

Hail to the Chief Administrator: The Framers and the President's Administrative Powers

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In the United States, our first executive magistrate is not obnubilated behind the mysterious obscurity of counsellors. Power is communicated to him with liberality, though with ascertained limitations. To him the provident or improvident use of it is to be ascribed. For the first, he will have and deserve undivided applause. For the last, he will be subjected to censure; if necessary, to punishment. He is the dignified, but accountable magistrate of a free and great people.¹

I. INTRODUCTION

What would the Framers think of a President who was not responsible for executing major portions of federal law? Currently, the President has limited statutory authority over many officers and agencies. Congress has created "independent agencies,"² such as the Securities and Exchange Commission and the Federal Reserve Board, which execute federal law independent of presidential supervision. Even with respect to the executive departments,³ the President's statutory authority hinges on each department's enabling statute.

Historical evidence, in contrast, indicates that the Framers attempted to establish an executive who alone is accountable for executing federal law and who has the authority to control its administration.⁴ This view of the presidency

1. 1 THE WORKS OF JAMES WILSON 319 (Robert G. McCloskey ed., 1967).

2. 44 U.S.C.A. § 3502(10) (1991) lists independent regulatory agencies. Independent agencies are thought to be insulated from Presidential influence. In reality, however, these agencies are not truly "independent" of either Congress or the President. Congress influences these agencies through the appropriations process and through authorizing legislation. The President influences them through the appointment power and also by pressuring agency decisionmakers to adopt his policies.

3. 5 U.S.C. § 101 (1988) lists executive departments. Currently, Congress decides whether to establish an independent agency or to place an agency within the executive branch. However, since independent and executive agencies perform identical functions, there is no apparent rationale underlying these choices.

4. Several commentators have asserted that the President has the constitutional authority to control an administrative official's exercise of statutory discretion. See generally JAMES HART, THE AMERICAN PRESIDENCY IN ACTION—1789, at 134 (1948); CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY 1775-1789, at 122 (1923); Frank B. Cross, *The Surviving Significance of the Unitary Executive*, 27 HOUS. L. REV. 599, 616 (1990); Lee S. Lieberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court was Wrong*, 38 AM. U. L. REV. 313, 316 (1989). All of these authors have a robust view of presidential power and discuss presidential control of administrative discretion.

Recently, Steven Calabresi and Kevin Rhodes contended that comparisons between Article II and Article III support a hierarchical executive branch with the President at the apex. Steven G. Calabresi & Kevin H.

may be called the "Chief Administrator theory." Under this theory, even if a statute grants discretion to the Secretary of State and explicitly prohibits presidential intervention in the decisionmaking process, the President retains the constitutional authority to substitute his own judgment for the Secretary's determination.⁵ Whenever an official is granted statutory discretion,⁶ the Constitution endows the President with the authority to control that discretion.⁷ Of course, where a statute commands that an executive officer take a *specific* action (i.e., perform a nondiscretionary or ministerial function), the President may not order the official to stray from the statute's dictates. If Congress passed a statute requiring that the Administrator of the Environmental Protection Agency close factories emitting pollution, for example, the President could not prevent that law from taking effect. Since the President is charged with faithfully executing federal law, he may not flout the will of Congress as explicitly stated in a statute.⁸

Several commentators have examined the intent of the Framers at the Philadelphia Convention to establish a unitary executive.⁹ However, these

Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

5. The Chief Administrator theory is akin to what Calabresi and Rhodes label the "first mechanism" of presidential control. Calabresi & Rhodes, *supra* note 4, at 1166. The first mechanism of presidential control is the President's ability to "supplant any discretionary executive action taken by a subordinate with which he disagrees, notwithstanding any statute that attempts to vest discretionary power only in the subordinate." *Id.*

There may, of course, be delegation problems when Congress impermissibly grants broad discretionary authority. See *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). Since that issue is analytically distinct from the question of whether the President can control the exercise of constitutionally-delegated discretion, this Note will not discuss impermissible delegations.

6. For example, if a statute grants the Secretary of Agriculture the authority to determine the level of sugar subsidies, the Secretary exercises discretion in the administration of federal law.

7. Some deny that the President has such constitutional authority or that the Framers intended to create a Chief Administrator. See generally Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 539 (1989); Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 465 (1987); 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, 690 (1989); Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. REV. 59, 86 (1983); Itzhak Zamir, *Administrative Control of Administrative Action*, 57 CAL. L. REV. 866, 869 (1969); A. Michael Froomkin, Note, *In Defense of Administrative Agency Autonomy*, 96 YALE L.J. 787, 788 (1987). These commentators assert that Congress can restrict or forbid presidential control over executive branch officials as well as create a completely independent agency not subject to any presidential superintendence.

Peter Strauss offers a middle ground between complete presidential control of discretion and a more independent bureaucracy. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984). Strauss maintains that the President must have "some degree of participation in the decisionmaking process." *Id.* at 668.

For a sound presentation of the constitutional arguments for and against a strong President, see Bruce Ledewitz, *The Uncertain Power of the President to Execute the Laws*, 46 TENN. L. REV. 757 (1979).

8. U.S. CONST. art. II, § 3. However, the President may interfere with the official's actions if the official is not faithfully executing federal law. The President must supervise the enforcement of all federal law in order to satisfy his take care duties.

9. See generally THACH, *supra* note 4, at 85-90; Cross, *supra* note 4, at 603-18; Strauss, *supra* note 7, at 599. Unitary executive theorists attempt to draw inferences from the Framers' rejection of a plural executive. The Chief Administrator theory is a claim that the unitary executive may control the administration of federal law and may control the exercise of statutory discretion.

commentators make unnecessary concessions to opponents of the Chief Administrator theory.¹⁰ Moreover, no one has given a full chronology of the histories of the Take Care Clause and the Written Opinions Clause. If these authors had conducted a more thorough examination of the convention histories of these clauses, they might not have conceded so much. These scholars also overlook evidence supporting the proposition that those statutorily charged with executing federal law are constitutionally subordinate to the President.

Examining these key clauses using the Philadelphia Convention Debates¹¹ and *The Federalist Papers*,¹² Part III of this Note uncovers evidence supporting the Chief Administrator theory.¹³ The history of the Take Care Clause suggests that the Framers understood that the President would be responsible for execution of federal law. A similar analysis of the Written Opinions Clause suggests that the President may ask for written opinions of his department heads so that he may make informed decisions. Moreover, contrary to the opponents of the Chief Administrator theory, the Inferior Officers Appointments Clause and the Necessary and Proper Clause do not authorize Congress to interfere with the President's constitutional duty to execute federal law.

Part IV shows that the Framers thought that only one individual should be held accountable for administering federal law. Responsibility for sound or poor administration could then be traced to that unitary executive. An examination of the relationship between those statutorily charged with execution of federal law and the only individual constitutionally charged with executing federal law,¹⁴ shows that these assistants were to be subordinate to the President. The Framers recognized that the President could not enforce federal law alone; he would need the help of others.

10. For instance, Cross claims that the essential unity of the executive "may admit of exceptions." Cross, *supra* note 4, at 614. Cross bases his conclusion on an examination of the Necessary and Proper Clause and the Inferior Officials Appointments Clause. *Id.* at 614-15.

11. See THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1966) [hereinafter FEDERAL CONVENTION].

12. THE FEDERALIST (Clinton Rossiter ed., 1961). These papers provide the "best single extra-textual source in explicating the Constitution." Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1498 n.285 (1987); see also Jack N. Rakove, *Early Uses of The Federalist*, in SAVING THE REVOLUTION 234 (Charles R. Kessler ed., 1987) (arguing that *The Federalist Papers* is the "most comprehensive, enlightened, and authoritative original commentary on the Constitution . . .").

13. This Note will not address cases that have discussed presidential control of discretion. For those interested in judicial interpretations of the President's administrative powers, the following cases will prove helpful: *Myers v. United States*, 272 U.S. 52, 71-72, 132-35 (1926); *Kendall v. United States*, 37 U.S. (1 Pet.) 524, 610-13 (1838); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-71 (1803); *Sierra Club v. Costle*, 657 F.2d 298, 406 (D.C. Cir. 1981). *Kendall* and *Marbury* are usually interpreted as undermining the Chief Administrator theory. *Myers* and *Sierra Club* are interpreted as supporting the Chief Administrator theory.

