselors. Power is communicated to him with liberality, though with ascertained limitations. To him the provident or improvident use of it is to be ascribed.”¹⁵² Thus, the sparse legislative history of the clause likewise suggests that the original unitary executive impulse behind the Morris-Pinckney plan was only strengthened with the elimination of the council.¹⁵³ The only way the president could be responsible for decisions made after receiving opinions is if the officers’ statutory duties were understood as controlled by the president. If the president could ask for opinions only and not make statutory decisions himself, there is no way he could “have credit of good, or the censure of bad measures.”

Indeed, during the ratification struggle, no one ever asserted that the clause meant that the president lacked the general authority to execute the laws or to direct the law execution of executive officers.¹⁵⁴ Rather, people understood that because of the Convention’s decision, an executive council could never be a rival to the president. Nor would a council serve as a means of evading responsibility. Instead, all eyes would be drawn to the chief executive responsible for federal law execution.¹⁵⁵

The Opinions Clause, properly understood, assumes presidential control of law execution and the officers and departments charged with law execution. The president may ask for written *opinions* from those who head his executive departments regarding their statutory duties so that either he can direct them in their law execution or execute the law

151. 4 *id.* at 110; see also *Observations on George Mason’s Objections to the Federal Constitution*, in 1 DEBATES ON THE CONSTITUTION, *supra* note 139, at 377 (clause ensures that “President must be personally responsible for every thing”).

152. 1 THE WORKS OF JAMES WILSON 319 (Robert G. McCloskey ed., 1967). In *The Federalist No. 70*, Hamilton also criticizes the use of an executive council. Like Wilson and Iredell, Hamilton recognized that the council often served as a means of concealing faults and avoiding responsibility for executive decisions. See THE FEDERALIST NO. 70, *supra* note 75, at 476–80.

153. See Amar, *supra* note 129, at 666.

154. See *supra* notes 20–23.

155. Ultimately the clause probably was added out of an abundance of caution. The Philadelphia framers wanted the people (many of whom were accustomed to executive councils in the states) to understand the president would not lack advice when executing the law and exercising other powers. Rather than resorting to a council that might shield the president, the president could secure an opinion from the officer statutorily charged with executing in a particular area and then make a decision about how to execute the law. At the same time, other readings have merit too. The claim that the clause is redundant is supported by Hamilton’s claims. On the other hand, the best textual reading of the Constitution suggests that the clause was necessary because though the president could execute the law and direct the law execution of others, the president would not enjoy a constitutional right to *advice* from his executive assistants. In any event, the chief executive thesis is consistent with all three readings. And each is far superior to any that would undermine the ample evidence supporting the president’s primary role in law enforcement.

himself.¹⁵⁶ Thus, the clause hardly contemplates an “information exchange” between independent equals, but instead envisions a hierarchical relationship between the chief executive and his subordinate executives.¹⁵⁷

E. The Appointment of Inferior Officers

The Constitution establishes an appointments default rule for all officers: the president must appoint, and the Senate must confirm. Article II permits Congress to circumvent this cumbersome process for so-called inferior officers. By law, Congress may “vest the Appointment of such inferior Officers, as they shall think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”¹⁵⁸ As noted earlier, some have questioned why the Constitution would grant Congress the ability to vest appointment power with the president *and* the department heads.¹⁵⁹ If the latter were under the thumb of the former, it would have been sufficient to permit Congress to vest appointment authority with the president, and then permit presidential delegation to his department heads.¹⁶⁰ Those posing such questions contend that a proper reading of the Appointments Clause suggests that department heads may appoint independently and hence exposes deficiencies in the chief executive thesis. If the Constitution contemplates that department heads may appoint inferior officers independently, perhaps department heads may execute the law independently as well.

Such inferences are mistaken. Even if one concluded that the Appointments Clause permitted department heads to appoint inferior officers without presidential direction, that narrow independence hardly dooms the chief executive thesis.¹⁶¹ Whatever the Appointments Clause means for appointments, the clause carries no hint that Congress generally could withdraw or abridge the executive power or somehow relieve the president of his faithful execution duty.¹⁶² Indeed, someone enam-

156. See Prakash, *Hail to the Chief Administrator*, *supra* note 8, at 1004–07.

157. See Calabresi & Rhodes, *supra* note 13, at 1207 n.262.

158. See U.S. CONST. art. II, § 2, cl. 2.

159. Froomkin, *Agency Autonomy*, *supra* note 9, at 799.

160. Alternatively, the Constitution could have granted Congress the ability to vest appointment authority with the courts or the department heads and the president could have directed the appointments made by his department heads.

161. Notwithstanding the potential redundancy, the clause does not imply that department heads may appointment inferior officers independent of presidential control. To maintain control of his executive branch, the president can instruct the department heads as to who will be appointed as an inferior officer and if the department head does not listen, the president may remove that head. The principles of executive unity and responsibility were too widely voiced to have these principles undermined by a doubtful inference from an obscure sub-clause. Moreover, given the president’s ultimate responsibility for law execution, there would be no reason to grant independence to the department heads where selection of inferior officers were concerned.

162. If the Constitution meant to grant department heads the authority to exercise executive power it might have read: “The executive Power shall be vested in a President and in such department heads as Congress may create.” Compare U.S. CONST. art. III, § 1, *with id.* art. II, § 1, cl. 1. Or the Constitution

ored with the *expressio unius* maxim might draw negative implications from this reading of the clause. If the Constitution had to declare (albeit implicitly) that department heads could appoint independent of the president, Congress arguably *lacks a broader authority* to carve up and subdivide the executive power. In any event, one ordinarily does not eviscerate a notorious grant of authority (in this case, the executive power) by such a surreptitious route.

Those swayed by references to legislative history have other reasons to doubt that the Appointments Clause undermines the chief executive. On the penultimate day of the Philadelphia Convention, with delegates exhausted, Gouverneur Morris submitted the inferior officer provision.¹⁶³ Morris probably proposed the clause to relieve the Senate and the president of the burden of going through the confirmation process for every federal officer. After the Convention initially rejected Morris's motion, it passed after someone urged that "some such provision [was] too necessary, to be omitted."¹⁶⁴ As far as the notes reveal, no delegate recognized that the plan might have implications for their earlier decision to create a chief executive. Given his previous positions, Gouverneur Morris would not have knowingly submitted anything that undermined the Constitution's chief executive. Recall that Morris (along with Pinckney) had submitted a proposal that made all the department heads explicitly subordinate to the president.¹⁶⁵ He also had declared that there must be "officers of State" who would "exercise their functions in subordination to the Executive."¹⁶⁶ Lastly, Morris's acknowledgment that the executive power consisted of the power to execute the laws¹⁶⁷ makes it unlikely that he knowingly introduced anything that remotely suggested that the chief executive would lack control over subordinate executives.

Likewise, the ratification debates provide little solace for those who would use this mostly insignificant clause as a wedge to splinter the executive branch. Apparently only one person, Anti-Federalist Richard Henry Lee, read the clause as implying that Congress could vest independent appointment authority with department heads.¹⁶⁸ Yet Lee never suggested that the department heads generally would be independent of the chief executive. To the contrary, Lee declared that

might have stated: "Congress may by law vest the executive Power in the President alone, or in the Heads of Departments." *Compare id.* art. II, § 2, cl. 2, *with id.* art. II, § 1, cl. 1.

163. See 2 FEDERAL CONVENTION, *supra* note 93, at 627.

164. 2 *id.* at 627-28.

165. See 2 *id.* at 342.

166. 2 *id.* at 53-54.

167. See 2 *id.* at 79.

168. See Letters from a Federal Farmer (no. 14), in 2 ANTI-FEDERALIST, *supra* note 3, at 308 (observing that Congress could make the president stronger or weaker by vesting appointment power with him or with the department heads). No one else has supplied any evidence that the department heads had independent appointing authority, let alone that the clause implied that department heads were to be independent of the chief executive.

[r]eason, and the experience of enlightened nations, seem justly to assign the business of making laws to numerous assemblies; and the execution of them, principally, to the direction and care of one man. . . . [A] single man seems to be particularly well circumstanced to superintend the execution of laws with discernment and decision, with promptitude and uniformity.¹⁶⁹

Thus the only person who seems to have construed the Appointments Clause as permitting department heads to appoint independently also declared that the president would superintend to ensure a uniform and prompt execution. Strained inferences from this clause cannot overcome the ample evidence that the president controls the law execution of federal officers.

Though the Appointments Clause refers to certain “inferior officers” who may be appointed by the president, department heads, or the courts, properly speaking, all officers in the executive branch are inferior, save for the supreme executive magistrate. The inferior officers referenced in the Constitution are obviously inferior to their department heads. Though the department heads control departments, they, in turn, are inferior to the chief of the entire executive department.

F. Other Textual Indicia of a Law Enforcement Executive

There are two other telltale signs that the president executes the law. In particular, the Constitution’s illuminating use of “executive authority” and its recognition of three powers and three branches help confirm the executive power’s essential meaning. Pursuant to the Fugitive from Justice Clause,¹⁷⁰ the “executive authority” of a particular state may request the extradition from any other state of any person charged with any crime in the requesting state. Unlike the other instances where “executive authority” or its equivalent is employed,¹⁷¹ this particular use telegraphs the executive authority’s primary role. Because each executive authority’s essential function consisted of law enforcement, the executive authority was the natural repository of the power to make an extradition request addressed to other states.¹⁷² Indeed, the famous *Essex*

169. 2 *id.* at 310.

170. See U.S. CONST. art. IV, § 2, cl. 2.

171. The other uses of “executive authority” or “executive” in the original Constitution do not provide any clues as to the functions of the executive authority. See *id.* art. I, § 2, cl. 4 (stating that upon vacancy in a House seat, a state’s “Executive Authority” may issue writs of election to fill that state’s representation in the House); *id.* art. IV, § 4 (providing that if a state is imperiled by domestic violence and the state legislature cannot be convened, the state’s executive may request federal intervention); *id.* art. I, § 3, cl. 2 (stating that upon vacancy of Senate seat, each state’s “executive” could make temporary appointments to the Senate until state’s legislature made a permanent appointment).

172. It is worth noting that when Congress enacted legislation to facilitate the operation of the Fugitive from Justice Clause, it required that the executive authority seeking extradition address its demand to the executive authority of the state where the fugitive had taken refuge. See Act of Feb. 12, 1793, §§ 1–2. Given that the executive authority controlled the law enforcement machinery of a particular state, extradition demands were naturally addressed to the state chief executive.

Result written in Massachusetts in 1778 affirmed that a duty of the executive power was “to arrest offenders, to bring them to trial.”¹⁷³ Who better to make an extradition request for an accused lawbreaker than the entity solemnly constituted to enforce state laws?¹⁷⁴ Although the Fugitive from Justice Clause hardly proves the chief executive thesis, it is yet another piece of text favoring the thesis.

Another provision, by making clear that there are only three types of governmental officials, also helps illuminate the executive’s province (albeit indirectly). The Oaths Clause of Article VI indicates that the Constitution recognizes only three governmental branches.¹⁷⁵ Because the clause likely was meant to require an oath from all significant governmental officials, it strongly suggests that the federal and state governments were regarded as only having three types of significant officials: legislative, executive, and judicial. Indeed, the clause’s list completely conforms to the prevailing categories. From prior to the revolution, governmental powers and officials were divided up into three—legislative, executive, and judicial. If there were powerful federal or state officials that were not legislators, executives, or judges, then the clause contained a gaping hole. More likely, the clause applied to the universe of consequential state and federal officials.

By itself, the fact that the Constitution recognizes only three types of significant governmental officers hardly proves that the executive power is the power to execute the law. Nor does it establish that executive officers are subordinate to the president. But given what we already know about the president, his executive officers, and the meaning of “executive,” these provisions confirm quite a bit. First, the Constitution does not contemplate administrative, quasi-legislative, or quasi-judicial officers. If it did, the Constitution would not compel these officials to take an oath. Accordingly, attempts to vest law execution in such independent officers should be viewed as innovations inconsistent with the Constitution’s structure. Second, because all significant governmental officials can be divided into three categories, and because legislators and judges do not execute the law, executive officers are the only officials left

173. 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760–1805, at 501 (Charles S. Hyneman & Donald S. Lutz eds., 1983) [hereinafter AMERICAN POLITICAL WRITINGS]. Marc Kruman notes that the essay that was “a critical document in the history of American constitutional thought.” MARC W. KRUMAN, BETWEEN LIBERTY AND AUTHORITY 152 & n.91 (1997) (collecting cites of its importance).

174. Contrast the Fugitive from Justice Clause with the Fugitive from Injustice Clause. Compare U.S. CONST. art. IV, § 2, cl. 2, with *id.* art. IV, § 2, cl. 3. In both situations, the affected party makes the “delivery” request. In the latter clause, the person making the request is the slave owner (the person to whom “such Service or Labor may be due”). *Id.* art. IV, § 2, cl. 3. In the former clause, the entity requesting extradition is the entity constitutionally harmed by the fugitive from the law (i.e., the chief executive). *Id.* art. IV, § 2, cl. 2.

175. *Id.* art. VI, cl. 3 (“The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . .”).

who can execute the law.¹⁷⁶ Executive officers investigate, apprehend, and prosecute potential lawbreakers. As the wielder of the executive power, the president is the chief of these law enforcement executives.

G. *The Necessary and Proper Clause*

As noted earlier, Professors Lessig and Sunstein assert that the Necessary and Proper Clause¹⁷⁷ grants Congress the power “to determine the means for specifying *how* powers—and again, *all* powers—in the federal government are to be exercised.”¹⁷⁸ Regarding law execution, they claim that Congress may “determine how to structure the administration and how it is to function,” and who will control the execution of particular laws.¹⁷⁹ When Congress decides who will control law execution, it carries into execution its own legislative powers.

Yet a statute that sought to strip away the president’s executive power would fail on two independently sufficient grounds. First, such a statute would hardly be “proper” for it would amount to an inappropriate breach of the Constitution’s division of power. The clause does not entitle Congress to treat the Constitution as if it merely established “default” rules that Congress may alter by law. As Gary Lawson and Patricia Granger established, the clause’s “proper” constraint prevents Congress from using the clause as a textual basis for altering constitutional fundamentals. Hence, Congress cannot use the clause as a pretext for violating individual rights or altering the separation of powers.¹⁸⁰ Accordingly, the Necessary and Proper Clause can no more justify statutes that modify, abridge, or withdraw the president’s executive power than it can justify statutes that bar presidential pardons.

Second, such a law would not “carry into execution” any power of the federal government as required by the clause. The clause allows Congress to take subsidiary actions only in aid of the enumerated powers that Congress itself or another branch possesses.¹⁸¹ Because Congress

176. In their own limited way, judges do execute the law. But they execute the law only in the context of cases and controversies. They lack the ability to execute the law outside the courtroom.

177. The Necessary and Proper Clause grants Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. CONST. art. I, § 8, cl. 18.

178. Lessig & Sunstein, *supra* note 9, at 67 (footnote omitted).

179. *Id.* at 68.

180. See generally Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 324 (1993).

181. The clause takes the powers of the federal government as given (“vested by this Constitution”) and permits Congress to assist all three branches in implementing their respective enumerated powers. As Lawson and Granger observe, “the enumerations of power in the other seventeen clauses of Article I, Section 8 and elsewhere in the Constitution essentially provide the subject matter for the exercise of Congress’ executive ability.” *Id.* at 324. In discussing why he thought the clause was redundant, Madison confirms that the clause is about the means of exercising powers: “No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorised.” THE FEDERALIST NO. 44, at 285 (James Madison) (Jacob E. Cooke ed., 1961). Hamilton made a similar claim of redun-

and the rest of the federal government otherwise lacks authority to pass a nationwide inheritance code, the clause cannot be used to pass such a code.¹⁸² Likewise, if Congress enacts laws that establish who will enjoy the executive or judicial powers, it wholly fails to satisfy this condition.¹⁸³ First, such laws do not carry into execution any of Congress's powers. Second, such laws do not carry into execution any other federal power. No power vested in the rest of the federal government permits any entity to decide who will execute or adjudicate. Instead, the Constitution already grants the judiciary the power to adjudicate cases and the president the power to execute the laws. Accordingly, Congress cannot cite Articles II, III, or anything else as the basis for any power to determine who will execute or adjudicate federal law.¹⁸⁴

Given that Congress carries no federal power into execution when it creates independent executive officers and agencies, if it cites the clause as a basis for determining who will exercise the executive power, it engages in a massive bootstrap.¹⁸⁵ A clause that explicitly requires another

dancy: "What is the ability to do a thing but the power of employing the *means* necessary to its execution? What is a LEGISLATIVE power but a power of making LAWS? What are the *means* to execute a LEGISLATIVE power but LAWS?" THE FEDERALIST NO. 33, at 204 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). In the words of both of these founders, the Clause merely enables Congress to ensure that the powers of government can be effectively utilized and implemented.

182. See THE FEDERALIST NO. 33, at 206 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

183. By virtue of Article I, section 8, Congress may pass laws relating to particular subjects—appropriations, commerce, etc. Thus, Congress's power extends to regulating conduct and dispensing benefits. Such quintessential legislative authority, however, is a far cry from the quite different allocative authority that would allow Congress to assign the executive and judicial powers. Should Congress pass a statute declaring who will exercise the executive and judicial powers, it cannot assert that it is carrying into execution any of its powers. Although such officers would execute Congress's *laws*, the underlying statute would not be "carrying into execution" any of Congress's *powers*. In other words, the clause should not be read as if it provided that Congress can make all laws necessary and proper for "carrying into execution Congress' laws." To invoke the clause, Congress must be carrying into execution a power.

184. If we accept the claim that the Necessary and Proper Clause permits Congress to determine how all federal powers will be exercised, the Constitution becomes a giant default rule. For instance, Congress's limited ability to regulate the Supreme Court's appellate jurisdiction, see U.S. CONST. art. III, § 2, cl. 2, becomes swallowed by the Necessary and Proper Clause as does every other explicit constitutional default rule. Congress, under the guise of determining how powers will or should be exercised, could eliminate the jurisdiction of the Supreme Court entirely, because by virtue of the clause, the Article III jurisdiction heads are a starting point. Likewise, using the clause as a pretext, Congress could determine when the president may veto laws.

185. We should hardly be surprised that the Necessary and Proper Clause has become the hook by which some have challenged our Constitution's division of powers. Over two centuries ago, Madison, in an honest concession to those who opposed the clause and the Constitution, admitted that Congress might misconstrue the Necessary and Proper Clause and "exercise powers not warranted by its true meaning." THE FEDERALIST NO. 44, *supra* note 181, at 305. Legislation stripping the president of his authority to superintend execution of law, enacted under the cover of the Necessary and Proper Clause, is exactly the type of congressional usurpation that would have troubled Madison and Hamilton. See THE FEDERALIST NO. 48, at 332 (James Madison) (Jacob E. Cooke ed., 1961); THE FEDERALIST NO. 71, at 483 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Indeed this is precisely the sort of legislative usurpation that occurred in the states. As Madison expertly recounted, state legislatures repeatedly absorbed the executive and judicial powers under the guise of passing legislation. See THE FEDERALIST NO. 48, *supra*, at 335–36 (citing the instances of legislative usurpation in Virginia and Pennsylvania).

basis of authority before legislating¹⁸⁶ becomes transmogrified into one that independently grants Congress an unconstrained license to reallocate immense power even though no such allocation authority otherwise exists.¹⁸⁷ Congress cannot use the clause as a means of withdrawing those constitutional powers already granted, including the president's executive power.

None of the above means that the Necessary and Proper Clause is irrelevant to law execution. In fact, it is absolutely indispensable. It permits the creation of subordinate executive departments and officers that can help carry into execution the president's constitutional powers. The president clearly could not create officers on his own because the Constitution contemplates that such entities will be created "by Law."¹⁸⁸ Moreover, absent the clause, Congress might well lack authority to create departments and officers. Unlike the explicit congressional power to create lower federal courts,¹⁸⁹ Congress possesses no similar express authority to create subordinate executive assistants.¹⁹⁰ Without the enactment of laws creating departments and officers, the president would not only be the chief executive, he would be the only executive. Thus, the Necessary and Proper Clause plays a critical role, for without it, the president would lack the officers that help him execute the law.¹⁹¹

Because the clause empowers Congress to create the entire substructure of law execution, Congress enjoys broad latitude to dictate when and under what circumstances its executive creatures will be available to help the president in executing federal law. For instance, as has always been the practice, a statute can limit officers to only certain statutorily specified tasks. Thus, Congress may forbid the secretary of de-

186. See, e.g., 4 DEBATES, *supra* note 2, at 141 (MacLaine asserting that this "clause gives no new power, but declares that those already given are to be executed by proper laws").

187. Modern readings of the clause go beyond the most fantastic claims made by the critics of the clause and the Constitution. While Anti-Federalists were quick to attack the federalism implications of the clause, not one apparently ever suggested that the clause would allow Congress to dominate the executive (or the judiciary). Nor did any claim that Congress could treat the Constitution's vesting of powers as default rules to be modified by statute. Likewise, no Federalist appears to have adopted such constructions. Instead, proponents argued that the clause was redundant. See, e.g., THE FEDERALIST NO. 33, at 303 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); THE FEDERALIST NO. 45, at 285 (James Madison) (Jacob E. Cooke ed., 1961). Given that the clause was the subject of much debate, the fact that no one has cited any historical evidence to support the radical reading of the Necessary and Proper Clause is a telling indicator that this reading is distinctly modern.

188. U.S. CONST. art. II, § 2, cl. 2 (indicating that president will appoint those officers "established by Law" and thus creating the strong negative implication that offices must be instituted by statute).

189. *Id.* art. I, § 8, cl. 9.

190. The Appointments Clause governs how appointments are made, not how the underlying offices will come into being. See *id.* art. II, § 2, cl. 2.

191. Indeed, the only time the clause seems to have been discussed in relation to the president is when Hamilton observed that the clause may be used to enact laws enabling the president to call upon the posse comitatus to help enforce federal law. See THE FEDERALIST NO. 29, *supra* note 127, at 183. *But see* 2 DEBATES ON THE CONSTITUTION, *supra* note 139, 709–10 (Edmund Randolph's discussing whether the president might have implied powers).

fense from meddling in domestic affairs or decree that the Office of Management and Budget will not review environmental regulations.

Yet whatever Congress chooses to do, it must not abridge the president's authority to execute the law himself or control the execution of others. When Congress interferes with either power, the clause is of no avail. Thus, should Congress attempt to create a wholly independent executive officer, Congress is not carrying into execution the president's essential power to execute the law. Nor is it carrying into execution any other power of the federal government. Instead, Congress acts in contravention of the Constitution's vesting of the executive power with the president. As suggested earlier, as far as the original understanding is concerned, Congress can no more create independent executive officers consistent with the Executive Power Clause than it could create independent army and naval officers consistent with the Commander-in-Chief Clause.¹⁹² The Necessary and Proper Clause permits Congress to assist the president in the exercise of his powers; it does not grant Congress a license to reallocate or abridge powers already vested by the Constitution.

H. Summary of the Textual Treatment

If one examined the text alone, the non-executive and chief overseer theses offer plausible though unlikely readings of Article II. Indeed, if the Executive Power Clause truly vests nothing, perhaps one could interpret the other clauses to minimize presidential power and maximize congressional authority over law execution. Still, even those who disparage the chief executive thesis admit that mere consideration of the Constitution's text and structure "is quite likely to yield . . . a very strong conception of the President's power."¹⁹³

Yet once one peers behind and examines how the founders interpreted the text, these two theses lack sound historical foundations. As this part has suggested, the legislative history for the other provisions confirms the president's control of federal law execution. Founding era discussions of the Faithful Execution, Militia, and Opinions Clauses makes clear that the founders understood that the president could execute the law himself and control the law execution of other governmental officers. The history of the other clauses provide still more evidence on

192. If the Executive Power Clause did not exist as an exclusive power grant, and if there were no other provisions (such as the Faithful Execution and Militia Clauses) that confirmed the president's control of law execution, then perhaps Congress could create executive entities independent of the president. In such a world, because no one would have a constitutional claim to the executive power, perhaps Congress would exercise the executive power as it saw fit, just as the Continental Congress did under the Articles of Confederation. There would still be the troublesome textual question as to how Congress would enjoy the executive power. The Necessary and Proper Clause would still require that Congress be carrying a power into execution and allocating the executive power does not carry any power of the federal government into execution.

193. Lessig & Sunstein, *supra* note 9, at 12.

this point. Table II summarizes the textual arguments and their historical support.

TABLE II
SUMMARY OF THE CHIEF EXECUTIVE THESIS'S TEXTUAL CLAIMS

The Chief Executive Thesis
<ul style="list-style-type: none"> • At a minimum, the Executive Power Clause conveys the power to execute the laws. Locke, Montesquieu, Madison, Hamilton, and many others confirmed this essential meaning of executive power. • Because the executive power is his, the Constitution establishes that the president may execute federal law himself <i>and</i> may control officers who execute federal law. Numerous founders (both Federalists and Anti-Federalists) repeatedly said as much. • Remainder of Article II confirms that the president may execute federal law and also augments, refines, and limits the grant of executive power. • Faithful Execution Clause implies a preexisting presidential power to execute the laws. The president must exercise his executive power faithfully. State executives and founders confirmed that the clause (or its state predecessors) presupposed a law execution power. • Militia and Commander-in-Chief Clauses indicate that the president directs law execution in times of crisis. Numerous Federalists and Anti-Federalists said as much. This suggests that the president is in charge of law execution in ordinary situations as well. • Opinions Clause assumes that the principal officers of the executive departments are subordinate to the chief executive and makes clear that the president may ask for opinions so that he may make decisions. Opinions Clause also reflects a desire for focusing responsibility for executive branch decision making upon the president. • Fugitive from Justice and Oaths Clauses help confirm the essential meaning of executive power and the function of executives. • Necessary and Proper Clause does not permit Congress to vest an officer or department with independent executive power. Instead, it permits Congress to help the president effectuate his constitutional powers, including law execution.

What is striking is the lack of historical support for the textual claims of the alternative theories. No founders read Article II's provisions to undermine the vesting of executive power with the president. Apparently, the founders never construed the Faithful Execution Clause

as a duty to obey statutes that withdrew or abridged the executive power. Likewise, the founders never read the Opinions and Appointments Clauses as implicitly recognizing that the president could not direct law execution and the executive departments. It would seem that the prominent alternatives to the chief executive thesis are modern inferences without adequate originalist grounding.

By itself, this part makes a strong argument for the essential meaning of executive power and for the two parts of the chief executive thesis. The next several parts of this article turn to the best evidence about the meaning of the executive power and the validity of the chief executive thesis. They reveal, in great detail, what numerous individuals said about executive power and the president's relationship to law execution. The evidence relating to the essential meaning of executive power spans over a century and is uniform—the executive power is quintessentially the power to execute the laws. Furthermore, as we shall see, the president's ability to execute the law personally and superintend other executives is amply supported in the drafting, ratification, and post-ratification materials.

III. EIGHTEENTH-CENTURY POLITICAL THEORISTS EXPLAIN THE EXECUTIVE POWER

Though America is justly celebrated as the cradle for many political innovations, the concept of executive power hailed from England. This part examines the meaning of executive power during the century prior to the Constitution's ratification. The influential works of political theorists of the era and the writings of modern experts on the separation of powers¹⁹⁴ reveal that throughout this period, the executive power consisted of, at a minimum, the power to execute the laws.¹⁹⁵

194. See generally WILLIAM B. GWYN, *THE MEANING OF THE SEPARATION OF POWERS* (1965); M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* (1998); FRANCIS D. WORMUTH, *THE ORIGINS OF MODERN CONSTITUTIONALISM* (1949).

195. A cautionary note is appropriate. Executive power originally had a broader meaning that narrowed as the judicial power was stripped away from the executive. Though the Constitution lists three powers of government—legislative, executive, and judicial—the earlier division of powers, was even more simple. William B. Gwyn, the foremost chronicler of the separation of powers, writes that the executive power originally consisted of the present-day categories of executive power and judicial power. See GWYN, *supra* note 194, at 5; WORMUTH, *supra* note 194, at 61–62. But see VILE, *supra* note 194, at 31–32 (arguing that executive power discussed during the period really only encompassed the judiciary and not the executive law enforcement machinery known to us today). Accordingly, government power was principally classified into the legislative and the executive powers. See GWYN, *supra* note 194, at 5; VILE, *supra* note 194, at 33; WORMUTH, *supra* note 194, at 62.

Though both the English monarch and the judiciary executed the laws, people understood that judges performed a distinct “executive” function from the monarchy. Indeed, over time it became clear that the executive judiciary required independence from the executive monarch. After the Act of Settlement of 1701, codified this view, the judicial power slowly began to emerge from the shadows of the executive power. See GWYN, *supra* note 194, at 5–7; WORMUTH, *supra* note 194, at 193. (Vile argues that the judicial power primarily emerged as a distinct power because of the recognition that the House of Lords had the final power of appeal. See VILE, *supra* note 194, at 60.) Though for dec-

A. John Locke

Although John Locke was not the first to discuss the executive power, he undoubtedly was one of the most celebrated to have done so. Some regard Locke as the first political theorist to define and distinguish state powers.¹⁹⁶ Locke cast a long shadow, influencing not only other theorists that indirectly shaped our early constitutions but also the founders themselves.¹⁹⁷

Written in 1690, Locke's *Second Treatise of Government*¹⁹⁸ discussed executive power at great length. Especially curious to the modern reader, Locke broached the subject, not in the context of civil government, but in his chapter on the state of nature. According to Locke, the state of nature had a law of nature that everyone had to observe and that everyone could enforce: "The Execution of the Law of Nature is in that State, put into every Man[']s hands, whereby everyone has a right to punish the transgressors of that Law to such a Degree, as may hinder its Violation."¹⁹⁹ Indeed, the law of nature would "be in vain" if no one "had a Power to Execute that Law, and thereby preserve the innocent and restrain offenders."²⁰⁰ Later in this chapter, Locke admitted that many would find "strange" his claim that "in the State of Nature, every one has the Executive Power of the Law of Nature."²⁰¹ To enjoy the "Executive Power of the Law of Nature" was to possess the authority to execute the law of nature.

