

GOVERNMENTAL PRACTICE AND PRESIDENTIAL DIRECTION: LESSONS FROM THE ANTEBELLUM REPUBLIC?

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In *Association of Data Processing Service Organizations, Inc. v. Camp*,¹ Justice Douglas famously remarked, “Generalizations about standing to sue are largely worthless as such.”² Justice Douglas went on to say, however, that one generalization was necessary, that is, that the question of standing had to be considered within the framework of Article III of the Constitution. My sense is that Justice Douglas’s skepticism about generalizations applies with even greater force when the question is the extent of the President’s power under the U.S. Constitution to direct other officers concerning the execution or implementation of federal law. But, one generalization might be hazarded: Almost anyone who addresses the topic argues from historical practice, not merely from the text of the Constitution or from judicial pronouncements.

This practice of relying on practice is understandable, perhaps unavoidable. In his famous, and often-cited, concurring opinion in *Youngstown Sheet and Tube Co. v. Sawyer*,³ Justice Jackson began by noting, “A judge, like an executive advisor, may be surprised by the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves.”⁴ Judicial decisions concerning the President’s directive power are sparse. When looking for guidance a lawyer will often come up empty, or be required to extrapolate creatively from dictum in some tangentially related context.

Similarly, the Constitution is remarkably Delphic where administration is concerned. As I instruct my students at the

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1. *Ass’n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150 (1970).

2. *Id.* at 151.

3. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

4. *Id.* at 634.

beginning of every course in Administrative Law, there is a hole in the Constitution where administration might have been. Only two executive officers are mentioned, and the only function given to the Vice-President is to preside over the Senate and cast a vote in case of ties. The development of the machinery of government is left to Congress in the exercise of its Article I powers.

To be sure, arguments can be made from the constitutional text, but they are, in my opinion, largely tendentious. Article II vests the “executive power” in the President, but what is that? The President is charged with seeing that the laws are faithfully executed, but does this mean that he or she is to direct their execution? Under a Constitution whose drafters thought it necessary to provide the President explicitly with the power to request reports in writing from the heads of departments? How much should we make of the fact that the President is made Commander in Chief of the Army and Navy, surely a directive authority, but outside of that context, the President has a textual constitutional relationship to other officers only through appointment? And “officer” appointments are subject to Senate approval, while “inferior” officers may be appointed by department heads or the courts of justice as Congress directs?

Textual silence is sometimes deafening. No power of removal is mentioned save impeachment? Of course, the President is charged with the responsibility to see that the laws are faithfully executed.⁵ But the Constitution tells us nothing about how this duty is to be discharged, save for the clause authorizing the President to request written reports from department heads.⁶

We might combine all these textual indications—the grant of “the executive power,” appointment of department heads who must report on request and the responsibility for faithful execution—to infer a default position in the absence of contrary statutory language: The President is presumed to have authority to assure that lower level officials carrying out executive functions do so in accordance with law. Indeed, I believe that that is a fair inference from the text of the Constitution itself. The problem is that this default position fails to answer many of the vexing questions that present themselves⁷ once

5. Presidential Oath, U.S. CONST. art. 2, § 1, cl. 8.

6. U.S. CONST. art. 2, § 2, cl. 1.

7. As one influential treatise writer put it, the U.S. Constitution “failed utterly to recognize or to make direct provision for the exercise of administrative power.” W.F. WILLOUGHBY, AN INTRODUCTION TO THE STUDY OF THE GOVERNMENT OF MODERN STATES

Congress has exercised its authority to create, empower and fund executive offices under its authority in Article I, Section 8, “To make all laws which shall be necessary and proper for carrying into execution the foregoing [Article I] powers, and all other powers vested by this Constitution in the government of the United States, or in any department of officer thereof.”⁸

If Congress provides authority to be exercised by particular officers, can the President nevertheless direct their exercise of discretion, thereby effectively controlling the execution of the law himself? Would such action be assuring “faithful execution of the laws” or the usurping of lawful authority granted to another? Assuming that removal or threatened removal of an officer is one way—and perhaps the most powerful way—for a President to assure faithful execution of the law, does that imply that Congress may place no limits on presidential removal—notwithstanding the Constitution’s silence concerning removal save by impeachment?

The silence, vagueness or ambiguity of the constitutional text on most matters of operational consequence, and the paucity of judicial pronouncements, means that the issues of presidential directive power are by default addressed largely in Congress and within the executive branch. In these venues of lawmaking and implementation, grappling with issues of presidential authority and congressional power are a part of the ordinary routines of government. Justice Jackson understood this full well from his prior experience in the Justice Department and alluded to it by including “executive advisors” with judges as those who were likely to be surprised by the paucity of useful and unambiguous authority.

It was not just judicial and textual authority that Justice Jackson found frustrating. He also noted, “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

242 (1919). His brother, W.W. Willoughby, agreed that Article II provided little of interest concerning administration. But he nevertheless took a strong stand that

it was undoubtedly intended that the president should be little more than a political chief; that is to say ones whose function should consist in the performance of those political duties which are not subject to judicial control. It is quite clear that it was intended that he should not, except us to these political matters, be the administrative head of the government, with general power of directing and controlling the acts of subordinate federal administrative agents.

2 W.W. WILLOUGHBY, *THE CONSTITUTION LAW OF THE UNITED STATES* 1156 (1910).

8. U.S. CONST. art. 1, § 8.

any question. They largely cancel each other.”⁹ And yet, like Justice Jackson and his colleagues, we often turn to practice.¹⁰ Surely what people have done in running the government should give us some purchase beyond the narrow decisions of courts, the speculations of scholars, and the self-interested rhetoric of partisans during congressional-presidential struggles.

Yet, however sensible our turn to practice for guidance, we should pause to consider just how deeply problematic our reliance might be. The problems occur at two levels. First, what is the normative claim of practice as evidence of what the law is or should be? “Practice”, within which I mean to include both repeated prior actions and particularly salient events, are just facts. What gives them the power to bind us even presumptively? Second, assuming the normative force of practice, how is it to be interpreted? If we recognize a practice as ours, and as having a claim on the legal imagination, how are we to give it meaning? By seeking the meaning these actions had for the actors? By close attention to the contexts in which they occurred? By attending to their interpretation by contemporaneous or later commentators?

I do not want to dwell on the deep questions involved in what gives practice normative force. Rebecca Brown provided an excellent survey of this territory over fifteen years ago.¹¹ I broadly agree with Brown’s conclusions: First, in order for a practice to have any claim on us we must take it to embody some normative judgment. Second, there are no sound arguments that would make historical practice fully determinative for us as we feel our way into the 21st century. At best, our historical practices or traditions can give us insight into how our law is and should be shaped. Practices are likely to have an embedded wisdom that we should attempt to discern, and we should reject that wisdom only for good reasons. Indeed, to think that we can escape our traditions or practices would be folly. There is much

9. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–35 (1952) (internal citations omitted).

10. See Louis Fisher, *President’s Game? History Refutes Claims of Unlimited Presidential Power over Foreign Affairs*, LEGAL TIMES, Dec. 4, 2006, available at http://www.pegc.us/archive/Articles/Fisher_LT_20061204.pdf (discussing varied approaches by legal scholars in analyzing the diverse power exercised by the executive historically in practice in the area of foreign affairs and the relevant Supreme Court decisions that may or may not limit those powers).

11. Rebecca Brown, *Tradition and Insight*, 103 YALE L.J. 177 (1993).

in Justice Holmes oft-quoted aphorism: “[H]istoric continuity with the past is not a duty, it is only a necessity.”¹²

I will focus instead on the second difficulty, the difficulty of understanding exactly what the normative claim or reach of a past practice might be. For, the practice of American government has proceeded through the multiple actions and claims of executive and congressional officials in multifarious contexts and over a significant period. It is revealed both by what people did and what they said. And its understanding is illuminated by the background presumptions of the legal literature of the times as well as contemporaneous public reaction.

The difficulties of interpretation thus arise not just from the fact, as Jackson noted, that claims and actions are often informed by partisan or institutional self-interest, although that is problem enough. It is also that we have considerable difficulty recapturing the context within which practices arose, were contested, and survived or perished. Each claim about the meaning of a practice must be evaluated against the backdrop of that practice’s institutional, ideological, and partisan context. Giving meaning to practice is a formidable task, particularly if that task is understood as a search for general principles that have broad application to issues of presidential directive authority.

In the remainder of this article, therefore, I want to illustrate the epistemic difficulties of understanding what a practice means through illustrations from three quite distinctive political periods that preceded the American Civil War: the Federalist period from the founding through John Adams’ presidency, the Jeffersonian period from 1801 until Andrew Jackson’s inauguration, and the so-called Jacksonian era from 1830 until Lincoln’s administration. Each represented distinctive ideological moments in American history. Yet, the practitioners of governance in these periods often encountered similar issues concerning the reach of executive power, and addressed them in a much more eclectic fashion than one might have imagined. Ideology is not necessarily destiny. Hence, as we shall see from these examples—some well known, others obscure—deriving uncontested meaning from the practice of any period is almost impossible.

12. Oliver W. Holmes, Learning and Science Speech at a Dinner at the Harvard Law School Association in Honor of Professor C.C. Langdell (June 25, 1895), in *COLLECTED LEGAL PAPERS* 138, 139 (1920).

In the end, however, I want to argue that recognition of the difficulty of deriving constitutional meaning from governmental practice contains its own normative implications. The very opaqueness of the normative claims of the past demands a particular form of responsibility from lawyers operating in the present. When combined with the knowledge that most issues of executive power will themselves be decided by practice, not by judicial opinions, we who struggle to discern the meaning of past practice have a special ethical duty not to overstate our positions or to ignore contrary evidence. We should recognize that our institutional arrangements have always been more experimental and various than can be captured by a single narrative.