Those who wish to trace the views of Attorneys General regarding presidential control may examine the opinions of Caleb Cushing, 6 Op. Att'y Gen. 326, 332-33, 344 (1871) and 7 Op. Att'y Gen. 453, 463-79 (1855); Roger B. Taney, 2 Op. Att'y Gen. 489-91 (1852); William Wirt, 1 Op. Att'y Gen. 471-74 (1841). Wirt denies that the President can control discretion, Cushing elegantly defends presidential authority over discretion, and Taney falls somewhere in between.

14. See U.S. CONST. art. II, § 3 (empowering the President to "take Care that the Laws be faithfully executed").

No single piece of evidence is likely to persuade opponents of the Chief Administrator theory. However, the Constitution, when read in conjunction with *The Federalist Papers* and the convention records, provides a coherent and convincing account of the Framers' view of the President's administrative role: The Chief Administrator.

Our nation has undergone tremendous change since the ratification of the Constitution. Many will wonder what can be gained by analyzing the Founders' thoughts regarding the executive's administrative powers. This Note will not attempt to win over those who find such an analysis quixotic or irrelevant. Yet even the most vehement critics of original intent analysis may find that the Framers' understanding of the principles of sound, responsible government can enrich other interpretive modes as well as our understanding of the political science of government.

II. ARTICLE II, SECTION 1 AND THE FRAMERS' CHOICE OF A UNITARY EXECUTIVE

A. *Historical Background*

Before proceeding to the text of Article II and to a discussion of the unitary executive, an understanding of the Constitution's historical context will prove helpful. At the Philadelphia Convention of 1787, the Framers were reacting to the failures of a weak national government under the Articles of Confederation. Clinton Rossiter writes that "government under the Articles had lost most of its viability."¹⁵ Indeed, some wondered "whether a government without power to tax, to regulate trade, and to pass laws that individuals were bound to obey was a government at all."¹⁶

Vesting all national powers in the Confederate Congress compounded the weakness of the Articles.¹⁷ The Articles established a one-house Congress, with legislative, executive, and judicial powers.¹⁸ Because powers were concentrated in the unicameral Congress, execution of the laws suffered. Alexander Hamilton noted that the Articles of Confederation were characterized by a "want of method and energy in the administration."¹⁹ This defect resulted from congressional weakness and from the "want of a proper Executive."²⁰ Congress had "kept the power in their own hands and [had] meddled too much with details of every sort."²¹ To deal with the perceived failures of the Articles

15. CLINTON ROSSITER, *THE GRAND CONVENTION* 48 (1987).

16. *Id.*

17. *Id.* at 49.

18. ROBERT W. HOFFERT, *A POLITICS OF TENSION* 30-31 (1992).

19. 1 *WORKS OF ALEXANDER HAMILTON* 209 (Henry Cabot Lodge, ed., 1904), *quoted in* THACH, *supra*

note 4, at 647.

20. *Id.*

21. *Id.*

of Confederation, the Framers wanted to establish a more potent, independent executive.²²

The Framers were not only reacting to past failures; they were also looking forward to a bright future. Much of this optimism stemmed from the Framers' happy recognition of the first occupant of the office of the presidency. Delegates at the Constitutional Convention understood that George Washington would be the first President under the new Constitution.²³ The Framers were eminently satisfied with that impending selection and debated Article II with this in mind.²⁴ The first chief executive would not be a tyrant whom the populace would have to fear, and the Constitution reflected this sanguine belief.

B. *The Executive Power Shall be Vested in a President*

Having experienced the disadvantages of a weak executive, the Philadelphia delegates sought to create a potent and independent executive. That desire is reflected in Article II, Section 1, Clause 1: "The executive Power Shall be Vested in a President of the United States of America."²⁵ The clause's meaning is not readily apparent, for the Constitution does not explicitly define what constitutes "the executive Power." However, commentators from Hamilton and Madison to more recent scholars have claimed that Article II, Section 1, Clause 1 actually grants "the executive Power," however defined, to the President.²⁶

For example, Alexander Hamilton made much of the differences between the introductory portions of Articles I and II:

22. Historian Charles Thach goes so far as to claim that at the time of the convention "there was no lack of monarchic . . . sentiment." THACH, *supra* note 4, at 80.

23. Pierce Butler remarked that he did "[not] believe they [the executive's powers] would have been so great had not many of the members cast their eyes toward General Washington as President; and shaped their Ideas of the Powers to be given a President, by their opinions of his Virtue." 3 FEDERAL CONVENTION, *supra* note 11, at 302.

24. *Id.*

25. U.S. CONST. art. II, § 1, cl. 1.

26. Not everyone agrees with this interpretation of Article II, Section 1, Clause 1. Some commentators contend that this clause only grants the President powers explicitly enumerated elsewhere in Article II; that is, clause 1 merely identifies who has the executive powers that the rest of Article II confers. See Ledewitz, *supra* note 7, at 797 (characterizing that executive power as a "probably empty grant"); Morton Rosenberg, *Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues that May be Raised by Executive Order 12,291*, 23 ARIZ. L. REV. 1199, 1209 (1981) (arguing that vestment of executive power "is language that locates the situs but not its content"). Hence, under this interpretation, Article II, Section 1, Clause 1 does not independently grant any powers.

If we accept this interpretation of Article II, Section 1, Clause 1, then perhaps Congress can vest discretionary authority in executive officials whose decisions the President may not alter. Clause 1 does not grant the President any powers, and hence cannot support the Chief Administrator theory. Assuming that no other clause in Article II grants the President the ability to control all discretion, the President lacks constitutional authority to control discretion. Statutes set and circumscribe the President's ability to superintend discretion. McGarity, *supra* note 7, at 466 (contending that the vesting of the executive Power with the President "does not imply a presidential power to make decisions that Congress has delegated to inferior officers of the United States").

In the article which gives the legislative power of the government, the expressions are, 'All legislative powers herein granted shall be vested in a congress of the United States.' In that which grants the executive power, the expressions are, 'The Executive Power shall be vested in a President of the United States.'

The enumeration [in Article II] ought therefore to be considered, as intended merely to specify the principal articles implied in the definition of executive power; leaving the rest to flow from the general grant of that power²⁷

Thus, in Hamilton's view, Article II, Section 1, Clause 1 *grants* authority, rather than merely identifying who has the other powers granted in Article II.²⁸ The rest of Article II is but a partial enumeration of what is meant by "the executive Power."

James Madison also emphasized that the Constitution vested all executive power in the President:

The constitution affirms, that the Executive power shall be vested in the President. Are there exceptions to this proposition? Yes there are Have we a right to extend this exception? I believe not. 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.²⁹

Madison clearly understands that Article II vests all executive power with the President. Only those specific exceptions contained in the Constitution curtail the general grant of Article II, Section 1, Clause 1.

An examination of the history of the introductory sections to Articles I, II, and III supports Hamilton and Madison's interpretation of the vesting of executive power. Originally, all three were worded in a similar manner.³⁰ However, the Committee of Style³¹ altered the introductory sections and gave us the vesting clauses that we have today. Professors Morton Frisch and Frank Cross maintain that Pennsylvania delegate Gouverneur Morris³² altered the

27. Letter to the Gazette of the United States (June 29, 1793), *quoted in* JAMES HART, THE ORDINANCE MAKING POWERS OF THE PRESIDENT 223 (1925) [hereinafter HART, ORDINANCE] (emphasis omitted).

28. "The general doctrine of our Constitution then is, that the executive power of the nation is vested in the President; subject only to the *exceptions* and *qualifications*, which are expressed in the instrument [Constitution]." HART, ORDINANCE, *supra* note 27, at 223.

29. 1 ANNALS OF CONGRESS 463 (Joseph Gales ed., 1789).

30. 2 FEDERAL CONVENTION, *supra* note 11, at 177, 185, 186, 565, 572, 575.