The concept of executive power did not significantly resurface²⁰² until Chapter 9, "Of the Ends of Political Society and Civil Government."

ades to come many would continue to speak of the judiciary as part of the executive branch and as exercising the executive power, the judiciary's independence ultimately led to the creation of a new category of power, the judicial power.

As we consider Locke in particular, then, we must remember that the earlier theorists sometimes used executive power to cover both the familiar executive power and the judicial power. Notwithstanding the fact that the executive power was sometimes used in a broader sense than it is used today, a universally shared sense of executive power leaps from the pages of these writings. Repeatedly, executive power was used as a synonym for the power to execute the laws.

196. See BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* IV (Frank Neuman ed., Encyclopedia Britannica ed. 1952) (1748); see also KRUMAN, *supra* note 173, at 40, 53. Gwyn and Vile suggest that Locke's contributions were not as original as some have thought. See GWYN, *supra* note 194, at 70; VILE, *supra* note 194, at 61–62.

197. See GARY ROSEN, *AMERICAN COMPACT: JAMES MADISON AND THE PROBLEM OF FOUNDING* 5, 205 n.40 (1999) (describing Locke's influences on the founders).

198. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 169 (Peter Laslett ed., Cambridge Univ. Press 1963) (1690).

199. *Id.* at 312.

200. *Id.* Locke believed in "Perfect Equality" in the state of nature and that everyone could enforce the laws of nature. *Id.*; see also *id.* at 313 (declaring that "every Man hath a right to punish the Offender, and be Executioner of the Laws of Nature").

201. *Id.* at 316. By "strange," Locke probably meant "novel." *Id.* at 315 note on para. 9. Locke acknowledged the problems associated with the rule that every man may execute the law of nature. The proper remedy for the inevitable partiality arising from self-love and an excessive thirst for vengeance rests with the establishment of a civil government. *Id.* at 316–17.

202. In his chapter "Of Paternal Power," Locke argued that members of a family implicitly delegate all of their "executive Power of the Law of Nature" to the Father. *Id.* at 360.

Asserting that law execution was biased, vengeful, and ineffectual in the state of nature, Locke maintained that individuals ceded their executive power to government to secure a more regularized, convenient, and consistent execution of the laws.²⁰³ “[T]he *Power of punishing* he wholly gives up, and engages his natural force, (which he might before employ in the Execution of the Law of Nature, by his own single Authority, as he thought fit) to assist the Executive Power of the Society, as the Law thereof shall require.”²⁰⁴

After introducing governmental forms and his three governmental powers,²⁰⁵ Locke began his most extensive discussion of the executive power. He highlighted the problems that arise when legislators enforce (or oversee the enforcement of) their own laws. The first problem was efficiency: though legislatures were not always in session, their laws “need[ed] a *perpetual Execution* or an attendance thereunto.”²⁰⁶ Because the laws need perpetual execution, there must “be a *Power always in being*, which should see to the *Execution* of the Laws that are made, and remain in force. And thus the legislative and *Executive power* come often to be separated.”²⁰⁷ The second problem was the rule of law: if the same persons both made and executed the laws, they might be tempted to “suit the Law, both in its making and execution, to their own private advantage.”²⁰⁸ Hence, in all “well-order’d Commonwealths” the executive and legislative were kept in separate hands.²⁰⁹

In his last chapter, “Of The Dissolution of Government,” Locke insisted that the people may dissolve government when “he who has the Supream Executive Power, neglects and abandons that charge, so that the Laws already made can no longer be put in execution.”²¹⁰ When the laws are not executed it is “as if there were no Laws, and a Government without Laws is, I suppose, a Mystery in politiks inconceivable to human Capacity, and inconsistent with humane Society.”²¹¹ Hence when the executive power abandons law execution, anarchy prevails, effectively dissolving the government.

203. *Id.* at 396–97.

204. *Id.* at 398. Thus although individuals ceded their power to execute the laws, they could be summoned to aid society’s executive power in its execution of the laws.

205. Locke divided government power into legislative, executive, and federative. *See id.* at 409–11.

206. *Id.* at 409–10.

207. *Id.* at 410. Locke echoed this conclusion later: “It is not necessary, nor so much as convenient, that the legislative should be always in being. But absolutely necessary that the executive power should, because there is not always need of new laws to be made, but always need of execution of the laws that are made.” *Id.* at 415.

208. *See id.* at 410.

209. *Id.* (observing that if absolute monarch had legislative and executive powers, there would be no check on abuse).

210. *Id.* at 459.

211. *Id.*

Locke's *Second Treatise* repeatedly illustrated the core meaning of executive power.²¹² Executive power was not some indefinite abstraction. Rather the executive power was the power to execute the laws. Indeed the executive power was so fundamental that it predated civil society. In the state of nature, everyone had the executive power, i.e., the right to punish those who breached the law of nature. In civil society, though every man relinquished his executive power, each could be called upon to assist society's executive power in law execution. Further, proper civil societies kept the legislative and executive powers separate because if one entity wielded both, it might exempt itself from the application of the law and thus undermine the rule of law. Finally, because laws serve no purpose absent an executive power, whenever the executive power no longer enforces the laws, citizens may dissolve the existing government, create a new one, and establish a new institution vested with the power to execute the law.

Locke's executive was not merely an executor of the law; he had other powers, such as the veto²¹³ and the right to convene and dissolve the legislature.²¹⁴ These other authorities, however, did not make someone an executive or confirm that he or she enjoyed the executive power. As M.J.C. Vile observes, the executive "gets its name from *one* of its major functions, that of putting the laws in effect."²¹⁵ Other powers are deemed "executive" only because they typically belong to the entity charged with law execution. Thus, Locke's executive was the "supreme executor"²¹⁶ or "chief magistrate"²¹⁷ precisely because he enjoyed the power to execute the laws.²¹⁸

B. *Baron de Montesquieu*

Charles Louis de Secondat, Baron de Montesquieu, had perhaps the most influence of any political theorist on our Constitution's division of

212. See *id.* at 411 (observing that executive power comprehends "the execution of the municipal laws of the society within itself"); *id.* at 417–18 (claiming that he who is entrusted with the "Execution of the Laws" can be trusted with power of assembling and dissolving the legislature); *id.* at 421 (claiming that he who has executive power, i.e., he who is executor of laws, should also have "prerogative" to deal with unforeseen emergencies); *id.* at 461 (describing the "supreme executor" as one responsible for "supreme execution of the laws").

213. Locke observed that some executives had an absolute veto. *Id.* at 414.

214. *Id.* at 417–18.

215. VILE, *supra* note 194, at 67.

216. See LOCKE, *supra* note 198, at 461.

217. *Id.* at 450. In his *Letter Concerning Toleration*, Locke affirmed the law-execution duty of a magistrate: "It is the duty of the civil magistrate, by the impartial execution of equal laws, to" punish those who would violate the rights of others. JOHN LOCKE, *TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION* 172 (Charles A. Sherman ed., 1932).

218. As mentioned earlier, Locke did not treat the judicial function as a category separate from the executive function. GWYN, *supra* note 194, at 108; VILE, *supra* note 194, at 73–74. Thus, his executive power not only encompassed the power to prosecute and the authority to execute judgments, but also the power to pass judgment on whether someone had violated the law and Locke's executive power necessarily encompassed more than the simple judicial function of deciding cases.

powers.²¹⁹ Published in 1748, his *Spirit of the Laws* shaped early American constitutions, particularly his maxim that the three governmental powers must be kept separate for liberty to flourish. Given his oracular status, someone who proved that a political system violated Montesquieu's maxim had landed a serious blow against the scheme.

Perhaps following Locke's lead,²²⁰ Montesquieu initially divided governmental power into three categories: legislative, executive foreign affairs, and executive law execution.²²¹ Reflecting the increased prominence of the judiciary, however, Montesquieu bisected the last category—"by [which the magistrate] punishes criminals, or determines the disputes that arise between individuals."²²² The latter he called the "judiciary power" and the former "the executive power of the state." Thus, the executive power punished criminals and the judicial power settled disputes. The resulting familiar taxonomy—legislative, executive, and judicial—was the focus of his subsequent discussion.

Having divided governmental power in theory, Montesquieu declared that these powers must be kept separate.

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.²²³

Montesquieu similarly warned against uniting the judicial power with either the executive or legislative power.²²⁴ Though these combinations would be destructive enough, it "would be an end of everything" if one man or body exercised all "three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."²²⁵

Apart from Montesquieu's direct statement that the executive power consisted of the power to execute the laws, his various discussions clearly assumed as much. For instance, Montesquieu discussed the prince "who is established for the execution of the laws" and who "prosecutes" persons accused of violating the law.²²⁶ At another point, Montesquieu decried the tendency of legislatures to exert too much influence on the executive. While the executive should be able to veto leg-

219. Forrest McDonald claims that American "republicans regarded selected doctrines of Montesquieu's as being virtually on a par with Holy Writ." See FORREST McDONALD, *NOVUS ORDO SECLORUM* 80 (Univ. Press of Kansas 1985).

220. See VILE, *supra* note 194, at 95.

221. MONTESQUIEU, *supra* note 196, at 69. Recall that Locke had called these three powers legislative, federative, and executive. See *supra* note 205.

222. MONTESQUIEU, *supra* note 196, at 69.

223. *Id.* at 70.

224. *Id.*

225. *Id.*

226. See *id.* at 36–37. Montesquieu argued that a unitary executive was best situated to execute the laws with dispatch. See GWYN, *supra* note 194, at 109.

islative acts, the legislature should not have a similar check on the executive. “For as the execution [of the laws] has its natural limits, it is useless to confine it.”²²⁷ At the same time, the legislative power “has a right and ought to have the means of examining in what manner its laws have been executed.”²²⁸ Moreover, the legislature ought never “leave[] the executive power in possession of a right to imprison those subjects who can give security for their good behaviour.”²²⁹ Thus, while the legislature should not unduly fetter the executive’s law execution, neither should it allow the executive to execute the laws unsupervised and wholly unconstrained.

As with Locke, when Montesquieu discussed the executive power, he clearly referenced something beyond those subsidiary powers often held by executives. The power to veto, appoint and commission officers, or convene the legislature could hardly spell doom for liberty when exercised by the legislature or by the judiciary. Instead, Montesquieu also understood that the joint authority to make and to execute the laws could prove dangerous.

Moving beyond Locke, Montesquieu bequeathed an executive power with a distinctly modern definition when he stripped out the judicial power.²³⁰ At a general level, executive power still meant the power to execute the laws just as it had for Locke. However, the executive power no longer encompassed the power to issue judgments in judicial cases. His elementary definition of executive power—the power to execute the laws—must have been predicated on the notion that executives enjoyed the general authority to carry laws into effect, save for the power to pronounce a final judgment. Consistent with his new taxonomy, he regarded tasks such as prosecution, tax collection, and the expenditure of funds as executive tasks.²³¹

Indeed, one can only make sense of Montesquieu’s famous separation maxim if one regards him as subscribing to a modern conception of executive power—as all powers to execute the law except for the judicial power. Hence his fears of governments that unite the legislative and ex-

227. MONTESQUIEU, *supra* note 196, at 72.

228. *Id.* at 72–73; *see also id.* at 71 (observing that legislative should not usurp “executive part of government” but should instead see whether its laws “are duly executed”).

229. *Id.* at 71. Montesquieu does allow for one exception: if there is a danger of a secret conspiracy or of a correspondence with a foreign enemy, the legislature may wish to authorize the executive to imprison people without possibility of release. *Id.*

230. GWYN, *supra* note 194, at 101. Montesquieu cited structural reasons for why the judicial should be separate from the executive. First, he pointed that in monarchic states, the prince was the prosecutor who punished. If the same prince also judged the case, the prince “would be both judge and party,” and that clearly would be improper. MONTESQUIEU, *supra* note 196, at 36. For similar reasons, Montesquieu denied that the monarch’s ministers should sit as judges. Finally, Montesquieu claimed that if the monarch judged a case, he “would deprive himself of the most glorious attribute of sovereignty,” the pardon. *Id.* It would be “quite ridiculous of him to make and unmake his decisions,” and therefore, the monarch would never pardon. *Id.* Hence, prosecution and adjudication had to be kept separate.

231. *See* MONTESQUIEU, *supra* note 196, at 36–37, 80.

ecutive; if one entity enjoyed both, tyrannical laws would be followed by tyrannical execution. After all, the executive would not mitigate horrific statutes by forgoing prosecution if it had enacted the statutes. His alarm with regimes that combined the judicial and executive naturally followed; if one entity possessed both authorities, it could oppress because the judiciary would not check its own executive actions. We can also explain his pronounced horror of a complete fusion of all three powers. Someone would enjoy absolute authority to legislate, execute, and judge.

No less an authority than Vile has observed that Montesquieu discussed the three powers of government “in a very much more modern way” and was “one of the first writers to use ‘executive’ in a recognizably modern sense in juxtaposition with the legislative and judicial functions.”²³² In the half-century after the publication of *The Spirit of the Laws*, Montesquieu’s division of governmental powers into three and his definition of executive power became part of the orthodoxy that reigns till this day.

C. William Blackstone

Published from 1765–69, William Blackstone’s *Commentaries on the Laws of England*²³³ were treated as authoritative in America.²³⁴ The Constitution’s adversaries and advocates used his *Commentaries* as a yardstick to measure the Constitution.²³⁵ The *Commentaries* also served as a filter through which the founding generation read Montesquieu.²³⁶

Blackstone first discussed executive power at length²³⁷ in his chapter on parliament.²³⁸ Cribbing from Montesquieu,²³⁹ Blackstone remarked that “in all tyrannical governments the supreme magistracy, or the right of making and enforcing the laws, is vested in one and the same man” and where this is so “there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner.”²⁴⁰ However, “where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a

232. VILE, *supra* note 194, at 95, 105.

233. See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *50.

234. VILE, *supra* note 194, at 112.

235. See, e.g., THE FEDERALIST NO. 69, *supra* note 92, at 467 (Hamilton citing Blackstone); THE FEDERALIST NO. 84, at 577 (Alexander Hamilton citing Blackstone) (Jacob E. Cooke ed., 1961); 10 DOCUMENTARY HISTORY, *supra* note 65, at 1393–94 (Patrick Henry citing Blackstone).

236. VILE, *supra* note 194, at 112.

237. Blackstone had briefly mentioned executive power a bit earlier. See 1 BLACKSTONE, *supra* note 233, at *50 (stating that because “executive powers of the laws is lodged in a single person [in England], they have all the advantages of strength & dispatch”).

238. 1 *id.* at *146.

239. Blackstone clearly was familiar with Montesquieu’s work. See 1 *id.* at *161 (quoting SPIRIT OF THE LAWS for the proposition that England will lose its liberty when the legislative power becomes more corrupt than the executive).

240. 1 *id.* at *146–47.

power, as may tend to the subversion of its own independence, and therewith the liberty of the subject.”²⁴¹

Blackstone noted the obvious in his next chapter, “Of the King and his title”: “The supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen.”²⁴² Though he did not separately define executive power here, the meaning of the phrase would have been obvious to any learned reader. Indeed, the rest of his *Commentaries* were replete with references to the executive’s necessary relationship to law execution. For instance, he observed that because the Crown controls the “executive part of government,” England has a “chief” and “sole, magistrate of the nation” that helps secure “unanimity, strength, and dispatch.”²⁴³ Were the executive power in “many hands, it would be subject to many wills: many wills [can] create weakness in a government.”²⁴⁴ Moreover, Blackstone observed that as “executive magistrate,” the king may issue “proclamations” that help “enforce the execution” of the laws because “the manner, time, and circumstances of putting [the legislative branch’s] laws in execution must be” left to the chief executive.²⁴⁵

Blackstone also took a page out of Locke’s treatise, observing that individuals ceded their state-of-nature executive power to the government. Though individuals in the state of nature had the power to punish those who committed crimes against the law of nature, when they formed civil society, they ceded the “execution of the laws” to “one visible magistrate,” the king.²⁴⁶ As “pater-familias of the nation,” the king must protect the community and individuals from “injurious violence, by executing those laws” which the people have enacted.²⁴⁷ Because the crown is “injured by every infraction of the public rights belonging to the community,” the king “is the proper prosecutor of every public offense.”²⁴⁸ Accordingly, “all offenses are either against the king’s peace, or his crown and dignity: and are so laid in every indictment.”²⁴⁹

241. 1 *id.* at *147. Blackstone cited the Long Parliament as an example of tyranny resulting from legislative usurpation of the executive power. 1 *id.* at *154. In the mid-seventeenth century, the Long Parliament beheaded Charles I, installed Oliver Cromwell as Lord Protector, and then dissolved itself before Charles II restored the monarchy.

242. 1 *id.* at *190.

243. 1 *id.* at *249–50.

244. 1 *id.* at *250.

245. 1 *id.* at *269–70.

246. 1 *id.* at *7.

247. 4 *id.* at *127.

248. 4 *id.* at *2; see also 1 *id.* at *268.

249. 1 *id.* at *268; see also 1 *id.* at *349–50 (observing that the king is the “principal conservator of the peace”). Though the executive power is responsible for law execution, it does not have the authority to act contrary to the law. Indeed, the “principal duty of the king is, to govern his people according to law.” 1 *id.* at *233. Hence his proclamations meant to enforce the law could never “contradict the old laws” or make new law. 1 *id.* at *270. More generally, the king cannot suspend or dispense with the laws or the execution of them “without consent of parliament.” 1 *id.* at *142.

Like his predecessors, Blackstone made clear that the executive power is the power to execute the laws.²⁵⁰ From Montesquieu, Blackstone adopted the claim that combining the legislative and executive powers would result in tyranny because tyrannical legislation would more likely be followed by tyrannical law execution. Similarly, Blackstone repeated Locke's assertion that while everybody had executive power in the state of nature, the power to prosecute was vested in one person in civil society.

D. *John Louis De Lolme*

Though John Louis De Lolme lacks the modern-day renown of Locke, Montesquieu, or Blackstone, he nevertheless was influential. His *Constitution of England*, which first appeared in English in 1775, discussed the advantages of a unitary executive and thus made him a favorite of the Federalists who supported the Constitution. Hamilton, for instance, cited De Lolme for the proposition that the best executive is a unitary executive.²⁵¹ By the same token, Anti-Federalists used De Lolme's writings to criticize Article II.²⁵² Accordingly, De Lolme's views on executive power likely had a significant impact on political thought regarding the executive during the founding era.

In his chapter, "Of the Executive Power," De Lolme described the powers and privileges of the English king. He clearly did not regard the executive power as referring to only one sort of power. Instead, he considered many different types of "executive power": foreign affairs authority, military control, commerce power, and control of the Anglican church. The executive power he examined first, however, was the duty as "supreme magistrate" to administer justice by executing the laws.²⁵³ In the king's capacity as supreme magistrate, he was "concerned in all offences, and for that reason, prosecutions [were] carried on in his name in the courts of law."²⁵⁴ Moreover, he could "pardon offences, that is, remit the punishment that had been awarded by reason of his prosecution."²⁵⁵

Later on, De Lolme dedicated a whole chapter to his claim that "the Executive Power is more easily confined when it is one."²⁵⁶ Because in England the executive power was in the hands of one person and because that power never changed (claimed De Lolme), all persons knew whom

250. Although Blackstone initially divided governmental power into the legislative and executive, 1 *id.* at *147, he later built up Montesquieu's category of independent judicial power. See VILE, *supra* note 194, at 114.

251. See THE FEDERALIST NO. 70, *supra* note 75, at 479.

252. See generally 7 ANTI-FEDERALIST, *supra* note 3, at 29 (index listing various Anti-Federalist tracts that cited De Lolme).

253. JOHN LOUIS DE LOLME, THE CONSTITUTION OF ENGLAND 171 (William S. Hein, ed. 1999) (1784).

254. *Id.*

255. *Id.*

256. *Id.* at 229.

to watch and knew how to restrain the executive power. In contrast, “in those states where the execution of the laws is intrusted to several hands, and to each with different titles and prerogatives, such division and the changeableness of measures . . . constantly hide the true causes of the evils of the state.”²⁵⁷ He concluded that while the legislative power must be divided to ensure “permanency in the laws,” the executive power “should be one” to ensure that “that the laws have weight and continue in force.”²⁵⁸ Perhaps drawing upon Locke and Montesquieu, De Lolme also asserted that the legislature could have no hand in law execution. Instead, that power is “for ever the inalienable attribute” of the crown.²⁵⁹

De Lolme also helpfully surveyed the many ways in which the Parliament had constrained the king’s law execution. The crown could not imprison members of Parliament for their speeches; it could not imprison individuals without a jury trial; and it could not detain individuals without presentment to a judge.²⁶⁰ Each constraint existed precisely because it was so well understood that the king possessed general law execution authority. Indeed, many of these constraints on the executive power are quite familiar as they are found explicitly or implicitly in our Constitution. Not surprisingly, De Lolme’s consideration of the crown’s executive power (and its limitations) affirms that it consists, at a minimum, of the power to execute law.

E. *Lessons from the Eighteenth-Century Political Theorists*

These theorists were hardly atypical; others also understood the essential meaning of executive power. Adam Smith, in his *Wealth of Nations*, spoke of the “executive power,” who commanded the force of the nation, received complaints about injuries, and redressed wrongs done to the weak.²⁶¹ Emmerich de Vattel, in his *The Law of Nations*, wrote of the prince who had the “executive power”²⁶² and who, as “guardian and de-

257. *Id.* at 229–30. De Lolme also predicted that the division of the executive power would also promote “oppositions” that could occasionally turn violent. *Id.* at 231.

258. *Id.* at 231.

259. *Id.* at 254. That the legislative power was divided made it easier for the crown to execute the laws “upon all subjects, indiscriminately, without injury or danger to itself.” *Id.* at 297.

260. Notwithstanding the separation of legislative and executive powers, the English legislature had checked the English executive’s execution of laws in a myriad of ways both for its own protection and for the security of the populace. To shelter itself from the executive, the Parliament had provided that “nothing said or done in parliament, is to be questioned in any place out of parliament.” *Id.* at 314. De Lolme observed that the crown scrupulously observes this limitation and “without producing the least relaxation in the execution of the laws.” *Id.* To protect the rights of citizens from the executive, the Magna Carta provided that the “executive power should not touch the person . . . but in consequence of a judgment passed upon him by his peers.” *Id.* at 284. When the crown “imperceptibly assumed” the judicial authority, the Parliament abolished the Star Chamber, thus bringing the crown back to its “true constitutional office, viz, the countenancing, and supporting with its strength, the execution of the laws.” *Id.* at 285. Finally, the Parliament passed the Habeas Corpus Act to bar the executive from indefinitely detaining individuals without presenting them to judges. *Id.* at 285–86.

261. ADAM SMITH, *THE WEALTH OF NATIONS* 309, 314 (Encyclopedia Britannica ed., 1952) (1776).

262. EMMERICH DE VATTEL, *THE LAW OF NATIONS* 78 (Joseph Chitty ed., S. Sweet 1834) (1758).

fender of the laws,” must execute them.²⁶³ “When the laws are established, it is the prince’s province to have them put in execution.”²⁶⁴ Echoing Montesquieu, Jean-Jacques Rousseau, insisted that though it might make sense to have the “executive and legislative powers united,” it actually “is not good for him who makes the laws to execute them.”²⁶⁵

For almost a century prior to the Constitution’s ratification, an array of some of the most prominent political theorists of the era declared that the executive power was the power to execute the laws. To be sure, the phrase sometimes encompassed far more than this essential power. But at a minimum, the person with the executive power could execute the laws and was typically referred to as the “chief magistrate” or “supreme executive.”

Just as important, *none* of these theorists, or any others, support the claim that the executive power is an empty vessel with no essential substance as some modern scholars suggest. For each, the executive power is the power to execute the law. Nor do any contend that the chief executive vested with the executive power was limited to merely “influencing” law execution as the chief overseer thesis argues. Rather, each speaks of the dominant role of such a chief executive. Finally, none claims that the legislature could withdraw or abridge the executive power from the chief executive. Indeed, if the legislature could retract the executive power, it might tyrannically assume the power itself and thus make the initial separation of powers nugatory.

A skeptic might be tempted to downplay this evidence. Perhaps these are the musings of foreigners considering outdated concepts and institutions. On the other hand, maybe American institutions were home grown, created by American thinkers without reference to decrepit European traditions. The Constitution may have employed the same phrases, but new world rebels might have ascribed novel meanings to them, thereby creating a revolutionary language of politics.

The parts that follow refute this claim of American exceptionalism. Americans made many breaks from England, but on the basic meaning of executive power there was no great divergence. In America, as in England, the executive power was, at a minimum, the power to execute laws.²⁶⁶

263. *Id.* at 15.

264. *Id.* at 78.

265. JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 59 (Hafner Press 1947); *see also id.* at 86 (stating that the executive power “is only the force applied to enforce the law”).

266. The claim is not that the founders were implicitly referencing the works of Locke or Montesquieu whenever they referenced executive power during the Constitution’s drafting and ratification. Instead, the assertion is that these theorists helped solidify a definition of executive power that was well accepted by the founding generation. When a Madison, a Wilson, or a Jefferson used the phrase executive power, they utilized it the exact same way that Blackstone and De Lolme had used it, i.e., to encompass the power to execute the law.

IV. THE EXECUTIVE POWER IN AMERICA PRIOR TO THE CONSTITUTION'S DRAFTING

Because colonial Americans were originally members of the British Empire and spoke the same language as their English brethren, they naturally shared the same essential meaning of the phrase “executive power.” Notwithstanding the hostilities with the mother country, this understanding was not a casualty of war. Rather, Americans of all sorts employed “executive power” exactly as had the theorists. In fact, such was the theorists’ influence that Americans not only shared the same definitions, they also voiced the same fears, particularly the apprehensions about uniting the powers of government.

After considering numerous American political tracts that confirm the essential meaning of executive power, this part examines the executive power in the states and in the Continental Congress. The state constitutions generally ensured that the state executive powers were subordinate to the legislatures. Continental executive officers were weaker still. Because the Continental Congress effectively wielded the executive power, the national executives created by Congress were nothing but the servants of Congress. Nonetheless, though the state and continental executives were generally rather weak, both were empowered to execute the law.

A. *American Political Tracts Discuss the Executive Power*

Before the Revolution, American political tracts adopted the conventional meaning of executive power. For instance, in 1763, public letters disclosed that Montesquieu’s maxims and definitions had taken root in the new world.²⁶⁷ Massachusetts considered making the lieutenant governor a member of the upper legislative chamber. “T.Q.” complained that the proposal would unite the executive and legislative powers in one person and thus fears would arise “lest he should make tyrannical laws [in order] to execute them in a tyrannical manner.”²⁶⁸ In response, “J” embraced the maxim but denied that it damned the proposal. The lieutenant governor only had a share in legislation and thus was no different in principle from the English king; acting alone, neither could both make and execute the laws.²⁶⁹ Whatever the merits of the dispute, the exchange revealed an understanding of Montesquieu and a solid grasp of the core meaning of executive power.²⁷⁰

267. Letters by T.Q. and J., in 1 AMERICAN POLITICAL WRITING, *supra* note 173, at 19.

268. 1 *id.* at 20.

269. 1 *id.* at 25–26. “T.Q.” subsequently insisted that the English king’s veto—his power of rejection—was far different from the power to resolve itself. Montesquieu had blessed the former and not the latter. 1 *id.* at 30–31.

270. Not everyone accepted Montesquieu’s maxim even if they accepted his standard definitions. In 1750, Jonathan Mayhew, a Harvard graduate and minister, maintained that the “essence” of “good gov-

Documents composed during the Revolutionary era exhibited the exact same usage. In 1774, Thomas Jefferson drafted resolutions declaring that the king had violated the legislative right to determine whether armed forces could be used to execute the laws.²⁷¹ When King George's grandfather had brought in "Hanoverians" to defend England, Parliament's approval was necessary. Similar approval was necessary in the colonies, claimed Jefferson. Though the king "possesses . . . the executive power of the laws in every state . . . they are the laws of the particular state which he is to administer within that state, and not those of any one within the limits of another."²⁷² In Jefferson's view, though the executive power could execute the laws, he must seek each state's legislative sanction for the use of armed mercenaries within the state.

While Jefferson criticized the king's exercise of executive power, Joseph Galloway rebuked those who obstructed the crown's law execution. Galloway, a member of the First Continental Congress, wrote a pamphlet urging reconciliation.²⁷³ After mentioning that the king was vested with the "executive power" to ensure that the "laws are duly carried into execution,"²⁷⁴ Galloway charged those who espoused independence with treason because they had opposed the execution of laws and thereby had betrayed "his Majesty" who was "to superintend the execution of the laws."²⁷⁵

Even when the focus shifted from revolution to statecraft, the lingo remained the same. Described by historian Jack Greene as the "most influential of all proposals published in 1776," John Adams's *Thoughts on Government* was designed to influence the drafting of the state constitutions.²⁷⁶ Echoing Montesquieu, Adams listed three powers of government—legislative, executive, judicial—and then repudiated regimes where all three were vested in one assembly. Such an entity "would make arbitrary laws for their own interest, execute all laws arbitrarily for

ernment" consisted "in the *making and executing of good laws.*" Where this was so, it did not matter whether "the legislative and executive power be lodged in one and the same person, or in different persons." *A Discourse Concerning Unlimited Submission and Non-Resistance to the Higher Powers*, at <http://www.founding.com/library/lbody.cfm?id=230&parent=52> (last visited Feb. 6, 2003). Though Americans repudiated Mayhew's normative judgment in later years, he nonetheless voiced the shared definition of the executive power.

271. Thomas Jefferson, *A Summary View of the Rights of British America*, in TRACTS OF THE AMERICAN REVOLUTION 1763–1776, at 256, 276 (Merrill Jensen ed., 1967) [hereinafter TRACTS OF THE AMERICAN REVOLUTION].