I. RUNNING A CONSTITUTION: A PLAY IN THREE ACTS

A. *Federalist Foundations*¹³

The Constitution of 1787 provided a scheme for governing but not a government. Administration would have to be organized by someone but, oddly enough, the text of the Constitution was not clear even about who had this responsibility. The Constitution provides for the appointment of officers of the United States, but not for the creation of offices. Unlike Article III's provision for the creation of the lower federal courts, the previously quoted Necessary and Proper Clause ends with the words, "*and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.*"¹⁴ The italicized wording suggests that the Constitution itself provides powers to federal government departments and officers; but of course it does not—save for those vested in the President and in the Supreme Court.¹⁵ The practice of the first Congress in creating departments by legislation began a constitutional convention that has persisted to the present. Indeed,

13. The following section is drawn in part from Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256 (2006).

14. U.S. CONST. art. 1, § 8, cl. 18 (emphasis added).

15. The suggestion that the Constitution confers specific powers on departments is probably a drafting error, perhaps the residue of early proposals to include provisions for specific departments with defined duties in the Constitution itself. For discussion of the so-called Morris-Pinckney Plan that contained departments in the text of the Constitution, see CHARLES C. THATCH, JR., *THE CREATION OF THE PRESIDENCY, 1775–1789: A STUDY IN CONSTITUTIONAL HISTORY* 121–23 (1969).

this practice is so firmly established that it is difficult to imagine a different approach.¹⁶

But a decision that departments should be created by law is not a decision about what their relationship should be to the political departments once created. And on this question the practices of the first Congress were quite various. When creating the departments of War and Foreign Affairs, Congress by statute did little more than direct the respective secretaries to carry out the President's instructions.¹⁷ On the other hand, the statute that established the Treasury Department¹⁸ gave the Secretary of the Treasury a substantial number of specific tasks. Moreover, Congress seemed jealous of its own authority over the Treasury. Because the Treasury collected and disbursed all public money, oversaw the Bank of the United States, and was in charge of all military procurement,¹⁹ this concern for control was surely understandable. The Treasury statute thus instructed the Secretary to "perform all such services relative to the finances, that he shall be directed to perform."²⁰ Further language in this section suggests that those directions were to come from Congress.²¹

16. Yet, congressional creation of departments was not uncontroversial in the first Congress. Senator William MacLay argued that the President should have the discretion to create whatever administrative offices he thought appropriate. William MacLay, Diary Entry (June 18, 1789), in 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789–1791, at 81–83 (Kenneth R. Bowling & Helen E. Viet, eds., 1988). The only textual peg for this convention, beyond the broad language of the necessary and proper clause itself, is the phrase in the appointments clause of Article II giving the President the appointing authority with respect to officers "whose appointments are not herein otherwise provided for, and which shall be established by law . . ." U.S. CONST. art. 2, § 2, cl. 2. That language is then followed by the provision for Congress to vest appointment of inferior officers in the President alone or in the courts of law or the heads of departments. This too might obliquely suggest that all departments and offices would be created by Congress.

17. An Act for Establishing an Executive Department, To Be Denominated the Department of Foreign Affairs, ch. 4, § 1, 1 Stat. 28, 28–29 (1789); An Act to Establish an Executive Department, To Be Denominated the Department of War, ch. 7, § 1, 1 Stat. 49, 49–50 (1789).

18. An Act to Establish the Treasury Department, ch. 12, 1 Stat. 65, 65–67 (1789).

19. See LLOYD MILTON SHORT, THE DEVELOPMENT OF NATIONAL ADMINISTRATIVE ORGANIZATION IN THE UNITED STATES 99–101 (1923); LEONARD D. WHITE, THE FEDERALIST: A STUDY IN ADMINISTRATIVE HISTORY 116–22 (1948).

20. An Act to Establish the Treasury Department, ch. 12, § 2, 1 Stat. 65, 65–67 (1789).

21. The statute establishing the Treasury Department went on to require that the Secretary "make report, and give information to either branch of the legislature, in person or in writing (as he may be required), respecting all matters *referred to him* by the Senate or House of Representatives, or which shall appertain to his office." *Id.* (emphasis added).

Congress sometimes treated the Treasury Secretary almost as a part of that body. When Hamilton was confirmed as Secretary of the Treasury, the House abolished its Committee on Ways and Means and turned over those functions to the Secretary.²² But, this action, like so many in American history, is ambiguous. Giving Hamilton the leading role in proposing tax legislation could be seen as reinforcing executive authority. During Hamilton's energetic stewardship at the Treasury, it certainly did. Thus, when Jeffersonian Republicans, led by Albert Gallatin, sought to bring the Treasury more firmly under congressional control, their chief reform was to re-establish the Ways and Means Committee.²³

The presumption of special position for the Treasury in relation to the legislature would also seem to follow from colonial and state precedent concerning financial administration.²⁴ It was not until late in the Constitutional Convention that a provision for appointment of the Treasurer of the United States by both houses of Congress was eliminated in favor of presidential appointment of all department heads.²⁵ Does this suggest that the drafters believed that congressional control would be assured by statute in any event? Perhaps. But the clause was stricken in favor of presidential appointment. Avoiding the inefficiency and incompetence of administration by the Continental Congress in the confederation period, and the weaknesses of executives with limited appointing authority under state constitutions, was part of the point of the design of the new national Constitution.

The statute establishing the Treasury Department also failed to denominate it an "executive department." Is this significant? Perhaps, not. The Salary Act, which was adopted only nine days after the statute establishing the Treasury Department, described the Secretary of the Treasury as an "executive officer."²⁶ That the Secretary had the

22. Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 241 (1989).

23. JOHN SPENCER BASSETT, *THE FEDERALIST SYSTEM: 1789-1801*, at 141 (1968).

24. See HENRY BARRETT LEARNED, *THE PRESIDENT'S CABINET: STUDIES IN THE ORIGIN, FORMATION AND STRUCTURE OF AN AMERICAN INSTITUTION* 101 (1912) (recognizing that Colonial and State practice tended to lead administration and financial matters, not just appropriations, in the hands of legislative committees or officials appointed by the legislature).

25. *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 182, 614 (Max Farrand, ed., rev. ed. 1966).

26. An Act for Establishing the Salaries of Executive Officers of Government, with Their Assistants and Clerks, ch. 13, § 1, 1 Stat. 67, 67-68 (1789).

peculiar responsibility of reporting to either house of Congress independently, and of taking referrals from them, did not necessarily suggest that the Secretary would not also report to the President. Indeed, the constitutional provision requiring reports in writing said as much. And that the Secretary had many responsibilities, which were directed by law,²⁷ does not by itself suggest that the Secretary's discretion *within the law* might not be subject to presidential direction.

The statutes creating other early departments and offices shed equally ambiguous light on congressional presuppositions concerning executive directive authority. The Navy department established in 1796 was chartered by a statute very similar to that creating the Departments of War and State.²⁸ And Congress seemed to have the same executive-centered vision for the Post Office when it adopted that institution in its Articles-of-Confederation form and simply substituted the President for the Continental Congress as the party who was to give direction to the Postmaster General.²⁹ Yet, when Congress reorganized the Post Office in 1792, the President's directing power was removed, and the Postmaster General was given broad authority to enter into contracts, make appointments and operate the Post Office on the basis of independent financing through postal revenues.³⁰ While the Postmaster was required to send reports on accounts to the Treasury,³¹ the statute does not seem to presume that the Post Office was a part of any department.

Specific powers were also granted to certain officers within departments. The act establishing the Treasury Department vested responsibilities in the Comptroller, the Auditor, the Treasurer and the Registrar, all of whom were meant to provide checks on the Secretary of the Treasury and on each other in the crucial matter of safeguarding the fiscal affairs of the nation.³² With respect to these

27. See An Act to Establish the Treasury Department, *supra* note 18; see also *supra* note 21 and accompanying text.

28. An Act to Establish an Executive Department, To Be Denominated the Department of the Navy, ch. 35, § 1, 1 Stat. 553 (1798).

29. See An Act to Establish the Post Offices and Post Roads Within the United States, ch. 7, § 3, 1 Stat. 232, 234 (1792); compare Articles of Confederation, Art. IX.

30. An Act to Establish the Post Offices and Post Roads Within the United States., §§ 2–3, 1 Stat. 232, 233–34 (1792).

31. *Id.* at § 4, 1 Stat. at 234.

32. On these matters, see SHORT, *supra* note 19, at 35–77 and WHITE, THE FEDERALIST, *supra* note 19, at 116–22.

statutory duties, making them subject to political direction by anyone would seem inconsistent with Congress's basic purposes.

The Post Office was hardly the only organization established outside of an executive department. The Attorney General, whom we now view as virtually co-extensive with the President, occupied an office created by single paragraph in the Judiciary Act of 1789.³³ The Attorney General originally had no department—indeed, not even a clerk.³⁴ His duties were only to represent the United States in the Supreme Court and to give advice and opinions to the President or the heads of departments at their request.³⁵ The statute failed to provide for the Attorney General's appointment,³⁶ and he was given no authority with respect to United States Attorneys in each district, who were formally a part of the State Department.³⁷ The first Attorney General, Edmund Randolph, attempted to obtain directive authority with respect to the U.S. Attorneys, but Congress declined to provide it.³⁸ Litigation on behalf of the United States was even more fragmented by a 1797 provision that charged the Comptroller of the Treasury with instituting suit for the recovery of monies owed to the United States on any revenue officer's account.³⁹

Judged by the statutes establishing the early machinery of the Federal Government, Congress seems to have had no fixed general idea about the relationship of the President to administration.⁴⁰ Some principal officers were in departments and a part of the President's

33. An Act to Establish the Judicial Courts of the United States, ch. 20, § 35, 1 Stat. 73, 93 (1789).

34. SHORT, *supra* note 19, at 177–205.

35. *Id.*

36. The initial draft of this provision had conferred the appointing power on the Supreme Court. How or why this provision was eliminated from the original draft remains mysterious. See JULIUS GOEBEL, JR., ANTECEDENTS AND BEGINNINGS TO 1801 (The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States, Vol. 1), at 490 (1971); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 108–09 (1923).

37. SHORT, *supra* note 19, at 189.

38. WHITE, THE FEDERALIST, *supra* note 19, at 167–68, 408.

39. An Act to Provide More Effectually for the Settlement of Accounts Between the United States and Receivers of Public Money, ch. 20, § 1, 1 Stat. 512 (1797). That power was later expanded to direct suits and legal proceedings to collect any debt owed to the United States. An Act to Provide for the Prompt Settlement of Public Accounts, ch. 45, § 10, 3 Stat. 366, 367 (1817).

40. Congress also established a series of boards and committees that were outside executive department, but populated by executive officials as well as members of the judiciary and of the Congress. For a brief discussion of these peculiar institutions, see Mashaw, *Recovering American Administrative Law*, *supra* note 13, at 1301–02.

cabinet; some were not. Some statutes conferred directive authority on the President; others were silent, or gave other officers specific duties that seemed designed as counterweights to centralized executive authority.

Congressional practice does not, of course, exhaust our interest in early administrative arrangements. Federalist Presidents may have had quite different ideas about their relations with other federal officials. George Washington functioned as if departmental secretaries were essentially deputies or assistants to the President.⁴¹ Washington consulted broadly, but exercised independent judgment and kept continuous oversight concerning his department heads. He saw the cabinet individually or collectively almost daily, corresponded with them ceaselessly and seems to have reviewed virtually all significant correspondence going out in any department that expressed the position of the United States government.⁴² The modern proponents of the so-called “unitary executive” interpret Washington’s actions as the beginnings of a long history of presidential defense of executive prerogative concerning appointment, removal and direction of executive personnel.⁴³ But, presidential defense of executive prerogative is no more determinative than congressional challenges to presidential power. Unless, perhaps, Congress agreed.