31. The Committee of Style was a group of five delegates authorized to "revise the style of and arrange the articles agreed to by the [convention]." 2 *id.* at 547. The Committee was composed of William Samuel Johnson, Alexander Hamilton, Gouverneur Morris, James Madison, and Rufus King. *Id.*

32. Gouverneur Morris was a delegate from New York who was one of the foremost proponents of a unitary and strong executive. *See* THACH, *supra* note 4, at 99 (claiming that Morris was the "floor leader" of those who supported a strong executive); Donald L. Robinson, *Gouverneur Morris and the Design of the American Presidency*, 17 PRESIDENTIAL STUD. Q. 319, 323 (1987) (arguing that Morris was one of the most influential delegates in establishing the presidency and that he wanted a President who would be

language of Article I, Section 1, to limit Congress' powers to those expressly enumerated.³³ The Article concerning congressional authority originally read: "The legislative power shall be vested in a Congress"³⁴ The Committee of Style modified the language: "All legislative Powers herein granted shall be vested in a Congress of the United States"³⁵ Arguably, the Framers phrased the introductory sections differently because they intended to convey distinct meanings.³⁶ Article I explicitly limits Congress to legislative powers "herein granted," i.e., those enumerated. There is no such limitation in Article II. The President is simply given the general grant of "the executive Power."

Through a comparison of the introductory sections of Articles II and III, Steven G. Calabresi and Kevin H. Rhodes also conclude that Article II grants executive power, rather than merely vesting the enumerated presidential powers in Article II.³⁷ First, they scrutinize the investiture of judicial power in the judiciary. They argue that without the judicial power granted in Article III, Section 1, Article III courts would lack the "judicial power" to decide cases. Courts would have jurisdiction to hear cases but no power to actually decide them.³⁸ They conclude that Article III must be a grant of power to the judiciary. If Article III, Section 1 is a grant of power rather than an indication of where judicial power resides, then Article II, Section 1, Clause 1 should be interpreted in the same manner for they are worded similarly.³⁹

Much of Article II, then, can be seen as a *partial enumeration* of what constitutes "the executive Power." The Constitution explicitly grants the President authority to nominate individuals to the judiciary, to negotiate international treaties, and to veto legislation. The grant of "the executive Power" may include, implicitly, the ability to claim executive privilege.⁴⁰

independent of Congress and responsible for administration of federal law).

33. Frisch contends that:

Gouverneur Morris changed the wording of Article I of the draft Constitution to indicate that the legislature's authority was limited to the powers enumerated in that article . . . but at the same time he left unchanged the clause of Article II which grants the 'executive power' to a President. He therefore created the basis for a reasonable argument that this general grant of executive power in Article II was in fact meant to grant all 'executive power' not otherwise withheld to the President. . . .

Morton J. Frisch, *Executive Power and Republican Government—1787*, 17 PRESIDENTIAL STUD. Q. 281, 287 (1987). Frank Cross supports this interpretation. Cross, *supra* note 4, at 612 n.92.

34. 2 FEDERAL CONVENTION, *supra* note 11, at 177. The Article concerning congressional power actually was Article III of the draft Constitution. *Id.*

35. U.S. CONST. art. I, § 1.

36. See *supra* note 27 and accompanying text (Hamilton's comments); *supra* note 33 and accompanying text (commentary of Frisch and Cross).

37. Calabresi & Rhodes, *supra* note 4, at 1186-87.

38. Article II, Section 1 grants federal courts the judicial power. Section 2 describes matters over which federal courts may have federal jurisdiction to exercise the judicial power granted in Section 1. See U.S. CONST. art. III, §§ 1 & 2.

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

40. See generally *United States v. Nixon*, 418 U.S. 863 (1974).

Of course, once one accepts that Article II, Section 1 confers "the executive Power" to the President rather than locating "all executive Powers herein granted," one must examine what constitutes "the executive Power." This Note cannot explore all the implications of Article II's investiture of the executive power with the President. Instead, this Note focuses on the grant in the context of controlling statutory discretion. Does the President's executive power permit the President to supervise and control statutory discretion?

As mentioned earlier, the convention records and *The Federalist Papers* offer an answer to that question. However, before we proceed to the text of the Constitution and statements of the Framers that answer this question, it will be helpful to consider another well-examined Framers' choice: the unitary executive.⁴¹ Though the Framers' choice of a unitary executive is reflected in Article II, Section, 1, Clause 1, the constitutional text does not reveal the reasons for this decision.

C. *The Unitary Executive*

Although it is difficult now to conceive of more than one President, the Framers actually considered establishing a plural executive. The Framers' debates reveal some of the reasons for the decision to reject a plural executive in favor of a unitary executive.

Pennsylvania delegate James Wilson⁴² argued that a single President would provide the "most energy dispatch and responsibility."⁴³ Divided executive power would impede the ability of the President to take actions undiluted by compromise and with the necessary alacrity. Another reason for executive unity "was that officers might be appointed by a single, responsible person."⁴⁴ The single, responsible executive could then be held accountable for his personnel selections and administrative decisions.

Edmund Randolph⁴⁵ vigorously objected to the idea of a single executive. He denounced the unitary executive as a "foetus of monarchy."⁴⁶ Randolph

41. This Note relies primarily upon Thach and Cross for its discussion of the unitary executive. THACH, *supra* note 4, at 85-90; Cross *supra* note 4. However, the Note moves beyond their discussions and bolsters the unitary executive thesis with new evidence. The discussion of Article II's clauses helps eliminate many of the challenges to the unitary executive theory. *See infra* Part III. The discussions of presidential accountability (Part IV(A)) and the authority to superintend other executive officers (Part IV(B)) also support the unitary executive theory.

42. James Wilson was perhaps the "father" of the Constitution's vision of the President, and played a pivotal role at the Philadelphia Convention. Thach writes that Wilson receives "the credit of crystallizing the concept and laying it before the Convention." THACH, *supra* note 4, at 176. According to Robert DiClerico, "James Wilson fought for a vigorous, independent and accountable executive. While others would join him in this task, arguing with as much and sometimes more force, the model was his." Robert E. DiClerico, *James Wilson's Presidency*, 17 PRESIDENTIAL STUD. Q. 301, 314 (1987).

43. 1 FEDERAL CONVENTION, *supra* note 11, at 65.

44. 1 *id.* at 119.

45. Randolph was the Governor of Virginia and a delegate to the Philadelphia Convention. 3 *id.* at 95. He favored the creation of a weak President. THACH, *supra* note 4, at 107.

46. 1 FEDERAL CONVENTION, *supra* note 11, at 66.

asked why the “requisites for the executive department, vigor, despatch & responsibility could not be found in three men, as well as in one man.”⁴⁷ He agreed that the executive branch ought to be independent of Congress but thought that three executives would ensure an independent executive branch.⁴⁸ Randolph contended that three executives, chosen from different portions of the country, would ensure that the parochial views of one executive would be balanced by the views of the other two.⁴⁹ Randolph did not specify how the three executives would interact and carry out executive functions.

Despite Randolph’s comparison of the unitary executive to the monarchy, the forces arrayed in favor of the unitary executive won the day. South Carolina delegate Pierce Butler favored the unitary executive because of the “[d]elays, divisions and dissensions” that would accompany a plural executive.⁵⁰ Butler also thought that “[i]f one man should be appointed he would be responsible to the whole, [of the United States] and would be impartial to its interests.”⁵¹ Another South Carolina delegate, John Rutledge, stated his similar conviction that “[a] single man would feel the greatest responsibility and administer the public affairs best.”⁵²

Massachusetts delegate Elbridge Gerry complained that three executives would be “extremely inconvenient in many instances, particularly in military matters.”⁵³ Responding to Randolph’s proposal, James Wilson envisioned problems with a plural executive. “[A]mong three equal members, he foresaw nothing but uncontroled, continued, & violent animosities; which would not only interrupt the public administration; but diffuse their poison thro’ the other branches.”⁵⁴ On a vote of seven to three, the partisans for a unitary executive prevailed.⁵⁵

Defending the Constitution’s creation of a unitary executive, Hamilton wrote that “[t]he ingredients which constitute energy in the executive are unity; duration; an adequate provision for its support; and competent powers.”⁵⁶ He concurred with the adage that “the executive power is more easily confined when it is one.”⁵⁷ A unitary executive would administer laws more effectively and be more easily monitored. Selecting a unitary executive was a momentous decision at the convention. As we shall explore more fully later, the delegates’ choice and their proffered reasons have implications for the question of whether the President can control administrative discretion.

47. 1 *id.*

48. 1 *id.*

49. 1 *id.* at 88.

50. 1 *id.* at 90.

51. 1 *id.* at 88.

52. 1 *id.* at 65.

53. 1 *id.* at 97.

54. 1 *id.* at 96.

55. 1 *id.* at 97.

56. THE FEDERALIST No. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

57. *Id.* at 430.