272. *Id.* at 274.

273. Joseph Galloway, *A Candid Examination of the Mutual Claims of Great Britain and the Colonies*, in TRACTS OF THE AMERICAN REVOLUTION, *supra* note 271, at 350.

274. *Id.* at 356.

275. *Id.* at 374–75. Other documents from the era also confirmed the fundamental function of the executive. See, e.g., Nathaniel Niles, *Discourses on Liberty*, in 1 AMERICAN POLITICAL WRITINGS, *supra* note 173, at 257, 270 (confirming that "[t]he goodness of executive government, consists in its due administration of the laws already made").

276. See COLONIES TO NATION 304 (Jack P. Greene ed., 1967).

their own interest, and adjudge all controversies in their own favor.”²⁷⁷

Other tracts, meant to influence constitutional drafting across America, also recognized that the executive power was the power to execute the laws.²⁷⁸

Debates regarding specific state constitutions also utilized the standard executive power definition. In 1778, an Essex County convention debating the proposed Massachusetts Constitution produced the famous *Essex Result*.²⁷⁹ After noting the division of executive power into its internal and external parts, the *Result* commented that the former branch of the executive power was

employed in the peace, security and protection of the subject and his property, and in the defence of the state. The executive power is to marshal and command her militia and armies for her defence, to enforce the law, and to carry into execution all the others of the legislative powers.²⁸⁰

More concretely, the executive power was “to arrest offenders, to bring them to trial,”²⁸¹ inflict punishments after a criminal trial,²⁸² and to “take care” that recompense was paid in civil cases.²⁸³ After making the obligatory remarks against uniting executive power with the other two powers, the *Result* more carefully explored the “principles” of “executive power”:

When we recollect the nature and employment of this power, we find that it ought to be conducted with vigour and dispatch. It should be able to execute the laws without opposition, and to controul all the turbulent spirits in the state, who should infringe them. If the laws are not obeyed, the legislative power is vain, and the judicial is mere pageantry. . . . [If the laws] lay dormant through failure of execution, violence and oppression will erect their heads, and stalk unmolested through the land.²⁸⁴

Elements of the *Essex Result* trace back to Locke’s discussion of the anarchy that results when those possessing the executive power neglect

277. John Adams, *Thoughts on Government* (1776), in *COLONIES TO NATION*, *supra* note 276, at 308. Adams believed that the executive power was best exercised by one person in conjunction with a council that would mediate legislative-executive disputes. *Id.* at 308–09.

278. One anonymous tract cleaved to Montesquieu’s maxim by decrying the mixing of legislative and executive power: “where the making and executing the laws . . . lie in the same hand” there “can be but little chance for proper freedom.” *The Interest of America* (1776), in *COLONIES TO NATION*, *supra* note 276, at 315, 318. Another anonymous tract published in 1776 followed a variant of Locke’s categories of governmental powers, declaring that while government is generally divided into three parts, there were really only two powers in any government, “the power to make laws, and the power to execute them; for the judicial is only a branch of the executive.” *Four Letters on Interesting Subjects* (1776), in *COLONIES TO NATION*, *supra* note 276, at 311, 313–14.

279. KRUMAN, *supra* note 173, at 152 & n.91 (collecting cites of its importance).

280. *The Essex Result*, in 1 *AMERICAN POLITICAL WRITINGS*, *supra* note 173, at 480, 494.

281. 1 *id.* at 501.

282. 1 *id.* at 494.

283. *Id.*

284. 1 *id.* at 500.

their charge. Other portions hearken to Montesquieu's maxim of keeping the three powers of government in separate hands.²⁸⁵

Clearly the executive power was not some superfluous authority that only some governments might have. Rather, every effectual government required the exercise of the power. An address that accompanied the revised New Hampshire Constitution of 1784 emphasized the importance of the executive power: "This power is the active principle of all government: it is the soul, and without it the body politic is but a dead corpse. Its department is to put in execution all the laws enacted by the legislative body."²⁸⁶ In his multivolume *A Defense of the Constitutions of the Government of the United States*, John Adams made the same point: "The executive power is properly the government; the laws are a dead letter until an administration begins to carry them into execution."²⁸⁷ In modern times, we might say that without the executive power, the legislative power was no more useful than software without hardware.

Admittedly, these tracts shared little in common. They were written in different periods and by people of dissimilar outlooks. Notwithstanding these obvious differences, these documents all employed and adopted the common definition of executive power. Relatedly, no one during this period apparently speaks of the executive power as an empty phrase. The executive power was the "soul" of government, empowered to ensure that the laws are not "dead letters." Absent the executive power, any legislative power was in vain and the judicial counterpart mere pageantry. As we shall learn, the state constitutions and the Continental Congress's resolutions followed the same usage: the executive power breathes life into the laws by executing them.

B. *The Executive Power in the State Constitutions*

The states hobbled the executive power and disregarded Montesquieu's maxim. State legislatures seized executive authority from royal governors and wielded that authority themselves. Then most states adopted constitutions that, although they paid lip service to the separation adage, nonetheless made their executive powers appendages of the legislature. With notable exceptions, executives were appointed by the legislature, faced term limits, could not appoint executive officers, and

285. After the proposed Massachusetts Constitution was defeated, another was proposed. Accompanying the proposal was a statement of its framers that evoked Montesquieu by declaring that the "Legislative, the Judicial and Executive Powers naturally exist in every Government." History had revealed, however, that when the same body "enact, interpret, and execute" the laws, property becomes insecure and corruption runs rampant. An Address of the Convention, for Framing a New Constitution of Government, for the State of Massachusetts Bay, to Their Constitutions (1780), in *COLONIES TO NATION*, *supra* note 276, at 352, 355. Evidently, the framers of the revised constitution had at least paid lip service to the wisdom of Montesquieu and the *Essex Result*.

286. THACH, *supra* note 90, at 48.

287. 1 *DEFENCE OF THE CONSTITUTIONS OF THE UNITED STATES* 372 (Da Capo Press ed., 1971) (1787).

lacked veto authority. To top it off, the few constitutional powers they did enjoy were often subject to legislative alteration. Little wonder that experience under the state constitutions led many to decry legislative supremacy and executive impotence and laid the groundwork for a resurgence of executive power in the federal Constitution.

As Blackstone, Jefferson, and others affirmed, the English king possessed the executive power to execute the laws.²⁸⁸ With such power, he superintended law execution in England and its colonies. In the American colonies, the king's royal governors were his direct representatives²⁸⁹ and chief law enforcement officers in the various provinces.²⁹⁰ Indeed, numerous charters,²⁹¹ orders,²⁹² and other royal instruments spelled out the governors' law enforcement role.

With the revolution, the independent and sovereign states assumed the executive power of enforcing the laws. State legislative bodies initially assumed complete legislative, executive, and judicial authority,²⁹³ often forming "committees of safety" to exercise executive functions.²⁹⁴ Yet the all-powerful committees caused a great deal of unease because they violated Montesquieu's maxim. According to Marc Kruman, the attack on the assemblies emerged most fully in Maryland.²⁹⁵ One county instructed its delegates to the Maryland convention "that the Legislative, Judicative, Executive, and Military powers, ought to be separate, and that in all countries where the power to make laws and the power to enforce such laws is vested in one man, or in a body of men, a tyranny is established."²⁹⁶ Similar comments were voiced in other states.²⁹⁷ Because

288. See *supra* Parts II.C–D, III.A; see also GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 208 (quoting an 1730s English writer who declared that "[h]ad the King no more than the executive power, . . . [he would be] but a person entrusted by the Government to execute the laws of it").

289. LEONARD WOODS LABAREE, *ROYAL GOVERNMENT IN AMERICA* 98 (1930).

290. See EVARTS BOUTELL GREENE, *THE PROVINCIAL GOVERNOR* 65, 139 (1898) (describing "Governor" as "chief executive" and stating that it was his duty "to see that the laws were duly enforced.") [hereinafter GREENE, *PROVINCIAL GOVERNOR*]; see also MARCUS WILSON JERNEGAN, *THE AMERICAN COLONIES 1492–1750*, at 276 (1930). In many instances, these governors possessed more than just the executive power. They often were vested with legislative and judicial authority as well. See LABAREE, *supra* note 289, at 98–102.

291. See, e.g., NEW YORK CHARTER OF LIBERTIES AND PRIVILEGES of 1683, *reprinted in* GREAT BRITAIN AND THE AMERICAN COLONIES, 1606–1763, at 91 (Jack Greene ed., 1970) (providing that "Governour" was to "Exercise the Chiefe Magistracy and Administration of Government" and "rule and Govern" the province "according to the Lawes thereof"); see also *id.* (observing that when Governor died or was absent, the Governor's Council would take up "The Administration of the Gouvernour and the Execution of the Lawes thereof"); MARYLAND CHARTER of 1632, *reprinted in* SYDNEY GEORGE FISHER, *EVOLUTION OF THE CONSTITUTION 156–57* (1897) (establishing that Lord Baltimore and his heirs would have "absolute power" to "duly" execute the laws).

292. See *Fundamental Orders of Connecticut*, in FISHER, *supra* note 291, at 157 (providing governor's oath that governor will ensure that "all wholesome laws . . . be duly executed").

293. See WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS* 45, 47 (Rita and Robert Kimber trans., 1980); see also MACMILLAN, *supra* note 91, at 15, 21.

294. See MACMILLAN, *supra* note 92, at 32, 38; see also ADAMS, *supra* note 293, at 42, 45.

295. See KRUMAN, *supra* note 173, at 112.

296. *Id.* at 113; see also *id.* (noting that a Maryland militia battalion declared that whenever three powers of government were united, there was no security against the making "of arbitrary laws, and a

citizens grasped the essence of these powers, there was no need to define them.

Recognizing that the committees of safety could not provide stable and energetic law execution over the long term, states adopted constitutions with a nominally separate executive.²⁹⁸ Though the titles²⁹⁹ varied as did the size of the executive branch, each executive possessed the essential law execution power. Three states granted variations of the executive power to one person: New York's governor had "the supreme executive power and authority,"³⁰⁰ New Jersey's governor simply had "the supreme executive power,"³⁰¹ and South Carolina granted its "president" and later its "governor" the "executive authority."³⁰² In Pennsylvania and Vermont, the "supreme executive power" rested with a governor and an executive council.³⁰³ Delaware, Georgia, Maryland, North Carolina, and Virginia granted their unitary executives specific authority along with a general grant of "executive powers."³⁰⁴

Besides the grant of executive power, there were other signs of the executive's control of law enforcement. Some constitutions referred to the executive power as the chief magistrate³⁰⁵ or supreme executive magistrate.³⁰⁶ Others enjoined that the executive "take care that the laws are

wanton exercise of power in the execution of them"); MACMILLAN, *supra* note 91, at 45 (stating that an "American" objected to Maryland committee's mixing of the three powers in contravention of the famous maxim).

297. See KRUMAN, *supra* note 173, at 114–15 (quoting North Carolina, Pennsylvania, and New York documents that decried the mixture of the three powers in the revolutionary committees).

298. Not all states created new constitutions. Rhode Island and Connecticut continued under their English charters pursuant to the theory that the existing governments already represented the people. See ADAMS, *supra* note 293, at 66. These charters provided that the representative assemblies would elect governors and thus the executive was already someone accountable to the people. Given the persistence of old forms in these two states, the discussion of state constitutions that follows omits any analysis of these two states.

Accordingly, in the discussion that follows, I consider only those twelve entities that adopted constitutions after 1775. For the sake of completeness, I discuss Vermont's Constitution even though Vermont was not recognized as a state until 1791.

299. While most states resorted to the familiar "Governor" for the chief executive, others chose "President" perhaps implying that in the latter situation, the chief executive would preside over a plural executive. See MACMILLAN, *supra* note 91, at 57.

300. N.Y. CONST. of 1777, art. XVIII.

301. See N.J. CONST. of 1776, art. VIII.

302. See S.C. CONST. of 1776, art. XXX; S.C. CONST. of 1778, art. XI.

303. See PA. CONST. of 1776, § 3; VT. CONST. of 1777, § 3.

304. See DEL. CONST. of 1776, art. 7; GA. CONST. of 1777, art. XIX; MD. CONST. of 1776, art. XXXIII; N.C. CONST. of 1776, art. XIX; VA. CONST. of 1776.

Though the Massachusetts Constitution of 1780 did not formally vest the "executive power" in the governor, it vested the essence of such authority: the governor's powers were found in Chapter II entitled "Executive Power" and the governor was described as a "supreme executive magistrate." MASS. CONST. of 1780, pt. 2, ch. II, § 1, art. I; *cf.* 2 DEBATES, *supra* note 2, at 128 (Massachusetts Governor James Bowdoin confirming that he executed laws). Since New Hampshire essentially copied portions of the Massachusetts Constitution, New Hampshire's Constitution of 1784 took the same route. Under a subpart labeled "Executive Power—President," the New Hampshire Constitution created a "supreme executive magistrate." N.H. CONST. of 1784, pt. II.

305. See DEL. CONST. of 1776, art. 7.

306. See MASS. CONST. of 1780, pt. 2, ch. II, § 1, art. I; N.H. CONST. of 1784, pt. II.

faithfully executed to the best of his ability; and to expedite all such measures as may be resolved upon by the legislature.”³⁰⁷ One even had its chief executive take an oath that explicitly referenced his law execution.³⁰⁸ Apart from the textual indicia of a law enforcement role, the executives themselves understood their basic function. From the weakest to the strongest, they were to execute the laws.³⁰⁹

Although the outer reaches of their powers were often in doubt,³¹⁰ the executives’ law enforcement role could not be questioned.³¹¹ Indeed, as Gordon Woods notes, there were many who sought a chief executive that could do little more than execute the law.³¹² For instance, one gentleman of the era admitted that “for the sake of Execution we must have a Magistrate,” but the magistrate must be “solely executive.”³¹³ That desire was largely fulfilled. Indeed, a Virginian characterized the governors of the period as “wholly executive of the political Laws of the State.”³¹⁴ In other words, these governors generally could do little more than execute the law.³¹⁵

Notwithstanding the voices demanding that the three powers be kept separate and despite the grants of executive power, distrust of the executive was far too ingrained to ensure a proper separation of powers. In the minds of many, executives were associated with the agents of the British crown that had battled the local assemblies. A Delaware Whig reflected the lingering suspicions from the colonial past: “The executive power is ever restless, ambitious, and ever grasping at encrease of power.”³¹⁶ This “vicious tradition” of distrust yielded constitutions structured to ensure executive subordination to the legislature.³¹⁷ Despite their formal power to execute the laws, governors simply could not be “responsible administrators” for a number of structural reasons.³¹⁸

307. N.Y. CONST. of 1777, art. XIX; PA. CONST. of 1776, § 20 (stating the president and council “are also to take care that the laws be faithfully executed; they are to expedite the execution of such measures as may be resolved upon the general assembly”); VT. CONST. of 1777, ch. II, XVII (same).

308. See GA. CONST. of 1777, art. XXIV (governor must take oath that “the laws and ordinance of the State be duly observed, and that law and justice in mercy be executed in all judgments”).

309. See *supra* notes 91–93 and accompanying text.

310. See MACMILLAN, *supra* note 91, at 61–64.

311. See also *id.* at 72 (observing that each revolutionary assembly left “the routine execution of its acts in the hands of the governor or president”); cf. ADAMS, *supra* note 293, at 272 (observing that “[n]one of the constitutions attempted to limit the powers of the executive solely to carrying out the laws passed by the legislature”).

312. See WOOD, *supra* note 288, at 136, 149.

313. *Id.* at 136–37.

314. *Id.* at 149.

315. Cf. J. PAUL SELSAM, THE PENNSYLVANIA CONSTITUTION OF 1776, at 194 (1936) (stating that Pennsylvania Council only could execute the laws).

316. See WOOD, *supra* note 288, at 135.

317. GREENE, PROVINCIAL GOVERNOR, *supra* note 290, at 194–95.

318. MACMILLAN, *supra* note 91, at 60. *But see id.* at 68 (observing that Governor George Clinton was a responsible executive). Generalizing about the status of executives across the states may be problematic. Each constitution reflected its own state’s circumstances and history. Nevertheless, certain traits were shared by many, if not most of these constitutions.

First, though all chief executives were vested with the “executive power” or the equivalent, in many states the executive power was exercised at the sufferance of the legislature. In particular, many provided that executive authority could be exercised only “according to the laws.”³¹⁹ As Charles Thach pointed out, “[I]anguage like this fairly invited legislative interference” for one could argue that the constitution left the executive’s powers at the mercy of the legislature.³²⁰ Under such constitutions, the executive merely exercised default powers that could be withdrawn or reshuffled at will. Not surprisingly, such authority was not only used to direct the executive in all manners, but also to effectively strip away the executive power entirely.

A second reason for legislative dominance was that state executives lacked veto authority. The absence of a veto with which to defend executive prerogatives from rapacious assemblies gave new meaning to the phrase “parchment barriers” and made these executives paper tigers. Those few state executives that enjoyed the veto were appreciated as deriving power from it because it helped safeguard the executive’s powers and acted as a needed check on the assemblies.³²¹ For instance, the Massachusetts veto ensured that “a due balance may be preserved in the three capital powers of Government” and that no body of men would “enact, interpret, and execute the laws.”³²²

Third, the constitutions ensured executive subservience in a number of other ways. Seven of the state constitutions left selection of the chief

319. See DEL. CONST. of 1776, art. 7 (stating that the chief magistrate may “exercise all the other executive powers of government . . . according to the laws of the State”); GA. CONST. of 1777, art. XIX (same); MD. CONST. of 1776, art. XXXIII (same); N.C. CONST. of 1776, art. XIX (same); VA. CONST. of 1776 (same).

320. THACH, *supra* note 90, at 29.

321. The only constitutions that vested a veto with the executive were South Carolina, Massachusetts, and New York. The South Carolina Constitution of 1776 granted a veto, see S.C. CONST. of 1776, art. VII, but the new constitution of 1778 (passed over President John Rutledge’s veto, see KRUMAN, *supra* note 173, at 124) eliminated it. See generally S.C. CONST. of 1778. New York’s governor had a share in the veto. He along with the chancellor and other judges on the Supreme Court formed a “council of revision.” If a majority of the council objected to a bill, it would not become law until two-thirds of both chambers approved the bill. N.Y. CONST. of 1777, art. III. The Massachusetts veto adopted as part of the Massachusetts Constitution of 1780 was similar to New York’s, except that the Massachusetts governor had unilateral veto authority. See MASS. CONST. of 1780, § 2, art. II.

322. KRUMAN, *supra* note 173, at 126 (quoting Handlin & Handlin, *An Address of the Convention . . . to Their Constituents*, in POPULAR SOURCES 439 (1780)). Interestingly enough, others had successfully invoked Montesquian principles to argue that veto authority would be imprudent. The inhabitants of Anne Arundel county insisted that “the persons appointed to hold the executive power, have no share or negative in the legislature.” *Id.* at 123 (quoting *Instructions to the Delegates of Anne Arundel County in Maryland Convention*, MD. GAZETTE, Aug. 22., 1776). An anonymous tract, “The Interest of America,” claimed that it would be absurd if the “principal Executive power” was vested with the veto because there would be “but little chance for freedom, where the making and executing of laws of State lie in the same hand.” *Id.* In a pseudonymous tract, Democraticus objected to the veto, declaring that it was a “solecism” in politics “to invest the different power of legislation and the execution of the laws in the same hands.” *Id.* (quoting VA. GAZETTE, June 7, 1776). Clearly, the latter sentiments dominated, as most executives lacked veto authority. Nonetheless, those who opposed the veto power confirmed the essential meaning of the executive power.

executive with the legislature.³²³ Moreover, most chief executives had a one-year term³²⁴ and were term limited.³²⁵ The combination ensured an executive on a short legislative leash and with a short time horizon. Further, the constitutions often explicitly splintered executive authority. Nominal chief executives often lacked appointment and removal authority and thus had a difficult time controlling other executives.³²⁶ Without such authority, the executives found it difficult to be responsible administrators, for those statutorily created to help execute the laws were under no real obligation to heed the chief executive. Other constitutions created a plural executive, whereby the chief executive often was required to seek the advice or approval of an executive council.³²⁷ In at least two instances, the executive *was* a council.³²⁸ When executive power effectively was distributed across many independent executives, the executive branch as a whole was no match for the legislature. Such feeble and fettered executives could neither be the energetic, independent law enforcers envisioned by Locke or Montesquieu, nor the responsible superintendent of law execution described by Blackstone or De Lolme.

Almost alone, New York's executive suffered few if any of the problems associated with executives elsewhere. Vested with the "supreme executive power," an explicit duty to execute the laws faithfully, a

323. See DEL. CONST. of 1776, art. 7; GA. CONST. of 1777, art. II; MD. CONST. of 1776, art. XXV; N.C. CONST. of 1776, art. XV; N.J. CONST. of 1776, art. VII; S.C. CONST. of 1778, art. III; VA. CONST. of 1776. As mentioned earlier, the Charters of Rhode Island and Connecticut likewise sanctioned legislative selection.

Only the Massachusetts, New Hampshire, New York, and Vermont constitutions provided for popular election. See MASS. CONST. of 1780, pt. 2, ch. II, § 1, art. III; N.H. CONST. of 1784, pt. II; N.Y. CONST. of 1777, art. XVII; VT. CONST. of 1777, ch. 2, § XVII. The perennial outlier, the Pennsylvania Constitution, provided for a mixed selection. The president of the Executive Council was selected by the legislature, while each council member was selected by different counties in the state. PA. CONST. of 1776, § 19.

324. See MACMILLAN, *supra* note 91, at 57. Only New York, Delaware, and South Carolina had terms of office longer than one year (three, three, and two years). See DEL. CONST. of 1776, art. 7; N.Y. CONST. of 1777, art. XVIII; S.C. CONST. of 1778, art. III.

325. See DEL. CONST. of 1776, art. 7 (stating that the President may serve a three-year term and then must wait three years to serve again); GA. CONST. of 1777, art. XXIII (stating that the governor chosen annually and cannot serve more than one year in a three-year span); MD. CONST. of 1776, art. XXXI (same); N.C. CONST. of 1776, art. XV (stating that the governor can only serve three years in six successive years); PA. CONST. of 1776, § 19 (requiring that any person serving as a "counselor" for three consecutive years could not serve again in the next four); S.C. CONST. of 1778, art. VI (stating that the governor can serve one two year term every four years); VA. CONST. of 1776 (stating that the governor was chosen annually but could not remain in office longer than three years successively and would not be re-eligible until four years after he left office).

Only Massachusetts, New Jersey, New Hampshire, and New York imposed no term limits. See MASS. CONST. of 1780, pt. 2, ch. II, § 1, arts. II-III; N.H. CONST. of 1784, pt. II; N.J. CONST. of 1776, art. XVII; N.Y. CONST. of 1776, art. XVIII.

326. See MACMILLAN, *supra* note 91, at 60. In Georgia, New Jersey, North Carolina, South Carolina, and Virginia, the legislature appointed to virtually all important offices. See KRUMAN, *supra* note 173, at 119. In Delaware, New Hampshire, Maryland, Massachusetts, Pennsylvania, and Vermont, the constitutions divided up the appointment to particular offices between the executive and the legislature.

327. See, e.g., MD. CONST. of 1776, art. XXXIII (governor can summon militia only with Council's consent); N.Y. CONST. of 1777, art. III (creating a revisionary council to exercise a veto).

328. See PA. CONST. of 1776, § 3; VT. CONST. of 1777, § 3.

share in appointments and the veto, and appointed by the people, the governor came equipped with considerable authority. As Thach put it, “all the isolated principles of executive strength in other constitutions were here brought into a new whole.”³²⁹ Because the governor could withstand legislative attacks, it stood as an example for the federal Constitution.³³⁰

A few lessons can be gleaned from the state constitutions. First, these early constitutions were generally the products of ignorance, bias, and fear. In his *Notes on the State of Virginia*, Jefferson admitted that “we were new and unexperienced, in the science of government” when drafting the Virginia Constitution.³³¹ Much later, Jefferson wrote that prior to the revolution, all were “good English Whigs, cordial in their free principles, and in their jealousies of the executive Magistrates. These jealousies are very apparent in all our state constitutions.”³³² James Wilson likewise asserted that while the people treated the executive and the judiciary “like stepmothers” because of their former association with England connection, the people confidently ceded powers to the assemblies.³³³

Second, the inexperience, bias, and fear resulted in constitutions that enshrined executive weakness and legislative supremacy. Jefferson wrote that because no proper barriers separated the three powers and because the other branches were dependent for reappointment and salary,³³⁴ “[a]ll the powers of government, legislative, executive, and judiciary, result to the legislative body” in Virginia.³³⁵ The Pennsylvania Council of Censors claimed that despite the fact that the Pennsylvania Constitution had by a “most marked and decided distribution” separated

329. THACH, *supra* note 90, at 37.

330. The vigor of the New York executive was not due to the Constitution alone, but also stemmed from the emphatic views of its first governor, George Clinton. Clinton was aware of the alarming frequency with which legislatures had punched through parchment barriers. In his first gubernatorial message, Clinton admonished that he and the legislature should adhere to and preserve those powers and divisions found in the New York Constitution because the Constitution had “manifested the most scrupulous attention” by drawing “the line between” the three powers. *Id.* at 37–38. Clinton and the other members of the New York Council of Revision would make that pledge a reality, by successfully vetoing legislation that sought to vest executive powers in a legislative committee. *Id.* at 42. And, as noted earlier, Clinton had admonished that he was to execute the laws, not make them. MACMILLAN, *supra* note 91, at 68.

331. *Notes on the State of Virginia*, in COLONIES TO NATION, *supra* note 276, at 369.

332. 1 THE WRITINGS OF THOMAS JEFFERSON 112 (Paul Leicester Ford ed., 1892) [hereinafter WRITINGS OF THOMAS JEFFERSON]. A Committee of the Pennsylvania Council of Censors judged that many of the state’s constitutional problems stemmed from the Pennsylvania Constitution of 1776. Echoing Jefferson’s comments, Council’s Committee observed that when it was drafted, “our political knowledge was in its infancy.” REPORT OF THE COMMITTEE OF THE COUNCIL OF CENSORS ON THE EXECUTIVE BRANCH OF GOVERNMENT, in EARLY AMERICAN IMPRINTS, 1st Ser. No. 18692, at 9. Under the Pennsylvania Constitution of 1776, a Council of Censors reported every seven years whether the various branches had performed their duties and honored the Constitution. *See* PA. CONST. of 1776, § 47.

333. 1 WORKS OF JAMES WILSON, *supra* note 152, at 356–58.

334. *See* 1 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 332, at 370–71.

335. 1 *id.* (describing the legislature’s directions as habitual and familiar). Jefferson spoke from personal experience—he was Governor Jefferson from 1779 to 1781.

the powers of “making laws, and carrying those laws in to execution,”³³⁶ the legislature had usurped the executive power.³³⁷ At the Philadelphia Convention, Madison declared what all probably understood to be the case: “Experience had proved a tendency in our governments to throw all power into the legislative vortex. The Executives of the States are in general little more than cyphers; the legislatures omnipotent.”³³⁸

Finally, practice also had revealed that the framers of the revolutionary constitutions only paid lip service to Montesquieu’s maxim. Though numerous constitutions contained provisions stating that the three powers must be kept separate, these provisions were useless because the constitution ensured that the executive and the judiciary were the legislature’s pawns. As Wood put it, the discrepancy “between the affirmations of the need to separate the several governmental departments and the actual political practice” was “perplexing.”³³⁹

The anemic and defenseless state executives were not the templates for the federal chief executive. Rather, most state executives stood as reminders of what to avoid. Unlike the divided state executives, the Constitution’s executive is unitary. Unlike the default state executives, the Constitution’s many executive powers cannot be modified by ordinary legislation. Unlike the vulnerable state executives, the Constitution’s executive enjoyed veto authority to help prevent Congress from usurping or dividing-and-conquering the executive power. Unlike the dependent state executives, the Constitution’s executive is selected by electors (rather than the legislature) and enjoys a lengthy four-year term. Unlike the ineffectual state executives, the Constitution’s executive plays the dominant role in selecting executive officers. As a result of the lessons learned from the state constitutions, the federal executive power would be far more capable and powerful.³⁴⁰

336. A REPORT OF THE COMMITTEE OF THE COUNCIL OF CENSORS, *in* EARLY AMERICAN IMPRINTS, 1st Ser. No. 18693, at 3.

337. *See id.* For instance, the assembly had improperly ordered the Supreme Executive Council to prosecute the state’s property claims against the attainted traitor, Joseph Galloway. *Id.* at 15. In this case, the Supreme Executive Council was also at fault, for in conferring with the Assembly it had “yielded the executive power to the legislature.” *Id.*; *see also* REPORT OF THE COMMITTEE OF THE COUNCIL OF CENSORS ON THE EXECUTIVE BRANCH OF GOVERNMENT, *supra* note 332, at 8. The Supreme Executive Council had ample authority to proceed against Galloway’s estate and should not have shared its prosecutorial discretion. *Id.* at 9; *see also id.* (condemning Supreme Executive Council’s discussion with Assembly of accounts of Secretary Timothy Matlack); A REPORT OF THE COMMITTEE OF THE COUNCIL OF CENSORS, *supra* note 336, at 21 (observing that though the council was to “take care that the laws be faithfully executed,” *see* PA. CONST. of 1776, § 20, the assembly had tried to create a committee to defend some waterways, outfit ships, and expend funds).

338. 2 FEDERAL CONVENTION, *supra* note 93, at 35; *see also* 2 THE WRITINGS OF JAMES MADISON 169–70 (Gaillard Hunt ed., 1901) (observing that the Virginia executive was the “worst part of a bad Constitution” because it was dependent upon the legislature). Charles Pinckney and Edmund Randolph made similar comments about the state executives. *See* 4 DEBATES, *supra* note 2, at 324–25; 1 FEDERAL CONVENTION, *supra* note 93, at 176.