If the power to direct follows from the power to remove, then it might be said that Congress acquiesced in Washington’s practice. For it is often claimed, even by the Supreme Court, that the first Congress settled the removal question in 1789 in its extensive debates concerning whether the Constitution presumed a presidential power of removal or whether removal was instead dependent on Congress’s statutory prescriptions.⁴⁴ But, the famous *Myers v. United States* opinion, which relies heavily on those debates, has something of the flavor of law-office history.

41. See WHITE, THE FEDERALIST, *supra* note 19, at 35–56 (citing a circular from Thomas Jefferson to the heads of his departments explaining Washington’s practices and indicating that he was adopting them as his own).

42. For a further description of Washington’s management style, see Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1474–90 (1997).

43. See STEVEN G. CALABREISI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE (2008).

44. *Myers v. United States*, 272 U.S. 52, 114–25 (1926).

There was disagreement in the first Congress concerning whether the Constitution presumed a power of removal in the President, presumed such a power subject to the consent of the Senate or presumed that Congress would provide by statute for removal. The provision in the House bill to establish the Department of Foreign Affairs, that the Secretary might be removed by the President, was opposed both by those who thought the advice and consent of the Senate was required, and by those who thought that to put this provision in the statute would imply that the President's removal power flowed from Congress rather than the Constitution. To complicate matters, some of those who thought the provision unnecessary nevertheless favored its inclusion in the statute in order to cement a clear statutory majority favoring the President's removal power.⁴⁵

To resolve the impasse, Representative Benson proposed to strike out the clause specifically providing the presidential removal power, but to insert a section making the Chief Clerk the custodian of the records of the department "whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy."⁴⁶ Benson's amendment thus seemed both to provide for and to presume a presidential removal power, and his amendment passed. But, of course, it passed without resolving the dispute over whether the removal power could be regulated by statute.⁴⁷

Indeed, not only was the language ambiguous, the procedure by which this provision was adopted further clouded the picture. James Madison, who favored the position that the Constitution presumed presidential removal authority, engineered votes on amendments which divided the opposition into two groups, but which allied one of those groups with his position on each vote.⁴⁸ The Benson compromise was thus the product of clever agenda manipulation. Perhaps, as Harold Bruff recently wrote, in the so-called "Decision of 1789," "The only position . . . that had been definitively rejected was . . . that Congress could always participate in particular removals by

45. For discussion of these debates, see DAVID C. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801*, at 36-40 (1997).

46. *Id.* at 40.

47. For a detailed treatment, see CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 52-70 (1969).

48. For a discussion of Madison's maneuver, see *id.* at 62-63, and Brown, *supra* note 11, at 187.

refusing to consent to them.”⁴⁹ But even that may overstate what was resolved. If later Congresses had believed that proposition, the *Myers* case would not have arisen.

This is hardly the only plausible view of the matter. Professor Saikrishna Prakash concluded, after an exhaustive review of the debates, procedural tactics and contemporary public understandings, that there was a likely congressional majority in 1789 favoring the position that the Constitution gave the President removal authority.⁵⁰ But as Professor Prakash also recognized, that is not the same thing as concluding that a majority believed that Congress could not place limits on the exercise of presidential removal.⁵¹

B. *The Republican Era*⁵²

The Federalist leaders of the early republic, men like George Washington, Alexander Hamilton and John Adams, were ideological nationalists. When creating a government to exercise the authority established by the new Constitution, Federalist Congresses did so mindful of the weaknesses of the national government under the Articles of Confederation and the relatively feeble executive power permitted by most post-revolutionary state constitutions.⁵³ Federalists also emphasized executive leadership in ways that sometimes led

49. Harold R. Bruff, *The Incompatibility Principle*, 59 ADMIN. L. REV. 225, 256–57 (2007). And since that was the narrow issue at stake in *Myers*, 272 U.S. at 52, the decision did follow early practice, at least if you are willing to make the leap that a provision that applied to the secretary of war has meaning for a statute dealing with the removal of assistant postmasters. Interestingly enough, the position rejected in *Myers* was the one that Hamilton urged in the Federalist Papers when he argued that stability in the government would be guaranteed in part by the requirement that any removal of a presidential appointee would have to be acceded to by the Senate as well. In making that pronouncement Hamilton was echoing the debates about the Senate’s role both in the Constitutional Convention and in the ratification debates in the states. John A. Rohr, *The Administrative State and Constitutional Principles*, in A CENTENNIAL HISTORY OF THE AMERICAN ADMINISTRATIVE STATE, 113, 139 (Ralph Clarke Chandler, ed., 1987).

50. Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1076 (2006).

51. *Id.* at 1072–73.

52. The following section is drawn in part from Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636 (2007).

53. See generally ALLAN NEVINS, *THE AMERICAN STATES DURING AND AFTER THE REVOLUTION, 1775–1789* (1924); see also JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 120–23* (1979); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 127–96 (1969).

their political opponents to brand them monarchists.⁵⁴ It is somewhat surprising, therefore, to find that in the details of governmental organization Federalist Congresses opted for divergent models in the statutes creating various departments and offices, and provided clear directive authority for the President only as concerned military and foreign affairs.

Similar cross-currents are evident in the practices of Jeffersonian Republicans. Republican ideology was, of course, almost the opposite of Federalist commitments. Republicans viewed the legitimate sphere of the national government as limited mostly to war and foreign affairs. They thought the Army and Navy, commanded by the President, were a threat to democracy. For them, democratic governance resided in Congress, particularly the often-elected House of Representatives. Emphasizing Federalist-Republican ideological divergence, Thomas Jefferson described his election, and Republican control of Congress, as a “revolution in the principles of our government.”⁵⁵

Over time, as is well known, Republican administrations were forced by the realities of governance to retreat, in practice, from many bedrock Republican principles. To be sure, under Jefferson’s leadership Congress substantially reduced the military establishment, abolished federal internal taxes, reversed the Federalists’ late-term expansion of the federal judiciary, and allowed the charter of the Bank of the United States to expire. But Congress reintroduced internal taxes when fiscal necessities demanded them, and reorganized the Bank of the United States when the country’s monetary affairs fell into disarray. After the debacle of the War of 1812, it also strengthened and professionalized both the Army and the Navy.⁵⁶

The Federalist administrative system was ultimately reformed and enlarged rather than reduced to insignificance.⁵⁷ Indeed, the growth of the national government during the Republican period was substantial. Although the population more than doubled between

54. See JOHN P. DIGGINS, *JOHN ADAMS* 46, 163–65 (Am. Presidents Series, Arthur M. Schlesinger, Jr. ed., 2003).

55. Letter from President Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), in 15 *WRITINGS OF THOMAS JEFFERSON* 212, 212 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905).

56. See generally, Mashaw, *Reluctant Nationalists*, *supra* note 52.

57. These reorganizations are described in some detail in LEONARD D. WHITE, *THE JEFFERSONIANS: A STUDY IN ADMINISTRATIVE HISTORY, 1801–1829*, at 211–98 (1951).

1800 and 1830, public civilian employment quadrupled from slightly less than 3,000 in 1801,⁵⁸ to nearly 11,500 when Jackson took office in 1831.⁵⁹

Compromises with Republican ideology were demanded of all the Republican Presidents. Thomas Jefferson purchased Louisiana from Napoleon without effective statutory authorization and notwithstanding his belief that the annexation of foreign territory could not be accomplished without an amendment to the Constitution.⁶⁰ As we shall see in more detail below, the statutes implementing Jefferson's embargo policy provided the national government, and particularly the President, coercive powers of extraordinary scope and stringency. Henry Adams concluded that "the embargo and the Louisiana Purchase taken together were more destructive to the theory and practice of a Virginia republic than any foreign war was likely to be."⁶¹

In a similar vein, Garry Wills describes James Madison's presidency as "carried by events toward a modernity [in terms of the exercise of national authority] he neither anticipated nor desired."⁶² His successor, James Monroe, envisioned the United States as a continental empire and developed a muscular foreign policy that spilled over into an increasingly nationalist domestic program.⁶³ And, the final "Republican" President, the converted New England Federalist, John Quincy Adams, offered up a domestic program in his first message to Congress that presumed such broad powers in the national government that his cabinet, wisely, counseled him not to present it.⁶⁴

58. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, H.R. DOC. NO. 93-78, pt. 1, at 8 (1975).

59. *Id.* at pt. 2, 1103.

60. On Jefferson's doubts, see THE LOUISIANA PURCHASE AND AMERICAN EXPANSION, 1803-1898, at 8-10 (Sanford Levinson & Bartholomew Sparrow eds., 2005).

61. 4 HENRY ADAMS, HISTORY OF THE UNITED STATES, OF AMERICA DURING THE SECOND ADMINISTRATION OF THOMAS JEFFERSON 273-74 (New York, Charles A. Scribner's Sons 1890).

62. GARRY WILLS, JAMES MADISON 159 (Am. Presidents Series, Arthur M. Schlesinger, Jr. ed., 2002).

63. See GARY HART, JAMES MONROE 57-82 (Am. Presidents Series, Arthur M. Schlesinger, Jr. ed., 2005).

64. See ROBERT V. REMINI, JOHN QUINCY ADAMS 78 (Am. Presidents Series, Arthur M. Schlesinger, Jr. ed., 2002).

Assertions of national power are not necessarily assertions of presidential authority over administration.⁶⁵ But, there is a certain affinity between the two in practice. Many of the claims of modern Presidents have been predicated on the need for unified control of an otherwise fragmented and sprawling national administrative establishment. The enactment and implementation of the Embargo of 1807–1809 provides a dramatic example of how novel exertions of national power and presumptions of presidential control of administration go hand in hand.

The Embargo of 1807–1809 was a response to the constant harassment of American commerce by British and French naval forces.⁶⁶ These actions would have justified a declaration of war, but the United States was in no position to fight either the British or the French, and certainly not both at once. If war was unthinkable, doing nothing was insufferable. Jefferson, and James Madison his Secretary of State, proposed instead an embargo on the transfer of all goods from the United States to foreign destinations. The basic idea was “to keep our seamen and property from capture, and to starve the offending nations.”⁶⁷ Jefferson’s plan may or may not have had a reasonable chance of coercing the French and the British,⁶⁸ but, to be effective, the embargo would certainly have to coerce Americans.

The initial embargo act was brief, to the point and provided a President with extraordinary powers.⁶⁹ No ships or vessels in the

65. Nor is a commitment to limited national powers necessarily a commitment to limited presidential control over the powers that are properly national. Jefferson’s actions may provide a particularly apt example of this latter point. John C. Yoo, *Jefferson and Executive Power*, 88 B.U. L. REV. 421, 422 (2008).

66. See generally WALTER WILSON JENNINGS, *THE AMERICAN EMBARGO 1807–1809* (Arthur M. Schlesinger ed., 1921); LOUIS MARTIN SEARS, *JEFFERSON AND THE EMBARGO* (1927).

67. Letter from President Thomas Jefferson to Albert Gallatin, Sec’y of the Treasury (Apr. 8, 1808), in 12 *WRITINGS OF THOMAS JEFFERSON*, *supra* note 55, at 27.