III. CONSTITUTIONAL TEXT SUPPORTS THE CHIEF ADMINISTRATOR THEORY

A. *He Shall Take Care that the Laws be Faithfully Executed*

Article II, Section 3 states, in relevant part, that the President "shall take Care that the Laws be faithfully executed."⁵⁸ There are two competing schools of thought on the meaning of this clause. One school emphasizes that the President is to "take Care that the Laws be faithfully executed" *by others*.⁵⁹ That is, if a statute requires that a particular officer exercise discretion, the President is limited to ensuring that the officer faithfully acts within the statute's bounds.⁶⁰ Indeed, the Framers included the clause to limit the President's power.⁶¹ The clause ensures that the President does not ignore or violate the laws.⁶² Under this view, the Take Care Clause confirms that no one, not even the President, is above the law.⁶³

Even under this interpretation of the clause, however, the President would retain some administrative powers. He must supervise the enforcement of federal laws to ensure that officers statutorily charged with enforcement are faithfully conducting themselves in conformity with the law.⁶⁴ If the officer performed his duties honestly, adequately, and within the boundaries of his statutory

58. U.S. CONST. art. II, § 3.

59. McGarity, *supra* note 7, at 465-66 (arguing that the Take Care Clause "admits the possibility that the laws are to be executed by someone other than the President and his immediate staff").

60. Ledewitz, *supra* note 7, at 797 ("This wording implies that other parties are to execute the laws and that the President is to see that they execute the laws faithfully, thus limiting the President's role to supervision of execution by executive officers."). Morton Rosenberg contends that the Take Care Clause only means that the:

President 'shall take Care that the Laws be faithfully executed,' regardless of who executes them—arguably a duty quite different from the claim that the President has an encompassing responsibility for executing all the laws. A literal reading of the Take Care Clause confirms that it is the President's duty to ensure that officials obey Congress's instructions; the Clause does not create a presidential power so great that it can be used to frustrate statutory congressional intention.

Rosenberg, *supra* note 7, at 690 (citation omitted).

61. Tiefer, *supra* note 7, at 90 (contending the Take Care Clause was included in order "to limit, not expand, the President's power").

62. Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 613 (1989) (contending that the Take Care Clause "incorporated into the Constitution the English prohibition on the executive suspension of statutes").

63. Others attempt to downplay the significance of the clause. A. Michael Froomkin contends that the "clause is not among the major presidential powers of section two, and seems to be at most a modest grant of power." Froomkin, *supra* note 7, at 800. Froomkin also quotes Jerry Mashaw and Robert Merrill as saying that the Take Care Clause's position in Article II makes it seem "almost as an afterthought." *Id.* (quoting JERRY MASHAW & ROBERT MERRILL, *ADMINISTRATIVE PROCESS* 110 (2d ed. 1985)).

64. In essence, the President would be akin to a prosecutor who makes sure everyone in society is following their duties under the law, but does not presume to tell them how they should perform duties where they have discretion. For instance, if a health inspector decided not to certify a restaurant, the prosecutor would not be able to intervene and force the health inspector to certify the restaurant. The health inspector would have an area of discretion and if he were within that policy space, the prosecutor could not prosecute. Once the health inspector stepped outside of that policy space, the prosecutor could bring an action against the inspector for failure to perform prescribed duties.

discretion, the presidential inquiry would end, for the President would have taken care that the laws were faithfully executed.⁶⁵

A second interpretive school rejects this narrow and minimalist view of the clause and the Presidency. This school claims that the Take Care Clause means that the President is to execute federal laws, or at least be held responsible for his delegations. Madison asserted that "if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws."⁶⁶ In James Wilson's opinion, the faithful execution of the laws did not turn the President into a functionary of Congress. The "power" to take care that the laws be faithfully executed is "of no small magnitude."⁶⁷

The history of the Take Care Clause supports the second school's interpretation. The clause first appeared in the Virginia plan on May 29, 1787, and it stated that the national executive would have "a general authority to execute the National laws."⁶⁸ On June 1, the convention accepted Madison's formulation of the clause, which stated that a national executive would have the "power to carry into execution the national laws."⁶⁹ The New Jersey Plan, proposed on June 15, declared that the executive would have the "general authority to execute the federal acts."⁷⁰ On June 18, Alexander Hamilton submitted a plan with a President that had a veto power and the power of "execution of all laws passed."⁷¹ On July 17, the convention unanimously agreed that the President would have the power "to carry into execution the national laws."⁷² The convention sent this language to the Committee of Detail.⁷³

In the Committee of Detail, the clause was altered once again: "He shall take Care to the best of his Ability, that the Laws of the United States be faithfully executed."⁷⁴ Delegate John Rutledge would have substituted the following: "It shall be his duty to provide for the due & faithful exec[ution] of the Laws to the best of his ability."⁷⁵ On August 6, the Committee of Detail submitted to the convention its draft which declared that the President "shall take care that the laws of the United States be duly and faithfully executed."⁷⁶

65. This view of the President is most prominent in Attorney General William Wirt's famous opinion: The President is to ensure "that the officer assigned by law performs his duty *faithfully*—that is, *honestly*: not with perfect correctness of judgment, but *honestly*." 1 Op. Att'y Gen. 472 (1841).

66. HART, *supra* note 4, at 180 (quoting 1 ANNALS OF CONG. 481 (Joseph Gales, ed., 1789)).

67. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, RATIFICATION OF THE CONSTITUTION BY THE STATES: PENNSYLVANIA 568 (Merrill Jensen ed., 1976).

68. 1 FEDERAL CONVENTION, *supra* note 11, at 21.

69. 1 *id.* at 63. Note that the decision to have one executive was not finally made until June 4th. 1 *id.* at 97.

70. 1 *id.* at 244.

71. 1 *id.* at 292.

72. 2 *id.* at 32.

73. 2 *id.* at 116-17. On July 23, 1787, the Committee of Detail was formed and assigned the task of preparing a draft Constitution. 2 *id.* at 85. On August 6, the Committee submitted its draft back to the convention. 1 *id.* at xxii-xxiii.

74. 2 *id.* at 171.

75. *Id.*

76. 2 *id.* at 185.

This same language went to the Committee of Style on September 10, 1787.⁷⁷ The Committee of Style excised the words “duly and,” and we are left with today’s Take Care Clause.⁷⁸

The historical evolution of the clause is illuminating. On July 17th, the convention agreed upon language indicating that the President was to “carry into execution the national laws.”⁷⁹ Prior to this formulation, every previous proposed phrasing of the Take Care Clause unequivocally stated that the *President* would execute the laws. Though the Committee of Detail changed the clause’s wording slightly, no evidence suggests that the committee intended to change the clause’s meaning. Rather, the clause still presumably conferred on the President the duty of faithfully executing federal law. The Committee of Detail did not eliminate the President’s responsibility for enforcing the law.⁸⁰ Instead the Committee prudently *added the extra requirement* that the President *faithfully* execute the law.

What is striking about the convention records is that no one seemed concerned about vesting responsibility for administering federal law with the President. Throughout the history of the clause, no one ever suggested that this authority should be vested in Congress (as it was under the Articles of Confederation) or in independent executive officials.⁸¹ There was a consensus that the President should be charged with the administration of all federal laws.

One particular passage stands out as an illustration of this point. Early in the convention, Madison attempted to fix the extent of executive authority, so that the participants at the convention would know what powers and authority they were lodging in the hands of the President. He argued “that . . . certain powers were in their nature Executive, and must be given to that departmt.”⁸² He proposed:

that a national Executive ought to be instituted . . . *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.*⁸³

77. 2 *id.* at 564, 574.

78. 2 *id.* at 600.

79. 2 *id.* at 32.

80. I am assuming that the differences in wording among the various proposals do not reflect a different understanding of the President’s responsibility for executing federal law. This assumption is reasonable given the unanimity regarding the grant to the President of the power to execute federal laws.

81. The Morris-Pinckney plan would have created department heads with constitutional authority to execute laws. 2 FEDERAL CONVENTION, *supra* note 11, at 342-43. However, these department heads were clearly subordinate to the President. They would “assist the President in conducting the Public affairs . . .” *Id.* They would also serve at the President’s pleasure. *Id.*

82. 1 *id.* at 67.

83. *Id.* (emphasis added).