339. *See* WOOD, *supra* note 288, at 153. Wood also discussed how the later state constitutions more carefully preserved the separation of powers. *Id.* at 446–53.

340. Charles Thach makes some of the same points. *See* THACH, *supra* note 90, at 51–53.

C. The Executive Power at the "National" Level

The Continental Congress understood the necessary relationship between the executive power and the power to execute the laws. Prior to the ratification of the Articles of Confederation, the Congress relied upon the state executive powers to execute resolutions. After ratification, the Congress increasingly depended upon continental executives. Whether it used states' executives or created its own, however, Congress was the plural executive power. Indeed, Congress possessed legislative, executive, and judicial powers and there were neither checks and balances nor a separation of powers. In this respect, Congress resembled those revolutionary state assemblies that had amassed all powers in the Revolution's early days.

That the Continental Congress understood the executive power's fundamental function is clear from its earliest days. In the fall of 1774, Congress drafted a letter addressed to the Frenchmen of Quebec who now found themselves in an English colony. Though Quebec had "an appearance" of separated powers—"a Governor . . . vested with the executive powers, or the powers of administration," a governor and council charged with making laws, and judges who decided causes—the powers were actually all united.³⁴¹ The council and the judges were "dependent upon your Governor, and he [was] dependant on the servants of the Crown."³⁴² In the end, "the legislative, executive, and judging powers [were] all moved by the nods of a Minister."³⁴³ The public letter asked "[w]hat would your countryman, the immortal Montesquieu, have said to such a plan of domination."³⁴⁴ Congress evinced a shared understanding of Montesquieu and the province of the executive.

Subsequent uses of executive power did not refer to the famous maxim, yet they confirmed its conventional meaning. Typically, the references were found in resolutions that requested that state executives fulfill their natural role by executing war-related congressional resolutions. For instance, in December of 1776, Congress resolved that meats, soaps, and candles not be exported out of the United States. The resolution "recommended" that "the executive powers" of the states "see that this resolution be strictly complied with."³⁴⁵ Congress also sought the state executives' assistance in suppressing Tories. Once Congress entreated the "executive powers of the respective states" to silence opposi-

341. 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774–89, at 110 (Gaillard Hunt ed., 1912) (emphasis omitted) [hereinafter JOURNALS OF THE CONTINENTAL CONGRESS].

342. *Id.*

343. *Id.*

344. *Id.*

345. 6 *id.* at 1054; *see also* 7 *id.* at 26–27 (importuning "the executive powers" of several states to purchase and collect beef and pork, salt these meats, and then store them in magazines while using "utmost economy, and cautiously avoid bidding upon each other."); 8 *id.* at 660 (requesting the "executive power of North Carolina" to remove all military supplies to secure places and to destroy supplies that might fall into the enemy's hands).

tion to the war by “apprehend[ing] and secur[ing] all persons . . . who have . . . evidenced a disposition inimical to the cause of America.”³⁴⁶ Due to the lack of a proper federal chief executive, state chief executives were even asked to superintend the dispersed continental executives. In February of 1778, Congress requested “the supreme executive powers of every State, to give attention to the conduct and behaviour of all continental officers, civil or military, in the execution of their respective offices” within their state.³⁴⁷ A later resolution furnished funds for “executing the resolution of Congress.”³⁴⁸

Parallel with its appeals to the state executives, Congress developed its own executive institutions. Even before the Declaration of Independence, Congress established ad hoc committees to oversee the execution of congressional resolutions.³⁴⁹ After experiencing difficulties, Congress adopted standing congressional committees to oversee execution.³⁵⁰ Problems continued, however, because members were overwhelmed by the combination of legislative and executive tasks.³⁵¹

In 1780, Alexander Hamilton voiced the concerns of those who sought the creation of executive departments. Hamilton affirmed that one defect in the Congress was a “want of method and energy in the administration.”³⁵² This fault resulted “in a great degree” from “the want of a proper executive.”³⁵³ Congress was a “deliberative corps” and was not suited to meddle with details and “to play the executive.”³⁵⁴ Hamilton’s solution: “A single man in each [executive] department of the administration” would give administration “more knowledge, more activity, more responsibility, and, of course, more zeal and attention.”³⁵⁵ Writing

346. 8 *id.* at 695; *see also* 12 *id.* at 1015–16 (Congress recommending that state “executive powers . . . secure in safe and close custody all and any persons” who circulated seditious papers); 8 *id.* at 694 (Congress imploring state executives to “apprehend and secure” particular Tories and their “political” papers); 8 *id.* at 643 (Congress asking Pennsylvania executive council and Delaware President M’Kinley to apprehend and confine individuals). When Congress actually had custody of someone accused of aiding the enemy, they typically handed those individuals over to the executive power of the state of residence. *See, e.g.,* 8 *id.* at 644. Other times, paroled prisoners of war who originally resided in a state were conveyed to the “executive power” of the state. *See* 7 *id.* at 9, 24.

347. 10 *id.* at 139–40. If “misbehavior or neglect of duty” existed with respect to an officer not appointed by Congress, the executive powers could “suspend from pay and employment” and make a temporary appointment. The executive powers could also remove such officers that were “supernumerary.” For officers appointed by Congress, the executive powers were asked to lay reports spelling out the “reprehensible conduct” to Congress or the commander-in-chief. *Id.; see also* 14 *id.* at 870 (requesting “executive powers” to appoint “commissaries of hides,” superintend their conduct, and, if necessary “suspend” them).

348. 10 *id.* at 242.

349. *See* JENNINGS B. SANDERS, *EVOLUTION OF EXECUTIVE DEPARTMENTS OF THE CONTINENTAL CONGRESS 1774–1789*, at 4, 6 (1935).

350. *Id.* at 4.

351. *Id.*

352. Letter from Alexander Hamilton to James Duane, in 1 *WORKS OF ALEXANDER HAMILTON*, *supra* note 58, at 154.

353. *Id.*

354. *Id.*

355. 1 *id.* at 219–20.

about the same time, the commander-in-chief of the Continental Army admonished his friend in Congress that there must be “more responsibility and permanency in the executive bodies.”³⁵⁶ Congress deceived itself if it thought that it could superintend the war through fluctuating legislative committees.³⁵⁷

Perhaps moved by the recognition that execution by committee was hardly ideal,³⁵⁸ Congress belatedly³⁵⁹ created executive departments. In August of 1780, a congressional proposal called for “the revision and new arrangement of the civil executive departments of the United States under Congress.”³⁶⁰ In January of 1781, Congress partially carried out the proposal, creating a Department of Foreign Affairs superintended by a secretary.³⁶¹ In the following month, Congress continued the reforms, reorganizing three “civil executive departments”—Treasury, Marine, and War—and creating a Superintendent of Finance, and Secretaries of Marine and War.³⁶²

While Congress exercised executive authority first through committees and then by creating and superintending executive secretaries, its actions might be described as extralegal for most of the Revolutionary War. With the ratification of the Articles of Confederation in 1781, however, Congress’s executive exertions received a formal imprimatur. Though the Articles did not expressly grant Congress the executive

356. Letter from George Washington to James Duane, December 20, 1780, *quoted in* THACH, *supra* note 90, at 64.

357. *Id.*

358. SANDERS, *supra* note 349, at 3 (noting members understood that committees were unwieldy bodies that could not execute with efficiency and dispatch).

359. As early as 1776, some sought to transfer “executive business” to separate boards composed of people outside Congress. See 6 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 341, at 1041.

360. 17 *id.* at 791. These departments were consistently deemed “executive departments” prior to their creation. See 18 *id.* at 1092 (noting that a congressional committee indicated that while it believed that the Treasury Department should be superintended by one officer, another committee was charged with the arrangement of the “Executive Departments”); see also 19 *id.* at 31 (adding members to committee charged with reorganizing “civil executive departments”); 19 *id.* at 57 (“civil executive department” committee reading its report).

361. 19 *id.* at 43–44. Though the resolution did not state that Foreign Affairs was an executive department, subsequent proceedings make this clear. See 24 *id.* at 335 (stating that committee would not consider the secretary of foreign affairs’s rank “relative to the other heads of the Executive Departments” because another committee was considering same); 19 *id.* at 169 (stating that reporting civil list expenses is unnecessary because Congress was reorganizing “the four great executive Civil Departments”).

362. 19 *id.* at 125–26. Subsequent resolutions continued to refer to these departments as “executive departments.” For instance, on November 12, 1782, Congress tabled a resolution that provided “[t]hat when a matter is referred by Congress to any of the Executive Departments, to take order, it is the sense and intention of Congress that the measure referred to such department be carried into execution.” 23 *id.* at 722. The resolution apparently was tabled because delegates believed that the phrase “take order” actually ceded some discretion to the departments. 23 *id.* at 722 n.4. Later, when Congress considered creating a home secretary, the proposed resolution referred to “executive departments” who would, on occasion, respond to relevant correspondence. 28 *id.* at 213. Contemporaneous letters labeled these departments as executive as well. See Letter from James Duane to George Washington (Jan. 29, 1781), in 5 LETTERS OF THE MEMBERS OF THE CONTINENTAL CONGRESS 551 (Edmund C. Burnett ed., 1931); Letter from the Connecticut Delegates to the Governor of Connecticut (Feb. 9, 1781), in 5 *id.* at 566.

power,³⁶³ the Articles conveyed that power nonetheless. Under Article IX, Congress could appoint “committees and civil officers as may be necessary for managing the general affairs of the United States under [Congress’s] direction.”³⁶⁴ With this authority, Congress meddled with executive details, investigated and took up departmental matters without notice to the department heads, and acted as the supreme executive. According to Thach, congressional delegates were the actual chiefs of the executive departments until the end of the Articles.³⁶⁵

The congressional experience teaches us several things. First, Congress adopted the conventional understanding of executive power in its letters and resolutions. At a minimum, the executive power executed the law. Indeed, no one in the Continental Congress suggested that the phrase lacked a core meaning. Second, the national experience with executive power partly mirrored the state experiences. Through legislative committees, Congress initially exercised legislative and executive powers. When execution suffered, Congress sought to divest itself of the executive details by establishing executive departments superintended by chiefs. In another way, however, the national experience was more extreme. While the state constitutions at least created a separate (though usually servile) executive, the Articles vested the executive power with Congress. Congress either made or superintended executive decisions without even the pretense that another entity was constitutionally empowered to direct law execution. As a result, the period confirmed some of the maxims of the political theorists. When there was a plural executive, execution would not be vigorous or swift.³⁶⁶

The most significant lesson learned as a result of the Articles experience was the need for an independent, energetic national executive. At the eve of the Philadelphia convention, Jefferson, who had served as a delegate in the Continental Congress, thought it best “to separate in the hands of Congress the Executive and Legislative powers The want

363. Though the Articles lacked an explicit declaration that Congress possessed the executive power, the Articles hardly evinced a fear of using that phrase. Article IV, the predecessor of the Constitution’s Fugitive Clauses, *see* U.S. CONST. art. IV, § 2, cls. 2–3, provided the only relevant reference. (The other references to “executive authority” referred to disputes between states and do not shed light on the phrase “executive power.” *See* ARTICLES OF CONFEDERATION, art. VIII.) Article IV provided, *inter alia*, that if any person guilty of or charged with treason, felony, or other high misdemeanor “shall flee from justice . . . he shall upon demand of the Governor or Executive power, of the state from which he fled, be delivered up and removed to the State” with jurisdiction. *Id.* art. IV. Vesting authority to demand fugitives with the “executive power” made perfect sense. The executive power was charged with law execution and thus was the proper receptacle for the authority to demand extradition. *See supra* Part II.G. Indeed, the *Essex Result* had declared that the executive power was responsible for apprehending law breakers. *See supra* notes 172, 274–79 and accompanying text.

364. ARTICLES OF CONFEDERATION, art. IX, § 5.

365. THACH, *supra* note 90, at 70.

366. At the same time, one prediction was simply not borne out by the Continental Congress experience. Despite the fact that the Congress possessed legislative and executive power, the tyranny predicted by Montesquieu never materialized. This lack of oppression hardly refuted Montesquieu, however. Uniting an anemic legislative power with a feeble executive power could hardly bring about tyranny.

of [separation] has been the source of more evil than we have experienced from any other cause. Nothing is so embarrassing as the details of execution."³⁶⁷ Going beyond Jefferson's observation that execution and legislation ought to be kept distinct, another commentator remarked that law execution should be entrusted to one "great and fearful executive officer."³⁶⁸ Likewise, Noah Webster reasoned that if the "power of the whole" was vested in a single person, "the execution of laws will be vigorous and decisive."³⁶⁹

As we shall learn in the next part, the Philadelphia delegates certainly learned from the Articles experience. Congress would no longer exercise the executive power and sit atop the executive branch. Instead, the delegates proposed a Constitution with a unitary, independent executive to superintend the execution of the laws. Further, Congress would no longer have to rely upon state executives to carry out various tasks. The Constitution would create a national executive capable of executing the laws across the nation and enable Congress to create officers to assist the chief executive. In short, the executive would neither be a creature of statute, nor simultaneously enjoy the legislative power. Rather, the executive was a creature of the Constitution itself, with rights and powers that Congress was bound to respect.

D. Summary of Pre-Constitutional Evidence

Having covered much ground, a recapitulation will prove useful. Although many academics believe that the executive power has no core meaning, the evidence adduced in this part suggests that many in the eighteenth century thought otherwise. Locke, Montesquieu, Blackstone, and others made clear that the executive power was the power to execute the laws. This "foreign" meaning of executive power found its way to these shores as Americans embraced the phrase's traditional meaning. In the states, the executive power (whether singular or plural) executed the law, but lacked proper defenses against legislative encroachment. Indeed, many constitutions explicitly made the executive power subject to legislative alteration. At the national level, Congress enjoyed the executive power and created executive officers and departments. Yet Congress proved to be a plodding, inattentive, and anemic executive.

The weak and servile state and continental executives served as examples to avoid in the construction of the chief executive. The federal executive power would not be under the legislature's control, as was often the case in the states. Likewise, one entity would not enjoy both executive and legislative authority as was true under the Articles. Going

367. Letter from Thomas Jefferson to Edward Carrington (Aug. 4, 1787), in 4 WRITINGS OF THOMAS JEFFERSON, *supra* note 332, at 424.

368. HENRY BARRETT LEARNED, *THE PRESIDENT'S CABINET* 51 (Yale Univ. Press 1912).

369. *Id.* at 51-52.

into Philadelphia, most understood that a powerful, independent executive was necessary to ensure vigorous, efficient, and responsible law execution.

V. THE EXECUTIVE POWER AT THE PHILADELPHIA CONVENTION

Many doubt that we should draw lessons from the Philadelphia Convention's incomplete and once confidential records. Because the delegates laid down edicts that kept the records secret until 1818,³⁷⁰ all America knew for sure was that the Convention had drafted the Constitution. Perhaps for this reason, Madison asserted that "[a]s a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention can have no authoritative character."³⁷¹

Despite Madison's admonition, there are sound reasons for peeking behind the screen. First, even the most strict textualist must appreciate that the debates may shed light on what the Constitution's words would have meant outside the Convention. After all, though the debates were secret, they were not conducted in some clandestine code. Second, some might reject Madison's claim that the framers' intentions are not a proper means of divining meaning. Finally, a few might regard the Convention's secrecy as suspicious. They may wish to explore every nook and cranny of the records on the theory that, like the Wizard of Oz, the delegates had something to hide.

Once we peer behind the curtain, however, we realize that the Convention had nothing to hide. First, the usage of executive power was entirely conventional. Speaker after speaker assumes that any executive must be empowered to execute the law. Indeed, even those who unsuccessfully sought a weak executive acknowledged that their legislatively dominated executive would execute the laws. Second, the debates reveal that most delegates had learned from the state and Articles experiences. As Thach observed, "the majority of the delegates brought with them no far-reaching distrust of executive power, but rather a sobering consciousness that" the government would need a robust executive.³⁷² Most delegates understood that execution required vigor, dispatch, and attentiveness, qualities inconsistent with legislative supremacy. Where the

370. Without the leave of the Convention, no one could copy anything from the official journal and "nothing spoken in the House [could] be printed, or otherwise published, or communicated without leave." 1 FEDERAL CONVENTION, *supra* note 93, at 15. These restrictions were meant to facilitate candid discussion. See 3 *id.* at 28 (letter from George Mason to George Mason, Jr.); 3 *id.* at 34–35 (letter from James Madison to Thomas Jefferson). At the Convention's close, the delegates unanimously resolved that Washington would safeguard the journal and related papers until the future Congress (the one contemplated by the proposed Constitution) chose what to do with them. 2 *id.* at 648. In 1796, President Washington deposited the papers with the State Department. More than two decades later, Congress ordered the journals printed. 1 *id.* at xi–xii.

371. 3 *id.* at 447 (letter from James Madison to Thomas Ritchie (Sept. 15, 1821)).

372. See THACH, *supra* note 90, at 52.

executive was concerned, the Convention had very little cause for embarrassment.

A. *All Plans Called for a Law Enforcement Executive*

In the Convention's early days, individuals and state delegations submitted various proposals. Despite rather profound differences, all plans reflected the consensus that a separate, national executive branch was absolutely necessary.³⁷³ Whatever the size or other attributes of the executive branch, it would possess the core power to execute the laws. Introduced by Virginia Governor Edmund Randolph on May 29, 1797, the Virginia plan resolved that "a National Executive be instituted" and "that besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation."³⁷⁴ Drawing upon longstanding usage, the plan plainly assumed that a "National Executive" would execute the nation's laws.³⁷⁵ Proposed by South Carolina delegate Charles Pinckney³⁷⁶ on the same date as the Virginia plan, the Pinckney plan sought a President with "the executive Authority of the U.S."³⁷⁷ Among his duties would be "to attend to the Execution of the Laws of the U.S."³⁷⁸

373. These were not the first plans for the independent, national executive. Even before the First Continental Congress and the adoption of the Articles of Confederation, some foresaw that there would be a national government and a national executive charged with law execution. In 1754, delegates from the northern colonies, along with representatives from the Iroquois nations, met in Albany, New York to consider a national government. Benjamin Franklin drafted what would become styled as the *Albany Plan of Union*. The Plan would have called upon the crown to appoint a "President-General" charged with administering the government and with the "office and duty to cause [the acts of the national legislature] to be carried into execution. See *Albany Plan of Union*, in ROBERT C. NEWBOLD, *THE ALBANY CONGRESS AND THE PLAN OF UNION OF 1754*, at 186 (1955). Though the plan went nowhere for want of support from the crown, it apparently marked the first serious discussion of a "continental" executive. Two decades later, loyalist Joseph Galloway submitted a plan to the Continental Congress that, where the executive was concerned, was nearly identical to the *Albany Plan of Union*. See 1 *JOURNALS OF THE CONTINENTAL CONGRESS*, *supra* note 341, at 49–50. (Recall that Galloway had denounced those who sought independence because they opposed the king's superintendence of law execution." See *supra* Part IV.A.). Because the sentiments for a break from England were powerful, however, Congress never took up his proposal. See 1 *JOURNALS OF THE CONTINENTAL CONGRESS*, *supra* note 341, at 51 n.1.

374. 1 *FEDERAL CONVENTION*, *supra* note 93, at 21. Unless otherwise noted, the quotations in text come from James Madison's notes rather than from the other sources found in *Federal Convention*.

375. *Id.* The only other delegate to take notes on the substance of Randolph's plan, William Paterson of New Jersey, merely mentioned that the plan would create a "national Executive." 1 *id.* at 28. His notes suggest that Paterson probably understood that the word "executive" naturally conveyed some concomitant authority. Otherwise, merely mentioning that the plan contemplated a "national Executive" would be no more useful than observing that the plan contemplated a "national Jabberwocky." That Paterson appreciated that an executive executed the laws is confirmed by the New Jersey plan which provided as much. See 1 *id.* at 244.

376. See 1 *id.* at 23. There were two individuals named Charles Pinckney at the Philadelphia Convention. When this paper refers to "Charles Pinckney" or "Pinckney," the paper refers to the author of the Pinckney plan. Because the other Pinckney was a general, the paper refers to him as "General Charles Pinckney."

377. 2 *id.* at 157 n.15, 158. Pinckney's proposal did not make its way into the journal or Madison's records. Instead, the proposal is found among the papers of the Committee of Detail. That Committee

The New Jersey plan and Hamilton's proposal tread the same path. Presented by William Paterson on June 15, the New Jersey plan would have had Congress elect a plural executive. Mimicking the Virginia plan's language, the New Jersey plan provided that these federal executives "besides their general authority to execute the federal acts, ought to appoint all other officers not otherwise provided for."³⁷⁹ If someone frustrated the "carrying into execution" of acts and treaties, the "Federal Executive" could call forth the state militias "to enforce and compel an obedience to such" acts and treaties.³⁸⁰ Three days later, Hamilton proposed vesting the "the supreme Executive authority of the United States" in a "Governor" who "serve[d] during good behavior."³⁸¹ Among his other powers, this "Executive" would have "the execution of all laws passed."³⁸² Hamilton's notes reveal his belief that vigorous law execution could only come from an executive who enjoyed life tenure, because a republican executive would lead to weak law execution.³⁸³

After the Convention unanimously agreed that the "national Executive" would consist of one person³⁸⁴ and would "carry into execution the national laws,"³⁸⁵ these resolutions and others were sent to the Committee of Detail so that it could compose a draft Constitution.³⁸⁶ The Committee of Detail drafted clauses that would eventually become the Executive Power and Faithful Execution Clauses,³⁸⁷ thus codifying and confirming the executive's fundamental relationship to law execution.

The plans evinced a range of opinion about how powerful the executive ought to be. For instance, some contemplated congressional selection. Others contemplated a plural executive. Whatever their differences, however, each vested its executive with the constitutional authority necessary and proper for any executive: the power to execute

was formed to take the resolutions passed by the Convention and form a draft Constitution. *See 1 id.* at xxii.

378. *2 id.* at 157 n.15, 158. After the Convention, Pinckney issued a pamphlet entitled "Observations on the Plan of Government Submitted to the Federal Convention." *3 id.* at 106. Although the original fragment of Pinckney's plan, found in the Committee of Detail's papers, merely mentioned a power to "attend to the Execution of the Laws of the U.S.," *2 id.* at 157 n.15, 158, his "Observations" added the phrase "by the several States." *3 id.* at 111. It is not clear what Pinckney hoped to add by this phrase. Perhaps the phrase related to the use of state officers to execute federal law under the direction of the federal executive.

379. *1 id.* at 244.

380. *1 id.* at 245. Rufus King, the only other delegate to take notes on the plan, confirms that the New Jersey plan would have permitted the executive to call forth the militia to enforce treaties and laws. *See 1 id.* at 247.

381. *1 id.* at 292.

382. *Id.*

383. *See 1 id.* at 310. Farrand observes that these notes come from J.C. Hamilton's, *Life of Hamilton* and are not found in Hamilton's papers at the Library of Congress. Nevertheless, Hamilton's notes only confirm what other observers claim Hamilton said and what Hamilton was to say during the ratification fight. *See infra* Part VI.

384. *2 FEDERAL CONVENTION*, *supra* note 93, at 29.

385. *2 id.* at 32.

386. *See 2 id.* at 95, 129, 132.

387. *See 2 id.* at 185.

the laws. Any other choice would have made no sense; authority to execute the law is what made an entity an executive in the first instance.³⁸⁸ Consequently, their final product reflected this fundamental truth. As we have seen, the Constitution is replete with clues that the executive would control the execution of federal laws.

These plans were hardly the only instances which reflect the executive's necessary connection to law execution. There were important, sometimes intractable debates about the executive's other traits and powers. Across every major executive issue, delegates understood the obvious. Whether the question was the number of executives, its appointment, or its defenses, delegates expected that the executive would execute the laws.

B. Executive Unity

Though a unitary executive may seem like an obvious choice in hindsight, a few delegates sought a plural executive. Like many other executive questions, the dispute over the size of the executive apex revolved around law execution, specifically in this case, how many individuals would superintend federal law execution. Sensing that the Virginia plan left the door open for a plural executive,³⁸⁹ James Wilson proposed a single executive as soon as it came up for discussion.³⁹⁰ Apparently, a hush fell over the Convention. Delegates realized that George Washington would probably be that first chief executive and what was said about the executive branch could reflect the speaker's personal views about the commander-in-chief of the Continental army.³⁹¹

After Benjamin Franklin spelled out the importance of the issue, John Rutledge praised Wilson's motion. Rutledge "was for vesting the Executive power in a single person" because "a single man would feel the greatest responsibility and administer the public affairs best."³⁹² Wilson agreed, stating that a "single magistrate" would supply the "most energy dispatch and responsibility" to that office.³⁹³ According to Wilson, these traits would not be useful for powers of war and peace. Rather "[t]he only powers he conceived strictly Executive were those of executing the laws" and appointing officers not connected to and appointed by the legislature.³⁹⁴ Wilson and Rutledge were both of the view that a uni-

388. See VILE, *supra* note 194, at 67.

389. The Virginia plan merely provided for a "National Executive," but did not indicate how many individuals would make up that National Executive. 1 FEDERAL CONVENTION, *supra* note 93, at 21. The New Jersey plan openly contemplated a plural executive. The plan provided for a "federal Executive to consist of ___ persons." 1 *id.* at 244.

390. See 1 *id.* at 65.

391. See *id.* (stating Rutledge noted the shyness of gentlemen on this and other subjects).

392. *Id.*

393. *Id.*

394. 1 *id.* at 65-66. Rufus King's notes confirm Madison's observations about the Wilson proposal. First, King's notes begin with observation that the "Ex. power to be in one person." They also record that

tary executive would conduce to an energetic, prompt, and responsible execution of federal law.

Virginia Governor Randolph opposed a unitary executive as the “foetus of monarchy.”³⁹⁵ According to Randolph, Wilson’s list of the “great requisites for the Executive department” could be found in three men as well as in one.³⁹⁶ Furthermore, if there were more than one executive, the executive branch would be more independent.³⁹⁷ Given Randolph’s apprehensions, he probably feared that a single law enforcement executive would use the army and the law enforcement machinery to crown himself king.³⁹⁸ Apparently unsure which direction to take, the delegates shelved Wilson’s motion and considered the executive’s powers.

The ensuing colloquy confirms what was at stake during the initial debate about the executive branch’s apex. Madison thought it appropriate to fix the extent of executive authority before selecting a unitary or plural executive.³⁹⁹ “[C]ertain powers were in their nature Executive, and must be given to that department, whether administered by one or more persons.”⁴⁰⁰ Hence he sought a “national Executive” with “power to carry into effect the national laws, to appoint to offices in cases not otherwise provided for, and to execute such other powers (“not Legislative nor Judiciary in their nature”) as may from time to time be delegated by the national Legislature.”⁴⁰¹ Wilson seconded the congenial motion; after all, Madison, by affirming that law execution was in its “nature Executive,” had merely rephrased Wilson’s claim that “executing the laws” was “strictly Executive.”⁴⁰²

As these exchanges indicate, the debate about the number of chief executives principally concerned who would superintend the execution of

Wilson asserted that executive “powers are designed for the execution of Laws, and appointing Officers not otherwise to be appointed.” 1 *id.* at 70. Finally, King claimed that Madison “agrees” with Wilson’s definition “of executive powers.” *Id.*

395. 1 *id.* at 66.

396. *Id.*

397. *See id.*

398. Randolph’s opposition to the unitary executive was so fierce that he felt he would continue to oppose it “as long as he lived.” 1 *id.* at 88.

399. *See* 1 *id.* at 66.

400. 1 *id.* at 67.

401. *Id.* Apparently, General Charles Pinckney had suggested the parenthetical language to prevent the delegation of improper powers. *See id.*

402. 1 *id.* at 66–67. Not everyone immediately rushed to support this seemingly uncontroversial motion. Charles Pinckney objected to the last phrase of Madison’s motion as “unnecessary” and moved to strike it. Pursuant to its general “power to carry into effect the national laws,” the executive already could exercise any nonlegislative or nonjudicial powers that Congress wished to delegate. *See* 1 *id.* at 67. Edmund Randolph seconded the motion. *See id.* Madison admitted that both clauses after the power to execute the laws might not be “absolutely necessary” because they were perhaps part of that first, more general execution authority. But rather than letting the broader power subsume the two subsidiary authorities by implication, Madison saw nothing to be lost by including them; indeed, they “might serve to prevent doubts and misconstructions.” *Id.* Pinckney’s motion carried the day. After the arguably redundant language was struck, Madison’s motion passed almost unanimously. Alone among the States, Connecticut divided evenly on the motion. *Id.*

the national laws. This was the “strictly” executive and “natural” function that “must” be vested with any executive. Hence, though some quibbled with other portions of Madison’s proposal, *no one opposed declaring the obvious*: the executive, of whatever size, shape, or form, would execute the laws. Indeed, when the Committee of the Whole voted in favor of the unitary executive, this was the most important executive power.⁴⁰³ Siding with Wilson and Rutledge, the Committee of the Whole apparently agreed that a single executive would ensure vigorous, speedy, and responsible law execution.⁴⁰⁴ As we know, the Convention agreed as well as evidenced by the Executive Power and Faithful Execution Clauses.⁴⁰⁵

C. Selection and Tenure of the Executive

Perhaps the most contentious and protracted executive dispute arose over the executive’s selection. Once again, the executive’s power to execute the laws was the principal prize in dispute. Who could use the power to select the executive to exert influence over law execution: the national legislature, the states, or the people?