68. Many commentators, perhaps Henry Adams chief among them, viewed the embargo as doomed from the start by the improbability that it would seriously coerce the continental powers. See 4 ADAMS, *supra* note 61, at 288, 344. Careful examination of the effects on British manufacturers, however, suggests that the embargo was economically significant, if not politically efficacious. See SEARS, *supra* note 66, at 277–301.

69. An Act Laying an Embargo on All Ships and Vessels in the Ports and Harbors of the United States, ch. 5, 2 Stat. 451, 451–452 (1807) (repealed 1809) [hereinafter Embargo Act]. The embargo policy was drafted in the White House and passed in extraordinary haste. Jefferson forwarded his message to Congress on December 18, 1807, and the Senate, suspending its rules, passed the embargo the same day. The House followed suit three days later. See BURTON SPIVAK, *JEFFERSON’S ENGLISH CRISIS: COMMERCE, EMBARGO, AND THE REPUBLICAN REVOLUTION* 102–04 (1979).

United States were to be cleared for any foreign port save by direction of the President.⁷⁰ And, he was given authority to issue “such instructions to the officers of the revenue, and of the Navy and revenue officers of the United States, as shall appear best adapted for carrying the same into full effect.”⁷¹ Given the dependence of millions of Americans on foreign trade, evasion of the embargo was certainly to be expected. Congress was required to legislate again and again to plug holes in the embargo’s coverage and enforcement mechanisms.⁷²

Before the whole system was repealed, the various embargo statutes, in combination, made virtually everything that moved in commerce in the United States subject to seizure. Federal officials, both military and civilian, could stop sea and land transports on the mere suspicion that owners or carriers intended to evade the embargo.⁷³ Ships could not be loaded without a permit and loading had to take place under the supervision of a federal official.⁷⁴ The President was authorized to use the Army, Navy and state militias, not just to suppress insurrection, but to prevent any violation of any provision of the embargo statutes.⁷⁵

In structuring the embargo, Congress ceded blanket authority to the President and enforcement personnel. The President was granted almost unlimited authority to decide specific cases, to direct the activities of enforcement personnel and to suspend the operation of the embargo with such exceptions as he deemed prudent.⁷⁶ The embargo thus represented what we might currently call “presidentialism”⁷⁷ in administration. Indeed, Henry Adams claimed that Jefferson “assumed the responsibility for every detail of [the embargo’s] management.”⁷⁸ More recent commentators have concluded that in implementing the embargo, “Jefferson had set up a

70. Embargo Act, *supra* note 69, at § 1.

71. *Id.*

72. WHITE, THE JEFFERSONIANS, *supra* note 57, at 427–31.

73. *Id.* at 431.

74. *Id.*

75. JENNINGS, *supra* note 66, at 57–58.

76. *Id.* at 50.

77. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2346–47 (2001) (providing a description and defense of this form of administration in the modern administrative state).

78. 4 ADAMS, *supra* note 61, at 251.

state terrorism that made the Alien and Sedition prosecutions under Adams look minor by comparison.”⁷⁹

In its broad contours, the organization of the Embargo of 1807–1809 seemed to presume that the President was the chief implementer of federal regulatory policy, not merely the overseer of its implementation. To be sure, Jefferson was required by practical necessities to delegate much of his authority to the Secretary of the Treasury.⁸⁰ And most of the heavy lifting, in terms of answering queries and giving instructions to enforcement personnel, was left to Albert Gallatin. Gallatin’s letters and circulars seemed to make little distinction between his authority and the President’s.⁸¹ The Secretary may have been in day to day control, but he often explicitly viewed himself as speaking for the President when directing the actions of lower level personnel.

What are the lessons we should learn from this dramatic exercise of strong presidentialism so early in our constitutional history? Does it suggest that even a Republican Congress, dedicated to Republican principles of legislative supremacy, still presumed that in the enforcement of the law the President was to be in charge of all enforcement personnel?

79. WILLS, *supra* note 62, at 54.

80. See Letter from President Thomas Jefferson to Albert Gallatin, Sec’y of the Treasury (Apr. 19, 1808), in 12 WRITINGS OF THOMAS JEFFERSON, *supra* note 55, at 29, 29–30 (directing Gallatin to develop enforcement rules); Letter from President Thomas Jefferson to Albert Gallatin, Sec’y of the Treasury (Aug. 11, 1808), in 12 WRITINGS OF THOMAS JEFFERSON, *supra* note 55, at 121, 122 [hereinafter Letter of Aug. 11, 1808] (delegating enforcement authority to Gallatin).

81. Compare, e.g., Albert Gallatin, Circular of Dec. 31, 1807 (on file with author) (“You are instructed by the President . . .”), Albert Gallatin, Circular of Mar. 12, 1808 (on file with author) (“The President of the United States will immediately take into consideration the seventh section of the act in order that some general rules may be adopted for its execution”); Albert Gallatin, Circular of May 6, 1808 (on file with author) (“[T]he President considered ‘unusual shipments,’ particular of flour & other provisions, of lumber and of Naval Stores, as sufficient cause for detention of the vessel”); Albert Gallatin, Circular of Jan. 14, 1809 (on file with author) (“The President gives the following instructions . . .”); Albert Gallatin, Circular of Apr. 28, 1808 (on file with author) (“I now proceed to give some additional instructions . . .”); Albert Gallatin, Circular of May 18, 1808 (on file with author) (using similar language); Albert Gallatin, Circular of Nov. 15, 1808 (on file with author) (“It appears to me . . .”). Indeed, Jefferson instructed Gallatin several times that he was in the best position to make decisions and should proceed without consultation. See, e.g., Letter from President Thomas Jefferson to Albert Gallatin, Sec’y of the Treasury (May 6, 1808), in 12 WRITINGS OF THOMAS JEFFERSON, *supra* note 55, at 52, 53; Letter from President Thomas Jefferson to Albert Gallatin, Sec’y of the Treasury (May 27, 1808), in 12 WRITINGS OF THOMAS JEFFERSON, *supra* note 55, at 66; Letter of Aug. 11, 1808, *supra* note 80, at 122.

There are reasons to believe that such a broad reading would misconstrue the import of governmental arrangements and practices under the embargo legislation. First, instead of presuming presidential authority, much of the legislative language in the multiple embargo acts explicitly conferred enforcement or directive authority on the President.⁸² Moreover, far from relying on inherent presidential powers, or even the broad grant of instructional authority provided in the first Embargo Act, President Jefferson went back to Congress again and again to obtain additional authority when enforcement proved ineffective or incomplete. In some cases, Congress refused to provide the authority that the President sought,⁸³ and Jefferson failed to ask Congress for certain authority on Gallatin's advice that the measures "could not pass."⁸⁴ In short, the embargo episode was a major example of the use of presidential power in the enforcement of federal law, but the authority that the President exercised was in the law itself.

Second, enforcement of the embargo gave rise to a specific dispute concerning the President's authority to direct that highlights the ambiguity of the embargo's lessons. Under one of the early enforcement acts, Collectors of Customs were instructed that they should detain vessels if, in their opinion, the vessel intended to violate the embargo. In his instructions to Collectors concerning the exercise of that authority, Gallatin informed them that the President considered vessels loaded with provisions to be suspicious and subject to detention. On the basis of this instruction, the Collector at Charleston refused to clear a vessel loaded with rice and bound for Baltimore. However, the Collector stated publicly that he did not find the vessel suspicious in his own personal opinion, but was nevertheless bound by presidential instructions to detain it. The owner, armed with this public admission, brought a mandamus action in the Circuit Court to require the Collector to grant clearance to his vessel.

The Circuit Court, per Justice Johnson, a Jeffersonian appointee, granted the mandamus.⁸⁵ Johnson interpreted the statute to require the Collector to exercise his own judgment and noted that nothing in the statute gave the President the authority to direct the Collector in

82. See, e.g., Embargo Act, *supra* note 69.

83. See SPIVAK, *supra* note 69, at 175–76.

84. WHITE, THE JEFFERSONIANS, *supra* note 57, at 430.

85. *Gilchrist v. Collector of Charleston*, 10 F. Cas. 355, 357 (C.C.D.S.C. 1808) (No. 5420).

forming his opinion.⁸⁶ (Explicit authority was later provided in the Enforcement Act of 1809.) Johnson's decision seemed to presume that the President had no inherent authority to direct lower level officials in the exercise of their statutory discretion—at least when, as here, the statute's text suggested that the lower level officer would form his own opinion based on the facts and circumstances of a particular case.

Jefferson did not take this judicial rebuff lying down. He quickly secured an opinion from his Attorney General, Caesar A. Rodney, that rejected Johnson's understanding of the law and his authority to issue a mandamus to the Collector. Jefferson then distributed Rodney's opinion to the press and to the Collectors of Revenue, and instructed the latter to ignore Johnson's opinion and to follow Rodney's. The press reported that the Collectors were following the President's instructions. Executive direction had triumphed.

But what exactly was Jefferson asserting in countermanding the Circuit Court's opinion? Was he, in effect, saying that the President had an inherent authority to direct what the Congress could not regulate by statute?

Not really. Rodney's opinion⁸⁷ was largely devoted to the question of whether the Circuit Court could exercise mandamus jurisdiction.⁸⁸ As Rodney carefully explained, mandamus had never been an inherent power of the courts either in English or American practice.⁸⁹ The Judiciary Act of 1789 had conferred mandamus jurisdiction on the Supreme Court, but *Marbury v. Madison*⁹⁰ had declared that part of the statute unconstitutional.⁹¹ There was no statutory conferral of mandamus jurisdiction in the 1789 statute, or otherwise, on circuit courts. Justice Johnson, in one written defense of his opinion, came very close to conceding this point.⁹² Moreover, Rodney's opinion argues that the Enforcement Act itself negates any implication that a court can control the inspector's judgment by

86. *Id.* at 356.

87. Letter from C.A. Rodney to President Thomas Jefferson (July 15, 1808), *reprinted in* 1 AM. L.J. 429, 433–39 (1808).

88. *Gilchrist*, 10 F. Cas. at 357–59.

89. *Id.*

90. 5 U.S. (1 Cranch) 137 (1803).

91. *Id.* at 174–80.

92. 1 CHARLES WARREN, THE SUPREME COURT IN THE UNITED STATES HISTORY, 1789–1835, at 335 (1928).

mandamus. Under the statute, all detention orders were to be reported to the President for his approval or reversal. In Rodney's opinion, judicial review by way of mandamus directly interfered with the President's statutory authority to review detention orders. If the court required that a vessel be released, the President's statutory review would never occur. In short, Rodney's opinion was based on relatively narrow, statutory grounds.