Subsequently, South Carolina delegate Charles Pinckney successfully moved to strike out the last clause, stating that the words were unnecessary since the President already had the power to enforce national laws.⁸⁴ Pinckney's response is instructive; clearly, in his view, the President already had the power to execute federal law.⁸⁵

The President's authority to execute federal law arguably includes the power to control discretion. The Framers recognized that administration of the laws often involved a good deal of discretion. In a debate discussing the differences between the executive and judicial branches, Madison noted that "in the administration of the former [executive branch] much greater latitude is left to opinion and discretion than in the administration of the latter [judicial branch]."⁸⁶ Madison recognized that statutes were not always so precise as to limit the President to one course of action.

The Framers did not labor over the executive's duties under the Take Care Clause merely to create a glorified busybody who could only look over the shoulders of others to determine if they were faithfully executing federal law. The Framers wanted the President to execute the law; in the Constitution, no other officer is so charged. With the authority and responsibility to execute federal law comes the authority to exercise any discretion that is part of federal law.

If the Framers wanted the President to execute federal law, may Congress (consistent with original intent) create administrative agencies that execute federal law without presidential supervision and control? The answer is no. The choice of who is constitutionally responsible for executing federal law was made in Philadelphia.⁸⁷

While the Take Care Clause appears to support the Chief Administrator theory,⁸⁸ other portions of Article II have been said to undermine the theory. The next three Parts, III(B)-(D), deal with constitutional provisions that are thought to detract from the Chief Administrator theory.

84. Pinckney contended that the last clause was "unnecessary, [its] object . . . being included in the 'power to carry into effect the national laws.'" *Id.*

85. Even Edmund Randolph, one of the most vocal opponents of a strong President, understood that the President would execute federal law. He stated that one of the President's powers shall be "to carry into execution the national laws." 2 *id.* at 145.

86. 2 *id.* at 34.

87. Of necessity, assistants aid the President in fulfilling his constitutional duties and powers. However, the presence of assistants does not diminish the President's personal responsibility to administer federal law. These assistants cannot exercise independent executive authority. See *infra* Part IV(B).

88. Historian James Hart correctly noted that the constitutional command that the President faithfully execute the laws means that "[T]he President has the constitutional power of administrative direction, which Congress may perhaps not constitutionally limit . . . It is part of 'the' executive power to see that the laws are *faithfully* executed in accordance with *his own* ideas." HART, *supra* note 4, at 242; see also HART, ORDINANCE, *supra* note 27, at 20 ("As the possessor of the executive power and of the duty to take care that the laws be faithfully executed, he may issue administrative directions to his subordinates to guide them in the exercise of the powers given them by law.").

B. *He May Require the Written Opinions of the Department Heads*

The Written Opinions Clause of the Constitution states that the President may command the written opinions of department heads with respect to their duties.⁸⁹ If the President is the Chief Administrator, why would the Framers have bothered to enumerate an authority presumably subsumed under the grant of executive power or the Take Care Clause?⁹⁰ Opponents of the theory claim that the only logical explanation for the clause's inclusion is that the Framers conceived of heads of departments who would act independently of the President.⁹¹ They contend that the President needs the constitutional authority to demand opinions because without this authority, department heads could carry out their duties without even presidential cognizance of their actions. Once the President learns what the department heads plan to do, he can utilize his levers of influence, such as the power of persuasion and the threat of removal. However, the President may not substitute his judgment for the department head's decisions. He may only demand opinions.

Supporters of the Chief Administrator theory respond in various ways. Some contend that the Written Opinions Clause is a mere superfluity and not worth serious discussion or attention.⁹² Indeed, Alexander Hamilton writes in *The Federalist Papers* that the Written Opinions Clause is "a mere redundancy in the [Constitution], as the right for which it provides would result of itself from the office [of the Presidency]."⁹³ That is, even without the clause, the President has the power to ask for opinions of his department heads.⁹⁴ Others acknowledge the clause's potential ramifications for the President's administrative powers but urge that an examination of all the evidence should lead us to reject a construction that limits the President's executive authority.⁹⁵

89. 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 . . .").

90. Froomkin argues that a broad reading of the Take Care Clause reduces "this [Written Opinion] clause . . . to surplusage. If the President has so much control over the executive that he can fire at will, why put the power to request written opinions in the Constitution?" Froomkin, *supra* note 7, at 800.

91. *Id.* (arguing that clause exists "because it was not assumed . . . that the President had absolute power over Heads of Departments.").

92. Historian Charles Thach states that the clause is "[a]n intentionally meaningless imitation of that ministerial countersignature . . . from which the British cabinet system has been derived." THACH, *supra* note 4, at 125.

93. THE FEDERALIST No. 74, at 447 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

94. We should not be surprised that Hamilton thought the Written Opinions Clause was redundant. Akhil Amar has argued that much of the Constitution can be seen as redundant. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1154 & n.109 (1991) (discussing redundancy of the 10th Amendment and claiming that many portions of the Bill of Rights are merely meant "to clarify preexisting constitutional understandings").

95. James Hart pleads that the clause should not be given considerable weight as an argument for the independence of executive officers because such construction "would be . . . inconsistent, undermining the independence of the Presidency and the separation of powers for which the framers had sought to provide." HART, *supra* note 4, at 246.

Francis Scott Key, arguing before the Supreme Court in *Kendall v. United States*,⁹⁶ put another twist on the meaning of the clause:

[The department head] is, as to these duties of his office, subject to the President's control. For why should [the President] give any account of [the department head's] opinions upon matters appertaining to those duties . . . but to ascertain how he means to execute these duties; and to enable [the President], if he finds [the department head] is about to execute a law, or discharge any of his official duties improperly, to direct and control, and, if necessary, remove him from office?⁹⁷

Key's argument is a compelling one—the Framers arguably included this provision to facilitate presidential control of discretion. The President may demand opinions in order to determine how *he should execute federal law*.

Once again, a perusal of the convention records will help us sift through the various interpretations. On August 20th, Gouverneur Morris and Charles Pinckney submitted language to the Committee of Detail that would establish departments “[t]o assist the President in conducting the Public affairs.”⁹⁸ The President would be able to “require the written opinions” of the department heads, but “he shall in all cases exercise his own judgment, and either Conform to such opinions or not as he may think proper.”⁹⁹

On August 22, the Morris-Pinckney proposal emerged from the Committee of Detail. The President would have a council “whose duty it shall be to 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.”¹⁰⁰ On August 31, the convention sent the Morris-Pinckney plan to a committee comprised of eleven members.¹⁰¹ On September 4, the eleven-member committee reported out the Constitution's Written Opinion Clause.¹⁰² Conspicuously absent from the committee's report was the Morris-Pinckney plan and any explanation for the committee's rejection of that plan. The convention accepted the Written Opinions Clause on September 7, immediately after it rejected a plan by Virginia delegate George Mason to adopt an alternative executive council.¹⁰³ Evidently, the eleven-member committee reviewed the Morris-Pinckney plan, rejected it, and instead submitted the Written Opinions Clause.

96. 37 U.S. (1 Pet.) 524 (1838).

97. *Id.* at 543.

98. 2 FEDERAL CONVENTION, *supra* note 11, at 342.

99. 2 *id.* at 343-44.

100. 2 *id.* at 367.

101. 2 *id.* at 473. The committee was charged with reviewing “such parts of the Constitution as have been postponed.” *Id.* A careful parsing of the debates from August 23 to August 31 indicates that the Morris-Pinckney plan went to the committee because it had not yet been discussed.

102. 2 *id.* at 493, 495.

103. 2 *id.* at 541-43.

Under the original Morris-Pinckney plan, the President could demand the written opinions of department heads.¹⁰⁴ The proposal also explicitly recognized that officers could only offer advice; the *President's decision was conclusive*. Finally, the department heads were to “assist the President in conducting the Public affairs.”¹⁰⁵ The language of the Morris-Pinckney plan leaves no doubt that the President was charged with making decisions and that the department heads were the President’s assistants.¹⁰⁶

The resemblance of the Constitution’s Written Opinion’s Clause to the language in the Morris-Pinckney plan is unmistakable.¹⁰⁷ It is unlikely that the Framers adopted language similar to a prior conception of executive power, completely divorced it from its previous context, and gave those words the exact opposite meaning. Are we to conclude that the committee of eleven rejected the Morris-Pinckney plan because they did not believe the department heads should offer advice and opinions and merely assist the President? No delegate stated a desire to take a few words out of the Morris-Pinckney plan, include them in the Constitution, and thus turn the Morris-Pinckney plan on its ear. No one claimed that the Written Opinions Clause indicated that departments heads would act independently. Of course, the question then becomes, why did the committee reject the Morris-Pinckney proposal at all? They could have included the clause as Morris and Pinckney had submitted it, and the President’s role would have been crystal clear.