The Virginia plan called for legislative appointment.⁴⁰⁶ Although Wilson raised the “chimerical” idea of popular election,⁴⁰⁷ Roger Sherman countered that legislative appointment was appropriate because an “absolute” executive dependence was necessary. Indeed, “it was the will of [the legislature] which was to be executed.”⁴⁰⁸ Wilson’s motion failed and the Committee of the Whole adopted legislative selection.⁴⁰⁹

When the Convention finally took up selection, Gouverneur Morris, like Wilson, opposed legislative selection. If legislatively appointed and impeachable, the executive would be a product of “intrigue,” “cabal,” and “faction”⁴¹⁰ and would be “the mere creature of the” legislature,⁴¹¹ inevitably resulting in legislative usurpation and tyranny.⁴¹² Pinckney, however, regarded the pitfalls of popular election as “obvious” and “striking.”⁴¹³ Besides, the Congress “being most immediately interested in the laws made by themselves, will be most attentive to the choice of a

403. The other power being the subsidiary power of appointing officers.

404. See 1 FEDERAL CONVENTION, *supra* note 93, at 97.

405. See 2 *id.* at 29. In the interim, between the Committee’s vote and the Convention’s, the New Jersey plan reintroduced the idea of plural executive. See 1 *id.* at 244. Given the Committee’s vote, the opposition to a unitary executive clearly decided to surrender.

406. 1 *id.* at 21.

407. 1 *id.* at 68.

408. *Id.*; see also 1 *id.* at 65 (Sherman observing that “Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect”).

409. See 1 *id.* at 81.

410. 2 *id.* at 29.

411. *Id.*

412. See 2 *id.* at 31.

413. 2 *id.* at 30.

fit man to carry them properly into execution.”⁴¹⁴ Morris and Wilson could not convince even one delegation that the person who would “carry into execution the national laws”⁴¹⁵ should be popularly elected.⁴¹⁶ Instead, delegates hewed to the Pinckney-Sherman logic: Congress ought to choose the chief executor of its laws.⁴¹⁷

Delegates refought these battles when the closely intertwined questions of presidential tenure and term limits arose. After the Convention eliminated the Virginia plan’s term limit, Madison spoke out against legislative domination. Executive dependence on Congress would render Congress “the Executor as well as the maker of laws; & then according to the observation of Montesquieu, tyrannical laws may be made that they may be executed tyrannical manner.”⁴¹⁸ Madison also briefly discussed the differences between the executive and judicial departments. The latter “executed the laws in certain cases as the former did in others. The former expounded and applied them for certain purposes as the latter did for others.”⁴¹⁹ Madison clearly appreciated that executive selection determined who would execute the laws and that a legislative appointment could lead to an alarming consolidation of executive and legislative powers.⁴²⁰ Such arguments apparently swayed the Convention as it voted to have state legislators choose the presidential electors.⁴²¹

While there were sharp disagreements, delegates understood what lay at the heart of the dispute. They were keenly aware that the debate concerned who would select the official empowered to execute federal law. By granting Congress a relatively minor role in presidential selection, the delegates made it less likely that Congress effectively would control the executive and legislative power.

D. Adequate Defense of the Executive

Throughout the discussions of whether to vest a veto with the executive, it was likewise clear that the delegates understood that the executive would execute the laws. In fact, the veto was a powerful means by which the executive would be able to defend this core prerogative. Without a veto, the executive might be defenseless against legislative attempts to infringe upon this essential power.

414. *Id.*

415. *2 id.* at 32.

416. *See id.*

417. *Id.*

418. *2 id.* at 34. Gouverneur Morris later made the same point. *See 2 id.* at 404. If the executive is selected by Congress, Congress would “perpetuate and support their occupation by the influence of tax gatherers and other officers, by fleets, armies and c.” *Id.* In other words, if Congress selected the executive, Congress could use the law executive machinery as a means of oppression.

419. *2 id.* at 34.

420. *See 2 id.* at 56.

421. *See 2 id.* at 58.

The Randolph plan envisioned a Council of Revision (composed of the president and federal judges) that would exercise a veto over federal acts.⁴²² When the Committee of the Whole first considered the Council, John Dickenson objected to the union of the president and judges, because “the one is the expounder, and the other the Executor of the Laws.”⁴²³ Much later, Madison seemed to respond to Dickenson’s concerns that mixing the judiciary and the executive in this manner violated “the great maxim which requires the great departments of government to be kept separate and distinct.”⁴²⁴ Rather, the veto was meant to safeguard the “constitutional discrimination of the departments on paper.”⁴²⁵ If such a “union” was improper the argument proved far too much because a purely executive veto would be improper as well. Armed with a veto, the executive could shape the very laws he was to execute.⁴²⁶ Painting a simple portrait, Morris expanded upon Madison’s argument for defenses against legislative encroachment and thereby neatly encapsulated the three powers of government: “Suppose that the three powers, were to be vested in three persons . . . ; that one was to have the power of making—another of executing, and a third of judging, the laws.”⁴²⁷ Naturally, the two latter persons would want some security against “legislative acts of the former which might easily be so framed as to undermine the powers of the two others.”⁴²⁸ The Council of Revision would serve as that valuable check.⁴²⁹

A Council of Revision could do more than just safeguard their core authorities of executing and expounding the laws. But without this shield, these essential powers could be in continual jeopardy. As Morris later observed, the *Report of the Council of Censors* of Pennsylvania documented that there had been “many invasions of the legislative department on the [Pennsylvania] Executive.”⁴³⁰ Likewise, the Glorious Revolution revealed that without a strong veto, the executive would be destroyed.⁴³¹ Though proponents of the Council of Revision lost, they did make clear what was at stake. In part, a veto could help prevent the legislature from treating the Constitution’s vesting of powers as default

422. See 1 *id.* at 21.

423. 1 *id.* at 110 (Pierce’s notes).

424. 2 *id.* at 75.

425. *Id.*

426. *Id.* Madison cleverly drew upon Montesquieu’s fear of a complete mixture of the executive and legislative powers as a means of defending the veto’s partial mixture. 2 *id.* at 75, 77.

427. 2 *id.* at 78–79.

428. 2 *id.* at 79.

429. While considering a purely executive veto, delegates also understood the president’s power to execute the law. Pierce Butler complained that he had supported a unitary executive because he wanted “[g]overnment [to] be expeditiously executed, and not that it should be clogged.” 1 *id.* at 109. Butler was highlighting the seeming incongruity of granting someone who was supposed to execute the laws the power to prevent laws from ever coming into being.

430. 2 *id.* at 299.

431. See 2 *id.* at 300 (remarks of Gouverneur Morris); 2 *id.* at 301 (remarks of James Wilson).

rules or suggestions. Armed with a veto, the president could resist the legislative vortex and retain his power to execute the law.

E. Lessons from the Philadelphia Convention

A summary of points is in order. First, it bears repeating that every plan presented to the delegates provided that the executive would execute the national laws. Second, in the face of Madison, Wilson, Morris, Hamilton, Sherman, Rutledge, Franklin, Dickenson, and others who repeatedly confirmed the natural province of the Executive, no one dissented. Indeed, even the most ardent foes of a robust executive appreciated that the executive's essential function consisted of executing the legislature's laws. Third, numerous delegates also confirmed the president could execute the law himself⁴³² and direct the law execution of others.⁴³³ Clearly, the delegates had not tossed aside the core meaning of executive power discussed by Locke, Montesquieu, and others and subsequently confirmed by the preframing usage.

Moreover, a run-down of the issues reveals that the advocates of a strong executive nearly ran the table. The executive would not be a multiheaded hydra, each head pulling in a different direction; there would be only one chief law enforcement officer. The executive would not stand defenseless before the legislative vortex; he would enjoy a qualified veto meant to shield him from legislative encroachments and just as important, Congress would lack the constitutional authority to subtract from or define the executive's powers. The executive would not be a creature of Congress by virtue of being appointed by Congress or as a result of a short term of office and term limits; he would preside over the execution of the laws for at least four years and perhaps much longer.

Even across relatively minor issues, delegates understood the chief executive's essential law execution role. The executive would not be an irresponsible chief executive; he could appoint (with the Senate's con-

432. See, e.g., *supra* notes 412, 426; *infra* note 445.

433. Professor Jack Rakove claims that the relationship between the president and subordinate executives was largely unexplored in Philadelphia. See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 279 (1996). With all due respect to Professor Rakove, I disagree. Several delegates stated that the president would control the subordinate executive officers. See, e.g., 2 FEDERAL CONVENTION, *supra* note 93, at 53–54 (Morris observing that executive officers would be subordinate to president); 3 *id.* at 111 (Pinckney declaring that the president would be empowered to inspect, detect, and punish in the departments); 2 *id.* at 342–44 (noting that Morris-Pinckney plan would have created a council where all department heads would serve the president).

Moreover, as a matter of logic, the president would not have an effectual law execution power if the department heads could be independent in their law execution activities. While this kind of independence may have been typical in the states, *no one* spoke out in favor of executive department independence from the chief executive. To the contrary, the Convention records are replete with statements evincing a desire to create a powerful, responsible chief executive. Indeed, to the extent that the departments execute independently of the president, they share the executive power and we create a plural executive power where none was intended and we make a powerful, responsible chief executive an impossibility.

sent) those who would help him execute the laws.⁴³⁴ The chief law enforcement officer would not have to plead for a salary; he would be guaranteed a set amount.⁴³⁵ The president would not lack the wherewithal to execute the laws in times of crisis; with Congress's assistance, he could direct the militia in law execution.⁴³⁶ Given the string of victories, delegates who perceived that the executive's powers mushroomed as the summer progressed had not fooled themselves.⁴³⁷

On the other hand, the records of the Philadelphia Convention provide scant support for modern alternatives to the chief executive thesis. Given the unanimous support for a law execution executive, the non-executive thesis simply has no grounding in the Philadelphia debates. Similarly, the chief overseer thesis lacks support because no delegate ever spoke of the executive as having some distant relationship to law execution, whereby he would merely monitor and influence how others executed the law. The executive, of whatever size or shape, was to execute the laws and control the law execution of other executive offices. Finally, no one voiced support for the view that the Constitution actually permits Congress to redirect the executive power away from the chief executive.⁴³⁸ The idea of a default executive, so prominent under the state constitutions, never found its way into the federal Constitution.

This one-sided track record explodes the myth that the delegates were animated by a "jealousy of kingship."⁴³⁹ While most delegates surely opposed monarchy, most had also learned from the past. They (and the rest of America) were no longer infants, new and inexperienced in the science of politics. They had learned from the state and continental experiences and they no longer harbored an excessive and unwarranted distrust of the executive. Most delegates understood that the leg-

434. When delegates considered the Senate's role in appointments, James Wilson affirmed the president's intimate connection to law enforcement. He objected that the provision blended "a branch of the Legislature with the Executive. Good laws are of no effect without a good Executive; and there can be no good Executive without a responsible appointment of officers to execute." 2 *id.* at 538-39.

435. While denying that the executive would need a salary, Benjamin Franklin confirmed the executive's natural role. If the former commander-in-chief did without a salary, surely the nation could locate executives to "preside over our civil concerns, and see that our laws are duly executed," claimed Franklin. See 1 *id.* at 81, 85. As our Constitution indicates, Franklin's proposal never went far. See U.S. CONST. art. II, § 1, cl. 7 ("The president shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected . . .").

436. See *supra* Part III.C.

437. See 3 FEDERAL CONVENTION, *supra* note 93, at 427 (comments of Charles Pinckney in 1818); 3 *id.* at 216-17 (comments of Luther Martin in 1787 to the Maryland legislature); 3 *id.* at 302 (comments of Pierce Butler). Although Madison disagreed with some aspects of Pinckney's claims, 3 *id.* at 502, there is no doubt that the Constitution's executive was a far more powerful creature than the stripped down law enforcement executive envisioned by Madison in the early days of the Convention. Compare U.S. CONST. art. II, with 1 FEDERAL CONVENTION, *supra* note 93, at 66-67 (listing law execution, appointment, and other legislatively delegated authority).

438. Admittedly, there were those who sought an executive completely subservient to the legislature. See, e.g., 1 FEDERAL CONVENTION, *supra* note 93, at 65, 68 (noting the comments of Roger Sherman). But these delegates were unsuccessful.

439. THACH, *supra* note 90, at 52; see also RAKOVE, *supra* note 433, at 268, 272 (calling the president a "patriot-king" above party).

islature simply could not be permitted to dominate the other two branches and effectively exercise all three powers.⁴⁴⁰ Finally, delegates had come to appreciate the necessary ingredients of an energetic law enforcement executive: unity, adequate defenses, and independence from the legislative vortex.⁴⁴¹

VI. THE EXECUTIVE POWER DURING THE RATIFICATION STRUGGLE

As noted earlier, Madison once admonished those searching for the Constitution's meaning to ignore the Philadelphia Convention. If a "key is to be sought elsewhere [other than the text], it must be . . . in the sense attached to it by the people in their respective State Conventions where it rec.d [sic] all the authority which it possesses."⁴⁴² Jefferson made a more forceful assertion:

On every question of construction, carry ourselves back to the time when the constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed.⁴⁴³

Today, some of those who search for the Constitution's original meaning make similar claims. The Philadelphia Convention's records are irrelevant; the delegates merely drafted provisions but did not make them law. Instead, we must analyze the proceedings of the state conventions that actually ratified the Constitution.

It would have been odd, however, had the Philadelphia delegates understood the executive power differently from participants in the public ratification debates. In fact, the understandings were identical. The executive's natural law enforcement role was affirmed across many different issues during the ratification struggle: separation of powers, the unitary executive, and the selection, term, and reeligibility of the president. It was discussed in conventions, pamphlets, and private letters, both friend and foe of the Constitution understood the essential executive power: it was the power to execute the law. Armed with that power

440. Wood notes that the constitutions created in the 1780s had departed from the revolutionary constitutions' tendencies to heap power on the legislature. Instead, these constitutions reveal an increasing willingness to arm the executive with defenses to shield him from the rapacious legislatures. See WOOD, *supra* note 288, at 446–53. Clearly, those lessons were not lost by 1787.

441. In truth, the only "executive problem" was a "law enforcement" question. As Thach framed the question, how could the delegates construct a department "well enough equipped with power to see to it that the laws were faithfully executed in distant Georgia and individualistic western Pennsylvania and western Massachusetts as well in the commercial centers of the seaboard?" THACH, *supra* note 90, at 77. The delegates' answer can be found in the Constitution's erection of a responsible and vigorous chief executive empowered to direct the execution of federal law.

442. 3 FEDERAL CONVENTION, *supra* note 93, at 447–48 (noting letter of James Madison to Thomas Ritchie).

443. See Letter from Thomas Jefferson to William Johnson (June 12, 1823), in THE COMPLETE JEFFERSON 320–22 (Saul K. Padover ed., 1969).

the president could execute the law himself and control the law execution of others.

A. *Separation of Powers*

One oft-levied charge was that the Constitution consolidated the three governmental powers. On occasion, such charges were laid against the president's veto authority and the Senate's participation in treaty making and appointments. Sometimes the Constitution's advocates denied the impropriety; other times they admitted that the particular mixture was problematic. Relevant to our inquiry is how these exchanges confirmed the executive's law enforcement role.

The Constitution's adversaries criticized the veto for various reasons, oftentimes referencing the president's law execution power. Mirroring complaints made during the drafting of the state constitutions,⁴⁴⁴ some Anti-Federalists argued that the veto meant that there would be consolidated executive and legislative authority. "William Penn" inveighed that the veto permitted a dangerous mixture of executive and legislative powers. There could be "NO LIBERTY" when one person could enact tyrannical laws and could execute tyrannically as well.⁴⁴⁵ Likewise, "Republicus" grouched that though the president would have the "supreme continental executive power"⁴⁴⁶ and act as the "supreme conservator of laws,"⁴⁴⁷ he also enjoyed legislative authority. Despite his "modest title," the president could "exercise the combined authority of legislation and execution."⁴⁴⁸ The Federal Farmer had a complaint of an entirely different sort. Granting the president "a share in making the laws, which he must execute"⁴⁴⁹ was perfectly sound, but had the Philadelphia delegates emulated the New York Constitution rather than the one from Massachusetts, the veto power would be exercised with additional firmness and wisdom.⁴⁵⁰

Others objected to the Senate's executive functions. At the Virginia ratifying convention, John Dawson affirmed that "every schoolboy" understood that "in all free governments" the three powers were kept "separate and distinct."⁴⁵¹ Because the Senate acted "as council to the President, the supreme head," however, the Constitution had "closely

444. See *supra* note 334.

445. 3 ANTI-FEDERALIST, *supra* note 3, at 172.

446. 5 *id.* at 167.

447. 5 *id.* at 168.

448. 5 *id.* at 169.

449. 2 *id.* at 314.

450. 2 *id.* Recall that the New York veto was exercised by a joint executive-judicial council. See *supra* note 322. Recall also that the Virginia plan and delegates such as James Wilson and Gouverneur Morris had pressed for a Council of Revision composed of the chief executive and members of the judicial branch. See *supra* Part V.D.

451. 3 DEBATES, *supra* note 2, at 608.

united” the “legislative and executive powers.”⁴⁵² In fact, the Senate could “pass[] laws which they themselves are to execute.”⁴⁵³ Others launched similarly fallacious broadsides against the Senate’s rather limited executive roles.⁴⁵⁴

Madison countered such charges with a political lesson that confirmed the core meaning of executive power.⁴⁵⁵ Acknowledging the soundness of the separation maxim, Madison admitted that such fears were based on a “political truth” of the highest “intrinsic value.”⁴⁵⁶ Had the Constitution permitted a complete mixing of the powers, it deserved repudiation. Fortunately, the Constitution’s opponents had misunderstood and misapplied the maxim. Montesquieu, the “oracle” who, if he was not the font of this maxim, had convinced mankind to embrace it,⁴⁵⁷ had decried the *complete* mixture of the powers.⁴⁵⁸ In other words, Montesquieu had denounced governments in which one entity could legislate and execute the laws, or execute and judge the laws, or legislate and judge the laws.⁴⁵⁹ Far from repudiating the maxim, the Constitution had adhered to it because no entity unilaterally could exercise two or more of the governmental powers.

Madison also confirmed how separation might serve to prevent tyranny. Should the legislature exceed its authority, “the success of the usurpation will depend [in part] on the executive and judiciary departments, which are to expound and give effect to the legislative acts.”⁴⁶⁰ James Iredell made the same point in relation to the executive. Even if the “representatives or senators could make corrupt laws, they can neither execute them themselves, nor appoint the executive” charged with executing the laws.⁴⁶¹ Madison and Iredell had captured the essence of Montesquieu’s maxim. When the three powers were in different hands, tyranny was less likely because each branch could check the others. In this case, the executive could temper the effects of tyrannical laws with mild execution.⁴⁶²

452. *Id.*

453. *Id.*

454. *See* 4 *id.* at 117 (Samuel Spencer claiming that the Senate had the “chief executive powers”).

455. *See* THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961).

456. *Id.*

457. *Id.*

458. *See id.* at 325–26.

459. Indeed, the very British Constitution that Montesquieu held up as a “mirror of political liberty” permitted an absolute veto in the executive’s hands and allowed the House of Lords to function as the court of last resort. *Id.* at 324. Moreover, Madison illustrated how state constitutions permitted a mixture of powers that was at variance with a strict separation. *See id.* at 326–30. William Davie, speaking at the North Carolina Convention, made the same points. Montesquieu’s maxim did not require an “absolute and complete” separation. Moreover, the English and the state experiences confirmed that such separation was “impossible.” 4 DEBATES, *supra* note 2, at 121.

460. THE FEDERALIST NO. 44, *supra* note 181, at 305.

461. 4 DEBATES, *supra* note 2, at 58–59.

462. Clearly, the division of the three powers made it less probable that *any* branch would act tyrannically. With the domineering state legislatures a recent memory, however, Madison and Iredell concentrated their fire against the legislative vortex.

While Madison and Iredell revealed how the Constitution cleaved to Montesquieu's maxim, others responded to the specific separation of powers complaints. Many defended the veto in a manner that assumed the chief executive's law enforcement role. Oliver Ellsworth, writing as "A Landholder," observed that "[i]f lawmakers in every instance, before their final decree, had the opinion of those who are to execute them, it would prevent a thousand absurd ordinances"⁴⁶³ Massachusetts Governor James Bowdoin likewise noted that the president's proposed "legislative power[]" served the same role it did for the Massachusetts and New York governors.⁴⁶⁴ In all three cases, the veto ensured an independent executive and "preserve[d] a uniformity in the laws which are committed to them to execute."⁴⁶⁵ The Anti-Federalist, "A Federal Republican," found common ground with these veto defenders. Absent a veto, Congress would know no bounds. Even armed with a veto, however, the president would be limited by the laws themselves. "[T]o execute [laws] when made, is limited by their existence."⁴⁶⁶

Hamilton's defense of the Senate's treaty role likewise confirmed the executive's quintessential function.⁴⁶⁷

The essence of the legislative authority is to enact laws, or, in other words to prescribe rules for the regulation of the society. While the execution of the laws and the employment of the common strength, either for this purpose or for the common defence, seem to comprise all the functions of the executive magistrate.⁴⁶⁸

Based on these conventional (if narrow) definitions, Hamilton claimed that because treaties relate "neither to the execution of the subsisting laws, nor to the enactment of new ones," the treaty power "[did] not seem strictly to fall within the definition" of either legislative or executive power.⁴⁶⁹

The charges and the rejoinders regarding the Constitution's separation of powers (or the supposed lack thereof) reveal a shared understanding of executive power. Whether criticizing the Constitution or celebrating it, commentators appreciated that the executive power was the power to execute the law.

463. FRIENDS OF THE CONSTITUTION: WRITINGS OF THE "OTHER" FEDERALISTS 1787-1788, at 302 (Colleen A. Sheehan & Gary L. McDowell eds., 1998) [hereinafter FRIENDS OF THE CONSTITUTION]; see also "Citizen of New Haven" in FRIENDS OF THE CONSTITUTION, *supra*, at 269 (remarking that "[t]he united wisdom and various interests of a nation should be combined in framing the laws. But the execution of them should not be in the whole legislature.").

464. 2 DEBATES, *supra* note 2, at 128.

465. 2 *id.*

466. 3 ANTI-FEDERALIST, *supra* note 3, at 83.

467. See generally THE FEDERALIST NOS. 75-77 (Alexander Hamilton).

468. THE FEDERALIST NO. 75, at 504 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

469. *Id.*

B. Executive Unity and Superintendence

The Philadelphia Convention chose a unitary executive to secure vigorous, uniform, and responsible administration of the laws.⁴⁷⁰ Delegates understood that a plural executive might result in “uncontrolled, continued and violent animosities” in the executive branch.⁴⁷¹ During the ratification struggles, many participants likewise understood the salutary consequences of a unitary executive. There would be no councils to hide behind; there would be no plural, divided executive that might lead to chaos. Instead, one responsible person would superintend the administration of federal law.

In *The Federalist No. 70*, Hamilton wrote of the necessity of an energetic, responsible, and unitary executive. “Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws.”⁴⁷² There were two ways of destroying executive unity: vest the executive authority in two or more hands, each with equal dignity, or vest the executive authority in one man subject to a council’s concurrence.⁴⁷³ In either case, dissension would enervate the executive branch and would “serve to embarrass and weaken the execution” of legislative measures.⁴⁷⁴ Hamilton also insisted that a unitary executive was a responsible executive. Multiple executives or a council with executive authority made it difficult to assign blame for poor decision making.⁴⁷⁵ Hence, Hamilton agreed with the “deep, solid and ingenious,”⁴⁷⁶ De Lolme: “the executive power is more easily confined when it is one.”⁴⁷⁷

Hamilton later confirmed an implication of a unitary executive: other executives were subordinate to the chief executive. Hamilton wrote that “[t]he administration of government” in “its most usual and perhaps in its most precise signification” lies “within the province of the executive department.”⁴⁷⁸ Conducting foreign negotiations, preparing budgets, disbursing funds in conformity with appropriations, and directing war efforts—these and other related matters of a like nature were executive functions.

470. As noted earlier, Wilson, Madison, and the Convention itself had indicated that law execution was a strictly executive power, whether exercised by one or many. See *supra* Part V.B.

471. 1 FEDERAL CONVENTION, *supra* note 93, at 96 (comments of James Wilson).

472. THE FEDERALIST NO. 70, *supra* note 75, at 471. Here, Hamilton seemed to crib from Madison. See THE FEDERALIST NO. 37, at 233 (James Madison) (Jacob E. Cooke ed., 1961) (“Energy in Government is essential to that security against external and internal danger, and to that prompt and salutary execution of the laws, which enter into the very definition of good Government.”).

473. THE FEDERALIST NO. 70, *supra* note 75, at 472.

474. *Id.* at 475.

475. *Id.* at 473–75.

476. *Id.* at 470 (quoting the “celebrated Junius”).

477. *Id.*

478. THE FEDERALIST NO. 72, *supra* note 76, at 486.

The persons therefore, to whose immediate management these different matters are committed, ought to be considered as the assistants or deputies of the chief magistrate; and, on this account, they ought to derive their offices from his appointment, at least from his nomination, and ought to be subject to his superintendence.⁴⁷⁹

Hence, Hamilton made clear that executive unity did not mean that there should be only one executive. Rather, a unitary executive necessarily relied on many inferior executives, all of them acting as the chief executive's agents.⁴⁸⁰

At the North Carolina Convention, William Maclaine confirmed Hamilton's claim that a unitary, responsible executive would direct the assistant executives. Some delegates feared that federal tax collectors would oppress North Carolinians and that impeachment would be the only means of redress. Maclaine responded that if the revenue officers oppressed, the people could look to the president for satisfaction.

The President is the superior officer, who is to see the laws put in execution. He is amenable for any maladministration in his office. Were it possible to suppose that the President should give wrong instructions to his deputies, whereby the citizens would be distressed, they would have redress in the ordinary courts of common law.⁴⁸¹

At the same convention, Iredell similarly attested to the president's preeminent enforcement role. "The office of superintending the execution of the laws of the Union is an office of the utmost importance."⁴⁸² Maclaine and Iredell recognized that the chief executive would control the law execution conducted by the subordinate executive officers. A

479. *Id.* at 486–87.

480. In *The Federalist No. 77*, Hamilton made his famous claim that one advantage of the Senate's role in appointments is that it would have a similar role in removals and thus "contribute to a stability of the administration." *Id.* at 515. There are two reasons for believing that Hamilton's statement was ill-considered. First, as noted above, in *The Federalist No. 77*, Hamilton affirmed that executive officers were to be "superintended" by the president because their statutory functions were constitutionally committed to the executive. They were to be his deputies and assistants. One can usually remove deputies/assistants without the leave of someone else. Second, in earlier *Papers*, Hamilton assumed that officers would be removed when the administration changed. Hamilton had observed that the executive's "[d]uration in office" affected "the stability of the system of administration which may have been adopted under his auspices." THE FEDERALIST NO. 71, *supra* note 185, at 431. Should the president be capable of serving more than one term, that would ensure "the advantage of permanency in a wise system of administration." THE FEDERALIST NO. 72, *supra* note 76, at 488. Absent such an ability, every new president would "promote a change of men" in the departments and thereby "occasion a disgraceful and ruinous mutability in the administration." *Id.* at 487. If, however, officers could remain in office after the election of a new president per *The Federalist No. 77* because the Senate chose not to remove them, the executive's term and re-eligibility would not have much impact on the stability of the administration. In other words, if officers could remain in office until they voluntarily retired or were removed by the joint action of the president and the Senate, stable administration would come from these officers regardless of the length of the president's tenure. Hamilton's earlier extensive comments about unstable administration arising from short terms of office are clearly in tension with his terse claim about removal. See RAKOVE, *supra* note 433, at 286 (labeling Hamilton's removal claim "puzzling").

481. 4 DEBATES, *supra* note 2, at 47.

482. 4 *id.* at 106.

unitary executive made the assignment of responsibility infinitely easier. All eyes would be drawn to the superintending chief magistrate.⁴⁸³

Even some Anti-Federalists recognized the advantages of executive unity. The Federal Farmer argued that history and reason had taught that lawmaking should be left to plural legislatures. Law execution, however, was best entrusted “to the direction and care of one man.”⁴⁸⁴ A single executive seemed “peculiarly well circumstanced to superintend the execution of laws with discernment and decision, with promptitude and uniformity.”⁴⁸⁵ Obviously, the chief executive could not ensure wise, prompt, and uniform law execution unless he could direct the law execution of subordinate executives.

As might be expected, not everyone lionized the unitary executive power. Although William Symmes admitted that “there must be an Executive Power, independent of the legislature,” he thought that such power properly belonged within an executive council.⁴⁸⁶ “The execution of the law requires as much prudence as any other department.”⁴⁸⁷ Yet the president “had no council or assistant, no restraint” in the use of his executive power.⁴⁸⁸ Clearly, there were some who had not learned the lessons of the past decade and who continued to insist that law execution authority ought to be vested in a plural executive.⁴⁸⁹

At least one former proponent of a plural executive, however, had a change of heart. On the road to Richmond from Philadelphia, Edmund Randolph apparently underwent a conversion. The Philadelphia delegate who had inveighed that the unitary executive was the “foetus of monarchy” and had said that he would oppose one “as long as he lived,”⁴⁹⁰ became one of the most unabashed Richmond supporters of a unitary federal executive. According to Randolph, no one could object that executive power would be executed by one man. In fact, “[a]ll the enlightened part of mankind agree that the superior despatch, secrecy,

483. A unitary executive would not only result in superior, responsible law execution, it could also yield better laws. According to Oliver Ellsworth, “[i]n the President, all the executive departments meet, and he will be a channel of communication between those who make and those who execute the laws.” “A Landholder,” Letter V, in *FRIENDS OF THE CONSTITUTION*, *supra* note 463, at 301–02. The unitary executive would serve this function because he was the supreme law enforcement official. See 3 *DOCUMENTARY HISTORY*, *supra* note 65, at 489 (the “supreme executive should be one person and unfettered, otherwise than by the laws he is to execute”); see also *FRIENDS OF THE CONSTITUTION*, *supra* note 463, at 405 (Noah Webster, “A Citizen of America,” claiming that the president was the “supreme executive” with power “to enforce the laws of the union”). Once again, the “supreme executive” executed the laws through the assistance of his deputy executives.