Jefferson also later explained his rejection of Johnson's position in a letter to Governor Pinckney.⁹³ That letter emphasized standard rule of law values, not presidential prerogative. Congress was right, in Jefferson's view, to provide administrative discretion with respect to enforcement. But if that enforcement were left entirely to individual Collectors, the law might not be enforced consistently; indeed, it might be enforced corruptly. Unified control by

93. Jefferson wrote:

The Legislature having found, after repeated trials, that no general rules could be formed which fraud and avarice would not elude, concluded to leave, in those who were to execute the power, a discretionary power paramount to all their general rules. This discretion was of necessity lodged with the collector in the first instance, but referred, finally, to the President, lest there should be as many measures of law or discretion for our citizens as there were collectors of districts. In order that the first decisions by the collectors might also be as uniform as possible, and that the inconveniences of temporary detention might be imposed by general and equal rules throughout the States, we thought it advisable to draw some outlines for the government of the discretion of the collectors, and to bring them all to one tally.

With this view they were advised to consider all shipments of flour *prima facie*, as suspicious

But your collector seems to have decided for himself that, instead of a general rule applicable equally to all, the personal character of the shipper was a better criterion and his own individual opinion too, of that character.

You will see at once to what this would have led in the hands of a[] hundred collectors . . . and what grounds would have been given for the malevolent charges of favoritism with which the federal papers have reproached even the trust we reposed in the first and highest magistrates of particular States The declaration of Mr. Theus, that *he* did not consider the case as suspicious, founded on his individual opinion of the shipper, broke down that barrier which we had endeavored to erect against favoritism, and furnished the grounds for the subsequent proceedings. The attorney for the United States seems to have considered the acquiescence of the collector as dispensing with any particular attentions to the case, and the judge to have taken it as a case agreed between plaintiff and defendant, and brought to him only formally to be placed on his records. But this question has too many important bearings on the constitutional organization of our government, to let it go off so carelessly. I send you the Attorney General's opinion on it, formed on great consideration and consultation. It is communicated to the collectors and marshals for their future government.

Letter from President Thomas Jefferson to Governor Charles Pinckney (July 18, 1808), in 12 WRITINGS OF THOMAS JEFFERSON, *supra* note 55, at 102–04.

hierarchical superiors was therefore essential for consistent and equal treatment of citizens under the law.

To be sure, President Jefferson might be said to have ignored, as did his Attorney General, the Supreme Court's well-known decision in *Little v. Barreme*.⁹⁴ That opinion clearly established that executive direction could not, by misconstruction of a statute, immunize official action that would otherwise be unlawful. Moreover, *Little v. Barreme* involved an exercise of the Commander in Chief power, an inherently directive authority. However, the legal error in that case was crystal clear. The President had ordered seizure of a vessel of the wrong nationality headed in the wrong direction.⁹⁵

By contrast, the instructions that Jefferson, or Gallatin, had provided under the Embargo Act simply narrowed the discretion of customs officials by telling them on what basis to form an opinion about whether a vessel intended to violate the embargo. There is surely a much stronger argument that the President had inherent authority to provide that sort of direction. Indeed, in the embargo case inherent authority arguably was not even necessary. The original Embargo Act had given the President authority to direct the actions of enforcement personnel, and the statutory provision for a referral of detentions to the President seemed to confer final authority on the President in any event.

Shall we take this episode as establishing therefore that in any case where Congress directs that a decision be taken by particular officers their exercises of discretion are not subject to presidential direction? Or even more strongly, as Professor Kevin Stack has recently argued, that the President has no directive authority concerning discretion granted to other officials unless Congress has by statute said so.⁹⁶ Professor Stack based his argument both on policy grounds and on the long-standing practice of Congress to grant powers sometimes to the President, and sometimes to officials other than the President subject to the President's approval or instructions.⁹⁷

The idea that the President's directive authority must come from a statute might also be supported by opinions of the Attorney General of the United States during the Republican period. William Wirt,

94. 6 U.S. (2 Cranch) 170 (1804).

95. *Id.* at 178–79.

96. See Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 267 (2006).

97. *Id.* at 276–77.

America's longest serving Attorney General (1817–1829), provided Presidents James Monroe and John Quincy Adams with several opinions that support the Stack view.

For example, President Monroe ordered a new trial for a military officer on the ground that the court martial had improperly excluded evidence that would have been beneficial to the defense.⁹⁸ The court martial, however, declined to retry the officer because the statute creating its jurisdiction explicitly prevented officers from being tried twice for the same offense.⁹⁹ The question of the propriety of the court martial's refusal of the presidential order was referred to Wirt.

Wirt began his opinion¹⁰⁰ by noting that under the Constitution the President was the Commander in Chief of the Army and therefore "the national and proper depository of the final appellate power, in all judicial matters touching the police of the Army."¹⁰¹ But, rather than rely on the constitutional designation of the President as Commander in Chief, Wirt finishes the sentence, "but let us not claim this power for him, unless it has been communicated to him by some specific grant from Congress."¹⁰²

Wirt then turned to the statute to find some specific grant from Congress. He found it in the provision that required presidential approval before any severe sentence by courts martial could be implemented.¹⁰³

Under the statute, the President had the authority to approve the sentence or to act "otherwise as he should judge proper."¹⁰⁴ In Wirt's view, that broad authority certainly gave the President the power to require a retrial based on an improper exclusion of exculpatory evidence. Nor was the military tribunal barred from complying by a provision that prohibited trying officers twice for the same offense. Wirt concluded, convincingly, that the provision was there to protect officers from double jeopardy, not to prevent a retrial requested by the defendant because of legal error.¹⁰⁵ As was his practice in many of his opinions, Wirt went on to buttress his legal arguments with a survey of historical practice in England and under the Articles of

98. *New Trials Before Courts Martial*, 1 Op. Att'y Gen. 233, 233 (1818).

99. *Id.*

100. *Id.*

101. *Id.* at 234.

102. *Id.*

103. *Id.* at 235.

104. *Id.*

105. *Id.* at 240.

Confederation and by policy arguments based upon the unfairness of treating courts martial verdicts, which were not subject to judicial review, as subject to no appeal whatsoever.¹⁰⁶

Did Wirt mean to imply that the President had no directive power with respect to courts martial as Commander in Chief unless Congress had specifically provided the authority? If so, this would be a pretty radical view. After all the Commander in Chief Clause of the Constitution by its very language gives the President a power to direct. The difficult constitutional question, which seemed to be implicit in the courts martial case, was the degree to which that directive power could be channeled or restricted by Congress in the exercise of the undoubtedly broad congressional authority to raise, support and regulate the armed forces.¹⁰⁷ But, obviously, Wirt need not have reached that question, or the question of the President's independent constitutional authority, because he found sufficient authority in the statute itself to justify the President's actions.

To be sure, as a good Republican, Wirt did not take an expansive view of the President's constitutional authority standing alone. He denied, for example, that the President had any inherent authority to extradite to Great Britain those American citizens who were accused in that country of piracy.¹⁰⁸ Wirt first concluded that there was no obligation under international law to extradite the individuals involved.¹⁰⁹ He then went on to opine that even if there were such an obligation under the law of nations, the President had no authority to return the individuals to Great Britain because no U.S. statute authorized that action:

The Constitution, and the Treaties and Acts of Congress made under its authority, comprise the whole of the President's powers; neither of these contains any provision on this subject. He has no power to arrest anyone, except for the violation of our own laws. A Treaty or an Act of Congress might clothe him with the power to arrest and deliver up fugitive criminals from abroad; and it is perhaps to be desired that such power existed, to be exercised or not, at his discretion; for although not *bound* to deliver up such

106. *Id.* at 240–42.

107. For a masterful historical treatment of this question, see David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008) and David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008).

108. Foreign Requisitions—Law of Nations, 1 Op. Att'y. Gen. 509, 521 (1821).

109. *Id.*

persons, it might very often be *expedient* to do it. . . . [T]he lack of such authority might be corrected by] an Act of Congress providing for the punishment of our own citizens, who, having committed offenses abroad, come home for refuge; and for the delivery of foreign culprits who flew to us for shelter.¹¹⁰

Only the next year Wirt changed his mind concerning whether the President was bound by the law of nations when asked whether the President was required to order the return of a Danish slave to his owners in St. Croix. Without even mentioning his contrary dictum with respect to the Law of Nations in the extradition case Wirt said:

The President is the executive officer of the laws of the country; these laws are not merely the Constitution, statutes, and treaties of the United States, but those general laws of nations which govern the intercourse between the United States and foreign nations; which impose on them, in common with other nations, the strict observance of a respect for their natural rights and sovereignties, and thus tend to preserve their peace and harmony.¹¹¹

The President's authority to act to implement the law of nations seems to have been based, in Wirt's opinion, on the Vesting Clause which makes the President "the Executive Officer of the laws of the country." And, doubtless Wirt did not imagine that the President would deliver up the slave himself, but would, instead, order a federal marshal to do so. Hence, Wirt must, at the least, have concluded that where the law (here international law) required an act, but provided no implementing authority, it was the President's responsibility to see that the law was obeyed.

Yet, where Congress had vested authority to execute the law in others, Wirt also seemed to believe that the President had no right to alter their decisions. Thus, for example, over a period of two years Wirt advised President Monroe on several occasions that he had no authority to intervene in the Treasury's settlement of accounts—settlements which, as we noted earlier, were by statute the responsibility of the Auditor and the Comptroller in the Treasury Department.¹¹²

110. *Id.* at 521–22 (emphasis in original).

111. Restoration of a Danish Slave, 1 Op. Att'y Gen. 566, 570–71 (1822).

112. See The President and Accounting Officers, 1 Op. Att'y Gen. 624 (1823); The President and the Comptroller, 1 Op. Att'y Gen. 636 (1823); The President and Accounting Officers, 1 Op. Att'y Gen. 678 (1824); The President and Accounting Officers, 1 Op. Att'y Gen. 705 (1825); The President and Accounting Officers, 1 Op. Att'y Gen. 706 (1825).

Yet, Wirt's opinions in the accounting officer cases might well be limited by their particular context. The Treasury statutes clearly presumed that these officers were to act independently of the Secretary of the Treasury in settling individual claims. Moreover, they acted in an adjudicatory capacity. Indeed, in the debates concerning the provisions allowing an appeal to the Comptroller from an Auditor's settlement of an account, James Madison suggested that the Comptroller was exercising powers that "partake of a judiciary quality as well as executive."¹¹³ Although he ultimately withdrew his suggestion, Madison initially argued that the Comptroller should therefore not hold office subject to presidential removal. While Congress did not provide the Comptroller with a fixed term of office, it did specify by statute that his decisions would be "final and conclusive to all concerned."¹¹⁴

Hence, in the accounting officers cases Wirt would have had to have found that the President had a directive authority that Congress could not by statute restrict in order to justify presidential intervention. This would be a peculiar view for a Jeffersonian Republican. But Wirt's advice was not given in the spirit of an ideological partisan arguing the pro-Congress side of a separation of powers dispute. Instead, Wirt's opinions are redolent with practical grounds for avoiding the conclusion that the President could amend or annul the Controller's decisions. If every officer of the United States having a dispute with the Treasury over his accounts (and there were scores) could treat the President as a court of appeal, the President would have little time for other business.