The Morris-Pinckney council was probably not rejected because the committee feared granting final decisionmaking authority to the President. Rather, the committee likely rejected the council because its members envisioned it as a means by which the President could escape responsibility for his decisions. Early on in the debates, James Wilson argued that a council “oftener serve[d] to cover, [rather] than prevent malpractices.”¹⁰⁸ In response to George Mason’s council plan, Gouverneur Morris claimed that the eleven-member committee rejected the council idea because the President “by persuading his Council—to concur in his wrong measures, would acquire their protection for them.”¹⁰⁹ The Framers were concerned with maintaining presidential responsibility for

104. 2 *id.* at 344.

105. 2 *id.* at 342 (emphasis added).

106. Indeed, Morris and Pinckney expressed their understanding that department heads were to be subordinate to the President. Morris stated that “officers of State” would “exercise their functions in subordination to the Executive.” 2 *id.* at 53-54. Pinckney thought the President would inspect the departments, keep the officers attentive to their duties, and punish errors. 3 *id.* at 111.

107. Compare “he may require the written opinions of any one or more of the [council] members . . . and every officer abovementioned shall be responsible for his opinion on the affairs relating to his particular Department . . .,” 2 *id.* at 343-44, with “he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . .” U.S. CONST. art II, § 2, cl. 1.

108. 1 FEDERAL CONVENTION, *supra* note 11, at 97. Later on, Wilson found a council with appointment powers preferable to the current nomination and Senate confirmation process. 2 *id.* at 542.

109. 2 *id.* at 542.

executive decisions; they wanted him to make the final decision and be accountable for it.

Why did the Framers not retain the portion of the Morris-Pinckney plan that focused decisionmaking responsibility on the President? Most likely the Framers did not retain the explicit requirement that the President make decisions because this was implicit in the Written Opinions Clause itself. The President would not be demanding reports on how the departments would independently administer federal law; the President would be demanding *opinions* on how he ought to control the administration of the matters before each department.¹¹⁰

Indeed, future Supreme Court Justice James Iredell, a member of the North Carolina Ratifying Convention, understood the Written Opinions Clause to have this exact meaning. First, Iredell understood that the Written Opinions Clause was “in some degree, substituted for a council.”¹¹¹ Next he notes that the existence of the clause does not “diminish the responsibility of the President himself.”¹¹² The Written Opinions Clause ensures that “[T]he President will personally have the credit of good, or the censure of bad measures; since, though he may ask advice, he is to use his own judgment in following or rejecting it.”¹¹³ The President is responsible for the exercise of discretion, whether or not he asks for advice, for in the end, he is to “use his own judgment.”

Contending that the Written Opinions Clause indicates that the President’s constitutional relationship with the department heads ends with the ability to request their opinions does not do justice to the rich history behind the clause. Instead of detracting from the Chief Administrator theory, the clause, interpreted in its full historical context, may actually advance the theory. The Written Opinions Clause means that the President may ask for the considered opinions of the department heads and implies that the President will make the ultimate decision.

C. *The Inferior Officers Appointments Clause*

Article II, Section 2, Clause 2 might seem a clear indication that the Constitution recognizes that a department head may act independently of the President. The clause states, in relevant part, that “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.”¹¹⁴ Before

110. The word “opinions” in the clause was used in the same manner as it is used today. Recall that under the Morris-Pinckney plan, the President could get the opinions of the department heads, but he was to “exercise his own judgment, and either Conform to such opinions or not as he may think proper.” 2 *id.* at 343-44. This plan makes clear that the department heads were only offering “opinions” or advice.

111. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 108 (Jonathan Elliot ed., Ayer Co. 1987) (1888).

112. *Id.*

113. 4 *id.* at 110.

114. U.S. CONST. art. II, § 2, cl. 2.

department heads can appoint anyone, however, Congress must delegate this power to them.

A. Michael Froomkin justifiably asks why the Framers would grant Congress the ability to vest appointment powers in a department head if that department head was subordinate to the executive. The Framers arguably endowed Congress with the authority to delegate appointment powers to department heads because they wanted the department heads to have independent appointment powers.¹¹⁵ From the specific conclusion that the President cannot superintend the appointments made by department heads, however, Froomkin jumps to the unwarranted deduction that department heads are free from presidential supervision altogether.¹¹⁶ There are two convincing reasons why Froomkin's leap of logic is untenable.

First, while the Inferior Officers Appointments Clause may permit department heads to make appointments without presidential superintendence, it does not permit Congress to grant "the executive Power" to department heads.¹¹⁷ The executive power and the responsibility for faithfully executing federal law still rest with the President. If the Framers had wanted to grant department heads the authority to exercise executive power, they would have said: "The executive Power shall be vested in a President and in such department heads as Congress may create." Or the Constitution might have stated: "Congress may by law vest the executive Power in the President alone, or in the Heads of Departments." If the Framers had wished to grant Congress the ability to create a plural executive (i.e., more than one individual vested with power to execute federal law), it seems unlikely that they would have done so in such a surreptitious manner.

Second, because Froomkin does not examine the convention discussion of the clause, he fails to note that Gouverneur Morris submitted the clause as an amendment on the second-to-last day of the convention.¹¹⁸ As is widely recognized, Gouverneur Morris was the floor leader of the pro-executive forces at the convention.¹¹⁹ It is unlikely that the man who said that "officers of state" would "exercise their functions in subordination to the Executive,"¹²⁰ would also propose an amendment that implied that department heads could exercise executive power independent of presidential control.

115. Froomkin, *supra* note 7, at 799. Calabresi and Rhodes agree that the Inferior Officers Appointments Clause might pose some problems for their unitary executive argument. Calabresi & Rhodes, *supra* note 4, at 1181.

I do not believe that department heads may make appointments independently of presidential control. Since I lack the space to adequately explain why I disagree with the conventional interpretation, I have accepted, for argument's sake, that the Inferior Officers Appointments Clause permits department heads to make appointments free from presidential control.

116. Froomkin, *supra* note 7, at 799.

117. Calabresi & Rhodes, *supra* note 4, at 1182.

118. 2 FEDERAL CONVENTION, *supra* note 11, at 627.

119. See *supra* note 32.

120. 2 FEDERAL CONVENTION, *supra* note 11, at 53-54.

For these two reasons, the Inferior Officers Appointments Clause probably does not mean that department heads are free from presidential control. At most, the clause means that department heads can make appointments without presidential superintendence.

D. *Constitutional Authority to Splinter the Executive Branch*

Although Article II creates an executive branch under the President's control, other portions of the Constitution may permit Congress to divide the executive branch and diminish presidential power. William Van Alstyne has argued that since both the executive and judicial branches have nonenumerated powers, Congress also might have such powers.¹²¹ Van Alstyne contends that perhaps Congress has the implicit power to make exceptions to the President's executive powers. Van Alstyne, however, does not consider the rejoinder that Article I limits Congress to legislative powers "herein granted"; there is no such limitation in Articles II or III. Van Alstyne cannot find a nonenumerated congressional authority to divide the executive power because Article I, Section 1 explicitly prohibits congressional exercise of nonenumerated powers.

But perhaps there is an explicit constitutional provision that grants Congress the power to make exceptions to the executive's power and authority: the Necessary and Proper Clause. Article I, Section 8, Clause 18 states that Congress shall have the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."¹²² If Congress felt it were "necessary and proper" to insulate an agency from presidential control, perhaps such an institutional arrangement would be constitutional.