484. 2 *ANTI-FEDERALIST*, *supra* note 3, at 310.

485. 2 *id.*

486. 4 *id.* at 60.

487. *Id.*

488. *Id.*

489. See 3 *id.* at 82 (decrying that the “executive, as vested in the president is too pointedly supreme,” and insisting that it would have been better to have had a “sovereign executive council,” instead). *But see* 3 *id.* at 83 (praising the Constitution for ceding the executive a veto over the laws that it is to execute).

490. 1 *FEDERAL CONVENTION*, *supra* note 93, at 88.

and energy, with which one man can act, render it more politic to vest the power of executing the laws in one man, than in any number of men.”⁴⁹¹ Later, Randolph catalogued the president’s powers by beginning with the most obvious power: “What are his powers? To see the laws executed. Every executive in America has that power.”⁴⁹² Randolph knew something about executives because as governor of Virginia, he enjoyed the “executive powers of government.”⁴⁹³ Hence his two claims were hardly the products of ignorance. The first affirmed that the unitary executive debate principally concerned who would control law execution: a conflicted, feeble, plodding, and irresponsible executive council or a resolute, energetic, nimble, and responsible chief executive. Randolph’s second observation about American executives only buttressed that point. He might as well have said that around the world, every executive executed the law.

C. *Selection and Tenure of the Executive*

Because presidential selection and tenure were key issues in the constitution of the executive, these traits received their fair share of attention in the ratification debates. The president’s conduct as the chief law enforcement officer would be influenced by unique rules: each state legislature would decide how to select its presidential electors, the presidential term would be four years, and there would be no term limits.

Various individuals believed that the presidential selection process (as they understood it) would benefit law execution. Federalist Noah Webster asserted that popular, annual elections yielded “a negligent, partial, corrupt administration” and a “lax execution of the laws.”⁴⁹⁴ In free societies, “where laws govern and not men, the supreme magistrate should have it in his power to execute any law, however unpopular, without hazarding his person or office.”⁴⁹⁵ Fortunately, the supreme magistrate had such latitude by virtue of his appointment and tenure.⁴⁹⁶ At the South Carolina convention, Pinckney claimed that because the people would elect the “first magistrate,” the executive department would be infused with “that degree of vigor which will enable the President to execute the laws with energy and despatch.”⁴⁹⁷ William Davie, at the North

491. 3 DEBATES, *supra* note 2, at 201.

492. *Id.* Recall that Governor Bowdoin of Massachusetts observed that the “executive powers of the President are very similar to those of the several states” and that executives execute the law. 2 *id.* at 128. Earlier, Bowdoin observed that executives execute the law. *Id.*; *cf.* 2 *id.* at 349 (Hamilton in the New York Convention observing that all governments had the powers of purse and sword and rhetorically asking “does not your executive execute the laws without restraint”).

493. VA. CONST. of 1776.

494. FRIENDS OF THE CONSTITUTION, *supra* note 463, at 380.

495. *Id.*

496. *Id.* at 380, 405; *see also id.* at 405 (observing that the supreme executive was “invested with power to enforce the laws of the union”).

497. 4 DEBATES, *supra* note 2, at 329.

Carolina convention, sought to assuage those who feared consolidation. Even if federal legislators were the “most vicious demons that ever existed,” and plotted against the liberties of America and conspired against its happiness,

all their machinations will not avail if not put in execution. By whom are their laws and projects to be executed? By the President. How is he created? By electors appointed by the people under the direction of the legislatures—by a union of the interest of the people and the state governments. The state governments can put a veto, at any time, on the general government, by ceasing to continue the executive power.⁴⁹⁸

Davie stressed the importance of selecting the executive by rhetorically asking “[i]s not this government a nerveless mass, a dead carcass [sic], without the executive power?”⁴⁹⁹

Discussions of presidential term and term limits also confirmed the president’s law execution role. The Federal Farmer preferred a single seven-year term to the Constitution’s provisions. “On the one hand the first executive magistrate ought to remain in office so long as to avoid instability in the execution of the laws; on the other, not so long as to enable him to take any measures to establish himself.”⁵⁰⁰ Others preferred the possibility of recurring terms. Though Hamilton had once sought presidential tenure during “good behavior,”⁵⁰¹ he, nonetheless, praised the Constitution as conducive to “the personal firmness of the Executive Magistrate . . . and to the stability of the system of administration.”⁵⁰² Because there were no term limits, a chief executive could secure “the advantage of permanency in a wise system of administration.”⁵⁰³ The Anti-Federalist who wrote *Essays by a Farmer* agreed with Hamilton’s conclusion that law execution benefited from a longer tenure. “If the ex-

498. 4 *id.* at 58; *see also* 2 *id.* at 353 (“The Union is dependent on the will of the state governments for its chief magistrate”). In *The Federalist No. 39*, Madison made a similar point. “The executive power will be derived from a very compound source. The immediate election of the President is to be made by the States in their political characters.” THE FEDERALIST NO. 39, at 255 (James Madison) (Jacob E. Cooke ed., 1961). Madison went on to note that the overall selection of the president has national and federal features. *Id.* Of course, Madison had already made clear that he understood that the executive power consists of the power to execute the law. *See* 2 FEDERAL CONVENTION, *supra* note 93, at 34 (noting that executive power is the power to execute the laws); *see also* THE FEDERALIST NO. 47, *supra* note 455, at 325 (quoting Montesquieu).

499. 4 DEBATES, *supra* note 2, at 58.

500. *See* 2 ANTI-FEDERALIST, *supra* note 3, at 312. Others who had previously advocated term limits had a change of heart. The North Carolina delegates to the Philadelphia Convention had sought to limit the president to a single term. 4 DEBATES, *supra* note 2, at 103. Returning the president and other executive officers “into the common mass of the people” would ensure that “they would feel the tone they had given to the administration of the laws [which] was the best security the public had for their good behavior.” *See id.* After considering opposing arguments, however, one delegate endorsed the lack of term limits. 4 *id.* at 104 (comments of Richard Spaight).

501. *See* 1 FEDERAL CONVENTION, *supra* note 93, at 291 n.7, 292.

502. THE FEDERALIST NO. 71, *supra* note 185, at 481.

503. THE FEDERALIST NO. 72, *supra* note 76, at 488; *see also id.* at 439 (term limits would destabilize the administration).

ecutive is changeable, he can never oppose large decided majorities of influential individuals—or enforce on those powerful men . . . *the rigor of equal law, which is the grand and only object of human society.*⁵⁰⁴ Apparently, he regarded the executive as a check on the elites. “[A] *properly constituted and independent executive*,—a vindex injuriarum—an avenger of public wrongs . . . [could] enforce the rigor of equal law on those who are otherwise above fear of punishment.”⁵⁰⁵

During the ratification debates, the Constitution’s advocates (and even some opponents) understood that the choices made at Philadelphia facilitated an energetic and stable administration of the laws. Because the president would not be subject to congressional appointment in the normal course, he would be less likely to be a legislative tool. Inasmuch as the president would not face annual election, he would not need to continually glance over his shoulder as he executed the law. Finally, since the president could serve multiple terms, the president could ensure a stable administration of the laws.

D. *Lessons from the Ratification Struggle*

We have explored several issues. Across each issue—separation of powers, unity, selection, and tenure—numerous individuals confirmed that the executive power was the authority to execute the laws, that the president could execute the law, and that the president would superintend the law execution of others. Yet presenting the material thematically may have obscured other aspects of the consensus. First, the common meaning of executive power was affirmed in various fora: state conventions, pamphlets, and newspapers. Whenever people spoke of the president’s executive power, they were all on the same page. Second, the common meaning of executive power was affirmed by supporters and opponents of the Constitution across the states. Federalists and Anti-Federalists, northerners and southerners, all understood the president’s control of law execution. Given that the executive power had a well-known meaning and that virtually everyone agreed that the executive power was necessary, the Constitution’s adversaries attacked the secondary features of the presidential power.⁵⁰⁶

In the teeth of abundant testimonials confirming that the president could execute the law himself⁵⁰⁷ and control the law execution of others⁵⁰⁸

504. 5 ANTI-FEDERALIST, *supra* note 3, at 42.

505. 5 *id.* at 21.

506. Indeed, the Constitution’s opponents had plenty to criticize without indicting the executive power to execute the law. They complained about the president’s veto authority as blending the executive and legislative powers. Or they criticized the lack of a proper executive council.

507. See *supra* notes 309, 311, 322, 325, 329, 347, 350, 354 and accompanying text (explaining that the president would enforce the law).

508. See *supra* notes 338, 339, 341, 344, 346 and accompanying text (explaining that the president would direct execution of others).

from the likes of Madison, Governors Bowdoin and Randolph, and many others, no one seems to have contradicted these vital understandings. In particular, no one apparently denied that the executive power included the power to enforce the law. Nor did anyone claim that the president would not superintend law enforcement or could not execute the law himself as the non-executive thesis suggests. Moreover, no one suggested the president would have some distant or marginal tie to law execution whereby he would be limited to influencing the law execution of others; as far as the Constitution was concerned, he would be the *vindex injuriarum*—the avenger of public wrongs. Finally, the president's executive power was not understood to be defeasible; the Constitution would infeasibly vest it with him.

This strong consensus is unsurprising. The executive power simply had a well-understood core meaning as reflected in the writings of Locke, Montesquieu, and Blackstone. This definition had been confirmed by American writers, by words and deeds at the state and national level, and by the Philadelphia Convention. To have denied the chief executive's law execution function would have invited ridicule. One might as well have doubted that Congress would legislate or denied that the judiciary would adjudicate. Just as important, most participants in the ratification struggle understood that an executive power was absolutely necessary. At the Pennsylvania ratifying convention, James Wilson claimed that the government must enjoy all three powers "[f]or what purpose give the power to make laws, unless they are to be executed? and if they are to be executed, the executive and judicial powers will necessarily be engaged in the business."⁵⁰⁹ Likewise, "A Jerseyman" thought it bizarre that some opposed an independent executive. It would be "highly ridiculous to send representatives . . . to make laws for us, if we did not give power to some person or persons to see them duly executed."⁵¹⁰ Without an executive power, the government was a corpse, its laws were dead letters, and the legislature and the judiciary mere pageantry.

VII. THE EXECUTIVE POWER IN THE NEW REPUBLIC

Ratification hardly ushered in a brave new world full of fresh conceptions of the executive power and novel notions of the president's law execution role. To be sure, the Constitution marked a radical departure from the Articles of Confederation because the country finally had a true national government, one with independent executive and judicial branches. Notwithstanding the new regime, however, people did not abandon the accepted understanding of the executive power. Just as be-

509. 2 DEBATES, *supra* note 2, at 461; *see also 2 id.* at 469 ("[T]he executive and judicial departments ought to have power commensurate to the extent of the laws; for, as I have already asked, are we to give power to make laws, and no power to carry them into effect?" (Wilson making same point again)).

510. 3 DOCUMENTARY HISTORY, *supra* note 65, at 149.

fore, the executive power was essentially the power to execute the laws. Likewise, people affirmed, in theory and in practice, that the president would superintend law execution. Bedrock conceptions and meanings did not erode away overnight.

What follows is a sketch of the views of some prominent governmental officials in the early post-ratification period.⁵¹¹ In particular, the part explores the views of President Washington, Treasury Secretary Hamilton, Representative Madison, and Justice Wilson. These statesmen unquestionably played pivotal roles in the Constitution's founding and in the new government itself. As we shall see, founding fathers across all three branches recognized the core meaning of executive power and the president's power to execute the laws.

A. *President George Washington*

Although this article is hardly the proper forum for an exhaustive examination of the Washington administration, a brief discussion of how the first chief executive understood his relation to law execution is altogether fitting. If the essential meaning of executive power was so well-understood, surely the president's actions must have reflected that shared meaning.⁵¹²

Washington understood the consequences of his executive power and thus, from the very beginning of his administration, recognized that he was constitutionally in charge of law execution. Within a month of his inauguration, but before Congress had established new departments, Washington laid out his view of the president's relationship to his departmental officers: "The impossibility that one man should be able to perform all the great business of the State, I take to have been the reason for instituting the great Departments, and appointing officers therein, to assist the supreme Magistrate in discharging the duties of his trust."⁵¹³ In other words, if he could execute all the laws himself, there would be no need for departments and officers. Given the impossibility of such a task, executive institutions existed to assist him in discharging his constitutional duties and in exercising his constitutional prerogatives.

Understandably, Washington dominated law execution. Having experienced the problems of weak and sluggish execution while he was

511. The aim of this Part is not to record the definitive account of the federal executive's law enforcement role in the early days of the nation. Rather, it merely furnishes the reader a level of comfort.

512. Others have examined law execution during the Washington years and I borrow from their illuminating treatments. In particular, I rely upon the historical research of James Hart, Forrest McDonald, Glenn Phelps, and Leonard White. See generally FORREST McDONALD, *THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY* (1994) [hereinafter *McDONALD, THE AMERICAN PRESIDENCY*]; FORREST McDONALD, *THE PRESIDENCY OF GEORGE WASHINGTON* (1974) [hereinafter *McDONALD, PRESIDENCY OF GEORGE WASHINGTON*]; GLENN A. PHELPS, *GEORGE WASHINGTON AND AMERICAN CONSTITUTIONALISM* (1993); LEONARD D. WHITE, *THE FEDERALISTS* (1948).

513. 30 WRITINGS OF GEORGE WASHINGTON, *supra* note 79, at 334.

commander-in-chief of the Continental army, Washington sought vigorous and efficient law execution. He admonished his department heads to “deliberate maturely, but to execute promptly and vigorously. . . . Without an adherence to these rules, business never will be *well* done, or done in an easy manner”⁵¹⁴ Such presidential direction was typical.⁵¹⁵ Indeed, Washington was intimately involved in departmental matters, communicating frequently with his department heads.⁵¹⁶ On occasion, he would breakfast with Jefferson, Hamilton, and others. Other times, he proceeded to their offices to discuss matters with them.⁵¹⁷ Leonard White, perhaps the most thorough chronicler of Washington’s administration, declared that “[a]ll major decisions in matters of administration . . . were made by the President”⁵¹⁸ and Washington accepted full responsibility for all of them. After all, the departments and their officers were nothing but “dependent agencies of the Chief Executive.”⁵¹⁹ Likewise, Glenn Phelps, who canvassed Washington’s constitutional views, observed that “Washington’s presidency reflected a concern for administrative centralization. There would be no divided responsibility or ambiguity as to who was the chief executive.”⁵²⁰

We ought not be surprised by Washington’s views regarding the chief executive. During the Continental Congress’s impotent administration, Washington had argued for strong, independent executives.⁵²¹ He was also known to be an influential, albeit largely silent, Philadelphia delegate in favor of a strong executive.⁵²² Once Washington assumed office, he acted

514. 30 *id.* at 146.

515. Another example of Washington’s assertion of control over the executive departments: a mere month and a half after his inauguration, the president wrote to the Board of Treasury and the acting secretaries of War and Foreign Affairs, ordering each of them to supply him “an acquaintance with the real situation of the several great Departments, at the period of my acceding to the administration of the general Government.” 30 *id.* at 344. Accordingly, he demanded a “full, precise, and distinct *general idea* of the affairs of the United States, so far as they are comprehended in or connected with” a particular department. *Id.* Washington sent a similar letter to the postmaster general. 30 *id.* at 344 n.30.

516. WHITE, *supra* note 512, at 32.

517. *See id.* Nor were Washington’s discussions and opinion requests limited to the department heads’ statutory responsibilities as the Opinions Clause suggests. Instead, Washington consulted his subordinates on all matters. *See id.* at 56, 59, 142; *see also* PHELPS, *supra* note 512, at 162.

518. WHITE, *supra* note 512, at 27.

519. *Id.*

520. PHELPS, *supra* note 512, at 145. Though Washington personally executed many laws, when statutes explicitly called for presidential decision or action he apparently never made a decision or took an action statutorily confided in a subordinate officer. Notwithstanding this lack of evidence, I do not believe it reflects poorly on the claim that the president can personally execute any federal law. Such was Washington’s control over his subordinates that there was never any need to make a decision or take an action himself. He could (and did) instruct his assistants to take the course of action he thought most appropriate and he could be confident that his orders would be carried out. Presidential execution, while theoretically important, is only practically important in limited situations. Where the statutorily authorized official is somehow incapable or unable to make a decision, presidential execution would be useful. Alternatively, when an executive officer is unwilling or refuses to follow the president’s instructions and the president does not wish to remove, presidential execution is another means of achieving the president’s goals.

521. *See id.*

522. *See id.* at 103.

consistent with his prior beliefs and consistent with the Constitution's allocation of the executive power. Washington clearly recognized that he had the power to control law execution. Indeed, Washington's repeated references to the Faithful Execution Clause⁵²³ confirm that he understood that he controlled law execution.⁵²⁴

B. *Treasury Secretary Alexander Hamilton*

Recall that during the Philadelphia Convention, delegate Hamilton had proposed the creation of a "[S]upreme Executive" with the power of "execution of all laws passed."⁵²⁵ During the ratification fight, pamphleteer Hamilton had observed that the president would superintend those statutorily created to prepare the plans of finance and to disburse appropriations.⁵²⁶ "Publius" also had declared that the "execution of the laws and the employment of the common strength, either for this purpose or for the common defence, seem to comprise all the functions of the executive magistrate."⁵²⁷ Hamilton understood the natural province of the chief executive.

Nothing Treasury Secretary Hamilton did or said during the Washington administration contradicted his prior conception of the executive. As a deputy of the chief executive, Hamilton understood that he worked for the president.⁵²⁸ According to White, like all department heads, Hamilton never "settled any matter of importance without consulting the President and securing his approval."⁵²⁹ Forrest McDonald confirmed the same: "in administrative matters that were clearly executive such as the short-range borrowing and disbursal of funds . . . Hamilton continued to report directly as a subordinate and to act only upon orders from" the

523. See *supra* Part II.B.

524. McDonald claims that Washington understood "that executive authority was solely the [P]resident's, that the Senate had no share in it beyond that of approving or rejecting his appointments and treaties, and that department heads were responsible directly to him." MCDONALD, *PRESIDENCY OF GEORGE WASHINGTON*, *supra* note 512, at 39.

While vigorously pressing his view of the executive power, Washington consistently strove to stay within the Constitution's confines. Phelps notes that Washington withdrew William Patterson's nomination to the Supreme Court when Washington learned that confirmation of Patterson would violate the Constitution's Emoluments Clause. See PHELPS, *supra* note 512, at 137–38. Phelps maintains that the withdrawal was part of a principled strategy of strengthening the presidency by an "appropriate (and highly visible) deference to the Constitution." *Id.* at 138. Indeed, Washington was acutely aware that the precedents established in the beginning would influence posterity. Accordingly, he "devoutly wished" that "these precedents may be fixed on true principles." See 12 *THE PAPERS OF JAMES MADISON* 132 (Charles F. Hobson & Robert A. Rutland eds., 1979); see also PHELPS, *supra* note 512, at 122.

525. 1 *FEDERAL CONVENTION*, *supra* note 93, at 292.

526. See *THE FEDERALIST NO. 72*, *supra* note 76, at 487.

527. *THE FEDERALIST NO. 75*, *supra* note 468, at 504.

528. See MCDONALD, *PRESIDENCY OF GEORGE WASHINGTON*, *supra* note 512, at 40; PHELPS, *supra* note 512, at 184.

529. WHITE, *supra* note 512, at 27.

supreme executive.⁵³⁰ Nor was Washington particularly shy about directing his Treasury deputy. The chief executive regularly conveyed his approval or disapproval of Hamilton's plans or actions. For instance, he advised Hamilton on the structure of an agency that would collect revenue.⁵³¹ Moreover, Hamilton's famous opinion on the Bank of the United States was written in response to an "order" from Washington.⁵³²

Likewise Hamilton's writings largely confirmed his earlier understanding of executive power. In his famous defense of Washington's Neutrality Proclamation, "Pacifcus" observed that "the *executive power* of the nation is vested in the president; subject only to *exceptions* and *qualifications* which are expressed in the instrument."⁵³³ Vested with this power, the president was "charged with the execution of the laws, of which treaties form a part."⁵³⁴ If treaties had not abrogated the laws of neutrality, it was the executive's "province and its duty to enforce the laws incident" to neutrality because "[t]he executive is charged with the execution of all laws, the laws of nations as well as the municipal law, by which the former are recognized and adopted."⁵³⁵ Even opponents of the Proclamation "will readily admit, that it is the right and duty of the executive to interpret those articles of our treaties which give to France particular privileges, in order to the enforcement of them."⁵³⁶

Even if one objected to his Executive Power Clause argument, Hamilton had a backup: The Faithful Execution Clause. By virtue of that clause, "[t]he President is the Constitutional Executor of the laws. Our treaties, and the laws 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 mean-

530. McDONALD, *PRESIDENCY OF GEORGE WASHINGTON*, *supra* note 512, at 65. There is one wrinkle that needs further exploration. Congress often sought Hamilton's opinion on various finance matters. In providing these opinions, Hamilton exercised a degree of independence that he lacked when merely executing tax and spending laws. Hamilton's independence in these information requests has little bearing on the chief executive thesis. For the most part, Hamilton was not "executing" the law when he complied with these requests; hence, the president could not invoke his executive power as the basis for controlling Hamilton. As mentioned earlier, the chief executive thesis does not make the department heads the playthings of the chief executive. Rather, the department heads are only subordinate insofar as they are executing the law. *See supra* Part II.D.

Despite this possible difference between law execution and information submission, Washington disliked it when Congress requested information/opinions from his department heads. He viewed such requests as interference with the executive branch. As a matter of constitutional policy, perhaps it is problematic when the chief executive's instruments are made to provide information and opinions to Congress that might hinder the chief executive's agenda. Perhaps Congress should seek information elsewhere and not meddle with the executive's branch. As a matter of constitutional law, however, perhaps Congress may seek the independent opinions of the executive branch.

531. WHITE, *supra* note 512, at 33. Washington informed his Treasury secretary that "[t]he appointment of that gentleman to negotiate the Loans in Holland, and the Instructions you have given for his government, meet my approbation." 31 WRITINGS OF GEORGE WASHINGTON, *supra* note 79, at 118.

532. Alexander Hamilton, *Opinion on the Constitutionality of an Act To Establish a Bank*, in PAUL BREST & SANFORD LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 14 (3d ed. 1983).

533. 4 WORKS OF ALEXANDER HAMILTON, *supra* note 58, at 439.

534. 4 *id.* at 437.

535. 4 *id.* at 440.

536. 4 *id.* at 441.

ing.”⁵³⁷ Having judged that the treaties were not incompatible with neutrality, “it was his duty as executor of the laws, to proclaim neutrality” and to warn of the penalties that would attach for its violation.⁵³⁸ Once again, no one could object to this argument because all readily admit the natural role of the executive.

During the Whiskey Rebellion, Hamilton once again defended the chief executive. Writing as “Tully,” he backed Washington’s deployment of the militia to suppress the insurgents. Addressing his fellow Americans, Tully observed that

[y]ou are told that it will be intemperate to urge the execution of the [excise] laws which are resisted. What? Will it be indeed intemperate in your Chief Magistrate, sworn to maintain the Constitution, charged faithfully to execute the laws, and authorized to employ for that purpose force, when the ordinary means fail?⁵³⁹

The answer to Hamilton’s rhetorical question was obvious. In good conscience, Washington could do nothing less than execute the laws.⁵⁴⁰

These practices and pamphlets certify that Hamilton understood his place in the executive pecking order. He was not some executive free agent. Though the Treasury statute conferred many duties on Hamilton and did not explicitly subordinate him to the president, Hamilton fulfilled his functions as the assistant of Washington, the “Constitutional Executor” of the laws. Hamilton did not wield the executive power; Washington did.

C. Representative James Madison

During two controversial episodes in the Washington years—the 1789 removal debate and the Neutrality Proclamation—Madison faithfully clung to his ordinary (if narrow) conception of the executive power. He did not permit his legislative role to cloud his vision of an executive empowered to superintend law execution. Nor did he allow his sharp critique of the Proclamation to obscure the Chief Executive’s essential role. Law execution was still the power that the executive naturally must enjoy.

In the celebrated removal debate of 1789, some representatives asserted that the president lacked a constitutional power to remove executive officers.⁵⁴¹ Madison disagreed. In at least two places, the Constitu-

537. 4 *id.* at 444.

538. *Id.*

539. 6 *id.* at 421–22.

540. *Id.* Elsewhere, Hamilton recounted the chief executive’s direction of all executive and officers to enforce federal law. See, e.g., *Report on Opposition to Internal Duties*, in 6 *id.* at 358, 371 (listing Washington’s orders to all officers to execute the law and to commence prosecutions of law breakers).

541. In these debates, opponents of the chief executive thesis will find individuals in Congress who disparage the import of the executive power while they denied that the president had (or should have) the power to remove executive officers. But there are reasons for doubting their arguments and motives. First, these arguments stick out like a sore thumb, having little basis in political theory of the era or in the

tion dictated that “the first Magistrate should be responsible for the Executive department”⁵⁴² and enjoy the removal power. First, the Executive Power Clause ceded the entire executive power. Though Article II contained exceptions to the exclusive grant, such as the Senate’s appointment role, the Congress had no right to extend those exceptions.

If the Constitution has invested all Executive power in the President, I venture to assert that the Legislature has no right to diminish or modify his Executive authority. The question now resolves itself into this, Is the power of displacing, an Executive power? I conceive that if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.⁵⁴³

Second, the Faithful Execution Clause buttressed Madison’s conclusion about the executive’s control of the executive department. “If the duty to see the laws faithfully executed be required at the hands of the Executive Magistrate,” it must have been intended that he would have the power to accomplish this end.⁵⁴⁴ In other words, this duty had corollary implications for presidential power.

The nature, purpose, and position of the executive officers also indicated the propriety of presidential control and removal. Executive officers existed to execute the laws and “to aid [the president] in the administration of his department.”⁵⁴⁵ Those who “are over such officers naturally possess the Executive power.”⁵⁴⁶ Removal authority ensured that these officers would “conform to the judgment of the President” in carrying out their duties and that such officers were “responsible to the great Executive power.”⁵⁴⁷ Thus, “those who are employed in the execution of the law will be in their proper situation, and the chain of dependence will be preserved.”⁵⁴⁸ All officers “will depend, as they ought, on the President, and the President on the community.”⁵⁴⁹

By contrast, a Senate removal role would transform the executive into a “two-headed monster.”⁵⁵⁰ Officers could entrench themselves by

history of the nation leading up to the ratification of the Constitution. This Article recounted that history in detail and there is no basis for the claim that the executive power is not quintessentially about law execution. Second, members of Congress had institutional reasons for attempting to weaken an institutional rival (the president). To the extent that the president’s control of his branch was weakened, Congress would wield more influence over law execution. Third, the “feeble executive” faction in Congress simply did not understand that the Constitution had not copied the executive-as-cipher models of the state constitutions.

542. 1 ANNALS OF CONG. 462 (Gales & Seaton eds., 1789).

543. 1 *id.* at 463. Later Madison reiterated his claim: “if anything is in its nature executive, it must be that power which is employed in superintending and seeing that the laws are faithfully executed.” 1 *id.* at 500.

544. 1 *id.* at 496.

545. 1 *id.* at 379.

546. 1 *id.* at 500.

547. 1 *id.* at 394.

548. 1 *id.* at 499.

549. *Id.*

550. 1 *id.* at 519.

-serving the Senate's interests rather than satisfying the executive, "which is constitutionally authorized to inspect and control" their conduct.⁵⁵¹ As a result, the president would be reduced to "a mere vapor" and the executive officers and the Senate would assume the executive power.⁵⁵² Likewise, if the executive enjoyed the power to remove subject to the whim of Congress, that doctrine would set "the Legislature at the head of the Executive branch."⁵⁵³ Rather than the president directing his branch, Congress could parcel out the executive power to executive officers by providing that the president could not remove certain officers. Then the officers "who are to aid him in the duties of that department" would not be responsible to him.⁵⁵⁴ Either construction would give credence to complaints that the Constitution had failed to adequately separate powers⁵⁵⁵ and violate the Constitution's implicit bar against uniting any two of the three fundamental powers of government.⁵⁵⁶

Although they adopted a crabbed view of executive power, Madison's *Letters of Helvidius* were of a piece with his earlier claims about the natural province of the executive and the essential meaning of the executive power. Though Madison criticized Hamilton's arguments regarding presidential foreign affairs powers and the legality of the Neutrality Proclamation, the erstwhile allies agreed on the natural role of the executive. Whatever else one might say about the executive, he was to execute the laws.

Hoping to convince readers that the executive lacked the authority to issue the Neutrality Proclamation, Madison attacked Hamilton's claim that the treaty-making and war powers were exceptions to the general vesting of executive power found in the Executive Power Clause. Madison contrasted the powers to make treaties and to declare war with the executive's core function and thereby sought to highlight the folly of Pacificus's position. "The 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."⁵⁵⁷ Treaty-making hardly involved law execution, however. "[O]n the contrary [a treaty is itself a law] to be carried into execution, like all

551. 4 DEBATES, *supra* note 2, at 355.

552. 1 ANNALS OF CONG. 463.

553. 1 *id.* at 547.

554. 4 DEBATES, *supra* note 2, at 355.

555. 1 ANNALS OF CONG. at 380.

556. 1 *id.* at 495-96. Madison's view prevailed, as the organic statutes assumed that the Constitution vested removal authority with the president. Most members of Congress recognized that forbidding removal effectively would preclude presidential control of law execution and destroy presidential accountability for that task. At the same time, there may not have been a majority for the proposition that the president had removal authority by virtue of the Constitution itself. And there were others who seemed to believe that Congress could make independent executive officers. Fortunately, these representatives lost. For a discussion of the removal debate, see THACH, *supra* note 90, ch. VI.