To be sure there is broad language in some of Wirt's opinions concerning the accounting officers. In one, for example, he observed:

If the laws, then, require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of the law; and were the President to perform it, he would not only not be taking care that the laws were faithfully executed, but he would be violating them himself. The Constitution assigns to Congress the power of designating the duties of particular officers; the President is only required to take care that they execute them faithfully.¹¹⁵

113. 1 ANNALS OF CONG. 611–12 (Joseph Gales ed., 1834).

114. An Act for the More Effectual Recovery of Debts Due from Individuals to the United States, ch. 48, § 4, 1 Stat. 441, 442 (1795).

115. The President and Accounting Offices, 1 Op. Att'y Gen. 624, 624–25 (1823).

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But, it is far from clear how Wirt viewed officers other than those dealing with accounts. For the latter's independence in making particular decisions was supported by reasons of fairness to individuals, fiscal integrity and practical necessity.

True, Wirt also declined to advise individual District Attorneys in the conduct of prosecutions, stating that Congress gave individual District Attorneys, but not the Attorney General, the authority to "prosecute in [their] districts."¹¹⁶ Did Wirt believe that this bare statutory language prohibited their being subject to direction from the A.G. or the President? Perhaps. On the other hand, much of Wirt's opinion is really a defense of the Attorney General's refusal to become involved in lower court cases. With no staff other than a clerk, Wirt was not about to take on the responsibility of answering questions from District Attorneys who wanted him to do their work for them.

Yet, on another occasion, Wirt seemed to recognize the President's authority to direct the activities of District Attorneys in prosecuting suits on behalf of the United States. President John Quincy Adams questioned Wirt concerning his authority to order the discontinuance of a suit concerning a sale of a plot of contested land in New Orleans. Wirt confirmed the President's authority. But, again, his opinion is a model of cautious legal advice. Wirt said:

I entertain no doubt of the constitutional power of the President to order the discontinuance of a suit commenced in the name of the United States in a case proper for such an order. Were a District Attorney, for example, of his own mere motion, to commence a suit in the name of the United States, in a case wholly unfounded in law, the only effect of which would be to expose the defendant to needless . . . expense, I should consider the act not only authorized, but required by his duty, to order a discontinuance of such vexation; for it is one of his highest duties to take care that the law be executed, and, consequently, to take care that they not be abused by any officer acting under his authority But this power is a high and delicate one, and requires the utmost care and circumspection when is exercised; I could never advise its exercise in any case in which a court of the United States, free from all suspicion of impurity, had taken cognizance of the case.¹¹⁷

Wirt goes on to conclude that because the court had issued a preliminary injunction in the case, thus giving credence to the validity

116. Attorney General and District Attorneys, 1 Op. Att'y Gen. 608 (1823).

117. The Power of President to Discontinue a Suit, 2 Op. Att'y Gen. 53, 53-54 (1827).

of the claim, a presidential order to discontinue the suit would be an unwarranted interference with the judiciary.¹¹⁸

It is unclear, of course, whether Wirt's confident assertion of constitutional authority meant to claim an inherent presidential directive power, or to assert that as the chief agent of the client, the United States, the President could order that a suit in its name be dropped. And, even if he meant the former, there is instinct in Wirt's example of when the President might discontinue a suit; the idea that such an order should be based on the faithlessness of the District Attorney in bringing vexatious litigation, not simply on the President's disagreement with how the District Attorney was proceeding. Wirt thus seemed to be suggesting that the President had an authority to direct in the exercise of his oversight function, but only for reasons that related directly to that function, that is, that the officer was not engaged in the faithful execution of the law.

Some prominence has been given to Attorney General Wirt's opinions about presidential directive authority for several reasons. First, Wirt was the first Attorney General to collect and make his opinions available for the guidance of administrative officers.¹¹⁹ He thus began the practice of treating these opinions as authoritative, at least within the executive branch. Second, Wirt served for twelve years under two Presidents and issued 310 opinions over that period. He thus strongly reinforced the position of the Attorney General as a quasi-judicial counselor to the government as a whole. Finally, he seems to have taken this role extremely seriously. His opinions are often lengthy expositions of the law that draw upon English and colonial practice as well as statutory sources and practical concerns of administration.

Thus, while Wirt occasionally made broad pronouncements about presidential power, or the lack of it, his opinions are generally carefully qualified. When read in context, they clearly reflect the Jeffersonian Republican belief that Congress was the legitimate source of most administrative authority. Yet, as his opinion on the power of the President to discontinue a suit reflects, Wirt did not believe that the President's directive authority need be provided by statute so long as the President was exercising the oversight power that the Constitution clearly provided.

118. *Id.* at 55–56.

119. HOMER CUMMINGS & CARL MCFARLAND, FEDERAL JUSTICE 79–82 (1937).

What we do not know in any detail is what Wirt viewed the extent of that oversight authority to be. Did he really believe that the President could only direct an officer who was violating his duty? Or would he have approved Jefferson's position in the embargo controversy that the President had a duty to issue instructions that would ensure consistency and equal application of federal law? And, if he would approve of that, what about presidential directives based on prudence or disagreement with discretionary policies an officer was promoting? Neither Wirt's opinions, nor the general practices of government in the Republican era, allow confident responses to these questions.

C. *Practice in "The Democracy"*¹²⁰

The dominant political ideology of the Federalist period emphasized generous construction of national powers as conferred by the Constitution and the need for energetic leadership from the executive branch. The "Revolution of 1800" substituted a Jeffersonian Republican ideology that emphasized a limited national government and Congress as the principal seat of democratic legitimacy. As we have seen, practice sometimes supported and sometimes contradicted the dominant ideologies of these periods. Jacksonian America witnessed a partisan realignment that again shifted both ideological positions and governmental practices.

In the late 1820s and early 1830s a political realignment split the Jeffersonian Republican party into two warring factions which divided Federalist and Republican ideological positions in a Chinese menu fashion. The Clay-Adams wing of the party became the National Republicans and shortly thereafter the Whigs. Borrowing from Federalist ideology the Whigs embraced a neo-Hamiltonian program of federally funded internal improvements, regulation and promotion of monetary stability through a powerful national bank, and protective tariffs to aid the growth of American manufacturing. From the Jeffersonian Republicans they adopted the idea that democratic legitimacy resided in Congress.

The more conservative "Old Republican" wing of the Jeffersonian Republicans became Jacksonian Democrats, or

120. The following section is drawn in part from Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829-1861*, 117 YALE L.J. 1568 (2008).

sometimes just “the Democracy.” Like their Jeffersonian Republican predecessors, the Jacksonian Democrats emphasized strict construction of the constitutional powers of the national government, states rights, and a small and frugal government. But, like the Federalists, Jacksonian Democrats believed in presidential leadership. While Federalists supported an energetic executive because they thought it necessary to an effective national government, Jacksonians premised the legitimacy of executive power on its democratic pedigree.¹²¹

The President’s claim to a strong democratic pedigree was a function of radical changes in the electoral processes by which Presidents were selected. By the time of Jackson’s election, the states were shifting rapidly from restrictive, property-based voting regimes to eligibility rules that promoted universal white male suffrage.¹²² In most states this broad electorate, rather than the state legislature, chose delegates to the Electoral College, and the latter were pledged to particular candidates.¹²³ From Jackson forward, Presidents could claim with some considerable justification that they were the representatives of the people.¹²⁴ On this theory the people had put the President in office to run the government, and Andrew Jackson and his Democratic successors tended to act on this premise.

The Whigs resisted Jacksonian assertions of presidential authority, but they were almost always in a relatively weak position. Between 1828 and 1860, the Whigs won only two presidential elections and actually controlled the presidency for only four years. The victorious Whig, William Henry Harrison, died a month into his first term, and the Vice-President who succeeded him, John Tyler, was actually a Jeffersonian Republican in recently acquired Whig clothing. The Whigs had some greater success in maintaining control

121. *See generally* RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM; THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES* (1969); LEONARD D. WHITE, *THE JACKSONIAN’S: THE STUDY IN ADMINISTRATIVE HISTORY 1829–1861*, at 6–7 (1954). Further general studies include RICHARD P. MCCORMICK, *THE SECOND AMERICAN PARTY SYSTEM: PARTY FORMATION IN THE JACKSONIAN ERA* (1966); ROBERT V. REMINI, *MARTIN VAN BUREN AND THE MAKING OF A DEMOCRATIC PARTY* (1959); and ARTHUR M. SCHLESSINGER, JR., *THE AGE OF JACKSON* (1945).

122. On the changes in state electoral rules see SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 181–217* (2005).

123. *Id.* at 308–09.

124. For development of these shifting ideas of democracy and executive power, see ROBERT V. REMINI, *ANDREW JACKSON AND THE BANK WAR: A STUDY IN THE GROWTH OF PRESIDENTIAL POWER* (1967).

of one or both houses of Congress, but their majorities were seldom sufficient to override presidential vetoes. They controlled both houses only in the 27th Congress during Harrison's brief tenure and the first two years of Tyler's presidency.¹²⁵ Thus, both ideologically and politically in Jacksonian America, the stage was set for muscular use of presidential authority.

Indeed, the stage was set for one of the most famous presidential-congressional battles in American history, the so-called "Bank War" that erupted in response to Andrew Jackson's attempts to reign in the power of the Second Bank of the United States (BUS). Jackson thought the war worth fighting because he considered the Bank a major threat to majoritarian democracy.¹²⁶ The statute incorporating the BUS gave the United States the appointment of only five of twenty-five directors, yet allowed its affairs to be run by an executive committee of only seven directors, none of whom need represent the government's interests.¹²⁷ The Bank was authorized to open branches wherever it thought convenient and to appoint the boards of directors who managed these branch institutions. And, by statute, the United States was required to deposit all federal funds with the Bank, which paid no interest on those deposits, but instead provided banking services to the United States free of charge.¹²⁸ In Jackson's view, the Bank was not just unaccountable to the government; it had the capacity, by deploying its financial resources for political ends, to shape the government for its own purposes. Indeed, Jackson believed that the Bank had done so in opposing him and other Democratic nominees in the elections of 1824 and 1828.¹²⁹

Yet, the Bank was popular in Congress and had broad support in the electorate.¹³⁰ It was widely credited with providing reasonable monetary stability—a welcome change from the chaotic economic conditions that followed close upon the expiration of the charter of the first Bank of the United States and the refusal of the Jeffersonian Republicans to re-charter it.¹³¹ Recognizing Jackson's antipathy to the second Bank, Congress re-chartered it shortly before the 1832 elections, even though it still had four years to run on its charter. The

125. WHITE, *THE JACKSONIAN'S*, *supra* note 121, at 6–8.

126. REMINI, *ANDREW JACKSON AND THE BANK WAR*, *supra* note 124, at 44.

127. *Id.* at 26.