In order to examine whether Congress can create an independent officer or agency to execute federal law, we will have to unpack the Necessary and Proper Clause.¹²³ First, the clause only permits Congress to enact laws which are "necessary *and* proper." What does the term proper add to the clause? The inclusion of the word "proper" ensures that Congress cannot use the clause to violate the Constitution itself. For instance, Hamilton argues that the Constitution does not grant any part of the federal government the power to regulate the laws

121. William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, LAW & CONTEMP. PROBS., Spring 1976, at 102.

122. U.S. CONST. art. 1, § 8, cl. 18.

123. A history of the clause may prove illuminating. The clause first appeared as a congressional "right to make all Laws necessary to carry the foregoing Powers into Execu[tion]." 2 FEDERAL CONVENTION, *supra* note 11, at 144. The clause was then altered to state that Congress had the authority "to make all Laws that shall be necessary and proper for carrying into (full and complete) Execution (the foregoing Powers, and) all other powers . . ." 2 *id.* at 168. The Committee of Detail excised the phrase "full and complete" and we are left with today's Necessary and Proper Clause. 2 *id.* at 344-45.

of inheritance.¹²⁴ Given that no part of the federal government has authority to regulate inheritance laws, Congress may not enact inheritance laws employing the clause as a constitutional basis for those laws. It is improper, i.e., unconstitutional, for Congress to enact an inheritance law and hence the law cannot be sustained as an exercise of Congress' Necessary and Proper power.

Indeed, Pierce Butler contemplated the introduction of a clause which would have given Congress the power to "make all Laws, not repugnant to this Constitution that may be necessary for carrying into execution the foregoing powers and such other powers as may be vested by this Constitution in the Legislature of the United States."¹²⁵ Butler's substitute clause would have made clear that the clause could not be used to abridge other provisions of the Constitution. In today's clause, "proper" may merely act as a synonym for Butler's phrase "not repugnant to this Constitution."¹²⁶

Another principle of the clause is that it may only be invoked when Congress has passed a law "for carrying into Execution the foregoing [Article I, Section 8] powers, and all other powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof."¹²⁷ In other words, Congress may only invoke the Necessary and Proper Clause when it acts to "carry[] into Execution" a power of the United States. The clause does not give Congress the power to enact any law it deems "necessary and proper." If that were the intention behind the clause, the clause would have simply stated that Congress has the power "To make all Laws which shall be necessary and proper." Congress may only act when it carries into execution either one of its own powers or the powers of a coordinate branch.

So for instance, Congress is barred from enacting a law restricting the President's veto power because that law would not be "carrying into Execution [a] Power[] vested by this Constitution in [an] Officer thereof." In fact, Congress would be *preventing* the President from carrying into execution his veto power. In other words, the act would be attempting something that the Necessary and Proper Clause itself forbids.

On the other hand, when Congress creates departments and officers that help the President execute federal law (i.e., departments and officers under the President's control which do not detract from his take care responsibilities), Congress is enacting a law which is "carrying into Execution [a] Power[] vested by this Constitution in [an] Officer thereof." Congress is helping the President

124. Hamilton claims that the federal government has no authority to regulate laws of inheritance and that the Necessary and Proper Clause does not change this fact. *THE FEDERALIST* NO. 33, at 201-05 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

125. *SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 231 (James H. Hutson ed., 1987). Butler never introduced this version of the clause.

126. Of course, the term "proper" may not be synonymous with the phrase "not repugnant to this Constitution." It is possible that "proper" is meant to convey some other meaning. The question then becomes: "What other plausible meaning are we to ascribe to it?"

127. U.S. CONST. art. I, § 8, cl. 18.

carry into execution his executive power and his take care authority. Hence, the Necessary and Proper Clause enables Congress to assist the President in the fulfillment of his constitutional duties; it does not permit Congress to enact laws which thwart the exercise of the President's constitutionally-granted powers.¹²⁸

Applying these two principles to our question of whether Congress can use the Necessary and Proper Clause to create an independent agency, we must conclude that Congress cannot employ the clause as a constitutional justification for the creation of an independent agency. First, when Congress creates an independent agency executing federal law pursuant to the Necessary and Proper Clause, Congress' statute is not "proper." If one agrees that the Framers granted the executive power and the take care authority only to the President, a congressional decision to vest those powers in independent officers is as improper as vesting the veto power in an independent officer.

Second, when Congress creates an independent agency, which "powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof" is Congress carrying into execution? Nowhere does the Constitution grant the power to create an independent agency. Neither the Congress nor the President has such a power. When Congress creates an independent agency, it is "carrying into Execution" neither its own powers under Article I, Section 8, nor any of its other powers enumerated in the Constitution. Congress has the authority to make laws, not the authority to determine who will execute those laws.¹²⁹ The Constitution already grants the President the authority to execute laws that Congress has enacted.

Nor does the President have the power to vest others with his constitutional responsibilities. The President has the authority and duty to faithfully execute federal laws. The President does not have the constitutional authority to transfer this duty and authority to an independent entity. If the President does not have the power to create an independent agency, and Congress itself lacks such power, Congress cannot use the Necessary and Proper Clause as a pretext for creating an independent agency or officer.

These two aspects of the Necessary and Proper Clause bar Congress from creating independent agencies. More generally, the clause cannot be used either to alter constitutionally-fixed separation of powers principles or to upset the balance of state and federal authority.

128. Akhil Amar contends that the Necessary and Proper Clause permits Congress to determine how many Supreme Court Justices there will be and other decisions regarding the judiciary. Akhil R. Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 481-83 (1989). However, the clause does not allow Congress to limit the power of the judiciary or to alter the Supreme Court's original jurisdiction. *Id.* Applying Amar's argument to the executive branch leads to the conclusion that Congress may help the President exercise his powers, but may not use the Necessary and Proper Clause as a pretext for curtailing the President's constitutional powers.

129. Article I, Section 8 grants Congress the authority to legislate on numerous subjects. U.S. CONST. art. I, § 8. Section 8, however, does not permit Congress to determine who will execute the laws that it creates.

Hamilton emphasizes the clause's narrow import when he asserts that the clause is "only declaratory of a truth which would have resulted by necessary and unavoidable implication" of establishing a federal government and vesting it with powers.¹³⁰ Madison places a similarly restrictive gloss on the clause: "[T]here can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government by unavoidable implication" even if the clause had not been included in the Constitution.¹³¹

This Part has examined the constitutional text together with the Framers' statements in order to uncover the meaning of some of the Constitution's cryptic words. A detailed examination reveals that the Take Care Clause and the Written Opinions Clause advance the Chief Administrator theory. Moreover, although the Inferior Officers Appointments Clause and the Necessary and Proper Clause do not directly advance the Chief Administrator theory, neither do they permit Congress to undermine the Chief Administrator.

The next Part moves beyond the Constitution's text and relies primarily upon the statements of the Framers at the Philadelphia Convention and in *The Federalist Papers*. The Framers' statements make explicit what is implicit in Article II's text and structure: The President is the unitary, responsible, Chief Administrator.

IV. THE FRAMERS INTENDED TO ESTABLISH A CHIEF ADMINISTRATOR

At the convention, participants discussed the President's administrative role. From these debates and from *The Federalist Papers*, a coherent and clear picture of the Framers' views of the President emerges. As noted above, the Framers were intent upon establishing a unitary executive.¹³² The Philadelphia delegates also wished to fix political accountability for the administration of the laws on the unitary executive. Finally, the Framers wanted officers statutorily charged with execution of the laws to be subordinate to the President. Subordination to the President would further the goals of executive unity and of presidential accountability. The debates indicate that the Framers had a consistent and sophisticated vision of the President's authority.

A. *Administrative Responsibility*

As the pro-executive forces repeatedly stated during the convention, one of the central reasons for choosing a unitary executive was its salutary effect of concentrating responsibility for the execution of laws in one individual. As

130. THE FEDERALIST NO. 33, at 202 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

131. THE FEDERALIST NO. 44, at 285 (James Madison) (Clinton Rossiter ed., 1961).

132. See *supra* text and accompanying notes 42-57.

Hamilton noted, a plural executive “tends to conceal faults and destroy responsibility.”¹³³ James Wilson recognized that a single executive, on the other hand, would provide the “most energy dispatch and responsibility.”¹³⁴ Recall further that John Rutledge desired a single President because one executive would “feel the greatest responsibility and administer the public affairs best.”¹³⁵ Butler stated that “[i]f one man should be appointed he would be responsible to the whole, and would be impartial to its interests.”¹³⁶

Why was there such an emphasis on presidential responsibility? Because there was a fundamental assumption that the President was charged with execution of the laws. Indeed, all the various formulations of the Take Care Clause granted the President the authority to execute the laws.¹³⁷ Hence it was natural to speak of the President’s responsibility for the administration of the laws.