557. Helvidius, NO. I, *available at* http://press-pubs.uchicago.edu/founders/documents/a2_2_2-3515.html (last visited Apr. 2, 2003).

other laws, by the executive magistrate.”⁵⁵⁸ Indeed, it would be an absurd theory and a practical tyranny if the executive could make treaties alone because the executive would possess the legislative and the executive powers.⁵⁵⁹ Likewise, declarations of war did not involve law execution.

Regarding the Executive Power Clause itself, Madison never denied that the clause vested authority. To have done so would have been to repudiate his arguments during the ratification and removal debates. Instead, Madison dismissed Hamilton’s claim that making treaties and declaring war were akin to the removal authority adjudged to be part of the president’s executive power. “Nothing can in truth be clearer, than that no analogy, or shade of analogy, can be traced between a power in the supreme officer responsible for the faithful execution of the laws, to displace a subaltern officer employed in the execution of the laws” and the powers to make treaties and war.⁵⁶⁰ Nor were the treaty and the war powers derivable from the Faithful Execution Clause. “To see the laws faithfully executed constitutes the essence of the executive authority.”⁵⁶¹ Yet making treaties and declaring war had little to do with law execution. According to Madison, these powers were legislative in nature because they determined “what the laws shall be with regard to other nations.”⁵⁶² Helvidius’s arguments made good rhetorical sense because everyone understood the fundamental calling of the executive and he could wield that shared meaning as a club against a broader vision embraced by Hamilton.⁵⁶³

Madison stayed ever faithful to his view that the executive power was the power to execute the law. At the Philadelphia Convention, he had declared that the powers of the executive consisted of law execution and appointments. In Congress, he emphatically defended constitutional removal authority because he thought if any power was executive, it was the power to control law execution. Finally, in the Pacificus-Helvidius debates, Madison once again declared that the essence of executive authority was to execute the laws.

558. *Id.* at 145.

559. *Id.*

560. *Id.* at 149–50.

561. *Id.*

562. *Id.* at 149. In response to Hamilton’s claim that the president was charged with executing the law of nations to preserve peace, Madison exalted the president’s law execution duty above the duty to preserve peace. No. II, *in 6 id.* at 159–60. The executive was “bound to the faithful execution of these [treaties] as of all other laws internal and external, by the nature of its trust and the sanction of its oath” even if war resulted. *Id.* at 159. Finally, Madison agreed with Hamilton’s claim that the executive must judge and interpret the privileges found in treaties “in order to the enforcement of those privileges.” No. III, *in 6 id.* at 161. But when the executive judged whether there was a cause of war as a result of a breach of a treaty, the executive crossed the line from executing the treaty into usurping the congressional role in declaring war. *Id.*

563. For an argument that Helvidius adopted too narrow a view of executive power over foreign affairs, see Prakash & Ramsey, *supra* note 5, at 334–39 (criticizing Helvidius’s position).

D. Supreme Court Justice James Wilson

During the Washington administration, Wilson became a Supreme Court associate justice. In 1790, he became a law professor at College of Philadelphia, the first law professor appointed in the new Republic.⁵⁶⁴ As a law professor, Wilson wrote (and largely delivered) his *Lectures on Law* and thus became the only framer to “essay a general theory of government and law.”⁵⁶⁵ In these lectures, he affirmed that the executive power is the power to execute the law.

He began his lecture “Of Government” by attesting that the “powers of government are usually, and with propriety, arranged under three great divisions, the legislative authority, the executive authority, and the judicial authority.”⁵⁶⁶ Wilson decried the aversion and distrust that distorted the people’s view of the executive and the judicial authorities. When such powers were derived from England, it was natural that Americans would prefer the popular assemblies chosen by Americans.⁵⁶⁷ However, the executive and judicial powers now came from the same source, were animated by the same principles, and pursued the same ends: “They who execute, and they who administer the laws, are as much” the “servants” and “friends” of the people as those who legislate.⁵⁶⁸ Indeed, “the execution of the law and the administration of justice under the law” are “necessarily connected” to the happiness and prosperity of the people.⁵⁶⁹

Wilson also parroted Montesquieu’s maxim.⁵⁷⁰ If the executive and legislative powers were united, the wielder of both powers would enact tyrannical laws and execute them tyrannically.⁵⁷¹ If the executive and judicial powers were united, “[t]he laws might be eluded or perverted; and the execution of them might become . . . an engine of tyranny and injustice.”⁵⁷² The legislature would be powerless because neither the executive nor the judiciary would heed any new laws designed to correct the mischief. After all, the executive and the judiciary were responsible for the unfaithful or tyrannical execution in the first instance.⁵⁷³

In his chapter on executive power, Wilson repeatedly referenced the executive’s law execution power. The first “power and duty” that Wilson mentioned was the president’s faithful execution duty. He also observed that in the Saxon government, the first executive magistrate

564. CHARLES PAGE SMITH, *JAMES WILSON* 309 (1956).

565. 1 *THE WORKS OF JAMES WILSON*, *supra* note 152, at 45.

566. 1 *id.* at 290.

567. 1 *id.* at 292–93.

568. 1 *id.* at 293.

569. *Id.*

570. Wilson even cites the same two examples provided by Montesquieu as demonstrating the problems that stem from combining the two powers of government. *Id.*

571. *See* 1 *id.* at 298.

572. *Id.*

573. *See id.*

“had authority, not to make, or alter, or dispense with the laws, but to execute and act [upon] the laws, which were established.”⁵⁷⁴ Furthermore, Wilson argued that deterrence of criminals would arise from “vigilance and activity in the executive officers of justice” and “by an undeviating and inflexible strictness in carrying the laws against [criminals] into sure and full execution.”⁵⁷⁵

In his *Lectures on Law*, Wilson uttered rather conventional understandings. Indeed, he merely confirmed what he had said as a framer and a ratifier: law execution was a “strictly executive” function that must be given to the executive.

E. The Originalist Foundations of the Chief Executive Thesis

At the end of a long argument, a recapitulation seems appropriate. Better than its rivals, the chief executive thesis makes sense of the constitutional text and structure. The chief executive thesis contends that the Executive Power Clause vests a distinct power rather than merely reiterating, for the third or fourth time, the creation of a single “President.” That is, after all, the way the clause actually reads. Moreover, unlike the other theories, the chief executive thesis makes sense of *all* constitutional text relevant to the control of federal law execution. While alternative theories having nothing to say about the implications of the Militia or Oaths Clauses, the chief executive thesis makes these and other relevant clauses fit within an overall theory of presidential law execution.

Once one moves from the text to history, the chief executive thesis is the only one that is consistent with the evidence. Political theorists who established separation maxims that still resonate today defined executive power as the power to execute the law. Americans adopted the same definitions and accepted these maxims, often criticizing plans of government that mixed the executive and legislative powers. Lessons from the state and national experiences laid the groundwork for the creation of a responsible, efficient, and powerful federal executive who could execute the laws himself and superintend the law execution of others.

The debates of the Philadelphia Convention confirm the conventional meaning of executive power. Every plan contemplated a law enforcement executive. Moreover, across many issues, including executive unity and the veto, delegates discussed the executive’s natural law execution role. At the end of the long summer, the delegates successfully created a unitary, independent executive power authorized to execute the laws. When it came time to decide whether the Constitution would be made supreme law, dozens of individuals during the ratification fight confirmed that the Constitution authorized presidential law execution

574. 1 *id.* at 440.

575. 2 *id.* at 441.

and presidential control of law execution. These aspects of the president's executive power were once again discussed in the context of many different executive issues, including the separation of powers, presidential selection and tenure, and executive unity. Furthermore, both Federalists and Anti-Federalists agreed that the Constitution would establish the two elements of the chief executive thesis. Finally, during the Washington administration, prominent officials across all three branches recognized the president's role as chief law enforcement executive.

In contrast, the alternatives to the chief executive thesis have severe difficulties with the historical record. Notably missing is any eighteenth-century evidence of a contrary understanding of executive power. Executive power was not an empty phrase that could be used to describe whatever authority an "executive" might be granted by a constitution. Indeed, no political theorist subscribed to this nonessentialist definition of executive power. Moreover, once one turns to the federal Constitution in particular, there is no evidence that the founders understood the Executive Power Clause as establishing the title and number of executives and no more. Instead, at the very least, they understood the clause as vesting the power to execute the law. Furthermore, there is no evidence that those debating the Constitution ever claimed that the president could not execute the law himself or could not control the law execution of others. That no one made either claim (in the face of dozens who made claims to the contrary) is particularly telling. If the chief executive thesis incorrectly described the original understanding of the president's law execution role, there surely would have been someone who spoke up to disabuse the many Federalists and Anti-Federalists who noted that the president could control law execution and could execute the law himself. Ultimately, while there is a great deal of evidence that the rival theories cannot explain, there is remarkably little affirmative evidence supporting their textual claims.

VIII. CRITIQUING THE MODERN CRITICS OF THE CHIEF EXECUTIVE THESIS

As one might expect, some who have considered the Constitution's text, structure, and history dispute the chief executive thesis and the essential meaning of executive power. In particular, a few modern scholars deny the theory's textual and historical soundness. This part responds to their challenges to the chief executive thesis.

A. *The Myth of a Separate Administrative Power*

In *The President and the Administration*, Professors Lessig and Sunstein sought to expose a “plain myth.”⁵⁷⁶ Despite the claims of some scholars, the framers simply had not “constitutionalized a strongly unitary executive” who could control the execution of federal law.⁵⁷⁷ Rather, “any faithful reader of history must conclude that the unitary executive” theory is the product of twentieth-century categories “unreflectively” applied to an eighteenth-century document.⁵⁷⁸

Instead of empowering the president to control the execution of all federal law, the Constitution ceded control of law execution only in certain areas. While the founders only granted the president control of so-called executive functions, control of “administrative” functions was left to legislative discretion.⁵⁷⁹ “Executive” functions consist of those powers and duties described after the Executive Power Clause.⁵⁸⁰ Thus, the president has a constitutional right to control the execution of laws relating to military and foreign affairs because Article II places him in charge of such areas.⁵⁸¹ In contrast, “administrative” functions consist of carrying into execution the laws enacted by Congress to effectuate its powers under Article I, such as the spending and taxation powers.⁵⁸² Congress, through the Necessary and Proper Clause, may decide whether the president will play any role in the “administration” of these “administrative” laws.⁵⁸³ Thus, Congress could forbid any presidential role in executing administrative laws relating to the Treasury and the Post Office because these administrative departments administer laws that help effectuate Congress’s Article I powers over finance and the post.⁵⁸⁴

This distinction they discover in the Constitution did not exist at the founding. Almost every reference to the “administration” of the laws uncovered during research revealed the president’s central role in law execution.⁵⁸⁵ Indeed, careful analysis reveals that administration of the laws and execution of the laws were viewed as one and the same, just as

576. Professor Calabresi and I previously wrote an article responding to the claims of Professors Lessig and Sunstein. See Calabresi & Prakash, *supra* note 8. The brief discussion here supplies new evidence that counters their claims.

577. Lessig & Sunstein, *supra* note 9, at 2.

578. *Id.* at 2–4.

579. *Id.* at 78.

580. See *id.* at 46.

581. See *id.* at 71.

582. See *id.* at 46.

583. See *id.* at 74.

584. See *id.* at 71.

585. See, e.g., THE FEDERALIST NO. 72, *supra* note 76, at 435–36 (stating that the administration in its most familiar sense involves activities of executive departments and is superintended by the president); THE FEDERALIST NO. 44, *supra* note 181, at 268 (stating that the energy in executive is necessary for stable administration of laws); 16 DOCUMENTARY HISTORY, *supra* note 65, at 58 (Philadelphensis decriing that laws would be administered by a presidential tyrant); 4 DEBATES, *supra* note 2, at 103 (Davie observing that term limits would ensure that president would feel tone of his administration of laws in private life).

they are today. Moreover, there is no evidence that any framer or ratifier divided functions, departments, or laws into two categories—executive and administrative—with only the former under the president's control.⁵⁸⁶

If there was no evidence of anyone discussing an executive/administrative distinction, why did Lessig and Sunstein suggest such a dichotomy? They believed that their division solved three seemingly intractable puzzles: prosecutorial authority, the early departments created by Congress, and the Opinions Clause.

They catalog early prosecutorial practices that are supposed to give proponents of the chief executive thesis pause: 1) the attorney general lacked statutory authority over district attorneys; 2) the Treasury comptroller, a “relatively independent” officer, held the first centralized authority over district attorneys; 3) state prosecutors were charged with prosecuting federal laws; and 4) private individuals could bring *qui tam* suits on behalf of the federal government.⁵⁸⁷ While the chief executive thesis supposedly cannot explain these practices, their executive/administrative dichotomy can. Because prosecution was not an executive function, the president had no right to control prosecutions. Instead, prosecutory control was an administrative function to be allocated as Congress saw fit. Because Congress did not delegate prosecutorial control to Washington, he lacked control over prosecutions.

This prosecution puzzle is hardly puzzling. The first claim is simply a red herring. As far as the chief executive thesis goes, there need not even be an attorney general, and if there is one, she need not have any connection to prosecutions.⁵⁸⁸ The second piece of the prosecution puzzle—the claim that the comptroller was the first to exercise centralized control of federal prosecutions—is false. The chief prosecutor, George Washington, directed prosecutions before the comptroller gained limited statutory authority to direct U.S. district attorneys. Washington ordered his federal prosecutors to cease prosecutions,⁵⁸⁹ and to commence them.⁵⁹⁰ Because Washington instructed his district attorneys in the ab-

586. Interestingly enough, they do not cite any framer or ratifier who divided up law enforcement into law execution and law administration. Nor do they refer to any founder who distinguished executive laws and departments from administrative laws and departments.

587. See Lessig & Sunstein, *supra* note 9, at 14–22.

588. Proponents of the chief executive thesis have never claimed that Congress must create an attorney general able to control prosecutors. The chief executive thesis concerns the constitutional powers of the chief executive, not what powers a subordinate executive officer must enjoy.

589. See Letter to William Rawle, District Attorney for the Pennsylvania District (Mar. 13, 1793), in 32 WRITINGS OF GEORGE WASHINGTON, *supra* note 79, at 386. Washington had concluded that two indicted individuals, William Kerr and Alexander Beer, were innocent. He “therefore thought fit to *instruct*, and [did] hereby instruct you forth with to enter a *Nolle prose qui* on the indictment aforesaid: and for so doing let this be filed as your warrant.” *Id.* (emphasis added).

590. See The Proclamation of Neutrality, Apr. 22, 1793, in 32 *id.* at 430–31 (noting that he had “given instructions” to officers “to cause prosecutions to be instituted against all persons, who shall . . . violate the law of nations”); see also Letter to Edmund Randolph (Mar. 27, 1793), in 32 *id.* at 404 (acquiescing to

sence of statutory authority, he must have acted pursuant to his constitutional power to execute the laws. Indeed, on one occasion, prior to lending “all the sanction and authority” of his office to prosecutions, Washington cited the Faithful Execution Clause.⁵⁹¹

The third piece—state prosecution of federal offenses—only exists if one assumes that the president could not control state prosecutors. Yet Lessig and Sunstein cite no evidence or authority for their claim that the president could not direct state prosecutors in their prosecution of federal offenses. Given that Washington directed state governors,⁵⁹² there seems little reason to doubt that Washington would have directed state prosecutors had an occasion called for it.⁵⁹³

The final piece of the puzzle—the presence of *qui tam* statutes in the early years of the Republic—is the only one with any substance. But one should hardly transform a historical exception derived from English practice into a clever means by which one completely undermines the definition of executive power. Indeed, if England had an executive power authorized to control law execution, despite the presence of *qui tams*, the same seeming tension should be acceptable here.⁵⁹⁴ In any event, one genuine piece hardly constitutes much of a prosecutorial puzzle.⁵⁹⁵

The other two puzzles—the departments created by the early Congresses and the Opinions Clause—are closely related. Lessig and Sunstein noted that while the first Congress explicitly designated War and Foreign Affairs as “executive” departments, it did not apply this label to the Treasury.⁵⁹⁶ Subsequent departments supposedly followed this pattern.⁵⁹⁷ Second, they claimed that the Opinions Clause, when read in conjunction with the Appointments Clause, might support their executive/administrative distinction. Though the Opinions Clause refers to executive departments, the Appointments Clause refers to departments

the suggestions of the secretaries of State and Treasury and the attorney general that Washington ought to “instruct[]” the district attorney for Massachusetts to appear in court on behalf of an individual).

591. Letter to Alexander Hamilton (Sept. 7, 1792), in 32 *id.* at 317 (“It is my duty to see the laws executed . . .”).

592. See PHELPS, *supra* note 512, at 127–32.

593. Indeed, Glenn Phelps concludes that where federal law execution was concerned, “Washington firmly believed that governors were constitutionally subordinate to the President.” *Id.* at 132.

594. Even if *qui tams* are constitutional, it still is the case that *all governmental officials* charged with federal law execution are subordinate to the president.

595. Their conclusions about prosecutions lead to a prosecution puzzle that they cannot solve. If the president had no power over prosecution, as they suggest, how was he to see to the execution of the “executive” laws relating to the armed forces and foreign affairs? When someone violated such laws, the president would have been at the mercy of the supposedly independent district attorneys. There were no purely “executive” prosecutors on hand to handle the job of prosecuting violations of “executive” laws under the president’s direction.

596. Lessig & Sunstein, *supra* note 9, at 34–35.

597. See *id.* at 29–30. While the Naval Department was deemed “executive,” the Post Office was not.

generally and thus, the former clause might authorize opinions from executive departments only and not from others.⁵⁹⁸

There is less here than meets the eye. No one has reason to doubt that the Treasury and the Post Office were executive departments. Treasury was an executive department under the Articles,⁵⁹⁹ it was designated as such in the drafting,⁶⁰⁰ ratifying,⁶⁰¹ and the First Congress's debates;⁶⁰² its officers were referred to as executive during the same debates,⁶⁰³ and its officers were provided salaries in an act providing salaries for "the Executive Officers of Government" a mere nine days after the enactment of the Treasury Act.⁶⁰⁴ Moreover, after its creation, members of Congress continued to label Treasury an executive department⁶⁰⁵ and treat its officers as executives.⁶⁰⁶

Similarly, the Post Office was an executive department from the beginning. The first Congress temporarily authorized a postal department whose postmaster general was made "subject to the direction of the President of the United States in performing the duties of his office."⁶⁰⁷ Though the 1792 Postal Act did not reiterate this superfluous language, that omission hardly establishes that Congress meant to insulate the postmaster or his office. In fact, the debates preceding the 1792 enactment reveal that members assumed that the postmaster general was subordinate to the president.⁶⁰⁸

If there was any executive/administrative distinction, it was surely lost on Washington, Hamilton, and seemingly everybody else. Washington demanded (and received) opinions and documents from the principal officers in both the Treasury Department⁶⁰⁹ and the Post Office.⁶¹⁰ More

598. *See id.* at 32–38. They also suggest a less "radical" reading: The clause mandates "minimal unitariness" by ensuring that the president has at least some information about all departments. *Id.* at 72.

599. *See supra* notes 359–63 and accompanying text.

600. *See, e.g.,* 2 FEDERAL CONVENTION, *supra* note 93, at 404.

601. *See, e.g.,* A FARMER OF NEW JERSEY, Nov. 3, 1787, in 13 DOCUMENTARY HISTORY, *supra* note 65, at 558–61 (proposal to divide "executive" across three departments, including a "Superintendent of Finance").

602. *See, e.g.,* 1 ANNALS OF CONG. 382, 384 (Gales & Seaton eds., 1789) (comments of Representatives Boudinot and Benson).

603. *See 1 id.* at 592–94 (comments of Representatives Page, Tucker, and Gerry); *see also* A FARMER OF NEW JERSEY, *supra* note 601, at 560 (referring to the Treasury Secretary as an executive officer); 2 FEDERAL CONVENTION, *supra* note 93, at 53–54 (Secretary of Finance would be subordinate to President).

604. *See* Act of Sept. 11, 1789, ch. 13 § 1, 1 Stat. 67.

605. *See, e.g.,* 9 ANNALS OF CONG. (Appendix) 3597–98 (1798) (report of a committee examining the executive departments' expenditures).

606. *See, e.g.,* 4 *id.* at 465 (comments of Rep. Giles on propriety of Congress examining the operation of the Treasury department and its "executive officers").

607. *See* Act of Sept. 22, 1789, ch. 16 § 1, 1 Stat. 70. *See generally* Act to establish the Post office and Post Roads in the United States, ch. 7, 1 Stat. 232 (Feb. 20, 1792).

608. *See* 2 ANNALS OF CONG. 229–32 (1790) (various representatives discussing the president's role in postal affairs notwithstanding the fact that the president had no explicit statutory role).

609. *See, e.g.,* Letter to Washington (Aug. 2, 1794), in 6 WORKS OF ALEXANDER HAMILTON, *supra* note 58, at 353 (Hamilton observing that his opinion was in "compliance to [Washington's] requisition" of an opinion on the use of force against the Whiskey rebels).

generally, Washington felt entirely free to control these departments.⁶¹¹ The principal officers never raised an objection and, apparently, neither did anyone else. It bears repeating that the control Washington exercised must have been constitutionally grounded, because the Treasury statute did not authorize presidential direction.

There is remarkably little support for the claim that the Constitution actually distinguishes “executive” from “administrative.” No one at the founding spoke of the distinction and the only support for the claim arises out of modern inferences derived from statutory and constitutional text.⁶¹² On the other hand, if the chief executive thesis is just plain myth, it was a widespread myth propagated by founding statesmen such as Madison, Hamilton, Washington, Randolph, and many others. Modern champions of the chief executive thesis have excellent company.

B. *The Chief Inspector General*

Better than most, Professor Peter Strauss recognizes that the president was supposed to be responsible for law execution, ensure efficient law enforcement, and serve as a counterweight to the legislative vortex. Rather than reading the Executive Power Clause as a nullity, he understands that it strengthens the executive’s hand in law execution. Instead of brushing aside the Faithful Execution Clause, he properly challenges the orthodoxy that Congress may wholly insulate law execution from presidential oversight by pointing out that the president cannot ensure that all federal laws are faithfully executed if he must remain deaf and mute before the “independent” agencies.

Yet Strauss’s readings fall short of the mark for his president is not really a chief executive in the manner that the founders used the term. The Straussian president is shorn of so much of the authority typically invested in a chief executive that he is more akin to a constitutionally created inspector general, with the power to peer over the shoulders of those who actually wield the executive power. To be sure, the chief inspector general may quiz, cajole, and in limited circumstances, remove. But he is not a chief executive in the true sense of the term for he has no constitutional right to execute the law or to control how the laws are actually executed. More importantly, the Straussian president does not enjoy the executive power as the founders understood that phrase. If the president lacks the *constitutional* power to control law execution, he

610. See, e.g., Letter to Ebenezer Hazard (July 3, 1789), available at <http://memory.loc.gov/>; Letter to Ebenezer Hazard (July 17, 1789), available at <http://memory.loc.gov/>.

611. See *supra* notes 557–74 and accompanying text (discussing Hamilton’s subordinate role to Washington); see also Letter to Beverley Randolph (Dec. 14, 1789), in 30 WRITINGS OF GEORGE WASHINGTON, *supra* note 79, at 477 (Washington’s inquiring as to why one of his letters was received late, observing that the causes might shed light on the “general regulation of the Post Office,” and remarking that if a postmaster was held responsible, future delays would not occur).

612. Lessig & Sunstein, *supra* note 9, at 2.

hardly enjoys the executive power discussed by the eighteenth-century political theorists and the founders.

Strauss's problems principally arise because he does not know what to make of the Executive Power and Faithful Execution Clauses. Strauss sees ambiguities and then proceeds to extract narrow readings from each. Of the Executive Power Clause, Strauss claims that what the executive power means in the domestic context is not obvious from the text.⁶¹³ He then suggests that at a minimum, any reading of the clause must respect the founders' judgment that the president would be a responsible, efficient chief executive who could communicate and influence those who execute.⁶¹⁴ But as we have seen, the founders expected more than a chief overseer who could remove only in particularly egregious situations. They expected that the wielder of the executive power would be empowered to execute the law himself and direct the law execution of others. That is the import of the writings of Locke and Montesquieu, each of whom defined the executive power as the power to execute the law. That is what state executives declared as their principle function and power. That is what the participants in the ratification debates expected of the chief executive. And that is how Chief Executive Washington conducted his administration. Since the executive power was his, he controlled federal law execution.

Of the Faithful Execution Clause, Strauss notes that the "Delphic" clause

does not tell us whether the President has authority to direct the affairs of government beyond that which statutes confer. What is important to note, however, is that the uncertainty is not unlimited. Whether this phrase implies that the President is to be a decider or a mere overseer, or something between, it requires that he have significant, ongoing relationships with all agencies responsible for law-administration.⁶¹⁵

His last point is true enough, yet to stop at the most plausible narrow reading of the clause (as Strauss does) is to miss what the clause actually assumes about the president. A review of what the founders said about the clause (and about what executives who labored under analogous state constitutional clauses actually did) makes clear that the executive was to ensure that *their* law execution was faithful. Remember what the Pennsylvania plural executive said about its law execution power against the backdrop of the Pennsylvania Faithful Execution Clause.⁶¹⁶ Recall the history of the clause in Philadelphia where numerous delegates noted that the executive (of whatever size) would execute the law with the clause resulting from these desires (and absolutely no one objecting to

613. Strauss, *Place of Agencies*, *supra* note 11, at 598.

614. *Id.* at 600, 642.

615. *Id.* at 648.

616. *See supra* notes 90–91 and accompanying text.

executive execution of the law).⁶¹⁷ Hearken back to what was said during the ratification debates about the clause underscoring the president's ability to execute the laws.⁶¹⁸ The president is not merely an "overseer" but a "decider" and a "doer." Put simply, the president is an *executive*.

Ironically, Strauss's own conclusions provide reasons to doubt his chief overseer thesis. Strauss properly recognizes that the framers wished to create a president that would ensure a responsible and efficient execution of the laws. But in what sense can the president properly be held responsible for law execution if others exercise decisional independence in law execution? Consider an Environmental Protection Agency (EPA) administrator with a considerably more proenvironment friendly outlook than the president. While the president may question and prod the EPA administrator, the administrator will ultimately make enforcement decisions the president would not make. Given that Strauss would circumscribe removal authority, there will be numerous situations where the administrator will reach decisions or take actions that radically differ from the ones the chief executive would have made or taken and yet the president will not have cause for removal. In this case, on Strauss's view the founders must have contemplated that the president would be held responsible for decisions that were not his by any means. But any sensible president will deny his responsibility for decisions that were not his and any fair-minded, informed citizen can hardly blame the president for the decisions of others. Rather than a unitary responsible chief executive, Strauss's theory guarantees that dozens of individuals (or commissions) will be responsible for law execution.

Similarly, Strauss's vision of the chief overseer conflicts with the founders' desire for efficient execution of the laws. Strauss correctly notes that the president can play a centralizing role to ensure that various law enforcement agencies do not have conflicting agendas. But given that under the Straussian view the president does not have the ability to tell the agencies what actions or decisions to take, how can the president really prevent crippling disagreements that lead to inefficient execution of laws? The Food and Drug Administration may use its statutory discretion to draft regulations to curb tobacco demand, while the Agriculture Department may draft discretionary regulations to increase loans and grants available to tobacco farmers. Though the president can point out that the departments are acting at cross-purposes and attempt to convince them to act in concert towards the same goals, on Strauss's view, the president has no constitutional means of imposing consistency. For imposing a common goal would be to make decisions vested by Congress in the departments and not with the president. Can it be that the framers thought they were creating efficient administration by permitting

617. See *supra* Part V.A.

618. See generally *supra* notes 104–07 and accompanying text (discussing the history of the Faithful Execution Clause).

Congress to create executive fiefdoms where the president would be limited to probing and prodding?

There is no need to conclude that the founders' goals conflicted with their text. Properly understood, the text constitutionalized a powerful chief executive fully capable of ensuring responsible and efficient law execution. The president could be responsible because he would control law execution. Likewise, a chief executive could ensure efficiency by coordinating law execution across the departments.

One final point may drive home the implausibility of the Straussian vision of the president: suppose Congress established an "interdepartmental inspector general" with authority to make suggestions and demand information from all department heads and with a narrow ability to remove. Would we label this newly created officer a "chief executive?" Would we acknowledge that the official actually enjoyed the executive power? It is far more likely that we would call this officer the chief overseer. Less kindly, we might call this officer the "chief busybody"—which, of course, underscores that the Straussian president bears little resemblance to the chief executive/supreme magistrate the founders actually constructed.⁶¹⁹

C. Text and History "Slight"

In *The Most Dangerous Branch*, Professor Martin Flaherty attempts to debunk the "formalist" school of separation of powers and to defend the claim that the unitary, hierarchical law executing executive is a modern-day myth.⁶²⁰ According to Flaherty, the Constitution's separation of powers was meant to further several goals: balance among the branches, accountability to the people, and energetic and efficient government.⁶²¹ Given these "foundational imperatives," a "rigid tripartite division of all government" did not emerge from the founding era.⁶²² Rather, that era generated a "functional and general" separation of powers, leaving many unanswered questions.⁶²³ At the same time, Flaherty insists that the founders did answer one question: Congress could determine who would execute its laws.⁶²⁴

619. Indeed, Congress might create many such Straussian "chief overseers" because nothing prevents more than one person from seeking opinions and from influencing law execution. Moreover, in Professor Strauss's theory, nothing would seem to prevent Congress from granting removal authority to such inspectors general. Notwithstanding the grant of removal authority to these statutory overseers, as long as the president could remove upon a finding of faithless law execution, the Faithful Execution Clause would be satisfied (at least as lead by Professor Strauss).

620. Flaherty, *supra* note 9, at 1729.

621. *Id.* at 1729–30.

622. *Id.* at 1731.

623. *Id.* at 1787.

624. *Id.* (claiming that because so much was left unsettled, that it would fall to Congress "to fill in the Constitution's blueprint" including who "would control the administration of laws").