128. *Id.* at 27.

129. *Id.* at 44.

130. *Id.* at 41–42.

131. *Id.* at 26.

Bank's congressional supporters believed that its popularity would force Jackson to sign the bill.¹³² But Jackson used his veto. And, once he had confirmed his intent to suppress the Bank's power, undisguised political warfare broke out between the Jackson administration and the BUS and its allies in the Congress. Even if the Bank had stayed out of politics before, it was in politics now.

Having contested the 1832 presidential elections in part on a promise to curb the power of the BUS, Jackson interpreted his new electoral mandate as a mandate to do just that. But, anticipating legislative opposition even after the 1832 elections, Jackson did not seek legislation to control the Bank. He used his executive powers instead.

Because the Bank's influence derived importantly from its position as the sole depository for federal government monies, Jackson decided to withdraw them. But, there were problems. The statute establishing the Bank allowed removal of the government funds only by the Secretary of the Treasury, who was required to report his reasons for any withdrawal to Congress. Jackson's then Secretary of the Treasury, Louis McLane, favored the Bank. Jackson convinced McLane to move to the State Department, and appointed William Duane, a well-known Bank opponent, as Secretary of the Treasury. But, Duane too balked at removing the deposits. On his construction of the banking statutes, the only legitimate reason he could give Congress for removal of the deposits was that they were unsafe in the Bank. Because Duane thought the funds not only safe there, but safer in the Bank than in alternative depositories, he declined to make the necessary finding. After months of delay and attempts to convince Duane to do his bidding, Jackson removed him as Treasury Secretary and appointed Roger Taney. Taney removed the deposits.¹³³

Congress, or least the Senate which was in Whig hands, retaliated. Taney was a recess appointment. When Congress returned, the Senate refused to confirm him, and it passed resolutions censuring the President both for removing the deposits and for dismissing Duane. But Senate resolutions do not change the facts on the ground. After the election of 1834, when Democrats regained

132. Indeed there were those like Henry Clay who thought the bill to re-charter the bank would cause Jackson difficulties whether he signed it or vetoed it. NORMA LOIS PETERSON, *THE PRESIDENCIES OF WILLIAM HENRY HARRISON AND JOHN TYLER*, 12–13 (1989).

133. *Id.* at 14–15.

control of the Senate, the Senate censure resolutions were expunged from the record, and the Bank's charter was allowed to expire. Jackson had won the Bank War. But what exactly had he won?

To begin to answer that question we need to understand the complaints that were lodged against Jackson in the Senate's censure resolutions. The first was that in removing the deposits Roger Taney willfully misconstrued the banking statute. Henry Clay, Daniel Webster and John C. Calhoun all argued in the Senate that the general purpose of the statute was to ensure safe and faithful custody of government funds. Because Taney had conceded that the money was safe and the Bank faithful, these senators concluded that he lacked any authority to remove the deposits.¹³⁴ Taney instead relied on the plain text of the statute, which placed no restriction on the Secretary's authority other than the requirement to report his reasons to Congress.¹³⁵ And, while Taney conceded that the money had been safe up until then, he questioned whether the Bank might behave differently in a context in which it appeared that its charter would be allowed to lapse.

We need not resolve who had the better of the statutory argument. But, two important points should be noted. First, Taney's interpretation, like countless thousands of administrative interpretations, was never likely to be definitively resolved by a judicial determination. If administrators are willing to follow presidential instructions while staying arguably within the letter of the law these instructions are likely to be effective.¹³⁶ But, second, Congress was not without tools with which to sanction Taney. The Senate refused to confirm him, both as Secretary of the Treasury and in the first attempt to appoint him to the Supreme Court.¹³⁷

The Congress's power to fight back through the Senate's power to reject presidential appointments has important implications with respect to the Senate's other complaint against Jackson. According to Henry Clay, the statute chartering the Bank of the United States vested authority to remove deposits in the Secretary of the Treasury,

134. See 10 Reg. Deb. 51 (1833) (Clay); *Id.* at 206-07 (1834) (Calhoun); Cong. Deb. App., 23d Cong., 1st Sess. 148-50 (Webster).

135. See Cong. Deb. App., 23rd Cong., 1st Sess. 60.

136. The "letter of the law" is of course crucial. When Jackson backed his Postmaster General, Amos Kendall, in refusing to make a payment that had been directed by the Congress, the Supreme Court held that mandamus would lie to force the reluctant officer to do his clear statutory duty. *Kendall v. United States*, 37 U.S. 12 (Pep) 524 (1838).

137. REMINI, ANDREW JACKSON AND THE BANK WAR, *supra* note 124, at 141-42.

not in the President. Jackson, of course, hardly denied this. He removed Duane for refusing to follow his instructions; he did not attempt to exercise the Secretary's authority himself. But, in Clay's view, Jackson's removal had, in effect, usurped the Secretary's statutory authority.¹³⁸ This, Clay concluded, was part of Jackson's more general scheme to paralyze Congress and consolidate all power in the President.¹³⁹

In effect, Clay construed the removal of Duane and the search for an amenable Secretary of the Treasury as a violation of the statute chartering the Bank. Clay did not deny that the President could remove a Secretary of the Treasury; what he seemed to deny was that the removal could be premised on an exercise of discretion that had been conferred on the Secretary by statute. A majority of the Senate agreed with Clay by passing a resolution which read: "Resolved that the President, in the late executive proceedings in relation to the public revenue, has assumed upon himself authority and power not conferred by the constitution and laws, but in derogation of both."¹⁴⁰ Jackson responded by presenting a "protest"¹⁴¹ that reasserted the President's power to control executive officers, including the Secretary of the Treasury, and to remove them at will.

The matter did not rest there. Jackson's Senate champion, Senator Thomas Hart Benton waged a continuous campaign to remove the censure resolution from the Journal of the Senate, and succeeded when the Democrats re-took control of that chamber in 1836.¹⁴² Henry Clay countered with a resolution denying the President's power to remove officers at his pleasure and instructing the Judiciary Committee to consider legislation requiring that removals receive the consent of the Senate before becoming effective.¹⁴³ No such legislation ever passed, but the Senate did pass a bill requiring the President to give reasons for removal whenever a nomination was made to the Senate to fill a vacancy that had been

138. *Id.* at 138; *see also* PETERSON, *supra* note 132, at 14.

139. *See* 10 Reg. Deb. 58, 64–65 (1833).

140. S. Journal, 23d Cong., 1st Sess. 197 (1834).

141. Andrew Jackson, President, Protest (Apr. 15, 1834), *reprinted in* 2 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 1288 (1896).

142. *See* S. Journal, 24th Cong., 2nd Sess. 123–24 (1836).

143. *See* S. Doc. No., 23-155 (1st Sess. 1834).

occasioned by a presidential removal.¹⁴⁴ When that bill was sent to the Democratic House it was never reported out of the committee to which it was referred.

Presidential control over the Treasury remained a live issue for years afterward, but the President's powers of removal and direction were not championed by every president. When John Tyler assumed the presidency after William Henry Harrison's death, he proposed to protect the liberty of the people by keeping public funds out of the control of the executive branch. Tyler evocatively presented his plan as establishing "a complete separation . . . between the sword and the purse."¹⁴⁵ Tyler's plan, as presented to the Congress in 1841, would have established an independent Board of Exchequer which would have had exclusive power to receive, hold and disburse public money.¹⁴⁶ The Board's five members would have been removable only for physical inability, incompetence, or neglect or violation of their duties—with a requirement that the reasons for removal be laid before the Senate. Perhaps because Tyler had few friends in either party in Congress, nothing ever came of this proposal.

What then are we to make of the Bank War? What was its meaning for the directive authority of the President over administration? To some degree, these struggles re-established presidential powers of direction that had atrophied under the Jeffersonian Republicans.¹⁴⁷ But, Jackson never claimed that a President could himself exercise an officer's statutory authority. Indeed, Roger Taney, when Jackson's Attorney General, issued two opinions insisting that while a President could remove an officer, he could not substitute his action for the action conferred on the officer by statute.¹⁴⁸

Moreover, Congress showed itself perfectly capable of removing secretarial discretion when Jackson directed that it be exercised contrary to congressional intentions. At Jackson's request Treasury

144. This bill was introduced by Calhoun on February 9, 1835. S. Journal 148; 11 Reg. Deb. 361 (1835). The Senate passed it on February 27, 1835. 11 Reg. Deb. 576 (1835).

145. John Tyler, President, Inaugural Address (Apr. 9, 1841), reprinted in 3 RICHARDSON, *supra* note 141, at 1889, 1890.

146. See H.R. Doc. No. 27-28, at 6, 13-14 (2d Sess. 1841).

147. As one commentator put it, "by 1825, unless the trend were checked, the presidency bade fair to represent, in time much more than chairmanship of a group of permanent secretaries of the executive departments to which Congress . . . paid more attention than to the President." WILFRED E. BINKLEY, *PRESIDENT IN CONGRESS* 64 (1947).

148. *Jewels of the Princess Orange*, 2 Op. Att'y Gen. 482, 485-89 (1831); *see also* *Accounts and Accounting Officers*, 2 Op. Att'y Gen. 507 (1832).

Secretary Levi Woodbury issued a circular (Jackson's so-called "specie circular") in 1836 that required Land Offices to accept only specie in payment for public land purchases.¹⁴⁹ Congress annulled the circular's effects in 1838 by passing a joint resolution making it unlawful for the Secretary of the Treasury to create any difference between payments that were to be received for the various branches of federal revenue (i.e., land sales, taxes, fees, etc.).¹⁵⁰

Finally, the accepted idea that presidential direction can only be enforced ultimately by presidential removal has important consequences. Jackson's removal of Duane gave practical effect to his constitutional claims of removal authority, but prudent Presidents will not pick fights like that with Congress very often. Nor is the formal power to appoint or remove necessarily a guarantee that officers will be free from powerful congressional influence. Commenting on the degree to which Congress had come to control the appointments process by the end of the Jacksonian era, Leonard White concluded, "in this aspect of the struggle for power, the legislative branch emerged relatively a victor in 1861 even though the executive still held high [i.e., constitutional] ground."¹⁵¹ With the exceptions of Jackson and Polk, Presidents in the Jacksonian era were forced to yield substantial control over appointments to Congress.¹⁵²

The battles between Presidents and Congresses over appointments and removals would continue throughout the 19th century and beyond.¹⁵³ In this never-ending struggle, Jackson's successes were perhaps a high water mark from which presidential power and authority over administration ebbed almost continuously (Abraham Lincoln's tenure excepted) until world wars and major depressions re-energized presidential leadership.¹⁵⁴ But nothing in the

149. Circular from the Treasury, No. 1548 (July 11, 1836), *reprinted in* AMERICAN STATE PAPERS, PUBLIC LANDS 910 (1861).