In *The Federalist Papers*, Hamilton discusses the executive’s administrative powers in the context of examining presidential election. Tumult and disorder were evils to be avoided “in the election of a magistrate *who was to have so important an agency in the administration of the government as the President of the United States.*”¹³⁸ Hamilton also wrote of the necessity of a vigorous executive and its importance in administration: “*Energy in the Executive is a leading character in the definition of good government. . . . [I]t is essential . . . to the steady administration of the laws.*”¹³⁹

The President’s responsibility for administration becomes even clearer after acknowledging some of the choices the Framers explicitly rejected at the convention and the reasons proffered for rejection. As discussed earlier,¹⁴⁰ some wished to append an advisory council to the President, hoping that the council’s advice would prove beneficial. Gouverneur Morris and Charles C. Pinckney sought to establish five departments “to assist the President in conducting the Public affairs” and to furnish the President with advice.¹⁴¹ The President, however, would be responsible for any decisions made. Connecticut

133. THE FEDERALIST NO. 70, at 427 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

134. 1 FEDERAL CONVENTION, *supra* note 11, at 65.

135. *Id.*

136. 1 *id.* at 88.

137. *See supra* text and accompanying 58-88.

138. THE FEDERALIST NO. 68, at 412 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

139. THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added). In FEDERALIST NO. 72, Hamilton explicitly lays out the administrative responsibilities of the President: The actual conduct of foreign negotiations, the preparatory plans of finance, the application and disbursement of the public moneys in conformity to the general appropriations of the legislature, the arrangement of the army and navy, the direction of the operations of war, these—and other matters of a like nature, constitute what seems to be most properly understood by the administration of government.

THE FEDERALIST NO. 72, at 435-36 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

140. *See supra* text and accompanying notes 89-113.

141. 2 FEDERAL CONVENTION, *supra* note 11, at 342-44.

delegate Oliver Ellsworth also sought to establish a council whose advice would inform, but not bind the President.¹⁴²

Yet Wilson and others disapproved of appending a council to the executive. Wilson stressed the desirability of complete responsibility resting with the President. The council would serve “to cover, [rather] than prevent malpractices.”¹⁴³ Gouverneur Morris claimed that the committee which considered the Morris-Pinckney plan rejected his plan because the President “by persuading his Council—to concur in his wrong measures, would acquire their protection for them.”¹⁴⁴

The Framers were so concerned with the principle of presidential responsibility for the administration of federal law that they rejected every council proposal because each might shield the President. They believed that a unitary executive, unencumbered and unobscured by a council, would be most conducive to the assignment of responsibility and to the proper administration of federal law.

B. *Subordination of All Executive Officers to the President*

As a unitary executive responsible for the administration of the laws, the President was to have complete authority over all other executive officers. If the President was accountable for the administration of the laws, should he not have the ability to command those who help him administrate those laws? A review of the debates and *The Federalist Papers* supports the proposition that all officials who execute federal law are subordinate to the President.

Gouverneur Morris, anticipating the actions of the first Congress, thought that there would be certain “officers of State” such as a minister of war, foreign affairs, and finance.¹⁴⁵ Morris presumed that these officers would “exercise their functions in subordination to the Executive.”¹⁴⁶ Morris recognized that “without these ministers, the Executive [could] do nothing of consequence.”¹⁴⁷ Morris’ statements reflect his sophistication. He recognized that the President could not satisfy his take care duties alone and unaided; other executive officers would be necessary. Morris understood, however, that these officers must exercise their functions in subordination to the President to maintain executive unity and responsibility.

Similarly, Charles Pinckney thought that the President would be deeply involved in the departments’ activities. The President would

142. 2 *id.* at 329. Ellsworth’s “proposition was that it [the Council] should be composed of the President of the Senate—the Chief-Justice, and the Ministers as they might be estabd. for the departments of foreign & domestic affairs, war finance, and marine, who should advise but not conclude the President.” *Id.*

143. 1 *id.* at 97.

144. 2 *id.* at 542.

145. 2 *id.* at 53-54.

146. *Id.*

147. *Id.*

be empowered, whenever he conceives it necessary, to inspect the Departments of Foreign Affairs, of War, of Treasury, and when instituted, of the Admiralty. This inspection into the conduct of the Departments will operate as a check upon those Officers, keep them attentive to their duty, and may be the means in time not only of preventing and correcting errors, but of detecting and punishing malpractices.¹⁴⁸

Pinckney envisioned a “hands-on” executive, one who clearly controls the actions of all executive officers. The President would detect and correct errors as well as punish those who commit errors.¹⁴⁹

Finally, in *The Federalist Papers*, Hamilton discusses the subordinate position of executive officers:

The persons, therefore, to whose immediate management these [numerous executive powers] 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.¹⁵⁰

Hamilton recognized that the “immediate management” of the departments would not rest with the President. However, the individuals in charge of these departments would be mere deputies of the Chief Administrator and would be “subject to his superintendence.”¹⁵¹

The Framers had an extremely sophisticated understanding of how federal law would be administered. Though the President was granted the executive power and the take care authority, the Framers realized that others would assist the President in fulfilling these duties. These ministers, assistants, and deputies would be subordinate to the President. Indeed, how could it be otherwise? No one else but the unitary executive had been given “the executive Power” or the authority and responsibility “to take Care that the Laws be faithfully executed.” It should come as no surprise that the Framers considered the President the Chief Administrator and all other administrative officials as merely his assistants. Any other arrangement would detract from the unitary, responsible executive the Framers sought to construct.

148. 3 *id.* at 111.

149. Moreover, recall the Morris-Pinckney proposal to create a council. The department heads would “assist the President in conducting Public affairs.” 2 *id.* at 342. The President would be empowered to ask the advice of the department heads, but the President would make final decisions and would accept responsibility for those choices. 2 *id.* at 343-44. This plan also recognized that the President could not execute all the federal laws alone; he would need the assistance of others. Yet ultimately, the President would retain control and responsibility for decisions.

150. THE FEDERALIST NO. 72, at 436 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

151. *Id.*

V. CONCLUSION

Part IV illustrated the Framers' concern with keeping executive authority concentrated in one individual's hands. Such an arrangement would further presidential accountability and lead to better administration of federal law. However, as noted earlier, some may find discussions of the Framers' original intent largely irrelevant to a determination of what constitutional powers the President has today. Yet, even those who scoff at original intent analysis may still learn something from the Framers' keen understanding of how to structure the federal government.

The Framers' motivations, statements, and their text (i.e., the Constitution) remain relevant to the problems of today's administrative state. Despite the incredible expansion of the federal government and its increased complexity, we are still grappling with the same question that confronted the delegates over 200 years ago: How to establish a well-administered federal government that is also responsible to the people. The Framers' answer to this question was to create a unitary executive with the power to execute federal law.

The Framers were not arbitrarily choosing a set of constitutional constraints. They considered the benefits of multiple executives versus a single executive. They weighed the benefits of administrative independence against the benefits of hierarchy. They examined the advantages of diffusing administrative responsibility and alternatively, concentrating it in one person's hands. They chose to establish a Chief Administrator responsible for the execution of all federal law.

Though this Note has focused on the President's powers of administration, Congress, of course, may have the dominant role in the administration of federal law. Congress retains the enormous power of the purse, may convene the feared committee oversight hearing, and may draw unwanted attention to agency personnel. Most importantly, Congress could enact detailed statutes leaving the President with less discretion. If Congress chose to curb discretion dramatically, the administrative agencies would then be restricted to carrying out Congress' ministerial commands. In turn, the President would be restricted to ensuring that executive officials execute Congress' ministerial dictates.

Congress, however, has gone beyond its established role and has vitiated several decisions of the Constitutional Convention. Congress has resuscitated the plural executive in the form of independent agencies. Congress has splintered responsibility for execution of federal law among numerous agencies. Congress has established independent administrative officers. Congress' continual attempts to restrict the President's constitutional authority are not surprising; James Madison presciently warned that "[t]he legislative department is everywhere

extending the sphere of its activity and drawing all power into its impetuous vortex."¹⁵²

Returning to the question posed at the outset of the Note, suppose that a statute divested the President of his authority to supervise and control all those who administer federal law. Would such an arrangement be consistent with the Framers' vision of the President? The vesting of the executive power and the Take Care Clause would be reduced to nullities. The President would be able to demand written opinions of the department heads, but would be unable to direct those officers. The President could hardly be held responsible for execution of federal law in the way the Framers' contemplated. Nor would those who administer federal law be subordinate to the executive. We should hesitate to depart so radically from their original intent.

152. THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961).