Flaherty begins by discussing proper historical methods. After de-crying flawed uses of history by the Supreme Court and the legal academy,⁶²⁵ he reassures that history should matter but only if “credibly pursued.”⁶²⁶ Such pursuit entails “examining the larger context of the Founding” before leaping to “specific shop-worn sources.”⁶²⁷ In addition, “depth” and “breadth” are required.⁶²⁸ Because lawyers have disregarded these methods, legal history has a “notoriously poor reputation, especially among historians.”⁶²⁹

In his historical analysis, Flaherty acknowledges that by the 1770s, Americans generally recognized three governmental powers: legislative, executive, and judicial.⁶³⁰ Indeed, pamphlets, books, and speeches defined these powers as making laws, executing laws, and adjudicating cases.⁶³¹ Yet Flaherty asserts that these statements were rather meaningless because there was little agreement about what these powers meant.⁶³² Each power had an “imprecise core” and “the rest remained up for grabs.”⁶³³ As Flaherty correctly points out, “what matters is not just that people said it, but what they meant when they said it.”⁶³⁴ And what they meant was something far different from modern formalist categories and definitions, Flaherty claims.⁶³⁵ Though executive power was a hazy concept that could mean many things, executive power did not encompass the modern concept of law execution.

Having laid out his context, Flaherty turns to the constitutional text. According to Flaherty, the Executive Power Clause cannot bear the weight that some would place on it. He reiterates several well-known challenges to the claim that the clause grants power and contests the claim that it is exclusive.⁶³⁶ He suggests that the clause “advances the goal of governmental energy” and that perhaps it includes Henry Monaghan’s protective power principle.⁶³⁷ Any broader conclusions are “guesswork.”⁶³⁸ The Faithful Execution Clause does not advance the claim that the president controls law execution because it is not clear what “execute” means.⁶³⁹ The numerous statements that tie the president to law execution “say nothing about what [the speaker] conceived

625. *Id.* at 1732–42.

626. *Id.* at 1745.

627. *Id.*

628. *Id.*

629. *Id.* at 1750.

630. *Id.* at 1764–65.

631. *Id.* at 1765–66, 1802–04.

632. *Id.* at 1764–65.

633. *Id.* at 1765.

634. *Id.* at 1776.

635. *Id.* at 1756.

636. *Id.* at 1790–91.

637. See generally Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1 (1993).

638. Flaherty, *supra* note 9, at 1792.

639. *Id.* at 1793.

that power to be or whether it was to be exercised exclusively.”⁶⁴⁰ The Opinions Clause cannot suggest that the president would ask for opinions so that he could make decisions because that would imply that executive officers were the chief executive’s underlings. Flaherty believes that he has proven that proposition to be false.⁶⁴¹ Finally, Flaherty asserts that the Necessary and Proper Clause “means just what it says”: the “text on its own terms contemplated that Congress will determine how these [governmental] powers are best exercised.”⁶⁴² With this authority, Congress decides who will control the execution of its laws.

Despite his historian’s pedigree and his largely sound history tutorial, it is Flaherty’s account that suffers from surprising methodological errors. Moreover, he fails to supply coherent and consistent readings of the relevant constitutional text.

1. *Methodological Errors*

Flaherty’s methodological lessons are largely appropriate. Originalists must do more than quote the Philadelphia debates and *The Federalist Papers*. We must understand the broader context. Otherwise, we may fall prey to the ever-present tendency to view the Constitution and what was said about it as merely confirming our own preconceptions.

Yet Flaherty fails to put his methodology into practice. As Flaherty himself observes, one cannot speak intelligently about the Constitution’s separation of powers without some understanding of Locke, Montesquieu, and Blackstone. Though Flaherty dismisses prior treatments of these theorists as too cursory and inadequate,⁶⁴³ his consideration unfortunately suffers from the same ills.⁶⁴⁴ He mentions that Locke divided authority into legislative, executive, and federative but does not bother to supply Locke’s definitions.⁶⁴⁵ Surely Locke’s definitions of the powers of government are quite relevant to a paper on the separation of powers. He belittles the relevance of Blackstone and the powers of the English monarch⁶⁴⁶ without pausing to consider that even if the Constitution did not vest the American executive with all of the English crown’s executive powers, it still might have codified the executive’s essential power.

Especially troubling is the superficial treatment of Montesquieu. Flaherty correctly observes that Montesquieu defined executive power as the power to make war and peace and the power to establish security.⁶⁴⁷ But to end the definition here is incomplete and rather misleading. Anyone

640. *Id.*

641. *Id.* at 1795.

642. *Id.* at 1800.

643. *See id.* at 1775.

644. *See id.* at 1764–65.

645. *See id.* at 1764.

646. *See id.* at 1782–83.

647. *See id.* at 1765.

who has carefully read Montesquieu knows that his executive power also consisted of the power to execute the laws.⁶⁴⁸ Indeed, absent this core understanding, the immortal maxim against uniting the three powers of government would make little sense.⁶⁴⁹

This most renowned instantiation of the separation of powers principle refutes Flaherty's claims about the lack of a core meaning of executive power, the lack of a settled eighteenth-century meaning for "execute," and the supposed difference between the modern and the eighteenth-century meaning (or meanings) of "execute." First, Montesquieu's celebrated maxim clearly identified the core meaning of executive power as the power to execute the laws. Numerous others confirmed this essential meaning of executive power. Second, Montesquieu also revealed the meaning of "executing" the laws. Recall that he regarded tasks such as prosecution, tax collection, and the expenditure of funds as executive tasks.⁶⁵⁰ Numerous others made clear that to execute the laws is to enforce or carry them out. Finally, on the authority of Vile (and from reading Montesquieu), it is evident that Montesquieu discussed the three powers of government "in a very much more modern way" and was "one of the first writers to use 'executive' in a recognizably modern sense in juxtaposition with the legislative and judicial functions."⁶⁵¹ If Montesquieu used "executive power" and "executive" in the modern sense and he noted that eighteenth-century executives with the executive power "executed" the law, then Montesquieu used "execute" in the modern sense as well. Accordingly, Flaherty's claims that "executive power" and "execute" lacked a settled meaning and that "execute" meant something different in the late eighteenth century than it does today are mistaken.⁶⁵² The modern formalist notion of law execution is the one that existed in the eighteenth century.

Flaherty also has trouble with the history he purports to recount. For instance, his claims about the Philadelphia Convention rest on a number of factual errors, mistakes that advance his overall claims about the separation of powers and the president's law execution role. To begin with, he asserts that the influential Virginia plan contemplated a "weak and ill-defined" executive.⁶⁵³ Because his description of the plan omits that it would have ceded the executive rights of the Continental Congress to the executive,⁶⁵⁴

648. See *supra* Part II.B.

649. Recall that Montesquieu cautioned against governments that united the legislative and executive powers because the same entity could "enact tyrannical laws [and] execute them in a tyrannical manner." MONTESQUIEU, *supra* note 196, at 70. He confirmed this meaning of executive power when he decried governments that either mixed the executive and judicial powers or united all three powers. *Id.*

650. See *id.* at 36–37, 80.

651. VILE, *supra* note 194, at 95, 105.

652. Two other points bear noting. Those who repeated Montesquieu's maxim referenced the same meanings of "executive power" and "execute." They also employed these expressions in the same, "modern" manner, as had Montesquieu.

653. Flaherty, *supra* note 9, at 1780.

654. 1 FEDERAL CONVENTION, *supra* note 93, at 21.

he understates the plan's executive powers. For instance, the war power would have been conveyed by this language.⁶⁵⁵

Similarly off-base is his assertion that the delegates did not address the "nature of executive authority squarely" until the Committee of Detail's work in August.⁶⁵⁶ In fact, delegates considered the executive's essential role as early as June 1. Wilson and Madison both stated the obvious: the executive must execute the laws.⁶⁵⁷ The Committee of the Whole agreed to vest this authority in the executive without a single state opposed and without anyone voicing opposition.⁶⁵⁸ Confirming the unanimity of this point, every plan presented to the Convention vested the power to execute the laws with the executive. Finally, the Convention voted unanimously that the executive would execute the national laws.⁶⁵⁹ While the peripheries of executive authority were not fixed until the Convention's end, the core was rock solid by June 1.⁶⁶⁰

Much of Flaherty's methodological lesson is entirely praiseworthy. Yet Flaherty stumbles when putting this lesson into practice. He largely ignores what political theorists actually said about the executive power. He misconstrues proposals at the Philadelphia Convention and ignores the fact that every formal proposal provided that the executive would execute the laws and that Madison, Wilson, Franklin, and numerous other delegates made the same point. If Flaherty's treatment of the political theorists and the Philadelphia Convention is an exemplar of proper historical method, the much-maligned "law office history" has much more to commend it than Flaherty admits.⁶⁶¹

655. The Virginia plan did not separately allocate the war power. *See 1 id.* at 20–22. Thus it provided that the executive would enjoy the war power because the executive was to enjoy all the executive authorities vested in the Continental Congress. *See 1 id.* at 65 (comments of Wilson and Pinckney assuming as much).

656. Flaherty, *supra* note 9, at 1782.

657. 1 FEDERAL CONVENTION, *supra* note 93, at 65–67.

658. 1 *id.* at 67. Connecticut was divided, however. *Id.*

659. 2 *id.* at 32.

660. Flaherty's recounting of history suffers from other problems as well. Consider Flaherty's erroneous claims about the Committee of Detail. Flaherty asserts that Edmund Randolph proposed that the executive should enjoy "executive authority vested by Congress." Flaherty, *supra* note 9, at 1783. The only support for Flaherty's claim is a cite to the Virginia plan more than two months earlier. *See* Flaherty, *supra* note 9, at 1783 n.312 (citing 1 FEDERAL CONVENTION, *supra* note 93, at 21). That cite clearly cannot support what Randolph may or may not have done some two months later. In any event, he completely misreads the Virginia plan. The plan did not propose that the new executive would enjoy the "executive authority vested by Congress." Instead, the Virginia plan ceded the "Executive rights vested in Congress by the Confederation." 1 FEDERAL CONVENTION, *supra* note 93, at 21. Thus the plan certainly did not place Congress in the driver's seat by granting it the power to vest executive authority. Indeed, the plan left little to the imagination where the most important executive power was concerned; the power to execute the laws was explicitly conveyed. *Id.* Needless to say there is a world of difference between granting the executive the executive rights formerly held by the Continental Congress and granting the executive only those executive powers that Congress might grant by statute.

661. My point here is not merely to criticize Flaherty's unfortunate problems with history. Anyone who writes a paper as long as Professor Flaherty will undoubtedly make some errors (I hope that I will be excused for mine). The reason for highlighting these problems is that they may explain why Professor Flaherty reached the mistaken textual conclusions he did.

2. *Textual Confusion*

Focused on taking originalists to the historians' woodshed, Flaherty slights the Constitution's text with unhappy results. He spends pages on balance, energy, and accountability, yet the meaning of *actual* constitutional provisions are illuminated in a sentence or a paragraph without citation to any originalist evidence. Moreover, he fails to see how his claims are mutually conflicting. What he denies at one point, he affirms at another. Evidence he derides in one instance somehow later becomes evidence supporting his thesis.

Consider his treatment of the Executive Power Clause. At one point, he asserts that the clause "should not be read to grant the executive branch a prepackaged set of powers."⁶⁶² He also criticizes others who claim that the clause grants exclusive powers. In particular he chides those who assert that the clause grants the president exclusive authority over law execution and belittles their arguments as offering "relatively few historical claims."⁶⁶³ Yet he offers absolutely no evidence of anyone denying that the Executive Power Clause grants such authority. Nor does he cite any framer or ratifier denying that the president would execute the laws. As should be obvious, even minimal evidence is better than none. In any event, this article reveals that the molehill of evidence about the meaning of executive power was really a mountain all along.

When Flaherty finally discusses the clause, he makes a series of non-committal claims. First, he asserts that the clause supports the balance imperative "whether it merely signals the location of executive powers or grants them" because it demonstrates a commitment to a powerful executive.⁶⁶⁴ Yet this claim makes no sense. If the clause does not grant any power, it cannot make the executive powerful. The other powers in Article II supposedly referenced by the phrase "executive power" must do all the work. The only way the clause itself makes the executive powerful is if it vests powers in addition to those listed in Article II. Second, he asserts that the clause "advances the goal of government energy by declaring that the apex of the executive department shall be a single individual."⁶⁶⁵ Since his explanation is so terse, it is unclear what he means by this. If he means that the clause establishes that one person will enjoy the powers vested elsewhere, once again, the other clauses (which also make clear that there is but one executive) do all the work. If he means something else, namely the clause actually grants power separate from the rest of Article II, he should sketch what those powers are (and admit that the clause grants prepackaged powers). He ends with well-deserved praise for Henry Monaghan's

662. Flaherty, *supra* note 9, at 1778.

663. *See id.*

664. *Id.* at 1792.

665. *Id.*

*Protective Power of the Presidency*⁶⁶⁶ and thereby suggests that he believes that the clause *does* grant at least some prepackaged powers.⁶⁶⁷

One is left wondering, does Flaherty believe that the clause grants power beyond those specific authorities found after Article II's vesting clause or not? If so, are these powers "exclusive," may someone else enjoy them simultaneously, or may Congress completely divest the president of these powers? Finally, if the clause does grant "prepackaged" power, such as the protective power defended by Monaghan, does it also grant the power to execute federal law and the power to control the execution of other governmental officers, as numerous framers and ratifiers declared? Flaherty's treatment of this absolutely crucial clause suggests that his own beliefs are surprisingly uninformed.

The problems continue when he turns to the Faithful Execution Clause. Flaherty dismisses the extensive evidence that the founders contemplated that the executive would superintend law execution. In particular, he belittles Governor Randolph's statement that "[a]ll the enlightened part of mankind agree that the superior dispatch, secrecy, and energy with which one man can act, renders it more politic to vest the power of executing the laws in one man" and Randolph's claim that "[e]very Executive in America" has the power to "see the laws executed."⁶⁶⁸ These declarations actually establish precious little because they say nothing about what the power consisted of or whether it was exclusive, claims Flaherty.⁶⁶⁹ In fact, he says, law execution meant something quite different in the eighteenth century than it does today.

Though the assertion that the framers and ratifiers used "execution" and "execute" in a manner differently than modern English speakers is indisputably critical to Flaherty's argument and though he repeats it,⁶⁷⁰ he nowhere documents or defends the claim. The claim is absolutely crucial because it is his means of dismissing all the evidence that the founders granted the president the power to execute the law and the power to control the law execution of others. Yet he never cites a dictionary, a framer, or a ratifier to back it. Nor does he cite a historian who makes such a claim.⁶⁷¹ He does not even suggest what the alternative eighteenth-century

666. See Monaghan, *supra* note 637.

667. Flaherty, *supra* note 9, at 1792.

668. *Id.*

669. *Id.* at 1793.

670. See, e.g., *id.* at 1756 (claiming that "execute the laws . . . meant something far different from modern conception") (emphasis added); *id.* at 1776 (what matters is not "just that people said it, but what they meant when they said it").

671. Flaherty cites Gordon Wood for the proposition that founding-era discussions "assumed rather than explicated such definitions." *Id.* at 1765 & n.209. Unfortunately, Wood does not establish a definition of "execute" that is different from the modern definition. Instead, Wood merely points out that although separation of powers was discussed quite a bit during the period from 1776–1789, actual state practices did not take the doctrine to heart. See WOOD, *supra* note 288, at 150–61. For Wood to have made this claim, however, suggests that he disagrees with Flaherty's claim that "executive power" lacked a core meaning. After all, if executive power lacked an essential meaning, it would have been impossible for Wood to have claimed that the states failed to adhere to the separation of power doctrine.

definitions of “execution” and “execute” might be. Given that his claims rest on a different eighteenth-century meaning of “execute,” it would have been appropriate had he shared the distinct eighteenth-century meaning he has in mind.⁶⁷²

There is reason to believe that Flaherty actually doubts his claim about a separate eighteenth-century meaning of “execute.” Just a page after he questions what “execute” meant during the founding era, he repeatedly uses the phrase in his explanation of the Faithful Execution Clause. The clause was an “affirmative reference to the President’s authority to execute the laws” and requires that “the Chief Executive [] execute the laws with care.”⁶⁷³ If he relies on a supposedly distinct eighteenth-century meaning of “execute” in making this claim, Flaherty’s statements are remarkably opaque because he never divulges an eighteenth-century meaning. More likely, he uses “execute” the exact same way we use it today and does so to shed light on how “executed” is used in the Faithful Execution Clause. He thus contradicts his principal claim that “execute” meant something different in the eighteenth century because he uses the modern meaning of “execute” to flesh out the meaning of an eighteenth-century word. Again, one must wonder, does Flaherty believe that “execute” meant something different in the eighteenth century or not? And if it did mean something different, what was its meaning?⁶⁷⁴

Flaherty continues this pattern in his discussion of the Opinions Clause. He denies that the clause contemplates department heads who are constitutionally subordinate to the executive.⁶⁷⁵ In fact, he boasts that his article somehow proves that “what was not settled in this era was the exact relationship of the executive underlings to the Chief Executive.”⁶⁷⁶ Yet in his paragraph explication of the clause he declares that “[m]ore forcefully, [the clause] made clear that those in charge of various ministries could not defy the Chief Magistrate, as had occurred in the early state constitutions,

672. Although I believe that execute and execution had core meanings, each also probably had some “fuzziness” around the edges. Nor can I doubt that the same word can be used in more than one sense. Yet these two admissions hardly doom the chief executive thesis. Even if we cannot precisely establish the outer boundaries of execution (where execution blends with legislation or adjudication), we can still identify a core: ensuring that laws regulating conduct and distributing benefits were carried into effect so that violators were punished and beneficiaries actually received the benefits that the law promised. In any event, though Flaherty insists that execution and execute meant something different in 1787 than they do today, he fails to come up with even one alternative definition.

673. Flaherty, *supra* note 9, at 1756.

674. The confusion does not end there. In a later section, he quotes the first Randolph claim—that enlightened people “agree that superior dispatch, secrecy, and energy with which one man can act, renders it more politic to vest the power of executing the laws in one man”—to support his assertion that the framers sought to create a “unitary Chief Executive.” *Id.* at 1806 (citation omitted). If Randolph’s quote did not mean much before because Randolph did not define law execution, it is equally unhelpful here. If all Flaherty means to suggest, however, is that Randolph’s statement underscored the wisdom of one chief executive, Flaherty cannot make sense of the Randolph statement and should not have relied on it. Randolph did not merely attest that it is best to have a single executive; instead, he asserted that everybody recognized that law execution is optimal when superintended by one person.

675. *Id.* at 1795.

676. *Id.*

as well in Britain, but would have to report to him.”⁶⁷⁷ Yet in making these claims he never reconciles the clause’s contrary legislative history with his preferred reading. Nor does he explain how it could be an act of defiance to refuse to supply an opinion to the president when the “executive underlings” were not constitutionally subordinate to him in the first place. Failure to supply an opinion could be viewed as defiance only if the executive underlings were generally subordinate to the president.

He concludes with the Necessary and Proper Clause. Though he insists that there was uncertainty surrounding separation of powers, he declares the Necessary and Proper Clause an oasis of clarity: the clause “mean[s] just what it says.”⁶⁷⁸ Congress may “determine how [federal powers] are best exercised.”⁶⁷⁹ Though Flaherty does not equivocate here, he is on extremely shaky ground. First, he is oblivious to the possibility that his earlier claim that “execute” had a different meaning in the founding era might apply equally to this clause. If “execute” and “executive power” were imprecise terms, how can the clause, which speaks of “carrying into execution” the powers of the government, have some clear meaning? Second, he ignores the major work on the clause, contrary to his exhortation to consider the research of others.⁶⁸⁰ Third, he fails to see that his construction of the clause treats the Constitution’s separation of powers provisions as default rules. If the Congress can truly dictate how all the powers of government “are best exercised,” then Congress can tell the president the circumstances in which he may pardon or veto. Likewise, Congress could command that courts exercise their judicial power to decide cases in particular ways. Finally, he presents absolutely no originalist evidence supporting his claim. In particular, Flaherty provides no evidence supporting either his specific claim that Congress could take away the president’s power to execute the laws or his more general claim that Congress decides how all federal powers will be exercised. While he believes that this clause means what it says and that this meaning is obvious, he should not be so oblivious to the possibility that others could agree that the clause means what it says but read the clause completely differently.

Given the state of the historical record, the burden falls on those who would read this clause to eviscerate the president’s power to execute the laws to come forth with evidence supporting their reading. There are dozens of individuals who confirmed that the president would execute the laws and control the law execution of others. In the face of these statements, ab-

677. *Id.* at 1798.

678. *Id.* at 1800.

679. *Id.* (“By granting Congress the power ‘to make all laws for carrying into execution’ the enumerated powers assigned to any of the branches, the text on its own terms contemplates that Congress will determine how these powers are best exercised.”).

680. See Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993). Since Flaherty’s piece, Randy Barnett has only buttressed those who deny that the Clause vests Congress with generous legislative authority. See Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745 (1997).

solutely no one responded that Congress may determine who will execute its laws. Indeed, had any Federalist thought that Congress could divest the president of this authority, they would have ridiculed Anti-Federalists' claims that the executive would tyrannically execute the laws.⁶⁸¹ Yet not one of the Constitution's rather able advocates ever asserted that the Anti-Federalist charges were silly because Congress could strip the law execution power away from the executive. Nor did anyone make the even more far-fetched claim that the president could not enforce the laws because the Constitution never ceded such authority in the first instance. As everyone understood at the founding, the Constitution indefeasibly vested the power to execute the laws in the president.

3. *The End of the Separation of Powers*

Consider two final textual points. Flaherty's paper is meant to demonstrate that phrases like "legislative power," "executive power," and "judicial power" had no precise meanings at the founding.⁶⁸² Assuming that he is right, what can one say about separation of powers disputes? There is precious little left to say. We simply cannot know whether Congress may enact a legislative veto. Nor can we say whether the Supreme Court may strike down unconstitutional laws or even whether the other branches have to care what the judiciary declares. If we try to answer such questions by reference to the text, by Flaherty's account we are searching for answers where there are none.

Indeed, if Flaherty's general theory is correct, he cannot confidently conclude that Congress may preclude presidential control of law execution. For even if the Necessary and Proper Clause meant exactly what he thinks it means—that Congress may dictate how all federal powers will be exercised—because he does not know the meaning of "executive power" he has no way of knowing whether this provision constitutes an exception to his construction of the Necessary and Proper Clause. In other words, the very imprecision and uncertainty that he emphasizes makes *any* separation of power judgments little more than guess work.

Even worse, his claims also make the concept of separation of powers a logical impossibility. Early on, Flaherty boasts that his research points to a Constitution with a more flexible and less rigid "separation of powers." In fact, his claims make the whole concept of separation of powers unintelligible. In Flaherty's world, though the founding generation affirmed that the legislative power is the power to make laws, the executive power is the power to execute the laws, and the judicial power is the power to decide

681. Recall that numerous Anti-Federalists were afraid that the executive would be too powerful and spoke darkly of a president seizing authority and executing laws through the army. Other Anti-Federalists carped that the veto authority gave the president a dangerous combination of executive and legislative powers. See *supra* Part II.C.

682. Flaherty, *supra* note 9, at 1756, 1807.

cases according to the laws, each of these powers had an imprecise core meaning and a periphery even less well-defined.⁶⁸³ If one cannot define these powers with any level of precision, however, a *separation* of these powers is impossible. When it comes to words, core definitions are what make “separation” possible. In a perverse way, Flaherty makes separation of powers more flexible and less rigid by obliterating the concept of separation altogether.

4. *Concluding Thoughts*

None of these criticisms suggests that Flaherty’s claims are necessarily mistaken; they only suggest that he has a tough row to hoe. If Flaherty actually discloses and then defends alternative historical definitions of “executive power,” “execution of the laws,” and “execute,” definitions that makes sense of what Locke, Montesquieu, Blackstone, De Lolme, Madison, Wilson, Hamilton, and others actually wrote and said; if he supplies his readers with coherent, consistent, and complete discussions of all the many other constitutional provisions relevant to the question; if he takes seriously the evidence of other scholars who disagree with him; then we must confront his substantiated assertions. Until he or someone else can make such a case, however, we ought to embrace the simple wisdom of Madison: “if anything is in its nature executive, it must be that power which is employed in superintending and seeing that the laws are faithfully executed.”⁶⁸⁴ In a dispute between Montesquieu, Madison, and Hamilton on one hand and Flaherty on the other, the winners are obvious.

683. As proof for his claim that the powers had no distinct core, Flaherty cites Madison’s observation that the boundaries between the three branches “though in general so strongly marked in themselves, consist in many instances of mere shades of difference.” Madison also had written before the Convention that he had “scarcely ventured as yet to form [an] opinion either of the manner in which [the executive] ought to be constituted or of the authorities with which it ought be clothed.” 2 THE WRITINGS OF JAMES MADISON, *supra* note 338, at 348. But neither of these statements should be construed as if Madison did not understand the essential function of an executive. The first statement, properly read, *undermines* Flaherty’s argument because it demonstrates that there was a core. Before claiming that the boundaries are mere shades of difference, Madison first observed that the branches are “in general so strongly marked.” Flaherty, *supra* note 9, at 1807. In other words, there are strongly marked cores with peripheries that shade into each other.

The second statement most likely refers to the peripheries of executive power. Indeed, it would make no sense to be in favor of an executive without some sense of what an executive does. Just as no one could be in favor of a “legislature” without having some sense of what a “legislature” was, no one could be in favor of an “executive” without knowing what an “executive” did. Moreover, Madison at the Convention, during ratification, and post-ratification made absolutely clear that he subscribed to the commonplace conception of the executive power. Remember Madison said that “certain powers were in their nature Executive, and must be given to that department, whether administered by one or more persons,” principally the power to execute the laws. 1 FEDERAL CONVENTION, *supra* note 93, at 67. Recall that Madison also wrote that “if anything is in its nature executive, it must be that power which is employed in superintending and seeing that the laws are faithfully executed.” 1 ANNALS OF CONG. 519 (Gales & Seaton eds., 1789). In *Federalist No. 48*, Madison more accurately conveyed his view of the executive power: “the executive power [was] restrained within a narrower compass, and [was] more simple in its nature.” THE FEDERALIST NO. 48, *supra* note 185, at 334. Madison could say this because he had the essential meaning of executive power in mind.

684. 1 ANNALS OF CONG. 519.

D. Some Parting Puzzles for Friendly Skeptics

A few critical questions must be answered by critics of the chief executive thesis. Why was the “executive power” called the *executive* power? Why was it thought to be absolutely necessary to separate the executive power from the legislative and judicial powers? Why were some governmental officials deemed *executive* in nature and why did they toil in *executive* departments? Why was the president called the chief executive or supreme executive magistrate by the founders? In what sense would the president be the *chief* executive or the *supreme executive* magistrate if he could not control the executive officers and departments? Perhaps the most fundamental question: why classify the president as an “executive” at all? The chief executive thesis posits sensible answers to each of these questions. Other theories either do not answer them well or do not even bother trying.

IX. CONCLUSION

In the late-eighteenth century, someone vested with the executive power and christened as the chief executive enjoyed the power to control the execution of law. Disputing this simple truth would have been akin to denying that the legislative power could pass laws or that the judicial power could adjudge cases. None of these claims would have been tenable in the late-eighteenth century.

How do we know this? Because eighteenth-century political theorists revealed the meaning and function of the executive power. Because Americans, prior to the Constitution, confirmed the basic meaning of executive power in their pamphlets, letters, and constitutions. Because during the Constitution’s drafting and ratification, the founders repeatedly “ratified” this meaning. After ratification, giants across all three branches validated this meaning. In 1792, Jacques Necker, the famous French statesman, neatly summed up the function and significance of the executive power. Of the function: “[I]f by a fiction we were for a moment to personify the legislative and the executive powers, the latter in speaking of the former might borrow the well known words of the Athenian slave, and say: *All that this man has talked of, I will perform.*”⁶⁸⁵ Of the significance: “The laws would in effect be nothing more than counsels, than so many maxims more or less sage, without this active and vigilant authority, which assures their empire and transmits to the administration the motion of which it stands in need.”⁶⁸⁶ As this article reveals, Necker’s remarks were hardly singular.

685. JACQUES NECKER, 1 AN ESSAY ON THE TRUE PRINCIPLES OF EXECUTIVE POWER IN GREAT STATES 4 (1792).

686. *Id.*

So much for the abstract executive power. What of the president, the executive power of the United States? From the beginning it was understood that the federal executive would execute the laws. Every Philadelphia plan sought a law executing executive and while numerous delegates spoke in favor of the concept and other criticized other aspects of the executive, not one delegate objected to the law enforcement executive. During the ratification struggle, the Constitution's proponents and opponents praised the creation of an independent executive who would superintend law execution to ensure a vigorous, uniform, and responsible implementation of the laws. After ratification, Washington assumed his role as chief executive of the laws and others recognized the obvious. No one regarded him as a constitutional usurper when it came to law execution.⁶⁸⁷

Despite his seemingly empty title, the president is a powerful constitutional creature who wears many hats. Because he wields the veto power, he is the chief legislator. Because he is commander-in-chief, he is the nation's generalissimo. Because he enjoys executive power, he is the nation's chief diplomat. But first and foremost, he is the chief executive empowered by the executive power to execute Congress's laws and to control the law execution of executive officers. That many have disregarded or denied Article II's central truth in modern times merely reveals how far we have gone astray.

687. Though I have attempted a comprehensive canvassing of the sources relevant to the eighteenth-century meaning of executive power and the president's relationship to law execution, there are, no doubt, other sources that could be explored. Indeed, Justice Antonin Scalia noted that a complete understanding of the executive power might take 7,000 pages and thirty years to complete. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989). He is undoubtedly right. Nevertheless, this Article's admittedly partial analysis reveals that there is so much evidence validating the chief executive thesis that we can safely assume that any other materials will, in the main, bolster the thesis as well.