150. A Resolution Relating to the Public Revenue and Dues to the Government, res. 4, 5 Stat. 310 (May 31, 1838).

151. WHITE, THE JACKSONIAN'S, *supra* note 121, at 124.

152. JOSEPH P. HARRIS, THE ADVICE AND CONSENT OF THE SENATE 55-71 (1953).

153. See LEONARD V. WHITE, THE REPUBLICAN ERA, 1869-1901: A STUDY IN ADMINISTRATIVE HISTORY 20-67 (1958).

154. While Woodrow Wilson overstated his case 1885, he had this to say about the presidency:

The business of the president, occasionally great, is usually not much above routine. Most of the time it is *mere* administration, mere obedience to directions from the masters of policy, the standing committees [of Congress]. Except as far as his power of veto constitutes him as part of the legislature, the President might, not

Bank War or Specie Circular episodes provided significant new authority for the proposition that the President had a discretionary and inherent power of political direction over other officers that must remain free from congressional regulation—or for the proposition that Congress could limit presidential powers of direction in any way that it desired.

II. CONCLUDING COMMENTS

Antebellum political ideology and governmental practice provides evidence that is both frustrating and instructive when considering the question of the President's constitutional authority to direct the activities of administrative officials. A few things even seem to be settled: No President seems to have claimed that the President has authority to exercise personally the statutory jurisdiction of an officer empowered by Congress to make a particular decision or to take a particular action. Presidents may direct, but directions may be resisted and subsequently annulled by congressional action restricting an officer's authority. Presidents enforce their directions ultimately by removal, but the extent of congressional authority to regulate the removal power remains almost as contested today as it was in 1789. As Clay's proposal to require Senate concurrence in presidential removals and the subsequent attachment of that requirement to the removal of postmasters attest, even that idea persisted until the mid-20th century. The *Myers* case finally ratified the majority, but not the only, long-continued view of that question. Our antebellum forbearers have provided us with many examples of political struggle and constitutional controversy, but with few definitive resolutions.

Second, even in a system of judicial review of administrative action as limited as that that obtained throughout the 19th century, mandamus would lie to force executive action contrary to presidential direction where a statute gives an officer only ministerial duties. *Marbury v. Madison* promised this result in dictum, and *Kendall v. United States*, belatedly, made good on the promise.

inconveniently, be a permanent officer; the first official of the carefully-structured and impartially-regulated civil service system, through a series of merit promotions the youngest clerk might rise even to the Chief Magistrate.

WOODROW WILSON, CONGRESSIONAL GOVERNMENT, A STUDY IN AMERICAN POLITICS 253–54 (1885).

Finally the difference between the power to direct and the power to remove seems to have been firmly established prior to the Civil War. Attorneys General Wirt and Taney were ideological opposites concerning the true institutional seat of democracy in the United States. Wirt placed it in Congress; Taney in the President. But, both agreed that the President could not substitute his judgment for an officer charged by statute with a particular function. And both staunchly defended the President's constitutional authority to appoint and remove officers, at least where Congress had made no alternative provision.

But, as Justice Jackson noted, these generally agreed upon principles seldom answer the specific questions that governmental actors pose. Congresses and Presidents would like to know what the limits are on congressional restrictions on presidential appointments and removals. Officers who take an oath to uphold the Constitution and laws of the United States would like to know whether the Constitution presumes that they should take directions from the President, whether those directions are mandatory only if backed by statutory authorization, or whether congressional restrictions on presidential directive authority might themselves be unconstitutional, at least in some circumstances.

Confident general answers to these sorts of questions would require that we have a consistent ideological position concerning the authority meant to be granted by the Constitution, both to Congress and to the President. It seems clear that our antebellum ancestors had no such position. The people who had the government in their charge alternated between those who favored presidential authority and those who favored congressional authority. While the strength of those views waxed and waned, neither was ever driven from the field. And what these actors did in particular contexts was colored always by the specific functional necessities of the time and by ever present incentives to take positions for partisan political advantage.

I take from these developments, therefore, a somewhat ironic lesson. Practice will often be determinative of specific outcomes because practitioners' actions will effectively be final. And yet that same practice is, as a guide to the resolution of future or different disputes, a wavering and weak light with which to illuminate our way forward.

Yet, practice has its uses. At the very least, I believe it can guard against making serious mistakes of overgeneralization. Justice Scalia's dissenting opinion in *Morrison v. Olsen*¹⁵⁵ provides an apt example. Justice Scalia asserts, quite correctly it seems to me, that prosecution—if conducted by government rather than by a private party—has always been conducted by the executive branch, not by the legislature or by the courts.¹⁵⁶ But Justice Scalia derives from that the notion that any statute that reduces the Attorney General's power over a prosecutor is unconstitutional. On Scalia's account, this is because (1) the President exercises authority over the Attorney General and (2) the Vesting Clause provides "the Executive power shall be vested in a President of the United States."¹⁵⁷

A serious look at the practices of the antebellum Republic would surely have given Justice Scalia pause. First, Justice Scalia's exception of private prosecutions from his sweeping statement was surely prudent. Actions by private "relators" pursuing the interests of the Crown had a long history in England. Such actions were available in the colonies and by statute under federal law after the ratification of the Constitution.¹⁵⁸ Although the record is sketchy, there is no evidence that anyone in the government exercised any authority to direct, control or terminate these lawsuits.¹⁵⁹

While private prosecution might be distinguished in a number of ways from public prosecution, the early and continual practice of private prosecution tends to undercut the idea that the Vesting Clause has been understood historically as lodging ultimate prosecutorial authority over all lawsuits to enforce federal law in the President. One might surely argue that the Vesting Clause should be understood to make any prosecution independent of presidential control, including private prosecutions, unconstitutional.¹⁶⁰ But that is an argument that our early and long-continued practice is unconstitutional on textualist grounds, not an argument that historical practice sanctions that understanding.

155. 487 U.S. 654 (1988) (Scalia, J., dissenting).

156. Even this may be something of an overstatement considering the historic powers of common law courts to empanel grand juries *sua sponte* and to appoint counsel to represent the state in prosecutions.

157. *Morrison*, 487 U.S. at 697–98 (Scalia, J., dissenting); *id.* at 705–06.

158. See Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 576–96 (2005).

159. *Id.*

160. *Id.* at 578.

Similarly, the idea that congressional interference with the Attorney General's control over public prosecutors is unconstitutional must contend with even more substantial evidence that centralized control of legal enforcement was a post-Civil War development and that centralization has never been complete.

Almost from the beginning, Attorneys General lamented their lack of authority over U.S. Attorneys in the various districts.¹⁶¹ Perhaps the most elaborate statement is that of Caleb Cushing in 1854.¹⁶² Nor were the Attorneys General alone in calling for reform. President Jackson requested consolidation of authority over U.S. Marshals and U.S. Attorneys early in his tenure.¹⁶³ Congress responded, not by giving the Attorney General more authority, but by reorganizing the Treasury Department to provide for a Solicitor of the Treasury who was to have authority over U.S. Attorneys and Marshals with respect to the collection of debts owed to the United States. The Solicitor was merely to be advised by the Attorney General on request.¹⁶⁴ A similar authority of direction was also given to the Auditor of the Post Office Department.¹⁶⁵

The 1861 statute that purported to give the Attorney General direct authority over all U.S. Attorneys and Marshals¹⁶⁶ failed to clarify matters completely because it did not repeal the previous authority granted to the Treasury Solicitor or the Auditor in the Post Office. Moreover, U.S. Attorneys and Marshals remained located in the Department of the Interior. Other departments of the government continued to request and be given their own law offices.¹⁶⁷ Supervising authority was not unified in the Attorney General until the establishment of the Department of Justice in 1870.¹⁶⁸

If one attends to practice, therefore, one will surely note that, for those who had the early responsibility for running the Constitution, the general proposition that prosecution was an executive rather than

161. CUMMINGS & MCFARLAND, *supra* note 119, at 142–60.

162. Office and Duties of Attorney General, 6 Op. Att'y Gen. 326 (1854).

163. CUMMINGS & MCFARLAND, *supra* note 119, at 147.

164. See An Act to Provide for the Appointment of a Solicitor of the Treasury, ch. 153, 4 Stat. 414, 414–16 (1830).

165. An Act to Change the Organization of the Post Office and to Provide More Effectually for the Settlement of the Accounts Therefore, ch. 270, § 16, 5 Stat. 80, 83 (1836).

166. An Act Concerning the Attorney-General and the Attorneys and Marshals of the Several Districts, ch. 37, 12 Stat. 285 (1861).

167. See CUMMINGS & MCFARLAND, *supra* note 119, at 219–21.

168. An Act to Establish a Department of Justice, ch. 150, § 16, 16 Stat. 162, 164 (1870).

a judicial or a legislative function did not answer the more focused question of how that executive authority should be organized.

Justice Scalia would have been on firmer ground had he instead attended to the early presidential practice of directing both U.S. Attorneys and Attorneys General concerning the performance of their duties. As Professor Prakash demonstrates,¹⁶⁹ early Presidents gave both general and specific directions to federal prosecutors without any statutory authority and with the tacit approval of Congress (sometimes at its request). This authority seems to have been uncontested and could only have had its source in the Constitution itself—as Presidents sometimes asserted.

But what exactly does this practice demonstrate? It certainly seems to confirm what I earlier took to be the fair implication of the constitutional text, that is, that absent contrary statutory provision, the default rule should be that Presidents have authority to direct other executive officers in the execution of the law. Nor do I believe that this is a *mere* default rule, that is, that Congress can dispose of the President's directive authority—by limiting removals or otherwise—by the simple invocation of the Necessary and Proper Clause. The *Myers* case alone tells us that there are limits, and case law confirms that those limits go beyond situations like *Myers* in which Congress inserts itself directly and extra-constitutionally into the process of presidential appointment or removal.¹⁷⁰

But pursuit of precisely where those further limits might be goes much beyond the modest focus of this article. My claim is only this, attention to past practices in the exercise and limitation of presidential directive authority should give us pause when we are tempted to give general answers to particular questions. The early practitioners of the art of governance in the United States seem to have taken a more fine-grained view.

Our early practices seem to tell us that the question, “Does the President have the authority to direct administrative action?” is the wrong question. We should ask instead, “Direct what action; by whom; with what legal consequences; under what statutory language;

169. Prakash, *The Chief Prosecutor*, *supra* note 158, at 552–63.

170. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714 (1986) (Congress may not exercise normal power over executive officer); *Buckley v. Valeo*, 424 U.S. 1 (1976) (Congress may not appoint members of an executive body).

for what reasons?”¹⁷¹ On those questions the conflicting and nuanced practices of the early Republic yield some insights. They offer up, however, no unified theory upon which to premise presumptive resolution of most difficult cases.

171. For a similar call to more specific argumentation about separation of power issues, see Peter M. Shane, *The Separation of Powers and the Rule of Law: The Virtues of “Seeing the Trees,”* 30 WM. & MARY L. REV. 375 (1989).